TRENDS REFLECTED IN THE INVESTIGATION OF BODILY INJURY LIABILITY OF PUBLIC SCHOOL DISTRICTS IN SELECTED STATE SCHOOL SYSTEMS

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CHAPTER I

DESCRIPTION OF THE STUDY

School districts have generally been held free from legal liability for acts committed in the performance of their proper duties to maintain school. The liability of school districts for acts of tort in the operation of schools raises questions of a legal nature that have been the occasion of much activity in the courts of our land.

Political and educational beliefs in America require that public schools are to be supported for the welfare of the individual and are a creation of the state governments. It does not appear to be in keeping with this democratic principle that the state exists for the welfare of the individual citizen when attendance laws may force the pupil into the school at a tender age, require him to be placed in a position of circumstance in which he may be injured, and then allow the state to be able to escape liability for injuries that he may suffer as a result.

In some states, immunity of school districts for tort liability has been abolished or a limited responsibility has been imposed upon school districts by court decisions or by state statute.

STATEMENT OF THE PROBLEM

It is the purpose of this study to determine the extent to which the body of law of selected states--court decisions, statutory enactments including constitutional provisions, and attorney general opinions--has moved away from the position of legal immunity of school districts for tort liability in relation to bodily injury, and to determine what implications these changing patterns have for Kansas public school districts.

NEED FOR THE STUDY

The doctrine of non-liability of school districts for bodily injury is in the process of change. A recent decision in the courts of one state abrogated the doctrine for its school districts.[1] Other states have followed the lead of this state in modifying school district liability.

Officials and administrators need to be aware of the possibilities that they face as changes of this nature occur. This study will be helpful to them in understanding the rights and responsibilities of their school districts in an evolving legal process.

Specific attention has been given to what has been done for the protection of the rights of the individual--pupil, employee, or the citizen at large--in relation to school district liability for bodily injury in other states; the

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

study gives special consideration for the relevance of these actions to Kansas. It suggests implications for Kansas educators and school officials in their efforts to educate their charges while at the same time providing a high level of protection for their pupils, patrons, and employees.

Objectives for the study include:

1. Trends in the status of bodily injury tort liability of school districts of the selected states are to be determined.

2. Information is to be secured that will help educators and school officials become aware of the trend toward assumption of liability by school districts for their acts in tort so they may be in a better position to respond to the needs of their school districts as they make decisions affecting their institutions.

3. Pertinent implications are to be derived from the study from which recommendations may be made to school officials and administrators.

SCOPE OF THE STUDY

The scope of the study includes these limitations:

1. Data on tort liability of school districts is limited to those relating to bodily injury. Other torts are included where necessary for clarification.

2. States included are Kansas, Oklahoma, and Illinois.

3. Data for Kansas covered the period of statehood and include an investigation of the Constitution, Statutes, Court decisions, and opinions of the Attorney Generals.

4. Court decisions were limited to those resulting from action before the supreme courts of the selected states.

5. Court decisions of the selected states were investigated from the period of statehood to the present.

6. Data from statutory enactments and attorney general opinions of the selected states other than Kansas were limited to currently effective statutes and opinions.

PROCEDURES OF THE STUDY

The procedure used is that part of the general method of historical research using the techniques of legal research.

In the investigation of court cases, the American Digest System was used to locate pertinent cases, the National Reporter System was used to read the cases, and Shepherd's Citations to Cases for each of the respective states was used to determine the current status of case material.

Annotated Statutes of the states were investigated as required by the scope of the study.

Attorney general opinions were secured by letter request from the offices of the attorney generals and from published reports.

Chapter I describes the study that was undertaken. Chapter II contains the background information for the study. Chapter III reviews the literature available for the study. Chapter IV develops the status of tort liability for Kansas. Chapters V and VI present data from the states of Oklahoma and Illinois. The last chapter summarizes the study and discusses the implications of the findings for school administration.

CHAPTER II

BACKGROUND FOR THE STUDY

> I dissent from the decision of the court which, in one fell swoop, severs from the body of our Illinois law the ancient and established doctrine of governmental immunity from tort liability. The rule of immunity of the people collectively charged with a governmental function was well established by...(Russell v. Men of Devon, 2 Term Rep. 671, 100 Eng. Rep. 359)...[1]

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A tort literally means "wrong." It is a word that is derived from the Latin word tortos meaning twisted. The French changed tortos to tort which they used with the correct supplementary words to mean "I have wrong." England adopted the French word tort for their usage in court rather than the more easily understood "wrong."[2] When a suit in tort is mentioned, the general meaning is any suit seeking damages for injuries to persons or property caused by the wrongful act of another but exclusive of those wrongs involving contracts.

Stated in another way, any injury to one's person, property or reputation occurring through the negligence or

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[1]Molitor v. Kaneland Community Unit District No. 302, 163 N.E. (2d) 89, 98 (Illinois, 1959).

[2]William L. Prosser, Law of Torts (St. Paul, 1955), p. 2.

willful misconduct of another, except for contractual obligations is a tort and may give rise to legal action for damages.

One law dictionary defines a tort as:

> An act or omission, not a breach of contract and not involving a quasi-contract, which causes injury and which at common law or by statute creates a claim for damages in the injured person...[3]

Still another source calls it a "legal wrong committed upon the person, reputation or property of another, independent of contract."[4]

Cooley gives these ways by which one becomes liable for torts:

1. by actually doing to the prejudice of another something he ought not to do.
2. by doing something he may rightfully do but wrongfully or negligently doing it by such means or at such time or in such manner that another is injured.
3. by neglecting to do something which he ought to do, whereby another suffers injury.[5]

In speaking of liability for torts, Shapiro states that the "rule of law follows negligence."

> Negligent conduct may involve action or a lack of action, with foreseeability as the test to determine proper or negligent conduct. In situations where a reasonably prudent person could have foreseen or anticipated the consequences of his action or lack of action, an individual who

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[3]Max Radin, Radin Law Dictionary (New York, 1955), p. 347.

[4]Arthur A. Rezny and Madaline K. Remmlein, A Schoolman in the Law Library (Danville, 1962), p. 59.

[5]Thomas M. Cooley, Law of Torts (4th Ed., Chicago, 1932), p. 85.

> disregards the foreseeable consequences may be liable if his conduct results in injury to another.[6]

Reutter points out that responsibility for injuries from a school connected activity is not easily placed but is exceedingly complex since the rules for this type of injury are judicially oriented rather than based on statutes.

> To only a very small extent are guidelines regarding negligence to be found in codified form in the sense that one finds substantial direction in regard to curricular, financial, and personnel matters in state statutes, state board of education regulations, and local board policies. The guidelines come from the hundreds of cases decided by courts involving school accidents and the thousands involving other types of accidents--from the so-called common law of the Anglo-Saxon legal system.[7]

If the tort is committed by a governmental agency the injured party may sue but more often than not will be unsuccessful in collecting damages from the governmental agency for whom the wrong-doer works. As a general rule if an injury is caused by a governmental officer, employee or agent in the performance of a governmental function, the injured person has no right of action for damages against the government or agency unless there is a statute granting the right of suit.

Governmental non-liability for torts is generally referred to as sovereign immunity or governmental immunity.

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[6]Frieda S. Shapiro, "Your Liability for Student Accidents," NEA Journal, March, 1965, p. 46.

[7]E. Edmond Reutter, "Liability of Educational Personnel for Pupil Injuries," Baltimore Bulletin of Education, Spring, 1961, p. 23. (Taken from a mimeographed copy).

The doctrine had its beginning in an English court almost two centuries ago and has continued through common law by means of stare decisis.

Common law is that set of rules found in the records of decisions made by judges. It is law made by judges, rather than by legislative bodies. Early in England's history, judges had to decide legal cases according to what they felt most persons would think was right. They followed the customs of the community and the common beliefs of the people in making their decisions. This is the common law, sometimes referred to as unwritten law, and it is to be found in the reports of decided cases.

As stated by one author:

> In a codified system of law, a judge may interpret the language of the written law as he wishes, regardless of the precedent. This is not true of the English system, which is governed by the rule of stare decisis, or to stand by decided cases. Once a point of law has been decided by the highest court of appeal, it is fixed law and can be changed only by legislation. But the common law has been able to grow without constant interference by legislation because judges have been able in various ways to circumvent disagreeable or obstructive precedent. The courts have been inclined to reasonable flexibility in determining what current public policy may be.[8]

ORIGIN OF DOCTRINE OF GOVERNMENTAL IMMUNITY

The doctrine that immunized the state from tort liability is of greater antiquity than the actual judicial decision that permitted it to become established in English common law. It is founded upon a premise contained in the ancient idea of

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[8]Rene A. Wormser, The Law, (New York, 1949), p. 260.

divine right whereby a king could do no wrong. Divine right is the belief that kings were chosen by God and that their succession to the throne was the desire of deity. Thus their power to rule was a God-granted right and therefore they were not subject to suits in court at the instigation of the common people of the land.

The idea of non-liability of school districts for torts can trace its origin directly to two cases: Russell v. The Men Dwelling in the County of Devon (1788) and Mower v. The Inhabitants of Leicester (1812).[9] Case briefs of these actions follow.

Russell v. Men of Devon was an action based on these facts. Russell sued all the male inhabitants of the County of Devon for damages occurring to his wagon by reason of a bridge being out of repair. It was an undisputed fact that the county had the duty to maintain such structures. Two inhabitants of the county appeared before the court and demurred for themselves and for the rest of the county generally.

Question: Were the men of the county liable for injury to the property of an individual?

Decision: The men of the county were not liable.

Reasons: (1) a decision for the plaintiff would lead to a multiplicity of actions against the state, (2) no precedent existed for the action, (3) even if the defendants were found guilty, there was no fund from which to pay the

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[9]Lee O. Garber, 1964 Yearbook of School Law (Danville, 1964), p. 235-243.

damages, (4) it is better that an individual sustain an injury than for the public to suffer an inconvenience, and (5) only the government should impose this as a liability.

The setting for the Russell v. Men of Devon case was England. How did the idea of nonliability become a part of the judicial thinking in the United States? First of all, of course, the basic English court system was brought to America as a natural part of settlement of the country. The direct cause, however, was the case of Mower v. The Inhabitants of Leicester.[10]

A case brief of the action shows these facts: Mower owned a stage coach with a route through the town of Leicester. The town had the duty of maintaining the road in that area. The road became defective and one day on a trip through the town, one of the horses pulling the coach stepped into a hole, fell, and the stage coach ran over him with the result that the horse died later. Plaintiff sued for $120.

Question: Were the inhabitants of the town liable for injury to the property of an individual?

Decision: The inhabitants of the town were not liable.

Reason:

> But quasi-corporations, created by the legislature for purposes of publick policy, are subject by the common law, to an indictment, enjoined on them: but they are not liable to an action for such neglect unless the action be given by some statute.[11]

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[10]Lee O. Garber, 1964 Yearbook of School Law, p. 241.

[11]Mower v. The Inhabitants of Leicester, 9 Mass. 247, 250, (Massachussetts, 1812).

THE FEDERAL BACKGROUND

An early problem before the Supreme Court of the United States was an action brought in federal jurisdiction against a state by an individual of another state. The state refused to appear on the merits and claimed no liability to such an action because it was a sovereign state.[12] Chief Justice Jay rendered the opinion and clearly held that the state was subject to suit. The opinion states that the purpose of our scheme of government was to eliminate the immunity found in the English system. The Chisholm v. Georgia case no doubt led to the acceptance of the eleventh amendment to the United States Constitution. It states:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any Foreign State.[13]

One author comments that:

> Federal constitutional history supplied (an)...example of judicial overrule by constitutional amendment...the eleventh amendment overruled Chisholm v. Georgia, to make plain that a state could not be sued without its consent by a private party in the federal courts.[14]

In Kawananakoa v. Polyblank, the Supreme Court, with Mr. Justice Holmes writing the opinion, announced that a

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[12]Chisholm v. Georgia, 1 L.Ed. 440 (1793).

[13]Constitution of the United States, Eleventh Amendment, passed 1794, ratified 1798.

[14]James W. Hurst, The Growth of American Law (Boston, 1950), p. 245.

state, being the authority that made the law, could not be charged with tort liability:

> A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.[15]

In 1946, the United States Congress passed the Federal Tort Claims Act which provided for a general waiver of immunity by the federal government from tort actions arising out of negligence or wrongful acts or omissions of federal employees.[16] Although the authors of this act restricted liability to those where the plaintiff can show a "negligent or wrongful act or omission of any employee...acting within the scope of his employment"[17] and that the act was not the "abuse of a discretionary function,"[18] such limitations do not appear in other federal statutes covering special areas of torts. This includes the Military Claims Act,[19] Foreign Claims Act,[20] Coast Guard Act,[21] and the Naval Vessels Act.[22]

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[15]Kawananakoa v. Polyblank, 205 U.S. 349 (1907).

[16]This paragraph adapted from "Governmental Responsibility--A Need for Statutory Reform," Kansas Bar Association Journal, November, 1956, p. 183.

[17]28 USC, Section 1346 (B) (1952).

[18]28 USC, Section 2680 (A) (1952).

[19]57 Stat. 372 (1943).

[20]55 Stat. 880 (1942).

[21]34 USC, Sections 645-647 (1952).

[22]34 USC 600 (1952).

In the case of Indian Towing v. U. S., Mr. Justice Frankfurter added an important interpretation to these statutes:

> ...the theory whereby municipalities are made subject to liability for torts committed in the performance of non-governmental functions is an endeavor, however awkward and contradictory, to escape from the basic historical doctrine of sovereign immunity, and the Federal Tort Claims Act cuts the ground from under the sovereign immunity doctrine, and it is not self-defeating by covertly embedding the casuistries of municipal liability...within it...[23]

The important point to consider about these federal statutes is that some of them have been in existence for many years. There has apparently been no inclination by Congress to lessen the relief offered but on the contrary to broaden the coverage.

CRITICISMS OF THE DOCTRINE

Many legal authorities and court jurisdictions have criticized the doctrine of governmental immunity. Examples are:

> The whole doctrine rests upon a rotten foundation. It is almost incredible that in this modern age of comparative sociological enlightenment and in a republic, the medieval absolutism supposed to be implicit in the maxim 'the King can do no wrong' should exempt the various branches of government from liability and 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 community, constituting the government, where it could

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[23] Indian Towing v. U. S., 350 U. S. 61, 1 L.Ed. (2d) 1660, sec. 9 (1955).

be borne without hardship upon the individual and where it justly belongs.[24]

One court called the doctrine an "historical anachronism."[25] The Minnesota jurisdiction commented:

> Our consideration of the origins of tort immunity persuade us that its genesis was accidental and characterized by expediency, and that its continuation has stemmed from inertia...[26]

In a Michigan case, the court stated:

> All distinguished writers recommend corrective legislation...So do I. But what is an appelate court to do when the legislative process remains comatose, year after year and decade after decade, the court meanwhile bearing the onus of what was done judicially during the dim yesterdays and maintained to this day by the self-stultifying fetish of stare decisis?[27]

In the Wisconsin court:

> This court and the highest courts of numerous other states have been unusually articulate in castigating the existing rule...[28]

From the Arizona court:

> We are convinced that a court-made rule, when unjust or outmoded, does not necessarily become with age invulnerable to judicial attack...[29]

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[24] American Law Reports, Annotated (Second Edition, Vol. 75 (Rochester, 1961), p. 1196.

[25] McGraw v. Rural High School, 120 Kan. 413, 414 (1926).

[26] Spaniels v. Mounds View School District, 118 N.W. (2d) 795, 802 (Minnesota, 1962).

[27] Williams v. Detroit, 111 N.W. (2d) 16, 17 (Michigan, 1961).

[28] Holytz v. Milwaukee, 115 N.W. (2d) 618, 621 (Wisconsin, 1962).

[29] Stone v. State Highway Commission, 381 P. (2d) 107, 113 (Arizona, 1963).

In the state of California:

> The rule of governmental immunity for tort is an anachronism, without rational basis, and has existed only by the force of inertia.[30]

From a Florida decision:

> In preserving the theory, they seem to have overlooked the wrongs that produced our Declaration of Independence...and Revolutionary War.[31]

The Colorado jurisdiction stated:

> ...Sovereign immunity may be a proper subject for discussion by students of mythology but finds no haven or refuge in this court.[32]

These quotes indicate general dissatisfaction with the doctrine of governmental immunity.

JUDICIAL REASONING

Sovereignty of the state is the chief reason used by courts to uphold immunity. An example is:

> The exemption of the government from liability is based on the theory of sovereignty. The acts of the government were those of the King. In our state instead of the king being the sovereign, the powers of government reside in all the citizens of the state...[33]

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[30] Muskopf v. Corning Hospital District, 359 P. (2d) 457, 460 (California, 1963).

[31] Hargrove v. Cocoa Beach, 96 So. (2d) 130, 132 (Florida, 1957).

[32] Colorado Racing Commission v. Brush Racing Association, 316 P. (2d) 582, 585 (Colorado, 1957).

[33] Krutili v. Board, 129 S.E. 486, 487 (West Virginia, 1925).

However, in discussing the Russell v. Men of Devon case, the Minnesota court pointed out that:

> There is no mention of the 'King can do no wrong,' but on the contrary it is suggested that the plaintiff sue the county itself rather than the individual inhabitants...[34]

Adherence to stare decisis is given as one reason to continue governmental non-liability. The Florida court, however, believed that "judicial consistency loses its virtue when it is degraded by the vice of injustice."[35]

While the immunity of states and state agencies from tort liability is said to be based on the concept of sovereignty and precedent, many courts have assigned other grounds to support the doctrine. Some authorities hold that the doctrine of the relation of master and servant does not exist for governments and that the rule that the master is liable for the acts of servants or agents while acting within the scope of authority is not applicable.

A New Jersey case that overruled many earlier decisions held a city liable for respondeat superior. Part of the decision stated:

> The borough argues that any such change should come about, if at all, by action of the legislature. But the limitation on the normal operation of respondeat superior was originally placed there by the Judiciary. Surely it cannot be argued successfully that an outmoded, inequitable, and artificial curtailment of a general rule of action created by the

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[34] Spaniels v. Mounds View School District, 118 N.W. (2d) 795, 797 (Minnesota, 1962).

[35] Hargrove v. Cocoa Beach, 96 So. (2d) 130, 133 (Florida, 1957).

judicial branch of the government cannot or should not be removed by its creator.[36]

Another court believed that:

> By reason of the rule of _respondeat superior_ a public body shall be liable for damages for the torts of its officers, agents and employees occurring in the course of the business of such public body.[37]

Other courts point out that no liability attaches since the law provides no funds for payments of such claims against them. For example, it is argued that funds raised for school purposes may not legally be diverted to the payment of tort claims against the school district, the assumption being that payment of such claims is not an expenditure for school purposes.

The reply of one court to this argument is that:

> It is absurd to say that school districts cannot today expeditiously plan for and dispose of tort claims based on the doctrine of _respondeat superior_.[38]

Some jurisdictions have expressed the idea that, if a change in the doctrine of governmental immunity is needed, it is up to the legislature to change it. The Supreme Court of Pennsylvania stated:

> If it is to be the policy of the law that the Commonwealth of any of its instrumentalities or any political subdivisions are to be subject to liability for the torts committed by their

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[36] _Hargrove v. Cocoa Beach_, 96 So. (2d) 130, 133 (Florida, 1957).

[37] _Holytz v. Milwaukee_, 115 N.W. (2d) 618, 625 (Wisconsin, 1962).

[38] _Spaniel v. Mounds View School District_, 118 N.W. (2d) 795, 802 (Minnesota, 1962).

> officers or employees while engaged in governmental functions, the change should be made by the legislature and not by the courts.[39]

The answer by the Nevada court was:

> It is contended that it is for the legislature and not the courts to remove immunity. We so stated...Here, where only a county's liability is involved, we do not hesitate to say that since its immunity was court made, this court as well as the legislature is empowered to reject it.[40]

and, in Haney v. City of Lexington, the court commented:

> It seems to us that an equally reasonable assumption is that the legislature might expect the courts themselves to correct an unjust rule which was judicially created...[41]

Courts have stated that there is no liability because the law does not provide a means for raising funds to pay judgments against school districts. Special courts have been created to settle these judgments in some states.[42] Purchase of comprehensive insurance policies have been permitted by statute in other states. One court decision stated:

> Liability insurance, to the extent that it protects public funds, removes the reason for, and thus the immunity to, suit.[43]

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[39] Supler v. School District, 182 A. (2d) 535, 537 (Pennsylvania, 1962).

[40] Rice v. Clark County, 382 P. (2d) 605, 608 (Nevada, 1963).

[41] Haney v. City of Lexington, Court transcript from the Attorney General's office, dated July 6, 1964, p. 7.

[42] Claims courts as used in New York and Alabama.

[43] Thomas v. Broadlands Community Consolidated School District No. 201, 109 N.E. (2d) 636, 640 (Illinois, 1952).

Mort and Hamilton believe that the mere fact that a judgment may not be satisfied is not a realistic basis for nonliability. The courts taking this view have apparently considered it useless to render judgments against school districts since they cannot be paid. This could be said of any judgment, but no case can be found where the inability to pay on the part of the defendant has been given as grounds upon which a judgment was rendered in his favor.[44]

GOVERNMENTAL--NONGOVERNMENTAL FUNCTIONS

Some court jurisdictions have indicated a belief that there are degrees of liability for governments. These courts have held that certain areas of operations of governments are of such a nature that a state or a subdivision thereof may be held liable for the torts of officers or employees whereas others may not. The distinction is drawn between governmental and nongovernmental or proprietary functions. The general rule followed in these jurisdictions is that no liability exists for the exercise of governmental functions but tort resulting from the exercise of proprietary functions call for liability in the same manner as an individual or a private corporation. One court stated:

> The line of distinction between what is governmental, and what is proprietary, is sometimes difficult to draw...But we start with this premise: Any activity of the sovereign authority, or one to whom its powers are

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[44]Robert R. Hamilton and Paul R. Mort. The Law and Public Education (2nd Ed., New York, 1959), p. 280.

> delegated, is presumed to be governmental; and it follows, we think, that if there be uncertainty as to the classification into which the particular activity falls, the doubt should be resolved in favor of its being governmental rather than proprietary, for the reason that the usual function of government is to act in the interest of the public as a whole...[45]

The courts again rely on precedence in using the proprietary functions theory. One decision states that:

> ...The rule is...well established that this immunity does not prevail if the negligent act is committed in the course of a private or proprietary act.[46]

The statement of another jurisdiction shows that proprietary functions are used as a means of erasing part of the doctrine of governmental immunity:

> Most of the states, in attempting to decrease the severity of the rule, have adopted the governmental-proprietary test. The test is an arbitrary one, but the general trend of the decisions is to declare more and more functions proprietary rather than governmental so as to allow recovery...[47]

Agreement with this is indicated by the comment that:

> The development of governmental liability for proprietary functions was an acknowledgment that the original rule was unduly restrictive...[48]

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[45] Hayes v. Cedar Grove, 126 W. Va. 828, 835. From page 9 of an opinion received from C. Donald Robertson, Attorney General, July 21, 1964. Date of the opinion is 2/22/63.

[46] Shields v. Pittsburgh, 184 A. (2d) 240, 241, (Pennsylvania, 1962).

[47] Rhodes v. School District, 142 P. (2d) 890, 892, (Montana, 1943).

[48] Spaniels v. Mounds View School District, 118 N.W. (2d) 795, 802 (Minnesota, 1962).

One court's attitude on this point carried out the idea that where governmental torts are concerned, "the rule is liability--the exception is immunity" and then added:

> ...in determining the tort liability of a municipality, it is no longer necessary to divide its operations into those which are proprietary and those which are governmental. Our decision does not broaden the government's obligation so as to make it responsible for all harms to others; it is only as to those harms which are torts that governmental bodies are to be liable by reason of this decision.[49]

Mr. Justice Frankfurter dismissed this theory for federal jurisdictions as an "endeavor, however awkward and contradictory, to escape from the basic historical doctrine of sovereign immunity" and followed this by saying that the "Federal Tort Claims Act...is not self-defeating" by permitting use of this theory.[50]

The use of the distinction between governmental and proprietary functions is a technique used to lessen the harshness of the doctrine of governmental immunity. This distinction by itself appears to characterize the doctrine as inappropriate.

SCHOOL DISTRICT IMMUNITY AND LIABILITY

The following statements are not an all inclusive historical coverage. It is intended only to show the

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[49] Holytz v. Milwaukee, 115 N.W. (2d) 618, 625 (Wisconsin, 1962).

[50] Indian Towing v. U. S., 1 L.Ed. (2d) 1660, Sec. 9 (1955).

general development of school torts. Case references do not necessarily apply to more than one jurisdiction.

Inhabitants of quasi-municipal corporations are not liable for injuries to individuals.[51] A school district is a quasi-municipality and not liable for torts,[52] operates as a state agency,[53] and must have statutory enactment for liability.[54] School districts are but limited corporations and are organized for public purpose.[55] There is no relationship of respondeat superior between a school district and its employees.[56] School funds are for educational purposes and there are no funds for the payment of judgments.[57]

Cities have governmental and private or proprietary functions.[58] School districts also have governmental and proprietary functions.[59] In some jurisdictions, there is a question whether school districts can perform proprietary

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[51]Mower v. Inhabitants of Leicester, 9 Mass. 247, 250 (1812).

[52]School District v. Williams, 38 Ark. 454 (1882).

[53]Dick v. Board of Education, 238 S.W. 1073 (Missouri, 1922).

[54]Larsen v. School District, 272 N.W. 632 (Iowa, 1937).

[55]Bank v. Brainerd, 51 N.W. 814 (Minnesota, 1892).

[56]Ford v. School District, 15 A. 289 (Pennsylvania, 1888).

[57]State v. School Commissioners, 51 A. 289 (Maryland, 1902).

[58]Oliver v. Worcester, 3 Am. Rep. 485 (Massachussetts, 1869).

[59]Krutili v. West Virginia, 129 S.E. 486 (1925).

functions separate from their governmental functions.[60] Some attempts to convince courts that school districts are engaging in proprietary functions, such as when they charge admission for athletic contests, have been unsuccessful,[61] but this distinction was upheld in Arizona.[62] Where a school district operated a summer recreation program not required by statute and open to the general public upon payment of a fee, it acted in its proprietary capacity and was liable for the negligence of its employees.[63]

A school district has been held liable for nuisance.[64] It is usually impossible to determine in advance of the ruling by the court what factual situations will be held to constitute a nuisance.[65] The discharge of sewage into a stream[66] or the maintenance of a defective privy well on school district property[67] are nuisances for which school

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[60] Braun v. Independent School District, 114 S.W. (2d) 947 (Texas, 1938).

[61] Mokovich v. School District, 225 N.W. (2d) 292 (Minnesota, 1929).

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

[63] Morris v. School District, 144 A. (2d) 737 (Pennsylvania, 1958).

[64] Bush v. Norwalk, 189 A. 608 (Connecticut, 1937).

[65] Carlo v. School District, 179 A. 561 (New Jersey, 1935).

[66] Watson v. New Milford, 45 A. 167 (Connecticut, 1900).

