

Catholic University Law Review

Volume 7 | Issue 1

Article 3

1958

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Recommended Citation

Vernon X. Miller, *General Aspects of Tort Liability in School Cases*, 7 Cath. U. L. Rev. 16 (1958).

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GENERAL ASPECTS OF TORT LIABILITY IN SCHOOL CASES*

by

VERNON X. MILLER**

I begin my address with two texts. The first is from Article 2315 of the Louisiana Civil Code: "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." The second is a sentence from my article in the Symposium on School Law:¹ "The case law on school torts has been controlled by propositions of the taught law that are unreal and obsolete in an era of risk shifting and insuring." I hope to relate both texts to your special interests in personal injury cases and to the special immunity defenses which mean so much to proprietors of private schools and officials in public school districts. I hope also you will understand why I think the doctrines of immunity are unreal and obsolete today.

Torts is a subject offered in the curriculum to first-year law students. Perhaps to most students that is all that torts means. I hesitate to suggest that there are only two kinds of lawsuits, but there is a basic cleavage between wrongs which are breaches of contract and wrongs which are torts. Breaches of contract depend on voluntary obligations. Promises, specifications, consideration, defaults and damages are derived from a great area of law which depends on voluntary planning. Torts is the area of social obligations. Because a man lives among neighbors, he must look out for their interests when he conducts his every-day affairs.

I do not intend to minimize the effects of legislation in the social obligation area. Certainly in that field we are touching criminal law and regulatory legislation with prosecutions, fines and imprisonments as ordinary sanctions. Torts suggests that part of the social obligation area where the adjustments of conflicts are resolved between private persons through civil suits for damages. Here again I do not intend to minimize the impact of legislation as lawmaking on civil suits, but I emphasize that we are

* This paper was delivered as an opening address at the Conference on School Law sponsored by the Department of Education of Duke University at Durham, North Carolina on June 18, 1957. The paper is published as it was read except for extemporaneous interpolations which were suggested by the introduction and the special audience. I have not tried to annotate the address as if it were a learned article. Occasionally I have used footnotes for statute references and for law review articles which do have some scholarship to support them.

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¹ SCHOOL PUPILS AND THE LAW: *Personal Injury Litigation in School Cases*, 20 L. & C. P. 60 (1955).

SCHOOL CASES

concerned with fact variety which is so special, case by case, that we can resolve specific conflicts only through generalized routines and broad propositions. It is not practicable to resolve many of these controversies through precise legislation. To state this proposition summarily: the adjustment of conflicts through civil lawsuits for damages depends on broad judge-made propositions and a case by case administrative routine.

This morning I want to talk to you particularly about one area of torts. I shall discuss personal injury cases as they are related to your interests. I think the personal injury field is the largest in torts. I suggest a few other areas for comparison: property damage, nuisance, defamation, fraud and deceit. In the personal injury cases, as in other areas of tort, certain classical doctrines of the taught law are necessary background factors. It is hornbook law that responsibility for torts depends on fault. That is good Anglo-American law, and it is the thesis of the proposition I quoted from the Louisiana Civil Code, which in turn is a literal translation of the first clause from Article 1304 of the Code Napoleon. Cause and effect between conduct and hurt are not enough to spell a tort. Without something more, cause and effect, conduct and hurt are mere coincidences. That something more is fault, and the concept is big enough to include intentional torts and inadvertent conduct. It is sufficient when the facts indicate circumstantially that the defendant has tried to hurt the plaintiff. It is sufficient when the facts indicate that a defendant should have looked out for a plaintiff's safety. Lawyers have developed a special vocabulary. They refer to misfeasances and non-feasances in the inadvertent conduct area, and that spells negligence. They use malfeasances to suggest assaults and batteries and all other intentional torts. School teachers are interested in discipline cases which plaintiffs' lawyers may describe as assaults and batteries.

The levels of fault are many. Most of them are resolved through the standard of the reasonably prudent man which the trial judge presents to the jury when he permits them to evaluate a record in a negligence case. In reaching a verdict jurors act like lawmakers. They find for the plaintiff if they would proscribe the defendant's conduct, and they find for the defendant when they would forgive him or when they resolve conflicts in the evidence against the plaintiff. There is much more to fault than this which I have described. Law students learn about affirmative defenses, special duties of land-owners toward trespassers, licensees and invitees, something about absolute liability when people keep wild animals and use explosives. There are many other corollaries of fault, most of which we can omit today because they do not relate to your problems.

