

Spring 3-1-1996

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Recommended Citation

Michael A. Olsen, *The King Can Do No Wrong, But Will He Do Right By Our School Children?*, 1996 BYU Educ. & L.J. 55 (1996).
Available at: <https://digitalcommons.law.byu.edu/elj/vol1996/iss1/4>

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The King Can Do No Wrong, But Will He Do Right By Our School Children?

I. INTRODUCTION

Kathy Dockweiler needed help. She was losing weight and had an irrational fear of eating. Kathy sought help from the local health services company, a tax-supported government agency.¹ During her therapy she was the victim of several sexual advances by her staff psychologist which culminated in a sexual assault with forced intercourse.² In 1986 Kathy brought a lawsuit against the health care facility and the county for “professional malpractice, violation of [her] civil rights, negligent maintenance of premises, negligent supervision, and violation of the Mental Health Code.”³

Although Kathy could clearly bring a personal action against the staff psychologist, her complaint against the health care facility and Allegan County was dismissed. Such a frustrating outcome is common for many who bring lawsuits against state governments or municipal corporations and find that such entities are immune from suit. Regarding the *Dockweiler* case, Nickie McWhirter, in her article entitled *Law Has Some Lousy Loopholes*, observed:

The suit was dismissed . . . not for lack of proof or plaintiff's credibility, but because it is legally assumed the king can do no wrong. Worse than unfair Government is king. Its agencies and employees in pursuit of their duties are legally immune from the constraints that bind ordinary citizens or businesses, [and] the decent behaviors expected of other members of society.

Among the things they can get away with, evidently, is sexual harassment and what sounds to me like rape.

There are a few exceptions to this governmental immunity business. I'm told by lawyers if a government building falls on your head, you can sue. If a city bus runs you down, you can sue. If your car is eaten by an unmarked chuck hole the size of Cleveland, you can sue.

1. Because this agency was supported by tax dollars and sponsored by the government, it is deemed a quasi municipal corporation covered by governmental immunity.

2. *Dockweiler v. Wentzell*, 425 N.W.2d 468, 469 (Mich. Ct. App. 1988).

3. *Id.*

If you are emotionally ill, seek help from a governmental agency offering services for the emotionally ill and are then subjected to sexual harassment and unwanted sexual intercourse, however, you can't sue — although you could sue a private clinic and therapist⁴

Although Kathy Dockweiler was not a student, and her health care facility was not a public school, her case is closely analogous to that of children who are injured while at school. The parents of these children experience similiar frustration. These parents seek compensation from the school to help cover medical bills as well as compensation for the pain and suffering of their children, only to find that school boards of directors, maintenance staffs, and teachers are covered by a heavy blanket of governmental immunity.⁵

In 1977 the Massachusetts Supreme Court, in *Whitney v. City of Worcester*, heard the story of Kris Whitney, who was struck at school just above the right eye by a door and lost his vision.⁶ Kris' father sued the city. "He charged the school with negligence in ignoring a janitor's report that the door had a defective closing mechanism and that the staff was negligent for not notifying him about the accident immediately."⁷

The Massachusetts Supreme Court empathized with frustrated victims who faced the governmental immunity defense in tort actions. In its opinion the court referred to a decision it handed down in 1973 which dealt with the issue of governmental immunity:

On previous occasions we have voiced our conclusion that the

4. Nickie McWhirter, *Law Has Some Lousy Loopholes*, Detroit Free Press, July 31, 1988, at 1L.

5. See, e.g., *Whitney v. City of Worcester*, 366 N.E.2d 1210, 1213 (Mass. 1977) (Massachusetts Supreme Court explaining that injured school child should be able to bring his action but that the legislature must change the governmental immunity law not the court); *McIntosh v. Becker*, 314 N.W.2d 728, 729 (Mich. Ct. App. 1981)(holding that a student who was subject to slander and assault by a teacher was barred from bringing suit by governmental immunity statute); *Swieter v. Forest Hills Pub. Sch.*, 319 N.W.2d 386, 388 (Mich. Ct. App. 1982)(student who was struck in eye by chalkboard eraser thrown by another student was barred from bringing his action against the school by the governmental immunity statute despite the fact there was no supervision in the room at the time of the accident); *Ledfors v. Emery County Sch. Dist.*, 849 P.2d 1162, 1166 (Utah 1993)(student beaten up by fellow pupils was barred from bringing negligence action against the school district and principal, despite the fact he had told them of previous abuse by the same students and asked for protection).

