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TORT LIABILITY FOR ILLINOIS SCHOOLS UNDER SECTION 9-103 OF THE ILLINOIS TORT IMMUNITY ACT

Donald J. Kerwin*

School law continues to be one of the most dynamic areas of Illinois practice. In this Article, Mr. Kerwin analyzes two cases presently before the Illinois Supreme Court which will decide the standard of liability applicable to school districts and their employees in school tort situations. The cases will also decide whether the purchase of liability insurance pursuant to section 9-103 of the Illinois Tort Immunity Act constitutes a waiver of immunity for negligent conduct where a cause of action is grounded on the Tort Immunity Act. The author analyzes the statutes involved, the cases which have interpreted the statutes and their historical background.

INTRODUCTION

In recent months, the Illinois Supreme Court has seen fit to grant leave to appeal in two First District Appellate Court cases, *Chilton v. Cook County School Dist. No. 207*¹ and *Kobylanski v. Board of Education*.² Both cases involve seminal issues whose determination could have profound effects upon the standard of liability of school districts and school employees in circumstances where pupils are injured while engaged in school activities.

In *Chilton*, the appellate court held that a section of Illinois' School Code,³ which provides that in all matters relating to disci-

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1. 26 Ill.App.3d 459, 325 N.E.2d 666 (1st Dist. 1975), *leave to appeal granted*, 58 Ill.2d 596 (1975).

2. 22 Ill.App.3d 551, 317 N.E.2d 714 (1st Dist. 1974), *leave to appeal granted*, 57 Ill.2d 608 (1975).

3. ILL. REV. STAT. ch. 122, § 24-24 (1973). The section provides in pertinent part: Teachers . . . shall maintain discipline in the schools. In all matters relating to the discipline in and conduct of the schools and the school children, they stand in the relation of parents and guardians to the pupils. This relationship shall extend to all activities connected with the school program and may be

pline in and conduct of schools and school children, teachers and other educational employees stand in a relation of parents and guardians to pupils, does not bind a plaintiff-pupil to a standard of proof of wilful and wanton misconduct in the supervision of students before liability could be imposed upon the defendant school district.⁴ The opinion of the court in *Chilton* was the first in this state's history to so interpret the statute in question.

In stark contrast, the *Kobylanski* court, in reviewing an action by a pupil to recover for personal injuries under the provisions of the Local Governmental and Governmental Employees Tort Immunity Act,⁵ concluded that no liability can attach to teachers for mere negligence in student supervision or maintenance of discipline, as a teacher's status is that of a parent or guardian to all students, and the liability of a parent to a child does not adhere absent wilful and wanton misconduct.⁶

Beyond the issue of the standard of liability applicable to school districts and their employees in school tort situations, the *Kobylanski* case presents the Illinois Supreme Court with an additional, related question which begs for a determination: whether section 9-103 of the Illinois Tort Immunity Act,⁷ pursuant to which school districts and their employees may obtain liability insurance to insulate them from liability for injury or death, constitutes a waiver of immunity for negligent conduct where such insurance has been purchased and where a cause of action is predicated upon the Tort Immunity Act.

This Article, then, will undertake a detailed analysis of *Chilton* and *Kobylanski* and a survey of the cases which preceded them in Illinois, as well as a brief discussion of some of the decisions in other jurisdictions dealing with the subject of school torts; a review and analysis of the development of governmental tort im-

exercised at any time for the safety and supervision of the pupils in the absence of their parents or guardians.

4. 26 Ill.App.3d at 465, 325 N.E.2d at 671.

5. ILL. REV. STAT. ch. 85, §§ 1-101 to 10-101 (1973).

6. 22 Ill.App.3d at 553, 317 N.E.2d at 716. *Kobylanski* concerned the interpretation of section 34-84a of the School Code, ILL. REV. STAT. ch. 122, § 34-84a (1973). The only real difference between this section and the one involved in *Chilton*, § 24-24, is that section 34-84a applies to school districts with populations upwards of 500,000 inhabitants whereas section 24-24 is applicable to districts having fewer than 500,000 population.

7. ILL. REV. STAT. ch. 85, § 9-103 (1973).

munity; and, finally, a commentary upon what the author feels will be the far-reaching ramifications should the supreme court decide to affirm in *Chilton* and reverse in *Kobylanski*.

CHILTON V. COOK COUNTY SCHOOL DIST. NO. 207

At the outset, it will be helpful to compare and contrast in full not only the appellate court opinions in *Chilton* and *Kobylanski*, but, in addition, the respective arguments propounded by the parties in briefs.

On April 25, 1968, 15-year-old Suzanne Chilton, a freshman at Maine Township High School East, was severely injured while performing a trampoline stunt, known as a "front drop," during her physical education class at the school, one of several within defendant school district. An action was brought to recover damages for injuries allegedly caused by the negligence of defendant school district and an instructor employed by defendant in maintaining and supervising the trampoline class. A jury returned a verdict for plaintiff solely against the district, finding the instructor not to have been guilty of negligence, and a judgment was entered upon the verdict. On appeal, defendant challenged, *inter alia*, the sufficiency of plaintiff's complaint, in that the complaint had failed to allege that defendant and the instructor were guilty of wilful and wanton misconduct in supervising the class.⁸

The school district's principal contention on appeal was that the trial court had erred in failing to direct a verdict in its behalf, arguing that section 24-24 of the School Code⁹ bound the plaintiff

8. The evidence further revealed that at the time of plaintiff's injury, the school required all freshmen, regardless of any demonstrated ability, to enroll in a trampoline course as part of its physical education program. The record showed that Suzanne Chilton had experienced some difficulty in accomplishing the "front drop" prior to the day of injury, but that she had been encouraged and given personal coaching in the maneuver by her instructor. Three or four trampolines were in use at the time of the accident, and approximately 20-25 students were participating. Their activities were overseen by a single instructor, who was assisted by a number of student "spotters" whose responsibilities included pushing bouncing pupils to the center of the trampoline if they were to venture too near its periphery. The instructor viewed each of the trampolines in operation alternately and was stationed about ten feet from plaintiff, watching another student's performance, when plaintiff was injured. In previous years, there had been upwards of 70 trampoline-related injuries at the school, from sprained thumbs to serious fractures. 26 Ill.App.3d at 461, 325 N.E.2d at 668.