[67] Briegel v. Philadelphia, 19 A. 1038 (Pennsylvania, 1890).

districts have been held liable. Nuisance must have some kind of property association, such as the use of a playground in such a way as to interfere with the complainant's enjoyment of his property before liability will be held against the school district.[68] Some courts have held that immunity is so well established that it cannot be circumvented by the use of nuisance charges.[69]

One court held that a school district could not "step down from their pedestal of immunity" and enjoined the district from using its liability insurance and added that there could be no recovery from the insurance company in advance of a judgment from the court.[70] Even so, recovery against a school district has been found by stating that the district had waived its immunity, at least to the extent of its insurance coverage.[71] There are some states that adhere to the idea that liability insurance cannot be carried because there is no liability against which to insure.[72] The general belief is that, unless there is a

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[68] Ness v. Independent School District, 298 N.W. 855 (Iowa, 1941).

[69] Daniels v. Board of Education, 158 N.W. 23 (Michigan, 1916).

[70] Boice v. Board of Education, 160 S.E. 566 (West Virginia, 1931).

[71] Rogers v. Butler, 92 S.W. (2d) 414 (Tennessee, 1936).

[72] School District v. Rivera, 243 P. 609 (Arizona, 1926).

waiver by statute, the existence of insurance coverage has no effect upon a district's liability for negligence.[73]

On the other hand, common law immunity has been removed by statute.[74] A board of education was held responsible for its own torts.[75] With liability insurance, the need for governmental immunity does not exist.[76] Any moral claim against the state for which courts have no jurisdiction may be taken to the State Board of Claims.[77] A public body is liable for damages for torts of its officers, agents, and employees by reason of respondeat superior.[78] Governmental immunity may no longer be used as a substantive defense by agencies of the state.[79] School district immunity cannot be justified for any reason in these modern times and is abrogated.[80]

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[73]Supler v. School District, 182 A. (2d) 535 (Pennsylvania, 1962).

[74]Redfield v. School District, 92 P. 770 (Washington, 1907).

[75]Herman v. Board of Education, 137 N.E. 24 (New York, 1922).

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

[77]Hawkins v. State Board of Adjustment, 7 So. (2d) 775 (Alabama, 1942).

[78]Holytz v. Milwaukee, 115 N.W. (2d) 619 (Wisconsin, 1962).

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

[80]Molitor v. Kaneland Community Unit District, 163 N.E. (2d) 89 (Illinois, 1959).

School districts are subject to tort suits because of statutory approval of actions against "incorporated boroughs, cities, or other public corporations."[81] The state waives its immunity and shall be liable for torts in the same manner and to the same extent as a private individual; since school employees are employees of the state department, the law applied to them.[82] All reasons for school district immunity were rejected in a Minnesota case[83] but the state "still enjoys governmental immunity" for its schools by legislative declaration.[84] The board is liable in the name of the district for injuries to persons due to negligence of the district, officers, or employees.[85]

"Save harmless" laws are in effect in the states of Massachussetts,[86] New Jersey,[87] Connecticut,[88]

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[81]Letter from Michael M. Holmes, Deputy Attorney General, Alaska, dated September 14, 1964. (See AS 09.65.070, amended).

[82]Letter from W. H. Coulter, Deputy Superintendent, Department of Education, Hawaii, dated July 7, 1964.

[83]Spaniel v. School District, 118 N.W. (2d) 795 (Minnesota, 1962).

[84]Letter from T. J. Berning, Department of Education, Minnesota, dated July 6, 1964.

[85]California Education Code, Section 903. Letter from Philip K. Jensen, Deputy Attorney General, dated July 27, 1964.

[86]Massachussetts Annotated Laws, Chapter 41, sec. 100-c. Taken from Who is Liable for Pupil Injuries?, 1963.

[87]New Jersey Statutes Annotated, Section 18:5-50.2 to 4.

[88]Connecticut General Statutes, Sec. 10-235. Letter from Stephen J. O'Neill, Assistant Attorney General, dated July 24, 1964.

Oregon,[89] and Wyoming.[90] These statutes shift the costs of liability for torts from the employee to the school district.

SUMMARY OF THE BACKGROUND

The common law immunity doctrine protecting governmental entities from tort liability stems from English case law. Its theoretical basis evolved from the medieval age concept that the king can do no wrong. In America, the state has been given the attributes of sovereignty and United States courts in the past have reasoned, therefore, that the state is immune from tort liability and cannot be held liable for its actions. This immunity extends to the school district as an agency of the state.

The doctrine of governmental immunity is under attack by legislative and judicial means. Criticisms of the doctrine are varied and appear in all areas of the United States. Erosion of the doctrine has occurred through court attacks based on nuisance, trespass, proprietary functions, liability insurance, and statutory enactment. Abrogation by judicial decree has occurred in some states. Even so, the concept that a school district is not liable for its wrongful acts or for the wrongful acts of its agents continues to be used in many states.

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[89] Oregon Revised Statutes, sec. 243.610 and 620. Taken from Who is Liable for Pupil Injuries?, 1963.

[90] Wyoming Statutes, 1957, sec. 21-158. Letter from J. Pelham Johnston, Department of Education, dated August 5, 1964.

CHAPTER III

REVIEW OF THE LITERATURE

In today's affluent society, almost anyone can afford to bring suit in a court of law. Americans today are willing to threaten suit at the slightest provocation. An article in a national magazine states:

> We live in a time when damage suits for injuries, real or fancied, have become a national pastime. Never in history have so many citizens sued so many of the countrymen for so much. Statisticians show that one out of every two Americans will sue or be threatened with suit during his or her lifetime...[1]

This seems particularly true of public schools where young children are involved and parental emotions run high for any accident involving their child.[2] Schaerer concluded from a recent study that:

> Every year there are more lawsuits filed against school districts. The percentage (of suits filed) and dollar amounts are increasing.[3]

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[1]Leslie Lieber, "When in Doubt, Sue," This Week, January 17, 1965, p. 6.

[2]The writer, as assistant principal of a large high school, has received threats of law suit once or more per month during this past school year.

[3]Robert W. Schaerer, "Liability, Liability Insurance, and the School Business Manager," The American School Board Journal, July, 1964, p. 7.

Citations, used in chapter II, have established the doctrine of governmental immunity as a court made-doctrine. One writer states that:

> Although workmen's compensation is an exception, lawmen have not produced much comprehensive legislation on torts.[4]

Although most state school systems are still protected by the common law rule of governmental immunity, there is recognition that this may not be a proper approach. One school journal has editorially commented that:

> We shall never be able to say that the states and their school districts are fair in meeting their responsibilities for accidents until they uniformly remove the immunity which they now enjoy with such dubious results.[5]

Remmlein agrees with this in her statement that:

> Probably nowhere in the entire body of school law is there more uncertainty, more realization of the gap between the moral and the legal duty of the school board--between the social and the legal rights of the public school pupil.[6]

However, she believes this is changing since:

> There does seem to be some theoretical trend toward the abolition or modification of the theory of nonliability. A number of court opinions and legal authorities in their treatises have admitted the injustice of the common-law immunity.[7]

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[4]Vernon X. Miller, "Personal Injury Litigation in School Cases," Law and Contemporary Problems, XX (1955), p. 60.

[5]"School Accidents," The American School Board Journal, June, 1940, p. 55.

[6]Madaline K. Remmlein, School Law (2nd Edition, Danville, 1962), p. 281.

[7]Ibid., p. 280.

Any time that a school district faces a suit originating in tort, the general rule might be changed by judicial decision. An article in School Management stated:

> Although at the present time, districts are not generally liable, school board members should not get a false sense of security. In the next few years, there probably will be major changes regarding school district liability.[8]

Johns and Morphet warn school boards to consider the purchase of liability insurance in Financing the Public Schools because "the trend of court rulings has been to increase gradually the liability of boards of education."[9]

The literature of the field will be surveyed in consideration of these statements and the setting of governmental immunity as provided by the "background" chapter.

RESEARCH BRIEFS

David V. Martin suggests in his dissertation: "Trends in Tort Liability of School Districts as Revealed by Court Decisions," Duke University, 1962, that courts have observed three eras in their decisions on tort liability: (1) creation and perpetuation of school district immunity from liability, (2) qualification of the rule of nonliability, and (3) abrogation of the rule of nonliability.

He concludes that immunity has decreased markedly since 1930 and the trend will soon subject school districts to the

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[8]George Shroyer, "How's Your Liability Insurance?," School Management, September, 1963, p. 96.

[9]Roe L. Johns and Edgar L. Morphet, Financing the Public Schools (Englewood Cliffs, 1960), p. 516.

same law of torts which govern private corporations and individuals.[10]

The dissertation, "Legal Liability for Injuries Sustained in a Public School Program of Interscholastic Athletics," by Cleet C. Cleetwood of Duke University, 1959, explores the legal liability of districts, board members, and employees for injuries to participants and spectators in interschool athletic events. He found that:

1. Interschool athletics are an integral part of the school program.
2. Schools are not insurers of the participants or spectators at contests even though fees are charged.
3. Immunity of school districts does not extend to board or employees.
4. A simple but positive statutory enactment with regard to liability for injury constitutes the best remedy for existing inequities in the laws governing liability and hazards in interscholastic athletics.[11]

Robert D. Hartman, in his dissertation, "The Nonimmunity of School Districts to Tort Liability," University of Illinois, 1963, stated the belief that four components are needed before an action can be started based upon negligence. There must be: "(1) a legal duty to conform to a certain standard, (2) a failure to conform to that standard, (3) a close causal connection between the

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[10]M. R. Sumption, "Annotated Bibliography of Recent Studies in School Law," 1964 Yearbook of School Law, ed. Lee O. Garber (Danville, 1964), p. 262.

[11]M. R. Sumption, "Annotated Bibliography of Recent Studies in School Law," 1961 Yearbook of School Law, ed. Lee O. Garber (Danville, 1961), p. 231.

conduct and the resulting injury, and (4) an actual loss or damage."

He concluded from his study that:

1. The immunity doctrine originated in times very dissimilar to today.

2. While in a majority of states, school districts are immune, a number of states have moved toward nonimmunity.

3. In the absence of legislation permitting school district liability, some courts felt they did not have the power to modify.

4. In a great majority of the states the purchase of liability insurance has had little effect upon the liability of the school district for torts.

5. In the three leading states wherein liability has been allowed, the legislatures have acted to limit the amount of liability.[12]

Lewis C. Wood, in his dissertation, "A Study of Tort Liability in Michigan School Districts," Michigan State University, 1963, found that liability had not generally been the basis for school policies, rules, regulations and operating procedures in Michigan school districts. He recommended:

1. That clarification of the confusing status of school district liability in Michigan be considered a legislative responsibility.

2. That legislation abrogating governmental immunity be passed which would impose strict liability without fault as a condition.

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[12]M. R. Sumption, "Annotated Bibliography of Recent Studies in School Law," 1964 Yearbook of School Law, ed. Lee O. Garber (Danville, 1964), p. 253.

3. That laws be enacted giving protection to teachers from financial loss due to negligence.

4. That school liability be considered a premise supporting well-defined administrative policies and operating procedures.

5. That school officials acquire a sound knowledge of their particular state's school tort liability laws.

6. That professional education associations promote improved legislation relating to liability.[13]

Robert L. Fisher, in his dissertation, "An Analysis of Patterns of Liability Decisions in the Public Schools of Selected States of the United States," Oklahoma University, 1963, reviewed court decisions and opinions of attorney generals to determine the status of immunity in Arizona, New Mexico, Oklahoma, and Texas. He concluded that:

1. Many school officials and employees are unaware of the liability dangers that exist in various school activities.

2. School officials and employees may need protection from liability action which can be brought against them, arising from the scope of their employment.

3. School officials and employees are never immune from suit for financial loss due to injury arising from any judgment or claim by reason of negligence.

4. The permissive insurance laws for transportation should be replaced with a compulsory insurance law.

5. School officials and employees should be alert to the great number of injuries and deaths occurring in athletic programs.[14]

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[13]Ibid., p. 269.

[14]Ibid., p. 260-261.

In a nationwide survey of school administrators, the Nation's Schools found them divided in their opinions:

> As a question of ethics, and regardless of your present state statutes, do you believe that school districts should be held liable for property damage or personal injuries?

Answers to this question showed 42 per cent believed "yes" and 58 per cent said "no." The second question was:

> Should school districts be required to carry insurance covering such liabilities?

For this question, 49 per cent said "yes" while 50 per cent said "no" and 1 per cent offered no opinion.[15]

CORPORATE RESPONSIBILITY OR IMMUNITY

A list of the reasons usually given for governmental immunity from tort liability include: (1) sovereignty, (2) stare decisis, (3) tax funds theory, (4) legislature should change the policy, not the courts, (5) multiplicity of law suits would harass the school district, (6) schools are not authorized to commit ultra vires acts, and (7) no relation of respondeat superior.

SOVEREIGNTY

Sovereignty has been the most commonly used idea by the courts in upholding immunity. This is an ironical twist on the original idea of sovereignty as it relates to quasi-corporations according to the Yale Law Journal:

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[15]"Disagree on Public School Liability, But Half Would Require Insurance," Nation's Schools, February, 1961, p. 112.

> Included within these so-called quasi-corporations--for they were not at first incorporated at all--are counties, towns, school districts, road districts and the like. In view of the fact that the people themselves have so direct a share in the management of these bodies, it is perhaps the more surprising that they were endowed by the courts with the shield of kingly sovereignty...[16]

or as stated by another source:

> ...no one could seriously contend that local governmental units possess sovereign powers themselves.[17]

Sovereignty, as a reason for immunity, places the emphasis in the wrong area in any case, according to Smith:

> Functions commonly regarded as governmental are undertaken to benefit all members of the community. Should not all members of the community assume a proportionate share of the responsibility for injuries which result from the carrying out of these functions?[18]

STARE DECISIS

The principle of precedent receives attention in the following statement:

> The doctrine of Stare Decisis is a legal principle, tending to stabilize the law so that all may know what it is and act accordingly. It was once dependable but has become inconstant and unstable.[19]

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[16]"Governmental Liability in Tort," Yale Law Journal, XXXIV (1925), p. 9.

[17]Edgar Fuller and James Cosner, "Municipal Tort Liability in Operation," Harvard Law Review, XL (1941), p. 439.

[18]Allan F. Smith, "Municipal Tort Liability," Michigan Law Review, XLVIII (1958), p. 49.

[19]Emmett H. Wilson, "Stare Decisis, Quo Vadis?," Kansas Bar Association Journal, XIV (1945), p. 65.

GOVERNMENTAL FUNCTIONS--PROPRIETARY FUNCTIONS

James Smith, speaking of the purpose of tort law in general, states:

> From one end of the bookshelf of the centuries to the other, in every mature system of jurisprudence, there is only one rule of substantive law in torts--he who injures another must make the injured party whole.[20]

This has not been the case for governmental units. One idea used by many states is that immunity exists when schools are engaged in governmental functions but they become liable if engaged in proprietary functions. Strict courts will say, however, that schools can perform no proprietary functions but only those of a governmental nature. The main problem arises out of the difficulty in determining which act is governmental and which is proprietary. For example:

> ...incidental income may be substantial and yet leave an activity within the protection of governmental immunity, while another activity may be deemed proprietary without any monetary return at all.[21]

One writer states that it becomes difficult to tell if the government is immune because the function is governmental, or whether the governmental function exists because the governmental unit should be immune.[22]

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[20]James B. Smith, "A Proposed Code Provision on Tort Liability," Kansas Bar Association Journal, XVIII (1950), p. 307.

[21]Edgar Fuller and James Cosner, "Municipal Tort Liability in Operation," Harvard Law Review, XL (1941), p. 442.

[22]Richard W. Wahl, "Municipal Liability in Tort," Kansas Bar Association Journal, XIX (1951), p. 376.

Since no clear-cut differentiation between governmental and proprietary functions is possible, court decisions repeatedly attach one label in their cases when the other might well be expected. Thus confusion results because:

> ...the governmental-proprietary rule often produces legalistic distinctions that have only remote relationship to the fundamental considerations of municipal tort responsibility. It does not seem good policy to permit the chance that a school building may or may not be producing rental income at the time (of the injury) determine whether a victim may recover...[23]

Fuller and Cosner also claim that:

> This judicial exception has been justified in the face of the sovereign immunity principle. It indicates that immunity is not peculiar to sovereignty at all.[24]

It appears that the distinction between the two functions is only a means to lessen the force of the immunity doctrine.

LEGISLATIVE DUTY, NOT JUDICIAL

A consistent theme used by those jurisdictions upholding governmental immunity is that if the policy is to be changed, it is up to the legislature and not the courts to change it. Shapiro states:

> The more recent cases show, however, that the most persistent reason for the retention of the governmental immunity, even in courts sympathetic to the need to mitigate the

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[23]Edgar Fuller and James Cosner, "Municipal Tort Liability in Operation," Harvard Law Review, XL (1941), p. 443.

[24]Ibid., p. 442.

> doctrine is that abrogation should come from the legislature.[25]

Some jurisdictions have disregarded this belief and established liability by judicial decision. This has more generally occurred in municipal cases than in school-connected cases. Those courts disregarding "legislative duty" have used the idea that the doctrine was created by the courts and thus it is an obligation or right of the courts to take action as they consider necessary to reach justice.

HARASSMENT OF GOVERNMENT

Another argument used to promote governmental and particularly school district immunity is that of harassment of government by a multiplicity of suits for damages. Smith believes this is wrong since:

> ...the argument that if made liable for torts of its agents it will interfere with the proper carrying out of municipal functions... It is more likely...that the potential liability thus imposed will operate to compel the discharge of dangerous or incompetent individuals...better not poorer government will result.[26]

No record can be found to show that governmental operations were halted by the interference of a deluge of cases due to tort claims. As stated in one study:

> In none of the instances, where there has been a waiver of immunity, has there been any

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[25]Frieda S. Shapiro, "Your Liability for Student Accidents," NEA Journal, March, 1965, p. 47.

[26]Allan F. Smith, "Municipal Tort Liability," Michigan Law Review, XLVIII (1950), p. 51.

'crippling interference' with governmental operations.[27]

The Attorney General of the state of New York where immunity does not prevail, states:

> The courts have no marked disposition to decide the cases one way or the other but approach each controvery on its merits.[28]

ULTRA VIRES

The theory of the ultra vires act is used in many court cases as a reason to excuse school districts for tort liability. This idea is based on the reasoning that school districts have only those powers given them by statute and that these powers do not include permission to do wrong. Jurisdictions using this reason claim there is never authority given to a school board to do wrong and, when it does, the act is beyond its legal powers and does not bind the district. Mort and Hamilton state:

> It is obvious that the members of a board may act as a board and not in their capacities as individuals and a tort result.[29]

Or, as put by Fuller and Cosner:

> This is clearly an erroneous conception, for it fails to recognize that the tortious act may be committed while...acting within the scope of its delegated authority. The true

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[27] A Study of State Bonding and Insurance Problems (Carson City, 1960), p. 17.

[28] Letter from Paxton Blair, Solicitor General, Department of Law, State of New York, July 23, 1964.

[29] Robert R. Hamilton and Paul Mort, The Law and Public Education (Second Edition, 1959), p. 281.

> concept of ultra vires prevents liability only when a tortious act is committed beyond the delegated powers of the corporation...a correct application of the doctrine of ultra vires would bar few, if any, meritorious cases.[30]

According to James, those who believe sovereign immunity can be upheld by the idea of ultra vires are using incomplete reasoning in that:

> This reasoning, which is parallel to an earlier and discredited notion about the vicarious liability of (private) corporations has little appeal today...nor does it deserve any.[31]

FINANCIAL EXEMPTION

Immunity is sometimes based on the idea of no financial return from the governmental function performed. In discussing this theme, Smith raises the question as to whether "the absence of profits (is) a reason for denying responsibility?...no one would suggest this for private individuals..."[32]

The usual reason given for immunity based on finances is that school funds are tax moneys held in trust for education and that to use these funds to pay damage claims for tort liability would be an improper diversion of public

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[30]Edgar Fuller and James Cosner, "Municipal Tort Liability in Operation," Harvard Law Review, XL (1941), p. 439-440.

[31]Fleming James, Jr., "Tort Liability of Governmental Units and Their Officers," University of Chicago Law Review, XXII (1955), p. 613.

[32]Allan F. Smith, "Municipal Tort Liability," Michigan Law Review, XLVIII (1950), p. 51.

funds held in trust for educational purposes. Claims are also made that this would result in a dangerous depletion of the public treasury. One discussion of the reason follows:

> This reasoning is unsound, for it assumes that payment of tort judgments is not an ordinary expense of running governments and cannot be paid out of the general operating fund.[33]

The claim is often made that school districts are the biggest business of the community. It requires only a superficial look at any community to note that if education is not the biggest business of the area, it certainly is one of the biggest industries located there. In a debate held at the annual meeting of the League of Kansas Municipalities in 1961, the comment was made that:

> Everybody knows that government is the biggest business in the U. S. today. And yet we place upon all other businesses, requirements from which government continues to be immune, and absolve it from responsibility for acts which place millions of people in jeopardy every day.[34]

The two are related and:

> The simple answer is that tort liability is one of the expenses of doing business and that a private corporation will take this expense into account when determining its prices. Similarly, a governmental unit can take into account the cost of torts in determining its revenue requirements.[35]

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[33]Lawrence N. Walker, "Sovereign Immunity: Scope of Doctrine Severely Limited in California," California Law Review, XLIX (1961), p. 404.

[34]Steadman Ball, "King or Prople?," Kansas Bar Association Journal, XXX (1961), p. 187.

[35]Lawrence N. Walker, California Law Review, 1961, p. 404.

Reutter comments that financial reasons may have been valid in the past but have little justification today:

> Of all reasons cited...only that related to funds for payment of damages has any practical significance today. But, with the advent of insurance, and with substantially changed and changing governmental social policy, this reasoning is at best an extremely shaky support for a doctrine of such profound import.[36]

The tax funds theory was considered in Molitor v. Kaneland and rejected because:

> The court felt that today, when public education is one of the biggest businesses of the country, immunity cannot be justified on theory of protection of public funds and public property.[37]

According to another source, the depletion of tax funds may once have been a good argument but:

> The danger to the public treasury is no longer a valid argument to support the immunity doctrine, for the 'infant American states' have long since attained their financial, adult status. Furthermore, liability insurance can now be purchased for a small percentage of the total coverage.[38]

JUDICIAL MISINTERPRETATION

The Yale Law Journal states that even in those states where the statutes are written broadly and where language

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[36]E. Edmond Reutter, Jr., "Tort Liability of the School District," The American School Board Journal, March, 1958, p. 30.

[37]Sam M. Lambert and Norman Key, Who is Liable for Pupil Injuries?, (Washington, D. C., 1963), p. 19.

[38]A Study of State Bonding and Insurance Problems, (Carson City, 1960), p. 12.

might indicate that liability for the state and its subdivisions was intended, court decisions have upheld the immunity doctrine:

> So strongly entrenched in the judicial mind is the principle of immunity in tort that legislative consent to suit, though granted in the broadest language, has been deemed to exclude liability for tort.[39]

One example of this is shown by the Oregon Law of 1862, as reported in Law and the School Business Manager, where "action may be maintained against any of the other public corporations in this state...in its corporate character, and within the scope of its authority, or for an injury to the rights of the plaintiff..." This made no difference since:

> ...the Oregon courts interpreted this statute as a 'mere re-enactment of the common-law rule that a public corporation is liable for negligence only in the performance of private functions and not in the performance of public functions' such as education.[40]

Another report indicates that:

> A Michigan statute had created a court of claims and gave it jurisdiction 'to hear and determine all claims and demands liquidated and unliquidated ex contractu and ex delictu against the state and any of its departments.'[41]

In a 1942 case, this was disregarded as:

> The court, in an amazing decision, held

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[39]"Governmental Liability in Tort," Yale Law Journal, XXXIV (1925), p. 9.

[40]Madaline K. Remmlein, "Tort Liability of School Districts, Boards, and Employees," Law and the School Business Manager, ed. Lee O. Garber (Danville, 1957), p. 198-199.

[41]A Study of State Bonding and Insurance Problems, (Carson City, 1960), p. 17.

> the statute waived only immunity from suit, and not immunity from liability.[42]

THEORY OF NO RESPONDEAT SUPERIOR

Another justification for upholding governmental immunity is given as the lack of respondeat superior. This part of the doctrine literally means, in governmental immunity cases, that the relation of master and servant or agent does not exist. One principle of school law is that a school district is an agent of the state for the purpose of carrying out the function of education. The contradiction becomes clear, according to Fuller and Cosner, when it is considered that:

> ...local governments have been immunized as agents of the sovereign, quite regardless of the fact that agents, corporate or otherwise, are liable for their own torts under the common law.[43]

The same source indicates that only after the question of liability is open for decision should the question of master-servant relationship be investigated.[44]

Each case should be decided on its merits, according to Louis Jaffe, who believes that "the question of immunity...should become basically whether in all the

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[42]Ibid., p. 17.

[43]Edgar Fuller and James Cosner, "Municipal Tort Liability in Operation," Harvard Law Review, XL (1941), p. 439.

[44]Ibid., p. 439.

circumstances the plaintiff is entitled to monetary relief."[45]

SPECIAL PETITION TO LEGISLATURE

Constitutions usually guarantee the right of petition to the legislature. For example, the Kansas Constitution, in its Bill of Rights, states:

> The people have the right to assemble, in a peaceable manner, to consult for their common good, to instruct their representatives, and to petition government, or any departments thereof, for the redress of grievances.[46]

The possibility of settlement of injury claims by the legislature usually occurs after court review and:

> ...great numbers of litigants, after being denied judicial relief, take their cases to congress or to state legislatures and often receive substantial monetary awards.[47]

According to Mitchell, the amount of special legislation enacted by one state each legislative session to take care of injuries by governmental units is considerable:

> A glance at the Laws of Kansas, 1949, Chapter 96-98, will disclose at least 20 appropriations made by that legislature to compensate citizens for personal injuries in which it was recognized that the state was at fault.[48]

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[45]Louis L. Jaffe, "Suits Against Governments and Officers: Damage Suits," Harvard Law Review, LXXV (1964), p. 213.

[46]Constitution of Kansas, Bill of Rights, Section 3.

[47]A Study of State Bonding and Insurance Problems, (Carson City, 1960), p. 12.

[48]Gene Mitchell, "Sovereign Irresponsibility," Kansas Bar Association Journal, XX (1952), p. 276, Footnote 3.

Constitutions generally reject special legislation. The Kansas Constitution provides that:

> All laws of general nature shall have a uniform operation throughout the state; and in all cases where a general law can be made applicable, no special law shall be enacted...[49]

Wheat calls attention to the doubtful legality of the special awards for injuries made by the legislature:

> The first defect...is that it is not only extra-legal but illegal. The grant of funds to an individual because of a specific injury is special legislation, and is expressly declared unconstitutional.[50]

Wheat's general theme is that since special legislative relief is being given anyway, it should be made an automatic process to be taken through a claims court. He believes that if relief can be given in specific instances, then the court can do so on the merits of the specific injury and do it better and more quickly.