There is another basic area of the taught law of torts which is almost

as important as fault. Lawmen call it proximate cause. I am sure there never was a word like proximate until some judges invented it. Lawyers have discussed the propositions and refinements on proximate cause for a hundred years, but no-one has spelled out a general proposition on proximate cause as simple and as comprehensive as the quotation on fault from the Louisiana Civil Code. Some lawmen think Jeremiah Smith of Harvard did it fifty years ago when he proposed that proximate cause is a substantial factor in the sequence between cause and effect. Perhaps that does suggest that we do not trace cause and effect with legal liability to the nth degree. We concede that some consequences are too remote. We concede that some other factors, perhaps the conduct of another person, may have intervened in some instances to control the sequence. How far do we follow cause and effect with legal responsibility? The answer is not controlled by statute or by rule. In talking to juries or in explaining decisions we try to reduce the problem to foreseeable consequences, but sometimes we confess that we solve it through a rough sense of justice, the judge's estimate when he thinks the consequences are too remote, the jurors' when the judge instructs them on the standard of the reasonably prudent man, foreseeability and substantial factors.²

These taught law doctrines on fault and proximate cause accentuate the importance of individuals. I suppose some of us might contend that these propositions are consistent with some kind of natural law. But there is a fly in the ointment, and I hope some of you have guessed it. Not many persons in any community can pay for their torts. Most of us in this room are judgment proof. If that is so, if tortfeasors do not have the resources to pay for their torts, how can it be that there are so many personal injury actions, so many that they consume more than half of the trial time of all trial courts? Moreover, the personal injury actions which are tried represent a small fraction of all the personal injury claims which are processed and paid. Most tort claims are adjusted through settlements. If that were not so, there would not be courts enough to try them. It was not always so. During the classical common law era, during the period of Blackstone and Kent and before the year 1829, the quantity of litigated personal injury cases was small, about what you would expect if tortfeasors had to pay damages out of their own resources. To restate the question rhetorically: if tortfeasors are judgment proof, how can there

² A classical exposition of the "rough sense of justice" jury presentation is found in Judge Andrew's dissenting opinion in the famous *Palsgraf* case. *Palsgraf v. Long Island R.*, 248 N.Y. 339, 352, 162 N.E. 99, 103, 59 A.L.R. 1253, 1261 (1928). Ironically the opinion of the court by Judge Cardozo is the more famous one, although Cardozo's doctrine has become academic as insurance risk shifting has affected judge and jury routines. See Miller, *Administration in Legal Cause*, 3 LOYOLA L. REV. 45, 59 *et seq.* (1945).

be the great quantity of personal injury litigation which is clogging the trial courts?

There is an explanation. It begins with another doctrine of the taught law—that a master is responsible for the torts of his servant committed within the scope of the employment. Like many other doctrines of the taught law, lawyers have had to live with it through many controversies to understand it. Who is a servant? What do we mean by scope of employment? Nevertheless, and in spite of ambiguities, this is a vital doctrine in the story of tort law development. Because of this doctrine courts have devised special defenses in your interest as school proprietors. Because of this doctrine it has happened in many personal injury cases, if not in most of them, that the important defendant is not the tort-feasor but the master who is charged vicariously for servants' torts. Even in England over a century ago that condition did cause in some degree an increase in the quantity of personal injury litigation. Why was there not more personal injury litigation? Because lawsuits cost money. Attorneys must be paid. Defendants who lose must discharge substantial judgments. In England the losing party had to pay his opponent's attorney's fees. That is not so in our states, where the loser pays only statutory costs in addition to the judgment when he is a defendant. Obviously tort costs can be great enough that even an employer can become judgment proof. However, a commercial employer cannot stay in business unless he can discharge judgments entered against him. The master of a household cannot maintain his establishment unless he can satisfy his judgment obligations. In the United States we have reduced the constricting effects of plaintiffs' fees and defendants' insolvencies through contingent fees and insurance risk shifting.

The contingent fee came first by many years, insurance risk shifting only with the automobile era. I am assuming you know what the contingent fee is. The lawyer earns a big fee if he wins, nothing if he loses, and to get the case where he may earn the big fee, he may advance statutory costs. Is that good or bad? A little of both. Without it most injured plaintiffs could never begin a lawsuit. Even with the contingent fee, litigation will not be frequent if most defendants are judgment proof. There are many kinds of commercial proprietors. Some of them are big and some of them are little. Institutional defendants, like railroad companies, are big in resources. Their functions are so many that overhead costs can be spread over many transactions. Even today railroads are self-insurers. To stay in business they have always had to arrange for paying tort claims. Put together the doctrine of master-servant, the contingent fee and defendants who are not judgment proof, and personal injury

litigation picks up. I hope you have detected the reason for the 1829 date. That was the beginning of the railroad business in the United States.