9. ILL. REV. STAT. ch. 122, § 24-24 (1973).

to a standard of proof of wilful and wanton misconduct¹⁰ in the supervision of students in school activities before liability could be imposed upon the district. Defendant further urged that section 24-24 bestowed broad discretionary powers upon Illinois educators, who were said to legally stand in a parental relationship *vis-à-vis* their pupils¹¹ "in all activities connected with the school program,"¹² which, of course, would include the institution's physical education curriculum. The parental cloak, defendant argued, would therefore extend to its relationship with plaintiff—an *in loco parentis* relation—in the supervision of the trampoline class in which she was injured, requiring plaintiff to plead and prove wilful and wanton misconduct, as opposed to mere negligence.

Plaintiff sought to counter these arguments in *Chilton* by asserting that a thorough, close reading of section 24-24 of the School Code made it apparent that the proviso with respect to the maintenance of discipline was intended by this state's legislature to extend and apply only to those situations which could be characterized as disciplinary in nature. The statute, plaintiff maintained, was no more than a codification of the common law rule existing at the time of its enactment in 1965 that a teacher stood *in loco parentis* for purposes of discipline only, which would include the meting out of corporal punishment.¹³

10. For the purposes of this Article, a working definition of wilful and wanton misconduct can be found in *Schneiderman v. Interstate Transit Lines*, 394 Ill. 569, 583, 69 N.E.2d 293, 300 (1946), where the court stated:

A wilful or wanton injury must have been intentional or the act must have been committed under circumstances exhibiting a reckless disregard for the safety of others, such as a failure, after knowledge of impending danger, to exercise ordinary care to prevent it or a failure to discover the danger through recklessness or carelessness when it could have been discovered by the exercise of ordinary care.

11. When one occupies the place of the parent, he is liable only for wilful and wanton misconduct against his ward and not for ordinary negligence. *Mroczyński v. McGrath*, 34 Ill.2d 451, 216 N.E.2d 137 (1962); *Nudd v. Matsoukas*, 7 Ill.2d 608, 131 N.E.2d 525 (1955); *Cosmopolitan Nat'l Bank v. Heap*, 128 Ill.App.2d 165, 262 N.E.2d 826 (1st Dist. 1970). The rationale for the rule of parental non-liability for ordinary negligence derives from judicial reluctance to generate litigation and create strife among family members. See *Nudd v. Matsoukas*, *supra* at 619, 131 N.E.2d at 531. A second rationale arises from the state's interest in maintaining family harmony. See *Mroczyński v. McGrath*, *supra* at 454, 216 N.E.2d at 140.

12. ILL. REV. STAT. ch. 122, § 24-24 (1973).

13. See *Wexell v. Scott*, 2 Ill.App.3d 646, 276 N.E.2d 735 (3d Dist. 1971).

To underscore the validity of its arguments, defendant school district in *Chilton* directed the court's attention to a spate of cases which had interpreted section 24-24 as compelling plaintiffs in a range of school tort situations to allege and prove wilful and wanton misconduct, as opposed to negligence, before liability could attach. *Woodman v. Litchfield Community School Dist. No. 12*¹⁴ concerned permanent injuries suffered by an 8-year-old pupil, who was kicked in the head by a fellow student, after having been directed by his teacher to pick up papers from the classroom floor. The *Woodman* complaint alleged that the instructor's negligent supervision of the classroom activity was the proximate cause of plaintiff's injury. The appellate court, however, affirmed the dismissal of plaintiff's complaint.

In *Fustin v. Board of Education*,¹⁵ the plaintiff was injured after having been intentionally punched in the face by one of the players on the defendant's varsity basketball team during the course of a regularly scheduled game between two high schools. Plaintiff maintained that the school district had violated section 24-24 of the School Code in that it had failed to restrain its bellicose team member, as well as having failed to provide satisfactory supervision of the participants in the contest. The *Fustin* court concluded that in situations involving highly organized sporting activities, such as the basketball program out of which plaintiff's injuries resulted, school officials were empowered with discretion in the selection, preparation, and supervision of school teams, a broad discretion which is to be upheld and respected unless the actions of officials reflect wilful and wanton misconduct.¹⁶

In *Mancha v. Field Museum of Natural History*¹⁷ a claim was directed by a student against a school district for injuries sustained when several youths, unconnected with plaintiff's school, assaulted him while he was touring a museum as part of a school-supervised field trip. The plaintiff charged that the district had been negligent in permitting students to leave the school premises without adequate supervision and claimed that the teachers who had accompanied the group failed to properly supervise the

14. 102 Ill.App.2d 330, 242 N.E.2d 780 (5th Dist. 1968).

15. 101 Ill.App.2d 113, 242 N.E.2d 308 (5th Dist. 1968).

16. *Id.* at 121, 242 N.E.2d at 312.