EXCEPTIONS TO THE GENERAL RULE

Most writers, in discussing the liability of school districts, commence their articles with the statement that school districts have immunity from tort liability as a general rule but add that there are exceptions to the general rule. These exceptions usually consist of (a) proprietary functions, (b) nuisance and trespass, (c) liability to

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[49]Constitution of Kansas, Article 2, Section 17.

[50]James Wheat, "Governmental Responsibility--A Need for Statutory Reform," Kansas Bar Association Journal, XXV (1956), p. 190.

the extent of insurance coverage, or (d) liability under statute.

Another exception to the general rule occasionally mentioned is active wrong-doing. Remmlein states that the school district theoretically is liable:

> ...if the injury resulted from an active wrong-doing as opposed to mere negligence. Active wrong-doing is akin to an intentional tort.[51]

She then goes on to report "no case has been found where the court accepted" this exception.

Hamilton and Mort discuss the usual exceptions and then state:

> Further exceptions to the rule of non-liability are that school districts are liable for the maintenance of nuisance, the commission of trespass, and the infringement of patents.[52]

No report of cases based on infringement of patents by schools are mentioned nor was it discussed by other articles or books that were examined.

PROPRIETARY FUNCTIONS

Proprietary functions were discussed previously as a part of the Governmental-Proprietary section on pages 36 and 37.

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[51]Madaline K. Remmlein, "Tort Liability for School Districts, Boards, and Employees," Law and the School Business Manager, ed. Lee O. Garber (Danville, 1957), p. 196.

[52]Robert R. Hamilton and Paul Mort, The Law and Public Education (Second Edition, Brooklyn, 1959), p. 282.

NUISANCE

In describing the "inroads upon municipal immunity in tort," the Harvard Law Review states that "nuisance can be used to encroach upon it."[53]

Nuisance has been defined as a "continuous condition or use of property in such a manner as to obstruct proper use of it by others lawfully having right to use it, or the public."[54]

Remmlein states that a nuisance at law has a "narrow meaning" and explains that:

> When the injury is to property, the injured are likely to be neighbors of the school and the nuisance is not a general nuisance but merely a private inconvenience. When the injury is to the person, the hazardous condition causing the injury is usually a part of the operation of the school and as such constitutes a governmental function for which the general fule of immunity applies.[55]

However, nuisance is used to cut down the effect of the governmental functions theory according to Hourihan:

> Governmental functions immunity has been further narrowed by the development of the strict 'nuisance exception' under which a city is liable for damages to real property

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[53]"Inroads Upon Municipal Immunity in Tort," Harvard Law Review, XLVI (1933), p. 307.

[54]Arthur A. Rezny and Madaline K. Remmlein, A Schoolman in the Law Library (Danville, 1962), p. 58.

[55]Madaline K. Remmlein, "Tort Liability of School Districts, Boards, and Employees," Law and the School Business Manager, ed. Lee O. Garber (Danville, 1957), p. 196.

> caused by a nuisance maintained by it, even though in a governmental capacity.[56]

The doctrine of nuisance works as an exception to the general rule of immunity when property is involved and is occasionally applied to personal injury cases.[57] However, in trespass and nuisance, "immunity reasserts itself...in most cases involving personal injuries."[58] The difference is explained by common law rules concerning real property:

> In trespass and nuisance cases, sovereign immunity conflicts with the rules of the common law that strictly protects privately owned real property...and the latter consideration is made determinative. Thus recovery was allowed for damage to property because a nuisance was maintained on a public school grounds. (Miles v. Worcester, 28 N.E. 676 (1891).[59]

Suits in tort have apparently been more successful, where nuisance was used as a ground to recover, than for personal injuries.

Hamilton and Mort believe that nuisance is only another method used to lessen the harshness of the doctrine of governmental immunity and that:

> ...if the real basis for the doctrine of nonliability is the sovereignty of the state, illegal diversion of school funds, (etc.)... then the same reasons logically apply to exempt

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[56]James Hourihan, "Tort Immunity--Liabilities for Personal Injuries Caused by Nuisance Maintained by City," Michigan Law Review, LVIII (1960), p. 599.

[57]Bush v. Norwalk, 189 A. 608 (Connecticut, 1937).

[58]Edgar Fuller and James Cosner, "Municipal Tort Liability in Operation," Harvard Law Review, XL (1941), p. 449.

[59]Ibid., p. 444.

> the district from liability for maintenance of a nuisance.[60]

INSURANCE

Some states require school districts to purchase liability insurance for restricted areas of coverage; some states permit purchase of liability policies to cover all areas of risk while a few require purchase for all areas of risk. Garber, in discussing the liability of school districts that carry insurance, states that:

> ...the law is still vague on the question of whether a school district that carries liability insurance will be held liable, at least to the extent of the insurance coverage, in suits of tort liability. The problem is comparatively new and only a few cases involving this question have been litigated.[61]

However, it cannot be disregarded since:

> An increasingly important exception to the doctrine of school district immunity is through legislation that permits local school boards to carry liability insurance and to be liable to the extent of the insurance.[62]

Apparently, school boards are never fully assured of what the limits of nonliability are, or when the doctrine of immunity may be overthrown. Thus very good reasons exist for school boards to consider the purchase of liability insurance. Chaflin states:

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[60]Robert R. Hamilton and Paul Mort, The Law and Public Education (Second Edition, Brooklyn, 1959), p. 282.

[61]Lee O. Garber, "Liability of Districts That Carry Insurance," Nation's Schools, October, 1957, p. 90.

[62]E. Edmond Reutter, Jr., Schools and the Law (New York, 1960), p. 72.

> Is it not better for the public as a whole to bear the burden of damage to person or property through the negligence of government officials rather than make the injured party bear it?...[63]

Fuller and Cosner advance the same plea by stating:

> ...unfairness to the innocent victim of a principle of complete tort immunity and the social desirability of spreading the loss--a trend now evident in many fields--have often been advanced in favor of extending the scope of liability.[64]

Practical business reasons may compel school boards to consider purchase of liability insurance. Garber comments:

> With school district immunity under common law in a state of flux, and the trend pointing toward eventual abolishment, many school districts now face the question of protecting their financial well-being through liability insurance...[65]

At this point, a general principle of insurance law should be considered. There must be an insurable interest in the subject and the insurance must protect the insured. Hamilton and Mort comment that:

> Liability insurance is designed to protect the insured against being obliged to pay a judgment which may be rendered against him. It follows that if the insured is held not to be liable in the particular action the insurance company likewise would not be liable.[66]

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[63]O. Q. Chaflin, "The Distinction Between Governmental and Proprietary Functions of Municipal Corporations," Kansas Bar Association Journal, IV (1934), p. 280.

[64]Fuller and Cosner, Harvard Law Journal, Vol. XLV, p. 437.

[65]Lee O. Garber, "Schools That Earn Money May Lose Their Immunity," Nation's Schools, September, 1963, p. 54.

[66]Robert R. Hamilton and Paul Mort, The Law and Public Education (Second Edition, Brooklyn, 1959), p. 291.

Liability insurance runs into a conflict with the principle of governmental immunity. The mere existence of insurance coverage does not affect school district immunity although this concept may also be in the process of change. Nolte and Linn state that:

> Even in those states in which the law is silent on the legality of such an appropriation (to buy liability insurance), and where the common law principle of nonliability of school districts is the rule, many boards of education are purchasing liability insurance and in many cases 'save-harmless' insurance for their employees, even though the appropriateness of the expenditures may be challenged.[67]

Attempts to bypass insurance protection principles are done in two ways:

> ...by writing into the policy a provision that the claimant may maintain a direct action against the insurance company, and that the defense of governmental immunity is not to be asserted by the insurer.[68]

One other method used is to list, in the policy, the actual employees and school officials who are protected.[69]

In an article warning teachers of their increased chances of liability for injury and recommending the purchase of personal liability insurance, Bracken stated:

> Some experts have opined that the concept of school district immunity is outmoded and hold that:

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[67]M. Chester Nolte and John Phillip Linn, School Law for Teachers (Danville, 1963), p. 245.

[68]Sam M. Lambert and Norman Key, Who is Liable for Pupil Injuries? (Washington, D. C., 1963), p. 69.

[69]Actual policy used by the South Riverside School District, Sedgwick County, Kansas. This is one example of the "save-harmless" type of policy.

(1) the immunity of the school district does not afford ample protection for either students (who are required by law to attend school) or teachers;

(2) such immunity imposes upon teachers an even greater risk of being sued for damages resulting from their negligent acts; and

(3) it is difficult to collect large amounts of damages to adequately compensate pupils for certain kinds of injuries due to the limited income of teachers.[70]

In 1961, the Nation's Schools conducted a round-table discussion of the problems of school business. One part of the discussion was devoted to school liability insurance. Only one of the participants was against the purchase of liability insurance for schools. The frankest statement in the discussion was:

> We in Jefferson County don't want to be the Colorado guinea pig in this matter. We've seen what has occurred in California and Illinois, and we've got the biggest comprehensive insurance plan we can buy.[71]

Practical reform will result from the purchase and use of public liability insurance policies, according to Gibbons:

> The practice...creates a clear profit incentive, in a powerful industry, to seek legislative substitution of insured liability for the present immunity; and may thereby supply the spur to legislative action

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[70]Charles Bracken, "Teacher Beware!," Kansas Teacher, October, 1963, p. 24.

[71]"Round Table Tells How to Buy, Save on School Insurance," Nation's Schools, January, 1962, p. 108.

on the problem which the unorganized victims... have never been able to muster.[72]

LIABILITY UNDER STATUTE

A number of states have created liability for various phases of school operations by enacting statutes to waive immunity. Included in this general category are those states that have by statute waived immunity almost completely or for such areas as workmen's compensation, save-harmless laws, safe-place laws, transportation insurance, and where the states have not waived immunity but have chosen instead to create a claims court to handle injury claims that have merit.

States that have waived general immunity by statute include Hawaii, California, Washington, New York,[73] and Alaska.[74] Added to these 5 statutory states are Illinois, Wisconsin,[75] and Arizona,[76] who have abrogated school district immunity by court decision, for a total of eight

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[72]Gerald R. Gibbons, "Liability Insurance and the Tort Immunity of State and Local Government," Personal Injury Commentator, Jan., 1962, p. 55. Condensed from Duke Law Journal, Fall, 1955.

[73]"Tort Liability and Liability Insurance," School Law Summaries (Washington, D. C., 1963), p. I-2.

[74]Letter from Michael M. Holmes, Deputy Attorney General, State of Alaska, September 14, 1964.

[75]School Law Summaries, February, 1963, p. I-1.

[76]Letter from Phillip M. Haggerty, Assistant Attorney General, State of Arizona, July 20, 1964.

states that would fit the category of complete or almost complete waiver of immunity.

States that permit or require save-harmless protection for employees include New Jersey, Connecticut, Massachussetts, Oregon, and Wyoming.[77] A list of the states that permit or require the purchase of liability insurance includes California, Connecticut, Illinois, Massachussetts, Minnesota, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, South Dakota, Washington, and Wyoming.[78] Five additional states probably have authority through their insurance laws (as opposed to their school laws) to permit school districts to purchase liability insurance: Arkansas, Idaho, Iowa, North Dakota, and Vermont.[79]

Shapiro, in a discussion of the liability of teachers and other employees of school districts, believes the employee is protected in about one-fourth of the states:

> ...court decisions in Illinois, Wisconsin, and Arizona...(and) statutes in nine other states offer protection.[80]

Workmen's compensation laws protect employees from injury while on the job. Technically, this type of statute

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[77]Sam M. Lambert and Norman Key, Who is Liable for Pupil Injuries? (Washington, D. C., 1963), p. 23-24.

[78]"Tort Liability and Liability Insurance," School Law Summaries (Washington, D. C., 1963), p. I-1 to I-9.

[79]Ibid., p. II-1, II-2.

[80]Frieda S. Shapiro, "Your Liability for Student Accidents," NEA Journal, March, 1965, p. 47.

might not be considered as a tort statute but the effect is the same. Workmen's compensation insurance is to protect the employee and employer from loss caused by accidental injury to the employee arising out of the employee's job. According to Schaerer, only Arkansas, Mississippi, and Oklahoma do not allow or require purchase of this type of protection.[81]

In general, safe-place statutes require the owners of public buildings to construct and maintain them in such a way as to keep them safe while in use. The literature usually mentions Wisconsin and California when discussing this type of statute. New Jersey, to the contrary, provides that no liability shall hold for personal injury from the use of buildings.[82] Workmen's compensation laws would appear to remove some of the need for safe-place statutes.

Liability insurance for transportation is generally approved by state statutes. Only South Dakota, Texas, Alabama, and Mississippi "maintain vigorous immunity" in this area of responsibility.[83] It should be noted that Alabama and Mississippi use a claims court to review and pay damages for meritorious claims against the state.

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[81]Robert W. Schaerer, "Liability, Liability Insurance, and the School Business Manager," The American School Board Journal, July, 1964, p. 6.

[82]Sam M. Lambert and Norman Key, Who is Liable for Pupil Injuries? (Washington, D. C., 1963), p. 27-28.

[83]Robert W. Schaerer, "Liability, Liability Insurance, and the School Business Manager," The American School Board Journal, July, 1964, p. 6.

STATUS OF THE STATES

Unless there is a statute to the contrary, the general common law rule holds that school districts, as governmental agencies, are immune from liability for injuries suffered by pupils, patrons, or employees. This rule of immunity has been challenged again and again, in the courts, in the textbooks, and in the general literature in the field. Only a few years ago, the literature laid heavy stress upon the "three states that had abandoned tort immunity" for school districts. The previous section discussed the results of more recent research which indicates the changes that have occurred. Other studies have been made that support these statements.

Schaerer, in a study of liability and liability insurance for school districts of the United States, divides the states into three groups: (1) Immunity waived, (2) immunity vigorously maintained, and (3) compromise states. He places nine states in category 1 of those states who have waived their immunity by one means or another. Alabama, Arkansas, and West Virginia are grouped as states where full immunity is "vigorously maintained," and 38 states are listed as compromise states where immunity is maintained but purchase of insurance is permitted or required to one degree or another and in one area or another.[84]

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[84]Ibid., p. 5-6.

Table I, "Where We Are Going," shows an historical picture of governmental immunity waiver for school districts from 1859 to 1963. Changes that should be noted include the status of Minnesota which has since been revised by statute and the additions of Arizona by court decision and Alaska by enacted statute. Kentucky, Oregon, and Tennessee are placed in the figure on the basis of waiver by purchase of insurance.

THE "MODERN" THEME

One idea that runs through the court cases and the literature is that of "modern." Does the doctrine fit the needs of modern day society? Molitor v. Kaneland put the question this way:

> Thus we are squarely faced with the highly important question--in the light of modern developments, should a school district be immune from liability for tortiously inflicted personal injury to a pupil thereof arising out of the operation of a school bus owned and operated by said district? (Emphasis added).[85]

Boyer v. Iowa High School Athletic Association has this statement in its text:

> The single error relied on for reversal is the sustaining of the motion in that, it is said, the doctrine of governmental immunity should be abrogated in Iowa as outmoded, harsh and not in keeping with the modern trend of the law. (Emphasis added).[86]

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

[86] Boyer v. Iowa High School Athletic Association, 127 N.E. (2d) 606 (Iowa, 1964).

TABLE I

WHERE WE ARE GOING

IMMUNITY WAIVED

Year	Court Decision	Statute	State
1859		X	Washington
1907	X		Washington
1907	X		New York
1937		X	New York
1923		X	California
1933	X		Tennessee
1936	X		Tennessee
1945	X		Tennessee
1938		X	New Jersey
1942		X	Alabama (Board of Claims)
1942		X	Mississippi (Board of Claims)
1942	X		Kentucky
1945		X	Connecticut
1955		X	Wyoming (Save Harmless)
1955		X	Oregon (Save Harmless)
1957		X	Hawaii
1959	X	X	Illinois
1959		X	Massachussetts (Save Harmless)
1962	X		Wisconsin
1963	X		Minnesota

Table I is adapted from the American School Board Journal, July, 1964, p. 7, and is used by permission of the Bruce Publishing Company.

These are only two examples but they do not stand alone. The decisions of the courts, in reference to governmental immunity, time after time contain such phrases as "archaic," "anachronism," "antiquity," and so on.

One classic observation on the doctrine states:

> It is almost incredible that in this modern age of comparative sociological enlightenment,...(the doctrine) should exempt the various branches of the government from liability for their torts... (Emphasis added).[87]

Commenting on the liability of governments, the Yale Law Journal stated:

> ...the rules relating to the liability of...quasi-corporations...have remained stagnant in the face of great social and even legal changes... (Emphasis added).[88]

A textbook raised the question in this manner:

> Is the common law doctrine of nonliability justified in modern American society? (Emphasis added).[89]

Another textbook stated:

> Because governmental immunity has been considered inequitable under modern conditions, courts sometimes try to find a way around it. (Emphasis added).[90]

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[87]American Law Reports, Annotated (Second Edition, Vol. 75, Rochester, 1961, p. 1196.

[88]"Governmental Liability in Tort," Yale Law Journal, XXXIV (1925), p. 45.

[89]Roe L. Johns and Edgar L. Morphet, Financing The Public Schools (Englewood Cliffs, 1960), p. 195.

[90]Madaline K. Remmlein, "Tort Liability of School Districts, Boards, and Employees," Law and the School Business Manager, ed. Lee O. Garber (Danville, 1957), p. 196.

In an article on governmental-proprietary functions pointing out the desirability of legislative help to clear up the confusion surrounding the theory, Chaflin stated the belief:

> The modern tendency is all in this direction and it would seem the Kansas legislature would do well to enact legislation which would bring about this desirable result. (Emphasis added).[91]

Shapiro stated it this way in her article on pupil injuries:

> ...governmental immunity...has no place in modern day society. (Emphasis added).[92]

Garber, in an analysis of the Molitor v. Kaneland decision, believes that:

> All through the report of the case there is evidence that the court disregarded precedent in favor of timeliness. (Emphasis added).[93]

Governmental immunity, based on the common law concept, is having to meet a challenge from legal writers and from the courts in the form of the "modern society" concept.

IMMUNITY IN CIVIL LAW COUNTRIES

The civil law countries of Europe generally hold governmental agencies liable for the negligent acts of their employees as contrasted to the nonliability doctrine used

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[91]O. Q. Chaflin, "The Distinction Between Governmental and Proprietary Functions of Municipal Corporations," Kansas Bar Association Journal, IV (1934), p. 280.

[92]Frieda S. Shapiro, "Your Liability for Student Accidents," NEA Journal (Washington, D. C., March, 1965), p. 47.

[93]Lee O. Garber, 1962 School Law Yearbook (Danville, 1962), p. 198.

in the United States. Even the common law country from which the immunity doctrine originated has adopted the concept of liability for governmental agencies.

The Yale Law Journal stated that "in most of the countries of Europe, the risk should be borne by the community and not by the unfortunate victim alone."[94]

In England, it was established in 1890 that a school board or school district was responsible to suits in tort for personal injuries on the same basis as a private individual or corporation. Nonimmunity has continued to be the law to the present time.[95]

In Germany, the official of the government is held accountable for negligence for injuries to another in the scope of his duties. However, in reality, the state assumes the responsibility because:

> ...the socially felt need of providing a certain source of payment...Article 34 of the Basic Law of the West German Federal Republic provides...'the responsibility therefor attaches primarily to the State or public body in the service of which the official stands.'[96]

In France, almost complete governmental liability holds since:

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[94]"Governmental Liability in Tort," Yale Law Journal, XXXIV (1925), p. 9.

[95]American Law Reports, Annotated (Second Edition, Vol. 160, Rochester, 1961), p. 84.

[96]"Sovereign Responsibility and the Doctrine of Sacrifice," University of Chicago Law Review, XXIV (1957), p. 514-515.

> In French law the sacrifice doctrine is being carried to its logical extreme and most injuries traceable to fault (are covered)...[97]

Thus France and Germany, civil law countries, and England, a common law country, have adopted the concept of governmental liability.

CHARITABLE INSTITUTION IMMUNITY

A discussion of the tort liability of charities is included because of the similarities to governmental immunity. In addition, a charitable institutional immunity case is cited in a case involving school district immunity in one of the states considered later in the study.

In those states where charitable institutions have immunity from tort liability, these reasons are the most commonly given to explain their immunity:

> (1) the trust fund theory; (2) the theory that charities are exempt from the doctrine of respondeat superior; (3) the theory that privately conducted charities are performing functions that would otherwise devolve upon the government and therefore the same immunity should apply; (4) the theory...(of) assumption of risk; and (5) the public policy theory.[98]

Reason number 3, by itself, would seem to necessitate consideration of charitable immunities in connection with that of governmental immunity. Fuller and Cosner state that:

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[97]Ibid., p. 518.

[98]Ratheul L. McCollum, "Torts of Administrative Personnel of Hospitals," Personal Injury Commentator, March, 1960, p. 18. Quoted material is from "Editor's Note."

> The doctrine that charities are not liable for torts has had considerable effect on municipal tort immunity...the doctrine of charitable tort immunity has often been closely allied with that of governmental function.[99]

Other reasons for including charitable immunities are the origin of the doctrine (England),[100] its American beginning,[101] and its subsequent rejection in England. These parallel the general historical trend found in governmental immunity. James states that:

> It would seem that the same policy arguments which have led to the widespread destruction of the charitable immunity, must necessarily apply with equal force to governmental immunity.[102]

He goes on to discuss the invalidity of each of the reasons used for charitable immunity and concludes that "the trend toward liability represents public policy which is keeping pace with the times."[104]

A later article on tort liability shows that Kansas has abrogated the doctrine that private schools are immune from

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[99]Edgar Fuller and James Cosner, "Municipal Tort Liability in Operation," Harvard Law Review, XL (1941), p. 441.

[100]Heriot's Hospital v. Ross, 12 Clark and Fin. 507, Eng. Rep. 1508 (England, 1846).

[101]McDonald v. Massachussetts General Hospital, 21 Am. Rep. 529 (Massachussetts, 1876).

[102]Merrit E. James, "Tort Liability for Governmental Functions," Nebraska Law Review, XLII (1963), p. 720.

[103]John L. Rader, "Tort Liability of a Charitable Institution for the Negligent Acts of its Agents," Kansas Bar Association Journal, XIX (1951), p. 369.

[104]Ibid., p. 374.

suit for personal injuries because they are charitable institutions. A factor involved in the abrogation is the "possibility of obtaining insurance would seem...to justify the break with the previous authority."[105]

An analysis of the status of charitable immunity as contained in the editorial comment in the Personal Injury Commentator shows that:

> ...twenty-one of the states have an immunity rule in one form or another; in twenty two states and the District of Columbia the charity is not immune; in three states the immunity rule is adhered to unless there is... insurance; while four states have not, as yet, had the matter arise.[106]

SUMMARY

In relation to school district tort liability, the literature reveals that courts have gone through the periods of (a) creation and perpetuation of immunity, (b) the modification of the rule of immunity by exceptions and (c) abrogation of the rule of immunity. Court suits against school districts are on the increase. Dollar amounts collected in these suits have also risen.

Components needed for consideration of bodily injury liability are those that are used for negligence. Commentators indicate that there is no liability without

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[105]Harold E. Hanson, "Schools and Teachers--Tort Liability in our Changing Society," Kansas Law Review, VIII (1959), p. 126.

[106]Ratheul L. McCollum, "Torts of Administrative Personnel of Hospitals," Personal Injury Commentator, March, 1960, p. 17.

negligence. A wrongful act or a failure to act may also lead to liability.

The law of tort liability for governmental units, as reported in the literature, is in a state of conflict and confusion. According to common law, it is a general rule that school districts are exempt from liability for tortious acts. Literature on the subject is universal in condemnation of the general rule.

Exceptions to the general rule of immunity (not including comprehensive statutory liability) are reported as a means to by-pass common law immunity and could be considered steps toward full liability. Nuisance has been used successfully for claims for property damage but less successfully for personal injury claims.

School district policies and state board of education rules and regulations do not now generally include policies that prepare for tort liability.

The reasons used to support school district or other governmental unit immunity are being challenged by definite counter reasons both in the literature and in the courts. Special stress is laid upon the idea that the doctrine of governmental immunity does not fit "modern" times nor "modern social or educational beliefs."

Many of the commentators favor shifting the burden of the cost of tort injuries so that it is borne by the community rather than by the victim alone. Liability insurance, properly authorized, is proposed as a method of providing protection for those injured by school district

negligence. Unauthorized liability insurance is reported as being purchased by school districts.

Proposals are advanced in the literature that judgments for injury claims in tort should be considered a legal part of the cost of public education and that proper arrangements be made for them either at the district level or at the state level through insurance or other means. One fourth of the states now provide for settling claims due to school district negligence.

America uses governmental immunity as a general rule while the motherland of their common law system, England, and the civil law countries of Europe are using governmental liability.

The doctrine of immunity for charitable institutions from tort liability uses many of the same reasons to infer immunity as does the doctrine of governmental immunity. Charitable institutional immunity parallels governmental immunity in reasons, conception and usage. One main reason given for using charitable immunity is governmental immunity. Charitable institutional immunity is being abrogated or modified in many states.

CHAPTER IV

KANSAS SCHOOLS AND TORT LIABILITY

The average citizen of Kansas is likely to believe that he has protection from any injury by state action. He looks to the federal and state constitutions as his guardians. To a large extent this belief is well founded, but gaps do exist in this belief. Injuries may occur from torts committed by the state and its agents with governmental immunity preventing collection of damages for the injury. Many have protested against the evils of governmental immunity for school districts. Progress in changing governmental immunity has been slow.

The problem is not one of diminishing importance. The increase in the volume of pupils and the variety of school district activities at all levels has, in fact, made the problem more urgent.

The purpose of this chapter is to investigate bodily injury tort liability for school districts of Kansas and to note changes in the doctrine that may have occurred through the years. Data were secured through an historical investigation of the state Constitution, case law, statutory enactments, and recorded opinions of the attorney generals. Related areas, where applicable, were also studied. Data are summarized at the end of the chapter.

SCHOOL STRUCTURE IN KANSAS

It is recognized that the education of the school children of any state is the responsibility of that state, and one of its most important responsibilities. The federal government does not, nor can it, maintain a national system of schools.

The Kansas Constitution recognizes the responsibility of the state for the education of its children and directs the legislature to promote intellectual training at all levels.

Kansas and many other states received a large grant of land from the public domain at the time of their admission to statehood to be used for the support of education.

The Organic Act of Kansas Territory provided:

> That when the lands in the said territory shall be surveyed under the direction of the government of the United States preparatory to bringing the same into market, sections numbered sixteen and thirty-six in each township in said territory shall be, and same are hereby, reserved for the purpose of being applied to schools in said territory and in the states and territories hereafter to be erected out of the same.[1]

The Constitution of Kansas has several sections related specifically to schools:

> The legislature shall encourage the promotion of intellectual, moral, scientific and agricultural improvement, by establishing a uniform system of common

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[1] "Organic Act of Kansas Territory," General Statutes of Kansas, 1949, p. XXXVII, Section 34.

