North Dakota Law Review

Volume 43 | Number 4 Article 9

1967

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About two thousand years ago, enterprising Romans discovered that they could use mortar and stone to build a high and an almost impregnable wall at relatively little cost. The significance of such a structure in a time of high taxes became readily apparent. It was simply less expensive to build a wall around a complex of homes, stables, and granaries than it was to pay taxes. As an added safeguard, a deep and wide ditch was dug around the outside of the wall and filled with water When the tax collector's army approached and demanded the payment of taxes, the men inside would climb to the top of the wall and drop rocks on the soldiers below until, battered and weary and without remaining supplies, the tax collector and his army withdrew It must have been an idealic life, — free, as it was, from taxation. The inhabitants behind the wall could carry on their everyday functions of living and local government oblivious to all that went on about them outside their wall. Unfortunately, for those merry making tax evaders, the day was to come when gunpowder was imported from the Orient and the tax collector and his army, without having to advance far enough to get their feet wet or have stones dropped upon them, effectively demolished the wall.

Today, we are concerned with the protective walls of immunity which stand as the great deterrent to tort litigation involving school districts and their governing boards. These walls have often been built upon judicial decisions applying the English medieval doctrine *rex non potest peccare,* "the king can do no wrong." This is the doctrine of sovereign immunity, generally applied to state and federal governmental activities.[1] It remains firmly standing

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1. PROSSER, TORTS 125 (3d ed. 1964).

in many of our states even though its application to school districts has been denied throughout England for the past seventy-six years.

The immunity of local governmental units was not sovereign immunity but found birth in the early English case, *Russell v Men of Devon*.[2] That Eighteenth century case arose when Russell damaged his wagon while driving it over a bridge that was in disrepair in the County of Devon. Russell sued the men dwelling in the county who, it was alleged, had neglected their duty to keep the bridge in passable condition. Relief was denied, however, because: (1) to grant relief would open a floodgate of litigation; (2) there was no precedent to sustain such a cause of action; and (3) there were no corporate funds from which a judgment could be satisfied. Lord Kenyon, Chief Judge on the King's Bench, opined that they could not be sued for any breach of duty they collectively owed. In a separate opinion in the case, Judge Ashurst reasoned:

> It is better that an individual should sustain an injury than that the public should suffer an inconvenience. Now if this action could be sustained, the public would suffer a great inconvenience; for if the damages are recoverable against the county, at all events they must be levied on one or two individuals, who have no means whatever of reimbursing themselves for if they were to bring separate actions against each individual of the county for his proportion, it is better that the plaintiff be without remedy [3]

Although the issues in *Russell v Men of Devon* arose out of an action against the people of an unincorporated community, the reasoning of that case was adopted without discussion by an early Massachusetts court in a case involving a *quasi*-corporation,[4] and so a concept of governmental immunity was raised as a protective wall surrounding all political subdivisions.

Private institutions, as well as public institutions, found their protective walls. In some cases, the courts applied the trust fund theory to deny relief. According to this theory, monies collected for the purpose of providing education must be held in trust for that purpose alone; it was considered a misapplication of the trust to deplete the "funds for education" in satisfaction of a judgment for a claim founded in tort.[5]

If legal scholars had had their way, the walls of immunity would have been torn down long ago. They have been almost unanimous in their adamant criticism of the immunity doctrines.[6] But,

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2. 2 T.R. 667, 100 Eng. Rep. 359 (1788).
3. *Id.* at 673, 100 Eng. Rep. 362.
4. Mower v. The Inhabitants of Leicester, 9 Mass. Rep. 247 (1812).
5. Leviton v. Board of Education, 374 Ill. 594, 30 N.E.2d 536 (1940).
6. See PROSSER, TORTS 125 (3d ed. 1964), Borchard, *Governmental Liability in Tort*, 34 YALE L. J. (1924) Fuller, *Municipal Tort Liability in Operation*, 54 HARV. L. REV. 437 (1941) Green, *Municipal Liability for Torts*, 38 ILL. L. REV. 355 (1944) Harno, *Tort*

until recently, the legal scholars, just as the armies of the early tax collector, got little more than wet feet and stones dropped upon their heads when they attacked the doctrines. Their arguments were sometimes found in judicial opinions but the courts steadfastly refused to accept the responsibility for effecting change. In effect, the courts simply loaded the cannon of overrule with powder and ball, aimed it at the immunity wall and then refused to fire the destructive shot. That unpleasant task, it appeared, had to be left to state legislatures.