Fifty years ago, a hundred years ago, most proprietors were not railroad companies. Nor were many of them as large as railroad companies with great overhead spreads. Practically courts had to develop doctrines to condition the effects of master-servant and contingent fee practices. A hundred years ago it was decided that the master-servant rule did not work within the employment. Negligence of a fellow servant was a defense in a work-injury case against an employer. We shall not discuss that rule here because people everywhere have escaped from it by statute. Nowadays we have workmen's compensation. Responsibility depends on the occurrence of injury during the employment, and compensation is paid according to standardized schedules. A hundred years ago courts decided also that proprietors were responsible only to their customers when persons sustained injuries through the use of defective products. In those cases judges let contract relations between buyers and sellers control an area of social obligation. As judges expressed it, there could be no tort unless there was privity of contract between the parties. For a hundred years lawmen have wrestled with exceptions to this idea, and they have developed what they call the doctrine of dangerous instrumentalities, until now almost everything which is carelessly processed is a dangerous instrumentality, and there is little left to the old rule. Most of these exceptions, I may add, have occurred after we have added the other ingredient—insurance risk shifting.

Perhaps that other ingredient is the most important one in the picture. It has conditioned the trend of the case law relating to your special interests. Although you are concerned about student discipline cases where teachers or janitors perhaps are sued for assault and battery, most often you are concerned as other employers are because your customers, your students, your visitors or employees are injured on your premises. Students may be knocked down on the stairway when they rush to leave the building. Visitors can be injured when a handrail breaks. As proprietors and administrators you are automobile owners in your official capacity. Pedestrians may be struck down by your trucks and buses far from your premises. As lawyers appraise them, these would make good contingent fee cases. Although you have your special immunity defenses for reasons which we shall try to explain, you are thinking about safety-first programs and you do buy some insurance protection.

Perhaps we are getting ahead of our story. This other factor, insurance risk shifting, has not been in the picture as long as the other two. Until it was there, judges had to be cautious. Without some kind of

ceiling on tort costs, the community could not support financially the taught law possibilities. We have suggested something already about special conditioning rules, like fellow-servant and no privity of contract, but judges were hypercritical also about fault, proximate cause and scope of employment. Frequently defendants prevailed with a trial judge when they convinced him that there was not enough evidence of negligence in the record for a jury to use, or that consequences obviously were too remote, or that an employee had detoured from his employment at the time of tort, and in those instances judges would direct verdicts for the defendants. There was even a kind of ceiling accepted as such on damages. Jurors sensed practical limits to the price a defendant should have to pay for a tort. When jurors were not cautious, judges would set aside verdicts or reverse judgments or affirm judgments subject to the remission of some of the damages, all of which judges did when they thought damages were too high. Before the turn of the century there is no American appellate court report of a personal injury case in which a judgment for more than \$25,000 was affirmed.³

Since 1900, even since 1915, the quantity of personal injury litigation has increased rapidly, and the ceiling has risen. Verdicts and judgments nowadays have reached six figures. By 1929 the ceiling on personal injury judgments was somewhere around \$50,000. That was not fixed by law, but it represented a top level after trial or settlement. Fifteen years later it was \$100,000.⁴ Today there are no practical limits. To counteract this trend casualty insurers are advertising in magazines and warning prospective jurors what big verdicts can mean to them in the purchase of automobile liability insurance.

Along with the trend upward in dollars and cents, there is another trend which is just as important and just as expansive in the overall picture. Although judges and jurors talk about the taught law rules as they did fifty years ago, more and more often trial judges let personal injury cases reach juries. Judges are not as hypercritical today as they were fifty years ago about evidence and whether it is sufficient to support findings on negligence, remoteness and scope of employment. There is not hanging

³ This is a big statement, and it is difficult to support except with an "I could not find" explanation. There was such a case in the English reports, and for many years it was at the top among Anglo-American reported tort cases. *Philips v. London & Southwestern Railway Co.*, L.R. (1879) 5 C.P. Div. 280. The verdict and judgment in that case were for £16,000. See Miller, *Assessment of Damages in Personal Injury Actions*, 14 MINN. L. REV. 216 (1930).