> schools, and schools of higher grade, embracing normal, preparatory, collegiate and university departments.[2]

School lands are taken up in Section 1 of the Ordinance of the Constitution[3] as required by the Organic Act. Disposition of proceeds of the sales of public lands are outlined in Sections 6 and 7.[4]

Article 6, Section 1 of the Constitution mentions state and county superintendents of schools. A state permanent school fund is created in Article 6, Section 3 and the apportionment of income for schools and its application follows in Sections 4, 5, and 6. The schools are to be nonsectarian according to Section 8.[5]

The subdivision of the state into school districts for the propose of maintaining common schools is not directly required by any provision of the Constitution. The state legislature in 1861, finding a system of local schools already established in many communities, accepted the situation and devised a state system of districts based upon the plan used in Missouri and to be laid out by the county superintendent as the public domain was settled in each county.[6]

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[2]Constitution of Kansas, General Statutes of Kansas, 1949, p. LXII.

[3]Ibid., p. XXXVIII.

[4]Ibid.

[5]Ibid., p. LXII, LXIII.

[6]Interview with W. C. Kampschroeder, Assistant State Superintendent, July 13, 1965.

It is well to keep in mind that the state of Kansas is a unit for all purposes of public education. The key words in the state Constitution are "a uniform system of common schools."[7]

The first State Board of Education was established in 1915.[8] Thus it has long been the policy of the state that educational policy-making be vested in and determined by a state board of education rather than by a single officer.

The present State Department of Public Instruction, more commonly called the State Department of Education, was created by statute in 1945.[9] This statute revised the structure of the Department as it was first created in 1915.[10] Its duties are to administer the state-wide school laws and to bring uniformity by supervising the state school system. The Department consists of the State Superintendent of Public Instruction and the State Board of Education and certain subordinate administrative officers heading its several organized divisions or departments.

County superintendents are the second state school official position provided in the Constitution. This officer, although nominated and elected on a county basis,

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[7]Constitution of Kansas, General Statutes of Kansas, 1949, p. LXII.

[8]Laws of Kansas, 1915, Chapter 296, Section 1.

[9]Laws of Kansas, 1945, Chapter 282, Section 2, G. S. 72-106.

[10]Laws of Kansas, 1915, Chapter 296, Section 1, G. S. 72-101.

is a state school officer, with statutory duties going back to 1861.[11]

Common schools are provided for by statute:

> Every common-school district shall be a body corporate and shall possess the usual powers of a corporation for public purposes...[12]

Provisions are also made for city schools[13] and high schools[14] with the present trend to place all districts into a unified school system of grades K-12.[15]

SCHOOLS AS STATE AGENCIES

Education of the school children of the state is the responsibility of the state. A school district is an agent of the state, responsible for performing a special function of the state. The Constitution of Kansas states that "the legislature shall encourage the promotion of intellectual... improvement by establishing a uniform system of common schools..."[16] The promotion of intellectual and moral improvement is thus mandatory upon the state.[17]

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[11] Laws of Kansas, 1861, Chapter 76, Section 1.

[12] General Statutes of Kansas, 1949, G. S. 72-302. The base of this statute is from Laws of Kansas, 1861, Chapter 76.

[13] Ibid., G. S. 72-1612.

[14] Ibid., G. S. 3501.

[15] Laws of Kansas, 1963, Chapter 393, Section 1.

[16] Constitution of Kansas, General Statutes of Kansas, 1949, p. LXII.

[17] State v. Kemp, 261 P. 556 (Kansas, 1927).

The state legislature may determine the agency to control schools established throughout the state.[18] School boards are the managing authority of the school district corporation.[19] The very existence of or creation of a school district depends upon state statute.[20] State legislatures have plenary power over school districts, their creation, their structure, and their continuance.[21] School districts are subject to legislative modification or dissolution[22] and statutes provide the method for forming and changing boundaries of school districts.[23] State legislatures may pass any act not expressly or impliedly forbidden by fundamental law.[24]

Another court case puts it differently by stating that acts of school districts are not committed for private advantage but "to promote the general welfare through education of the young, a sovereign function..."[25]

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[18] State v. Freeman, 58 P. 959 (Kansas, 1899).

[19] Conklin v. School District No. 37, 22 Kan. (2d) 364, 367 (1879).

[20] State v. Sumner County School District No. 2, 209 P. 665 (Kansas, 1899).

[21] State v. School District, 185 P. (2d) 677 (Kansas, 1947).

[22] State v. French, 208 P. 664 (Kansas, 1922).

[23] State v. Rural High School District, 117 Kan. 332, 335, 231 P. 337 (Kansas, 1924).

[24] State v. Chetopa, 252 P. (2d) 859 (Kansas, 1922).

[25] McGraw v. Rural High School, 120 Kan. 413, 414 (1926).

TRUE AND QUASI-MUNICIPAL CORPORATIONS

Cities, counties, townships, and school districts are all created by the state and act as local agents to perform assigned state functions for its citizens in an orderly and convenient manner.

QUASI-CORPORATIONS

School districts, counties and townships are not full corporations in the sense that cities are corporations. While counties, townships, school districts, and cities are each endowed with certain corporate powers, only cities are municipal corporations in the strictest meaning of that term.[26] In Kansas, a school district is held to be "a body corporate but is classified only as a quasi-corporation."[27]

The case of Beach v. Leahy distinguished between municipalities and quasi-municipalities. In discussing whether a statute authorizing action by only one school district within the state was a special act and thus unconstitutional, the court stated:

> Article 12...is entitled 'Corporations,' and wholly devoted to provisions concerning them. As to all organizations covered by its terms its provisions are absolute, and the section binding. No corporate powers can be given them by special act. The question is whether school districts are corporations within the meaning of the term used in this article. Cities, towns

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[26] Eikenberry v. Township of Bazaar, 22 Kan. 556 (1879).

[27] Woodson v. School District, 127 Kan. 651, 654 (1929).

> and villages, municipal corporations proper, are included. This has already been decided in this court.[28]

The court then discussed Section 5 of Article 12 of the Kansas Constitution which names certain public corporations which, in the same manner as private corporations, may not be the subject of special legislation but then stated:

> ...with reference to counties, townships, and school districts, the case is different. True, they are called in the statutes, bodies corporate. Yet they are denominated in the books, and known to the law, as quasi-corporations, rather than as corporations proper... This distinction between quasi-corporations and corporations proper is no new thing, nor of recent recognition.[29]

In the case of Eikenberry v. Township of Bazaar, the court said of quasi-corporations that:

> The theory...is...that such organizations, though corporations, exist as such only for the purpose of the general political government of the state..."[30]

The court commented in the State v. Wyandotte County Commissioners case that "a county is a governmental agency and not a corporation as is a city..."[31]

Quasi-municipal corporations, such as counties, school districts, and townships, are created as local agencies of the state to carry out the state's governmental functions.

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[28]Beach v. Leahy, 11 Kan. 28, 31 (1873).

[29]Ibid., p. 32.

[30]Eikenberry v. Township of Bazaar, 22 Kan. 389, 391 (1879).

[31]State v. County Commissioners, 140 Kan. 744, 748 (1934).

TRUE MUNICIPAL CORPORATIONS

Cities are created primarily to carry out the functions of local government.[32] Cities are not limited, however, in their powers and duties to local functions but may also be required to do state governmental functions as well:

> Municipal corporations are primarily created to perform the functions of local government, but they are also created as agencies of the state for governmental purposes.[33]

True municipal corporations operate under dual roles. With one role, they act as an arm of the state but in the second role, they exercise the powers of a private corporation.

> The functions of a municipality performed in its sovereign capacity are ordinarily called governmental; those exercised in its individual corporate capacity are commonly called proprietary or municipal.[34]

LaClef v. Concordia defines the functions of a municipality in this manner:

> The distinction between an act done by a city in a public capacity and as a part of the political subdivisions of a state, and for an act done for its private advantage, and relating to things in which the state at large has no interest, is clearly defined and is well recognized.[35]

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[32] Mankato v. Jewell County Commissioners, 125 Kan. 674 (1928).

[33] State v. City of Lawrence, 79 Kan. 234 (1909).

[34] Krantz v. Hutchinson, 196 P. (2d) 227, 228 (Kansas, 1948).

[35] LaClef v. Concordia, 41 Kan. 323, 325 (1898).

SCHOOL TORTS IN COURT

The first bodily injury liability case for schools in the Kansas courts was the McGraw v. Rural High School case in 1926.[36] Prior to this, however, a number of tort cases for other quasi-municipalities were considered. Discussion of these cases are necessary to build the foundation of the doctrine of governmental immunity for school districts in Kansas.

Eikenberry v. Bazaar concerned an action to recover damages for personal injury due to the impassibility of a public highway under the maintenance of the township of Bazaar. The township was held not liable since:

> ...all the powers with which they are entrusted are the powers of the state, and all the duties with which they are charged are the duties of the state; that in the performance of governmental duties, the sovereign power is not amenable to individuals and therefore these organizations are not liable at the common law for such neglect and can only be made liable by statute.[37]

In another action to recover damages to a herd of cattle injured while crossing a defective bridge, the court stated:

> If the writer of this opinion deemed the question an open one in this state, and felt at liberty to pass upon the subject solely in accordance with sound reason, he would deny the liability of even cities in neglecting to exercise their control and care over streets

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[36] McGraw v. Rural High School, 120 Kan. 413 (1926).

[37] Eikenberry v. Bazaar, 22 Kan. 389, 391 (1879).

> and sidewalks, or for their imperfect execution of such power.[38]

The decision went on to hold the county not liable:

> In the absence of a liability expressly declared by statute, a county is not liable for damages accruing from defective highways or public bridges.[39]

A later case in the federal courts with an exhaustive review of earlier decisions affirmed the decisions given in the Beach v. Leahy case (status of quasi-corporations), and the Eikenberry v. Bazaar and Marion County v. Riggs cases.[40]

A contractual tort of a school board was considered in 1898. The board of education had failed to take a bond from a building contractor as required by statute and, during construction, the contractor became insolvent and unable to pay his bills. A lumber company tried to collect its bill from the district and cited the unfulfilled duty of requiring the bond as reason to hold the district liable. The court found the board not liable and stated:

> A quasi-corporation, like the board of education of a city, is never liable for the consequences of a breach of public duty or neglect or wrong of its officers unless there is a statute expressly imposing such liability.[41]

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[38] Marion County v. Riggs, 24 Kan. 188, 190 (1880).

[39] Ibid., p. 188.

[40] Travelers Insurance Co. v. Township of Oswego, 59 F 58 (1893).

[41] Lumber Company v. Elliott, 59 Kan. 42 (1898).

When a quasi-corporation rented privately owned property for a court house and through neglect the building was burned, the decision was different. In this instance, the court held that decisions reached in the Marion County v. Riggs and the Lumber Company v. Elliott cases did not apply.

> In those cases, the violated duty was public and general, not specific and particular...It was a political and administrative duty, due alike to all individuals; not a contractual duty, due to a single individual.[42]

At a later date, the court held that the rule of respondeat superior does not apply to quasi-corporations.[43]

McGraw v. Rural High School was an action for bodily injury damages that held the school district not liable. In this case, Kansas schools were placed squarely into the middle of governmental immunity even while at the same time the court thoroughly condemned the doctrine. Several important principles were stated in this case. The construction of school buildings was affirmed as an indispensable governmental function. A contract of employment does create a relation of master and servant but not for private advantage when school districts are involved. The court stated that the school district is not liable due to the doctrine of governmental immunity and then criticized the doctrine by stating:

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[42] Williams v. Kearney County Commissioners, 60 P. 1046, 1047 (Kansas, 1900).

[43] Womack v. Lesh, 180 Kan. 548 (1957).

> If the doctrine of state immunity in tort survives by virtue of antiquity alone, it is an historical anachronism, manifests an inefficient public policy, and works injustice to everybody concerned, the legislature should abrogate it. But the legislature must make the change in policy, not the courts.[44]

The 1950 case of Thurmond v. Consolidated School District was the next school suit in tort. This case had an interstate flavor with a question of jurisdiction. The complaint was filed by residents of Arizona against a school district of Oklahoma and a car owner from Kansas. A school bus was being used to transport Oklahoma high school students through the state of Kansas to an auto race in Indiana when the accident occurred with a car from Arizona and a car from Kansas. Action was brought through the Secretary of State of Kansas in federal courts which held:

> ...acceptance by a non-resident person of the rights and privileges...to operate motor vehicles on the public highways of Kansas is to be deemed...appointment of the secretary of state...as his agent.[45]

However, governmental immunity would still hold if certain conditions were met. The court stated that a foreign:

> ...school district could assert governmental immunity from suit outside of the state of which they were a political subdivision.[46]

Further than that, another defense could be used to prevent liability:

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[44]McGraw v. Rural High School, 120 Kan. 413, 414 (1926).

[45]Thurmond v. Consolidated School District No. 128, 94 F. Supp. 616, 619 (1950).

[46]Ibid., p. 616.

> ...defendant school district, and defendant members of the school district in their official capacities, could rely on the defense of ultra vires.[47]

In 1951, the court held that school districts could not maintain a nuisance. Although bodily injury was not involved, the case might have application in nuisance suits where bodily injury had occurred.

In Nieman v. Common School District, Niemann asked for an injunction to prevent the school district from permitting the use of or making available to any private group the athletic field belonging to the school district when the use was not directly connected with the school program. The use of the public address system, blowing dust and use of flood lights were contended to be nuisances. The court stated that school boards do have control of the use of school property, that softball is not a nuisance per se, and that only the state may question the board about the use of the property but:

> Quasi-corporations have no more right to create and maintain a nuisance to private individuals than do municipal or other corporations.[48]

In a liability case involving a principal, an agent, and the "guest statute," school district immunity was upheld. The owner of a car loaned it to the school district for the purpose of carrying students to an athletic contest. No rental was involved and the owner's son, also a student

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[47]Ibid., p. 617.

[48]Nieman v. Common School District No. 95, 232 P. (2d) 422, 429 (Kansas, 1951).

of the school, drove the car and several students to the contest. A wreck occurred and one of the passengers sustained bodily injury. She sued for damages claiming that she was under the supervision of the school and an involuntary guest in the car. The decision stated:

> A pupil of a school district who, while under school control and discipline is being transported by school bus or car from her home district to another district to attend an athletic contest as a part of her school's activities...is not a guest in such bus or car...[49]

The court went on to hold the driver of the car personally liable for his own negligence but found the car owner not liable:

> The mere fact that the owner of a motor vehicle may lend it to the school district... does not render him liable for the negligence of the driver...[50]

An action was raised against both the city government and the school district in 1954 for injuries sustained by a pupil who slipped on a floor of the school building because of the slippery condition of the floor caused by water, which was splashed onto the floor by other pupils. Plaintiff contended negligence and the maintenance of a nuisance. The court held the city to be not liable for the conditions of school property and found that wash basins located in school buildings are not nuisances in and of themselves. However, the decision stated that failure to clean up water from the floor around the wash basin

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[49] Kitzel v. Atkeson, 245 P. (2d) 170 (Kansas, 1952).

[50] Ibid., p. 170.

is negligence but governmental immunity applied to the school district.[51]

In 1959, action was brought by the father of a 6 year old boy against the board of education and the custodian of a school in Abilene for injuries suffered when the boy stepped into burning coals resulting from the burning of a tree stump on the school grounds. Charges of negligence and nuisance were contended.

The court held that immunity does not extend to nuisance but that maintenance of the grounds is a governmental function as "opposed to a proprietary function." Boards of education are not responsible for the neglect of an employee and the cloak of immunity does not extend to employees of the district.

In this case, the court made a distinction between negligence cases and cases involving nuisances or proprietary functions. If actionable damages were proven, the school district would be liable for such damages.

> ...the doctrine of immunity does not extend to cases where the conduct of the...school board results in creating or maintaining a nuisance... maintenance of the grounds is a governmental function as opposed to a proprietary function.[52]

An action was brought against the Newton school district when plaintiff was struck on the head by another

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[51] Jones v. City and Board of Education of Kansas City, 271 P. (2d) 803 (Kansas, 1954).

[52] Rose v. Board of Education of Abilene, 337 P. (2d) 652, 655 (Kansas, 1959).

student during recess period. The plaintiff cited inadequate supervision, failure of the board to comply with statutory responsibilities, negligence, and mob action on the school grounds as cause for the action. The court upheld immunity in this case while stating:

> Immunity does not apply where a statute expressly imposes a liability or where the governmental body maintains or creates a nuisance or is performing a proprietary function.[53]

Concerning the use of the "mob" statute (G. S. 1949, 12-201) as an actionable cause against school districts, the court felt that:

> ...all that need be said about this contention is that the legislature saw fit to limit the application of the...statute to incorporated cities and towns.[54]

GOVERNMENTAL AND PROPRIETARY FUNCTIONS

Many municipal functions have been classified by the Kansas courts as proprietary while a larger number have been placed in the governmental category. There are probably many functions which have not yet been classified by the court in cases involving tort liability. Direct statements on proprietary functions for schools, other than that proprietary functions exist for schools, are not to be found in the decided cases and only one case attempts to define activities of schools that might not be considered educational.

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[53] Koehn v. Board of Education, 392 P. (2d) 949, 951 (Kansas, 1964).

[54] Ibid., p. 951.

A discussion of municipal decisions may be helpful in understanding governmental-proprietary distinctions in Kansas. The court in the case of Krantz v. Hutchinson stated:

> The cases involving the question are legion, and are replete with conflict and inconsistencies. In many cases it may, perhaps, be said that particular acts partake of both characteristics. Each situation should be approached in the light of the fundamental purpose of the distinction (between governmental and proprietary functions).[55]

In State v. Lawrence, the court commented that:

> Municipal corporations are primarily created to perform the functions of local government, but they are also created as agencies of the state for governmental purposes.[56]

In Beach v. Leahy, the dividing line between the two functions was described by the court as being very narrow:

> In theory, the two classes of powers are distinct; but the line which separates the one from the other is often very difficult to trace.[57]

The delineation mentioned in Krantz v. Hutchinson is that:

> All functions and activities of a municipality not strictly governmental in character are to be classified as proprietary.[58]

Governmental functions of a local governmental unit are those performed as a branch or arm of the state government

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[55] Krantz v. Hutchinson, 196 P. (2d) 227, 232 (Kansas, 1948).

[56] State v. Lawrence, 79 Kan. 234 (1909).

[57] Beach v. Leahy, 11 Kan. 23, 33 (1873).

[58] Krantz v. Hutchinson, 196 P. (2d) 227, 228 (Kansas, 1948).

in carrying out the functions of the state. Proprietary functions are those of a purely local, semi-private nature for local and special corporate benefit or profit:

> The distinction between an act done by a city in a public capacity and as a part of the political subdivisions of a state, and for an act done for its private advantage, and relating to things in which the state at large has no interest, is clearly defined and is well recognized.[59]

The distinction seems clear but the application of the rule becomes difficult. Proprietary functions that have been classified as such by the court include municipal light and power plant operation,[60] waterworks,[62] ultra vires construction outside city limits,[63] lease of a city levee for commercial purposes,[64] or the operation of steam boilers to heat municipal water plant and the city building.[65] None of these have any effect on school operations.

There are no decisions in school cases appearing before the court that define or determine what actions are proprietary functions for school districts. However, in State Tax Commission v. Board of Education, the court, in considering

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[59]LaClef v. Concordia, 41 Kan. 323, 325 (1898).

[60]Snook v. Winfield, 144 Kan. 375 (1936).

[61]Perry v. Independence, 146 Kan. 177 (1937).

[62]Wichita v. Railroad and Light Co., 96 Kan. 606 (1915).

[63]Krantz v. Hutchinson, 165 Kan. 449 (1948).

[64]State v. McCombs, 156 Kan. 391 (1943).

[65]McCormick v. Kansas City, 127 Kan. 255 (1929).

whether receipts from school activities for which admission is charged are exempt from the sales tax, decided that the "legislature has explicitly authorized a board of education to engage in athletic or other recreational activities." The court went on to state:

> We need not now decide just where the line is that determines where the expenditure passes beyond an educational purpose, but we are clear that purchases of athletic goods, confectionary and soda pop for resale were not expenditures for educational purposes. And in connection with the Girl Reserves and Hi-Y activities, we have no difficulty in determining that using a part of its funds for the purpose of defraying the expense of parties and picnics and for the purchase of gifts for some unnamed recipient lacks much of being an educational purpose, and the same may be said concerning the use of activity funds for the purpose of an all-school party. Another activity is school dances limited generally to students who pay an admission charge, the total of the admission charges being expended for orchestra, decorations and refreshments. The fact that the dance is given by students for students is in no sense different than if it were given by a social club for its members. The purpose is recreational and for pleasure. If there is educational purpose, it is submerged by the other purposes.[66]

Thus some activities sponsored by or related to schools are not considered educational by the Kansas courts. Included in the activities are goods for resale, parties, picnics, purchase of gifts, and school dances. Another result of this decision is to require schools to pay sales tax on its purchase of food items used in school lunch rooms.

In the event of a suit for damages due to negligence based on these activities, they might be considered

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[66] State Tax Commission v. Board of Education, 146 Kan. 722, 727 (1937).

governmental or they might not. The decision in the State Tax Commission case indicates they are not considered educational for tax collection purposes. The best answer is that the question has not been spelled out by the Kansas courts.

Court decisions in the cases of Rose v. Board of Education[67] and the Koehn v. Board of Education[68] mention that immunity does not apply to instances where the school district is engaged in proprietary functions, but these functions are not defined.

Governmental functions, related to tort cases that have been claimed for school districts by the court, include repairs to school buildings and the administrative need to require a bond from contractors,[69] the construction of school buildings,[70] athletic contests,[71] control of the use of school property,[72] transport of pupils to athletic contests,[73] maintenance of wash basins in school

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[67]Rose v. Board of Education, 337 P. (2d) 652 (Kansas, 1959).

[68]Koehn v. Board of Education, 392 P. (2d) 949 (Kansas, 1964).

[69]Lumber Company v. Elliott, 59 Kan. 42 (1898).

[70]McGraw v. Rural High School, 120 Kan. 413 (1926).

[71]Nieman v. Common School District, 232 P. (2d) 422 (Kansas, 1951).

[72]Nieman v. Common School District, 232 P. (2d) 422 (Kansas, 1951).

[73]Kitzel v. Atkeson, 245 P. (2d) 170 (Kansas, 1952).

buildings,[74] maintenance of grounds,[75] and supervision of school playgrounds.[76]

SCHOOL STATUTES

The will of the state, in the exercise of its authority over or responsibility for education is expressed in its constitution or in statutes enacted by the legislature. The constitution makes the promotion of intellectual and moral improvement mandatory.[77] Constitutions limit, rather than confer, power and powers. Those powers not enumerated in the constitution remain with the people.[78]

People exercise governmental power through the legislature,[79] or as stated by another court decision, legislative power is vested in the legislative assembly.[80] State legislatures may pass any act not expressly or impliedly forbidden by fundamental law.[81] The creation of municipal corporations is a rightful subject of legislation.[82] The state

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[74]Jones v. Kansas City, 271 P. (2d) 803 (Kansas, 1954).

[75]Rose v. Board of Education, 337 P. (2d) 652 (Kansas, 1959).

[76]Koehn v. Board of Education, 392 P. (2d) 949 (Kansas, 1964).

[77]State v. Kemp, 261 P. 556 (Kansas, 1927).

[78]Lemons v. Noller, 63 P. (2d) 177 (Kansas, 1936).

[79]Manning v. Davis, 201 P. (2d) 113 (Kansas, 1948).

[80]Elliott v. Lochnane, 1 Kan. 126 (1862).

[81]State v. Chetopa, 252 P. (2d) 859 (Kansas, 1922).

[82]State v. Young, 3 Kan. 445 (1866).

legislature has plenary power over school districts, their creation, their structure, and their continuance.[83] The chief arbiter of public policy is the legislature.[84] Legislative power is limited by the Bill of Rights.[85]

Placed in this setting, what do the statutes say in regard to tort liability for Kansas schools?

STATUTES RELATING TO GOVERNMENTAL IMMUNITY

Only two statutes specifically mention schools and immunity. G. S. 72-615 authorizes school districts to purchase motor vehicle liability insurance. It states:

> The governing body of any such school district may purchase motor vehicle liability insurance, driver liability insurance and passenger medical payments insurance for the protection and benefit of those officers and employees of the school district responsible for the operation of such vehicles and of the persons lawfully transported in such vehicles and pay for same out of general school funds for any or all motor vehicles operated, maintained or controlled by such school district. The purchase of such insurance shall not constitute a waiver of the immunity of such school district from any action or suit.[86]

The statute is permissive. It does not place any limits upon the amount of insurance that may be purchased. Liability insurance may be purchased to protect and benefit

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[83] State v. School District, 195 P. (2d) 667 (Kansas, 1947).

[84] State v. Board of Education, 122 Kan. 701 (1927).

[85] Atchison Street Railway Co. v. Mo. Pac. Railway Co., 3 P. 284 (Kansas, 1884).

[86] Laws of Kansas, 1953, Chapter 317, Section 1.

"officers and employees" and "persons lawfully transported" in vehicles "operated or controlled" by the school district. Purchase of transportation liability insurance would not benefit the school district and the school district does not waive its governmental immunity by its purchase.

Schools participating in civil defense activities may rely upon statutory authority for governmental immunity. Any employees of the state or its subdivisions would also be protected except for conditions that are spelled out in the act. G. S. 48-915 provides:

> Neither the state nor any political subdivision of the state, nor the agents or representatives of the state or any political subdivision thereof, shall be liable for personal injury or property damage sustained by any person appointed or acting as a volunteer civilian worker, or member of any agency engaged in civilian defense activity...neither the state nor any political subdivision of the state, nor, except in cases of willful misconduct, gross negligence, or bad faith, the employees, agents, or representatives of the state or any political subdivision thereof, nor any volunteer or auxiliary-civilian defense worker or member of any agency engaged in any civilian defense activity, complying with this act, or any order, rule, or regulation promulgated pursuant to any ordinance relating to blackout or other precautionary measures enacted by any political subdivisions of the state, shall be liable for the death of or injury to persons, or for damage to property, as a result of such activity performed during the existence of such emergency or grave public disaster.[87]

Thus, in civil defense activities, school districts would have no obligations regarding personal injury or property damage regardless of the source of the claim. Neither would

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[87]Laws of Kansas, 1951, Chapter 323, Section 14.

employees, representatives or volunteers be obligated for claims except in case of "willful misconduct, gross negligence, or bad faith."

STATUTES IMPOSING LIABILITY

Only one statute expressly imposes liability on school districts for bodily injury. This is the state's permissive Workmen's Compensation Act. Kansas began workmen's compensation in 1911[88] with revisions periodically to the present date. At first, it applied only to private industry and to workers employed in hazardous work. Regardless of legal right of purchase, municipalities were buying workmen's compensation policies for their employees with litigation eventually resulting from these ultra vires acts.