17. 5 Ill.App.3d 699, 283 N.E.2d 899 (1st Dist. 1972).

group's activities while at the museum. The trial court dismissed the suit, and, on appeal, the dismissal was affirmed. The *Mancha* panel, in reaffirmation of the *Woodman* principles regarding section 24-24, noted that nothing which might constitute wilful and wanton misconduct had been alleged in the complaint.¹⁸ In finding that no duty had been breached, the court stated in part:

The burden sought to be imposed on the defendant School District and teachers is a heavy one which would require constant surveillance of the children. A baseball game, a football game or a game of hopscotch played on school grounds might break up a [sic] fight resulting in serious injury to one or more of the children. A teacher cannot be required to watch the students at all times while in school, on the grounds, or engaged in school-related activity.¹⁹

Beyond *Woodman*, *Fustin*, and *Mancha*, *Clay v. Board of Education*²⁰ provided further authority for defendant's announced posture on appeal in *Chilton*. In *Clay*, plaintiff brought a personal injury action against the Chicago Board of Education for damages arising when a fellow student allegedly struck plaintiff while in a classroom. Plaintiff alleged that defendant was guilty of one or more wilful and wanton acts or omissions, including the failure to provide adequate protection for students in the classroom, permitting dangerous instrumentalities to be left within the reach of students, and the failure to exercise a degree of supervision commensurate with the known circumstances.²¹

18. *Id.* at 703, 283 N.E.2d at 902.

19. *Id.* at 702, 283 N.E.2d at 901-02. *Merrill v. Catholic Bishop of Chicago*, 8 Ill.App.3d 910, 290 N.E.2d 259 (2d Dist. 1972) is another decision which seemed to clearly support defendant's position in *Chilton*. *Merrill* involved a plaintiff-pupil who had lost the sight in his left eye after he had been injured while cutting lengths of wire at the direction of his art class teacher. The question on appeal was whether a non-profit, private school and its staff were liable for personal injuries suffered by a student due to ordinary negligence. The court held that section 24-24 was applicable to determine the general propriety of the supervision of students in school activities, both in private and public schools. *Id.* at 911, 290 N.E.2d at 260. It is to be noted that on appeal in *Merrill* the plaintiff proffered the specific argument put forth by the plaintiff in *Chilton*: that section 24-24 was limited in its application to disciplinary situations only. The *Merrill* court found otherwise.

20. 22 Ill.App.3d 437, 318 N.E.2d 153 (1st Dist. 1974).

21. *Id.* at 438, 318 N.E.2d at 154. Note that in *Clay*, the plaintiff alleged wilful and wanton misconduct; in the other cases reviewed thus far the allegations have consistently remained within the realm of negligence.

After having discussed the *Woodman* and *Mancha* decisions, the court held that the trial court had been correct in its decision that a cause of action for wilful and wanton misconduct had not been stated against the defendant.²²

In response to the decisions cited by defendant in *Chilton*, plaintiff urged that the attendant factual circumstances in four of those cases were easily distinguishable from the facts in the case at bar. *Woodman* (student kicked in the head by another student while picking up papers), *Fustin* (student punched in the face by member of opposing basketball team), *Mancha* (student beaten by others unaffiliated with student's school while on museum trip), and *Clay* (student struck by another student while in classroom) all involved uniquely disciplinary situations, plaintiff argued, and each concerned personal injuries resulting from intentional acts of third parties.²³

Its survey of relevant authority complete, the Second Division of the First District Appellate Court, speaking in *Chilton* through Justice Downing, stated:

With all due respect to the courts which have ruled upon the question, it is our opinion that section 24-24 of the School Code did not bind the plaintiff in this case to a standard of proof of wilful and wanton misconduct in the supervision of students in school activities before any liability whatsoever could be imposed upon defendant. We do not believe that the legislature of this state intended, by its enactment of section 24-24, to extend the section's applicability to situations other than those which are disciplinary in nature.²⁴

The court then dispensed with other allegations of error regarding

22. *Id.* at 441, 318 N.E.2d at 156.

23. The opinion in *Merrill v. Catholic Bishop of Chicago*, 8 Ill.App.3d 910, 290 N.E.2d 259 (2d Dist. 1972), *supra* note 19, where a pupil was injured while cutting wire in art class, followed the reasoning and holding of the *Woodman* panel. Plaintiff claimed that the *Merrill* court had not distinguished between the disciplinary character of the activity in *Woodman* and the supervisory activity of the art teacher in *Merrill*; therefore, plaintiff concluded, the *Merrill* case was not persuasive authority regarding defendant's stance in *Chilton*.

24. 26 Ill.App.3d at 465, 325 N.E.2d at 671. The court went on to state:

Further, with reference to the record before us, we note that the trial court refused to instruct the jury that the *in loco parentis* standard was applicable to the case at bar and that the trial court declared that the basis for its ruling on

the admissibility of evidence and affirmed the judgment of the Circuit Court of Cook County.

Subsequent to *Chilton*, the Second Division of the First District rendered an opinion in *Wilson v. Kroll*,²⁵ a case reflecting strikingly similar factual circumstances, party alignments, and legal issues as those found at the heart of *Chilton*. *Wilson* was concerned with an action for damages against a school district and one of its teachers for negligence in the supervision of a physical education class, where plaintiff, a first grade pupil, suffered injuries when he fell from a horizontal ladder. Defendants moved to dismiss on the ground that, by virtue of section 24-24 of the School Code, defendants stood *in loco parentis* to the minor plaintiff, and, thus, could not be sued for acts of ordinary negligence; the trial court granted the motion. In reversing the dismissal, the court stated in part:

In *Chilton v. Cook County School Dist. No. 207*, . . . this court recently considered the issue presented by the instant case, to wit: whether a school district is responsible for injuries sustained by a student in the course of a physical education class as a result of the district's alleged negligence (as opposed to wilful and wanton misconduct). . . .

The reasons set forth in that opinion are controlling here. Therefore, we conclude that the trial court erred in dismissing plaintiffs' complaint.²⁶

The *Chilton* decision, and its only legal offspring, *Wilson*, which is not up for review by the supreme court, fascinates in many respects. First of all, its arrival allows the supreme court *itself* to grapple with the statutory interpretation of section 24-24 of the School Code as it relates to the standard of liability of school districts and their employees in tort situations. Until now, the intricate questions raised by the section have been addressed only by courts of appeal in three (the first, second and fifth) of

the point was its belief that section 24-24 applied only to disciplinary situations. We agree, and we find that the cited section does not specifically outline a broader basis for a school's disciplinary and supervisory powers and does not make such broader basis a matter of state law.

