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GRADUATE COLLEGE

AN ANALYSIS OF PATTERNS OF LIABILITY DECISIONS IN THE PUBLIC SCHOOLS OF SELECTED STATES OF THE UNITED STATES

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IN THE PUBLIC SCHOOLS OF SELECTED STATES

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AN ANALYSIS OF PATTERNS OF LIABILITY DECISIONS IN THE PUBLIC SCHOOLS OF SELECTED STATES OF THE UNITED STATES

CHAPTER I

NEED FOR THE STUDY

Introduction

The indefiniteness of liability laws as they apply to school districts, school board members, and school employees affords most school administrators with more than a little concern. The legal position of the school district, its board members, and employees has been understood in a general sense for many years, but the willingness of courts to mold the laws in the direction that the social facts indicate as desirable, make it difficult or impossible to understand the problems of liability of school districts, board members, and employees. An analysis of court cases, current literature, and statutory enactments needs to be reviewed in order to draw conclusions as to patterns of liability.

Background Of The Problem

According to American political and educational philosophy, public schools are supported for the welfare of the state and the individual. Consequently, when the state forces the individual into the school, and requires the child to be in a position or under circumstance in which he

may be injured, and can then escape all liability for such injury, it seems not in keeping with the democratic principle that the state exists for the welfare of the individual citizen. Social and political pressure has forced some states to remove immunity of schools as governmental agencies.

The extension of liability insurance protection so as to authorize its application to all types of physical injury to school board members, school employees, and students, while they are engaged in any kind of school activities under the supervision of the school, is within the power of the state legislature. The Oklahoma courts could find, upon the examination of the question of school district liability, that school programs and social conditions have changed sufficiently, in the last few years, to warrant courts modifying or even reversing their earlier rulings which established non-liability for school districts in Oklahoma. With Oklahoma's more comprehensive school programs of more physical education and types of vocational courses which are more likely to cause physical injury, and the social and political pressure for liability insurance protection, it appears there is a need for a close scrutiny of liability practices of public schools in the southwestern states. This may suggest a change in approaching in the attitudes of courts and legislatures on school liability. Specific attention should be given to what has been done for the protection of the individual in relation to school district liabilities in other states and what the implications are for Oklahoma.

Statement of Problem

The problem of this study was to analyze the court liability decisions

relating to bodily injury liability of public school districts, individual school board members, and school employees, acting within their official capacity.

Purpose of Study

The purpose of this study is to determine the extent to which the patterns of court decisions and statutory enactments are changing away from legal immunity of schools, and to see what implications these patterns have for Oklahoma Public Schools in relation to bodily injury.

Procedures used in Study

The method used in this research was primarily a documentary one. It is part of a more general pattern of historical research.[1] The procedure in attacking this problem involved three steps:

1. Collecting of data to determine patterns existing in the selected states. This was accomplished by the following:

   A. Collecting all court cases in the selected states that pertain to the problem.

   B. Collecting all statutory enactments in the selected states pertaining to school liability for physical injury.

   C. Examination of textbooks, current literature, and other publications which refer to bodily injury cases of school liability by title.

   D. The securing of statements from the Attorney Generals of each of the selected states pertaining to patterns of liability of school districts, individual school board members, and school employees in the home state of the Attorney General.

2. Analysis of the data for determining whether there was a pattern toward eliminating immunity for schools for liability responsibility. This was accomplished by the follow-

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[1] John B. Barnes, Educational Research for Classroom Teachers, (G. P. Putnam's Sons, 1960), p. 25.

ing:

A. Investigation of court records of cases that had been adjudicated and that referred to liability of public districts, individual school board members, and school employees.

B. Study of statutory enactments of various states pertaining to school liability.

C. Review of current literature, textbooks, and other publications which refer to school liability by title.

D. Statements, from the Attorney Generals of each of the selected states to secure the current thinking of this judicial group about school liability.

3. Interpreting the data, drawing conclusions, making recommendations, and itemization of the implications for Oklahoma Public Schools. The following steps were followed in this process:

A. Each case was identified as to principle or issue it illustrated.

B. The resulting principle and issue were assembled and studied, and those similar were grouped together.

C. The data were organized and tabulated, then presented to a jury of six reputable judges and/or practicing attorneys for their evaluations to see if legal patterns were deviated from immunity.

D. Conclusions were drawn, implications for Oklahoma Public Schools were identified, and recommendations for the Oklahoma legislature on school liability were made.

Definition of Terms

Agent - The agent is one who undertakes to transact some business, or to manage some affair, for another, by authority and on account of the latter, and to render an account of it.

Collateral Attack - An attempt to destroy the effect of a judgment showing reasons why the judgment should not be given.

Common Law - Comprises the body of those principles and rules of action, relating to government, persons, and property which derive their

authority from usage and customs.

Contributory Negligence - If the evidence shows that the plaintiff himself was guilty of negligence contributing to his injury, there can be no recovery.

Conversion - An unauthorized assumption and exercise of the right of control over goods or personal chattels belonging to another, to the alternation of their condition or the exclusion of the owner's rights.

Decision - A judgment rendered by a competent tribunal.

Defendant - A party sued in a personal action.

Derelict - Neglectful.

Dicts - The opinions of a judge which do not embody the resolution or determination of the court, and, made without argument or full consideration of the point, are not the proessed, deliberate determinations of the judge himself.

Discretionary Powers - Powers or rights conferred to act according to the dictates or conscience or judgment.

Employees - Administrators, teachers, bus drivers, custodians.

Immunity - Freedom from natural or usual liability.

Indictum - Statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand are otiter dicts, and lack the force of an adjudication.

In Loco Parentis - In place of a parent.

Jurisprudence - System of laws of a country.

Liability - The state of being bound or obligated in law or justice to do, pay, or make good on something. The state of one who is bound in law and justice to do something which may be enforced by action.

Ministerial - It is a definite duty arising under circumstances admitted and imposed by law.

Misfeasance - Improper performance of an act.

Negligence - The omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or the doing of something which a prudent

and reasonable man would not do.

Nolen Volens - Whether willing or unwilling; consenting or not.

Nonfeasance - Neglect or failure to perform a duty.

Nuisance - Anything that unlawfully causes hurt, inconvenience, or damage.

Opinion - The statement of reasons delivered by a judge or court for giving the judgment which is pronounced upon a case.

Plaintiff - He who complains.

Plenary - Meaning full, complete, unabridged.

Proprietary - One who has legal right to anything.

Quasi - A term used to mark a resemblance, and which supposes a difference between two objects. Indicates partial or part owner.

Quasi-judiciary - A judicial act performed by someone not a judge.

Respondeat Superior - A phrase often used to indicate the responsibility or a principal for the acts of his servant or agent.

Save Harmless - To exempt or reserve from harm. As where a statute reserves or saves vested rights.

School - An institution of learning of lower grade than a college or university.

School District - A public and quasi-municipal corporation, organized by legislative authority or directive, comprising a defined territory, for the erection, maintenance, government, and support of the public school within its territory in accordance with and in subordination to the general school laws of the state, invested, for these purposes only, with powers of local self-government and generally of local taxation, and administered by a board of officers, usually elected by the voters of the district, who are variously styled "school directors", "trustees", "commissioners" or "supervisors" of schools.

School Officials - School board members, trustees, clerks and treasurers.

Solvent - Having the power of dissolving.

Stare Decisis - To abide by, or adhere to, decided cases.

Statute - A law established by the act of the legislative power.

Subrogation - The substitution of another person in the place of the creditor to whose rights he succeeds in relation to the debt.

Tort - In modern practice is used to denote an injury or wrongful act. A private or civil wrong or injury. A wrong independent of contract.

Ultra Vires - A term used to express the action of a corporation which is beyond the powers conferred upon it by its charter, or the statutes under which it was instituted.

A History of Torts

The field of torts is that branch of the law which protects the rights of a person against injury to his body, reputation, character, conduct, manner, and habits. In brief, a tort is a private injury. Cooley has indicated the ways in which one may become 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 an injury.[1]

The rule is well established that school districts are not liable for the negligence of their officers, agents, or servants while acting in a governmental capacity in the absence of a statute expressly imposing such liability. Immunity from liability is based on the theory that the state is sovereign and cannot be sued without its consent. Bochard, in his study, "Governmental Liability in Tort," points out that the doctrine had its origin in the maxim that "the King can do no wrong." He states that how it came to be applied in the United States is one of the mysteries of legal evolution and seriously questions the validity of the doctrine.[2]

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[1]Thomas M. Cooley, Law of Torts (4th ed. Chicago: Callaghan & Co. 1932), p. 85.

[2]Robert R. Hamilton and Paul R. Mort, The Law and Public Education (2nd ed.; New York: The Foundation Press, Inc., 1959), p. 279.

While the immunity of state instrumentalities from liability in tort is said to be based on the concept of sovereignty, many courts have assigned other grounds to support the rule. Some authorities sustain the result reached on the ground that the relation of master and servant does not exist, hence the rule that a master is liable for the acts of his servant or agent while acting within the scope of his authority is not applicable. Others point out that no liability attaches due to the fact that the law provides no funds for the payment of such claims against the district. It is also said that funds raised for school purposes may not be legally diverted to the payment of tort claims against the district, the assumption being that payment of such claims is not an expenditure for school purposes.

The soundness of the reasoning in all these cases may well be questioned. There is nothing inherent in the nature of municipal or quasi-municipal corporations which prevents the operation of the rule which holds a master liable for the acts of his servant while acting within the scope of his authority. The argument that there is no liability because the law does not provide a means for raising funds to pay judgments if they are obtained is not sound. The fact that a judgment may not be satisfied is not a legal basis for non-liability. The courts taking this view have apparently considered it useless to render judgments against districts since they cannot be satisfied. The same may be said of a judgment against any insolvent judgment debtor, but no case has been found in which the insolvency of a defendant been stated as a ground upon which judgment was rendered in his favor.[1]

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[1]Robert R. Hamilton and Paul R. Mort, The Law and Public Education (2nd ed.; New York: The Foundation Press, Inc., 1959), p. 280.

Chief Justice Taney of the United States Supreme Court in 1875 stated:

> It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other without its consent or permission, but it may, if it thinks proper, waive this privilege and permit itself to be made a defendant in a suit by individuals or by another state. And as this permission is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued, and may withdraw its consent whenever it may suppose that justice to the public requires it.[1]

The common law rule of immunity persists in the United States through stare decisis, not reason. European countries long ago discontinued such immunity.

Public School is a State Agency

The following section examines the legal status of the public school district as a governmental agency. In legal theory the public school is a state institution. The rule is well established that a state, unless it has assumed liability by constitutional mandate or legislative enactment, is not liable for injuries arising from the negligent or other tortuous acts or conduct of any of its officers, agents, or servants committed in the performance of their duties. If the public school is a state institution, the school district is at least a quasi-governmental agency and thus partakes of the governmental immunity. As Rosenfield stated:

> Thus, in the case of a school district, it is well nigh impossible for a court to label any of its functions 'proprietary' so as to impose liability therefore.[2]

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[1] Beers v. Arkansas, 61 U.S. (20 How.) 527, 15, 1st ed.

[2] Harry N. Rosenfield, Liability for School Accidents (New York: Harper and Brothers, Publishers, 1940), p.xi.

Various theoretical explanations for this immunity have been given by Garber:

1. Under common law the state and its political subdivisions are not subject to tort actions.
2. School districts have no power to operate a proprietary function; their only power is to operate the schools, and all parts of the school program are applications of the governmental function of education.
3. Since school districts receive no profit or advantage from operating the schools and are required to do so under the state law, they are acting nolens volens or involuntarily; therefore they should not be charged with liability for their mistakes.
4. School districts ordinarily have only those powers given them by the state legislature or the state school officers, and they have not been given permission to commit a tort.
5. School district money is tax revenue collected for educational purposes only, and not to pay damages.
6. School property is exempt from attachment to pay damages for claims, so it is impractical, even if it were legal, to allow a judgment against a school district.
7. The injured's personal interest of collecting tax money as damages must give way to the public welfare so that the money may be perserved for the operation of the schools.[1]

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[1]Lee O. Garber, Law and the School Business Manager (Danville, Illinois: Interstate Printers and Publishers, Incorporated, 1957), pp. 195-96.

CHAPTER II

REVIEW OF THE LITERATURE, COURT CASES, STATUTORY ENACTMENTS

Liability of School Board

As a general rule, officers, directors, trustees, and members of a local school district or other local school organization are not personally liable for loss or injury resulting from acts within the line of their duty or the scope of their authority; nor are they liable in the exercise of their lawful discretion, unless such act is performed willfully, maliciously, or unless they assume to act in an individual capacity. A board member may be liable for any loss which may be caused by or ensue from the performance by him of any act not within powers conferred to him by statute.[1]

It is thoroughly acknowledged that an administrative official, such as a board member, will be held personally liable if he fails to perform a specific, mandatory, statutory act. This rule is not applied often, but high state courts have applied it in some cases.

The prevailing principle of law in the United States is that a school district or a school board is not, in the absence of a statute, subject to liability for injuries of pupils or others during their attendance in school. The Arizona court well stated the rule that a school

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[1]Corpus Juris, LXXVIII, p. 746.

district, under our system of government, is merely an agency of the state as it is said in Freel v. Crawfordsville:

> They are involuntary corporations, organized not for the purpose of profit or gain but solely for the public benefit, and have only such limited powers as were deemed necessary for that purpose of administering the state system of public education . . . In performing the duties required of them, they exercise merely a public function and agency for the public good for which they receive no private or corporate benefit. School corporations, therefore, are governed by the same law in respect to their liability to individuals for the negligence of their officers or agents as are counties and townships. It is well established that where subdivisions of the state are organized solely for public purposes, by a general law, no action lies against them for an injury received by a person on account of the negligence of the officers of such subdivision, unless a right of action is expressly given by statute. Such subdivisions as, counties, townships, and school corporations, are instrumentalities of government, and exercise authority given by the state, and are no more liable for the acts or omissions of their officers than the state.[1]

> Such being true, the overwhelming weight of authority naturally is to the effect that school districts are not liable for the negligence of their officers, agents, or employees, unless such liability is imposed by statute either in express terms or by implication.[2]

This general or common-law principle is applied in more or less blanket fashion with almost complete disregard of the facts in the case. In virtually all our states the courts will not permit the injured pupil or person to succeed in a suit against the board of education. The dominant principle of law in the United States in this regard is that in the performance of a governmental function, the state, or any of its agencies (here the school district) is immune from liability.

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[1] Freel v. Crawfordsville, 142 Ind. 27, 37 L. R. A. 301, 41 N. E. 312

[2] School District #48 of Maricopa County v. Rivers, 30 Ariz. 1, 3--4, 243 Pac. 609 (1926).

How did such a rule of law develop? In effect, it permits a board of education to commit homicide. It is a principle of law springing from the medieval theory of the divine right of kings: "A king can do no wrong." Kings fell out of favor in the United States, but the sovereign states took over the prerogatives of the king: "The state could do no wrong." Hence, a suit cannot be brought for what is not a wrongful act. This theory of sovereignty is the main principle upon which is based this almost universal American rule of governmental immunity from liability for tortuous acts.[1]

The fact that school districts are quasi-corporations, and school board members are lay citizens elected to represent the state in the function of school business, might reveal the leniency with which they are considered in a court of law. Then too, boards of education are representing the people of the district who are the innocent third party if school business is not conducted properly. This concept, while still generally upheld in courts of law, is being gradually changed as indicated by interpretations of courts in California, Washington, and New York where immunity of school districts and school board members is sometimes questioned.

The immunity from liability enjoyed by school districts does not extend to school officers by virtue of their official positions. However, it does not follow that members of boards of education are held to the same degree of accountability and care in the management of school affairs as they or other individuals are held in their personal activities. It is an accepted law that a public official engaged in the performance of

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[1] Burns v. Board of Education, New York City, 239 App. Div. 713, 268 N.Y. Supp. 626 (1934), aff'd. 264, 191 N.E. 631 (1934).

governmental duties involving the exercise of judgment and discretion may not be held personally liable for more negligence in respect to the performance of his duties. The result is that, in such cases, an offical may not be held personally liable unless it be alleged and proved that his act, or failure to act, was corrupt or malicious, or that he acted outside of and beyond the scope of his duties. This rule is sound.[1]

When school board members act in good faith, without fraud, they will not generally be held liable even though it later arises that their acts were not legally authorized. Courts will not rule on the wisdom of school board actions, so long as it appears the action was taken in good faith.[2]

Discretionary Powers

A board of education is a quasi-judiciary when it is authorized or compelled to look into facts and to act upon them in such a manner as to exercise discretion. School Board members are not judicial officers, but many of their duties require interpretation and judgment. As long as they act honestly and in good faith, board members will not be held liable for injury to an individual when that injury occurs as a result of the judgment decision.[3]

Rules and regulations set up by the board of education must be reasonable if they are to be enforced. Conditions surrounding a problem in one case may be quite different in another; therefore, even though wide discretion may be exercised, it must be used sensibly, or the courts will in-

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[1]Hamilton and Mort, op. cit., p. 292.

[2]Fredrick Weltzin, The Legal Authority of the American School (Grand Fork, North Dakota, 1931), pp. 154-57.

[3]John H. Messick, The Discretionary Power of the School Boards (Dunham, North Carolina, 1949), pp. 24-25.

terfere. Examples of abuse of discretionary powers are: acting in bad faith, inequitable, fraudulently, arbitrarily, maliciously, wantonly, not in the best interest of the public, and without statutory authority. All of these, however, must be obvious violations before the courts will act because courts realize that school board members work many hours serving the public gratuitously. If such people were held liable for more mistakes of judgment, it would become very difficult to secure people of good faith to act as board members.[1]

Sometimes members of a board of education are used as individual when they unwittingly pay out money in an illegal manner. Such is the case in the case in the Board of Education of Oklahoma City v. Cloudman.[2] Cloudman was a member of the Oklahoma City board when claims were paid for doctors and dentist prior to the protest period. Later the courts ruled this action illegal, and the board sued for recovery; but it was denied on the grounds that it was a discretionary duty acted upon in good faith. The fact that warrants were issued prior to the end of the protest period was of no consequence as that, too, was a matter of discretion. Another case in point is Keenan v. Adams[3] where a school superintendent was reimbursed without completing a voucher, and a trustee was paid for repairing a school building. Suit was brought for recovery but was denied on grounds that no fraud was committed, the public had received full value, and that the pur-

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[1] Ibid., pp. 6-7.