In 1927, a case was brought to the Supreme Court by a county employee against the county and the insurance company, which had written a workmen's compensation policy covering the employee, to recover for injuries sustained while on the job. The court stated:

> The policy does contain provisions to indemnify the county, defend its suits, pay its losses, etc., and since the county has no liability to plaintiff because of his injury, the insurance company is not liable under those provisions of the policy...The policy itself provides that the direct obligation of the insurance company to the employee 'shall not be affected by the legal incapacity or inability of the board of county commissioners.' So under the wording of the policy itself...There is no necessity for us to pass upon the legal capacity of the county to take out this policy of its

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[88] Laws of Kansas, 1911, Chapter 218, Section 1.

> insurance...The insurance company is bound to the injured employee irrespective of the legal capacity of the county to take and pay for the policy...[89]

The case returned to the Supreme Court a second time and it held that even though the county was not within the terms of the workmen's compensation law, and had no liability to the employee, it did have implied authority to carry workmen's compensation insurance on its road employees.[90]

In 1934, the court held that a county had no authority to elect to use the workmen's compensation insurance.

> Municipalities have only such liability for injuries to their employees as are fixed by the legislature. The legislature has long known the Workmen's Compensation Act did not apply to municipal corporations, and had it intended they should have a right to avail themselves of its rights and privileges for the benefit of their employees, it could have used unmistakable language to that effect. It has not done so...[91]

In 1935, the legislature amended G. S. 44-505 to authorize counties, cities, townships, and schools to elect to use the workmen's compensation insurance even when engaged in governmental functions.[92]

The Kansas legislature provided in a 1931 driver's license law that the state, counties, cities, municipal and public corporations should be liable for negligent

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[89] Robertson v. County Commissioners, 122 Kan. 486, 489 (1927).

[90] Robertson v. County Commissioners, 124 Kan. 705 (1927).

[91] Kopplin v. Sedgwick County, 139 Kan. 837, 841 (1934).

[92] Laws of Kansas, 1935, Chapter 202, Section 1.

driving of motor vehicles by their employees and officers in the scope of their employment.[93] The law was declared unconstitutional because the title contained more than one subject, but not because of lack of power of the legislature to pass such a statute.[94] The Kansas legislature then revised the driver's license law omitting the insurance provision entirely so that it no longer provides a liability insurance requirement for officials and employees of municipalities.[95]

G. S. 12-2603 provides a waiver of immunity for any municipality. In the definitions section of the act, municipalities are defined as "county, township, city, municipal university, drainage district, and any other political subdivision of taxing district of the state."[96] This should include school districts and has been mentioned in opinions by the attorney general's office as applying to school districts. Among other provisions, the act states:

> The governing body of any municipality securing liability insurance as hereinbefore provided, thereby waives its governmental immunity from liability for any damage by reason of death, or injury to person or property proximately caused by the negligent operation of any motor vehicle by an officer, agent or employee of such municipality when acting within the scope of his authority or within the course of his employment. Such immunity is waived only

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[93] Laws of Kansas, 1931, Chapter 80, Section 23.

[94] Cashin v. State Highway Commission, 137 Kan. 744 (1933).

[95] Laws of Kansas, 1937, Chapter 73, Section 1-38.

[96] Laws of Kansas, 1955, Chapter 248, Section 1.

to the extent of the amount of insurance so obtained.[97]

In the 1961 session of the legislature, Senate Bill No. 82 was introduced which would have waived the immunity of the state and all its subdivisions for all purposes.[98] It was refused recommendation for passage. The Judiciary Committee then introduced Senate Bill No. 399 requiring every state agency to purchase insurance with not less than $25,000 liability for bodily injury or death of one person and not less than $50,000 for two or more persons plus $1,000 medical insurance for each person. The bill passed the Senate by a vote of 25 to 10. The House referred the bill to the State Affairs Committee which recommended passage but it was killed by the House Committee of the Whole.[99]

OTHER LEGAL CONSIDERATIONS

School districts have only such power as is conferred upon them by statute, specifically or by clear implication, and any reasonable doubt as to the existence of such power should be resolved against its existence.[100] Under Kansas law, school districts have no power to purchase any type of

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[97] Supplement to General Statutes of Kansas, 1961, G. S. 12-2603, p. 164.

[98] Interview with W. C. Kampschroeder, Assistant State Superintendent, July 13, 1965.

[99] Interview with Richard Foth, Assistant Attorney General, July 13, 1965.

[100] State ex rel. McAnarney v. Rural High School District, 233 P. (2d) 727 (Kansas, 1951).

liability insurance except that expressly authorized by statute. The attorney generals have consistently ruled that purchase of liability insurance other than for bus transportation (by schools) is of doubtful legality.[101]

The Kansas legislature has taken a step in providing insurance protection for students, officers, and employees by permitting school districts to carry liability insurance on their motor vehicles It must be noted, however, that G. S. 72-615 does not require the insurer to waive the defense of governmental immunity of the school district. The statute specifically states that purchase of such insurance shall not constitute a waiver of immunity. G. S. 12-2603, however, calls for a waiver of immunity for municipalities and other subdivisions of the state. There would appear to be a conflict between the two statutes.

Insurance company liability would, however, possibly be upheld on the basis of benefit to the officers, employees, and passengers of school district vehicles. In Elliott v. Behner the plaintiff secured damages from an insurance company, who had sold a liability policy to a county, on the basis of direct liability from the insurance company to the employee. This case was an example of the ultra vires purchase of liability insurance by a county. Injury was sustained by a county employee and the insurance company

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[101]Interview with Richard Foth, Assistant Attorney General, July 13, 1965.

refused payment on the basis of no liability due to governmental immunity of the county. The court stated that:

> ...garnishee is taking the position that it may sell the policy and take the premiums and never be liable, because the only way a county could be liable for the death or injury of anyone would be for them to recover on account of a defective highway. There are, however, provisions in the policy that have been quoted and discussed heretofore, making the garnishee liable for an injury caused by an automobile covered by the policy when it is being driven by someone with the consent of the county. We hold that... this is such a case...[102]

If the policy had not included an agreement to insure the driver, but only to insure the county, the result might have been different. Regardless of the question of authority to purchase liability insurance, which was not answered by the decision, the court held the insurer liable on a policy purchased by a quasi-corporation but with direct benefit to the driver of the car. Since G. S. 72-615 benefits the officers, employees, and passengers of school district vehicles rather than the district, the same principle would appear to apply.

G. S. 44-505 permits school districts to elect to come under the provisions of the Workmen's Compensation Act:

> ...each county, city, school district... of the state of Kansas...may elect to come within the provisions of this act by filing with the workmen's compensation commissioner a written statement of election to accept...[103]

This act is a permissive statute for school districts.

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[102] Elliott v. Behner, 150 Kan. 876, 888 (1950).

[103] Laws of Kansas, 1935, Chapter 202, Section 1.

G. S. 40-2305a allows Federal Old Age and Survivors Insurance for school employees. This act provides a certain protection in case of disability or to survivors should an employee sustain injury or death.[104]

There are no Kansas statutes expressly authorizing schools to purchase insurance for athletes nor is there on record a supreme court decision concerning it. Implied authority might be argued on the basis of the State Tax Commission case[105] or upon the contents of G. S. 72-618 authorizing transportation for school activities including athletic contests.[106] The Kansas State High School Activities Association is given authority to write policies in G. S. 40-202 but it does not engage in this activity.[107]

There is no express statutory authority for school districts to purchase insurance for students injured in class or on playgrounds. However, implied authority might be argued on the basis of a number of statutes including G. S. 72-5201 requiring free dental inspections for all pupils,[108] G. S. 72-5377 requiring vision testing for all pupils every two years,[109] G. S. 72-5501 which includes

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[104]Laws of Kansas, 1955, Chapter 246, Section 6.

[105]State Tax Commission v. Board of Education, 146 Kan. 722 (1937).

[106]Laws of Kansas, 1947, Chapter 359, Section 5.

[107]General Statutes of Kansas, 1949, Chapter 40, Section 2.

[108]General Statutes of Kansas, 1949, Chapter 72, Section 52.

[109]Laws of Kansas, 1959, Chapter 310, Section 1.

nurses within the definition of school employees,[110] G. S. 17-17,104 relating to retirement of school employees and including doctors within the list of eligible employees,[111] G. S. 40-2210 on group sickness and accident policies issued to a "college, school...or principal, who or which shall be deemed the policyholder, covering students, teachers, or other employees,"[112] or G. S. 79-1963 authorizing tax levies to pay any final judgment.[113]

ATTORNEY GENERAL OPINIONS

Opinions of attorney generals have the effect of law if a subject has not been interpreted by the supreme court. If a question has been decided by the court, the opinion of the attorney general should interpret for his questioners according to the recorded decision. Where no court decision has been given in regard to a question, the attorney general gives opinions based on research into statutes, court decisions on subjects related to the question or from similar cases decided in other jurisdictions.[114] Attorney general opinions are guidelines to follow unless reversed by court decisions.

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[110] General Statutes of Kansas, 1949, Chapter 72, Section 55.

[111] Laws of Kansas, 1947, Chapter 384, Section 6.

[112] Laws of Kansas, 1951, Chapter 296, Section 10.

[113] Laws of Kansas, 1933, Chapter 309, Section 19.

[114] Interview with Richard Foth, Assistant Attorney General, July 13, 1965.

School districts are "not liable for damage in actions involving negligence of...such district."[115] This rule of law is based on:

> ...the common-law principle that the state or sovereign is immune to civil suit, extends to municipal corporations and quasi-municipal corporations such as school districts. In the absence of a specific enactment by the legislature imposing liability on a school district for the negligence or other wrongful conduct of its officers and employees, no such liability would exist...An examination of the statutes of Kansas indicated that no such liability has ever been imposed by the legislature. Therefore, we must conclude that there is no such liability resting upon school districts.[116]

Although it is not the oldest recorded Kansas case on liability of quasi-municipalities, the case cited as authority for this belief is Williams v. Board of County Commissioners.[117]

> The quasi-municipal corporation, like the board of education of a city, is never liable for the consequences of a breach of public duty or the neglect or wrong of its officers, unless there is a statute expressly imposing such liability.[118]

The first mention of exceptions to the general rule came in 1958 when nuisance and proprietary functions were inserted into opinions concerning school district liability:

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[115]Letter to J. K. Moser, August 26, 1941; Jay S. Parker, Attorney General.

[116]Letter to W. F. Kuyken, January 17, 1952; Harold R. Fatzer, Attorney General.

[117]Williams v. County Commissioners, 61 Kan. 708 (1899).

[118]Letter to W. W. Ferguson, February 8, 1958; signed by Eugene A. White of the Attorney General's office.

> The Kansas court has noted two exceptions to this general rule (1) that the governmental corporation's immunity does not extend to the creation or maintenance of a nuisance (Nieman v. Common School District, 171 Kan. 237), and (2) the governmental corporation's immunity does not extend to the proprietary functions of a municipality as distinguished from its governmental functions...The Kansas court has placed a very strict construction on the exceptions...[119]

Application of the immunity principle by the attorney general indicates several related statements concerning school district authority and liability. Authority to commit an act or to stay within governmental functions is stressed. School districts have:

> ...only such powers as are conferred upon them by statute, specifically or by clear implication, and any reasonable doubt as to the existence of such powers should be resolved against its existence.[120]

Since school districts are not liable for negligence of its officials or employees, it follows that the "purchase of liability insurance is not authorized" and "payment therefore from school district moneys would be an unlawful expenditure of public funds."[121] By 1958, this unqualified statement on the purchase of liability insurance had been amended by adding:

> School districts are authorized to purchase motor vehicle liability insurance,

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[119]Letter to James H. Rexroad, May 8, 1958; John Anderson, Attorney General.

[120]Ibid.

[121]Letter to W. F. Kuyken, January 17, 1952; Harold Fatzer, Attorney General.

> driver liability insurance, and passenger medical insurance.[122]

School districts do not have "authority to purchase accident insurance on students while on school premises."[123] Since the authority to buy accident liability insurance is lacking, there would be no authority for school boards to settle a pupil accident claim:

> We are likewise unaware of any statute authorizing a board of education to expend public funds in settlement of a claim against a school district. Such authority would be implied where immunity is waived by statute. In the absence of such a statute, we are of the opinion that the expenditure of school funds in settlement of a claim against a school district would be unauthorized.[124]

The question of the school district purchasing liability insurance to cover teachers while on the job must be answered in the negative.[125] Neither can a school board defend an employee in court when accused of negligence.[126]

It would be "improper for the board to pay medical and hospital expense for an athlete injured while at practice" on the school grounds.[127]

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[122]Letter to James H. Rexroad, May 8, 1958; John Anderson, Attorney General.

[123]Letter to Thomas H. Conroy, September 21, 1960; John Anderson, Attorney General.

[124]Letter to James H. Rexroad, May 8, 1958; John Anderson, Attorney General.

[125]Letter to Carl Elvin, June 15, 1964; William Ferguson, Attorney General.

[126]Ibid.

[127]Letter to Irvin H. Myers, December 19, 1961; William Ferguson, Attorney General.

School districts have a statutory duty to provide playgrounds and recreational equipment. There would be no liability to children injured on the playground[128] or for spectators injured in a bleacher accident at an athletic contest since:

> ...a school district is engaged in a governmental function when holding an athletic contest for which admission is charged the general public.[129]

There is no question but that a school district through its governing body can "make reasonable rules and regulations for the safety of children." This authority applies to all school property but:

> ...it is doubtful if such rules and regulations can be extended to govern traffic on the public streets.[130]

School patrols are approved if proper steps are taken. There must be cooperation between school district and city. The school district should not go beyond its authority since:

> There is no express statutory authority authorizing the governing body of a school district to supervise the activities of school children on their way to and from school. It would follow that a school district would have no legal responsibility to provide street patrols...[131]

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[128] Ibid.

[129] Letter to H. D. Richardson, October 24, 1960; John Anderson, Attorney General.

[130] Letter to Don Wilkinson, September 17, 1954; Harold R. Fatzer, Attorney General.

[131] Letter to Adel F. Throckmorton, February 23, 1961; William M. Ferguson, Attorney General.

Civil defense drills hold no liability for school districts by statute but in any case would become a governmental function if authorized by the school board since:

> ...the board of education would have the authority to determine that such tests were educational in character.[132]

The school board cannot bring suit upon patrons or others for assault and battery upon an employee for damages to the employee, but they may "institute such a suit...to recover damages peculiar to the board or school itself."[133] Neither may the board begin a criminal action on the attacker of an employee since:

> ...the person filing such complaint must be an individual who can swear that the facts alleged are true. Therefore, the board could not, as a corporate body, file a criminal complaint although an individual member who has personal knowledge of the facts could.[134]

There would be no liability to the school district for libelous statements appearing in school publications since "it is an agency of the state."[135]

Unqualified immunity for the school board for liability of school torts is indicated by one opinion:

> ...members of a school board are not liable for damages in actions involving negligence

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[132]Letter to Hugh H. Kreamer, February 16, 1961; William M. Ferguson, Attorney General.

[133]Letter to Carl Elvin, June 15, 1964; William M. Ferguson, Attorney General.

[134]Ibid.

[135]Letter to Dorothy Elliott, February 3, 1965; Robert C. Londerholm, Attorney General.

of such district...[136]

Neither would the school board bear responsibility for acts of school employees:

> The members of a board of education would have no personal liability for negligent acts of persons employed by the school district who are performing governmental functions under the general direction and authority of the board. In Wommack v. Lesh, 180 Kan. 548, the court stated:
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> 'It also is a general rule that with respect to governmental functions, a municipal officer performing duties strictly public is not liable for negligent acts of misfeasance of persons employed by the municipality who are under his general direction and authority, the rule being based on the ground that the doctrine of respondeat superior does not apply under such circumstances.'[137]

The first mention of possible board member liability comes in the 1960 and 1961 opinions. In civil defense drills:

> The members of boards of education and the school superintendent would be liable only for their active negligence.[138]

G. S. 72-618 provides for transportation of students to school activities of educational importance. The statute ends with:

> All pupils so transported shall be deemed under school control and discipline and shall in every case be accompanied by suitable school

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[136]Letter to J. K. Moser, August 26, 1941; Jay S. Parker, Attorney General.

[137]Letter to James H. Rexroad, May 8, 1958; John Anderson, Attorney General.

[138]Letter to Hugh H. Kreamer, February 16, 1961; William M. Ferguson, Attorney General.

officials and instructors.[139]

The attorney general believes this requirement could result in liability for board members who might act as sponsors:

> The last sentence of the above quoted statute would require a school official or instructor to accompany students being transported for extra-curricular activities. As heretofore mentioned, said official or instructor would be liable for damages or injuries occasioned by his negligence on such occasions.[140]

The largest number of attorney general opinions pertain to transportation. There is no liability mentioned for the school district and little liability for board members.

> A school district or the members of a school board are not liable for damages in actions involving negligence of such district; however, there is always the possibility that the driver of the bus might be personally liable for any negligent acts in connection with the operation of such school conveyance.[141]

On senior class trips sponsored by the school following their graduation, "no liability rests upon the district."

> Should an injury occur under the circumstances apprehended in your letter, liability would rest on the individual whose negligence or other wrongful conduct was the proximate cause of the injury. However, this negligence would not be imputed to the school district.[142]

It may be desirable to have a signed statement from parents of children who are going on school sponsored trips

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[139] General Statutes of Kansas, 1949, G. S. 72-618.

[140] Letter to L. Carl Cox, June 6, 1960; John Anderson, Attorney General.

[141] Letter to J. K. Moser, August 26, 1941; Jay S. Parker, Attorney General.

[142] Letter to Charles L. Williams, March 25, 1952; Harold R. Fatzer, Attorney General.

in school owned vehicles but:

> ...I doubt that such a consent would serve to relieve persons responsible for injuries to the child from liability. I doubt that the act of the parent under those circumstances would be construed to prejudice the rights of the child.[143]

The signed statement of consent to go on the activity "would not be binding on the child." However, it still should be obtained since "such a release...indicates that consent has been given and for this reason would be desirable."[144]

Where a school bus had an accident that injured a passenger and a third party and the driver is guilty of ordinary negligence:

> ...municipal corporations in the performance of governmental functions are not liable for the torts of their employees. Regarding the liability of the driver of the school bus, we are unable to find any Kansas case specifically dealing with drivers of school buses. However,...decisions of the Supreme Court of Kansas recognize the liability of municipal employees for their own acts of negligence.[145]

The legislature appears to have given a qualified consent for action against the school district in certain instances:

> A school district acting by its district board may waive the governmental immunity from liability for any damage by reason of negligent operation of a school bus by an officer, agent or employee of the school district when acting within the course of his employment. However, it must be observed, this immunity is waived

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[143]Ibid.

[144]Letter to Eugene B. Oates, May 31, 1961; William M. Ferguson, Attorney General.

[145]Interoffice Memorandum, March 19, 1953.

only to the extent of the amount of the insurance. (See 12-2603, 1957 Supp. to G. S.).[146]

Where the school board contracts to have its students transported by an outside agent or company, there is no liability to the district or the board members.

> We believe the school board members, also the school district itself, is immune from liability and cannot be sued unless it has waived its immunity by...(G. S. 12-2603).[147]

A school district does not have legal right to rent school buses to a city for summer recreational purposes. School district powers are limited to those based on statutory enactments:

> School districts have only such power to use transportation facilities as may be found in the statutes...We are not aware of any statute which would authorize a school district to rent school buses to a city recreation commission and in the absence of authority therefore, it is our opinion that such a rental arrangement would not be authorized.[148]

If injury occurs on a class project such as driver's training or vocational agriculture trips, the same principles used for bus transportation would hold. Legal liability would not change. The school district has authority to do such activities as an educational endeavor but in any case:

> The school activities enumerated in the... statute are not to be considered exclusive of

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[146]Letter to Harold Pellegrino, June 9, 1958; Stanley Taylor, Assistant Attorney General.

[147]Ibid.

[148]Letter to Glenn F. Mitchell, January 25, 1960; John Anderson, Attorney General.

> other type of school activity, and the result would not be changed if the transportation was being provided for a class project such as a driver's training or vocational agriculture course...[149]

The adequacy of an insurance policy is a matter for school determination since:

> Policies of insurance are contractual in nature and whether adequate protection was afforded under such policies of insurance would depend upon the terms and provisions of the policy or policies involved and the limits of the coverage.[150]

SUMMARY

The school district, in Kansas, has not appeared in the courts in the field of torts to any great extent, but there are indications that would point to greater activity. Mass transportation of pupils to centralized educational facilities, multiplication of vocational courses, additional student growth, increased emphasis on physical educational activities and many other increased responsibilities add to the chance of bodily injury.

The Kansas Supreme Court has held that school districts are agencies of the state created to furnish a governmental function of the state to a local area. They have been held to be quasi-municipal corporations, not true municipalities in the same sense that cities are municipalities. Kansas court decisions hold that quasi-municipalities do not have

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[149]Letter to Eugene B. Oates, May 31, 1961; William M. Ferguson, Attorney General.

[150]Ibid.

liability in tort since they are state agencies with state governmental responsibility.

Kansas Supreme Court decisions have adhered to the governmental immunity rule for school districts although the court has accepted two changes in the idea of non-liability for school districts by making them liable for the creation and maintenance of nuisance and by recognizing the distinction between governmental and proprietary functions and stating that school districts would be liable for tortious acts resulting from proprietary acts.

School districts have been held not liable by the Kansas Supreme Court for the breach of public duty or neglect or wrong of public officers unless the liability is statutorily imposed. Governmental immunity holds for ultra vires acts. Respondeat superior does not apply to school districts. However, school districts may not create or maintain a nuisance and they may be held liable for tortious acts committed in proprietary functions. School districts are not liable for libelous statements appearing in school publications. Extra-curricular activities, if authorized by the school board, are governmental functions. Civil defense practice is exempt from liability by statute.

The Workmen's Compensation Act is the only statute that expressly imposes liability for injuries upon the school district. Workmen's compensation insurance is a permissive statute for school districts.

School districts have the right to purchase motor vehicle liability insurance, driver's liability insurance,

and medical payments insurance to benefit officers, employees, and passengers transported by school district vehicles. Purchase of transportation liability insurance does not waive the immunity of the district.

Purchase of liability insurance, other than that for motor vehicles, is not expressly allowed by statute and, if purchased, may be considered an ultra vires act. School districts may not buy liability insurance to cover teachers nor defend them in court for their negligence. Injury claims by students may not be paid by the school district.

School districts may take their graduates on a senior class trip and maintain immunity. Parentally signed permits to participate in these or other school activities apparently does relieve the sponsor's responsibility to the parent but not to the student; immunity would still hold for the school district.

According to an opinion of the Kansas Attorney General, there is no statutory authority for school districts to supervise children on the way to and from school. School districts have no legal authority or responsibility to furnish school patrols and, although approved under certain conditions, any regulations for traffic control is the responsibility of the city and not of the school district.

The Kansas Supreme Court has determined that cities are not liable for activities on school district grounds.

Foreign school districts using Kansas highways have been permitted the defense of governmental immunity or ultra vires for claims based on negligence.

CHAPTER V

ILLINOIS SCHOOLS AND TORT LIABILITY

Illinois, in the past, has had the protection of governmental immunity for its schools. In 1959, this immunity ceased at the time of the Molitor v. Kaneland Community Unit School District case when the Illinois Supreme Court found the common law doctrine "unsound and unjust under present conditions" and awarded a personal injury damage claim to a student upon a complaint alleging negligent bus operations of the school district.

The purpose of the chapter is to trace the chain of events in the development of governmental immunity for Illinois school districts and the later abrogation of the doctrine. Data were secured through an investigation of the constitution, statutes, and court cases. The information is summarized at the end of the chapter.

SCHOOL STRUCTURE IN ILLINOIS

Authority for the establishment of a public school system comes from the constitution and the legislature of the state of Illinois must maintain them at public expense. The General Assembly of the state shall provide a "thorough and efficient system of free schools whereby all children

of this State may receive a good common school education."[1] Articles VIII, Section 1 of the Constitution becomes:

> ...a mandate to the legislature to exercise its inherent power to carry out a primary, obligatory concept of our system of government, i. e., the children of the State are entitled to a good common-school education, in public schools, and at public expense.[2]

A constitutional requirement that the legislature provide a free school system is not a grant of power, but a limitation thereon.[3] The constitutional provisions relative to free public schools are mandatory on the legislature.[4] The constitution commands the legislature to provide a fair and effecient system of schools which must be free and which must be open to all equally.[5] A primary purpose of requiring the maintenance of a common school system is to increase the usefulness of the citizens of the state.[6]

There is no constitutional limit placed on the rights and powers of the legislature to form school districts or as to the agencies that the state shall adopt to provide the system of free schools.[7] Fundamental law directs the

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[1]Constitution of Illinois, Article VIII, Section 1, Smith-Hurd Illinois Annotated Statutes (St. Paul, 1964), p. 197.

[2]People v. Deatherage, 81 N.E. (2d) 581, 586 (Illinois, 1948).

[3]Fiedler v. Eckfeldt, 166 N.E. 504 (Illinois, 1929).

[4]People v. Young, 139 N.E. 894 (Illinois, 1923).

[5]People v. Barrington Consolidated High School District, 71 N.E. (2d) 86 (Illinois, 1947).

[6]People v. Reed, 176 N.E. 284 (Illinois, 1931).

[7]McLain v. Phelps, 100 N.E. (2d) 753 (Illinois, 1951).

General Assembly to set up a free school system and it may use any agency or means necessary to provide and guide the schools.[8]

The conduct and maintenance of schools is a governmental activity and has a long history. "The first legislative expression in regard to schools" in Illinois was in the Ordinance of 1787, which declares that:

> Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.[9]

Legislative discretion decides the mode of organization of the free schools.[10] Maintenance and preservation of a thorough and efficient system of free schools is a public and governmental function in Illinois and is delegated to a municipality only that it may be more effectively exercised.[11] The legislature may confer authority on the agency having charge of the management and conduct of public schools to provide reasonable rules and regulations to maintain the schools.[12]

Authority for establishment and continuance of a public school system is derived from the constitution and the

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[8]Speight v. People, 87 Ill. 595 (1877).

[9]Scown v. Czarnecki, 106 N.E 276, 279 (Illinois, 1914).

[10]Plummer v. Yost, 33 N.E. 191 (Illinois, 1893).

[11]People v. Jackson-Highland Building Corporation, 81 N.E. (2d) 578 (Illinois, 1948).

[12]Sutton v. Board of Education, 138 N.E. 131 (Illinois, 1923).

legislature is required to maintain public schools at public expense.[13] Subject to constitutional restrictions, the state legislature has authority to pass any act which may in its opinion seem wise.[14] The legislature has supreme power over public corporations and may divide, alter, enlarge or abolish them as it pleases.[15] School districts and their inhabitants have no contracted or vested rights in the existence of school districts or in their territory or boundaries.[16] Unless constitutionally restricted, the legislature is charged with the duty of declaring public policy.[17]

SCHOOLS AS STATE AGENCIES

The state legislature has plenary power to provide for the creation of school districts.[18] From time to time, the legislature may, in its discretion, increase, modify or abrogate the powers of school districts.[19] School districts are involuntary political divisions of the state organized

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[13] Wilson v. Board of Education, 84 N.E. 697 (Illinois, 1908).