6. 366 N.E.2d at 1210.

7. Jean Caldwell, *I Wonder Why I Cannot See "Courts and Cannots" Dashing the Hopes of a Blind Teen-ager*, Boston Globe, July 4, 1983.

governmental immunity doctrine and the convoluted scheme of rules and exceptions which have developed over the years are unjust and indefensible as a matter of logic and sound public policy. However, on those occasions we further concluded that comprehensive legislative action was preferable to judicial abrogation followed by an attenuated process of defining the limits of governmental liability through case by case adjudication.⁸

In *Whitney*, the court finally gave the legislature a bold ultimatum to lift governmental immunity, in some cases even retroactively:

[W]e state our intention to abrogate the doctrine of municipal immunity in the first appropriate case decided by this court after the conclusion of the next (1978) session of the Legislature, provided that the Legislature at that time has not itself acted definitively as to the doctrine. Thereafter, when appropriate cases concerning State and county immunity are presented, it is our intention to take similar action to abrogate immunity.⁹

The Massachusetts legislature, with this ultimatum hanging over its head, changed the law. Sadly, for the *Whitneys*, the legislature made the action retroactive to August 16, 1977, one day too late to apply to their claim.¹⁰

This paper examines the background of the government or sovereign immunity doctrine, the public policy behind it, and how this doctrine has been applied to tort liability suits brought by students against school districts, boards and teachers. Furthermore, this paper considers the general effect of the governmental immunity doctrine on school administrators and teachers.

8. *Whitney*, 366 N.E.2d at 1211 (citing *Morash & Sons v. Commonwealth*, 296 N.E.2d 461 (Mass. 1973)).

9. *Id.* at 1212.

10. Caldwell, *supra* note 8.

II. HISTORY OF GOVERNMENTAL IMMUNITY

A. *Governmental Immunity Generally*

"An immunity is a freedom from suit or liability."¹¹ The government has enjoyed such immunity over time on both the national and state levels. The idea originated in the old English law notion that "the King can do no wrong."¹² The rationale behind the doctrine was that an individual may not sue the authority who granted the right to sue in the first place.¹³

In 1946, however, the national government, through the Federal Tort Claims Act, gave its consent to be sued in tort.¹⁴ Although this was a big step in reforming the law on governmental immunity, there were still several restrictions on the types of tort claims that could be brought and under what circumstances.¹⁵

Similarly, at the state level, the immunity from tort liability offered complete protection until recently, when many states began adopting statutes which give consent to liability. However, each state, like the national government, has established various restrictions on the types of suits that can be brought.¹⁶ They can be grouped in three different categories:

First, about seven or eight states, though technically retaining immunity from suit in the law courts, have established administrative agencies to hear and determine claims against the state. . . .

Second, a group of nine states have waived the tort immunity in some limited class of cases, typically cases in which the state or its agency has procured liability insurance that will pay any judgment, or cases involving the use of motor vehicles or tangible property. One or two states have injected the distinction much followed in the law of municipal immunity so as to retain the immunity for 'governmental' activities, but to abolish it for 'proprietary' or commercial activities of the state. . . .

Third, about 30 states, the largest single group, have abrogated the immunity in a substantial or general way. . . . On

11. W. PAGE KEETON et. al., PROSSER AND KEETON ON THE LAW OF TORTS § 131 at 1032 (5th ed. 1984).

12. *Id.*, (citing Borchard, *Governmental Responsibility in Tort*, 36 Yale L.J. 1 (1926); Parker, *The King Does No Wrong—Liability for Misadministration*, 5 Vand. L. Rev. 167 (1952)).

13. *Id.* at 1033.

14. 28 U.S.C.A. § 2674 (1988).

15. KEETON, *supra* note 11 at 1038-39.

16. *Id.* at 1044.

the whole . . . the liability of . . . this group is approximately as broad as, or broader than, the liability of the federal government under the tort claims act.¹⁷

The governmental immunity enjoyed by federal and state governments has also been applied to government municipalities; hence, school districts and school administrators fall under it's protection.