The early attitude of the Supreme Court of Illinois was typical in matters involving tort immunity [7] Until recently, Illinois school districts realized the full protection of the immunity wall. Whenever a claimant stood outside the wall and demanded recovery, the school district had but to send its attorneys to the top of the wall armed with boulders marked *stare decisis* to drive the claimant away

Then in a 1950 Illinois case,[8] the court announced that while the trust funds of a charitable institution were not available to satisfy a judgment in a tort action, the charitable institution, by the rule of *respondeat superior,* was responsive for the tortious conduct of its agents and relief was available when liability insurance existed. While the target of that judicial shot was not a public school district, a similar shot did fall on the Broadlands Community School District in Illinois two years later [9]

The Broadlands School District had earlier purchased liability insurance, even though no statutory authority existed for the purchase of that insurance by a school district. In fact, the persuasive case law of sister states indicated that such purchase by a school district was an *ultra vires* act. Obviously, school districts have only those powers specifically granted by statute or which may necessarily be implied—and because public school districts clearly enjoyed protection under the immunity doctrine, there was no need to purchase liability insurance. The school district, however, was not permitted to plead its own illegal act of procuring liability insurance as a defense. The court held that "where liability insurance is available to protect the public funds, the reason for the rule of immunity vanishes to the extent of the available insurance."[10] The court found no justifiable reason for the immunity of school districts based upon the mere fact that the school district was created *nolen volens* by general law and, as such a *quasi-*

Immunity of Municipal Corporations, 4 ILL. L. Q. 28 (1921) Pugh, *Historical Approach to the Doctrine of Sovereign Immunity,* 13 LA. L. REV. 476 (1953).

7. Elmore v. Drainage Comm'rs, 135 Ill. 269, 25 N.E. 1010 (1890).

8. Moore v. Mogle, 405 Ill. 555, 92 N.E.2d 81 (1950).

9. Thomas v. Broadlands Community Consolidated School Dist., No. 201, 348 Ill. App. 567, 109 N.E.2d 636 (1965).

10. *Id.,* 109 N.E.2d at 641.

corporation, was a part of the State of Illinois exercising a governmental function. The court said that the only justifiable reason for immunity of school districts from suit for tort is that it is public policy to protect public funds and public property and to prevent diversion of school funds to the payment of damage claims.[11] The effect of its decision was not to abrogate immunity but to allow school districts to waive as little or as much of the immunity as they wished by the purchase of insurance. Subsequently Illinois legislation authorized the purchase of some insurances by school districts on a voluntary basis.[12] A school district could however, go without insurance and rely on the protection of the immunity wall.

But, in 1959, the protective wall of immunity in Illinois was reduced to rubble in the case of *Molitor v Kaneland Community Unit School District*[13] which arose out of a school bus accident. In its opinion, the court analyzed the theories supporting the immunity doctrine. It noted that the principles of *Men of Devon* had not been applied to Illinois school districts until 1898,[14] eight years after English courts had refused to extend them to their school districts. It construed several acts of the General Assembly of Illinois as legislative dissatisfaction with the doctrines of sovereign immunity—the Workmen's Compensation and Occupational Disease Act;[15] the Court of Claims Act,[16] under which the state itself is liable; the act imposing liability on cities and villages in certain circumstances,[17] and especially the legislatively authorized insurance covering liability arising out of school bus accidents which created a most pertinent anomaly After concluding that school district immunity cannot be based on the sovereign immunity theory or governmental theory, it turned to the protection of public funds theory