[14] People v. Wood, 104 N.E. (2d) 800 (Illinois, 1952).

[15] People v. Cowen, 119 N.E. 335 (Illinois, 1918).

[16] Dolan v. Whitney, 109 N.E. (2d) 198 (Illinois, 1952).

[17] Hankenson v. Board of Education, 146 N.E. (2d) 194 (Illinois, 1957).

[18] People v. Newman School District, 115 N.E. (2d) 606 (Illinois, 1953).

[19] Keime v. Community High School District, 180 N.E. 858 (Illinois, 1932).

for public advantage.[20] School districts are arms of the legislative branch of government.[21]

Because education is a state function, school districts and their governing bodies are agencies of the state to perform a state or governmental function.[22] Public school officers are state officers or public officers of the state government.[23] Members of the board of directors of a school district are agents appointed by statute to carry out administrative actions of the schools in general and have no powers except such as are conferred by legislative act or as may arise by necessary implication and, generally, doubtful claims are resolved against them.[24]

TRUE OR QUASI-MUNICIPAL CORPORATIONS

Quasi-municipal corporate powers are more limited than those of incorporated cities and towns.[25] School townships were created and continued only for school purposes and not for the purpose of exercising the ordinary function of

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[20] Scown v. Czarnecki, 106 N.E. 276 (Illinois, 1914).

[21] Board of Education v. County Board of School Trustees, 142 N.E. (2d) 742 (Illinois, 1957).

[22] Garrison v. Community Consolidated School District, 181 N.E. (2d) 360 (Illinois, 1962).

[23] People v. Peller, 181 N.E. (2d) 376 (Illinois, 1962).

[24] Yeates v. School Directors, 26 N.E. (2d) 748 (Illinois, 1940).

[25] Stevens v. St. Mary's Training School, 32 N.E. 962 (Illinois, 1893).

government.[26] School districts are not municipal corporations; they are corporations for school purposes only[27] and are quasi-municipal corporations.[28]

SCHOOL TORTS IN COURT

An early personal injury claim against a city was denied and the court commented:

> We are satisfied, on principle and authority, the town of Waltham was not liable on this action at common law, and none has been given by statute.[29]

However, this belief changed and cities were later held liable for certain bodily injury claims.[30]

The court in Elmore v. Drainage Commissioners, after citing liabilities for cities and towns, upheld nonliability for quasi-municipal corporations:

> In regard to public involuntary quasi-corporations, the rule is otherwise, and there is no such implied liability imposed upon them...there is no responsibility to respond in damages in a civil action for neglect in the performance of duties, unless action is given by statute.[31]

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[26] People v. Board of Education, 99 N.E. 659 (Illinois, 1912).

[27] People v. Trustees of School District, 78 Ill. 126 (1875).

[28] Chicago City Bank and Trust Co. v. Board of Education, 54 N.E. (2d) 498 (Illinois, 1944).

[29] Waltham v. Kemper, 55 Ill. 346, 351 (1870).

[30] City of Chicago v. Board of Education, 243 Ill. App. 327 (1927).

[31] Elmore v. Drainage Commissioners, 25 N.E. 1010 (Illinois, 1890).

The decision then went on to describe the reasons for nonliability:

> The nonliability...is placed upon these grounds: That the corporations are made such nolens volens; that their powers are limited and specific; and that no corporate funds are provided which can, without express provision of law, be appropriated to private indemnification. Consequently, the liability is one of imperfect obligation, and no civil action lies at the suit of an individual for non-performance of the duty imposed.[32]

An early school tort concerned alleged slanderous statements by the school board in the Barth v. Hanna case. Statements charging a teacher with immoral conduct with her pupils were made by the president of the school board to other directors in the presence of third persons. Statements of this type are conditionally privileged. However, in this instance, the statements were heard by more people than duty necessitated and the president was held liable.[33]

The first bodily injury action against a school district came in 1898. A workman was killed during the construction of a school building and his heirs sued alleging negligence by the city and the board of education in failing to provide proper safeguards for use by the workmen. The city was not held liable on the basis that it was not responsible for acts of the board of education. Neither was the school district liable since "it is perfectly clear the declaration disclosed no cause of action against the board of education."

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[32]Ibid., p. 1011.

[33]Barth v. Hanna, 158 Ill. 346 (1896).

> ...(The) board is a quasi-corporation created nolens volens by the general law of the state to aid in the administration of the state government, and charged, as such, with duties purely governmental in character...It is simply an agency of the state...The state acts in its sovereign capacity, and does not submit its action to the judgment of courts, and is not liable for the torts or negligence of its agents, and corporations created by the state as a mere agency for the more efficient exercise of governmental functions is likewise exempted for the obligation to respond in damages, as master, for the negligent acts of its servants to the same extent as is the state itself, unless such liability is expressly provided by statute...[34]

In 1927, the city of Chicago was sued for personal injuries due to negligent conditions of a sidewalk around a coal shute leading into a school building. The plaintiff collected from the city. Chicago then brought suit against the board of education stating that the school board had possession of the premises and should be responsible for the costs. The court first stated the general rule that:

> ...a school district or a school board is not...subject to suit in tort for personal injuries. There are two reasons for this rule, first, that a school board acts nolens volens as an agent of the state, performing a purely public or governmental duty imposed upon in by law, for the benefit of which it receives no profit or advantage; second, since the property which it possesses is held in trust, the payment of judgments in tort would amount to a diversion or, in some cases, a destruction of the trust. Such is the general rule.[35]

That this rule had changed in some jurisdictions was recognized by the court with the comment that:

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[34] Kinnare v. Chicago, 49 N.E. 536, 537 (Illinois, 1898).

[35] City of Chicago v. Board of Education, 243 Ill. App. 327, 329 (1927).

> The contrary rule seems to obtain in England. (See Crisp v. Thomas, (1890) 63 L.T.N.S. 756). New York seems to have modified the general rule in Wahrman v. Board of Education, 187 N. Y. 331...[36]

However, the board of education was not liable to the city since "the Supreme Court of Illinois has never departed from the general rule, but on the contrary it has rigidly adhered thereto."[37]

In an action for personal injury damages received on school property as the plaintiff attended a church society entertainment, the plaintiff alleged negligence on the part of the board of education and that they were engaged in a proprietary act in renting the school property for revenue purposes. In disposing of these questions, the court said:

> It matters not whether the charge...was for the use of the auditorium or a mere incidental charge to reimburse the board of education for light, heat, etc., or whether it was purely for profit. If it was the former, we think it was within the power of the board in connection with its governmental function. If it was for the latter, then it was beyond the power of the board. In either case, no liability would attach to the board of education on account of the injury. Where governing bodies of municipal corporations engage in unauthorized enterprises, the corporation cannot be made liable for resulting damages.[38]

On negligence, the court restated the immunity doctrine:

> ...quasi-corporations...(have) no responsibility to respond in damages in a civil action

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[36]Ibid.

[37]Ibid., p. 329.

[38]Lincke v. Moline Board of Education, 245 Ill. App. 459, 464 (1927).

> for neglect in the performance of duties, unless a right of action is given by statute.[39]

Owners of property adjoining a Chicago high school site commenced construction of a new building in February, 1928. The board of education instituted condemnation of the adjoining property by eminent domain on the first of March. Condemnation proceedings were dismissed by the court in July. Action was then brought against the board of education on the grounds that condemnation had not been dismissed in a reasonable time. The court reiterated the governmental immunity rule and refused damages in this case.[40]

Action was instituted against the Chicago Board of Education in a group of suits over breach of duty concerning payment of tax anticipation warrants issued in 1929. The board was held not liable for breach of duty of its officers[41] even when it involved a wrongful use of tax money.[42] School districts are not subject to recovery suits:

> If any actual wrongdoing was committed... it was by the board of education, and we have held that it is a quasi-municipal corporation, not subject to liability to individuals injured by the tortious conduct of its officers or servants.[43]

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[39] Ibid.

[40] Lindstrom v. Board of Education, 162 N.E. 128 (Illinois, 1928).

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

[42] Chicago City Bank & Trust Co. v. Board of Education, 54 N.E. (2d) 498 (Illinois, 1944).

[43] Schreiner v. Board of Education, 92 N.E. (2d) 133, 141 (Illinois, 1950).

In 1952, Loeb v. Board of Education was considered by the federal court where the board was held liable for breach of duty for the tax anticipation warrants. The court stated:

> The court has considered the defendant board's contention that it is a quasi-municipal corporation and cannot be held liable for the torts of its officers. It is sufficient for the court to comment that this doctrine cannot be extended to protect a quasi-municipal corporation, or any other public body in retaining unjust enrichment which is obtained as a result of a legal fraud, as was done in this case.[44]

Even though the courts usually follow precedent in rendering decisions, they need not do so where proceedings and facts are different because of changing times. The case of Moore v. Moyle is a charitable institutional immunity case. However, the Moore v. Moyle decision was cited as the basis to permit recovery for personal injuries in the public school case of Thomas v. Broadlands. The court pointed out that "the law is not static" and must "justify its existence as protector of the people."

Moore sued to recover damages for personal injuries received during a physical education class at Bradley University in 1940. The court allowed recovery and stated:

> We are of the opinion there is no justification for absolute immunity if the trust is protected, because that has been the reason for the rule of absolute immunity. Reason and justice require an extension of the rule in an attempt to inject some humanitarian principles into the abstract rule of absolute immunity.[45]

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[44] Loeb v. Board of Education, 103 F. Supp. 876, 880 (1952).

[45] Moore v. Moyle, 92 N.E. (2d) 81, 86 (Illinois, 1950).

The decision, in Moore v. Moyle, that charitable institutions are subject to tort liability, to the extent that liability insurance is available to protect the trust fund, was later to be used in allowing recovery from public school districts in Illinois.

School bus drivers have a duty to exercise extraordinary or the highest degree of care for the safety of the pupils being transported to and from school. This pronouncement came in a 1951 case charging a bus driver of a private carrier under contract to a school district with negligence. The use of mere ordinary care is not enough and it makes no difference whether the bus is operated as a common carrier or a private carrier. The court explained:

> We do not deem it to be controlling whether the defendant was a common carrier or a private carrier, for it is our opinion from the facts in this case that it was the duty of the defendant to operate the bus with the highest degree of care consistent with the practical operation of the bus.[46]

The question before the court in Thomas v. Broadlands School District was whether a school district that carried liability insurance should be held liable for damages even though the insurance company had agreed to reimburse the district for any judgment obtained against it. A main basis of the governmental immunity doctrine is that no funds are available to pay damages and that educational moneys are for only one usage and may not be diverted for

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[46] Van Cleave v. Illini Coach Co., 100 N.E. (2d) 398, 399 (Illinois, 1951).

other purposes such as the payment of damage claims. The court also had to decide if the purchase of liability insurance was a legitimate expenditure of school funds. In other words, the court was faced with the question of deciding whether insurance destroys the common law reasons for school district immunity from liability suits.

In the Thomas v. Broadlands case, a child was injured on the school playgrounds. The plaintiff brought suit against the school district alleging negligence of the supervising teachers which resulted in the loss of one of the child's eyes. The district used the usual defense of governmental immunity through the exercise of governmental functions to show that it was not liable for the negligent acts of its teachers. Counsel for the child expressly agreed to limit the collection of any judgment which might be rendered in their favor to the amount of insurance carried by the district. The court stated:

> ...absent the question of insurance, the law in Illinois is clear that a School District, as a quasi-municipal corporation, is not liable for injuries resulting from tort.[47]

Taking up the similarities between charitable institutional immunity to governmental immunity, the court noted that:

> ...the doctrines of charitable immunity have had considerable effect on the doctrines pertaining to municipal immunity. The charity cases...have often turned on the 'trust fund' theory...which is similar to the 'tax fund' theory...Thus law first intended for private

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[47]Thomas v. Broadlands School District, 109 N.E. (2d) 636, 637 (Illinois, 1952).

> charities has influenced branches of the public services.[48]

The court felt that, if the Moore v. Moyle case was to influence the Thomas suit, it must be shown that liability insurance affected the case in a way "similar to that in which the reason" for charitable liability was influenced. The court concluded that it did influence it and:

> ...there is no justification for absolute immunity if the public funds are protected... Liability insurance, to the extent that it protects the public funds, removes the reason for, and thus the immunity to, suit. The reasoning of the Supreme Court in the Moore case, supra, applies with equal force to the question before us. If the public funds are protected by liability insurance, the justification and reason for the rule of immunity are removed.[49]

The Thomas v. Broadlands decision removed school district immunity to the extent of the district's liability insurance and allowed recovery to this amount.

Tracy v. Davis was an action against a trucking corporation and a school district for personal injuries sustained in an auto-bus-truck accident. Plaintiff contended negligence on the part of a school district employee while the district asked dismissal on the grounds of governmental immunity for torts of its employees. The complaint did not allege that liability insurance existed although the defendant school district's brief did mention this fact. The federal court stated:

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[48]Ibid., p. 638.

[49]Ibid., p. 640.

> The proposition of law is should a tort action against a school district be dismissed when no allegation is made in the complaint that the school district has insurance, or other means of paying the sought judgment without impairment of its public funds.[50]

Citing the Thomas v. Broadlands case and its usage of the decision of Moore v. Moyle, the court commented that:

> The reason for tort immunity of a school district, a quasi-municipal corporation, is similar to that of a charitable corporation and the same rules of law apply to each...In the case of the school district, it is based upon the protection of public funds and in the immunity of the charitable corporations, it is grounded upon the protection of trust funds.[51]

A decision was entered for the plaintiff with the caution that a "judgment against charitable institutions or quasi-municipal corporations may be obtained, if there are assets, such as insurance, available to pay judgment, but it should be limited as to collection."

> The court concludes that the rule is that immunity exists against dissipation of public funds in paying a tort judgment, but it is not a defense to a tort action. This is just and reasonable. An individual injured by the tortious act of a quasi-corporation or a charitable institution should not individually suffer his loss where there is a source of funds other than public funds or trust funds, from which the judgment is paid.[52]

The sequence becomes clear that Moore v. Moyle introduced the concept of liability to charitable institutions, provided trust funds were protected, and this case influenced the decision in Thomas v. Broadlands School District

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[50]Tracy v. Davis, 123 F. Supp. 160, 161 (1954).

[51]Ibid., p. 162.

[52]Ibid., p. 163.

where insurance protection to school district tax funds existed and was alleged in plaintiff's case brief. Tracy v. Davis extended this idea since no allegation of protection to tax funds was made by the plaintiff although existence of insurance was mentioned in the defendant's case brief.

In the Molitor v. Kaneland case, a minor, through his father, brought action against a school district for injuries received in a school bus accident resulting from the alleged negligence of the driver. Originally, the suit was brought by the four Molitor children and four others. In trial court, the school board asked for dismissal and was upheld. There was no way of knowing if the dismissal would be upheld by the Supreme Court of Illinois so one of the cases was arbitrarily selected for expedition through the courts so that a quick review could be had. Plaintiff contended that dismissal violated his constitutional rights and on this basis the Supreme Court accepted it for immediate consideration. Their decision was that no constitutional rights were involved and the case was assigned to appellate court for hearing.

The Appellate Court took up the case on the basis of previous decisions in similar cases and noted that there was "no allegation of the existence of insurance or other non-public funds for the payment of a judgment." This had been left out on purpose according to the counsel of the plaintiff. Commented the court:

> It is conceded that the inclusion of...an allegation in the instant complaint that the

> district carried liability insurance as shown by the abstract, would make a good complaint to the extent of such coverage. However, plaintiff states that he purposely omitted such an allegation from his complaint in this case.[53]

Appellate court decided against the plaintiff and stated that:

> Absent the existence of a statute expressly providing for tort liability or an allegation of the existence of insurance or other nonpublic funds for the payment of a judgment herein, we conclude that the law in Illinois is clear that a school district is not liable for injuries resulting from tort...[54]

In the Molitor cases, plaintiff recognized the common law rule of immunity but asked the court to abolish it. Counsel for the plaintiff knew of the rule concerning liability insurance and understood that he could collect damages if he chose to use it. Plaintiff chose not to use the insurance rule and the Supreme Court was faced with a need to re-examine the governmental immunity doctrine as it applied to all school districts.

The Supreme Court stated the question of the case in this manner:

> ...in the light of modern developments, should a school district be immune from liability for tortiously inflicted personal injury to a pupil thereof arising out of the operation of a school bus owned and operated by said school district?[55]

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[53] Molitor v. Kaneland Community Unit School District, 155 N.E. (2d) 841, 842 (Illinois, 1959).

[54] Ibid., p. 844.

[55] Molitor v. Kaneland Community Unit School District, 163 N.E. (2d) 89, 90 (Illinois, 1959).

Tort immunity had not been re-examined by the supreme court for many years, according to the transcript of the case. The court noted that extensive consideration had been given to the doctrine during that time by authors and text-book writers and that it was "almost unanimously" condemned by these legal writers.

Tort law in Illinois had been the object of dissatisfaction by the General Assembly, said the court. Dissatisfaction was expressed by passage of the Workmen's Compensation and Occupational Diseases Act. A Court of Claims Act had made the state liable for damages in tort for negligent acts. Cities had been made liable for various negligent acts or unsafe conditions due to negligence. Illinois courts classified municipal activities into governmental and proprietary functions and instituted full liability in tort under proprietary functions and instituted full immunity in tort under governmental functions.

It is a general rule of law that liability follows negligence. The court commented that the governmental immunity doctrine runs counter to this belief and asked:

> 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?[56]

Reasons for governmental immunity were taken up one at a time and discussed by the court. It was noted that under

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[56]Ibid., p. 93.

statute a school district was permitted to take out insurance. This meant, said the court, that each school district could decide its liability for tortious acts:

> ...a person injured by an insured school district bus may recover to the extent of the insurance, whereas, under the Kinnare Doctrine, a person injured by an uninsured school district bus can recover nothing at all.[57]

Noting that the doctrine of immunity was "a survival of the medieval idea that the king can do no wrong," the court reasoned that the doctrine could no longer be defended on this ground since "the Revolutionary War had been fought to abolish that divine right of kings."

Another main reason advanced in support of the governmental immunity doctrine is "the protection of public funds and public property." This is archaic too, said the court, since it is based on the idea that "it is better for the individual to suffer than for the public to be inconvenienced" and:

> We do not believe that in this present day and age, where public education constitutes one of the biggest businesses of the country, that school immunity can be justified on the protection of public funds theory...To predicate immunity upon the theory of a trust fund is merely to argue in a circle, since it assumes an answer to the very question at issue, to wit, what is an educational purpose?[58]

In commenting further on the case, the court believed that abolition of the doctrine would tend to decrease the frequency of bus accidents. "School districts will be

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[57]Ibid., p. 92.

[58]Ibid., p. 94.

encouraged to exercise greater care" in the use of policies of bus operation, insurance policies and employee selection.

To the contention that the legislature and not the courts should change the law, "if indeed it should be changed," the court answered by pointing out that the doctrine was judge or court made and that the courts not only have the power but the duty to abolish it. Quoting from Pierce v. Yakima Valley, the court stated "we closed our court-room doors without legislative help, and we can likewise open them."[59]

Finally, the court took up stare decisis and noted that the use of precedent is not inflexible and that a court need not follow it blindly. Instead, when it appears that:

> ...public policy and social needs require a departure from prior decisions, it is our duty as a court of last resort to overrule those decisions and establish a rule consonant with our present day concepts of right and justice.[60]

The other children, who were plaintiffs in the original action with Thomas Molitor, were heard by the appellate court in 1961. This court decided for the school district since the supreme court decision "does not have retrospective or retroactive application to cases" occurring

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[59]Pierce v. Yakima Valley Memorial Hospital, 260 P. (2d) 765, 774 (Washington, 1953).

[60]Molitor v. Kaneland Community Unit School District, 163 N.E. (2d) 89, 96 (Illinois, 1959).

earlier than December 16, 1959, "the date that the opinion in the Thomas Molitor case was filed."[61]

In 1962, these children appealed to the supreme court for relief for their injuries. The court enlarged upon its earlier decision:

> Because the Thomas Molitor appeal was treated by the parties as a test case for determining which ruling should ultimately be made, we hold the counts in question should not have been dismissed.[62]

Thus the court permitted the application of the new rule to all those who brought the original action. However, it was specifically stated by the court that this ruling had no effect on other retroactive cases.

The Price v. York case was an action against a school district and a bus driver employee for the alleged negligence of each which caused the death of a child who was killed when struck by a vehicle as she was crossing the highway to board the bus. The court held the defendants not liable and stated:

> School district and bus driver did not owe a duty to the child to protect her from injury while she was walking from her home to the point where the bus stopped or would pick her up and were under no duty to route the bus so that no child using the bus would be required to cross the highway to board it.[63]

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[61] Molitor v. Kaneland Community Unit School District, 173 N.E. (2d) 599 (Illinois, 1961).

[62] Molitor v. Kaneland Community Unit School District, 182 N.E. (2d) 145, 147 (Illinois, 1962).

[63] Price v. York, 164 N.E. (2d) 617 (Illinois, 1960).

Several cases were brought to the Illinois court for personal injury claims in accidents that occurred prior to the cut-off date for school immunity as given by the Thomas Molitor case. Except for the related claims arising out of the original Molitor case, all were refused on the basis that "the doctrine of governmental immunity from tort liability of school districts and boards of education remains in effect as to all cases of action arising prior to December 16, 1959."[64]

These actions included claims for personal injury sustained by a student in gymnastic activities,[65] an injury sustained during a dramatic production,[66] and an injury to a spectator at a football game.[67]

In 1964, a mandamus proceeding was instituted to require state officials to pay an appropriation of $750,000 from the Motor Fuel Tax Fund to the Kaneland School District. The contention by state officials was that they had no power to transfer the money. The court awarded the writ of mandamus on the basis of legislative action taken during the previous legislative session.[68]

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[64]Garrison v. Board of Education, 181 N.E. (2d) 360, 361 (Illinois, 1962).

[65]Terry v. Mt. Zion School District, 174 N.E. (2d) 701 (Illinois, 1961).

[66]Garrison v. Board of Education, 181 N.E. (2d) 360 (Illinois, 1962).

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

[68]People v. Howlett, 195 N.E. (2d) 678 (Illinois, 1964).

A group of children, injured in the same accident as the Molitor children and others were injured, brought action to vacate their judgments, set aside jury verdicts, and secure a new trial. These requests were based on a contention of miscarriage of justice since plaintiffs in this case received an average claim of only $9,000 while those connected with Molitor v. Kaneland received an average claim of $90,000.

Judgments for these plaintiffs were rendered under the liability rules of Thomas v. Broadlands and Moore v. Moyle. Here, the plaintiffs alleged in their brief that the school district carried liability insurance to protect school district funds. The court upheld trial courts decision with the statement that "they were limited to a recovery not exceeding the insurance coverage."[69]

GOVERNMENTAL-PROPRIETARY FUNCTIONS

Although no case was found that actually held a school district liable for tortious acts under proprietary functions, the Molitor case, when surveying the background of torts for Illinois, implied that they might be liable in a suit of this category.[70] However, Syllabus 3 of Garrison v. Board of Education states that the distinction "is not applied to school districts or other quasi-municipal

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[69]Larson v. Kaneland Community Unit School District, 201 N.E. (2d) 865, 868 (Illinois, 1964).

[70]Molitor v. Kaneland Community Unit School District, 163 N.E. (2d) 89 (Illinois, 1959).

corporations which are mere subdivisions of the state."[71] There are no further cases concerning proprietary functions of school districts. One effect of the Molitor case would be to remove the need for the distinction.

SCHOOL STATUTES

The Illinois legislature took immediate action on school liability following the decision in the Molitor case. Chapter 122 of Sections 821-826 were enacted to lay out the public policy of Illinois concerning liability for torts by public and private non-profit schools. 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."[72] The statute also states that action must "commence within one year from the date that the injury was received or the cause...incurred"[73] and that notice of such action must be given the school district "within six months."[74]

Limitations on the amount that might be collected as a result of "each separate action shall not exceed $10,000, except as otherwise provided by law."[75]

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[71] Garrison v. Board of Education, 181 N.E. (2d) 360 (Illinois, 1962).

[72] Smith-Hurd Illinois Annotated Statutes (1962), p. 429.

[73] Ibid., Section 822, p. 430.

[74] Ibid., Section 823, p. 430.

[75] Ibid., Section 825, p. 431.

Transportation insurance statutes were revised to do away with the reference to governmental immunity. There are no restrictions on the policy so long as it is issued by a company licensed to "write insurance coverage" in Illinois. The statute reads, in part, that:

> Any school district, including any non-high school district, which provides transportation for pupils may insure against any loss or liability of such district, its agents or employees, resulting from injury or accident to the ownership, maintenance or use of any school bus.[76]

This would allow the school district to write the size of liability insurance policy that the board deemed large enough to protect the district.

School districts may purchase liability insurance to protect against loss by the school district or its officials, agents or employees. The statute reads:

> To insure against any loss or liability of the school district or any agent, employee, teacher, officer, or member of the supervisory staff thereof resulting from the wrongful or negligent act occurred within or without the school building, provided such agent, employee, teacher, officer or member of the supervisory staff was, at the time of such wrongful act, acting in the discharge of his duties within the scope of his employment and/or under the direction of the school board.[77]

Another section allows the board of education to deduct from employee salaries to "participate in provisions for insurance protection" but the deduction shall be withheld "with the consent of the employee."[78]

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[76]Ibid., Section 29-9, p. 510.

[77]Ibid., Section 10-22.3, p. 428.

[78]Ibid., Section 10-22.3a, p. 429.

Workmen's compensation is a school district responsibility under Illinois law. The Molitor case cited the Workmen's Compensation and Occupational Disease Act when it surveyed "the whole picture of governmental tort law as it stands in Illinois today."[79] The act "shall apply automatically and without election to the State... school district, body politic or municipal corporation" for those activities "which are declared to be extra hazardous.[80]

CHARITABLE INSTITUTIONAL IMMUNITY

Charitable institutional immunity from liability due to negligence has played an important part in the status of governmental immunity in Illinois. The influence of charitable and governmental immunities upon each other may be seen in the decisions of several cases. The public school cases of Thomas v. Broadlands[81] and Molitor v. Kaneland[82] discuss Moore v. Moyle,[83] a charitable institution case. The earliest charitable immunity case, Parks v. Northwestern University, stated:

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[79]Molitor v. Kaneland Community Unit School District, 163 N.E. (2d) 89, 91 (Illinois, 1959).

[80]Smith-Hurd Illinois Annotated Statutes (St. Paul, 1950), p. 411.

[81]Thomas v. Broadlands School District, 109 N.E. (2d) 636, 640 (Illinois, 1952).

[82]Molitor v. Kaneland Community Unit School District, 163 N.E. (2d) 89 (Illinois, 1959).