B. Governmental Immunity in School Systems

The only difference for schools is that in determining whether the immunity applies, the court must establish whether there was harm while the entity was acting in a proprietary or a governmental role. If harm occurred to another while the governmental entity was acting in a proprietary or money-making role, then liability may stand against the municipality. If, however, the harm occurred while the municipality was perpetuating a governmental function, the municipality is covered by governmental immunity.¹⁸

The blanket of governmental immunity can be broad or narrow depending on how a state defines governmental function. For example, the State of Utah falls under category three in the above breakdown, yet the state retains substantial coverage under governmental immunity because of its broad statutory definition. Governmental function, as defined in the Utah Code Annotated, includes any act or failure to act by a governmental entity, whether it be a proprietary or governmental function.¹⁹

More specifically, the Utah Code enforces waiver of governmental immunity for certain acts such as negligent acts of a government employee but then also offers exceptions to those waivers.²⁰ It is only in this very narrow area of the analysis that the "proprietary versus governmental" function distinction takes place, and even then, the question is whether the employee performed or failed to perform a "discretionary function" and whether or not that discretion was abused.²¹

The Utah Supreme Court used a three part test in making the "discretionary function" determination. 1) Was the activity the entity performed a governmental function and therefore immunized from suit by the general grant of immunity contained in section 63-30-3(1)? 2) If the activity was a governmental

17. *Id.* at 1045.

18. *Id.* at 1053.

19. UTAH CODE ANN. § 63-30-2(4)(a) (1989).

20. UTAH CODE ANN. § 63-30-2(4)(a) (1989).

21. UTAH CODE ANN. § 63-30-2(4)(a) (1989).

function, has some other section of the Act waived that blanket immunity? 3) If the blanket immunity has been waived, does the Act also contain an exception to that waiver which results in a retention of immunity against the particular claim asserted in this case?²²

The majority of states generally consider the running of a school to be a governmental function. Even the administration of school athletics has been deemed a governmental function.²³ There have been both economic and historic reasons given for allowing governmental immunity to apply to schools.

The public policy rationales for abrogation of governmental immunity are compelling:

(1) the absence of funds for discharge of a judgment and (2) the theory that it is preferable that an individual should sustain an injury than the public suffer an inconvenience. As to the lack of funds as a basis for immunity, the state legislature may grant boards of education the authority to purchase liability insurance As to the preference for the public interest over private interests, the justification is deemed archaic, since personal injuries from the negligence of those entrusted with the care of school children is not a risk the children should, as a matter of public policy, be required to bear in return for the benefit of a public education.²⁴

It is important to understand that the doctrine has been applied to schools to protect school teachers, administrators and school boards from excessive litigation.

III. WHAT EFFECT DOES GOVERNMENTAL IMMUNITY HAVE ON THE WAY SCHOOL TEACHERS PROTECT THEIR CHILDREN IN REACTION TO VIOLENCE IN SCHOOLS?

A. *Duties of Educators to Protect School Children*

The law has always placed a duty on teachers and administrators to protect the children in their care. Historically, under the common law there was a duty of care owed to students while they were under school administration. The extent of the duty was determined by the standard of care deemed necessary by the common law. In order to understand the duty owed to

22. *Ledfors v. Emery County Sch. Dist.*, 849 P.2d 1162, 1164 (Utah 1993).

23. *Id.*, see also *Grames v. King*, 332 N.W.2d 615 (Mich. Ct. App. 1983)(stating that school districts, in planning and carrying out extracurricular girls' basketball program, were engaged in governmental function and thus immune from suit).

24. 57 AM. JUR. 2D *Municipal* § 52 (1985).

students by teachers at school it is important to understand the common law concept of *in loco parentis* (in place of the parents). "Under the *in loco parentis* doctrine, teachers and school administrators [were] liable for their omission or failure to act when a student [was] in danger within the school setting."²⁵ This doctrine was both a benefit and a burden for teachers and administrators. It allowed them the same right to punish as parents had, but, held them to the same standard of care as a conscientious parent.²⁶

The current standard of care is discussed in terms of "reasonableness" or the "reasonable person" standard. If a student bringing an action against a teacher or administrator can prove 1) that a "reasonable" standard of care was not met, and 2) that failure to meet that standard caused him injury, and 3) the extent of such injury, then the teacher or administrator would be held liable to pay the damages incurred, if governmental immunity did not apply.

The reasonableness standard did not fully discard the doctrine of *in loco parentis* but rather loosened the standard slightly. Where the *in loco parentis* standard put the teacher "in place of the parent," the reasonableness standard only requires "exercising reasonable and prudent care, ordinary care and that care which a person of ordinary prudence charged with the duties involved would exercise under the same circumstances."²⁷ Additionally, the duty of reasonableness is limited to foreseeable events. Thus, when injury occurs suddenly, or without warning, there is generally no obligation.²⁸

In light of this standard of care and the governmental immunity doctrine discussed above, a conflicting system of laws has been created. On the one hand, teachers and administrators have a duty to exercise reasonable care in protecting the children in their schools. On the other hand, governmental immunity often provides blanket immunity for the negligence of teachers and administrators, essentially nullifying the reasonableness standard.