⁴ See *Avance v. Thompson*, 320 Ill. App. 406, 51 N.E. 2d 334 (1943) (judgment for \$100,000 affirmed in appellate court after remittitur of \$25,000), *rev.* because of error in the instructions, *Avance v. Thompson*, 387 Ill. 77, 55 N.E. 2d 57 (1944); *cf.* Miller, *Workmen's Compensation for Railroad Employees*, 2 LOYOLA L. REV., 138, 157 (1944).

over judges today as there was fifty years ago the sword of potential insolvency for commercial proprietors and individual defendants when tort costs are high. Just as the doctrine of master and servant added much to relieve some injured plaintiffs from the risk of judgment proof defendants, and just as the master became the more important defendant in the tort action, so now there is a third party, who may not be one of the defendants, but who is the most important person in the system. Through his casualty insurance program, an employer can reduce his overhead tort costs and injured persons are protected against the judgment proof tort-feasor and the proprietor's insolvency. The insurer is the most important person in a personal injury action. Without an insured defendant most cases would never be processed. A proprietor can charge costs of litigation and costs of judgment against the price of an insurance policy. The price will not be nominal, but it will be determinable, and it can be calculated in overhead costs with a great degree of certainty.

There are no provisions in any one comprehensive statute which can explain the differences in results between 1907 and 1957. Courts have not generated new doctrines, and we cannot point to landmark cases, but there are conditions which explain the differences. We have escaped from the tight rules through exceptions and from tight administration by letting more cases reach the jury, and we have boosted ceilings on verdicts and judgments until practically today there is no ceiling. What is the explanation? That proprietors can shift tort costs through casualty insurance has removed the sword hanging over judges and defendants. Nor have proprietors been hurt except as all proprietors must pay bigger premiums for casualty insurance as settlements and judgments continue to pile up.

All of this has meant much to the people in your fields, more perhaps to the proprietors of private schools but something significant even to administrators of public agencies. There is still another development which I want to describe before we reach your special interests. This too cuts across all kinds of cases, including tort cases affecting schools. Nowadays many instances of negligence are statutory. As lawyers state the proposition in taught law jargon, violation of a statute is negligence *per se*. Practically that means that when a local city council prescribes a safety ordinance which certain proprietors must observe, criminal penalties are not the only sanctions. If a patron at a public place of amusement is injured on a stairway which is not equipped as required by statute, it is negligence without more evidence. On that issue, at least, there is nothing left for the jury to do. The violation of the statute, cause and effect between that omission and the injury, are enough for a plaintiff's

prima facie case. Although there is not much comprehensive legislation in torts except in the work-injury field and about death by wrongful act and survival of tort actions, there is a great quantity of regulatory ordinances and statutes which affect the processing of many personal injury cases.

To summarize at this point: I remind you that the combination of master-servant, contingent fee and insurance risk shifting plus all the special legislation by way of ordinance and statute has changed the picture in the personal injury business, although the taught law doctrines sound today as they did fifty years ago or a century ago. Lawmaking in the personal injury business may be effected occasionally through pronouncements of new doctrine or as corollaries of older concepts or by comprehensive statute, but most of the lawmaking in torts is effected by way of administration.

Private school proprietors and public school administrators are employers. You have lived with the master-servant doctrine and contingent fees for almost a hundred years. Your problems have been special enough that judges have considered other factors than price and cost when your institutions have been defendants in personal injury cases. When the resources of a charity are depleted many persons suffer.⁵ So judges have said that they cannot let administrators and employees of eleemosynary institutions waste the assets of the charity in discharging tort claims. Some lawmen have described this as the trust fund theory. The rule is comprehensive. Proprietors of private charities are not responsible for their servants' torts. The proposition sounds reasonable. Perhaps in a world where casualty insurance is unknown, the end results are reasonable.

People have been buying casualty insurance for more than a generation. The effects of risk shifting possibilities are reflected in the case law. When an eleemosynary institution carries liability insurance, the benefit of any special immunity defense is enjoyed primarily by the insurer. Judges are aware of that even when they do not discuss it in their opinions. Ever since that kind of risk shifting has been possible, exceptions have been recognized to immunity defenses. Some courts have decided that private charities are like other owners when they maintain automobiles to serve their beneficiaries. Because insurance is available, these institutions must carry the cost of automobile using. So, too, it has been held that the immunity does not extend to the operating of commercial properties although income from the properties is utilized to subsidize the charities. More important than any of the others is the exception which is

⁵ Cf. Miller, *Personal Injury Litigation in School Cases*, 20 L. & C. P. 60, 63-64 (1955).

recognized when plaintiffs are not beneficiaries of the charity. The immunity defense may be effective still against pupils or patients in a hospital, but in some states it is not effective against plaintiffs who have been visitors on the premises. In many states employees of charitable institutions have been included under workmen's compensation programs. Eleemosynary institutions in those states must carry insurance protection for their employees against work injuries.