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

> But the exemption accorded to charitable institutions does not rest alone on the doctrine that the state or sovereign is not liable for the acts of its servants.[84]

In this case, a student received injuries resulting in the loss of an eye through the alleged negligence of one of the professors employed by the university. Recovery was denied on the basis of no liability for the acts of servants or agents, as already mentioned, and on the "no diversion of trust funds" theory:

> ...if this liability were admitted the trust funds might be wholly destroyed and diverted from the purpose for which it was given, thus thwarting the donor's intent, as the result of negligence for which he was nowise responsible...[85]

Johnson v. City of Chicago held, in 1913, that:

> ...a purely charitable corporation is by the weight of authority held not liable for the torts or neglect of its servants in the performance of their duties in carrying on the work of such corporations.[86]

A jury in a lower court brought in a verdict in the sum of $45,000 for plaintiff in Maretick v. South Chicago Community Hospital, but this was set aside on appeal on the basis on no liability to charitable institutions for negligence of servants of employees.[87] The doctrine of charitable

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[84]Parks v. Northwestern University, 75 N.E. 991, 993 (Illinois, 1905).

[85]Ibid., p. 993.

[86]Johnson v. City of Chicago, 101 N.E. 960, 962 (Illinois, 1913).

[87]Maretick v. South Chicago Community Hospital, 17 N.E. (2d) 1012 (Illinois, 1938).

immunity was confirmed in Marabia v. Mary Thompson Hospital[88] and Hogan v. Chicago Lying-In Hospital[89] while in Piper v. Epstein, the court extended the doctrine so as to preclude recovery in tort from the proceeds of liability insurance.[90]

Shortly afterward, the court reversed this policy in Wendt v. Servite Fathers and directed a judgment against the institution because:

> ...a charitable corporation which had protected its trust funds from tort liability by carrying insurance indemnifying it against negligence resulting in injury to others could not invoke the defense of immunity.[91]

A student injured in a fall while practicing on a school installed trapeze in preparation for a school circus brought suit against the physical education instructor and Bradley Polytechnic Institute (now Bradley University) to collect for personal injury due to negligence on the part of the instructor. The university carried liability insurance covering such risks and other funds were available from which a judgment might be satisfied without diminishing the trust funds designated for charitable purposes. The court first pointed out that:

> The law is not static and must follow and conform to changing conditions and new trends

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[88]Marabia v. Mary Thompson Hospital, 140 N.E. 836 (Illinois, 1923).

[89]Hogan v. Chicago Lying-In Hospital, 166 N.E. 461 (Illinois, 1929).

[90]Piper v. Epstein, 62 N.E. (2d) 139 (Illinois, 1945).

[91]Wendt v. Servite Fathers, 76 N.E. (2d) 342 (Illinois, 1947).

> in human relations to justify its existence as a servant and protector of the people and, where necessary, new remedies must be applied where none exist.[92]

The court then held:

> The immunity from liability of a charitable corporation for torts committed by its employees and agents is not absolute but extends only to the protection of trust property; hence when it appears trust funds will not be impaired or depleted by enforcement of a judgment, a tort action will lie.[93]

Farral v. St. Mary's Hospital, a 1962 suit for damages by a patient alleging negligence, affirmed the policy of allowing liability only to the extent of liability insurance carried by the institution.[94]

SUMMARY

The constitution makes support of an educational system mandatory to the legislature in Illinois. Plenary power is exercised by the legislature and it designates who or what agency shall have direct control over schools. Thus school districts are state agencies and classed as quasi-municipal corporations with their main reason for existence being the maintenance of education for its citizens.

Immunity for quasi-municipal corporations was based on two main reasons: the creation of schools nolens volens and on the idea of no diversion of tax funds from its designated

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[92]Moore v. Moyle, 92 N.E. (2d) 81, 86 (Illinois, 1950).

[93]Ibid., p. 86.

[94]Farral v. St. Mary's Hospital, 187 N.E. (2d) 15 (Illinois, 1962).

purpose. Until the time of the Thomas v. Broadlands case, school district immunity had been upheld for negligence in safeguarding working conditions of employees, in proprietary actions, in condemnation cases, in pupil accidents and in breach of duty by school officials.

Liability for personal injuries for public schools was first instituted in Thomas v. Broadlands to the extent that public funds and property were protected by insurance or if non-public funds could be shown to exist. The plaintiff's claim must allege the existence of this protection to the public funds and property or even a good claim would be denied.

The theory of liability as used in Thomas v. Broadlands was based on a prior decision in the charitable institutional immunity case of Moore v. Moyle. A federal hearing, in Tracy v. Davis, upheld the doctrinal change of Thomas v. Broadlands and extended it so that plaintiff need not allege insurance protection or the existence of non-public funds in order to be eligible for a damage award.

Breach of public duty, where fraud is involved by school officials, may no longer be avoided by the defense of governmental immunity.

An important step in the transportation court cases of Illinois was the decision by the Supreme Court that the exercise of ordinary case by bus drivers is not good enough but that extraordinary care must be used to protect pupils.

The plaintiff in the Molitor case took no refuge in the Thomas v. Broadlands theory. Although plaintiff knew

of the existence of liability insurance, the allegation of its existence was deliberately avoided and the court was asked to abrogate governmental immunity for schools. Governmental immunity was abrogated for schools on these reasons: governmental immunity does not meet the needs of modern society; the burden of suffering from school district neglect should not be borne by one individual alone but should be distributed among the public; holding school districts liable for this tort would actually result in better government since officials would use more care in their transportation duties; a doctrine of law based on the idea that the king can do no wrong is not justifiable in a country that fought a Revolutionary War to rid itself of kings. In addition, the court stated that since the doctrine was court made and continued through precedent, it was not up to the legislature to change the doctrine but was the court's duty alone and that stare decisis must be flexible enough to change when the needs of society demanded a change.

Legislation was passed as a result of the Molitor case to permit liability for tortious acts of school districts up to a maximum of $10,000. Transportation liability insurance coverage may be larger than the maximum liability of $10,000 stated by the general statute. Workmen's compensation is obligatory to school districts for hazardous positions. School districts in Illinois may purchase liability insurance coverage on its officials, agents and employees.

CHAPTER VI

OKLAHOMA SCHOOLS AND TORT LIABILITY

The purpose of this chapter is to ascertain liability for bodily injury of Oklahoma school districts and to determine any changes that might have occurred in the immunity doctrine for the state's school district. Data were secured through an investigation of the constitution, statutes, court cases and attorney general opinions. The information is summarized at the end of the chapter.

SCHOOL STRUCTURE IN OKLAHOMA

The Oklahoma Constitution states that:

> The Legislature shall establish and maintain a system of free public schools wherein all the children of the state may be educated.[1]

Thus education becomes a required governmental duty. Education for youth of the state of Oklahoma "is a matter of state concern, care, or supervision. It is a state function."[2] The supreme court stated on another occasion that the legislature had no choice in the creation of a school

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[1]Constitution of Oklahoma, Article 13, Section 1, Oklahoma Statutes, Annotated (St. Paul, 1952), Book 2, p. 703.

[2]State v. Board of Education, 339 P. (2d) 534 (Oklahoma, 1959).

system since it is by "mandate charged with the duty of establishing a public school system."[3] By constitutional requirement, the legislature must do the minimum effort to establish a school system, but it may do more.[4] As far as it is practical to do so, the state must extend the opportunity "to its youth to obtain such mental and moral training as will make them useful citizens of our great commonwealth."[5]

SCHOOLS AS STATE AGENCIES

Except as limited by the constitution, the legislature has full power to provide by general law for a system of schools. Not only is the establishment of common school education obligatory on the part of the state but attendance of pupils is compulsory.[6] The state is all-powerful in control of the state's school districts and control of the local district may be delegated by the legislature to any governing body that it desires to designate:

> Our Legislature has plenary power with respect to the establishment and change of school districts, and exercise that power directly by laws containing definitions and explicit directions for all occasions, or it may delegate the exercise

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[3] Musick v. State, 90 P. (2d) 631 (Oklahoma, 1938).

[4] School District No. 62 v. School District No. 17, 287 P. 1035 (Oklahoma, 1930).

[5] Miller v. Childers, 238 P. 204 (Oklahoma, 1924).

[6] Consolidated School District No. 12 v. Union Graded School District No. 3, 94 P. (2d) 549 (Oklahoma, 1939).

> of that power to subordinate agents under such terms as it judges to be reasonable.[7]

Unless "limited by organic law," the state legislature may choose any agency or method to maintain schools.[8] Methods and policies of organizing and reorganizing school districts are legislative decisions. The method of carrying out the requirements of the constitution is largely within the legislature's discretion.[9] Further than this, the power of the legislature does not lessen with time:

> Power of the Legislature to establish and maintain a system of free public schools is not exhausted so long as there remains room for improvement in the system sought to be established and the legislature may return to its task again and again until the public policy of the state respecting its public schools has been established on a firm and equitable basis.[10]

Any school law will be interpreted as liberally as needed in order to accomplish the purpose for which the legislature conceived the school code:

> ...the Oklahoma School Code will receive liberal construction to the extent that the general purpose of the entire Code and of public education will be advanced.[11]

Prior to the time of statehood, the schools were agencies of the territory doing the work of the

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[7]Ensley v. Goines, 138 P. (2d) 540, 541 (Oklahoma, 1943).

[8]Miller v. Childers, 238 P. 204 (Oklahoma, 1924).

[9]Public Service Company v. Parkinson, 141 P. (2d) 586 (Oklahoma, 1943).

[10]School District No. 25 v. Hodge, 183 P. (2d) 575, 581 (Oklahoma, 1947).

[11]Matlock v. County Commissioners, 281 P. (2d) 169 (Oklahoma, 1955).

territory.[12] An early case summed the status of school districts as governmental agencies in this manner:

> A school district is but a subordinate agency of the territory, doing the work of the territory. It is a creature of the legislature. The legislature may create or abolish school districts, or it may change their boundaries without consulting the inhabitants.[13]

After statehood, a school district became a subordinate agency of the state doing the work of the state.[14]

The public school system is of state concern and is not a municipal affair. School districts are separate corporate entities and exist separate and apart from cities and towns within which they exist.[15] Any conflict between these corporations is superfluous since:

> City charters...can only run current with, and never counter to, the general laws of the state touching the free public school system.[16]

School property is public property[17] and citizens are not owners of school property merely because they reside within a certain area or district.[18] School property

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[12] Oklahoma Railway Co. v. St. Joseph's Parochial School, 127 P. 1087 (Oklahoma, 1912).

[13] School District No. 17 of Garfield County v. Zediker, 47 P. 482 (Oklahoma, 1896).

[14] Dowell v. Board of Education of Oklahoma City, 91 P. (2d) 771 (Oklahoma, 1939).

[15] State v. City of Lawton, 224 P. 347 (Oklahoma, 1924).

[16] Board of Education of City of Ardmore v. State, 109 P. 563 (Oklahoma, 1910).

[17] Merritt Independent School District v. Jones, 249 P. (2d) 1007 (Oklahoma, 1952).

[18] Dowell v. Board of Education of Oklahoma City, 91 P. (2d) 771 (Oklahoma, 1939).

belongs to the state:

> The ownership of school property is generally in the local district...as trustee for the public at large. Such property occupies the status of public property and is not to be regarded as private property of the school district by which it is held or wherein it is located.[19]

However, a school board may, unless prohibited by statute, dispose of school property.[20]

TRUE OR QUASI-MUNICIPAL CORPORATIONS

School districts are maintained at public expense and are administered by a "bureau" of the state, district, or municipal government. School districts are corporate bodies with limited powers[21] or as stated in another case:

> The public schools...organized pursuant to law are made a body corporate, and as such possess the usual powers of corporations for public purposes, and may, in its corporate name, sue or be sued, and be capable of contracting or being contracted with...[22]

School districts are not municipal corporations and do not have the same powers as pure municipalities. A school district is a "quasi-municipal district;"[23] it is a mere

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[19] James v. Union School District No. 2 of Muskogee County, 207 P. (2d) 241 (Oklahoma, 1949).

[20] Joachim v. Board of Education of Walters, 249 P. (2d) 129 (Oklahoma, 1952).

[21] Stanolind Pipe Co. v. Tulsa County Excise Board, 80 P. (2d) 316 (Oklahoma, 1938).

[22] Board of Education of Sapulpa v. Corey, 163 P. 949, 952 (Oklahoma, 1917).

[23] Dowell v. Board of Education of Oklahoma City, 91 P. (2d) 771 (Oklahoma, 1939).

quasi-corporation that possesses limited governmental powers as a corporation.[24]

SCHOOL TORTS IN COURT

The first bodily injury liability case for schools in Oklahoma was Consolidated School District v. Wright in 1927.[25] Before this case, however, the general pattern for tort liability had been set in other quasi-municipal corporation cases.

James v. Trustees was a case concerning bodily injury allegedly caused by defective roads due to the negligence of the township. The defendants were not held liable because a township, as a quasi-municipality, was not "answerable for the negligence of its officers:"

> In the absence of express statute, townships are not liable for neglect of public duty of failing to keep the highways in a safe condition.[26]

Noting that the usual reason for nonliability of quasi-municipalities was that they are "mere agencies of the state," the court went on to say:

> We think the correct theory on which it is held that quasi-corporations, such as counties and townships, are exempt from liability, is

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[24]School District No. 17 of Garfield County v. Zedeker, 47 P. 482 (Oklahoma, 1896).

[25]Consolidated School District No. 1 of Tulsa County v. Wright, 261 P. 953 (Oklahoma, 1927).

[26]James v. Trustees of Wellston Township, 90 P. 100, 101 (Oklahoma, 1907).

> that they are but auxiliary parts of the sovereignty.[27]

The court explained that since the state is divided into subdivisions to carry out the political powers of the state and that these subdivisions are merely "component parts of the great body politic of the state" to which the same rule of nonliability would apply. Quoting with approval from Marion County v. Riggs, the court agreed that "if the writer" had his choice and "felt at liberty to pass upon the subject solely in accordance with sound reason, he would deny the liability of even cities" in their neglect to exercise "control and care over streets and sidewalks or for their imperfect execution of such power."[28]

Other reasoning used by the court was that creation of liability for tortious acts of quasi-corporations would start "an endless amount of litigation" and that those states where liability had been imposed were old states and had "ample funds and a sufficient number of officers" and were "in possession of good highways and bridges." The court then stated:

> It seems to us the better rule would be that which is supported by the great weight of authority on the subject, as well as by the stronger reasoning; that is, that no such liability exists until such liability is fixed by legislation or constitutional amendment...[29]

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[27]Ibid., p. 101.

[28]Marion County v. Riggs, 24 Kan. 199, 190 (1880).

[29]James v. Trustees of Wellston Township, 90 P. 100, 106 (Oklahoma, 1907).

This reasoning was upheld in a 1913 case when a township was again held not liable in a civil action for neglect of its officers in failing to perform an official duty.[30]

A few years later the court stated that township officers, but not the township, could be held liable in an injury case:

> An officer may be liable to an individual for negligence in the performance of a purely ministerial duty, although the state or political subdivision thereof which elects him may not, under the law, be liable for his negligence.[31]

Counties have assumed many of the functions of townships and also enjoy immunity from most tort liabilities. One decision stated that a county is not liable for torts of its agents in the absence of a statute imposing liability.[32] Another case held that a statute[33] providing that every person shall abstain from injuring another and that everyone is responsible for injury to another does not render a county liable for tort injuries.[34]

However, a county is liable for actual damages for wrongful acts in taking land from a private person even

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[30] Howard v. Rose Township, 131 P. 683 (Oklahoma, 1913).

[31] Mott v. Hull, 152 P. 92 (Oklahoma, 1915).

[32] Whiteneck v. Board of County Commissioners, 213 P. 865 (Oklahoma, 1923).

[33] Oklahoma Statutes, Section 5085, 5091 (1921).

[34] Hazlett v. Board of County Commissioners, 32 P. (2d) 940 (Oklahoma, 1934).

though appropriating it for a lawful public use.[35] Counties are also responsible for bodily injuries to employees where the employment fits the definition of hazardous work as listed in the act giving workmen's compensation protection; in fact, "employer," as defined by the Workmen's Compensation Act, includes state, county, city or municipality when engaged in hazardous work.[36]

Although a statute[37] was passed in 1961 permitting the purchase of liability insurance by counties, the legislature made it clear that no action would lie against a county for torts arising from the performance of governmental functions. In a recent case, the court held that, since there was no legislative intent to change the law, "the immunity of a county from liability in tort as in this case is something that must be lived with."[38]

Recent litigation involving a state agency may also have relevance to school district immunity from tort liability. In State v. Bone, two cases have been tried, one in 1954 and one in 1959. Plaintiff sued the State Insurance Fund in 1954 for damages for personal injuries sustained by her while riding in a car driven by her husband, which

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[35]Baxter v. Board of County Commissioners, 241 P. 785 (Oklahoma, 1925).

[36]Board of Commissioners of Okmulgee County v. State, 83 Okla. 48 (1921).

[37]Oklahoma Statutes, Section 16.1 (1961).

[38]Chicago, Rock Island, & Pacific Railway v. Board of County Commissioners, 389 P. (2d) 476, 478 (Oklahoma, 1964).

collided with a car driven by a state employee while he was on duty for the Fund. The employee's car allegedly crossed the center line of the road and hit the Bone car due to the employee's negligence.

The Supreme Court of Oklahoma, in a 1954 decision, granted a writ which prohibited the district court from proceeding further in this case insofar as the State Insurance Funds was concerned, holding that the Fund was a department of the state and was not liable for tort damages.[39]

However, in the 1959 decision the court re-examined its earlier position and expressly overruled it. The court, in holding the Insurance Fund liable, indicated that when the state is engaged in a competitive business enterprise and not a purely governmental function, it has no immunity from tort actions arising out of the negligence of its employees.[40]

By this decision the court seemed to invoke a form of the governmental-proprietary distinction and perhaps relaxed the strict immunity rule. If so, the court did not go far since the decision stated:

> ...under no circumstances can the general funds of the state be reached in order to satisfy an obligation of the Fund.[41]

The implication is that if a state agency has its own

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[39]State v. District Court of Oklahoma County, 278 P. (2d) 841 (Oklahoma, 1954).

[40]State v. Bone, 344 P. (2d) 562 (Oklahoma, 1959).

[41]State v. Bone, 344 P. (2d) 562, 568 (Oklahoma, 1959).

special funds it may be sued in tort but damages may be paid out of special, non-public funds only.

In a breach of public duty action by a lumber company against a school board for costs of materials used in the erection of an addition to a school house, plaintiff claimed the board did not require a bond of the contractor as required by law and thus the district was liable for the costs when the contractor failed to pay his materials bill. The court agreed that a school district was "a body corporate, capable of suing and of being sued" and that the district had the power to contract and the duty of securing protection in the form of a bond from the contractor. However, companies or individuals dealing with schools are expected to know the law and to keep within it. Since the company failed to find out about the bond, it could not collect from the school district.[42]

Oklahoma is one of three states that does not either permit or require school districts to purchase workmen's compensation for school district employees. Two cases, involving school districts and workmen's compensation, have appeared in the Oklahoma Supreme Court.

In 1932, an action was brought by the Ponca City Board of Education to secure court review of an award by the State Industrial Commission to an employee of a contractor who was working for the school board. The court held that a school district was not an employer within the meaning of

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[42] Frensley Brothers v. Scott, 245 P. 615 (Oklahoma, 1926).

the provisions of the Workmen's Compensation Act. The opinion held that if the legislature had intended to cover employees of the school district, it would specifically have named school districts along with the other groups of organizations listed in the act:

> ...the provisions (of the act)...shall include the State, county, city, or any municipality when engaged in any hazardous work... School districts are not, in those terms, included in that definition...[43]

A later case upheld these findings. This time the employee worked as a printer's assistant in a high school and during the course of her work lost part of the use of her right arm. She asked disability under the Workmen's Compensation Act. The court refused, since:

> A school district is not an employer within the meaning of the provisions of the Workmen's Compensation Act of Oklahoma.[44]

In an action for injuries sustained by a student while being transported to school, the plaintiff sued the school district, alleging negligence on the part of the driver and the school board and received a judgment in trial court. The defendant appealed to the supreme court. The facts of the case were that a student in the school at Turley was permanently injured in an accident occurring to a school bus driven by a teacher at the school. The bus driver was not made a party to the suit. Negligence was alleged in

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[43] Board of Education of Ponca City v. Beasley, 11 P. (2d) 466, 467 (Oklahoma, 1932).

[44] Driskell v. Independent School District No. 1 of Tulsa County, 323 P. (2d) 964 (Oklahoma, 1958).

that the bus driver was an inexperienced and incompetent driver and that the defendant school district and the individual board members knew of his incompetence since he had had a number of accidents. It was also alleged that his negligence directly caused the accident.

The court first established state agency status by citing the Constitution of Oklahoma.[45] Any possibility of liability as a municipality was removed by using the statement from Oklahoma Railway Co. v. St. Joseph's School that education "is a matter of state concern and not a municipal affair."[46] School District v. Zediker was referred to as the source of "subordinate agency" of the state status given to school districts.[47] Reference was made to James v. Trustees as authority to hold school districts as "auxiliary parts of the sovereignty."[48] In the absence of statutorily imposed liability, there would be no liability for damages due to "neglect of public duty."

In reply to the plaintiff's contention that transportation of students is not a governmental function, the court discussed Oklahoma transportation laws and found that it was a "mandatory duty of the district boards to furnish

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[45]Article 13, Section 1, 5.

[46]Oklahoma Railway Co. v. St. Joseph's School, 127 P. 1087 (Oklahoma, 1912).

[47]School District No. 17 of Garfield County v. Zediker, 47 P. 482 (Oklahoma, 1896).

[48]James v. Trustees of Wellston Township, 90 P. 100 (Oklahoma, 1907).

free transportation" to pupils residing two or more miles from school and that this would include modern methods of transportation.[49]

Protection of funds of school districts was taken up next:

> ...public school funds...shall never be in any manner diverted from the purpose for which they were intended...[50]

School districts were then declared not liable in tort for bodily injury due to neglect of the school district or its governing body. The case was reversed and sent back to trial court with directions.

Several years later, the court again reviewed the Wright case. No change was made in the decision. Furnishing of free motor transportation to public school children was held "a public governmental function" and none of the defendants, "school district, its board, nor individual members thereof, acting in good faith, are liable for injuries to a pupil caused by the negligence of the truck driver."[51]

In 1944, another transportation case was considered. An accident, after the child had alighted from the school bus, resulted in the child's death. Appeal was made to

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[49]Consolidated School District No. 1 of Tulsa County v. Wright, 261 P. 953, 955 (Oklahoma, 1927).

[50]Ibid., p. 959. Constitutional references were to Article 11, Sections 2 and 3 concerning permanent school funds.

[51]Wright v. Consolidated School District No. 1 of Tulsa County, 19 P. (2d) 369 (Oklahoma, 1933).

the Federal District Court in the Earl W. Baker & Co. v. Lagaly case.

This was an action by the father of the child killed in an accident when the bus stopped to let children off the bus and a truck passing the bus struck the child as he ran across the road to the driveway entrance to his home. Insurance became a prime factor in the decision.

First, the court took up the question of statutory authority of a school district to purchase liability insurance and found that by statute[52] school districts could:

> ...purchase insurance for the purpose of paying damages to persons sustaining injuries proximately caused by the operation of a motor vehicle used in the transportation of school children...[53]

However, action could not be brought against the school district but:

> ...may be brought against the insurer; and that the amount of the damages recovered shall be limited to the amount provided in the contract of insurance.[54]

The court noted that the insurance policy was "issued and acquired" under statutory authority. Provisions in the policy included coverage for death "at any time caused by an accident arising out of the operation, maintenance, or use of the bus."

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[52]Oklahoma Statutes, Chapter 34, Article 9, Section 13 (1939).

[53]Earl W. Baker & Co. v. Lagaly, 144 F. (2d) 344, 345 (1944).

[54]Ibid., p. 345.

Next, the court took up the question of whether a child exiting from the bus actually fit the provisions of operating a school bus. It did, since:

> ...the operation of the bus within the scope of the statute and the policy included the receiving of the children into the bus and their exit from it.[55]

The duty of the school district toward pupils being transported was the next consideration. School districts must use more than ordinary care in the transportation of pupils:

> It was the duty of the school district to exercise extraordinary care for the safety of the children being transported to and from school.[56]

It was then necessary to fix proximate negligence before a claim could be established. Testimony showed that the bus driver knew the truck was following the bus and that the highway was heavily traveled but did not take any precautions even with this knowledge:

> Yet, without exerting any effort to ascertain the condition of traffic approaching from the rear, without making any effort to ascertain the proximity of the truck, and without giving the children any warning in respect of the approaching truck, he opened the door and permitted then to alight.[57]

The court decided that, in view of these facts, "negligence was a proximate cause of the accident" and that the insurance company was liable.

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[55]Ibid., p. 345.

[56]Ibid., p. 346.

[57]Ibid., p. 346.

In 1950, a school bus belonging to a school district in Oklahoma was involved in an accident in Kansas with a car owned by residents of Arizona. The school bus was taking students on a trip to Indiana to view the Indianapolis Speedway Races. In an action for damages, the plaintiff contended that a political subdivision of a state cannot plead governmental immunity when it is operating outside its home state. The federal court refused this contention and held that immunity could be extended beyond the boundaries of the state if the home state accepted the doctrine of governmental immunity. In addition, the district might also rely upon the defense of ultra vires.[58]

In 1959, a pupil sustained injury when attacked by two other students in the gym during the noon hour recess. Action for damages was brought against the district stating that it was negligent because it hired an allegedly incompetent teacher and gave him supervisory duty over the gym during the noon hour. The plaintiff claimed that the teacher assigned to police the gym was negligently absent and that no one was present to protect or supervise the students.

The court dismissed the appeal with the statement that:

> The general rule in this state is that a school district, or school board, is not subject to liability for injuries to pupils of public schools suffered in connection with their attendance thereat, since such district, or board, in maintaining school acts as an agent

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[58] Thurmond v. Consolidated School District, 94 Fed. Supp. 616 (1950).

> of the State, and performs a purely public or governmental function, or duty, imposed upon it by law for the benefit of the public, for which it receives no profit or advantage.[59]

Liability was refused on the ground that the board "was performing a mandatory governmental function, and...was not liable for the negligent or tortious acts (of its) employees."

STATUTORY PROVISIONS

Boards of education of Oklahoma shall "provide for sick leave for all teachers" under conditions that may be determined by the board. However, they may also:

> ...provide hospital and medical benefits; and sickness, accident, health and life insurance or any of the aforesaid for any or all of its employees.[60]

A school board that took advantage of the permissive part of this statute would, in effect, be insuring against possible claims due to those that might give rise to claims under workmen's compensation or those that might fall under negligence in providing a safe place to work.

Boards of education who are authorized by statute to furnish transportation[61] may purchase liability insurance for their motor vehicles involved in pupil transportation. The statute states that this insurance shall be:

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

[60] Oklahoma Statutes, Annotated (St. Paul, 1952), Chapter 70, Section 6-9, p. 139.

[61] Docket Supplement, Oklahoma Statutes, Annotated (St. Paul, 1964), Chapter 70, Article 9, Section 1, p. 40.