In finding that the protection of public funds theory seems to follow the line "that it is better for the individual to suffer than for the public to be inconvenienced,"[18] the court concluded that in this day and age public education constitutes one of the biggest businesses in the country and is as capable of satisfying judgments based on the tortious conduct of its agents or servants as any private business must do. Further, it appeared that the cost of tort liability was a part of the cost of educational activities and could and should be included and spread over the district in the same way as other educational expenses. When public funds may

11. *Id.*, 109 N.E.2d at 640.
12. ILL. ANN. STAT. ch. 129, 29-11a (Smith Hurd 1957).
13. 18 Ill.2d 11, 163 N.E.2d 89 (1959).
14. Kinnare v. City of Chicago, 171 Ill. 332, 49 N.E. 536 (1898).
15. ILL. REV. STAT. ch. 48, 138.1, 172.36 (1957).
16. ILL. REV. STAT. ch. 37, 439.1-439.24 (1957).
17. ILL. REV. STAT. ch. 24, 1-13, 1-16 (1957).
18. Moliter v. Kaneland Community Unit Dist. 302, 18 Ill.2d 11, 163 N.E.2d 89 (1959).

properly be expended to procure liability insurance as authorized by statute, there is no reason to deny the propriety of spending the funds to pay the liability itself in the absence of insurance.

To the school district's argument that abolition of the immunity doctrine should be a function of the legislature and not the courts, the court remarked that the doctrine had been established by the courts and it was quite proper that it be abolished by the courts without legislative help. When it was argued that a non-immunity rule should be applied prospectively only, the court noted that such a holding would deprive the plaintiff of the case before the court of any benefit from his effort and expense in challenging an erroneous rule. It was recognized that completely retrospective application of the non-immunity rule would place a hardship on school districts who had relied on the doctrine of immunity Consequently, the court limited its holding to those actions arising out of the bus accident and subsequent cases. Nevertheless, the school district had judgments totalling $850,000 rendered against it.[19] It was the judicial shot heard 'round the world of education.' School districts feared that in their own states the wall might come a-tumbling down. But what has happened since *Molitor v Kaneland*?

In Illinois, the State General Assembly has set a statutory limitation of $10,000 for each cause of action based in tort against a school district and established a system of filing such a claim.[20]

The Supreme Court of Wisconsin followed Illinois' lead. In the case of *Holytz v City of Milwaukee*,[21] an action for personal injury suffered by an infant on a city playground, the court said:

> (W)e are now prepared to disavow those rulings of this court which have created and preserved the doctrine of governmental immunity from tort claims. . Upon careful consideration we are of the opinion that it is appropriate to abolish this immunity notwithstanding the legislature's failure to adopt corrective enactments. The case at bar relates specifically to a city; however we consider that abrogation applies (prospectively) to all public bodies within the state: . . . school districts . . and other subdivisions whether incorporated or not.[22]

Haney v City of Lexington,[23] a 1964 Kentucky case involved a municipal corporation. The court's holding in the case, which abolished immunity from liability for the torts of muncipal corpor-

19. Molitor v. Kaneland Community Unit Dist. 302, 24 Ill.2d 467, 182 N.E.2d 145 (1962) See also Nolte, *Extraordinary Care Lessens Vulnerability*, AM. SCHOOL BD. J. 40 (June 1964).
20. ILL. ANN. STAT. ch. 122, 821-31 (Smith Hurd 1961).
21. 17 Wis.2d 26, 115 N.W.2d 618 (1962).
22. *Id.* 115 N.W.2d at 625.
23. 386 S.W.2d 738 (Ky. 1964).

ations and their agents, was specifically limited to municipal corporations. The Kentucky court cited the *Holytz* case of Wisconsin with approval but, unlike the Wisconsin court, did not extend the holding to school districts. In one reported case dealing with school district immunity since *Haney*, the Kentucky Supreme Court affirmed a directed verdict for the school district because the plaintiff failed to present sufficient evidence of negligence,[24] but the court said nothing concerning the doctrine of immunity The clear implication is that the Kentucky court intends to wait to determine the immunity question as applied to school districts when it is squarely faced with such a case. The Kentucky court may then abolish the rule concerning school districts, as happened in Illinois,[25] or it may refuse to remove immunity, as happened in Florida,[26] where the Florida court simply said that a school district is "an arm or agency of the state" and inside the wall of sovereign immunity enjoyed by the state.