[2] Board of Education of Oklahoma City v. Cloudman et al. 185 Okla. 400, 92 Pac. (2nd) 837.

[3] Keenan v. Adams, Superintendent et al, 176 Ky. 618, 196 Sw. 193.

pose for which the money was spent was not in itself unlawful.

Boards of education and school districts are not subject to collateral attack. The courts deny a suit against the board of education because of the judicial decision within the scope of the board's authority. The courts further state that when a board is called to pass upon evidence and decide their conclusions, they cannot be collaterally attacked and are not liable to answer in a suit for this action.

Ministerial Duties

Ministerial duties are those duties required of a board of education by statute are mandatory that they be performed. It seems well-founded that school board members are liable to third parties for in injuries sustained because of the board's failure to perform ministerial acts or to perform them improperly. Officers are guilty of nonfeasance, failure to perform an act, or misfeasance, failure to perform the act properly.

Liability of School District Officers in the Exercise of Discretion

School district officers are not judicial officers, but the performance of many of their duties requires the exercise of judgment and discretion. Their acts then are quasi-judicial, and, as long as they act honestly and in good faith, they will not be held liable to an individual for injuries growing out of error or judgment, however great it may be.[1] This exemption applies only when officers act in good faith and within the scope of their corporate powers. A judicial officer proper will not

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[1] Board of Education v. Cloudman, Supra.

be exempt from liability if he acts outside his jurisdiction.

In the case of Braun v. Trustees of Victoria Independent School District, the action came about from injuries to a pupil while in attendance at school. The child fell into a small tree next to some steps and was injured. The plaintiff alleged that the pruning and posioning of the tree were done in a negligent manner. The court held that the earing for school grounds is a governmental function and that an independent school district is an agency of the state. While exercising governmental functions, it is not answerable for its negligence in a suit concerning tort. The court stated that unlike a city or town a school district is purely governmental and performs no propiritary functions which are separate and independent of its governmental powers. The court also denied requital on a nuisance theory and stated that there was no distinction in this instance between negligence and nuisance as far as liability for personal injury is concerned.[1]

A school board's corporate character protects its members from individual liability while their official character is the opportunity or occasion of the neglect. If they neglect to discharge the duties immediately imposed upon them by law, the neglect is that of the corporate body and not of the individuals composing it. Moreover, school board members are not liable as individuals for injuries growing out of the negligence of their employees.[2]

Legal Status of School Districts

The legal status of school districts in the United States is that of a

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[1] Braun v. Trustees of Victoria Independent School District, Texas, Supra.

[2] Consolidated District No. 1 of Tulsa County et al v. Wright, Supra.

public corporation of limited authority, usually termed a quasi-corporation. The school district's origin can be determined by a study of educational history, but its modern organization and the sources and extent of its authority can be approximated only by a study of constitutions, statutes, and court decisions.

The Constitution of the United States does not mention school districts or any other public corporations confined to restricted geographical areas within the several states. Education thus becomes one of the functions reserved under the Tenth Amendment "to the states respectively or to the people."

The early state constitutions did not make public education mandatory upon the states. The majority of them commented briefly but favorably and left the further interest of the states in the matter entirely with the several legislatures. Public education was not universal in the period during which the first state constitutions became effective. Since the public schools have become well established and the provisions of the state constitutions have become more numerous and definite, the courts now commonly refer to public education as mandatory.

The legal basis of public education is found among the powers reserved to the states by the Federal constitution. The legal authority under which public schools operate is therefore, one of the group of indefinite powers given to the states and is referred to generally as a "state's right." Since the conduct of public education is a part of the exercise of this reserved power of the state, it is clear that public education is in legal theory a function of the state.[1]

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[1]Robert R. Hamilton, Legal Rights and Liabilities of Teachers (Wyoming: School Law Publications, 1956), pp. 1-2.

Thus, the law seems to be that the school district has no inherent powers. The legal theory is clear. All such powers that local units may have enjoyed before the Federal government was formed were absorbed by the states including the right to form and regulate public school districts. Units of public education can be initiated and operated only under the authority delegated from the state.

The Present Status of School District Liability for Injury

Only the states of California, New York, and Washington have enacted effective legislation which abrogates the rule that the district is not liable for tort.[1] California has been most successful in its statutory enactments; school districts have practically the same liability status as private corporations. Several states have passed "save harmless" statutes whereby the districts are required to recompense teachers who have been found liable for torts.[2] Many school authorities agree that only the states of California and New York have made appreciable progress in effecting means whereby the injured may receive recovery from school districts for torts committed by their employees. California has achieved school district liability for torts by statute; New York has attained this by unorthodix court interpretations (stare decisis not invoked). Satterfield has said: "New York is the only state in which tort liability is imposed on school districts in the absence of express statutory provision."[3]

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[1] Ibid., p. 5.

[2] Ibid., p. 41

[3] Ted J. Satterfield, "The Teacher Pays," The Phi Delta Kappan, XXXII (September, 1950), p. 6.

Chambers noted that a changing viewpoint toward liability is being evolved. "A fresh look at the outcomes of suits against school districts for injuries to pupils reveals that there is a gradual softening of the harsh rule of immunity based on the ancient doctrine, "The King can do no wrong."[1]

Discussion of the liability of school districts involves analysis of a legal problem. The legal position of the school district as a corporate entity and its legal relationships are obviously important for an understanding of the problem. For several decades, however, a new viewpoint has graudally exerted its influence in the law and has proposed to take this development into account. In its present form, the new view point may be described as the willingness to mold the law in the direction the social facts indicate as desirable. It is essentially an increased emphasis on the scientific approach to law and admission of evidence about practical situations that may be affected by legal rules and how legal rules operate in terms of social results. The common law principle, universally applied by the courts, is that school districts and municipalities are not liable to pupils for injuries resulting from the negligence of the officers, agents, or employees of the district or the municipality. Nor does it matter that the injury was sustained while the pupil was off the school premises or while being transported to or from school.[2]

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[1] M. M. Chambers, "Can the King Do Wrong?" The Nation's Schools, XXIX (April, 1942), pp. 56-58.

[2] Wright v. Consolidated School District No. 1 of Tulsa County, 162 Okla. 110, 19 P. 2d 369 (1933).

The case of Wright v. Consolidated School District No. 1 serves to illustrate the reasoning of the courts concerning injuries to pupils because of negligence of school districts or their agents. In the Wright case, the court held that the school board was not liable for injuries to a pupil injured as a result of the negligence of the driver of a school bus. The court reasoned that it was the duty of the school district to provide transportation to and from school for the plaintiff. It was a public duty from which the district derived no benefit or advantage. The right of the plaintiff to be transported was one to be enjoyed in common with other students in the district. It has long been recognized in Oklahoma that an action cannot be maintained against a school district without the consent of the state; such consent cannot be granted in the absence of a statute making it responsible. The officers, agents, and employees of a school may be held liable individually for their negligent acts.

School district officers, of course, are not judicial officers, but the performance of most of their duties requires the exercise of judgment and discretion. When such is the case, their acts are quasi-judicial, and as long as they act honestly and in good faith within their jurisdiction, they will not be held liable to an individual for injuries growing out of error of judgment, however, great it may be.[1] If officers were held responsible in damages for more mistakes of judgment, it would be extremely difficult to secure the services of upright men and women to perform the duties of an office which neither pays remuneration nor affords great public

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[1]Board of Education v. Cloudman, 185 Okla. 400, 92 P. 2d 991 (1939).

honor.[1]

Except in three states, and in certain restricted conditions in two or three others, the district is not liable for the torts of its agent or employees. The rule is that there is no liability against the state's institutions except in California, Washington, and New York, and with slight modifications in the District of Columbia, North Carolina, Mississippi, and possibly another state or two. There has recently been a statute passed in Illinois which permits limited liability against certain state institutions. The theory of this immunity is that the state is sovereign and a sovereign can do no wrong.

Since a school district is an agency of the state, and since the state cannot be sued without its consent, a school district cannot be sued without the consent of the state. That is the second reason for the rule. The third reason for the rule is that there is no money to pay judgments in case judgments are rendered against a district. But that, of course, is reasoning in reverse. In all probability there would be money to pay a judgment if there were liability rather than saying there is no liability because there is no money. There seems to be a growing feeling on the part of the courts that this is the principal reason for not permitting liability of districts.[2]

The practical significance of these conclusions for the courts is that the school district is a creation of the state and derives its power

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[1] Dickey v. Cordell, 176 Okla. 205, 55 P. 2d 126 (1936).

[2] Hamilton, op. cit., p.

from the state. Liability is often adjudicated on the basic fact that the school district is a state unit and unlike municipal corporations in that it does not engage in proprietary function. The assumption is only partially correct in bare legal theory; it is largely incorrect according to the social facts.

Liability of School District for Transportation of Pupils

In a large number of school districts, perhaps the greatest proportion of school accidents occur in connection with the bus transportation system. Many accidents are to be expected under the present conditions when several million pupils daily are transported. The rules of liability applicable to bus transportation are exactly the same in most respects as those applicable to any other proper activity of the school board. Whether or not the board of education or the school district can be held liable for an accident depends upon the situation and principles involved. Moreover, just as in the case of teachers, if the bus driver is personally negligent, he can be held personally liable for any accident that occurs. The principle of non-liability of school district while in the performance of a governmental function applies in cases where school children suffer injuries while being transported to and from school.[1]

Immunity from liability for injuries to school children while being transported to and from school does not apply to drivers of school busses. The driver of a school bus will be held personally liable for injuries growing out of his own negligence. This is true whether he be the operator

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[1] Wright v. Consolidated Schools District No. 1 of Tulsa County, Supra.

of his own bus under a contract with the district, or whether he be employed by the district to operate one of its own busses. In the case of Krametbauer v. McDonald, the action was to recover for the death of after being hit when she was leaving a school bus driven by the defendant. This case deals directly with the liability of an individual employee and not the liability of a school board of district.[1]

The degree of care which the driver of a school bus must exercise in order to escape liability for negligence in the event a child is injured is not always easy to determine. Even a safe and properly equipped bus may cause injury to a student if the driver is negligent in its operation. Like any other person in our society, the driver must refrain from being negligent. Some states even place upon a school bus driver the obligation of a public utility, that is, not the duty of ordinary care, but the duty of extrodinary care of the highest degree of care.[2] The courts have held that a bus driver must exercise in the given situation. This rule of reasonable prudence and care governs the bus driver in all his relations with the pupils whom he transports to and from school. It governs the bus driver in all his relations with the pupils whom he transports to and from school. It governs the condition of the bus, the speed, the discipline of pupils while on the bus, and the circumstances under which they are permitted to leave it. A bus driver will not escape liability by pleading that he did not foresee the precise injury that the pupil sus-

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[1]Krametbauer v. McDonald, 44 N. M. 473, 104 Pac. 2d 900 (1940).

[2]Archuleta v. Jacobs, 43 N.M. 425, 94 Pac. 2d 706 (1939).

tained; he will be held liable if a reasonable circumspect person, under the circumstances, would have anticipated some injury.

School administrators must ensure that bus drivers park in such a manner as not to cause a dangerous condition to arise because the bus is parked in the middle of a road at a road intersection.[1] Just as the duty of the school teacher or supervisor does not end with the students' leaving the class, but continues to the very end of dismissal, so the obligation of the bus driver does not end when the student alights from the bus.

> He owes to the child the duty, not merely to carefully transport and discharge it at the usual unloading zone, but he has cast upon him the additional duty of exercising every reasonable precaution under the circumstances to prevent harm to her while alighting from and leaving the immediate vicinity of the bus at the end of her journey.[2]

If there is any one field in which regulations by the board are necessary, it is in the supervision of bus transportation. The regulations should require proper equipment and the latest generally accepted safety devices. Some qualifications should be made so that only competent people are chosen and the bus should be used only for specific approved purposes. There should also be rules and regulations established prohibiting bus drivers from allowing children to alight when the bus is in motion or before it is properly parked.

There are many occasions when a teacher permits the use of his personal car for school or allied business. In one Idaho case, a teacher

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[1] Reeves v. Tittle, 129 S.W. (2) 364 (Tex. Civ. App., 1939).

[2] Archuleta v. Jacobs, Supra.

loaned his car to the football coach for transportation of the school team to a game. The defendant was not paid for the use of his car, but the school district provided the gas. As a result of the coach's negligent driving the car was overturned, and he was killed. The plaintiff who was hurt while riding in the car was awarded a judgment of $5,780 against the teacher on the ground that the coach was the teacher's agent in driving the car and that, therefore, the defendant was liable.[1] The attorney general of Oklahoma ruled on September 13, 1938, that school districts are not liable for injuries incurred during the use of the district busses to transport a school team out of the country. The driver of a school bus cannot escape liability for injuries to pupils resulting from his negligent operation of the bus on the grounds that he is performing a governmental function.

Liability of School Districts in the Performance of Proprietary Functions

The courts are not agreed in drawing a distinction between a governmental and a proprietary function with respect to the liability of school districts. In legal contemplation, there is no such thing as a Board act- in a proprietary capacity for private gain.[2] Other courts, however, recognize the distinction between a governmental and a proprietary function and intimate or expressly declare that a school board may be held liable in the performance of a proprietary function.

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[1] Gordon v. Doty, 57 Idaho 792, 69 Pac. 2d 138 (1937).

[2] School District v. Rivera, Supra.

Thus it was said by the Court of Civil Appeals of Texas. "There can be no question but that an independent school district is an agency of the state, and, while exercising governmental functions, is not answerable for its negligence in a suit sounding in tort. . . . However, if such a district may properly exercise proprietary acts, and while exercising such proprietary acts is guilty of tort, the district may be required to answer in damages for such tort."[1]

Before school began in the autumn, a teacher used a school bus to transport pupils and some school trustees outside the district to buy school supplies. They had an accident which injured a third party.[2] In the second instance a school board had a tree planted and trimmed near a buttress to the entrance of a school building. A pupil fell off the buttress to the entrance of the school building and was injured.[3]

While school officers are not, as a rule, individually liable for acts of negligence on the part of the board or its employees, they may be held personally liable for intentional torts committed while administering the affairs of the district.[4]

Review of Court Cases

The case of Treadaway v. Whitney Independent School District serves to illustrate the reasoning of Texas courts concerning an action to re-

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[1] Braun v. Trustees of Victoria Indep. School Dist., Supra.

[2] Treadway v. Whitney Indep. School Dist., Supra.

[3] Braun v. Trustees of Victoria Independent School District, Supra.

[4] Thompson v. Shifflett, 267 S. W. (Texas) 1030. Newton Edwards, The Courts and the Public Schools, p. 428.

cover from the school district damages sustained because of alleged negligence in the operation of a school bus. The courts held that a school district operating in a governmental capacity cannot be held to answer in a suit appearing to be tort. The school district does not have to answer for the torts of its agents, servants, and employees, in absence of statute, when it is exercising a governmental function.[1]

The common law principle, universally applied by Oklahoma courts is that school districts and municipalities are not liable to pupils for injuries resulting from the negligence of the officers, agents, or employees of the districts or the municipalities. Nor does it matter that the injury was sustained while the pupil was off the school premises or while being transported to or from school.[2]

Many reasons have been designated in support of the common law rule of non-liability of the school districts in Oklahoma, New Mexico, Arizona, and Texas, for the negligent acts of their officers and employees. Of these, the most fundamental is that school districts are agents of the states in the performance of public or governmental function. In America, the state is assumed to be sovereign and cannot be sued without its consent. Moreover, immunity from liability has been extended to such quasi-corporations as the state has created for the execution of its policies. These subordinate agencies are emanations of the states. They are liable for no other reason in some instances, than that of the great difficulty

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[1] Treadaway v. Whitney Independent School District, Texas, 205 S.W. 2d 97.

[2] Wright v. Consolidated School District No. 1 of Tulsa County, Supra.

in distinguishing public or governmental from municipal functions. The courts are agreed that education is a function of government and do not hesitate to apply the rule of non-liability to school districts.

In the Wright case, the court held that the school board was not liable for injuries to a pupil which resulted from the negligence of the driver of a school bus. The court reasoned that it was the duty of the school district to provide transportation to and from school for the plaintiff. It was a public duty from which the district derived no benefit or advantage. It has long been recognized in Oklahoma that an action cannot be maintained against a school-district without the consent of the state; such consent cannot be granted in the absence of a statute making it responsible.

Statutory Enactments of Selected States

An examination of the constitutional and statutory law of the states and of judicial decisions shows the structural pattern under which our schools now operate and reflects something of its conceptual design. Statutes and decisions are continually being modified to conform to this conceptual design as old methods prove inadequate, as new problems arise, and as the conceptual design itself undergoes change. However, few, if any, states have undertaken a redrafting of the basic law to reflect emerging conceptual designs. It is regrettable that with all the changes that have occurred in public education over the past half-century, there appears to have been little if any attention given to the possibility that the basic structure established in our constitutions may have gotten out of line with present needs.[1]

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[1]Robert R. Hamilton and Paul R. Mort, The Law and Public Education (Brooklyn: The Foundation Press, Inc., 1959), pp.14-18.

In addition to California, New York, and Washington, a few states have modified the immunity rule, to a limited extent, by statute. In Alabama, the legislature created a body known as the State Board of Adjustment. The Supreme Court of that state had held that claims against school districts fall within the purview of this statute.[1] This body was created as a means of extending a measure of compensation or relief to citizens entitled thereto who, unfortunately, have suffered injury or damage because of the activities of the state agencies enumerated in the statute. This law was designed specifically to permit recovery in certain cases despite the fact that the rule of sovereign immunity exempts the state and its several agencies from any other recognized form of legal action. From the statute, it is clear that the Board of Adjustment has jurisdiction only of tort claims since they are the only ones to which the immunity rule would be applicable; thus they would be the only ones of which the courts do not have jurisdiction.[2]

Statutory Rules

The general common-law rule states that a school district is not liable for injuries unless it consents. Only the state can consent to suit against school districts. Some states have attempted to pass such statutes. The statute with the broadest scope has been enacted in California which allows practically a complete right of suit against the school corporation. Here two basic statutes place the school district in

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[1] State ex rel. McQueen v. Brandon, 244 Alabama 62, 12 So. 2d 319 (1943).