With some of these exceptions recognized everywhere, all charitable institutions must carry some kind of insurance protection. If insurance risk shifting were not available there would be no exceptions. When insurance protection can be purchased, there is little reason for any immunity defense. Lawmen are conservative, but the trends in the case law are obvious. Earlier cases are being reversed. Some courts have conceded that insurance possibilities change the picture. In the District of Columbia, we do not recognize the doctrine any longer. In Maryland the legislature has prescribed by statute that insurance carriers cannot assert a charity's defense.⁶ Apparently the charity is a proper party in a case when a plaintiff alleges that there is insurance protection.⁷ It could be that the coverage of such a policy is relatively small, although there are reasons why administrators of a charity cannot afford to carry limited protection. It is likely that some kind of exception in charity cases will be recognized everywhere, and the charity cannot afford to be without large-sum protection when the exception occurs. Public liability insurance costs money, and costs will be increased when immunity defenses are erased. It is arguable that the public interest is served when the defense is abolished at a cost to the charity which is not prohibitive. So, too, the public interest was served by the immunity defenses in the old days before insurance when tort costs could have crippled charitable institutions.

Perhaps there are more public school administrators in the audience than proprietors and directors of private schools. All of you are interested in immunity defenses. You have much in common. You are employers of personnel who can be tortfeasors. As employers and defendants in personal injury cases you have been affected by what I have called the three-way combination—vicarious responsibility, contingent fees and insurance risk shifting. I have tried to indicate what I think is the end of the story for private school administrators. The public agency story is different, nor am I so sure what the end should be.

I think it is in order to recapitulate. When injured plaintiffs could

⁶ Md. Laws (1947) c. 900, MD. CODE ART. 48A § 82 (1951).

⁷ Cf. *Thomas v. Board of County Commissioners*, 200 Md. 554, 92 A. 2d 452 (1952); *Gorman v. St. Paul Fire & Marine Insurance Co.*, 121 A. 2d 812 (1956).

reach the employers of tortfeasors, some relief was effected against the judgment-proof condition of many employees. Until commercial proprietors (and we may add automobile owners) could purchase casualty insurance at fixed and relatively low costs, judges were cautious. They administered the traditional rules and they devised corollaries to control cost possibilities against employers. I remind you again of fellow-servant, privity of contract, directed verdicts because of remoteness and scope of employment and, in your own field, the doctrine of immunities for private charities, all of which have been affected now by risk shifting possibilities through insurance. Verdicts are bigger, administration is looser, more cases reach the jury, exceptions to the general rules are devised, and in some instances, as in the charity cases in some states, the special defenses are no longer available.

But the immunity defenses in the public agency cases stem from a different and older tradition. That the king can do no wrong is an ancient proposition. That it is unreal as a maxim in 1957 is obvious. That we can begin to think of the state or administrative subdivisions as defendants in ordinary lawsuits presents another problem. It is not that public agencies ought not to be charged with obligations. It is not that in many instances, and particularly in tort cases, public agencies ought not to respond in damages as other employers must do. But there may be other alternatives. In contract obligation cases, resorting to ordinary litigation as a means for adjusting claims against the state would be an expensive kind of business. I do not intend here to discuss proposals for reducing the maxim to modern practicabilities, but I do point up that the idea of governmental immunity is older than the personal injury business. Lawmen are conservative enough to live with that immunity and the conventional explanations for it when they sense other difficulties in the personal injury area, and particularly during an era like the late nineteenth century when all employers had to be self-insured. A control device against excessive tort costs was at hand in these cases without the courts' having to create special limitations like fellow-servant and the trust fund theory, and without their having to resort to a tight administration of taught law rules about fault and proximate cause as an administrative device.

However, even conservative lawmen do not stand pat generation after generation. We still say that the king can do no wrong, or in the United States that the state cannot be sued without its consent, but we create a federal court of claims. We know how to use mandamus; we are aware of ministerial functions and processes against officials to compel them to pay claims covered by statutory authorizations. On the contract obligation level the governments, state, federal, county or municipal, are

not like ordinary entrepreneurs, but they do have to discharge their contract obligations to function normally, and there are legal ways and means to expedite that discharging.