In 1962, the Supreme Court of Minnesota removed the immunity wall as it protected municipal corporations, school districts and other sub-divisions of government as to claims arising out of in jury "sustained after the next regular session of the Minnesota Legislature."[27] Subsequently, the Legislature reinstated the doctrine as it applied to school districts, but the statute provides for its own expiration in 1968.[28]

In *Stone v Highway Comm'n*,[29] a case involving the claim for wrongful death brought against the Arizona State Highway Commission, the high court of Arizona declared that the reason for the immunity rule no longer existed. Immunity was abolished not only for the case before the court but for all such cases pending or not yet filed, which were not barred by the statute of limitations, including cases against the state under the theory of *respondeat superior* School districts were not specifically referred to in the Arizona court's opinion, but it is reasonable to conclude that school districts in Arizona are no longer protected.

In two states, Iowa and Colorado, the wall of immunity stands by only the slim majority of four-to-three decisions.[30] The immunity doctrine is criticized but then applied by the majority of the court because it feels that if change is to come, it must come from the legislature. A single change of mind or change of court personnel might earlier cause the wall to fall. As a result, school

24. Bailey v. Gallitan County Bd., 383 S.W.2d 363 (Ky. 1964).
25. Moliter v. Kaneland Community Unit Dist. 302, *supra* note 18.
26. Buck v. McLean, 115 So.2d 764 (Fla. 1959).
27. Spanel v. Mounds View School Dist., 118 N.W.2d 795 (Minn. 1962).
28. MINN. STAT. ANN. 466.02-466.10, 466.12 (Supp. 1965).
29. 93 Ariz. 384, 381 P.2d 107 (1964).
30. Boyer v. Iowa High School Athletic Ass'n, 138 N.W.2d 914 (Iowa 1965) Testone v. School Dist. R.E. 2, 152 Colo. 596, 384 P.2d 82 (1963).

districts in these states, as in other states, are purchasing insurance protection. What, however, is the effect of such insurance protection?

Where the legislature has authorized the procurement of insurance, but has not expressly provided for waiver of immunity, the courts have little difficulty in finding a waiver by implication to the extent of the liability covered by insurance.[31] Where the school district has purchased insurance without statutory authority, courts have inconsistently acted when faced with the question of immunity waiver. The Supreme Court of Tennessee held that purchase of insurance did constitute an immunity waiver [32] The Illinois court in the *Broadlands* case also considered the unauthorized purchase of liability insurance an immunity waiver and later, in *Molitor*, considered this a factor leading to the destruction of the wall of immunity But a Federal District Court in Alaska, in discussing immunity, stated that purchase of insurance would not constitute a waiver of immunity although the existence of insurance was not pleaded in the case.[33] Michigan has refused to consider the purchase of insurance as an immunity waiver [34] Similarly, the Pennsylvania court held that the purchase of liability insurance by a school district did not constitute a waiver of immunity [35] When it was argued that to deny valid waiver when insurance exists is against public policy because the denial would deprive the school district of the value of its purchase, the court answered that the insurance would protect the school district from the liability of claims arising out of *proprietary* functions for which no immunity exists.

One deterrent to the apparently unauthorized purchase of insurance protection is the possible court action that might be brought against individual school board members for the cost of such insurance. The argument of the Pennsylvania court—that the school district still needs insurance to protect against liability for claims arising out of proprietary functions—if not for claims arising out of governmental functions—would seem to raise a very valid defense against such court actions.