[2] Hamilton and Mort, op. cit., p. 288.

practically the same situation as any other person or corporation insofar as amenability to negligence suits is concerned. A provision which might appropriately be called a "safe place" statute[1] resembles one that existed in the state of Wisconsin. It provides that any public agency shall be liable in damages for any injury resulting from the dangerous or defective condition of public property. As a result of this statute, suits were brought individually against trustees,many of whom resigned throughout the state.[2] To provide personal security to school trustees and officers, the California legislature passed statutes absolving school-board officials of personal liability[3] and made the school district liable for all injuries arising through negligence of the district, its officers, or employees.[4]

A recent case in the Supreme Court of the United States held that a congressional statute permitting the Reconstruction Finance Corporation to "sue-and-be-sued" constituted a waiver of immunity from suit in tort. It is to be noted, however, that in some instances statutes creating special school districts and endowing them with the customary power to "sue-and-be-sued" specifically provide statutory immunity from suit in tort.[5]

The immunity of school districts refers not only to pupils, but to all others with whom the school districts come in contact including the employees and teachers. Another form of statute rather widely adopted in some parts of the country waives the school district's immunity, at least

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[1] General Laws of California, (Deerings Code, 1937) Act. 5149 (3).

[2] Ahern v. Livermore Union High School District, 208 Cal. 770, 284 Pac. 1105, (1930).

[3] California School Code, Section 2, 804

[4] Ibid., 804-802

[5] McVey v. City of Houston, (Texas) Supra.

as to injuries suffered by employees and teachers in the course of duty; for example, workmen's compensation acts are applied to specified categories of employees.[1]

An interesting type of statute exists in North Carolina where the school authorities are authorized and directed to compensate the parents of children injured or killed from injuries while "riding on a school bus to and from the public schools of the state," for "medical, surgical, hospital and funeral expense incurred because of such injury and/or death" in an amount not to exceed six hundred dollars.[2] The North Carolina statute specifically reaffirms the ordinary common-law rule of immunity as to all other liabilities except those mentioned in the statute. Without such a statute, payments to parents are illegal, ruled the Texas attorney general.[3]

State Boards of Education

In accordance with constitutional mandate, legislatures have enacted thousands of school laws. The statute books of every state contain legislation more or less extensively prescribing how the public schools shall be operated. State statutes enacted by state legislatures are, therefore, the most prolific source of school law. Some aspects of the public school program are spelled out in state statutes. Other aspects are merely mentioned, and the power to regulate details therein is delegated to the state

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[1]Rosenfield, op. cit., pp. 29-30.

[2]North Carolina Code (1939 Anno. Michie ed), 5780 (78-83a), added by Laws of 1935, ch. 245, and amended in part by Laws of 1939, ch. 267.

[3]Attorney General, Texas, Letter Opinions, Oct. 28, 1931, Vol. 327, p. 666.

board of education. Additional aspects are ignored in the state statutes, but the general powers of the state board of education, or the state superintendent in those states which have no state board of education, may be sufficiently broad to include them.

In any phase of school management wherein the state board of education has been given powers of operation, the rules and regulations of the state board have the force and effect of law. However, being a creature of the legislature in most states, the state board has only the powers delegated to it or implied in the delegated powers. In the states where the state board is created by constitutional provision, its constitutional powers are very general, and in specific instances it depends upon the legislature for its authority to act. In either case, if the state board acts outside its delegated or implied power, the rule or regulation is void. There is a presumption of authority and, until challenged in court, all rules and regulations of the state board are presumed to be valid and have effectiveness as enforceable as a statute enacred by the legislature. Statutory sources of school law are the enactments of the state legislature, rules and regulations of the state board of education, and resulutions of the local school board.[1]

In some states, the immunity rule may be modified by indirection through the operation of what has come to be called "save harmless" statutes. Laws of this type either authorize or require school districts to defend, at district expense, suits which may be brought against teachers

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[1]Remmlein, op. cit., p. 3.

as a result of damages caused by their allegedly negligent acts. Under laws of this type, districts also are required or authorized to pay any judgment which may be recovered against teachers. Thus they relieve the teacher of liability for any judgment which may be rendered against him and the cost of defending himself. Among the states having such statutes are Connecticut, New Jersey, New York, and Wyoming.

Arizona Article 2, 15-436, Liabilities of board of trustees;payment of liabilities; reliance upon opinions of attorney general.

> A. Boards of trustees are liable as such, in the name of the district, for a judgment against the district for salary due a teacher on contract and for all debts contracted under this title. They shall pay judgments or liabilities from the school money to the credit of the district.
> B. Boards of trustees shall have no personal liability for acts done in reliance upon written opinions of the attorney general.

Article 2, 15---453, Insurance on school bus operator; authority of board of purchase.

> A. The board of trustees may purchase public liability and property damage insurance covering school bus drivers while driving school busses.
> B. The governing board of school district may require the operator, of a school bus used for transportation of pupils attending schools in the district, to carry public liability insurance in amounts not to exceed twenty thousand dollars for personal injuries arising out of any one accident covering any liability to which the operator may be subject on account of personal injuries to a passenger or other person caused or contributed to by an act of the operator while operating a school bus. If the policy of insurance is filed and approved by the governing board of the school district, the governing board may increase the compensation, otherwise, payable to the operator by an amount equal to the cost to the operator of the insurance.

The power to insure school district property and employees is given by statute to the school districts of Oklahoma.

> 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 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 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 this section shall not be construed as creating any liability whatever against any school district which does not provide said insurer.[1]
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> This Oklahoma statute creates a situation of doubtful acceptance in general insurance law. If the contract is between the insurer and the school district, the injured party cannot usually sue the insurer, but must sue the insured, even if only as a preliminary step to ascertain the amount of the claim.[2]

Under our system of government, the states have reserved power to establish a system of free public education. The right to this power is protected by the tenth Amendment to the Federal Constitution.[3] In the absence of a statutory grant of such authority, a school district in Oklahoma may employ counsel to represent it when its legal rights and interests are involved.[4]

Doctrine of Respondent Superior

The doctrine of respondent superior does not apply to school districts since they are but arms of the state created for the sole purpose of the administration of the commonwealth's system of public education.

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[1] Oklahoma Law, 1949, Title 70, Article 9, Section 7.

[2] Remmlein, op. cit., p. 261.

[3] Ibid., p. 1.

[4] Board of Education v. Thurman, 247 (1926), p. 996.

Negligence of School Directors

The school district or the board of education acting in its corporate nature cannot be held liable for the negligence of its officers, agents, or employees. The school district cannot be held liable in *ultra vires* acts of officers or agents beyond the scope of their authority.

CHAPTER III

INTERVIEWS WITH ATTORNEY GENERALS OF ARIZONA, NEW MEXICO, OKLAHOMA AND TEXAS

Introduction

In order to add depth to the study and, at the same time, furnish the investigator assistance in interpreting the literature, statutory enactments, and court cases, the Attorney Generals of the states of Arizona, New Mexico, Oklahoma, and Texas were interviewed.

Arizona

Interviewer: "I need the thinking of this office on liability practices pertaining to school districts in relation to bodily injury. You have a very famous case, the Tucson case--"

Attorney General: "Oh, yes, the Tucson case, that is about the only expression we have, you know, by our Supreme Court."

Interviewer: "There are two or three questions that I would like to get your thinking on which I feel are very pertinent in this field at the present time. There is a lot of uncertainty with the school people in Oklahoma, Texas, New Mexico, and Arizona about liability. They do not worry so much about the rulings of the courts today, but they do not know what it will be tomorrow or the next day."

Attorney General: "Yes, that is one of the problems especially in

this field of liability where you have government agencies. Some states probably have just abrogated the doctrine of governmental immunity. Now, other states, you know, have made this distinction between governmental proprietary, that is they say this is an agency of the state if it is acting in a proprietary capacity. It is not really acting in a governmental function. This is a big item. For what is a governmental function, and what is a proprietary function? I have not read the Saroyan Case for* quite awhile, but I believe they did not abrogate the doctrine of governmental immunity. They found in that instance the Tucson Public School District was acting in a proprietary capacity. But, by reason, they state, in drawing some remuneration, and because they were in a proprietary capacity, they found that it was a cause for action for damages because the child was hurt in the stands where it actually happened. However, it is not a final arbiter because the schools today are doing many things such as extra curricular activities. You know they are assuming this burden, and it has been provided by tax paying support."

Interviewer: "This is one of the questions I would like to ask you. What is your personal feeling about this common law or governmental immunity law that most of us stand behind and that most school districts operate under?"

Attorney General: "I think the trend is away from the governmental immunity doctrine. In the recent cases in these instances, that seems to be the trend. I am not saying I am for it. But I am looking at the law, and I think there is a slight trend away from it. Probably one of the bases of that is the fact that this risk can be shifted by insurance. In the Maxim Ware Case, the Supreme Court did say "Indictum." That is, it was necessary

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*The ease referred to here is --- etc.

to decide the case. The school district is a subdivision of the State of Arizona, and it can purchase liability insurance to protect itself. I remember looking over the decision and seeing this statement.

Interviewer: "In 1959, the Illinois Supreme Court ruled that the common law under which we have been operating for such a long time was outdated, that it no longer served the society in which it was supposed to be operating, and that the courts of the land not only had the power but also the obligation to do away with this."

Attorney General: "This was an expression by one high court?"

Interviewer: "The Supreme Court, yes. I wondered when I read this, if it would have any effect on the opinions that you might give."

Attorney General: "When we give an opinion, we must, of course, be guided by our own Supreme Court decisions, the statutes, and our own precedents more than--"

Interviewer: "In the absence of this, what would you do? Would you consider this court case in Illinois?"

Attorney General: "No. In summation of the Arizona law today, as Mr. Sagarino pointed out, it is hard to say what the Arizona Supreme Court might do with the various fact situations that might come before it in the question of liability. To summarize the Arizona law in its present form from the pronouncements of our Supreme Court, the doctrine of non-liability in governmental functions, that is the liability of school boards and school districts appearing purely in governmental functions, still exists. This is expressed in a case called School District #48 v. Riveria, which is found in thirty Arizona reports starting on Page 1."

Interviewer: "Was this a transportation problem?"

Attorney General: "No, it says here (reading from the aforementioned case) that a school district had taken possession of a plaintiff's house and established a school therein without the plaintiff's knowledge or consent. Through negligence of its janitor, the building was destroyed and the courts held no liability there. This was an old Arizona case, at least comparatively old, a 1926 case. I think the reason that it probably took some time for a case similar to the Tucson High School Case to come before the court was because of the difficulty to differentiate between governmental and proprietary activities of a school district. Here they are charging admission to the football game, but on the other hand, football and athletics, I believe, are very well accepted as a governmental part of the school operations. That was why the Tucson Case started a new branch. In that case, for example, the students were playing on the field, perhaps without an audience, and were not charging any admission. They were just letting people come and watch as they possibly do in a lot of small towns throughout the United Stated today. So, here is a football game on the field which is probably governmental. Yet when admission is charged to get into the grandstand, our court terms this as proprietary. It is a business pursuit of the school, and they may be liable to customers for negligence under these circumstances. However, I would not say, though, that the court had meant to go any further. That is why every fact situation is so important."

Interviewer: "Do you see any societal pressure being put on the goverment of the state to provide protection for these youngsters?"

Attorney General: "There your idea breaks down. Under our system

of law, generally throughout the United States, a person, a school district, a corporation, or whatever type of individual or entity it might be is only liable for negligence. The only departure from this doctrine is found in our Workmen's Compensation Laws throughout the United States where we have what we call liability with fault. In other words, a person, who is working on a job, and the employer are liable to carry Workmen's Compensation insurance. There is no question of negligence, fault, or anything, just the injury on the job. That is perhaps the reason a lot of school districts, under the existing situation, here in Arizona and probably throughout the United States, carry insurance to provide them the cost of a defense. Just because a child or some individual-- In the Tucson stated case, it was apparently a spectator and did not have anything to do with the child on the school ground. The question would be: was there really any negligence, or was it simply a child on the school grounds that just received an injury. We all know that children are going to get hurt on the school ground. Was someone negligent? Or does someone have to be negligent every time someone gets hurt? Is there fault? This is where it breaks down. If there is any doctrine in the United States where the furnishing of insurance protects or covers children generally, you are getting into the health and accident field. Not into the field of what we call liability insurance."

Interviewer: "What if there is neglect on the teacher's part or a driver of a bus and a child is killed?"

Attorney General: "That is a question of individual negligence to which all of us are subject. Even though we might be working for the government at some level, we can be liable for our individual negligence. This

goes back to the bus driver case you were talking about. That bus driver might have been both negligent and liable, but he was judgment proof for all practical purposes. He was probably a man of very small means and that is why. These questions get down to liability and who can pay. The two cases that you have described here illustrate this point perfectly. Here was an individual teacher who was not judgment proof. Here was probably an individual bus driver who was judgment proof, and this points up the problem very strikingly.

Let me tell you another interesting aspect of this same thing that has occurred here in Arizona. You will need to know this in connection with the study you are making. For many years, cities, towns, school districts, state agencies, and county agencies were not allowed to buy liability insurance for their employees, especially employees who were in very dangerous situations like bus drivers and fire engine operators. As you know, firemen who operate fire engines could do a large amount of damage. It was said that if the school district, for instance, bought this insurance and paid for it on these people, that would be additional compensation. It would violate the constitution on giving credit or gifts of state money, or even liable. There were a lot of objections to it. I talked to several firemen during the period when this thing came to light. One man that I talked with drove a hook and ladder fire engine in Phoenix. He told me that if the vehicle ever went out of control, he might wipe out a building with it, which worried him; but that he was not making enough money to afford to buy the insurance. In fact, I doubt if he could have found an insurance company that would have covered his liability. We did pass a law here, four or five years ago, which allowed all governmental

units to buy insurance on these employees who were driving automobiles or any heavy equipment. There also is a special statute covering school districts. A school district can purchase liability insurance covering bus drivers. But if the school district is liable, it has to be through its agent. Let us say this plan is carried over, and this would have to be almost legislative enactment, where we go into what we call the field of liability without fault. This is where a school district is just liable for anything that happens in connection with school activities. However, until we accept the doctrine of liability without fault, the situation will continue where the school district, if it is liable, has to be through the liability of its agents, because the school district itself is just an entity."

Interviewer: "These are situations that prevail to some degree throughout all the states. I believe there are three states in the nation that do not have this. I believe they have it, but not to the degree that we have in Oklahoma and Arizona. The three states who do not are California, Washington, and New York."

Attorney General: "I think that it generally can be stated, not only in connection with schools and government, that the personal injury field has grown so much in the last several years that the attorneys, when a potnetial case comes to their office, tend to look the fact situations over a little closer and consider bringing action probably more than they would have done twenty-five years ago. Twenty-five years ago, people would come in with a case and say, "We want to sue the school district." The lawyer probably would not even bother to look at his books. I mean, it was just basic law school teaching. There was no liability. However, we are now

in an era where lawyers will look at these occurrences, probably sue a school district or a governmental unit, and take a chance that the tenor of the Supreme Court might put an interpretation on it. A lot of people blame the lawyer, but I personally feel that it is not necessarily the lawyers as they cannot create these causes of action. It has to be to a degree accepted by the public.

I do think that we are in a period where personal injury verdicts given by juries are much higher now than they used to be. For instance, here in Arizona where most of our population is centered in Maricopa County and Pima County, the verdicts are higher than they would be in one of our outlying counties. You get a jury together in one of our smaller agricultural counties such as Apache County where they are chiefly farmers and ranchers, they will not tend to give as much as perhaps a jury in Phoenix. This is all in the air, and there is definitely an answer to your other question. Definitely a period of change is here. The lawyers take a chance now. They say, "Well, maybe the courts will accept this. I cannot advise my client any more that this is an open and shut case."

The main thing that I think school boards want to know, as anyone else responsible for government agencies wants to know, if there is possible liability, is how to insure themselves against this liability. So that all of a sudden they are not going to find a big judgment against the shcool district which the tax payers are going to have to take care of. Someone might even bring or try to get individual judgments against the school board members. Another thing is that they also want a defense presented for them because the cost of defending some of these personal

injury cases in this day and age is very expensive. I think that with the coming of the Tucson High School Case, and cases like that, these school boards definitely have to buy insurance against this. This is about the only way they can realistically provide for a potential liability. Assuming that they might have to defend a lawsuit, even though the people might not recover, the plaintiffs might not even recover anything if the proper defense is presented. The cost of that defense itself is an item they have to consider. Secondly, the possibility of a big judgment coming against a school district is always there because we know that the Tucson Case shows the fact situations that could arise are the important matters. This case is on the border line between what is governmental and what is proprietary. It used to be conceived that everything was governmental that a school board did. Now we know that the courts are considering the difference and that some things can be proprietary."

Interviewer: "For example, what do you think about the youngster whom the laws force to go to school? Then as a board member, or as a school official, I force him into a situation where he is injured.

Attorney General: "Yes, or even boxing. Suppose a youngster does not want to box at all, he is forced into physical education class, and part of that is boxing; and he is injured or killed in a boxing class. Should we escape all responsibility for this?"

Attorney General: "I do not know to tell you the truth. Right now I would say this, that this whole theory of liability or freedom of liability, or immunity from liability arose from the doctrine of what we call "The King can do no wrong," theory. We started from there. As you say, here is a child that is forced to box. It has happened to all of us when

we were in school. If it happened to be a rainy day, they would move the whole physical education class inside and make everyone box. I never was a good boxer and I have been matched against some pretty fast kids. I about had my head knocked off one day. I do not know that I particularly objected to it, but I remember one day they put me against a guy that could have killed me if he had wanted to. And here are the physical education teachers, you know, in control. I think that we are coming to a period of time in human events when on that conduct somebody someday, perhaps the physical education teacher, is going to become personally liable. Someone is going to get hurt. As I stated, I remember one particular day finding myself in a boxing situation. That is just one example of what can happen.

The school district might not be found liable, you know, themselves. It might be just a matter of the individual teacher. But with this philosophy growing, I think probably the school boards are going to have to take a little more interest in the policies and on almost every detail of school life. Maybe they should or maybe they should not, I do not know. Maybe they should have detailed policies that the teachers are charged with so that when a teacher gets into a certain situation, he will know what is expected.