Id. at 465-66, 325 N.E.2d at 671.

25. 26 Ill.App.3d 954, 326 N.E.2d 94 (1st Dist. 1975).

26. *Id.* at 955, 326 N.E.2d at 94.

the state's five districts. Moreover, a tentative wave of excitement has been brought on by the decision among those who travel in plaintiff-oriented circles, those who would relish a change from the nearly-impossible-to-meet wilful and wanton standard to a far more simple negligence standard. There is another side to that coin, however. No doubt, the insurance industry is looking for, and indeed expecting, a reversal in *Chilton*, so as to put a stop to any erosion, however seemingly insignificant, of the current *status quo*.

Other jurisdictions, of course, have adopted and maintained a negligence standard where schools have been brought to account for student injuries. For example, in *Bellman v. San Francisco High School District*²⁷ a 17-year-old pupil was injured in a tumbling class, in which she had enrolled under protest, when she improperly performed a "roll over two" tumbling exercise. The evidence before the courts revealed that the girl's instructor did not coach students directly, that the girl had a bad knee, and that the "roll over two" exercise demanded complete coordination.²⁸ *Bellman* held that a judgment on the girl's behalf was justified, either on the theory that the exercise was not suitable for high school girls, that the teacher knew or should have known that the girl was not in the proper condition for such instruction, or that the teacher did not properly instruct the girl.²⁹ An 11-year-old, in *Gardner v. State of New York*,³⁰ dislocated a vertebra in her neck after having fallen in the performance of a headstand in a physical education class. It was held that there had been presented sufficient evidence to warrant a finding that the failure to instruct the claimant in accordance with the customary method of instruction was the proximate cause of her injuries.³¹ In a more recent New York case, *Keese v. Board of Education of the City of New York*,³² plaintiff was injured in the course of a line soccer game played on the gymnasium floor of her junior high school; plaintiff was an involuntary participant in the game. The court

27. 11 Cal.2d 576, 81 P.2d 894 (1938).

28. *Id.* at 582-85, 81 P.2d at 897-98.

29. *Id.* at 583, 81 P.2d at 898.

30. 281 N.Y. 212, 22 N.E.2d 344 (1939).

31. *Id.* at 217, 22 N.E.2d at 346.

32. 37 Misc.2d 414, 235 N.Y.S.2d 300 (Sup. Ct. Trial Div. 1962).

held that the evidence established the school board's negligence in permitting the game to be played under such conditions that eight relatively inexperienced girl students actively contended for possession of the ball at one time.³³

Chilton, then, by reason of its maverick interpretation of section 24-24, brings to our supreme court an issue of first impression.

KOBYLANSKI V. BOARD OF EDUCATION

Turning now to the *Kobylanski* case,³⁴ which was decided some months prior to *Chilton*, the plaintiff therein appealed from orders of the trial court directing a verdict in favor of defendant school board and one of its physical education instructors, James Lecos, and the denial of plaintiff's post-trial motion for a new trial. The action sought to recover damages for personal injuries under the provisions of the Local Governmental and Governmental Employees Tort Immunity Act,³⁵ and on appeal plaintiff argued that the trial court had erred, in that a *prima facie* case of negligence had been proven.

Plaintiff, a seventh-grader at the Mark Twain Elementary School in Chicago, suffered spinal injuries while attempting to perform on an exercise apparatus known as the "rings" during a physical education class. Her teacher had given directions on the manner in which to perform on the "rings" prior to her accident. Defendants were covered by liability insurance at the time of plaintiff's injury, and, in answer to her complaint, set forth as a defense section 34-84a of the Illinois School Code³⁶ which differs from section 24-24 of the Code in only one respect. The former applies to districts with populations upwards of 500,000 inhabitants, while the latter is applicable to those having fewer than 500,000 people.

In the appellate court, plaintiff contended that where public entities and their employees had obtained liability insurance,

33. *Id.* at 417, 235 N.Y.S.2d at 303. For a more extensive list of cases in other jurisdictions concerned with school torts see Forde, *Liability of Schools for Injuries to Students*, 17 TRIAL LAW. GUIDE 1 (1973).

34. 22 Ill.App.3d 551, 317 N.E.2d 714 (1st Dist. 1974).

35. ILL. REV. STAT. ch. 85, §§ 1-101 to 10-101 (1973).

36. ILL. REV. STAT. ch. 122, § 34-84a (1973). The section reads in part:

Teachers . . . shall maintain discipline in the schools. In all matters relating

liability for personal injuries could be founded upon ordinary negligence. Further, plaintiff asserted that section 34-84a was inapplicable to the facts of the case, and, moreover, that the doctrine of "parental immunity" was eroding in Illinois, especially where the concept was sought to be introduced into the teacher-pupil relationship. Its introduction there was simply not justified, because the threat to family harmony was not present.

Justice Lorenz, in delivering the opinion for the Fifth Division of the First District Appellate Court, found that although section 34-84a of the School Code had not been the subject of appellate review, its twin, section 24-24, had. After an analysis of the case law interpreting section 24-24³⁷ the court stated:

It cannot be disputed that plaintiff's injuries in the instant case occurred during activities directed by a teacher as part of the school program. In view of the interpretation given to identical language in section 24-24, we conclude that section 34-84a of the School Code of 1961 is applicable to the facts as pleaded by plaintiff.³⁸

The court next considered plaintiff's argument that defendants' procurement of liability insurance constituted a waiver of whatever protection section 34-84a of the School Code afforded defendants. It was plaintiff's claim that section 9-103(b) of the Tort Immunity Act³⁹ functioned as an effective waiver of a public

to the discipline in and conduct of the schools and the school children, they stand in the relation of parents and guardians to the pupils. This relationship shall extend to all activities connected with the school program and may be exercised at any time for the safety and supervision of the pupils in the absence of their parents or guardians.