Tort possibilities in the administration of public affairs may not seem to be so close to everyday governmental functions as the borrowing of money, but tort possibilities are present. Perhaps they are not as important as contract obligations in dollars and cents, but in the tort area we can be alerted to the prospect of numerous civil lawsuits against governmental agencies with much time spent in litigation if that is the only way that personal injury claims can be adjusted. We can be frightened about the costs of litigation, the time consumed and eventually the costs of judgments. I suggest for the moment that you think of the whole field of public agencies, not only schools, but all public buildings and all using of automobiles for public agencies, and think of the possibilities through bad policing, bad maintenance and bad driving. Think of the possibilities among visitors, employees and people on the streets. It is true that every other employer has to meet tort costs, but the city, the state, the United States are special kinds of employers.

Again I lay out much in order to retreat from some of it. I do not propose to consider everything about governmental immunity. I catalogue a few facts and ideas. Not until 1946 did Congress enact a Federal Tort Claims Act. Claims against the United States because of employees' torts are processed now in the United States District Courts like ordinary personal injury suits except that they are tried by the judge without a jury. Judgments have been large. In New York⁸ and in North Carolina⁹ there are state tort claims acts. There may be other states where such legislation is impending. In North Carolina the scheme is administered differently from the federal act. Here it is administered through an administrative commission and there is a ceiling on damages. Currently the ceiling is \$10,000. Within the states I think it is obvious that most of the tort possibilities relate to the functioning of administrative subdivisions like counties and municipalities. As insurance risk shifting has become possible even for public agencies, the judges have recognized a division of func-

⁸ N.Y. Ct. Cl. Act § 8. This scheme covers agencies on the state level and includes only those schools which are state institutions. Within the states most public agencies function on the county, municipal or school district level, and they are not covered by this kind of statute. But see *Weber v. State* (Ct. of Cl.) 53 N.Y. Supp. 2d 598 (1945).

⁹ N. C. GEN. STAT. §143-291 *et seq.* (1952) as amended by N. C. Laws (1955) c. 1283, N. C. GEN. STAT. §144-300.1 (1955). In some respect the North Carolina statute is like the New York act. It relates to agencies on the state level only. However, it has covered the operation of school district buses, because the buses were owned by the state. *Greene v. Mitchell County Board of Education*, 237 N.C. 336, 75 S.E. 2d 129 (1953). In 1955 the State Act was amended to cover school bus cases explicitly, whether buses are operated by the state or the school districts.

tions on the municipal and county levels. Some are public and governmental, some are private and proprietary. The division is arbitrary. The same functions may fall into different categories in different states. The umpire in each geographic area is the state supreme court. In public function cases the immunity is recognized. In the private function cases the city or county is like any other employer. Judgments can be entered against it in a personal injury case. Obviously creditors cannot resort to execution to enforce such a judgment, but once a personal injury claimant is a judgment creditor, he is in the category of a contract claimant, and we have suggested before that there are legal devices for contract claimants which can lead to satisfaction. But to touch your interest particularly, administering schools is a public function. In that area the immunity defense is effective. If that is so, why are you people concerned about tort costs?

At this point I want to digress and to touch a problem or an area which cuts across all the defenses on state levels in personal injury cases. Automobile using generates over half of all the personal injury business. Among school cases only, that may not be true, but in the sum total of personal injury claims, most of them arise out of automobile accidents. The casualty insurance business today would not be what it is without the automobile. Because you and I can buy automobile liability insurance, we are not judgment proof tortfeasors as automobile drivers.¹⁰ Automobiles are used for all governmental agencies. You have school district buses and trucks. With the insurance possibilities behind automobile using to cover costs of litigation and costs of judgments, the frightening aspects about time and money costs in tort cases lose most of their color. There are some possibilities for governmental agencies. State legislatures may waive the immunity defense in all automobile-using cases affecting all public agencies. That has happened in California¹¹ and Wisconsin.¹² There may be other states where there is some of it. Your North Carolina program is particularly important in school bus cases. In Wisconsin the legislature has attached a procedural limitation. These personal injury cases must be adjusted before a state commission. They will not be litigated like other lawsuits. Lawmen are cautious enough that this kind of

¹⁰ The old common law rule that the bailor-owner is not responsible for the torts of the bailee-user has been modified by statute and by insurance practices. See, for example, Motor Vehicle Safety Responsibility Act of the District of Columbia, Act of May 25, 1954, 68 STAT. 120, 123, D.C. CODE, §40-424 (Supp. 1955). Omnibus clause insurance policies afford insurance protection against the torts of persons who use a vehicle with permission of the owner.

¹¹ CALIFORNIA VEHICLE CODE §400 (West, 1956).

