Tort Liability of Public School Districts in Selected States, as Affected by Either a Common Law Or Statutory Immunity

Antonio Ignatio Torres
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TORT LIABILITY OF PUBLIC SCHOOL DISTRICTS IN SELECTED STATES, AS AFFECTED BY EITHER A COMMON LAW OR A STATUTORY IMMUNITY.

By
ANTONIO IGNATIO TORRES

A Dissertation Submitted to the Faculty of the School of Education of Loyola University in Partial Fulfillment of the Requirements for the Degree of Doctor of Education

February 1973
V I T A

ANTHONY IGNATIUS TORRES was born in Chicago, Illinois on July 5, 1929. His Mexican parents named him ANTONIO IGNATIO, after their two favorite saints, St. Antonio de Padua and St. Ignacio de Loyola.

He attended Sts. Peter and Paul, a small Chicago parochial school, for both his elementary and high school education, graduating in June, 1947. It was while he was a student at this school that the Irish Nuns of the Franciscan Order which operated the institution, anglicized his name.

He was granted the Bachelor of Science in Education degree in January, 1954, from Northern Illinois State Teachers College. He attended DePaul University, receiving his Master of Education degree in August, 1956 and his Specialist in Education degree in February, 1958. He has studied law at DePaul University Law School and John Marshall University Law School at Atlanta.

From 1954 to 1966, the author was a teacher in the Chicago Public Schools. In 1966 he joined the staff of the Office of the Superintendent of Public Instruction, State of Illinois, where he was an Educational Specialist. In 1972 he joined the staff of Park Ridge-Niles School District 64, where he is now the Principal of the Jefferson School.
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CHAPTER I

INTRODUCTION

There was a time in the not too distant past, when it was a relatively simple matter to serve as a member of a board of education. The task of making policy for a school system, while subject to certain community pressures, was manageable, partly because the public school district, being a creature of the state, enjoyed some legal privileges. The oldest of these privileges was the principle of immunity from certain tort liability actions, an immunity shared with other government bodies.

This doctrine, like many other traditional prerogatives of a board of education, has been subject to review by the courts in the past few years, so that now, in order to know what their legal position may be, the study of school district tort liability is essential to everyone who would act as a board member or a school administrator.

A. PURPOSE OF THIS STUDY

The primary emphasis of this study revolves around the modification of immunity of school districts from tort liability for negligence. School districts are sometimes found
liable for some torts, such as the maintenance of a nuisance or for the trespass to property. However, in this study only the tort of negligence on the part of employees of a school district, which resulted in property damage or personal injury to pupils or others, received treatment. Injuries to persons which are covered by Workmen's Compensation were also outside the scope of this study.

Related subordinates of this problem are: governmental vs. proprietary functions, "safe place" statutes, "save harmless" statutes, the effect of carrying liability insurance, and bars to recovery. All of these come into focus as the study progresses. More specifically, the investigation sought to answer the following questions:

1. What is the rationale behind the immunity doctrine? What are the reasons advanced for its growth and perpetuation in the United States? What is its current status?

2. What is the rationale behind the trend toward nonimmunity? What is the present status of non-immunity of school districts in the United States?

3. Does this trend seem to be increasing or decreasing? What is the future probability of nonimmunity? What guidelines for educational administration can be noted? What steps can be taken by the administration so as to prevent litigation? What steps can be taken so as to mitigate the awarding of damages? How can public confidence be maintained?

4. Is there a conflict between the role of the courts and the legislature in this area? How does this affect modification?
5. How do the courts interpret the legislative attempts to limit the liability of the school districts?

6. Does the purchase of liability insurance remove the immunity of the district? If so, to what extent? If the district is immune from suit, is the purchase of liability insurance an authorized legal expenditure?

It is the aim of this inquiry to examine primary authorities, such as the cases and statutes, in relation to the above questions so that the answers will be accurate statements of the law in a given jurisdiction.