37. Justice Lorenz analyzed the decision in *Merrill v. Catholic Bishop of Chicago*, 8 Ill.App.3d 910, 290 N.E.2d 259 (2d Dist. 1972), and found it to be in accord with those in *Mancha v. Field Museum of Natural History*, 5 Ill.App.3d 699, 283 N.E.2d 899 (1st Dist. 1972); *Woodman v. Litchfield Community School Dist. No. 12*, 102 Ill. App.2d 330, 242 N.E.2d 780 (5th Dist. 1968); and *Fustin v. Board of Educ.*, 101 Ill.App.2d 113, 242 N.E.2d 308 (5th Dist. 1968). See notes 14-19 and accompanying text *supra*.

38. 22 Ill.App.3d at 553, 317 N.E.2d at 716.

39. ILL. REV. STAT. ch. 85, § 9-103(b) (1973). The section reads:

Every policy for insurance coverage issued to a local public entity shall provide or be endorsed to provide that the company issuing such policy waives any right to refuse payment or to deny liability thereto within the limits of said policy by reason of the non-liability of the insured public entity for the wrongful or negligent acts of itself or its employees and its immunity from suit by reason of the defenses and immunities provided in this Act.

entity's right to deny its liability for negligent conduct. In rejecting this argument out-of-hand, without real comment on its true parameters, the court stated:

The applicable provisions found in the School Code of 1961 do not require, as does section 9-103 of the Tort Immunity Act, any waiver of defenses or immunity from suit. The Tort Immunity Act does not purport to impose liability on school districts where no liability otherwise exists. Furthermore, the existence or non-existence of insurance coverage is not a proper factor in determining liability.⁴⁰

As a consequence, the panel concluded that plaintiff's complaint, alleging ordinary negligence, was insufficient as a matter of law. "It was therefore proper," the court said, "for the trial judge to direct a verdict in favor of defendants and deny plaintiff's motion for a new trial."⁴¹

With all due respect to the court in *Kobylanski*, a far more detailed exegesis of the arguments offered by both parties to the appeal on the issue of insurance coverage may have been in order. Throughout the *Kobylanski* proceedings, before both the appellate and supreme courts, plaintiff has maintained these positions: (1) the Local Governmental and Governmental Tort Immunity Act of 1965⁴² controls the matter at bar; (2) the purchase of liability insurance by defendants—a local governmental entity and one of that entity's employees—extends insurance coverage to defendants for liability for the injuries complained of by plaintiff; (3) the purchase of insurance coverage by defendants waives grants of immunities and defenses which may have been otherwise available to defendants in the absence of such insurance; (4) any defense to liability for negligence provided defendants by section 34-84a of Illinois' School Code, if such defense is available to them in the first instance, is waived by reason of the provisions of section 9-103(b) of the Tort Immunity Act of 1965; and (5) because section 9-103(b) was enacted after⁴³ the mandatory procurement of insurance provisions set forth in section 34-18.1 of Illinois'

40. 22 Ill.App.3d at 554, 317 N.E.2d at 716 (citations omitted).

41. *Id.*

42. ILL. REV. STAT. ch. 85, §§ 1-101 to 10-101 (1973).

43. The date of enactment was August 13, 1965.

School Code⁴⁴ and because defendants have available to them only those defenses and immunities provided in the Tort Immunity Act of 1965, with regard to their liability for negligent conduct, section 9-103(b), as concerns the waiver of immunity, is applicable to the School Code insurance provisions.

In response to those positions, defendants have maintained: (1) the Tort Immunity Act is in no manner involved in the case; (2) the purchase of liability insurance is irrelevant to the facts of the occurrence therein complained of; (3) section 9-103(b) applies only to defenses and immunities provided in the Tort Immunity Act of 1965, and not elsewhere; (4) the provisions of section 34-84a of Illinois' School Code provide a defense to defendants, which defense is not waived pursuant to section 9-103(b) of the Tort Immunity Act of 1965; (5) because section 2-111 of the Tort Immunity Act of 1965, which reads: "[n]othing contained herein shall operate to deprive any public entity of any defense heretofore existing and not described herein,"⁴⁵ was enacted subsequent to section 34-84a of the School Code, the defense claimed by defendants under the latter section would continue to be available to defendants.

In what follows, the author analyzes the statutes involved and surveys the cases which have interpreted the statutes and their historical background. He will also interpret what he believes to have been the legislature's clear intent in enacting section 9-103(b), which is that the purchase of liability insurance by local governmental entities acts to waive any defenses and immunities from tort liability available to those entities.

44. Enacted on August 26, 1963, ILL. REV. STAT. ch. 122, § 34-18.1 (1973) reads: Protection from Suit. The board of education shall insure or indemnify and protect the board, any member of the board or any agent, employee, teacher, student teacher, officer or member of the supervisory staff of the school district against financial loss and expense, including reasonable legal fees and costs arising out of any claim, demand, suit, or judgment by reason of alleged negligence . . . or alleged wrongful act resulting in death or bodily injury to any person or accidental damage to or destruction of property, within or without the school premises, provided such board member of the supervisory staff, at the time of the occurrence resulting in such death, bodily injury, or damage to or destruction of property was acting under the direction of the board within the course and scope of his duties.