We finally get to the philosophical matters here. A real conservative person would say, 'by gosh, back in the good ole days' no matter what happened, there was no liability. This is true. The law of Torts and the idea of somebody being liable for anything except what we call intentional torts, or assaults, where somebody beat up someone deliberately did not exist. Outside of those kinds of cases, there was no liability in

the Tort field. Then we came into what we call the field of negligence. Negligence is a field whereby intention is not an element. It is holding people to a standard of conduct, the conduct of a reasonably prudent man under the circumstances. This is a doctrine that can be applied to the boxing class, for instance. This teacher did not intentionally kill that student, but he probably did not use his head in matching or being sure that the student was matched with somebody of equal ability; or the school bus driver that we were talking about a while ago who did not watch when the little girl went around the bus. Did he fall below the standard of conduct of a reasonably prudent man under the circumstances? No idea of intention? Now the question we have first, the liability -- but then we have also the question of the amount of damages, which is a separate field altogether, because you cannot measure human life and limb, in the long run, in dollars and cents. This is a difficult field. You will see, as I told you a while ago, we know that negligence cases and personal injury cases can be tried in one county, and the jury of that county because of their feelings, their standards of living, and their standards of life that they are used to in that community, will not bring in a judgment for the same type of case that might be brought in by a jury in another case. These are the great problems. Probably more of a problem in the amount than it is in the liability."

Interviewer: "Would you have any idea if society is going to demand this protection?"

Attorney General: "It appears to be going that way, whether I feel that way or not."

Interviewer: "Would you have any suggestions as to what might be

done to protect school districts, board members, and school employees? For example, this year or next year, what could be done that would let us feel more assured that we can do our job without being involved in these terrific law suits that are cropping up around the nation now?"

Attorney General: "Well, you would probably not be able to keep yourself out of the law suits. I personally would recommend, however, that the school board analyze their entire operation, or have somebody to this. It might be a good idea to make a study of their entire operation including a lot of the minute details around the school where teachers, principals, and janitors are responsible. Of course, one cannot foresee everything, but to cut down the possibilities of trouble in the different areas perhaps could be done by having the policies printed in a handbook that every teacher should be familiar with. And on top of that, try to buy as much liability coverage as you could get. I think the public should have to pay for liability insurance. If you are going to ask public officials to run for school boards and serve on them, they should know that if they are sued a defense will be provided, and that there will be money to cover it if a liability is found. This is just in the interim.

It is foreseeable that some day we might see liability coverage on liability without fault. If a person had liability without fault, it would be like workmen's compensation. They standardize the benefits, the pay, and it is not like to variance in the judgments. Workmen's compensation in any state provides an employee a certain amount of money for certain conditions, and there are limits to the liability. But right now, with the liability with fault theory that we are operating on, I think

those school districts should very seriously analyze their entire operation and try to get liability insurance to cover it, and probably the cost of this should be passed on to the public.

New Mexico

Interviewer: What is the position of school districts, school board members, and employees in New Mexico in regard to liability for physical injury to the student?"

Attorney General: "There is no liability for this group since they are part of an organization that is an aim of the state."

Interviewer: "Arizona, New Mexico, Oklahoma, and Texas all adhere to the common law practice or governmental immunity for schools, school board members, and school employees."

Attorney General: "Right."

Interviewer: "As our schools become more comprehensive and more inclusive, I wonder what the thinking is going to be in the next few years. When we force a youngster into a school, and then force him into an activity, and as our schools become more comprehensive, we find these various activities more hazardous, such as FHA trips, athletics, etc. In other words, there have been many youngsters forced into physical education and then injured. I wonder if this is right? What is your thinking on this?"

Attorney General: "Well, the general position is, in that physical education is part of the education system that we are set up to take care of, and if we have a right to compel youngsters to attend school, we have a right to compel him to take certain forms of physical exercise along with it. If for any reason, medically speaking, he is not physically able to

participate in this form of exercise, certainly in all instances that I have ever heard of, a certificate from the family doctor, or any physician, is accepted to excuse him from physical education. I do not know of any instance in New Mexico where any youngster has been forced to enter competitive athletics as such, that is, intramural, and between various schools. That is usually on a voluntary basis. I assume that there is a little coercion on the part of ambitious coaches and parents sometimes to get their youngsters into those places. But we have always considered that a voluntary field for youngsters."

Interviewer: "We find each year in America a large number being injured in physical education, and in vocational courses such as welding, auto mechanics, etc. Should the schools or employees be held liable for these students?"

Attorney General: "I would say this: The purpose of the school, of course, is to serve the individual because it is the purpose of the state to serve the individual. That is our system. But at the same time, we have a responsibility if we are going to educate the individual to take his place in society, to vary his subjects and activities to such a point that he will be able to assume his place in society. You spoke of government immunity. We have never applied that, as far as I can recall, in the State of New Mexico, to the extent of leaving political sub-divisions, which includes our school districts completely immune from court action. If we have made a mistake in the, say, careless selection of a professor, or coach, or someone who does not know how to train in those fields, and through the carelessness of that individual this youngster is injured, then I think we have always recognized a right of action. Certainly I

am familiar with the cases against cities in this state. I do not know of any actions against any school boards or the part actions that have come to the Supreme Court, but there have been any number of cases against cities where individuals have recovered damages for negligent action on the part of the city."

Interviewer: " In the New Mexico cases that I reviewed, it seemed that every one had something to do with transportation mishaps, and I believe in each case the courts ruled in favor of the defendant."

Attorney General: "Yes".

Interviewer: "Are New Mexico transportation laws much the same as ours in Oklahoma?"

Attorney General: "Yes, we take quite a bit from Oklahoma, in fact a great number of our laws come from Oklahoma and Texas."

Interviewer: "The Tulsa School District was sued in a transportation mishap and it went to the Supreme Court. In Oklahoma, we have no way of paying liability claims from our schools' budget."

Attorney General: "We have muffed it constitutionally if we must pay a judgment. It is assessed in the ad valorem taxes of the district that the judgment is against."

Interviewer: "Is this over a period of time?"

Attorney General: "No, actually the judgment may be assessed all in one year."

Interviewer: "In Oklahoma, you can do this, but it is a three year pay-out. Do you think that the people in New Mexico, and the nation, are any more conscious of the need for liability protection than they were, say ten years ago, or earlier?"

Attorney General: "Well yes, everyone is. In a way, the insurance companies have brought this on themselves with the stories that they issued and method of advertising to show the need for this coverage. Then, they cry about the number of losses to show their need for increased premiums on their policies. But we have gotten to the point now in New Mexico, compared with just a few years back, where, I doubt if there is hardly a student body in the state where the school does not act, more or less, as a contracting officer for students in the class. Policies cover normal injuries that might be expected on play grounds, such as a broken arm from falling off a swing, or a bump on the head from being hit by a baseball. There is a special policy for which they pay just a little bit more for the athletic program. I think in most of these instances, perhaps in the athletic program, the schools pay the premiums out of the athletic fund. But in the individual coverage, the students bring the money into the teacher and pay for it that way."

Interviewer: "When the Supreme Court of Illinois ruled on a case, they gave these reasons for ruling as they did. The court ruled that it was the court's obligation and not the legislative body of the state to provide protection for the students in a school or school board. They argued that this all stemmed from the constitution, and that there had been no statutory enactments to provide this. Earlier, this was an interpretation of the courts. They said it no longer served the populace or the people of the country, and that the courts were obligated with this responsibility to do away with this outmoded law."

Attorney General: And certainly complied with, because of course, I can understand those students in the lab. They want to build one. Prob-

ably the thing that brought the question to our attention was a few injuries in other parts of the country from this very type of thing. It is our general feeling that so long as the instructor is qualified in his field in these various experiments, he has a right to teach and supervise them even in our public schools. Certainly, if they are going to college, and if they are following the same line of work, they are going to get those experiments somewhere along the line. High school students are capable of learning these things at that age. There is no reason why it should be held back just because there is some danger involved, as long as the instructor is completely qualified. The law has never intended to protect the negligent person. Yes, we know it is part of the old common law that if you stop to assist one in need of immediate emergency help, you had better be versed in what it requires that you do, else you would probably be better off to stand to one side and leave it alone."

Interviewer: "Is society demanding more insurance protection?"

Attorney General: "I would say definitely they are. Even our workmen's compensation law, as such, does not exclude the political sub-divisions. However, we have not required sub-divisions to take workmen's compensation because we feel it comes within governmental immunities. In workmen's compensation, we do not have the element of having to prove the neglect; just the mere fact that the workman was injured while on the job is sufficient cause for payment to be made. But, quite a number of our institutions are taking workmen's compensation to cover their employees. Now, we have gone to the extent to taking out public liability insurance on practically all of our governmental vehicles. This is a thing that is not required of us, but society, as such, has demanded it. In other

words, it is legislative policy to furnish the public the same coverage from governmental vehicles that they require private vehicles to have, and we are demanding private vehicles to be covered with public liability insurance. That is part of the law."

Interviewer: "Do you foresee the day in New Mexico, and perhaps other southwestern states, when the courts will begin to mold their decisions in a way that society thinks desirable? And if they do, what will this do to school districts?"

Attorney General: "It will simply add to their burdens to far as their insurance premiums are concerned. And in the years to come, that will probably add further litigation expenses also, I mean litigation time, not necessarily extra expenses. As this insurance program extends to include more and more public liability on the part of political subdivisions, why, it is more and more advertised, the fact that they are covered by insurance, they go ahead and collect. It becomes the attitude of those parties covered by insurance to say to those injured, but uncovered, Go ahead and collect."

Interviewer: You know, as a school superintendent, it is very easy for me if I have insurance. If a disgruntled patron comes to my office and says, "I want something done," I report it to the insurance agent and they take care of this. It is a real good out for me. I do not know if this is a desirable thing?"

Attorney General: "Well, I do not know how desirable it is, of course, but a number of social changes have come about because of the various forces that are working along this line. The world has grown smaller and we are demanding more and more of the government. They do so many more things

for us individually and as a group. So, I rather suspect that it will come to be the accepted program, that not only the political sub-divisions os the state but also the state itself starts to cover all forms of possible damage by insurance."

Interviewer: "That leads to the last question, and I think you are getting right into that. Would you care to make any recommendations or suggest any ways that we might provide this protection for school districts, school employees, school board members, and even the students? Can you think of any way that this might be done, Mr. Hartley?"

Attorney General: "Well, I think that before you can do it, or before you should do it, there should be some recognition by your legislation body that you will be entitled to do this as a matter of public policy of the state, just as the Federal Torts Act in the matter of suing the United States Government under certain sets of facts. The legislature of your state has opened up some of those same methods, I am sure, because we have in this state extended Tort Claims Acts. In these instances where we are covered by insurance, we extend the Torts Claims Act to the extent of policy coverage and it is accepted. It is considered, apparently, by the general public to be very highly desirable because, in that way, the agencies that are covered with this insurance, not only cannot stand back of governmental immunity, but they do not even try to stand back of governmental immunity. That is part of the contract with the insurance company. That they will not raise governmental immunity is one of the defenses in these instances. Now, to cover yourself with insurance blanket wise, without prior legislation, you might possibly be accused of wasting some of the federal and some of your public monies on insurance that, even

an injured party could not collect under, because there is no statutory ground for it. Going back to the old common law of governmental immunity, and certainly your insurance company is going to raise it every time they can."

Interviewer: "I know in Oklahoma that we can do this for transportation only, and the Attorney General there suggested that we extend this to cover all phases of school activities as one way of providing this protection."

Attorney General: "Generally, at least it has been the experience, so far, in these states that have adopted insurance programs to cover all phases of possible damage or injury to have certain limitations usually around $10,000 per individual. But I definitely think that that is the trend that society is demanding. I hardly see my way to escape it since our government is going to do what the people demand of it. I used to be a very good friend and close to a Republican Senator in World War II days when they were trying hard to elect Mr. Dewey. I recall his making this remark to me, that the Republicans cussed the Democrats a lot, but if they should get elected, they could not serve very much differently because of the public demand. The public is demanding economies in government all the time. But, if you attempt to economize in any one particular field, the squawk from that group overcomes the cry for economy. They meant for you to economize on somebody else, not on them."

Interviewer: "That is right."

Attorney General: "It is quite often termed in political circles as "creeping socialism." I do not know what "creeping socialism" is. I do not even know what socialism is. If we are going back and start de-

fining, we become socialists the day we instituted the United States mails when we spread the cost of delivering letters. I have not heart anyone advocating the government getting out of the postal service, and it is sure as thunder costing more than they are taking in. It is simply that the governmental officials are going to have to be responsive to public demand; otherwise they do not return to office. That is part of the Democratic system. And sure, it is true that there are specialized groups that are demanding things for their particular group. I think that you will find it true and are finding it more true every day in your teaching field, that certain groups are demanding certain things in this field of education. I think you will find your parents getting around to the point eventually of demanding coverage for playground injuries and incidents like that. They are getting it now through more or less a voluntary cooperative system whereby you are acting as agent for the students. I imagine your school is doing that same thing."

Interviewer: "Yes, it is."

Attorney General: "They are all doing it that I know of."

Oklahoma

Interviewer: I am trying to find if there is a trend or pattern in the southwestern states that might indicate that the tendency is away from immunity for school districts, school board members, and school employees. If I cannot find that, I would like to see if there are any implications from people such as you that might indicate that this is an outmoded thing. I am sure you are familiar with a case in Illinois in 1959, where they said this immunity clause was outmoded and threw it out."

Attorney General: "Yes, I have seen that case."

Interviewer: "At the same time, they said that this was the courts' obligation. They have the power and duty to do this. This was the Supreme Court of Illinois, and I wonder what this is going to do to the rulings of the courts?"

Attorney General: "Well, my impression is that a trend has started which will hold school districts liable; however, that has not started here in Oklahoma as yet. We have one, you might say, the "bay horse case" cited in, I believe, 252 or 253 Pacific, involving transportation, that was school transportation, which was a question on liability. That case was recently followed by our State Supreme Court to the effect that there was no liability for tort as far as school districts were concerned here in Oklahoma. So you might say, even recently, that our courts have not joined this other trend."

Interviewer: "Mr. Johnson, are you referring to the Wright Case in Tulsa?"

Attorney General: "Yes, that is the one that I meant in 252 or 253."

Interviewer: "Did the courts first hold the driver or the district liable on this? Or did they throw this out right at the beginning? Do you recall?

Attorney General: "Do you mean in the trial courts before it went to the Supreme Court?"

Interviewer: "Yes."

Attorney General: "I do not know, but I could check it for you."

Interviewer: "Do you think there is a movement away from the common law or governmental immunity for school districts? Do you think there is

any pressure from our society in Oklahoma today saying that we want the courts to rule against non-liability and to provide protection?"

Attorney General: "I think there is."

Interviewer: "Do you think the society of our state will demand liability protection soon?"

Attorney General: ""I think so."

Interviewer: "The Supreme Court of Illinois said this common law rule was outmoded and needed to be abolished. They said this was the court's obligation and not the legislature's obligation because the courts had apparently made the decision to establish this precedent. The court said in ruling that it was the court's obligation; they had the power, and it was their duty to do away with non-liability laws. Do you foresee something like this, perhaps in Oklahoma, that could cause us to reverse earlier rulings on this?"

Attorney General: "Well, I think basically the Illinois court was correct. I do think it is a judicial question rather than a legislative one, and where the immunity theory has been followed, it is not because of any legislation, but because of the old adage or statement that "the sovereign can do no wrong." That is not based upon legislation, but on what you would call common law which is more or less customs and usage. So, I do agree with the Illinois courts that it is a judicial question rather than a legislative one. Now, it is legislative to this extent. Assuming that there is no liability, as the courts have held, the legislature can waive that immunity which does make it a legislative question now. That is to remove the immunity, but as far as installing the immunity, that was not done by legislative enactment."

Interviewer: "Was this a decision handled by the courts, and was the Supreme Court of Illinois referring to this?"

Attorney General: "I believe so."

Interviewer: "Is it legal for a school district to purchase liability insurance?"

Attorney General: "Yes, that is by statute."

Interviewer: "What if the Oklahoma Legislature would provide us with the same privilege of buying liability insurance for our student body, just as we can for our busses? Would this be out of line?"

Attorney General: "It would certainly be constitutional."

Interviewer: "It would be constitutional?"

Attorney General: "Yes, I do not know of anything in our state constitution that would make it impossible for the legislature to impose that liability. I think one reason for what we are speaking of, is the trend and the thinking of the people, or the demand. Another reason for that is, for example, members of school boards. They serve without pay, and people think, and I concur, that someone doing a job for nothing, so to speak, certainly he should be protected in any acts for which he is not individually responsible."

Interviewer: "Should teachers and employees be liable for thier acts?"

Attorney General: "I believe so. I think every individual is liable for his tortuous acts, and law suits for damages are principally based upon negligence. If a teacher or bus driver is negligent, I think they are liable for their acts. The only thing that the court held in the Wright Case, as I remember it, was that the school district itself was not liable. But it did not hold that the bus driver could not be held liable. Nor did it

hold that the individual members of the board of education were not liable. So, I do not think your immunity extends to the employees of the school district. I think they are just like anyone else."

Interviewer: "That is their business and they must be responsible for their negligent acts."

Attorney General: "That is right. Of course with emphasis on negligence, because just the fact that an accident occurred, or someone is injured does not necessarily mean that someone else has to pay the damages on it."

Interviewer: "Do you think someone should be responsible when there are people forced into these activities?"

Attorney General: "I think so."

Interviewer: "Should someone be responsible for students?"

Attorney General: "Well, I think that there is a lot of sense in what you are saying on that. But still bear in mind that this immunity is only on the political subdivision and not on the individuals. The fact that an individual is working as a teacher for a school district, that in itself does not give him the immunity that a school district enjoys. So we still have the same situation that one would have to prove that the teacher was responsible in some way. You could not do it as principal and agent as you might do on ordinary business as when you have a truck driver and he causes an accident. Then you could hold the principal responsible for that. That does not hold true as far as a teacher in the public schools is concerned. There is no relationship of principal and agent. I do not think you can hold the teacher responsible because of the teacher-pupil relationship. I believe that you will have

to prove that the teacher in some way caused the accident, directly or indirectly, before you can hold the teacher liable."

Interviewer: "Mr. Johnson, this interview is going to be very helpful to me. You have been kind. Before we quit, can you think of, or would you want to make any suggestions of ways the schools might protect the youngsters and teachers from injury and still be protected with insurance? Can you determine off-hand, any way that this might be done in Oklahoma?"