¹² WISCONSIN VEHICLE CODE §345.05 (1957).

immunity waiving may be tight. In some areas it covers school buses only.¹³ The protection afforded to injured pedestrians or student occupants against immunity defenses may be limited to the size of the bond which district administrators must require from bus drivers. What happens if school supervisors use school funds to pay premiums for insurance protection in the interest of district employees and without anything like a statute to authorize such expenditures? I pose that question now to return to it in my conclusion. Here I point up that automobile using for all state agencies is a special area. Insurance costs for automobile liability insurance are different and separate from the costs and computations in the general public liability area. They are more expensive. In a real sense the resource pools behind the separate areas are different, although they may be administered by the same private insurance carriers.

Other than automobile cases, you are concerned primarily with bad policing and bad maintenance. You can be interested in discipline cases in the intentional tort area. When teachers or custodians chastise pupils, it is an intentional tort. I shall not discuss with you at length the problems of scope of employment and intentional torts except to mention that theatre proprietors must respond when ushers manhandle patrons, that department store proprietors must pay damages for slanders published in the heat of argument between clerks and customers, and that in most states automobile owners must respond when their chauffeurs retaliate physically during arguments at traffic intersections. However, when lawmen begin to plan legislation for cutting into the immunity defenses of public schools, they may exclude intentional torts as the legislators have done in California, Connecticut and in North Carolina.

Almost everything in this paper has been introductory to the problems you will discuss in your special panels. I do not propose to solve those problems within the next few minutes. I do list now certain states where solutions have been devised by the legislatures. I am supposing you will analyze solutions like them carefully during your special sessions. Immediately I want to suggest some concrete instances to illustrate what I mean by bad policing and bad maintaining. You will recall others from your own experiences. After a teacher leaves a classroom, students have been injured during a period of disorder. I am thinking of an unusual instance. A 12-year-old boy returned to a classroom with an armful of books when the teacher was absent during school hours. No-one was in charge of the students. Pupils were disorderly, and one boy threw a pencil across the

¹³ Bolmeier, *Legal Issues in Pupil Transportation*, 20 L. & C.P. 45 (1955); Miller, *Personal Injury Litigation in School Cases*, 20 L. & C.P. 60, 69 (1955).

room just as the 12-year-old entered. The point of the pencil was sharp. The boy was struck in the eye, and he lost his sight. Whether or not the boy who threw the pencil tried to hurt the other boy was not important. The conclusion about bad policing was supported by the facts. The event happened during school hours, there was no-one in charge of the students, and the class was unruly.

Bad maintenance cases are legion. Seats in an auditorium may collapse, the ball at the top of the flagpole on the school grounds may fall during recess, a marble slab in a hall may fall from its place. In such instances people nearby may be hurt, and in such cases it is difficult to identify tortfeasors. In actions against private proprietors these are *res ipsa loquitur* cases. The mere showing of the event requires an explanation from the proprietors. These are cases which strike your problems. All of them are immunity cases unless there is some special statutory program under which they can be processed. That is not to say that there cannot be underwriting programs devised to afford some protection to tortfeasors against costs and to injured persons for compensation without the mechanics of a planned statute.

It is surprising, I think, that there has not been much planned legislation in this area. I omit the school bus cases, because there has been much legislation in that field. I am thinking of all the other instances. Legislation is important in New York, California, Washington and Wisconsin.¹⁴ There is other legislation in New Jersey and Connecticut which may become important.¹⁵ Legislation in Maryland¹⁶ and Louisiana¹⁷ affecting primarily insurance obligations of private charities may be effective also in public school cases. The legislation in North Carolina is particularly important to you. The legislation in California and New York is comprehensive. In California it is effective only on the local level. In New York the State Tort Claims Act covers agencies at the state level only. Special statutes are effective for school district cases. This legislation has had far-reaching effects. Because it is legislation there have been problems of interpretation special in each state. Only the experienced tort man can become familiar enough with the trend of these cases to know when case law analogies from the general personal injury area must be conditioned by special limitations in the statutes. That is always a

¹⁴ California: EDUCATION CODE §§1007, 1008, 1026-1029 (West, 1956), GOVERNMENT CODE §§53050, 53051 (West, 1956). New York: EDUCATION LAW §§2560, 2562, 3023, 3024. Washington: CODE §408.120 (Rem. 1951). Wisconsin: STAT. §101.06 (1957).

¹⁵ Connecticut: GEN. STAT. tit. 13, c.71 §§951d, 952d (Supp. 1955). New Jersey: N.J. STAT. ANN. §18:5-50.2 (Supp. 1952), §18:5-504 (Supp. 1956), §18:5-30 (1940).