45. ILL. REV. STAT. ch. 85, § 2-111 (1973).

MOLITOR V. KANELAND COMMUNITY SCHOOL DISTRICT

It is a basic concept underlying the whole law of torts today that liability follows negligence, and that individuals and corporations are responsible for the negligence of their agents and employees acting in the course of their employment. . . . What reasons, then, are so impelling as to allow a school district, as a quasi-municipal corporation, to commit wrongdoing without any responsibility to its victims, while any individual or private corporation would be called to task in court for such tortious conduct?⁴⁶

The above question was posed in the landmark *Molitor* case and answered in the negative. In an extensive review of the constitutional, statutory, and common law framework of tort immunity for governmental entities, the supreme court could find no valid reasons for immunizing public bodies—and specifically school districts—from liability for acts of simple negligence. Hence, the common law doctrine of governmental immunity was abolished and the defendant school district in *Molitor* was held liable for the negligence of its employee-bus driver in injuring student passengers in an accident.

The abandonment by the *Molitor* court of the immunity doctrine⁴⁷ served as an impetus for the modern development of the doctrine in this state. The *Molitor* court made clear its rejection of theories proffered over the decades in support of immunity when it declared:

We are of the opinion that none of the reasons advanced in support of school district immunity have any true validity today.⁴⁸

The rationale underpinning the decision in *Molitor* was founded upon a reevaluation, in light of the norms then current in society, of the so-called sovereign immunity defenses: on the one hand, that “the king can do no wrong;” on the other, that the

46. *Molitor v. Kaneland Community School Dist.*, 18 Ill. 2d 11, 20, 163 N.E.2d 89, 93 (1959).

47. The immunity doctrine was adopted by Illinois courts with reference to towns and counties in *Town of Waltham v. Kemper*, 55 Ill. 346 (1870), and was extended to shield school districts in *Kinnare v. City of Chicago*, 171 Ill. 332, 49 N.E. 536 (1898).

48. 18 Ill.2d at 24, 163 N.E.2d at 95.

satisfaction of tort claims by school districts was an improper diversion of public educational funds. The court's reappraisal of the defenses mentioned led to a sweeping away of both the "uner-ring king" argument, as well as the "protection-of-public-funds" theory. Regarding the former, the court said:

It is almost incredible that in this modern age . . . the medieval absolutism implicit in the maxim, 'the king can do no wrong,' should exempt the various branches of government from liability for their torts, and that the entire burden of damage resulting from the wrongful acts of the government should be imposed upon the single individual who suffers the injury, rather than distributed among the entire community⁴⁹

Of the latter theory, the court said:

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

. . . .
Private concerns have rarely been greatly embarrassed, and in no instance, even where immunity is not recognized, has a municipality been seriously handicapped by tort liability.⁵⁰

POST-*Molitor* LEGISLATION

There resulted in the wake of *Molitor* a disjointed, discordant rush of legislative activity and judicial decisions concerning the subject of governmental immunity, a flurry which finally culminated six years later in the enactment by the legislature of the Local Governmental and Governmental Employees Tort Immunity Act of 1965⁵¹ (hereinafter the Tort Immunity Act of 1965). Another statute enacted in response to *Molitor*, the 1959 School Tort Liability Act,⁵² applied to schools and school districts the proprietary-governmental distinction, which had previously been drawn concerning the immunity of municipal corporations, ren-

49. *Id.* at 21, 163 N.E.2d at 94, citing *Barker v. City of Santa Fe*, 47 N.M. 85, 88, 136 P.2d 480, 482 (1943).

50. 18 Ill.2d at 22, 163 N.E.2d at 94-95.

51. ILL. REV. STAT. ch. 85, §§ 1-101 to 10-101 (1973).

52. ILL. REV. STAT. ch. 122, §§ 821-31 (1973).

dering them wholly immune from tort liability in their governmental functioning and limiting their liability in tort for proprietary functions to \$10,000.⁵³

With respect to arguments in *Kobylanski*, the legislature, in section 821 of the 1959 School Tort Liability Act, stated the policy reasons behind the statute's enactment.

The General Assembly finds and hereby enacts as . . . public policy . . . that public schools in the exercise of purely governmental functions should be protected from excessive diversion of their funds . . . and that non-profit private schools conducted by bona fide eleemosynary or religious institutions should be protected from excessive diversion of their funds for purposes not directly connected with their educational functions.⁵⁴

Moreover, the legislature showed concern for the impropriety of precluding recovery to injured persons owing to governmental immunity. In the statute's preamble, the legislature states "that there should be a reasonable distribution among the members of the public at large of the burden of individual loss from injuries incurred as a result of negligence in the conduct of school affairs."⁵⁵

In addition to the 1959 School Tort Liability Act, the 1959 Illinois legislature passed several statutes in direct response to the *Molitor* decision, granting full tort immunity to park districts generally,⁵⁶ the Chicago Park District,⁵⁷ forest preserve districts,⁵⁸ and counties.⁵⁹ However, most of those stopgap statutes were subsequently found to have been constitutionally defective.⁶⁰

53. *Id.* §§ 821, 825. See also Coteleer, *Illinois School Tort Immunity: 1959 to the Present*, 2 LOYOLA (CHI.) L.J. 131, 136-37 (1971).

54. ILL. REV. STAT. ch. 122, § 821 (1973).

55. *Id.*

56. Law of July 9, 1959, ch. 105, § 12.1-1 [1959] Ill. Laws 782 (repealed 1967).

57. Law of July 22, 1959, ch. 105, § 333.2a [1959] Ill. Laws 2020 (repealed 1965).

58. Law of July 22, 1959, ch. 57½, § 3a [1959] Ill. Laws 1954 (repealed 1965).

59. Law of July 22, 1959, ch. 34, § 301.1 [1959] Ill. Laws 1890, as amended ILL. REV. STAT. ch. 34, § 301.1 (1973).

60. See *Treece v. Shawnee Community Unit School Dist. No. 84*, 39 Ill.2d 136, 233 N.E.2d 549 (1968); *Lorton v. Brown County Community Unit Dist. No. 1*, 35 Ill.2d 362, 220 N.E.2d 161 (1966); *Hutchings v. Kraject*, 34 Ill.2d 379, 214 N.E.2d 274 (1966); *Harvey v. Clyde Park Dist.*, 32 Ill.2d 60, 203 N.E.2d 573 (1964).