B. DEFINITION OF TERMS

Since the field of law utilizes a technical vocabulary unfamiliar to the average lay reader, an attempt is made at this point to define these terms in an appended glossary. It was with the average reader in mind that the definitions are given so that one not familiar with the legal terminology can still reasonably well understand the meaning thereof.¹

C. DATA GATHERING AND PROCESSING

In general it can be said that the procedure used in this study is the typical system followed in legal research. Various research books such as the American Digest System, American Law Reports and Shepard's Citator were used to compile a bibliography of cases. The Reader's Guide to Periodical Literature and the Index to Legal Periodicals were used to
locate other pertinent information. Various legal encyclopedia were studied for cases and major subdivisions of the larger area of negligence and tort liability of the school district. In the field of school law several textbooks were available which touch upon the subject at hand. Garber's *Yearbook of School Law* which is published every year was an excellent source of recent cases of import. The *National School Law Reporter* was also another reliable and current source of cases and statutes.

After compiling a bibliography of cases and statutes, note cards were prepared for each, and after carefully reading them, a brief was prepared on each case. Each brief contained the citation, the date of the case, and the identity of the court hearing the case. The following items were subject for examination in each case: who the plaintiff and defendant where, if the case was being appealed, from what court did it originate, the facts of the case, the points of law, the points of fact, the congruity or discongruity with past decisions, the dissenting opinion and other related dicta.

D. REVIEW OF RELATED RESEARCH

A number of studies were found, which in some cases related to the problem at hand. The bulk of the studies dealt with the larger and less clearly defined area of immunity as a whole. In some materials a chapter or section was devoted
to the modification of the immunity doctrine.

In 1958 Davis studied the status of governmental immunity in the area of tort liability of school districts for negligence as it related to pupil injuries. ² Davis pointed out the increasing amount of litigation and a general relaxation of the harsh rule of immunity. The writer defined torts, negligence and attractive nuisance in their legal usage. Later Davis traced the origin and development of governmental immunity from liability for negligence on all levels. One chapter was devoted to reasons for allowing recovery. In one chapter the various states that permit recovery were discussed with their applicable statutes. In a summary of the states allowing recovery, five-sixths of the allowable cases were found in California, New York and Washington. Davis discussed the liability of certain states under special statutes dealing with transportation, "safe places," courts of claims, and other similar state agencies. At the time of the research, in fourteen of the common law states which denied liability, only twenty-two cases were decided in favor of the injured party. Of these twenty-two cases, sixteen were based upon a statute of some type (such as authorization for the purchase of insurance), guarantee of a "safe place," small tort claims act, special recovery allowed by the legislature, and an employee's liability act. A distribution of the cases granting recovery against
school districts was made. This chart showed that, of the 126 cases studied, thirty-two were in California, forty-seven were in New York, and seventeen were in Washington. The remainder of the cases were in the states which had provisions for special applications of liability as outlined above. In another chart showing the reasons for granting recovery, the abrogation of immunity by statute accounted for eighty-five of the 105 cases reported. Other reasons, which were mentioned frequently by the courts, were: failure to supervise properly, sufficient knowledge of the defect, improper use of certain equipment, and the maintenance of a nuisance. In the summary, New York was noted as the most liberal of the states in granting recovery, although there was no express statutory provision for such liability. Washington was one of the first states to pass an act abrogating immunity in 1869, but this was somewhat restricted by a later amendment. California in 1923 passed a statute which abolished immunity and by future enactments the schools now occupy the same position as that of a private corporation in the field of tort liability. In only these three states had the immunity doctrine been changed to any degree. In some of the states various means of circumventing the immunity principle have been devised, but the principle still remains largely intact.

A dissertation by Moss in 1960 compared the status of
school district liability for torts in Oklahoma, California, and New York. His purpose was to identify the principles of law affecting the tort liability of school districts in the above states and to compare the status of these three states. He categorized these principles into four groups: statutory enactments, court interpretations, court determination of the essential elements of liability, and the reasons for voiding immunity. In his findings he noted that New York has had the so-called New York rule since 1906 which holds districts liable for their own torts. California has abolished its immunity by statutory enactments. Both New York and California have classified the functions of a school as being either governmental or proprietary. If the function is governmental, immunity results; if the function is proprietary, liability attaches. The courts have held that substantial compliance with the statute is all that is required. If construction of a statute is required by the courts, they will attempt to determine the intent of the legislature. If the decision is in keeping with common law holdings, the courts are prone to liberal findings. Oklahoma was holding firmly to the immunity rule, although there was a permissive statute allowing the purchase of insurance. This statute allowed direct suit against the insurer without first securing a judgment against the insured. Although this is contrary to general insurance law, it was followed in Oklahoma,
since the insurance companies were presumed to have full knowledge of the law. Since there was no statutory authority to the contrary, the Oklahoma courts felt no right to change this ruling.