Attorney General: "Not under existing law. I do think that the legislature could enact a law authorizing school districts to carry insurance to protect the teachers and the school districts. As you say, they can already do it as far as transportation is concerned, but legislature could extend that to accidents from other causes rather than just those in car accidents. I personally think that there will be an increasing extension of the statutory authorization to carry insurance to cover matters other than those involving transportation of pupils. I look for that in the next session or two of legislature. For example, the last session of legislature, I believe, amended a law which permitted the state highway department to carry insurance so as to permit the State Board of Agriculture to carry insurance. Also the state librarian or others in library work were permitted to carry insurance on accidents arising from the operations of these bookmobiles. So I would say that there is a legislative trend now to permit governmental agencies to carry insurance, and if that trend continues, and I think it will, then I think about the next step would be to permit the school district to carry its own insurance, as the saying goes. That is to impose liability on the

district without carrying insurance. I feel it will ultimately lead or come to that. The trend now is to permit more governmental agencies to carry insurance, and I think that is a reflection of the way you put it a while ago, the demands of society. I believe that people are getting more insurance conscious all the time, and especially when it is in connection with automobile accidents. So, I think that will be reflected in more legislation all the time to protect people from acts, in tort, of public employees.

Texas

Interviewer: "What is the legal position of school districts, the school board, and their employees in Texas, in relation to liability for personal injuries?"

Attorney General: "Sir, under the Texas law, the school districts are not liable for torts. In other words, I will state it this way. The Texas schools, just like the state and county, operate in a governmental capacity. It is well settled that the school district, and that would include the Board of Trustees, Superintendent, Business Manager, Principal, or whoever the administrators might be, is not liable for the torts of say. This includes the school bus driver, the janitor, or anybody connected with the school system. There was a bill, in fact there have been about two bills introduced, since I have been here, by the Texas legislature, to change that, so that there will be a modified system of tort liability on the part of the state of Texas, the school district, county, and other political sub-divisions. But up to now, for instance, when a boy is injured going to a football game, and even though the bus driver is derelict at duty, or he is at fault, and they have an accident,

there is no liability on the part of the school district or school officials. Now do not misunderstand this. If the bus driver is solvent or if he has insurance, of course more times than not this type of person, and I say this with all due respect, do not have anything in their own rights. Consequently, you cannot get the blood out of a turnip. Even though the individual, if he were the one at fault, for example, is driving a school bus, there is no liability on the part of the school in spite of the fact that he deliberately runs into somebody, a train, another car, or what not. But if he is the one at fault, and that can be established in court, if he has insurance, he can be held liable.

While you are here, if you like, I would be glad to get you some Attorney Generals' opinions and necessary decisions. I do not remember the names of the individuals, but there was a child, this was not an uncommon incident but very unfortunate, playing on the school ground at Dallas in one of the public schools a few years ago who was severely injured. There was a question for a long time whether the child would ever live. The father couldn't understand or the mother either, and I can understand it from a layman's stand-point, when it could be contributed to the carelessness or dereliction on the part of the school officials, why there was not some liability because of the injury to their child. Of course, the girl's hospital and doctor bills were quite large, but it is just one of those things. Perhaps it goes back to the fact that we are not a common law state, but we do follow it where the constitution and statutes are not adequate. But a great portion of our Texas law has been handed down from Great Britain and their idea was that, "The King can do no wrong." For instance, today if I were to start home, although we do

not have state vehicles in this organization, but some do, and the Chairman of the Board of Control maliciously and willfully ran over and killed me, there would be no liability on the part of the state of Texas. Now, if he were solvent, my wife and three boys could bring suit and get a judgment against him and recover perhaps.

But up to now, as to your school districts, I do not know of any case in Texas where a school district has been liable for its torts. There have only been two cases that I know of, one at state level, and one at county level. A few years ago, the state of Texas operated a railroad, and it was held that they were liable because they operated that in proprietary capacity. At county level, a few years ago, the case went to the United States Supreme Court. As I recall it, in the situation, in the county where Corpus Christi is the county seat, there was a draw bridge across a navigable river, streams, or channel. They held that that was under admiralty law, it was tried in Federal courts, and the county was liable. But the general rule from state on through that state, county, school, and political sub-divisions are not liable for their torts."

Interviewer: "Do you see any relaxing of this immunity situation?"

Attorney General: "Yes sir, I can."

Interviewer: "Can you see any relaxing in the society of Texas today?"

Attorney General: "When the Attorney General, Will Wilson, first took office he appeared before some committees and advocated that there should be, of course not all together, but that there should be some relaxing of it. In other words, if the state or county or school district is at fault, why set them apart in modern civilization from you or me?

If we are the ones at fault and are going to be held liable for our acts of omission or commission, then I certainly think that the state or county or school should be put in the same category. Now, I can understand how you could open the thing up to where you would have a volume of nuisance suits, and people would perhaps take advantage of it. It is my personal opinion, it may not be shared by a lot of Texas lawyers, that to remove any question I would go about it by Constitutional amendment, rather than by statute."

Interviewer: "In 1959, the Illinois Supreme Court ruled that the law of immunity was outdated and it did not serve the society. Now many people feel that this is a legislative responsibility. But most attorneys that I have talked with say it is definitely something for the courts to decide. What is your thinking?"

Attorney General: "I think it is not for the courts to decide as I do not believe in legislation by courts. In other words, basically, if I were going to do it, there would be no question, if I had the authority but that I would start with a constitutional amendment giving the legislature the authority to pass the necessary enabling statutes. It would be necessary to meet some bounds, not only to protect the injured party, but to protect the school, county, and other political sub-divisions of the state.

It might be interesting to you to know there was a case from Brown County a few years ago when the present Attorney General, Will Wilson, was on the Supreme Court of Texas. It was a political sub-division and I believe a child was drowned. I am not positive about the facts but I imagine it was a drainage district. I started to say navigation, but I

do not believe they have any navigable streams in Brown County at Brownwood. Anyway, the attorneys representing the political sub-division and district claimed that the district was in the same category as the county or state, and that there could be no liability. The majority of decisions, six of the judges, agreed that that particular district was in the same category as the county, and held them not liable. But the Attorney General, Will Wilson, who was an Associate Justice on the Supreme Court, wrote a protocol dissenting opinion at that time in which he was joined by two other members. Two of his brethren in the court and he personally felt that at that time there was tort liability on the part of the state, county, school district and other sub-divisions. At the same time, he was a good enough lawyer to say, "You are derelict of your duty. Until the law is changed, you should ignore my minority opinion and follow the majority opinion." I, for one, and I am a staunch Democrat, but do not believe in courts relining the law. I believe in it being changed constitution or by legislature. But the time is coming, as I said a while ago, when if the school district is responsible for injuring your child or mine, they should be in the same shoes as an individual."

Interviewer: "We force these youngsters into various activities and we force them by law into our schools. Is it right for the school and school officials to escape all liability if your youngster is hurt or injured in school?"

Attorney General: "No Sir, I would say by analogy, that is just like a situation we had at state level. For a long time, a fellow working for the highway department or university, for example, had no protection at all if they were injured on the job. Today, pursuant to a constitutional

provision and enabling statutes, they have workmen's compensation that protects them. I would say, certainly, the worker, regardless of where or what type of work he is doing, is entitled to protection. He is there to make a livelihood. Your child and mine are in school to get an education. In other words, what he is doing today is probably the greatest and most important thing to him that he will ever do, and without it he would be a failure. I am not comparing him to the day laborer or the fellow who is working on the bridge or highway, but if it is important that those fellows have protection, it is just as important or more so that your child and mine have protection while they are at school. Whether he is in regular class where he slips on the floor and breaks a leg, taking a course in shop work, or whether he is on the football or basketball field, he needs protection. In other words, he has his whole life before him, and if he is injured, certainly he, his family, guardian, or whoever is responsible for him, should have adequate protection. That is the Democratic way of life, and as I said a while ago, I think we have been following it basically. We have a wonderful system, but the old idea that the state or school can do no wrong is long since outmoded."

Interviewer: "Do you think there is a trend or pattern developing for the Judges to feel as Judge Wilson did and as you say that you feel about this?"

Attorney General: "I think there might be. I believe it is still going to take a change in the law to bring it about. Even your associations of officials, for instance, County Judges, Commissioners, Tax Assessors and Collectors, and those officials at the local level, are coming around to the view that there should be some happy medium whereby the

county or school, or whatever the government sub-division is, or its offices or employees of the public, are at fault. And as you say, particularly those that go involuntarily are going to have inadequate protection."

Interviewer: "Would you care to suggest ways that this might be remedied?"

Attorney General: "My suggestion would be that they take it up with the legislature at the regular session and get the constitution amended. You submit a constitutional amendment to Congressman, and then it may need to be changed from time to time. You never get a Utopia when an act is first passed, and I say that with all due respect to everybody. We have learned that on our teacher retirement and state employment retirement. The act may be good when passed, but times and circumstances may change and it is rather hard to come back. You have to have a two-thirds vote. It is sometimes hard to get one hundred in the House and twenty-one in the Senate to submit a constitutional amendment, but if you have something that is maritorious, it is fairly easy to show the legislature where the system is outmoded. For instance, on teacher retirement, they put a certain limitation on it, and in that period of time during the depression it was wonderful. Of course, we had to change it because it would not work at all when times became more prosperous. Start with a general authorization by constitutional amendment then let the Texas legislature pass an act. This general act should be for all school districts in the state, whether they be independent, common, a rural high school, or any other, and should provide an adequate system of tort liability."

Interviewer: "What sort of protection would this be? Would this be insurance?"

Attorney General: "I would say that something would have to be worked out. In other words, with our workmen's compensation at the state and county level, particularly at the county level which would be more pertinent here, the county could adopt the provisions of that act and then it could be its own insurer and carry its own compensation. Or it could carry it with a recognized insurance corporation. So, I have not thought about it too profoundly, but I rather think that it probably would be better if it were a form of insurance that the school district did not carry themselves. After all, they may be very efficient and they are improving in Texas and Oklahoma all the time, but when it comes to insurance business that is something that has been established a long time. I am not beating a drum for insurance companies, but I believe they could but it more cheaply and more wisely for a lot less than if they had to carry it themselves."

Interviewer: "I think you are right. A good example of that would be the accident in Colorado last year. This would be a terrible thing for a school district to even attempt to compensate for this."

Attorney General: "I have seen, and you have too, certain accidents that would have completely bankrupted a school district. Take for instance, years ago when they had that horrible accident at Roundrock and all those athletes were killed from Baylor University. That was a denominational institution, but if the college or university had borne the brunt of all that, it would have more than bankrupted them. And that is what I am saying. In other words, we have these insurance companies that are established and can

meet any loss. You take your average school district, even though some of them are pretty wealthy, one bad accident would take all their funds and then some."

Interviewer: "I believe this will be adequate to cover the interview."

Attorney General: "Would you like me to get you some of those opinions while you are here?"

Interviewer: "I surely would"

Attorney General: "It is something that has been very controversial. I have three boys, one in the university, one in high school, and one in elementary school, and if it is the fault of the school, whether by its acts of omission or commission, I feel there ought to be liability there; and we are coming around to this in Texas. I am not comparing a convict to a school child, far be it from me, but a few years ago they had passed the necessary enabling statutes and this is to illustrate the trend. There is no way in dollars and cents that you can compensate a man for time spent in a penitentiary when he is innocent. Just a few years ago in Texas, there was a constitutional amendment passed that would authorize the legislature to put the teeth to it. They made a statute to provide a system of compensating a fellow that had been mistreated. I think the gradual trend, at the national, state, and local level, is that if you are injured, whether by individual, corporation, association, a governmental agency, or the government itself, everybody should stand in the same shoes. It goes back to England and Great Britain, "The King could do no wrong." That was a fallacious assumption then, yet we project that today. Regardless of how able our officials may be, they can still make mistakes.

I think this, Sir. As I said, we have a wonderful system at both national and state level. I have lived with state and county government practically all my life. I was in private practice for four years, a county judge in northwest Texas, and I am going on my 20th year here. When you check the history of Texas, and you read our Constitution, practically everything was placed there in the Reconstruction Period, or had its inception then when the carpetbaggers, scalawags, and freed slaves had just about taken us over and ruined us. As one writer said, "They darn near ruined the great State of Texas." And statistics will show that it took very little in the way of taxes at the state and local level. Where the county rate had been 15¢ on $100 valuation, and the state comparable to that, in a period of ten years during the Reconstruction Period, the tax rates jumped to about $2.17 at state and local level. So you can well imagine that our forefathers in Texas, when they wrote the Constitution of 1876, were not thinking of authorization. They were thinking about restrictions and prohibitions. At that time, they served a wonderful and useful purpose, and I am not trying to be critical at all. If you and I had been living then, we probably would have done the same thing. But we are living in a modern civilization now with the atomic bomb and everything streamlined, and we need more authorizations. Now the argument is often presented, particularly at conventions of state and local officials, that if you opened the door and if you liberalized it, there would be a lot more embezzlement and stealing. But contrary to that, I think 99.9 out of 100 per cent of our officials are honest. We all make mistakes because we are human. But you need more authorization, rather than restrictions and prohibitions. Still you are going to have the taxpayer, the voter, and the

public who will all have added protection. Basically in Texas, there have been some very fine changes in the Constitution, both for the benefit of the local officials and the state, too. However, we need to modernize that idea. We have a Constitution that is so long since antiquated in so many respects that we need to modernize so that the governing body of the state or school district, or the county, or whatever it might be, will be authorized to do something of an affirmative nature within certain limitations, instead of having all these "don'ts" and prohibitions. I hope you do not misunderstand, I am a Democrat and a very conservative lawyer, but I believe in a fellow being objective and facing up to reality.

Tentative Conclusions

The tentative conclusions are based on the evaluation of the received letters and the comments by the jurors.

1. Oklahoma, New Mexico, Arizona, and Texas courts, principally in cases of severe injury, deplore the lack of statutory enactments giving relief to those suffering from injuries attributable to the school districts. It is apparent that the only adequate way of abrogating immunity is by means of statutes.

2. There seems to be a growing feeling that the individual should not be made to suffer for any injury committed either by a school district or by any of its representatives. To make this possible the thinking is that the school district should avail itself of some means of protection against loss from liability judgment.

3. It appears that professional school organizations and the legislature should take the initiative to study the developments in educational

legislation in other states. The Oklahoma school districts, school boards, teachers, pupils, and patrons need the protection of wise and justifiable legislation that will allow recovery for injuries to a person.

4. Statutes of most states declare school districts to be corporations or corporate bodies. None classifies them as to whether they are one type of public corporation or the other. The question has been left to the courts. The most prevailing judicial opinion has classified school districts as quasi-corporations because of their restricted powers. A school district is a corporation created by statute solely for the purpose of carrying out the educational policy of the state.

5. Oklahoma has been content to rely upon the age-old rule of sovereign immunity. It is not surprising to find but two statutes addressed to tort liability. The one outlines the school district's non-liability for torts as a public corporation for the public purposes with all the rights and privileges granted under the common law. The other concern itself with permissive insurance against liability in the operation of the school district's public school busses.

6. The courts of Oklahoma, Arizona, New Mexico, and Texas are often called upon to interpret statutory enactments. A reading of a statute tells what the legislature said, but not until the courts have interpreted the law can one be certain of the meaning of the legislature's enactments. If the legislature makes a direct mandate, courts go along with any procedure if they are convinced that the legislative intent has been substantially carried out. However, courts are quick to point out that they cannot legislate, and the courts hesitate to assert their right to order a school district to make a liability settlement. They can find no sta-

tutory authority for such an order. A study of court decisions shows traces of dicta that indicates the court's thinking with reference to the manner by which a legislature could provide legislation to meet the situation in issue.

7. The courts of the four states under study give many reasons for voiding liability. The degree of accountability required of a school district is less than that of a private corporation or a private person; this is because it is an arm of the state. A school district has no funds from which judgments may be paid. Courts look upon liability judgments as an attempt to open a new field of litigation and are quite consistent in their rejection of any such encroachment.

8. The legal status of public school teachers varies from state to state according to the particular relationship which the laws have set up. Since education in the American scheme of government is essentially a matter of state policy, the courts have been called upon repeatedly to define the function of the public schools of the states. Whatever vagaries may have been entertained by educational reformers and others, it seems the courts have been forced by necessity to formulate a theory of education based upon what they deem to be fundamental principles of public policy. Oklahoma courts have held that in legal theory public school districts are branches of the state government. The state cannot prohibit private educational institutions, but it can regulate the teachings which challenge the existence of the state and the well-being of society. It may, moreover, require that children be educated in schools which meet substantially the same standards as the state requires of its own schools.[1]

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[1] Wright v. State, 21 Okla. Cr. 430, 209 P. 179 (1922).

9. The principles and issues emerging from the briefing of the court cases, statutory enactments, and remarks of the Attorney Generals have been presented in the study. Where feasible, direct quotations were presented from the court cases and the laws to give the thinking and the wording of jurists and the legislators. Quite often sufficient facts were presented with the principle or principles in order to help the reader to better understand the reasons upon which the decisions were based. Some principles and issues occurred but once, while others were brought to bar many times. In the latter instance, it has been attempted to pick those cases giving the clearer exposition of the court's thinking; reference has been made to supporting or distinguishing cases that have been adjudicated in other states.

10. It should be noted that the reader may make reference to the specific court cases and statutory enactments referred to in this study by going to the appropriate source materials.

CHAPTER IV

EVALUATION OF JURORS

Introduction

The purpose of this chapter is to give the evaluation of the tentative conclusions by the jury. This chapter will also have definite conclusions and recommendations.

Selection of Jury

There is no claim to the expertness of the jury other than they are practicing judges or attorneys in Oklahoma. The jury consisted of the following:

William L. Anderson - General Councilor of Corporation Commission Attorney
Ben Huey - Practicing Attorney
Edward H. Purcer - Practicing Attorney
Harold Freeman - Chairman of Corporation Commission of Oklahoma
Kirksey Nix - Judge, Court of Criminal Appeals
John A. Brett - Judge, Court of Criminal Appeals

Procedure of Evaluation by Jury

Tentative conclusions were drawn in Chapter III. These conclusions were developed in the study and numbered. Page number and paragraph number of supporting evidence in the dissertation were cited for each conclusion. Each juror was presented the first three thapters of the disertation in addition to the tentative conclusions. They were asked to

agree or disagree with the tentative conclusions.