JUDICIAL RESPONSE IN *Harvey*

The decision in *Harvey v. Clyde Park District*⁶¹ provided the foundation for a major part of the judicial assault made upon the 1959 legislation, which had been prompted by the holding in *Molitor*. *Harvey* applied section 22 of Article IV of the 1870 Illinois Constitution,⁶² which prohibited special legislation, to strike down a section of the Park District Code, which granted park districts immunity from suit for their negligent acts. The case concerned a negligence action on behalf of a minor who had sustained injuries on a faulty playground slide. The defendant park district alleged that it was wholly immune from liability. The court held that the immunity statute in question was special legislation, in violation of the Illinois Constitution, and, as such, was unconstitutional. No rational distinction could be found between the playground facilities maintained by the park district in *Harvey* and those provided by schools or the state, against whom recovery, though limited, would be available.

As it had responded to the earlier *Molitor* decision, the legislature again responded quickly to the pronouncements of *Harvey*, which was viewed by some as shaking the foundations of the General Assembly's pattern of immunity,⁶³ and the legislature enacted the Tort Immunity Act of 1965. The Act was written to comply with the constitutional interpretation rendered in *Harvey*, granting immunities solely upon the basis of the function of a local public entity, rather than upon a particular, arbitrary classification of persons or of governmental units. In addition, the legislators of this state were guided in their drafting by the California Tort Claims Act of 1963.⁶⁴

SECTION 34-18.1 OF ILLINOIS' SCHOOL CODE

Before turning to a more detailed discussion of section 9-103 of

61. 32 Ill.2d 60, 203 N.E.2d 573 (1964).

62. ILL. CONST. art. IV, § 22 (1870). The ban on special legislation is presently contained in ILL. CONST. art. IV, § 13 (1970).

63. See Coteleer, *supra* note 53, at 141-43.

64. CAL. GOV'T. CODE §§ 810-996.6 (West 1966). See also Baum, *Tort Immunity of Local Governments and Their Employees: An Introduction to the Illinois Immunity Act, 1966* U.ILL.L.F. 981, 985.

the Tort Immunity Act of 1965 under scrutiny by the supreme court, it should be noted, again, that plaintiff's cause of action in *Kobylanski* was predicated upon a violation of the Act itself. While section 9-103(b) of the Act applies to all local public entities which *choose* to avail themselves of its provisions, school districts with populations upwards of 500,000 (the Chicago School District and the Chicago Board of Education) have been *required*, since 1963, to provide the insurance designated in section 34-18.1 of Illinois' School Code.⁶⁵ Section 34-18.1 does not require that any liability policy issued pursuant to its provisions contain a "waiver of immunity" clause; section 9-103(b) does require the clause. It is clear, however, that the section 9-103(b) requirement concerning the "waiver of immunity" clause would apply as well to policies obtained pursuant to section 34-18.1, as section 9-103(b) maintains its requirements for "[e]very policy for insurance coverage issued to a local public entity," not only for those which happen to have been purchased in accordance with section 9-103.

In any event, both defendants in *Kobylanski* had purchased liability insurance, which, by dint of section 9-103(b), is to provide a waiver of immunity for tort liability, as described in the section.

CODIFICATION OF THE RULE OF *Thomas v. Broadlands Community Consolidated School District*: SECTION 9-103(b) OF THE TORT IMMUNITY ACT OF 1965

In *Sullivan v. Midlothian Park District*,⁶⁶ the court made clear that section 9-103(b) of the Tort Immunity Act of 1965 was an attempt to codify the decision in *Thomas v. Broadlands Community Consolidated School District*,⁶⁷ which established in Illinois law that the possession of liability insurance by a governmental entity, such as that required to be obtained by defendants in *Kobylanski* pursuant to section 34-18.1 of Illinois' School Code and made available to defendants by section 9-103, acted as a waiver of immunity from suit for injuries arising from the risk insured against.

65. ILL. REV. STAT. ch. 122, § 34-18.1 (1973). See note 44 *supra*.

66. 51 Ill.2d 274, 281 N.E.2d 659 (1972).

67. 348 Ill.App. 567, 109 N.E.2d 636 (3d Dist. 1952).

After having considered arguments in support of a grant of immunity in *Thomas*, the court concluded that the arguments sounded in the two rationales mentioned earlier in this article: first, in the axiom that "the king can do no wrong," and second, that public policy dictated that funds intended for "public purposes" should not be diverted to the satisfaction of private tort judgments. The *Thomas* court concluded that the first rationale was not a proper basis upon which to grant immunity, reasoning that the better approach would be to distribute the burden of tort liability to the community of which the responsible governmental unit was a part, so as to prevent an injured person from suffering the loss without a remedy. Regarding the second rationale, diversion of public funds, while the court found the principle sound, it nonetheless concluded that where liability insurance protected a governmental entity, the justification for the grant of immunity ceased to exist. The court stated:

When liability insurance is available to so protect public funds, the reason for the rule of immunity vanishes *to the extent of available insurance*.⁶⁸

In other words, the *Thomas* court reached the result that the procurement of insurance adequately protected the diversion of public funds.

The progressive rule of the *Thomas* decision with respect to insurance waiver has been adopted by numerous state courts, as well as by the legislatures of several states.⁶⁹

LEGISLATIVE INTENT: SECTION 9-103(b)

With the passage of the Tort Immunity Act of 1965, then, this

68. *Id.* at 576, 109 N.E.2d at 641.