B. Courts Have Often Held Teachers and Administrators Blameless for Violent Occurrences in Schools

In January of 1989, Richard Ledfors (Richie) informed his school principal that two of his fellow students had assaulted him

25. Donald L. Beci, *School Violence: Protecting Our Children and the Fourth Amendment*, 41 Cath. U. L. Rev. 817, 823 (1992).

26. Eugene T. Connors, *Educational Tort Liability and Malpractice*, 23 (1981).

27. 57 AM. JUR. 2D *Municipal, ETC., Tort Liability* § 541 (1985).

28. *Id.* at § 545.

several times. The principal assured Richie that he would take care of the problem, yet nothing was done.²⁹ In February, while Richie was attending his gym class, the coach left to check on some other students in another gym. The students, who had been roaming the halls, passed the gym and saw Richie inside. While Richie's friends unsuccessfully searched for a teacher or school employee to intervene, Richie was viciously beaten.³⁰ He was taken by ambulance to the hospital, where he remained for several days, receiving care for severe injuries to his head, abdomen and back.³¹

The Ledforses sued the two boys for battery. They also named the physical education teacher, the school district, and the principal in the suit and alleged negligence in failing to supervise the gym class and for allowing the two students to roam the halls unsupervised.³² However, the trial court granted the school teacher, the school district and the principal summary judgment, as the court deemed these parties covered under Utah's governmental immunity statute.³³

On appeal to the Utah Supreme Court, the Ledforses made three basic arguments challenging the lower court's interlocutory order:

[F]irst, that operation of a school is not a governmental function; second, that section 63-30-10(1)(b) should not immunize the government from suit for injuries arising out of a battery committed by a person who is not a government employee; and third, that their cause of action arises not from the battery, but from the government's breach of its duty to supervise and protect minor students in public schools.³⁴

The Utah Supreme Court addressed each of these issues. As to the first it defined "governmental function" as:

any act, failure to act, operation, function, or undertaking of a governmental entity whether or not the act, failure to act, operation, function, or undertaking is characterized as governmental, proprietary, a core governmental function, unique to government, undertaken in a dual capacity, essential to or not essential to a government or governmental function, or could be performed by private enterprise or private persons.³⁵

29. Ledfors, 849 P.2d at 1162.

30. *Id.* at 1163.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 1165.

Since the court held that the running of a school was a governmental function, they concluded that governmental immunity should apply to general actions of the school. The court then looked at other statutes to see if any exception waived the immunity afforded the school in this case. Utah Code “waives immunity for injuries caused by a negligent act or omission of a governmental employee.”³⁶ However, the court found an exception to that waiver. Section 63-30-10(1)(b) provides “that immunity is waived ‘except if the injury arises out of . . . assault, battery, false imprisonment, or false arrest.’”³⁷

The second argument put forth by the Ledforses—that governmental immunity should not stand where it was not a government official who actually committed the battery—failed to persuade the court. “Our statute clearly states that the employment status of the assailant is irrelevant to the question of immunity.”³⁸

The final argument—that the cause of action arose not from the battery itself, but from the negligent supervision of school teachers—was also discounted by the court. The court stated that “the Ledforses ignore the fact that the structure of the Utah Governmental Immunity Act, especially section 63-30-10, focuses on the conduct or situation out of which the injury arose, not on the theory of liability crafted by the plaintiff or the type of negligence alleged.”³⁹ This was simply a bootstrapping argument as “school supervision” is as much a “conduct or situation” as it is a “theory of liability.”

Although this opinion was not favorable for the Ledforses, it does illustrate a forward step for student protection and the enforcement of school administrators and teachers duty of reasonable care. The conclusion of the *Ledfors* opinion is significant because it demonstrates that the Utah Supreme Court felt the same frustration in formulating this decision as the Massachusetts Supreme Court felt when it handed down the *Whitney* decision. As discussed above, the Massachusetts Supreme Court moved from an admonition to an ultimatum to the legislature that the law be changed regarding the extensive governmental immunity.

The Utah Supreme Court similarly offered its apology to the Ledforses and asked the legislature to correct this injustice by

36. UTAH CODE ANN. § 63-30-10(1) (1989).

37. UTAH CODE ANN. § 63-30-10(1)(b) (1989).

38. *Ledfors*, 849 P.2d at 1166.