There is also the possibility that a school district might be subject to an action for damages, as well as a suit for injunctive relief, where it maintains a nuisance. William Prosser, after drawing from many sources,[36] concluded that "(a nuisance) has meant

31. *E.g.*, Vendrell v. School Dist. No. 26 C, 226 Ore. 263, 360 P.2d 282 (1960).
32. Rogers v. Butler, 170 Tenn. 125, 92 S.W.2d 414 (1935).
33. Tapscott v. Page, 17 Alaska 507 (D. 1958).
34. Sayer v. School Dist. No. 1, Fractional, 366 Mich. 217, 114 N.W.2d 191 (1962).
35. Supler v. School Dist., 407 Pa. 657, 182 A.2d 535 (1962).
36. BISHOP, NON-CONTRACT LAW 411 n.1 (1889). Smith, *Torts Without Particular Names*, 69 U. PA. L. REV. 91 (1921) Commonwealth v. Cassidy, 6 Phil. Pa. 82 (1865) Carroll v. New York Pie Baking Co., 215 App. Div. 240, 213 N.Y.S. 553 (1926).

all things to all men, and has been applied indiscriminately, to everything from an alarming advertisement to a cockroach baked in a pie."[37] Generally, a nuisance has been said to arise out of conduct that substantially interferes with the use and enjoyment of the land of another, but this is not a necessary limitation. The Kansas Supreme Court, which recognizes the immunity doctrine, allowed recovery against a municipality for the wrongful death of an infant who had walked upon the accumulated crust of an abandoned city dump, fell through, and drowned.[38] The court said that government ownership does not establish a right to maintain a nuisance. Michigan has denied recovery in an action, based on nuisance, to recover damages for wrongful death arising out of a playground accident.[39] That court reasoned that the harm complained of was not an interference with the use of land—therefore the plaintiff could not recover Virginia has said that even though personal injury results from a nuisance maintained by the school district, recovery is denied on the ground that the school district is an "arm or agency" of the state and is immune from liability in the performance of a governmental function.[40] Ohio and Tennessee,[41] states which have held fast to the doctrine of immunity, have simply enjoined the maintenance of nuisances by school districts because of the unreasonable interference with the use of the land.

Just as the concept of nuisance may be used to cause a chink in the immunity wall, so may the concept of trespass. Trespass, as the name implies, operates to afford relief when the governmental entity, in the performance of a lawful function, trespasses on the land or person of another causing damage or injury Michigan has granted relief in a slip and fall case resulting from the wrongful construction of a school building in such a manner that water flowed across the public sidewalk and caused a dangerous icy condition.[42] The Michigan court said this was a cause of action to which the defense of governmental immunity may not be interposed. The court held that this case fell within the doctrine of an earlier case in which it was said that "where the injury is the result of a direct act or trespass of the municipality, it is liable, no matter whether acting in a public or private capacity "[43]

Plaintiff's attorneys can be expected to try their cases, at least

37. PROSSER, TORTS 87 (3d ed. 1964).
38. Lehmkulk v. City of Junction City, 179 Kan. 389, 295 P.2d 621 (1956).
39. Williams v. Primary School Dist. No. 3, 3 Mich. App. 468, 142 N.W.2d 894 (1966).
40. Kellams v. School Bd., 220 Va. 252, 117 S.E.2d 96 (1960).
41. Wyman v. Board of Educ., 6 Ohio App.2d 94, 216 N.E.2d 637 (1964), Jones v. Knox County, 327 S.W.2d 473 (Tenn. 1959).
42. Pound v. School Dist., 372 Mich. 499, 127 N.W.2d 390 (1964).
43. Ferris v. Board of Educ., 122 Mich. 315, 81 N.W 98 (1899).

in part, on nuisance or trespass whenever the facts permit because these appear as areas of weakness in the immunity wall.

Plaintiff's attorneys can be expected to focus attention on the anomalies created by state legislatures who promulgate "half way" laws which expose school districts to liability in some instances, which destroy the immunity wall on one side only, or leave the decision to destroy a part of the wall to the school district itself.

Immunity no longer extends to school districts in many states for liability arising out of bus accidents. Some state statutes require the school district or state agency to procure liability insurance before operating a school bus. Other state legislatures have simply authorized the purchase of insurance. Mississippi has waived immunity from tort for actions arising out of the operation of school buses up to $5,000 per person and $50,000 per accident,[44] but unlike other states, Mississippi does not authorize the purchase of insurance. Each school district in Mississippi is required to contribute $10 per year for each bus it operates to the state Accident Contingent Fund. If the fund should prove insufficient to satisfy a judgment, tax funds will be used to cover the shortage.