Jury Analysis

I have carefully read the dissertation of Leslie Robert Fisher, which has been presented to the great faculty of the University of Oklahoma to fulfill part of his requirements for a Doctor of Education. Before beginning my comments, I will state that, as a background, I have been engaged in the general practice of law in Oklahoma for almost twenty years, during which time I have, from time to time, represented both school boards, school districts, school teachers and other public employees, in matters related to the rights and obligations of both the districts and the teachers, but have not specialized in this practice of law so as to qualify myself as an expert. Therefore, my comments will be more that of a general practitioner of the law and a citizen of the State, rather than a specialist.

Generally, the dissertation is a scholarly, well-written, well-organized work. As an attorney, I think that it shows a great amount of research and an especially good analyses of legal principles. This is especially so, when you consider the writer of it is not a member of the legal profession.

The general thesis of the dissertation that there should be some relaxation of the common law rule for school districts and other districts in public liabilities for torts committed by the agents and employees of that public body, I am wholeheartedly in accord. I realize this is a disputed matter in the field of jurisprudence and the total wiping out by Legislative enactment of the exemption of the sovereign from suit for damages resulting from the neglect of its agents, servants and employees would, for a time, create many serious fiscal problems.

There are those in my profession, as well as public officials, who feel that the public policy should be to retain the exemption of the sovereign from suit on the theory that large numbers of tremendous money judgments would be secured against public bodies, which would create a tremendous burden on the taxpayers and, in many instances, impede public services.

For example, should there be a serious school bus accident, transporting children to and from school, or to some school event, as a result of the neglect and fault of the bus driver, the resulting suits for damages could reach hundreds of thousands of dollars, far in excess of the financial resources of the school district to compensate. If this should happen, it might well be that the finances of a school district could be reduced to such a point that a minimum necessary educational program could not be carried out by the school district.

On the other hand, to deprive persons so injured of the right to collect for reasonable hospital and medical expenses, permanent injuries, and conscious pain and suffering, in an accident of this nature, places a most intolerable burden on the persons injured, or their family.

In balancing the equities in the matter, I am in accord with the conclusion reached by Mr. Fisher, that the Legislative bodies and school administration officials should look to some reasonable relaxation of the common law rule of the immunity of the sovereign from suit.

Mr. Fisher has five possible proposals in his recommendations to remedy the situation which presently exists, with regard to claim for damages in school districts. I will comment briefly on each of these proposals.

Proposal I entails a far reaching, entire wiping out of immunity of sovereign from suit, without any provision for insurance coverage. The Legislature, in considering a proposal such as this, would almost inevitably be faced with the possibility of the Legislature being extended as a reasonable corollary to all other public bodies, thus making every city, town, county or any other body public, subject to suit without restriction. Personally, I think that it would be almost impossible to get Legislation, such as would be required in Proposal I enacted and, if it were enacted without adequate provisions for insurance coverage, the result could, in some instances, be disastrous to public service.

Concerning Proposal II, this proposal is not much different from the first proposal. Under it, rather than making the school district party defendant, the agent or employee of the school district would be a party defendant, but, after a judgment was secured, the school district would be required to satisfy that judgment much the same as a liability insurance carrier is under our insurance law. I think this proposal, like the first one, would be hard to pass in the Legislature, could result in many hardships, especially to small, weak school districts and, if enacted, should require the school districts to carry sufficient liability insurance so as to meet any obligation which might be imposed on them under this proposal. In addition, I notice that no distinction is made between the wilfull acts of the employees and the purely negligent acts. Possibly, if this proposal were considered, school districts should normally be held liable for the acts of negligence of the employees and not be liable for any wilfull, deliberate acts performed by the employees of school districts.

Proposal III authorizes the school district to insure its employees against liabilities for injuries or damages. I think this is a step toward a proper solution of the problem.

Proposal IV seems to be a logical extension of Proposal III, especially as it applies to transportation.

As to Proposal V, I think that some form of compulsory insurance, covering medical and public liability claims arising from sports, or other school . . . activities, should certainly be given serious consideration. This is especially true, since many of the injuries cannot be laid at the door of an agent or employee of the school district and no negligence, which would give rise to a tort action, could be found.

After having carefully considered all five proposals of Mr. Fisher, it is my personal opinion that a sixth alternative solution might be seriously considered. It is my suggestion that serious consideration be given to request the Legislature to enact a statute, which would compel all school districts in this State to carry compulsory liability insurance. This statute should also provide that the insurance policy should cover all agents and employees of the school district, including teachers, board members, bus drivers, custodians, or whatever category they might fall in, and should specifically provide, as Mr. Fisher suggested in Proposal IV, that the policy would waive any defense, by the insurer, that the school district was engaged in a governmental function.

My idea for placing this on a state-wide basis is simply this: By requiring every school district in the State to carry this insurance, the total over-all insurance rate, after it had been in operation for a reasonable time, could be reasonably computed. The Legislature, in its biennium

appropriations to finance an adequate school program in Oklahoma, could take these costs into consideration and appropriate sufficient additional sums of money, so as to enable schools that do not have enough revenue from sources to participate in this program without financially jeopardizing the rest of the school program.

It might be well to consider the possibilities of handling this state-wide insurance by some state agency, such as the State Insurance Fund, where it could be operated entirely without profit and at a minimum cost to the State. This type of state-wide insurance coverage would save having an enormous burden on any one district and would place the burden of compensating for damages, from the operation of the educational system in Oklahoma, on the State as a whole, rather than one individual, isolated school district.

After having read Mr. Fisher's dissertation and studied it, it is my sincere belief that the ideas he has expressed in it should be transmitted to the Legislative Council, to be referred to the Education Committee, so that the next Legislature might give serious consideration to enacting much needed legislation toward relaxing the archaic and out-of-date rule of law, which makes a sovereign immune from suit. I personally believe that the school people in this State, members of the Legislature, and the public in general, if they had this matter presented to them in the scholarly, thorough way that Mr. Fisher has prepared it, would feel that some change should be made, whereby the citizens of the State, as a whole, would recognize that our . . . obligations toward the school children of the State extend beyond mere classroom instruction. They would agree, I am certain, that this State has an obligation to those school children and

other persons who might be injured by the operation of our school system, and that they should receive reasonable compensation, at least for hospital and doctor bills, and possibly some monetary compensation for any permanent injuries.

William L. Anderson

Without having discussed the matter with you, it would seem that I am to evaluate the material in your dissertation to see if there are patterns of deviation by the Courts of the State of Oklahoma, from the statutory immunity for public school districts, school boards and employees, from liability for personal injuries predicated upon negligence.

In the time allotted me for this purpose, there is no opportunity for research, nor is the need for research on my part indicated. Therefore, my comments shall be confined to my experience over thirty-five years as a law student and practicing attorney, which includes ten years in the House of Representatives in the Oklahoma Legislature.

I have read your dissertation with a great deal of interest. You must have devoted many days to researching this matter, and, though the Graduate Faculty will have little interest in my opinion, I feel you have arranged and presented your research material in an excellent manner.

My greatest interest was in the interview with the Attorney General of the State of Oklahoma, for the reason that my answers to like questions would have been essentially the same.

Frankly, I have not noticed any tendency on the part of the Legislature or the Courts of Oklahoma to deviate from the Common Law concept of immunity for public school districts and boards. So far as the persons

in such positions as board members and employees, limited immunity prevails. That is, to show liability on the part of such person who was apparently acting in an official capacity, it must be first shown that such official was willfully or maliciously doing wrong, or that he was acting in an individual capacity, rather than official.

This limited personal liability of school officials is beins used as an opening wedge to do away with the common law immunity, though such is not necessarily the intention. I am sure most people would like to see all persons in official capacities covered with public liability insurance, so that students or any member of the public at large, can expect to receive adequate compensation for injuries suffered at the hands of such officials, and through no fault of the injured person. In that regard, the Courts are probably showing and will increasingly show a tendency to lessen the partial immunity now enjoyed by State, County and school officials, by holding them more strictly accountable for their tortuous acts, and by a more narrow interpretation of the partial immunity.

There is a growing tendency on the part of State, County, and school officials to require employees in occupations that are dangerous to the public, to carry public liability insurance. Where possible, the income of the employee is increased sufficient for the purpose. This attitude on the part of such officials will, no doubt, pave the way for later rulings by the Courts that the carrying of the public liability insurance constitutes a waiver that will eliminate the defense by the employee that he was not acting willfully, maliciously or as an individual. Then, it should follow, that in time, all State, County and school employees and officials in occupations that may be dangerous to the public, including

students, will be required to carry public liability insurance. The governing boards will be required to set up additional funds to underwrite such insurance.

When all such risks are covered by adequate public liability insurance, then the State, County and schools will have immunity in name only. When that day comes, it will probably be as well to leave the immunity, since the individual is protected from loss at the hands of an official, and at the same time, the appropriations for the operation of State, County and school would be more uniform and not subject to fluctuations to pay judgments. When and if that day comes, it is my opinion that immunity of the State, the County and the school district should be preserved, so that the functions of such departments may be accomplished free from the embarrassment of law suits and judgments.

It is my feeling that our concern should be for the student or individual who suffers personal injury and loss through the negligent performance of duty by a public official or employee; and that if adequate public liability insurance is permitted by law, and maintained, we will have little left to be concerned about.

I am glad to have had the opportunity to be of assistance to you, and I hope that you find my comments helpful.

Ben Huey

After reading the study concerning the position of the school district's immunity for its tort liability, I will have to agree with the author that steps must be taken to eliminate the inequities that exist. This is not to say that the maxim "the sovereign can do no wrong" should

be abrogated altogether. However, the harshness of such a rule could be lessened by the proper statutory enactments or by judicial decisions.

The very complexity of today's local and state governments and the services that we call upon them to perform are too well fixed to be eliminated at one time - the resulting chaos would be untold. However, inroads have been made into the protective shell of the state's immunity while completing its governmental functions. In some cases the states have done this themselves, realizing the inequities that exist because their immunity is invoked when tort liability is attempted to be established. This has been accomplished to a certain extent in Oklahoma by statute, 11 Okl. St. Ann. 16.1, though not dealing directly with the state's assuming liability for injuries attriutable to school districts, it deals with the right of enumerated subdivisions of the state, including the school district, to purchase insurance for the purpose of paying damages to persons sustaining injuries or damages to their properties proximately caused by the negligent operation of vehicles and motorized equipment; however, the statute goes on to say that this in no way constitutes the state liable, but on the contrary, a cause of action can only be brought against the insurer.

By extending the logic behind the provisions of the above mentioned statute, it would not be difficult for the legislature to extend this right to purchase insurance to cover other areas where a citizen is injured, especially the school districts.

Another example of the state making provisions to protect innocent parties injured through no fault of their own is the State's Workmen's Compensation Act, enacted in 1915. Recovery is allowed for injury, tho-

ugh the employer is blameless, if the injury comes within the purview of the statute. This act in itself was quite an innovation in that with the advent of the law, the state, by way of its legislative power, gave protection to its citizens. It is interesting to note that the author makes mention of the state of New York as being among the leaders in the field of legislation that protects the public from loss by industrial injuries sustained by citizens while engaged in employment that the statute declares to be hazardous; because historical notes available in the statutes concerning the Workmen's Compensation Act show that the general text of the act was taken from a similar law enacted in the state of New York.

The Federal Government has accomplished the same thing through the Federal Tort Claims Act covered in Title 28 1346, where under subdivision (b) the following language is set out:

> ***subject to the provisions of Chapter 171 of this title*** shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing*** for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable***

All of the foregoing examples illustrate the ability of the Federal Government acting under powers granted by Congress, and the State Governments acting under authority of the Legislature, to lessen the harshness of the rule "the sovereign can do no wrong" by proper legislation, whereby compensation is allowed to an injured party for the torts committed by the employees of such governmental division.

In examining the provisions of the foregoing acts in which the State and the Federal Governments give permission to be sued, it must be pointed

out that this permission, with the exception of the Workmen's Compensation Act, is given only if the tort was committed by the negligent act of such employee.

I feel that where a person, namely a school child, is required by law to attend school, where they are placed in a position that they may be injured by the acts of its employees, that this same law can be amended to give the injured party permission to sue the school district and recover for such injury, if the injury is caused by the negligence of such employee. This, of course, could be done by extending the right of the school district to purchase liability insurance to cover the negligent acts of its employees.

While the general theme of the study covers the immunity of the school districts and clearly points out the inequities that have occurred by the preservation of the immunity from liability for tortuous acts, as a subdivision of the State it also shows the thinking of various courts and attorneys and the feeling of the public in general that some steps must be taken to adequately protect innocent parties injured by the acts of the State or its subdivisions. Of course, safeguards must be set up to protect the State and its subdivisions, namely the school district, from a rash of law suits. This could be accomplished on the same theory of the Federal Tort Claims Act, or by allowing the Legislature to extend the permissive right of the State or its subdivisions to purchase liability insurance on its vehicles. The school districts could be allowed to purchase insurance to cover accidents or injuries sustained by students or employees of the school system, for the negligent acts of employees, and the district itself would still not be held liable. Insurance cover-

age purchased to cover all school activities would not subject the school district's funds to a judgment. To allow the State to give its subdivisions the right to extend the right to purchase protection from its liability would in no way do away with the established rules of "stare decisis" by which certainty and stability is given to our law. However, it must be pointed out that the rules of law do not survive if they are not in accord with the community's concept of justice.

I am not advocating that the courts by decision attempt to legislate a clear violation of the separation of power. However, I do feel that since the greater bulk of our law is found in the reported decisions of our courts, and the courts in interpreting statutory enactments use the Common Law in arriving at a decision concerning the statute, which become precedents to be followed by the court in future decisions; that the courts may, since the statute or code of law under which we operate is in derrogation of the common law, liberalize their decisions where in interpreting the acts of the Legislature to give the State and its subdivisions the right to purchase protection to cover its vehicles and not strike down its right to extend such protection to cover all school functions.

Edward H. Purcer

I have carefully reviewed the manuscript being submitted to the doctoral committee of the Oklahoma University by Leslie Robert Fisher, entitle "An Analysis of Patterns of Liability Decisions in the Public Schools of Selected States of the United States," and, after having carefully read and examined same, have the following comments and suggestions:

The writer of these comments and suggestions has, for a great number

of years, been engaged in the practice of law in Oklahoma, during which time he has, on various occasions, been involved as an attorney in litigation involving the rights and liabilities of school boards, school districts, their agents and employees, on both sides of the counsel table. In addition, the writer served for a great number of years in the Legislature of Oklahoma, being Speaker of the House at one time and having familiarity from this experience with the School Code of Oklahoma. With this background, I offer these comments concerning Mr. Fisher's dissertation.

First, I want to say that, as a lawyer, I was impressed with the scholarly work and research which went into the preparing of this dissertation. I did not examine all of the citations, but the landmark cases, with which I am familiar, were properly analyzed and correctly state the law as set forth in Mr. Fisher's work.

It is my opinion that, under the law in Oklahoma as it now exists, it would be a far reaching and probably unwise thing for the Courts to over-rule the long line of cases which hold that the sovereign (including school districts) is immune from suit. This would run contrary to such a long line of cases in Oklahoma and other states following the common law and would amount to legislation by the judicial, which all of us are strongly against.

As a lawyer and citizen, it is my feeling that this common law rule of the exemption of the sovereign from suit has outlived its usefulness and should be eliminated. It is my feeling that the responsibility of educating the children of this State and Nation lies with all the citizens and that while engaged in that activity, any damage or injury, which is

done to school children or other persons, should be compensated for, where there is any fault or negligence on the part of the school district, its agents or employees. We, as citizens, have a collective responsibility in this and should not be allowed to hide behind the cloak of immunity, created by the archaic and out-of-date run of the immunity of the sovereign from suit.

I do feel, however, that the proper way to do this is to face the matter squarely, have it submitted to the Legislature and have the Legislature, by express enactment, abrogate and eliminate this rule and make public bodies,- such as school districts, liable for the tortuous acts and wrongs of its employees, the same as any other person. I think that, coupled with this, it would probably be necessary to provide for compulsory liability insurance or some other form of indemnification, to be carried by all school boards, so as not to unduly burden any one school district which might have a serious accident. If this liability insurance is made cumpulsory, provisions for the payment of insurance plans can be provided in the budgets of each school district each year and, in turn, to the Legislature, in its biennial appropriations for financing the common schools. Oklahoma can make provisions for such additional funds as may be necessary to supplement the income of those weaker school districts who cannot carry this liability insurance and still maintain a minimum program for their school children.

I respectfully suggest that copies of this dissertation be submitted to the State Department of Education, the Legislative Committee of the Oklahoma Education Association, and the State Legislative Council, so that these groups may have an opportunity to study the historical background,

legal analysis and conclusions reached therein and, working with Mr. Fisher and other interested school people, arrive at some legislative program which will eliminate many of the evils so vividly pointed out by Mr. Fisher.

Harold Freeman

Mr. Fisher's conclusion that the immunity of school boards, their agents, and employees for injury inflicted while acting within the scope of their official capacity is based upon the out-moded rule of divine right of kings, that the king can do no wrong, is correct.

As he appropriately states, on page 18:

"The theory of this immunity is that the state is sovereign and a sovereign can do no wrong."

> "Since a school district is an agency of the state, and since the state cannot be sued without its consent, a school district cannot be sued without the consent of the state. That is the second reason for the rule. The third reason for the rule is that there is no money to pay judgments in case judgments are rendered against a district. But that, of course, is reasoning in reverse. In all probability there would be money to pay a judgment if there was liability rather than saying there is no liability because there is no money. There seems to be a growing feeling on the part of the courts that this is the principal reason for not permitting liability of districts."

> "The practical significance of these conclusions for the courts is that the school district is a creation of the state and derives its power from the state. Liability is often adjudicated on the basic fact that the school district is a state unit and unlike municipal corporations in that it does not engage in proprietary function, and the assumption is only partly correct in bare legal theory; it is largely incorrect according to the social facts."

These, he points out, are the basic reasons upon which the school districts are not held accountable for tortuous acts, but he makes it clear that that fact does not relieve the employees from liability for their negligent acts. He points out that there is a trend in thinking

towards holding that laws must be enacted either through legislative enactment where not contrary to constitutional provisions, and where constitutional basis does not exist, he asserts there is strong feeling that relief should be sought by amendments. Primarily because of the social aspects which the problem presents, we should afford our children as much protection as is afforded employees of the school district against injury due to negligence, or injury arising out of and in the course of the employees labor. He suggests at least insurance should be carried to protect our children against injury sustained by tortuous acts of the school board, just as the law provides for protection of others similarly situated.