39. *Id.* at 1166.

changing the governmental immunity law:

It is unfortunate that any parent who is required by state law to send his or her child to school lacks a civil remedy against negligent school personnel who fail to assure the child's safety at school. Nevertheless, the legislature has spoken with clarity on the question of immunity, and we are constrained by the plain language of the Act and our prior case law on this point. However, as we stated in *O'Neal v. Division of Family Services*, "Certainly, the legislature is not so constrained as we." 821 P.2d 1139, 1145 (Utah 1991). It is entirely within the legislature's power to permit all plaintiffs to whom the government owes a duty of care based on a special relationship to bring suit for injuries arising out of a breach of that duty. Or the legislature could tailor the waiver of immunity more narrowly; the state could permit suit by or on behalf of public school children injured as a result of such a breach of duty. Its power to craft waivers of immunity is far superior to ours.⁴⁰

Perhaps the language of this Utah opinion could have been stronger, but the point was made. Other states may have not have taken such a stand, and school administrators and teachers remain somewhat unbounded by the duty of care.

Some states have a different way of determining "governmental function" and whether or not governmental immunity applies. In Oregon, for example, if the school board or school administrators are acting in a discretionary function or making policy choices, they are immune from suit. If, however, they fulfil a functional role, and in so doing, fail to take reasonable actions, the negligent administrator or teacher may be liable.⁴¹

This theory of law was expressed in the *Mosley v. Portland School District* case, a negligence action brought by a female student who was stabbed during a knife fight with another girl at school. The plaintiff alleged that the school district

was negligent in: (1) failing to exercise proper supervision of students; (2) failing to provide proper security and sufficient security personnel for protection of students when defendant knew that students carried weapons at the school; (3) failing to prevent weapons from being carried into the school building; and (4) failing to stop the attack before the knife was used.⁴²

The Oregon court held that, as to allegations one, two, and three, the school district and the school principal were acting in a

40. *Id.* at 1167.

41. *Mosley v. Portland Sch. Dist.*, 843 P.2d 415 (Or. 1992).

42. *Id.* at 416.

discretionary function in determining what type of security to use and how many security personnel should be employed at the school to protect the students. Because the school district and the principal were taking discretionary measures, they were protected under doctrine of governmental immunity. As to the fourth allegation, the court held that there was insufficient evidence to suggest that the principal actually knew that the fight was occurring or consequently that he could have stopped it.

C. *The "Wait and See" Approach*

The two cases discussed above illustrate how the doctrine of governmental immunity may be applied to create injustice. It is likely that in both the *Ledfors* and *Mosley* cases the parents suffered financial hardship in paying for the medical bills of their children. It is also likely that the children harmed in those cases had a difficult time overcoming the trauma and pain that accompanied their injuries. It is unfair that the parents and the victims may not be compensated for the harm done to them. In such situations, the governmental immunity doctrine offers a possible safe haven for school teachers and administrators regardless of their negligence in allowing harm to come to school children who are placed in their care daily.

What effect will this doctrine have on the protection of our school children in the future? Will administrators and teachers take a "wait and see" approach to problems of violence in their schools because they know they will often be covered by tort immunity? Or will they actively seek to protect our children?

VII. CONCLUSION

This paper does not intend to answer those questions. Nor does this paper intend to suggest that all school administrators and teachers are negligent. However, this paper does illustrate that the law has created an out; the governmental immunity doctrine does create a possible safe haven for school administrators and teachers, severing the binding effect of their duty of reasonable care owed to the students of their schools.

The doctrine of governmental immunity is a confusing one for our courts to apply. In certain situation it allows the negligence of school boards, teachers, and administrators to go unpunished. If the act or omission to act by a teacher or administrator is deemed to be a discretionary or governmental function, they are immune from tort liability. This doctrine may encourage teachers and administrators to take a "wait and see" approach in protecting children.

Upon close analysis, the governmental immunity doctrine does not protect society as it was designed to do. If state legislatures choose to retain the doctrine, the idea set forth by the Supreme Court—that of restricting governmental immunity in our schools—should be more seriously considered.

For, if in the educational environment, we cling to the old notion that the King can do no wrong, will he not then, for lack of motivation, fail to do right?

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43 J.D., Brigham Young University, 1996. The author gratefully acknowledges the assistance of Christian Gianni, and Eric Johnson, editors and friends all, in the preparation of this article.