> ...for the purpose of paying damages to persons sustaining injuries proximately caused by the operation of motor vehicles used in transporting school children. The operation of said vehicles by school districts, however, is hereby declared to be a public governmental function, and no action for damages shall be brought against a school district under the provisions of this section but may be brought against the insurer, and the amount of the damages recoverable shall be limited in amount to that provided in the contract of insurance between the district and insurer and shall be collectible from said insurer only. The provisions of this section shall not be construed as creating any liability whatever against any school district which does not provide such insurance.[62]

The Oklahoma court has held sovereign immunity consists of an immunity from the liability itself, and immunity from suit, the two being separate doctrines.[63] The state legislature cannot waive immunity from liability by a special law:

> Laws of a general nature shall have a uniform operation throughout the state, and where a general law can be made applicable, no special law shall be enacted.[64]

However, immunity from suit, as opposed to immunity from liability, can be waived by a special act of the legislature as a part of the sovereign's personal right and thus becomes a proper subject of a special law.[65] It would be possible for the state legislature to waive the immunity of

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[62] Oklahoma Statutes, Annotated (St. Paul, 1952), Chapter 70, Section 9-7, p. 200.

[63] Duncan v. State Highway Commission, 311 P. (2d) 203 (Oklahoma, 1957).

[64] Constitution of Oklahoma, Article 5, Section 59.

[65] State v. Ward, 118 P. (2d) 216 (Oklahoma, 1941).

the state from liability through the enactment of a general law and then to follow this act with one specifically aimed at waiving immunity from suit. Through this method, it would be possible to enact special legislation permitting suit against the state for bodily injury damages due to tortious acts.

The Supreme Court of Oklahoma has been protective in the situations where special acts permitting suit are concerned. In the case of Wright v. State, the court stated:

> Senate Joint Resolution No. 18, S. L. 1937, purporting to waive the immunity of the state from suit by a particular individual to recover damages for injuries suffered as a result of the alleged negligence of a state employee, constitutes a special law within the meaning of the section 59, art. 5, Const., which prohibits the enactment of a special law when a general law can be made applicable, and is therefore unconstitutional and void.[66]

or as stated in another case:

> As statute authorizing suit against the state does not render the state liable in tort for the negligence or misconduct or wrongful act of officers or agents of the state, where the state is not liable on general principles of law or under any statute or constitutional provision.[67]

An example of this is shown by a joint resolution which waived the immunity of the state from liability for the negligence of state employees:

> That all immunity of the State of Oklahoma in respect of liability for the negligent acts of its employees hereby is waived:

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[66] Wright v. State, 137 P. (2d) 796 (Oklahoma, 1943).

[67] Mountcastle v. State, 145 P. (2d) 392 (Oklahoma, 1943).

> Provided, that suit for any such liability may be instituted in such cases as the State shall specifically waive immunity from suit therefore...[68]

This would appear to be a general law; however, in the preamble to the law, sepcific mention of a particular person is made. This law was removed from the books as being special legislation.[69]

School districts have authority to purchase liability insurance where transportation is concerned. The statute reads:

> The board of education of any school district authorized to furnish transportation may purchase insurance for the purpose of paying damages to persons sustaining injuries proximately caused by the operation of motor vehicles used in transporting school children. The operation of said vehicles by a school district, however, is declared to be a public governmental function, and no action for damages shall be brought against a school district under the provisions of this Section but may be brought against the insurer and the amount of the damages recoverable shall be limited in amount to that provided in the contract of insurance between the district and the insurer and shall be collectible from said insurer only. The provisions of the Section shall not be construed as creating any liability whatever against any school district which does not provide said insurance.[70]

This is permissive legislation allowing school districts to purchase insurance upon their school buses but carefully mentioning that transportation is a governmental function and that no liability exists on the part of the school

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[68] Oklahoma Session Laws, 1953, p. 508.

[69] Oklahoma Statutes (Supp. 1957), p. 1036.

[70] School Laws of Oklahoma, 1965, Section 127, p. 75 (Oklahoma Statute 70-9-4).

district if they purchase insurance. There is to be no liability if any school district should prefer not to purchase liability insurance.

Oklahoma Statute 11-16.1 extends this authorization to other types of motorized equipment that schools may own:

> Governing boards or body of any county, city, town, school district or soil conservation district owning or leasing or having under their care and custody motorized movable equipment and lawfully operating or moving the same upon any highway, road, street or alley is hereby authorized to, and may, at its option, purchase insurance for the purpose of paying damages to persons sustaining injuries or damages to their properties proximately caused by the negligent operation of motor vehicles or motorized equipment in the course of their operation as such. When the operation of said motor vehicles or motorized equipment is a public governmental function, no action for damages shall be brought against any county, city, town, school district, or soil conservation district owning or leasing or having under their care and custody and operating such motor vehicles or motorized equipment under the provisions of this section, but may be brought against the insurer and the amount of damages recoverable shall be limited in the amount to that provided in the contract of insurance between county, city, school district or soil conservation district...and shall be collected from the said insurer only.[71]

Other protection that may be provided by school districts in case of bodily injury includes the statutory right to provide hospital, medical benefits, sickness, accident, health, and life insurance:

> The board of education of each school district in the state shall provide sick leave for all teachers...provided, the board of education may provide hospital and medical benefits, and sick, accident, health and life insurance or

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[71] School Laws of Oklahoma, 1965, Section 570, p. 238, 239 (Oklahoma Statute 11-16.1).

> any of the aforesaid for any or all of its employees.[72]

An annotation to the statute includes an opinion by the attorney general that "a board of education may, but is not required to, provide health insurance benefits to employees."[73]

ATTORNEY GENERAL OPINIONS

As early as 1927, the attorney general's office issued an opinion to this effect:

> You are advised that there is no statute which makes it mandatory on the school board to carry liability insurance.[74]

In 1936, school boards were cautioned that a "school district cannot obtain insurance for injuries to laborers on a building project."[75]

On the question of classroom accidents, the attorney general ruled that there are "no provisions authorizing a school district to obtain insurance protecting the school from liability due to accidents occurring in classroom instruction since there exists no such liability on the part of the district."[76]

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[72] School Laws of Oklahoma, 1965, Section 90, p. 59 (Oklahoma Statute 70-6-3).

[73] Ibid., p. 59. (Date of the Opinion is August 9, 1957).

[74] School Laws of Oklahoma, 1933, p. 46. Annotation to a statute.

[75] School Laws of Oklahoma, 1965, p. 233.

[76] Ibid.

In the attorney general's opinion there is no authority to pay a supplemental part of the costs of hospitalization for athletes. A request was received from the state superintendent in 1958 for an opinion on the expenditure of school district general funds "to pay a part of the cost of the hospital bill" for an athlete injured in the course of a game. It should be noted that the above inquiry was made prior to the enactment of Oklahoma Statute 70-4-3.

The following question, as submitted, is quoted below since it has interesting implications on the status of ultra vires purchase of liability insurance:

> The Collinsville High School carries insurance on its athletes. One of the athletes sustained injuries and later developed pneumonia. The boy was hospitalized for quite a long time and the proceeds from the insurance policy were not adequate to pay all the expenses connected with his illness.
>
> Mr. Wilson (Superintendent at Collinsville) desires to know if the Board of Education of his school can legally supplement this amount by paying a part of the cost from the general fund of the school district.[77]

The opinion cited 68 C.J.S. Section 318 in stating that school districts are liable only for those expenses "expressly or impliedly authorized by law." In the opinion of the attorney general there was no authority to pay a supplemental part of the hospitalization costs. If there is any part of the opinion devoted to the fact that the high school carried "insurance on its athletes," it is by implication only:

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[77]Letter to Oliver Hodge, December 24, 1958; signed by J. H. Johnson, Assistant Attorney General.

> This office is not familiar with any statute which authorized or provides for the payment of expenses such as those mentioned in the aforementioned inquiry.[78]

In 1960, the attorney general received a request for an opinion concerning the "liability of a school district for damages resulting from the operation of school buses and the liability of the drivers of school buses." In delivering his opinion, the attorney general cited both of the Wright cases and the Dahl v. Hughes case as judicial authority for school district immunity. Reference was also made to 70 O.S. 1951, Section 9-7 as a further source recognizing "the nonliability of school districts for damages sustained in the transportation of pupils."[79]

On that part of the question concerning the liability of drivers of school buses, "the Attorney General respectfully declines to give an opinion as to personal liability of drivers of school buses for damages resulting from the operation of school buses."[80]

The question of the purchase of workmen's compensation insurance by a school district for the protection of custodial employees was raised in 1963. Workmen's compensation insurance may not be purchased by a school district in

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[78]Ibid.

[79]Letter to Oliver Hodge, September 16, 1960; signed by J. H. Johnson, Assistant Attorney General.

[80]Letter to Oliver Hodge, September 16, 1960; signed by J. H. Johnson, Assistant Attorney General.

Oklahoma since it "is not authorized by law."[81] However, authority is available for school districts to protect employees through other insurance since school districts may:

> ...provide hospital and medical benefits, and sickness, accident, health and life insurance on...any or all of its employees.[82]

There is no liability on the part of school districts or boards for accidents occurring in the classroom since this is "a governmental function" of the school district. The attorney general's office quoted from a 1945 opinion that:

> Instruction in Chemistry, being a part of the curriculum of the school, would necessarily be considered within the scope of governmental activity.[83]

On the question of authority to provide protection to children through "employment...of watchmen at school crossings where traffic congestion causes hazards to the safety of pupils in attendance at adjacent public schools," the attorney general commented that there "appears to be no statutory provision expressly authorizing a school district to employ watchmen at school crossings" and that school districts "cannot employ a person to perform services which the law makes it the duty of some other person or public official to perform."

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[81]Letter to Oliver Hodge, September 11, 1963; signed by Fred Hansen, Assistant Attorney General.

[82]Ibid. Reference in the quote is to Oklahoma Statutes, 1961, Section 6-3.

[83]Letter to Oliver Hodge, January 20, 1964; signed by W. J. Monroe, First Assistant Attorney General.

The attorney general approved school crossing watchmen on this basis:

> ...while it might be said that the policing of city streets is a responsibility of the city government, rather than the school district, it appears that the watchmen who would be employed in this instance would be engaged primarily to protect school children from physical injury as they approach and leave school, rather than just to regulate traffic.[84]

The reason for approving school crossing watchmen provides an interesting insight upon the whole question of nonliability of school districts for pupil injuries:

> We think such protection is a proper function of a school district and may be paid for in whole or in part from school district funds, under the broad powers vested in boards of education of school districts.[85]

On the question of legal purchase of liability insurance through the use of general fund monies of a school district, statutory authority[86] exists to purchase liability insurance protection for damages to persons for injuries "proximately caused by the operation of motor vehicles used in transporting school children." Statutory authority[87] also exists to expend "general fund monies of a school district" to be used for "liability insurance upon motorized movable equipment." No other liability insurance may be purchased by school districts with general funds:

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[84]Letter to Oliver Hodge, December 7, 1954; signed by J. H. Johnson, Assistant Attorney General.

[85]Ibid.

[86]Oklahoma Statutes, 1961, 70-9-7.

[87]Oklahoma Statutes, 1961, 11-16.1.

> ...general fund monies of a school district may not be expended for liability insurance upon any other school district property.[88]

An opinion was issued on the question of legality of purchase of accident or injury insurance on athletes by a board of education using moneys taken from the activity fund of the school. Taking up the legislative act[89] first, the attorney general noted that a student activity fund could legally be established, that accounts were to be maintained within it, and that methods of disbursement from the fund were provided for in the statute.

The fund is not to be "used for any purpose other than that for which the account was originally created" but the local board is given the right to designate "certain revenue" to "specific activity accounts" or to a "general activity" account that may exist within the student activity fund.

Rules, regulations and forms used with the activity fund are to be established by the State Board of Education. The opinion then cited paragraph 7 of these regulations as the only item applicable to the question. Paragraph 7 states that the governing body of each district may establish "accounts by whatever name or style it deems best suited to its needs." The question as to whether a board of education of a local district would consider it "best suited to the needs of the district" to establish such an activity account and use it to purchase liability insurance is a

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[88]Letter to Oliver Hodge, January 20, 1964; signed by W. J. Monroe, First Assistant Attorney General.

[89]Oklahoma Statutes, 1961, 70-4-33 (as amended).

question that "cannot be determined by the Attorney General" but:

> ...we believe that such a board may establish such an 'activity account,' if it deems it to be 'best suited' to the needs of the district.[90]

This opinion is used as an annotation in the School Laws of Oklahoma, 1965, and states:

> Accident or injury insurance on athletes can be purchased with funds in the activity account.[91]

SUMMARY

School districts in Oklahoma are quasi-municipal corporations. They have the usual powers of quasi-corporations for public purposes. Schools operate as agencies of the state, created nolens volens, for a limited purpose to do a specific local duty for the state. They are auxiliary parts of the sovereign state.

The legislature is obligated to create and maintain a system of free public schools for the children of the state of Oklahoma. Plenary power over the state school system resides in the legislature except as restricted by the constitution of the state. Legislatures may create, abolish, or revise school districts according to their discretion and wishes.

Reasons given by court decisions for governmental immunity of school districts in Oklahoma include the protection

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[90]Letter to Oliver Hodge, September 11, 1963; signed by Fred Hansen, Assistant Attorney General.

[91]School Laws of Oklahoma, 1965, p. 233.

of school funds even to the extent of using a constitutional reference in the first case although not in the later cases. There is no liability for tortious acts unless given by statute. It is the duty of the legislature to change the law and not the court. Another reason is that school districts are mere agencies of the state, an auxiliary part of the sovereignty of the state.

As interpreted by the Oklahoma Supreme Court, school districts are not employers as defined by the Workmen's Compensation Act and thus may not avail themselves of workmen's compensation.

Although no case directly deals with the subject, liability in proprietary functions might be implied to school districts as a result of the Bone case. If so, and if the court followed the reasoning of the Bone case, there appears to be little possibility of collecting since "under no circumstances can the general funds" of the state be used to satisfy the judgment.

Liability insurance may be purchased by school districts for limited purposes connected with motor powered equipment owned or used under the direction of the school district. There is no liability to the district but the insurer may be liable to the amount called for in the policy. The district is expressly given immunity by the statute permitting purchase of liability insurance.

A federal court decision states that school districts may assume the cloak of immunity even when operating beyond the boundaries of the state. The school district is not

responsible for the ultra vires acts of the governing body of the district.

By statute, school districts must provide sick leave for teachers in Oklahoma but they may also provide insurance protection in the form of hospital and medical benefits, accident, health, and life insurance for all employees.

On the basis of an opinion of the attorney general, accident or injury insurance may be purchased by school districts to protect athletes, if purchased with money from the activity fund.

CHAPTER VII

CONCLUSIONS AND IMPLICATIONS

It was the purpose of this study to determine the extent to which the body of law of the selected states had moved away from the position of legal immunity for school districts for tort liability for bodily injuries and to determine implications that might be implied for public school districts.

The objectives were to determine trends in the status of bodily injury tort liability of school districts in the selected states and to indicate the implications that these trends might have for school districts.

Limitations placed upon the study included limiting it to the states of Kansas, Oklahoma, and Illinois. Court decisions were limited to supreme court cases. Except for Kansas, statutes were limited to currently effective laws. Opinions of the attorney generals were limited to those that were available. Tort liability cases were limited to those relating to bodily injury except where other kinds were needed for clarification.

The procedure used was that part of the general method of historical research which consists of the techniques of legal research.

BACKGROUND AND LITERATURE

The common law immunity doctrine protecting governmental entities from tort liability stems from English case law. It evolved from the theory of divine rights whereby the king can do no wrong. In America, this immunity is given to the state as sovereign and is placed upon school districts as an agent of the state.

The doctrine of governmental immunity for school districts is under attack by the legislative and judicial branches of the governments and by writers in the field. Erosion of the doctrine has occurred through court decisions and through legislative enactments.

As a general rule, school districts are exempt from tort liability. Exceptions to the general rule of nonliability include proprietary functions, nuisance and trespass, statutory enactment creating liability, and directly or indirectly, through liability insurance. All reasons used to support school district immunity are being challenged by definite counter-reasoning both in the literature and in the courts.

KANSAS SCHOOL DISTRICTS

Kansas adheres to the governmental immunity rule for school districts although the courts have recently installed two changes in the direction of nonliability by making districts liable for the creation and maintenance of nuisance and by recognizing the distinction between governmental and proprietary functions for schools. School district immunity

for Kansas schools is based on precedent and the courts have reasoned that if the doctrine is to be changed, it is the duty of the legislature to change it.

Based upon the general recency of court cases and opinions given by the attorney general, the problem of school district torts is one of increasing importance.

Governmental immunity holds for ultra vires acts. Respondeat superior does not apply to school districts of Kansas. School districts may not be held liable for libelous statements appearing in school publications. Extra-curricular activities, where authorized by the school board, are governmental functions. The Workmen's Compensation Act is the only statute that permits liability for injuries to accrue to the school district and it is a permissive statute.

Motor vehicle insurance protecting passengers, employees, and officials of the district may be purchased by the school district although the statute permitting this purchase expressly exempts the district from liability and places it only on the insurer.

ILLINOIS SCHOOL DISTRICTS

Illinois used the doctrine of governmental immunity for school districts until the decade of the 1950's when a series of court decisions began to erode and finally to abrogate the doctrine. In Illinois, the doctrine went through the periods of establishing and maintaining the immunity, erosion of it, and abrogation. The Molitor v. Kaneland case contains a thorough review of the doctrine.

The court considered all causes and reasons for the doctrine and ended it by the adoption of school district responsibility for tortious acts.

In 1959, the legislature of Illinois adopted remedial legislation limiting the amount of liability that school districts may be responsible for, although transportation liability insurance may, at the school board's discretion, exceed the $10,000 limit set by the statute. School districts may purchase liability insurance to protect officials, agents, and employees of school districts for negligent acts resulting from school district operations. Workmen's compensation insurance is mandatory for Illinois school districts for those employees engaged in hazardous work.

OKLAHOMA SCHOOL DISTRICTS

School district governmental immunity is vigorously maintained in Oklahoma. Immunity is upheld in school districts of Oklahoma on the basis of precedent. There can be no diversion of state funds to pay this type of claim against a school district. School districts are agents of the state and are entitled to the same protection as the state. In the absence of a statute imposing liability, school districts are immune from tort liability.

Liability insurance may be purchased by school districts for their movable motorized equipment but immunity is expressly given to the school district and any claim can only be placed upon the insurer and only to the amount of the insurance. Insurance may also be purchased from general

funds to protect employees in the area covering hospital and medical benefits, accident, health, and life insurance. Accident or injury insurance may be purchased by the school district to cover athletic injuries if activity funds are used to pay the premium. Workmen's compensation insurance is not available for the use of Oklahoma school districts as interpreted by the supreme court.

CONCLUSIONS

The doctrine of governmental immunity originated in times that bear little or no resemblance to today. An examination of the historical background of the doctrine shows that it rests upon extremely doubtful reasoning in the first case and that this doubtful reasoning is compounded when used in a democratic country such as the United States. Although the origin of the doctrine rested upon questionable reasoning and its continuance upon contrived reasoning, its continued application in a majority of the states indicates its strength as a rule of law.

The doctrine is of judicial origin and maintained by precedence. Sovereignty of the state is the most common reason used to uphold the doctrine. Since the school district is an agency of this sovereign, the district partakes of this same immunity. Courts commonly adopt the idea that if the doctrine is to be changed, it is the duty of the legislature to make the change and not that of the court. The theory of <u>respondeat superior</u> does not apply to school districts. A school district is not responsible for the

ultra vires acts of its agents or governing body. School districts levy taxes for educational purposes and these funds cannot be diverted to other purposes such as the payment of tort judgments. If the doctrine were changed from immunity to liability, there would be a deluge of suits that would harass the school district and prevent its carrying out its prescribed duties. Thus runs the reasoning of the courts in maintaining the doctrine of immunity for school districts.

Criticisms of the doctrine, as commonly given in court decisions, are many and widespread over the United States. Courts have stated that the doctrine has a rotten foundation. It has been called archaic and that it is maintained by the inertia of the courts. It does not fit today's social beliefs. It does not fit a society dedicated to democratic political beliefs. It is an historical anachronism and continued mainly through stare decisis. The doctrine contradicts the reasons for the Revolutionary War. It has been called unjust and outmoded. Certain economic techniques, as used today in the form of insurance, render the reasons for the doctrine invalid. Unfortunately, not all the courts have had the courage of their convictions and, after making these statements, some have continued to maintain the doctrine.

School district immunity from responsibility for tortious acts is being eroded by many methods. This has occurred through action of the legislatures and the courts. Exceptions to the general rule of immunity have taken four

forms: 1.) proprietary functions, 2.) nuisance and trespass, 3.) liability to the extent of insurance coverage, and 4.) liability under statute. Abrogation of the rule for school districts has occurred through court decisions in some jurisdictions.

Insurance is playing an increasingly important part in the status of school district immunity. Insurance protection has taken different forms such as liability insurance, medical benefits, health and accident insurance, and workmen's compensation. The most comprehensive legislative enactments in the field of tort liability are workmen's compensation laws with only three states not being covered with this type of insurance. Many states permit insurance protection to one extent or another with transportation liability insurance allowed by all but four states. There is an implication, both in the court decisions and the literature, that the ultra vires purchase of liability insurance is fairly widespread.

General school district immunity has been waived by statute in five states. Save-harmless statutes, where the financial responsibility for negligence judgments is shifted from the employee to the school district, are in force in five states. Permissive or mandatory legislation for the purchase of general liability insurance protection is in effect in fifteen additional states.

Statutory waiver of school district immunity, in addition to court abrogation of the doctrine, provides almost complete waiver of the doctrine in one-fourth of the

states. This number contrasts sharply with that number given in school law textbooks, even those currently used, which emphasize the "three states" that are nonimmunity states.

The dates of legislative enactments and of the court abrogations are of general recency in time. Much of this activity has occurred in the past two decades.

The history of school district immunity in individual states follows a pattern: install the doctrine, uphold it, erode it, and then replace it.

Governmental immunity was directly extended to school districts by the Illinois Supreme Court in 1899. The doctrine was upheld and unchanged for about 50 years. Based on a decision in 1948 holding charitable institutions liable for torts to the extent that trust funds were protected, public school liability was installed in 1952 to the extent that public funds and property were protected. The doctrine was abrogated in 1959. Legislative enactments followed abrogation and set standards for school district liability. Illinois is a clear example of the pattern of installing the doctrine, upholding it, eroding it, and then replacing it.

The Kansas court extended governmental immunity to school districts in 1926. No deviation was made until the decade of 1950. In 1951, nuisance was made an exception to the general rule of school district immunity. Transportation liability insurance was statutorily permitted in 1953 although school district immunity was not affected. A

distinction between school district immunity and school board immunity appeared in the opinions of the attorney general. In 1959, a court decision involving a school district tort case mentioned both nuisance and proprietary functions as exceptions to the general rule of immunity. A portion of the pattern of erosion of immunity for school districts has occurred in Kansas.

Oklahoma made governmental immunity apply directly to school districts in 1927 and has continued the basic immunity virtually unchanged in so far as judicial decisions have been concerned. Statutory changes have been made in insurance coverage through permissive purchase of transportation liability insurance, permissive purchase of medical, life, accident and health policies for employees and the permissive purchase of accident protection for athletes through the use of activity funds. No decrease in school district immunity has occurred as a result of this legislation. Oklahoma appears to be staying within the "upholding immunity" phase of the erosion pattern.

IMPLICATIONS

Governmental immunity from liability has decreased over the recent years. The extent of this decrease should put school officials on the alert to find methods of protecting their operations in a businesslike manner. There will be an ever-increasing amount of litigation in the field of tort liability for school districts. It would be in their interest to actively seek legislation that would give them

authority to protect their districts through insurance. Professional associations should join them in seeking improved legislation of this type.

Legislation should be enacted requiring school districts to carry comprehensive liability insurance against suits in tort. General operating funds of school districts could easily be protected by means of insurance. School boards should not have discretion in deciding whether or not they want to insure. This should be a legislative decision.

Abrogation or legislative curtailment of the use of the doctrine of governmental immunity for school districts will not force forward looking school districts to decrease their educational activities. Private schools and governmental agencies, such as cities and counties, have not become insolvent because of a lack of immunity.

The school district should be held fully accountable for its acts, regardless of governmental or proprietary function. The liability question for school districts should be resolved, not on the basis of governmental immunity or some doubtful exception, but upon the basis of the standard of care needed by its agents to accomplish their activity, education. It would be better to require the plaintiff to establish the negligence of the defendant, by and through its agents, and to prove that damage occurred as a result. Simply put, each bodily injury case should be tried on its own merits.

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TABLE OF TERMS

Abrogate. A judicial act that annuls or revokes a previously held doctrine.

Action. A proceeding in court by which one party complains against another for the enforcement or protection of a right, the redress of a wrong, or the punishment of a public offense.

Civil Law. The system of law originating in Rome, compiled by Justinian from the rules developed in the administration of the Roman Empire.

Citation. A reference to decided cases or books of authority.

Common Law. Legal principles derived from usage and custom or from court decisions affirming such usages and custom.

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

Decision. The conclusion of the court as to the merits of the claims of the contending parties.

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

Demurrer. Allegation by one of the parties that even though the other party's claims are true they are not of such consequence as to justify continuing the case.

Governmental Immunity. Immunity from tort actions enjoyed by governmental units in the common law states of the United States.

Liability. Legal responsibility.

Libel. Written defamation of another person's character.

Negligence. Failure to exercise the care that circumstances justly demand in order to protect the rights of another.

Nolens Volens. Created with or without consent.

Nuisance. A continuous condition or use of property in such a manner as to obstruct proper use of it by others lawfully having right to use it.

Plaintiff. The person who brings action or suit to obtain a remedy for injury to his rights.

Precedent. A decision of the courts which serves as a rule for future determinations in similar cases.

Proprietary Functions. Activities of the governmental unit when it is acting in its private or corporate capacity and in the interests of the local area as contrasted to acting in the interests of the state.

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

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

Safe-Place Statutes. Legislation that requires the safe construction and maintenance of buildings in order to protect the users of the buildings.

Save-Harmless Laws. Legislation which imposes costs of liability upon the school district rather than upon the employee who was judged guilty of tortious acts.

Sovereign Immunity. Immunity based upon the idea that the supreme political power of the governmental unit can not be challenged in court without first giving consent.

Stare Decisis. Principle that when a court has made a declaration of a legal principle it is the law until changed by competent authority. The literal meaning is to stand by precedent set in previous cases.

State Agencies. Organizations or quasi-corporations created by the state to perform a limited governmental purpose.

Statute. Act passed by the legislature.

Tort. Legal wrong committed upon the person, property, or reputation of another person but excluding contractual wrongs.

Trespass. An act which encroaches upon the personal or property rights of another.

True Municipality. A municipal corporation occupying a definite area and created with dual powers. It has both state and private functions.

Ultra Vires. Acts that are committed beyond the scope of authority.

Writ of Mandamus. A court order compelling public bodies or officers to perform a duty.

VITA

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