A few states have recognized the responsibility of school districts for the liability of its agents or servants through the establishment of "save-harmless" laws. New York,[45] New Jersey,[46] Connecticut,[47] and Massachusetts[48] have such statutes. In Wyoming,[49] and Oregon[50] the school district may assume the liability of agents and servants arising out of the negligent performance of duties within the scope and authority of their employment.

The "save-harmless" laws, whether mandatory or discretionary, are of tremendous importance to school district employees who have never enjoyed the protective wall of immunity As teachers become more active in their demands made collectively through their organizations, it is likely that more states will enact "save-harmless laws." But the point to be stressed here is the legislative recognition that the school district should respond in damages for the torts of its servants under the same doctrine of *respondeat superior* that applies to private employers outside the wall of immunity Such limited liability affords additional protection to the injured person where there is negligent conduct or negligent supervision but it leaves the innocent injured person without relief where the injury occurs because of inadequate supervision. A very large percentage of the tort cases involving school districts as

44. MISS. CODE ANN. 3.996(101) to -.996.(115) (supp. 1965).
45. N.Y. EDUC. LAW 2023, 2560.
46. N.J. REV. STAT. 18:5-50.4 (Supp. 1964).
47. CONN. GEN. STAT. ANN. 10-235 (Supp. 1965).
48. MASS. GEN. LAWS ANN. ch. 41, 100 C (Supp. 1964).
49. WYO. STAT. ANN. 21- 158 (1957).
50. ORE. REV. STAT. 243.610 (1965).

reported from those jurisdictions[51] where immunity has been removed by legislative act, are founded on inadequate supervision—the failure to assign sufficient personnel to provide the necessary supervisory duties.

Courts continue to narrowly construe "save-harmless" statutes on the ground that they are in derogation of the common law [52] Similarly, "safe place" statutes, requiring the safe construction and maintenance of buildings, are narrowly construed to prohibit recovery in suits against school districts.[53]

In analyzing the status of the law of school district immunity since *Molitor v Kaneland*, one cannot help but question the logic of a body of law that permits a child to recover for a broken arm suffered in a school bus accident but denies recovery when an innocent student suffers loss of speech, permanent brain damage and paralysis on the school grounds.[54]

No American court has recently given whole-hearted support to the doctrine of immunity Many courts condemn the doctrine or the reasoning supporting it, but almost all courts are still willing to dismiss the problem with the suggestion that its resolution lies solely with the legislature. One may discern a persistent effort to negate the immunity doctrine; yet it is a nibbling process. State legislatures move in a halting and hesitating manner away from the immunity concept by authorizing school districts to purchase some indemnity or liability insurance. But there is no frontal assault that will bring about full scale destruction of the immunity walls. Consequently school districts go about their business, behind their protective walls, secure in the realization that unless social, economic or political pressures produce a gunpowder more destructive than that produced thus far by legal logic there is little to fear.

51. New York, California, Washington, Hawaii, Nevada and Utah have to some extent abrogated the immunity doctrine: N.Y. EDUC. 3813 N.Y. GEN. MUNIC. 50e,h,i,3a, CAL. GOV'T CODE 815-996.6 WASH. REV. CODE 28.58.030 (1961), HAWAII REV. LAW 37-1 & 2, 38-4 to 9.5, 245A (Supp. 1961), NEV. REV. STAT. 41.031 to .038 (Supp. 1965), and UTAH CODE ANN. 63-30-1 to 34 (Supp. 1965).

52. See Boucher v. Fuhlbruck, 213 A.2d 455 (Conn. Super. Ct. 1965).

53. See Niedfelt v. Joint School Dist. No. 1, 23 Wis.2d 641, 127 N.W.2d 800 (1964).

54. Koehn v. Board of Educ., 193 Kan. 263, 392 P.2d 949 (1964).