69. See, e.g., *Hall County v. Loggins*, 110 Ga.App. 432, 138 S.E.2d 699 (1964); *Geislinger v. Village of Watkins*, 269 Minn. 116, 130 N.W.2d 62 (1964); *Brown v. City of Omaha*, 183 Nebr. 430, 160 N.W. 2d 805 (1968); *White v. Mote*, 270 N.C. 544, 155 S.E.2d 75 (1967); *Vendrell v. School Dist. No. 26c*, 226 Ore. 263, 360 P.2d 282 (1961); *Ballew v. Chattanooga*, 205 Tenn. 289, 326 S.W.2d 466 (1969); *Medlar v. Aetna Ins. Co.*, 127 Vt. 337, 248 A.2d 740 (1968); *Marshall v. Green Bay*, 18 Wis.2d 496, 118 N.W.2d 715 (1963); FLA. STAT. ANN., § 455.06 (Supp., 1975); LA. REV. STAT. ANN., §§ 32.601 *et seq.* (1963); MINN. STAT. ANN., § 466.06 (1963); N.H. REV. STAT. ANN., § 412.3 (1968); N. MEX. STAT. ANN., §§ 5-6-18 *et seq.* (1974); N.D. CENT. CODE, § 39-01-08 (Supp., 1975); VT. STAT. ANN. tit. 29, §§ 1403, 1404, 1406 (1970); WIS. STAT. ANN., § 66.18 (1968). See generally *Van Alstine, Governmental Tort Liability: A Decade of Change*, 1966 U.I.L.L.F. 919.

state's legislature intended to do away with what had become known as "the twin evils:" the diminution of public funds by virtue of tort judgments against governmental entities and the discouragement of conscientious performance of their duties by public officials, who might be apprehensive about the possible harassment or economic catastrophe brought on by negligence complaints lodged against them. At the same time, the legislature was not insensitive to the plights of claimants created by the statutory immunity the legislature would grant, and, consequently, provided, pursuant to section 9-103(b), that if a governmental entity was to avail itself of insurance against loss created by negligence, then the governmental entity would, within the ambit of the insurance contract itself, waive immunity from actions for negligence.

The effect of section 9-103(b) has been succinctly stated in *Schear v. City of Highland Park*⁷⁰ to waive the immunities provided by sections 2-102 through 6-109 of the Tort Immunity Act, and in *Sullivan v. Midlothian Park District*⁷¹ the immunities made available by section 3-106 of the Tort Immunity Act of 1965. The court stated in *Sullivan*:

We must assume that when section 9-103 was enacted the General Assembly was aware of the history of the doctrine of local governmental immunity from its adoption in *Town of Waltham v. Kemper* (1870), 55 Ill. 346, to its abolition in *Molitor*

. . . . Section 9-103(b) is . . . applicable to all local public entities who elect to avail themselves of its provisions and obviously is the method selected by the General Assembly to enable the governmental units to which it applies to shift the risk of loss to an insurance carrier. The enactment of the section may be evidence of legislative recognition of the dominant role played by the insurance industry in the field of personal injury litigation.⁷²

In *Housewright v. City of La Harpe*,⁷³ the supreme court held that the acquisition of insurance by local public entities to cover

70. 104 Ill.App.2d 285, 244 N.E.2d 72 (5th Dist. 1968).

71. 51 Ill.2d 274, 281 N.E.2d 659 (1972).

72. *Id.* at 280, 281 N.E.2d at 663.

73. 51 Ill.2d 357, 282 N.E.2d 437 (1972).

liability due to wrongful and negligent acts must waive the defenses and immunities provided by the Act, pursuant to the provisos of section 9-103(b). In *Fanio v. John Breslin Co.*,⁷⁴ the court, following the reasoning in *Housewright*, again defined the relationship between the waiver provision of section 9-103 and certain defenses granted by the Act and held that section 8-101 of the Act was also subject to the waiver provision.⁷⁵

It would seem, in this writer's opinion, that the legislature did not intend, by its enactment of section 34-84a of the School Code to immunize, or make available a defense to local public entities which have procured insurance against tort liability. Section 34-84a was enacted during the same session of the legislature as was the Tort Immunity Act of 1965, and had that body intended to create a defense such as that upon which defendants in *Kobylanski* rely, the proper vehicle for its creation would have been the Act itself; such a defense—among those specifically and exclusively granted in the legislation—is nowhere to be found in the Act.

If the legislature had intended to create what in effect is a non-waiverable defense for teachers from all their acts of ordinary negligence while acting within the scope of their employment, it would have been a simple matter for it to include the subject matter of section 34-84a within the Tort Immunity Act. It did not do so and, it is submitted, it did not create such a defense by passage of section 34-84a either. The intent of that section was to make it clear, in the interests of the orderly administration of classrooms, that teachers, like parents, had the right to discipline students.

CONCLUSION

In conclusion, then, where a public entity elects to insure itself against liability (in *Kobylanski* such insurance was mandatory) the entity places itself on the same basis as all other tort defendants, as other public entities were placed immediately following the *Molitor* decision, having available to them only those com-

74. 51 Ill.2d 366, 282 N.E.2d 443 (1972).

75. *Id.* at 369, 282 N.E.2d at 445. See also *Cleary v. Catholic Diocese*, 57 Ill.2d 384, 312 N.E.2d 635 (1974); *Helle v. Brush*, 53 Ill.2d 405, 292 N.E.2d 372 (1973).

mon law defenses which had arisen beyond the confines of the Tort Immunity Act. Further, where the coverage of the insurance policy itself is broader than a public entity's liability, it would seem that liability expands to the full extent of such coverage.⁷⁶

76. *Thomas v. Broadlands Consol. School Dist. No. 201*, 348 Ill.App. 567, 576, 109 N.E.2d 636, 641 (3d Dist. 1952).

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