Mr. Fisher makes it quite clear that the law as it now stands makes fish of one segment of society, and fowl of the other through the medium of unjust discrimination, to save "a sacred cow" among the technicalities of the law.

As we said in Ex parte Lewis, 85 O. C. 322, 188 P2d 367, holding to these old out-modeled technical interpretations of law give some semblance of fact to the skeptic's conclusion that "justice is a blind fool, dealing in technicalities in her cumbersom efforts to administer the law." He points out that great legal agencies other than the courts have been established to handle such matters, particularly involving hardship cases. Nevertheless, he does not point up that evils attendant to such establishments are arbitrary procedure, arbitrary decisions fraught with inequities, and a total lack of consistency in determination of issues. One need only follow such administrative boards' opinions to become aware of these conclusions. Even in hard-ship cases, the evils we may encounter may prove

more damnable than the wrongs we seek to evade.

Mr. Fisher points out that the letter of the law can be preserved, even though it has gotten completely out of line with modern needs, through the medium of boards of adjustment such as have been established in Alabama for handling such situations. Thus he points out that the problem can be met in such forums of relief which, if established, will make government responsible for its tortuous acts not in a court of law, but in such boards. They are designed to recognize that after all the state has some humanitarian responsibility which it should meet, even though the technicalities of out-moded law will not permit. This he presents as a practical solution where no other instrument of justice is available to the injured party. It certainly commands our respectful consideration, at least in hardship cases.

Mr. Fisher calls to our attention other modes of relief which have been recognized in other jurisdictions, such as those provided in North Carolina, making partial relief available, burial, medical expenses, etc. This remedy might prove useful in hardship cases.

Only the states of New York, California, and Washington have effective laws abrogating the rule that the school district is not liable for its torts. These changes have been wrought by legislation. Legislation is the better approach, for it is a frontal attack to the problem, and not an attempt to affect indirectly that which the law says can't be done directly. Mr. Fisher implies the courts may do something about the problem. He indicates the courts are softening on the question and may give some relief, but, in our opinion, judicial decree is never justified in establishing substantive law but is excusable in procedural law. If the

law is outmoded and does not meet the needs of today, change it so that it will meet our present conditions. The last named states afforded strong evidence of this philosophy. Theirs was a straightforward approach. If the cause is not just, why resort to backdoor methods; if the cause is just, it can and should be sustained on cold legal logic. Then why create unfounded suspiction with devious methods to effect it?

Oklahoma, he points out, is one of those states that has been content to go along with the crowd. Only two pieces of legislation are to be found in this field in Oklahoma. The one established non tort liability of the kind under discussion, and the other permits the acquisition of insurance against liability of school busses. The latter is, of course, a step toward regulation of tort liability. It is the camel's nose that may open the tent. He asserts the courts have indicated that they are willing to enforce such liability if the legislative door is opened, but personally we are unwilling to invade a field of legislation that is clearly not judicial.

On the other hand, Mr. Fisher makes it also clear that the courts have not been hesitant in advancing many reasons why the liability should not be assumed. In other words, he indicates it might be that the courts are in a judicial rut on the subject, and there should be a new challenge to judicial thinking.

Nevertheless, he warns this area of liability could develop into a lucrative method by which damage suit litigants could get their hands into the public pocket. When the gate is opened to new pastures, the sheep will certainly go in for good grazing. Of course, there is always justification for righteous grazing, but how to keep the goats from over-graz-

ing is the problem. He suggests that this may be the real reason the courts have denied this school board tort liability. We agree that one need not be sage or seer to see the necessity in many cases for the establishment of school district liability for torts, while on the other hand, it is possible the public liabilities assumed may far excell the legitimate benefits to be bestowed. Possibly in hardship cases, the adjustment board idea might be preferable to opening the door to litigation.

But even the idea of the board is not without its evils of favoritism and discrimination, if not outright fraud. Should we be diverted in our search for justice by even the possibility of error, mistake, or unfaithfulness in public administration? These are natural hazards that always arise and have to be met in any human enterprise.

Mr. Fisher has made a direct and accurate contribution in our opinion, to stimulate thought in this very controversial field of law. His paper is a most worthwhile contribution. He quite definitely indicates a trend away from the old school of legal thought to the new, that school districts should be liable for their torts. This is in keeping with the basic concept of justice that "There is a remedy for every wrong, even though the law moves on leaden feet" when it strikes, "it strikes with an iron fist".

A solution may be closer than we think in this area or justiciable vacuum.

Kirksey Nix

and

John A. Brett

CHAPTER V

SUMMARY, CONCLUSIONS, AND RECOMMENDATIONS

Introduction

This study is concerned with the analysis of the liability practices that pertained to public school districts, school boards and school employees of the selected states of Arizona, New Mexico, and Oklahoma, and Texas.

This was done by reviewing the current literature in the field, the adjudicated court cases, the statutory enactments, the interviews of Attorneys General from the selected states, and the evaluations made by the jury consisting of judges and practicing attorneys of Oklahoma.

SUMMARY

There are evidences that the courts see the inadequacy of legislation pertaining to the problem but feel that they cannot do anything to remedy the "lack of justice." Since there is no statutory authority for the payment of claims, courts feel that they have no right to order school districts to pay any judgments against them. Too often the doctrine of *stare decisis* seemingly holds back the courts in meting out "justice."

Courts hold school districts to a degree of accountability for the improper management and use of school property. If a nuisance exists, school districts may be forced to abate or remedy the cause of said nuisance by the courts. Ownership with power of control is necessary before

liability for nuisance may be attached to school districts.

In 1959, the New Mexico State Legislature did enact legislation covering the liability of a school district for personal injuries resulting from an employee's negligence.

> Section 5-6-18, et. seq. N.M.S.A., 1953 Compilation (P.S.) provides in substance that a private individual may sue the State, County, City, School District or other public body where such public agency or instrumentality has obtained liability insurance. Section 5-6-20, N.M.S.A., 1953 Compilation (P.S.) provides that no judgment obtained shall run against the State, County, City, School District, District, and State Institution, etc., unless there is liability insurance to cover the amount and cost of such judgment.

As to the tort liability of an individual employee working for a school system, the state of New Mexico has no statute giving immunity to the individual.

In several Supreme Court decisions of the state, McMullen v. Ursuline Order of Sister, 56 N.M. 570, 246 P. 2 d. 1052 and Archuleta v. Jacobs, 43 N. M. 425, 94 P. 2d 706, it was recognized that an individual may be personally liable, depending upon the facts involved in a particular case.[1] These being the specific statutes governing tort liability of school personnel.

Oklahoma courts are ever ready to invoke the governmental nonliability principle. This was done by a court in failing to penalize a school district for the negligent operation of its school bus.[2] The school districts

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[1]Thomas A. Donnelly, Assistant Attorney General, State of New Mexico, July 24, 1962 (Letter).

[2]Wright v. Consolidated School District No. 1 of Tulsa County, Supra.

interpret school busses as school property and thereby receiving governmental immunity as a public function for the public's benefit.

Two cases involving pupil transportation were brought before the courts. In the first case, the courts held that the school bus was school property and shared in the school district's governmental immunity in its operation. In the second case, an insurance company was held liable under Oklahoma's permissive school bus insurance statute for the negligence of the school bus driver in permitting a child to cross a road without warning him of an approaching truck. The court held in that case that the insurance company was liable for damages in the death of the child although the school district was not liable under the immunity status.

Many reasons have been given by the courts in disallowing a judgment to be entered against a school district. They all stem from the fact that everyone is agreed that a school district is but an arm of the state. As such, all resources of the school district are to be expended for educational purposes only.

Some other instances of the application of the doctrine of nonliability in the performance of a governmental function are: The case of Treadway v. Whitney Independent School District in Texas[1] where the court held that a school district operating in a governmental capacity cannot be held to answer in a suit sounding in tort. Also in Arizona the courts held that school districts being agencies of the state are not liable for the torts or negligence of its officers, agents, or employees, unless such

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[1] Treadway v. Whitney Independent School District, Texas, 205 S. W. 2d 97.

liability is imposed by statute.[1]

School districts, in the absence of a statute making them liable, are not liable for injuries to pupils growing out of the negligence of employees. In such cases the rule of respondent superior does not apply. Obviously, if a school district is not liable for the negligent acts of its officers, it is not liable for the negligence of its employees.[2]

Courts determine what a law actually is. There have been few laws which have not been contested in the courts. Legislative bodies have often made many amendments to an enacted law before the courts were convinced that the law was as the legislatures intended it to be. Some statutes must be strictly construed while others may be liberally interpreted. Whenever possible, courts tend to determine the legislative intent and then decide accordingly.

The doctrine of nonliability that is applicable to any agency of the state in the performance of a governmental function has been subjected to criticism as being illogical and unjust. A number of courts have expressed dissatisfaction with it on grounds of social policy. But it is a long and well-established principle, and the courts take the position that if it is to be changed, the legislature should do it. The Supreme Court of Kansas has expressed the view apparently entertained by most courts: "If the doctrine of state immunity in tort survives by virtue of antiquity alone, it is a historical anachronism ... and works injustice to everybody con-

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[1] Sawaya v. Tucson High School District 18, Arizona, 389 281 P. 2d 105 (1955). School District No. 48 of Maricopa County v. Rivera, 30 Arizona 1, 243 Pac. 609 (1926).

[2] Treadway v. Whitney Independent School District, Texas, Supra. Newton Edwards, The Courts and the Public Schools, pp. 389-99.

cerned . . . the Legislature should abrogate it. But the Legislature must make the change in policy, not the courts."

The courts of New York are the only ones to depart, in some degree, from the common-law immunity from tort. In this state the courts have, in the absence of a statute providing for liability, repeatedly held a school board liable in its corporate capcity for the negligent performance of duties imposed by law on the board itself. More recently, the state has waived, in the Court of Claims Act, its immunity from liability for the negligence of its agents in its charitable and other institutions, and by statute has made boards of education in some classes of school districts liable for damage arising out of the negligence of their employees. In many New York cases, therefore, boards of education have been held liable for the negligence of their teachers or other employees. Similarly, in California and Washington the common-law immunity from tort has been repealed by statute, and in many cases boards of education have been held liable for injuries growing out of the negligence of their employees.[1]

Arizona, New Mexico, Oklahoma, and Texas have been content to reply upon the age-old rule of sovereign immunity. There seems to be some quickening of judicial "conscience", but the courts still are quite willing to be influenced by stare decisis. The courts of these states often are called upon to interpret statutory enactments. It may truthfully be said that the laws are what the courts say they are. A reading of statutes tells what the legislatures say, but not until the courts have interpreted

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[1]Newton Edwards, The Courts and the Public Schools (Chicago: University Press, 1955), pp. 411-12.

the law can one be certain of the meaning of the ligislature's enactments. If the legislatures make a direct mandate, courts go along with any procedure if they are convinced that the legislative intent has been substantially carried out. However, courts are quick to point out that they cannot legislate, and the courts hesitate to assert their right to order a school district to make a tort settlement. They can find no statutory authority for such an order.

The U. S. Supreme Court has not made all the important decisions regarding educational changes. In 1959, the Illinois supreme court reached a decision considered to be a bench mark in judicial history. They held that the common law rule of school-district immunity from liability for injury was outmoded, and so overthrew it. Answering the argument that if the rule "is to be abolished it should be done by the legislature" and not by the courts, the Illinois court stated that the doctrine of school-district immunity was created by the courts. Therefore, the courts have both the power and the duty to abolish it if it no longer serves the public interest. The great importance of the Illinois Court decision may be that it could touch off a chain reaction that would ultimately make the common law rule obsolete everywhere. Other states have enacted legislation making the rule a nullity, but in no other state have the courts ruled in opposition to the common law.

While courts seldom are called on to face criticism squarely, they have not, when the occasion warranted, failed to speak directly to this point. Their pronouncements indicate that they must walk a tightrope. They must follow precedent to a certain degree if law is to have stability, but they must not hesitate to depart therefrom, even to the extent of

overruling everything they have previously held, when the need arises.[1]

A case arose from injuries to a pupil while in attendance at school. The child fell into a small tree next to some steps and was injured. The plaintiff alleged that the pruning and positioning of the tree were done in a negligent manner. The courts held: (1) Caring for school grounds is a governmental function. (2) An independent school district is an agency of the state and while exercising governmental functions is not answerable for its negligence in a suit sounding tort. The court went on to state that unlike a city or town, a school district is purely governmental and it performs no proprietary functions which are separate and independent of its governmental powers. (3) The court also denied recovery on a nuisance theory and stated that there was no distinction in this instances between negligence and nuisances as far as liability for personal injury is concerned.[2]

In another case, a plaintiff was injured in a school bus accident. She sued, as parties defendant, the school district and the individual members thereof. The driver was not a party. The court held that furnishing transportation to and from school is a governmental function. Neither the school district, the school board, nor the individual members thereof are liable in damages for injuries to a pupil caused by the negligence of its officers, agents, or employees.[3]

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[1]Garber, op. cit.

[2]Braun v. Trustees of Victoria Independent School District, Tex. 114 S. W. 2d 947 (Ct. Civil App., 1938).

[3]Consolidated School District No. 1 of Tulsa County v. Wright, 128 Okla. 193, 261 Pac. 953 (1927).

In the absence of a statute a school district is not liable, generally speaking, for injuries sustained by pupils on school property. This rule of nonliability applies also to a municipality to whom the statute has given the authority to maintain schools. It is so provided the act compalined of is governmental nature, because the municipality in performing educational functions is in reality a school district.

The only condition under which a school district can be held liable is by express statute. California and Washington are two states in which such statutes exist and there is one exception to this rule of nonliability. The one outstanding exception is New York, where courts have consistently held that school districts will be held liable for injuries resulting from the negligent or wrongful acts of the district acting through the school board.

There are several reasons why the courts ruled nonliability: The most important are:

(a) The state is not liable in such cases unless expressly made so, and the district is an agent of the state performing a governmental function.

(b) The master-servant relationship does not exist between a municipality and the agents it employs to execute its powers of a governmental nature.

(c) The district has no funds to pay damages, nor has it the power to raise a fund for that purpose.

(d) School funds are trust funds and cannot be diverted from the purpose for which they were raised.

(e) Districts are involuntary corporations organized for the purpose of public benefit.

(f) To assess liability against districts might conceivably necessitate the closing of schools while taxes were being used for paying damages.

(g) A school board cannot render the district liable in tort because in committing a wrong or tort it does not represent the district.[1]

The position of boards of education in the past has been relatively secure in regard to liability due to the governmental immunity stemming from the "King Can Do No Wrong" concept. They have been completely secure in the use of their discretionary power excepting in rare cases of obvious malice or fraud. There have been very few successful litigations against them in regard to their ministerial duties in relation to the careless way so many of them operate. It seems the very leniency in which they have been treated by the courts has strengthened their disregard and contempt for the statutes if present practices are the criteria.

There is no valid reason for boards to operate in the manner in which they do when an elementary knowledge of school law and an understanding of their powers and its limits would be so easy to possess. The boards are responsible for a large corporation and should operate it as efficiently as they do their private business. School business should be so operated to the letter of the law, not only for the protection of the school district and the board, but also in respect to the innocent third party who so many times is kept from receiving what is rightfully his by an antiquated concept that is not fair nor just.

There are indications that the favored roles of schools are changing as indicated by legilsation in some states of breaking down government immunity. It is a healthy sign, and school boards should take heed and

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[1]Lee O. Garber, Handbook of School Law (New London, Conn.: Arthur C. Croft, Publications, 1954), pp. 82-83.

become more efficient in their tasks. No one wants school districts persecuted, but in law there should be equality. Board members should arm themselves with the rudiments of law and then retain a good lawyer and use him any time there is a question of doubt about the legality of an action. If they do this, the business of the district will be carried out in a much improved manner. They will be able to leave a board meeting with a sense of pleasure in a job well done.

The eight conclusions in Chapter III have been revised into five definite conclusions in Chapter V. The evaluations of the jurors suggested that the tentative conclusions be toned down and combined into a more specific set of conclusions. The writer has attempted to make the changed by deleting Tentative Conclusion Number 4, combining Tentative Conclusion Numbers 1 and 2, combining Tentative Conclusion Number 3 and 5, and by altering Tentative Conclusion Numbers 6, 7, and 8; thus making five definite conclusions.

Conclusions

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

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 law 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 occuring in athletic programs.

Recommendations

It is concluded from this research that a sane protective program for physical injury could be provided in the four states considered in this study.

The earlier stated tentative conclusions (Chapter 3) which are supported by remarks of the jurors suggest the following recommendations as a legislative program for the Oklahoma Schools. This program might significantly clarify the legal responsibility for the public schools, school board members and employees of Oklahoma schools.

Proposal I

The common law rule of exemption of the sovereign from suit for damages should be abrogated, insofar as it applies to school districts, school boards, their agents and employees, for reasons heretofore stated.

Proposal II

Coupled with Proposal I, every school district in the State of Oklahoma receiving any form of state aid should be required, as a condition precedent to qualifying for state aid, to carry comprehensive liability insurance covering the districts, agents, and employees within reasonable limits, to be determined either by the Legislature or the State Department of Education.

Proposal III

As a correlary to the second proposal, the cost and expense of liability insurance should be handled as a part of the operating expense of the schools and used in computing the cost of the minimum program in

in determining the amount of state aid which any school should receive.

Proposal IV

In the field of extra-curricular activities, such as athletic contests, normal recreation on the playground, there are numerous injuries which are pure accidents, that is, one in which no legal liability can be placed on any one person. It is suggested that all schools be required to carry hospitalization and medical insurance coverage, covering injuries to children while engaged in school activities for which there is no legal liability against some other person.

Proposal V

It is further suggested that serious consideration be given to a study by the Legislature, based on the experience of the State Insurance Fund and other similar agencies, of handling both the liability insurance and the hospitalization and medical care through some state agency to reduce to a minimum the cost of the liability and insurance coverage.

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APPENDIX I

ALPHABETICAL LIST OF ABBREVIATIONS

APPENDIX I

Alphabetical List of Abbreviations

App. Div.	Appellate Division, New York
Ariz.	Arizona Reports
Cal.	California Reports
Ind.	Indiana Reports
Ky.	Kentucky Reports
L. R. A.	Lawyer's Reports Annotated
N. E.	New England Reporter
N. M.	New Mexico Reports
N. Y. S.	New York Supplement
Okla.	Oklahoma Reports
Okla. Cr.	Oklahoma Criminal Reports
Pac.	Pacific Reporter
Pac. 2d	Pacific Reporter, Second Series
S. W.	Sweeney's N. Y. Superior Court Reports
S. W. 2d.	Sweeney's N. Y. Superior Court Reports, 2nd Series
So. 2d.	Southern Reporter, Second Series
Tex.	Texas Reports
U. S. (How)	Howard's Reports, U. S. Supreme Court

APPENDIX II

COPIES OF LETTERS

Copy

Earl E. Hartley
Attorney General

Boston E. Witt
First Ass't. Attorney Gen.