¹⁶ See footnotes 6 and 7 *supra*.

¹⁷ LA. REV. STAT. §22.655 (Supp. 1956).

problem when any remedial statute is enacted. Under the New York and California statutes, school districts may be made defendants. Under the California statute, in cases of bad maintenance there must be evidence that a bad condition was obvious to maintenance men before an accident occurred. The cases under the New York statute are controlled by other regulations affecting all proprietors and relating to equipment and personnel. Failure to comply with these other regulations is like negligence *per se*. I catalogue these few instances to suggest again that in New York and California there is much case law which the draftsmen of a statute for any other state must study.

The Washington statute is aimed against the defense on all levels except the top. As the statute relates to school districts, the legislature has excluded specially cases involving the use of equipment and playground apparatus.¹⁸ In bad maintenance cases the statute is interpreted strictly. There must be evidence of bad conditions and there is no room for inferences of negligence. Wisconsin has a safe place statute which relates only to bad maintenance in public buildings.¹⁹ In New Jersey and Connecticut the legislatures have enacted what are known as save-harmless statutes.²⁰ Unless the school district purchases liability insurance to cover the personnel mentioned in the statutes as immediate insureds, the statutes lose much of their punch. The school district cannot be made a party to the action in New Jersey. Without insurance protection the teachers and janitors, who are the only persons protected, would be judgment proof. The case law is scant. No-one has tried to enforce an obligation directly against a school district after he has reduced the case to judgment against a teacher or a janitor when the school district has not purchased insurance. My guess is that the district administrators do buy insurance protection for these individual employees. In maintenance cases this kind of protection is almost worthless because it is almost impossible to identify a particular tortfeasor as it would be necessary to do when the case must be processed against a named insured individual.

I suggest that this is not a long list. I know that the list of statutes relating to automobile driving is much longer, and I am supposing you will discuss some of them in your other panels today and tomorrow. I have two more ideas to suggest in this introduction to your panel studies. First of all, I think much can be done through underwriting programs. I know there are arguments against the spending of school district funds to buy insurance protection for all employees as individuals. I know it

¹⁸ WASH. CODE §28:58-030 (Rem. 1951).

¹⁹ WIS. STAT. §101.06 (1957).

²⁰ See footnote 15, *supra*.

can be more expensive to buy that kind of blanket insurance for all employees of an organization as individual insureds than it would be to purchase general public liability protection for an institution. Of course there is the public purpose argument. School district administrators cannot spend public moneys for the benefit of private individuals. I submit that the argument is misleading, but I know lawmen and I know their literal thinking. Perhaps the best way out is for a general authorization statute. We have it now for bus driving in some areas. Pennsylvania enacted such a statute for school districts and all employees in 1951.²¹ Finally I suggest that the most effective statute is an immunity waiver statute for all public agencies in personal injury cases. You have reached halfway with your North Carolina statute. Insurance absorbs most of the cost and most of the time losing. In many states we are familiar today with compensation programs for all state employees in work injury cases.

I have one final word of caution which is something of an anticlimax. Anyone who proposes anything special today for any part of the personal injury business must reckon with something which is hanging over all of the legal profession. The personal injury business is affecting adversely every other area where cases must be litigated. It consumes too much of the courts' energies. It generates conditions which can encourage ruthless methods of practice. Even with insurance as the cost absorbent, the costs of litigation, settlement and judgment-paying are reflected in the costs of premiums. Moreover, a system of private enterprise cannot absorb many judgments on the six-figure level through any kind of insurance program. All of that makes it difficult to step confidently with remedial legislation in the immunity areas. Literally this big problem is not yours for discussion during these sessions, but you are living under its shadow. You will be thinking of tort law doctrines and practices in your own area. I have spoken today to alert you to what can be done practically to build up the rules of the game as they affect schools to the level most of us live with in the other personal injury fields. But I am concerned. The personal injury business and the classical concepts of tort law need shaking up. I hope I am not talking in riddles. There is something in the scheme of workmen's compensation with its absolute liability and standardized schedules which we may draw from in shaking up the personal injury business.²² Then we may have a better case for waiving immunity defenses.

²¹ 24 PA. STAT. ANN. §7-774 (b) (Purdon, Supp. 1956). Minnesota has such a statute effective for all agencies of the state. MINN. STAT. (1949) §471.42, as amended by Minn. Laws (1951) c. 134.

²² Miller, *An Interpretation of the Act of 1939 (FELA) to Save Some Remedies for Compensation Claimants*, 18 L. & C.P. 241, 254-255 (1953).