Lucy M. Gonzales
Adm. Ass't.

State of New Mexico
OFFICE OF THE
ATTORNEY GENERAL
Department of Justice
Santa Fe

Ass't. Attorneys Gen.
Carl P. Dunifon
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Oliver E. Payne
Shirley C. Zabel

Spec. Staff Ass't.
Felimon Torrez
Spec. Investigator

July 24, 1962

Mr. Leslie Fisher
Superintendent of Schools
Moore, Oklahoma

Dear Mr. Fisher:

In response to your long distance telephone call of this date, inquiring as to whether or not New Mexico has any specific statutes governing tort liability of school personnel, a check of our statutes indicates that the 1959 State Legislature did enact legislation covering the liability of a school district for personal injuries resulting from an employee's negligence.

Section 5-6-18, et seq. N.M.S.A., 1953 Compilation (P.S.) provides in substance that a private individual may sue the State, County, City, School District or other public body where such public agency or instrumentality has obtained liability insurance. Section 5-6-20, N.M.S.A., 1953 Compilation (P.S.) provides that no judgment obtained shall run against the State, County, City, School District, District, State, Institution, etc. unless there is liability insurance to cover the amount and cost of such judgment.

As to the tort liability of an individual employee working for a school system our State has no statute giving immunity to the individual. In several Supreme Court decisions of this State, McMullen v. Ursuline Order of Sisters, 56 N.M. 570, 246 P.2d. 1052 and Archuleta v. Jacobs, 43 N. M. 425, 94 P.2d. 706, it was recognized that an individual may be personally liable, depending upon the facts involved in a particular case.

Very truly yours,

THOMAS A. DONNELLY
Assistant Attorney General

TAD:am

Copy

THE ATTORNEY GENERAL

OF TEXAS

Austin 11, Texas

GERALD C.MANN
Attorney General

Honorable W. K. McClain
Criminal District Attorney
Georgetown, Texas

Dear Sir:

Opinion No. 0-1418
Re: Can an independent school district take out an insurance policy covering bodily injury and bus damage in connection with its operation of school busses for the transportation of children? Where such a policy has been taken out may an injured student recover upon such a policy?

We are in receipt of your letter of September 1, 1939, wherein you seek our opinion on the following questions:

"In view of the fact that a school district is not liable for personal injury from a school bus accident, is a school board mis-using tax money to take our personal injury insurance? (Such as represented by the enclosed policy.)

"In case of accident can the injured party recover on the contract in view of the rider attached to the insurance policy enclosed herewith?"

The policy which you enclose obligates the insurance company to "pay on behalf of the insured all sums which the insued shall become obligated to pay by reason of the liability imposed upon him by law" for damages to person or property through the operation of school busses. Uniform Rider No. 101, which is attached to the policy, contains, among other things, the following provisions:

"It is agreed that in the event of claim arising under coverage of bodily injury liability and property damage liability afforded under this policy, the company will not interpose the defense that the insured is engaged in the performance of a governmental function,

> except in those cases where its action will involve the insured in a possible loss not within the protection of this insurance."

Subsection (2) of Paragraph II provides that the insurance company shall defend in the name of the insured and on his behalf any suit alleging injury or destruction and seeking damages which are covered by the policy. Under "Special Conditions", the policy provides that "no action shall lie against the Company unless, as a condition precedent thereto, the insured shall have fully complied with all the conditions hereof, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant, and the company. . "

Article 2687a, Vernon's Annotated Texas Statutes, reads in part as follows:

> "The trustees of any school district, common or independent, making provision for the transportation of pupils to and from school, shall for such purpose employ or contract with a responsible person or firm. . . The drivers of all school transportation vehicles shall be required to give bond for such amount as the board of trustees of the district may prescribe, not less than two thousand dollars ($2,000), payable to the district, and conditioned upon the faithful and careful discharge of their duties for the protection of pupils under their charge and faithful performance of the contract with said school board . . . ."

Another Article which should be construed in connection with the question presented in your letter is Article 2827, Vernon's Annotated Texas Statute, which provides that local funds of independent school districts may be expended "for the payment of insurance premiums". We are unable to find any other statute which might be construed as authorizing a school board to take out and pay for such an insurance policy as is described in your letter.

Your first question, therefore, may be divided into two parts, as follows, to-wit: (1) Does said Article 2827 provide express authority for the expenditure of local school funds in payment of insurance premiums on the tupe of policy described in your letter? (2) If not, is such authority implied from the express statutory authority to operate school busses?

In a letter opinion to Mr. W. E. James, First Assistant State Superintendent of Public Instruction, under date of September 16, 1936, this department held that there was neither expressed nor implied authority to expand public school funds for this purpose. In another letter opinion by this department addressed to the same person, under date of August 17, 1936, it was pointed out that the provision in the statutes requiring a bond of bus drivers for the faithful performance of their duties

provided an adequate means for compensating such school children for damages resulting from injuries through the negligent operation of such busses, and such means was exclusive. and that it cannot be assumed that there is an implied power to provide against such contingencies in a different manner. A careful study of the questions presented leads us to the same conclusion.

It is now well settled that a school district is not liable for the torts of its agents or employees which are committed in the performance of a governmental function. The operation of a school bus for the transportation of pupils to and from school is, in our opinion, a governmental function. It is apparent, therefore, that the protection afforded under the policy enclosed in your letter is not for the direct benefit of the school district but insures to the benefit of three classes of people, to wit: (1) The driver, whose liability for damages resulting from his negligence in the operation of the bus is protected by the policy. (2) The school children who ride on the bus. (3) Any other person who may receive an injury to his person or damage to his property through negligent operation of the bus.

It is our opinion that insurance policies for which premiums are authorized to be paid by Article 2827 out of local school funds are such policies as protect the district, itself, from pecuniary liability or loss. Ordinarily it is the purpose of insurance policies to protect the insured from liability or loss and not to provide a means of compensating the third parties for injuries which they may receive at the hands of the insured. We cannot believe that the Legislature intended that the funds of the school districts should be expended to pay insurance premiums for the protection of third parties against damages for which the school district itself could not be held liable. In our opinion the authority so to expand public funds is not found in said Article 2827, nor do we believe it to be implied from the power to operate school busses and employ school bus drivers found in Article 2687a. Implied powers are founded upon reasonable necessity. Such necessity springs from the fact that the expressed powers cannot be fully executed or enjoyed unless supplemented by such implied powers. In this case the district receives the full benefit of the expressed statutory authority to operate school busses without the necessity of taking out this type of insurance.

Doubtless the Legislature could authorize school districts to expend local school funds for insurance premiums to protect its school children against injury, and its employees against both liability and injury, from the operation of its school busses. We do not believe that the Legislature has as yet exercised its authority to confer upon school districts this authority.

We are unable to agree with the Tennessee Supreme Court in the cases of Marion County vs. Cantrell, 61 S.W. (2d) 477, and Rogers vs. Butler,

92 S. W. (2d) 415, wherein the court holds that under a similar statute authorizing school districts to require a bond of bus drivers, the district may elect to take out a public liability and property damage insurance policy in lieu thereof. The driver of a school bus owes to the children whom he transports the highest degree of care consistent with the practical operation of the bus. Phillips vs, Hardgrove, 296 Pac. 559; Sheffield vs. Lovering, 180 S.E. 523. The driver's duty extends beyond the actual operation of the school bus to such matters as seeing that children alighting from the bus do not walk into the path of another and oncoming motor vehicle. Robinson vs. Draper, 106 S.W. (2d) 825, 127 S.W. (2d) 181 (Comm. App.). The statutory bond required of bus drivers doubtless covers broader liabilities and duties of the driver than are covered by the policy which you enclose in your letter. On the other hand, the policy doubtless covers liabilities of the bus driver to third parties which would not be covered by the statutory bond. Such a policy, therefore, is not a proper substitute for the required bond, and the school trustees should in every case, require bus drivers to furnish adequate bonds.

For the reasons stated, we answer your first question in the affirmative. It, therefore, becomes unnecessary to answer your second question.

We enclose the insurance policy herein.

Yours very truly,

ATTORNEY GENERAL OF TEXAS

By s/Victor W. Bouldin
Victor W. Bouldin
Assistant

VWB:FG:wc

APPROVED SEP. 25, 1939
s/ W.F. Moore
First Assistant
Attorney General

Approved Opinion Committee By s/BWB Chairman

Copy

THE ATTORNEY GENERAL

OF TEXAS

Austin 11, Texas

GROVER SELLERS
Attorney General

Honorable C. C. Randle
County Attorney
Ellis County
Waxahachie, Texas

Dear Sir:

Attention: Mr. F. L. Wilson
Assistant County Attorney

Opinion No. 0-6182
Re: Use of School bus on extra-curricular activities, and related questions.

Reference is made to your letter of August 28, 1944, which is as follows:

"We will appreciate your opinion,

"1. Do the members of the school board, either officially or personally, have any liability for operation of school buses on extra-curricular activities, such as athletic trips, etc.

"2. Does the bus driver's statutory bond apply when the bus is being driven on missions described in question above?

"3. Could the school board legally buy, from non-tax funds, liability and property damage insurance protecting the school board and the bus drivers against its liability arising from outside activities mentioned in Question No. 1?"

It is well settled that a school district is not liable for the torts of its agents or employees which are committed in the performance of a governmental function.

School trustees are vested under our laws with broad powers in the control and management of schools. They are charged with the promotion of education within their respective districts, and in the absence of statutory limitations they are vested with large discretion in the exercise of their powers of administration. State Line School District vs.

Farwell School District, 48 S. W. (2) 616.

It is recognized generally in this State that athletic contests, interscholastic league meetings, and other extra-curricular activities have become a necessary and integral part of our educational system. The plans for modern school plants have been designed with the view of providing proper facilities for the furtherance of this program. The use of a school bus in aid of these activities has been deemed essential, in many instances, to equalize the opportunities of pupils who, in the absence of such use, could not participate.

It follows that the use of a school bus under such circumstances is but the performance of a governmental function, and in the absence of an abuse of discretion on the part of the trustees, they are not legally personally liable for the operation of the bus.

The bond executed by the school bus driver in accordance with the provisions of Article 2687a, V.A.C.S, is made for the benefit of the children to be transported. Robinson v. Draper, 133 Tex. 280, 127 S.W. (2) 181. The statutory bond of the bus driver would apply when the bus is being driven on such mission provided the driver's contract with the school board, and on which the bond is based, obligates him to drive the bus on these occasions.

In response to your third question, this is to advise that this department has held in Opinion No. 0-1418 that public funds could not be used to pay premiums on insurance policies covering school busses for the protection of third parties against damages for which the school district itself could not be held liable. We concur in such holding, and are of the opinion that this includes any public fund, whether it be tax or non-tax.

We trust that this gives you the information desired.

Yours very truly

ATTORNEY GENERAL OF TEXAS

By: s/Jack W. Rowland
Jack W. Rowland
Assistant

JWR:BT:wc

APPROVED OCT. 13, 1944
s/Grover Sellers
ATTORNEY GENERAL OF TEXAS

Approved Opinion Committee By s/H.T. Chairman

Copy

THE ATTORNEY GENERAL

OF TEXAS

Austin 11, Texas

April 14, 1939

GERALD C. MANN
Attorney General

Honorable T. M. Trimble
First Assistant State Superintendent
Austin, Texas

Dear Mr. Trimble:

Opinion No. 0-443
Re: Tort Liability of Independent School District

This Department is in receipt of your letter of March 22, 1939, in which you request an opinion upon the questions submitted by H. W. Stilwell, Superintendent of Texarkana Public Schools, which is attached to your request.

Mr. Stilwell's letter is as follows:

"Our School Board desires you to secure an opinion from the Attorney General as to its liability in the following cases. The question has arisen as to whether we should carry insurance or not.

"1. A number of teachers own their cars and come to and from school in their cars. It has been represented to the Board that if any teacher coming to or from school in his own car should be involved in an accident, the Board might be held both for casualty and property damage. Does the Board have any responsibility in this premise?

"2. Two repair men employed by the Board drive cars. One of them drives a small truck which he owns himself. The other pulls a trailer; the Board owns the trailer, but the car belongs to one of the repair men. It has been represented to the Board that it might have certain liabilities in case any of this equipment should figure in an accident. Is there any liability of the Board in this connection?

"3. It has been represented to the Board that students or the

public in passing by the school building, across the school grounds, up and down stairs at the school, or in walking in the halls might have an accident and the Board be held liable. Is there any liability to the Board in this case?

"4. The Board owns as one of its buildings an auditorium, and public school programs are given in this auditorium. Great numbers of people attend. Traffic is heavy sometimes around the buildings. It has been held that the Board might be liable if any one were attending a school program and should be injured in an automobile accident, or should be injured in any kind of an accident at the auditorium. Is there any liability in this premise?

"5. The Board sometimes rents the auditorium for a fee to certain interests desiring to present a program. These interests charge entrance fees of various amounts. It has been represented to the Board that if any accident should occur to any attending these meetings for which their sponsors had rented the auditorium from the Board, the Board might be held liable. Is there any liability in this instance?"

This Department ruled in a letter opinion, dated October 28, 1931, Volume 327, page 666, that a school district is not liable for injuries suffered by a student while engaged upon his duties in the manual training department of the school, and that the Board was without authority to compensate his parents. It was also ruled in a letter opinion, dated November 17, 1937, Volume 379, page 9, that a school district is not liable for injuries to a student while being transported to school in a school bus.

In McVey v. City of Houston (T. C. A. 1925) 273 S. W. 313, the Court in denying liability of both the city and the school district to a student who was injured when an archway fell upon him stated:

"Such duty (to maintain schools) is, nevertheless, public and governmental, and such corporation cannot be held liable for negligence of its employees in performing such duty. It is laid down as a general rule in 19R. C. L. Section 402, p. 1124, applying the doctrine above mentioned, such corporations are not liable for personal injuries to pupils resulting from the defective condition of the school buildings, or from the negligence of the person in charge thereof. In the section cited it is said that - - - .

"In such a case, it can make no difference that the duty of maintaining the public school, in connection with which the injury occurred, was voluntarily assumed under permissive

statute rather than imposed by a command of the Legislature."

The case of Braun v. Trustees of Victoria Independent School District, (T. C. A. 1938) 114 S. W. (2d) 947, writ of error refused, should be particularly considered in this connection. In that case the Board of Trustees of the Independent District was sued for negligent injury to a school child who fell from a buttress of the school building into a freshly pruned tree having stiff and unyielding branches and was thereby injured. The Court held that there was no liability on the part of the Board of Trustees and in the course of the opinion stated:

> "The first question here presented is whether or not the board of trustees of an independent school district can be sued at all when the cause sounds in tort. There can be no question but that an independent school district is an agency of the State, and, while exercising governmental functions, is not answerable for its negligence in a suit sounding in tort. (Citing cases). However, if such a district may properly exercise proprietary acts, and while exercising such proprietary acts is guilty of a tort, the district may be required to answer in damages for such tort. (Citing cases establishing the liability of cities for torts committed while engaged in non-governmental activities).
>
> "The conducting of public schools is in our opinion the exercise of a governmental power. Public schools are conducted for the benefit of the entire state by a governmental agency and it matters not whether such schools are conducted by the trustees of a common school district or trustees of an independent district. It is not a function undertaken for the private advantage and benefit of the locality and its inhabitants.* * .
>
> "When employees of the Victoria Independent School District planted the ligustrum tree near and under the buttress on the left side of the front steps of the Mitchell school building, and when they pruned and trimmed the tree, they were engaged in a governmental function and had not turned aside from the main purpose of such school and become engaged in a proprietary function of local interest only. If we have schools, we must have school buildings and school grounds and it is nothing but natural that those conducting schools would like to beautify the school grounds by planting trees and shrubs, and we are unwilling to hold that when they do so they have abandoned their main purpose of furthering education in the state.
>
> "***If a school district might be sued for every injury suffered by every child resulting from the negligence of its employees, all available funds might be consumed in paying damages and none be left with which to conduct the schools.

> " ***There is quite a distinction between a school district and a city or town. Cities and towns exercise a dual function, to-wit, governmental and proprietary, while a school district is purely a governmental agency and exercises only such powers as are delegated to it by the state. It performs no proprietary functions which are separate and independent of its governmental powers. In this respect it is more readily comparable to a county, which is not held answerable for its negligence in an action founded in tort.***"

We also call your attention to 24 R. C. L. page 604, Section 60, which discusses the liability of school districts for actions founded in tort and to the special act creating the Texarkana Independent School District, Acts 26th. Legislature, 3rd. C. S. Special Laws, ch. 31, P. 83, section 28, provides in part as follows:

> "Said independent school district shall not be liable for damages of any kind to any person or persons injured or killed on the property or premises controlled by said board, or under the jurisdiction thereof."

It has not come to our attention that this provision in the act creating the Texaekans District has ever been repealed or amended.

It is the opinion of this Department that the Texarkans Independent School District and its Board of Trustees would not be liable in damages in each of the instances presented in the above letter.

Yours very truly,

ATTORNEY GENERAL OF TEXAS

By s/Cecil C. Cammack
Cecil C. Cammack
Assistant

CCC:LM:LM

APPROVED

s/ Gerald C. Mann

ATTORNEY GENERAL OF TEXAS

APPENDIX III

LIST OF JURY

LIST OF JURY

ANDERSON, WILLIAM L. . . . . GENERAL COUNCILOR OF CORPORATION COMMISSION ATTORNEY

BRETT, JOHN A. . . . . JUDGE, COURT OF CRIMINAL APPEALS

FREEMAN, HAROLD . . . . . .CHAIRMAN OF CORPORATION COMMISSION OF OKLAHOMA

HUEY, BEN . . . . . PRACTICING ATTORNEY

NIX, KIRKSEY . . . . . PRESIDING JUDGE, COURT OF CRIMINAL APPEALS

PURCER, EDWARD H. . . . . PRACTICING ATTORNEY FOR MOORE PUBLIC SCHOOLS