Schaerer in a doctoral dissertation completed in 1959 studied the status of Indiana school district liability and compared this with the insurance practices of the Indiana schools. He analyzed the statutes and court decisions in Indiana, the standard type liability insurance policy, and surveyed the school corporations having a superintendent and a board of education. He found that there were three categories of liability as far as the other states were concerned. The liberal states, such as California, New York, Washington, and, to a lesser extent, Connecticut, Colorado, New Jersey, and Wisconsin, were so called because of their waiver of immunity. The conservative states, such as Alabama, Arizona, and West Virginia, were so called because they upheld immunity and did not authorize the purchase of insurance. The compromise states, such as Indiana, were so known because they retained the immunity doctrine but permitted the purchase of insurance. The Indiana school districts were immune unless expressly stipulated by statutes (such as Workman Compensation Laws). The schools purchased eleven types of policies and twelve different types of liability insurance coverages. Seventy-two per cent of the policies named either the board of education or the school
district as the sole insured. Although the reviewing court held to the immunity doctrine, the lower courts were permitting recovery if the board of education did not inject the defense of governmental immunity. Schaerer also found that insurance companies were making out-of-court settlements even though the school districts were immune from liability. An increase in the frequency of suits filed and in the number of out-of-court settlements was noted. He concluded that school districts purchased liability insurance for the following reasons: moral obligation, the protection of school officers, appointees, agents, and employees against catastrophic judgments, and public relations.

It should be pointed out that the use of an agent presents some special considerations. Unlike some employees, an agent does not share in any immunities that the employer may have, but the principal or employer may be liable for torts committed by his agent.

In 1949 Satterfield investigated the legal aspects of tort liability in school districts as evidenced by recent court decisions. He discussed the nullification of immunity by statutory enactments and he found that while no state constitution mentioned the tort liability of school districts, many cases held the school district responsible for the acts of its teacher employees under the rule of respondeant superior.
It is interesting to note also, that although the majority of American states enjoy immunity, England and Germany, from whom we modeled so much of our school system, did not extend this right to school districts. 3

In 1930 Weltzin studied the subject of tort liability of school districts, of the officers, and of the members of the instructional staff. 7 Among the questions that were stated was: When is the school district responsible in suits for damages? Sources of materials were the statutes, reports of cases, and other related data. In the chapter dealing with the tort liability of the school as a quasi corporation, it was stated that the general rule in New York and some other states was that a school district would be liable for torts such as trespass or nuisance, but would not be liable for the actions of its servants. The distinction seems to be in that a school district might pass rules or start activities which result in a tort, (such as trespass) in which case it could be held liable, while an employee is liable for his own torts and if it is for negligence and results in injury to another, the employee cannot share in the school district immunity from such action. The statutes of a few states such as California, Minnesota, Oregon, and Washington explicitly provided for action against the school district. However, in Minnesota, Oregon, and Washington, the construction of these statutes has been severely restricted.
A study of the liability for accidents occurring in physical education activities was made by Leibee in 1952. He discussed the role of negligence in such liability and the essential ingredients of a charge of negligence. He enumerated the principal defenses to negligence as being contributory negligence, assumption of risk or volenti non fit injuria, and the governmental immunity of school districts. In order to avoid the barrier of immunity, actions against the school district were sometimes brought on the charge of maintaining a nuisance. The courts were divided on this charge but the majority extended the cloak of immunity to the area of nuisance. The abrogation of immunity in the states of California and New York was noted, and various statutes and cases were cited. The New York Court of Claims Act abolished the immunity of the state to the degree that the state may be sued in that court for the acts of its officers or employees. This act, passed in 1937, was in addition to the liability of school districts under the New York rule.

Hindle inquired into the realm of the financial responsibility for injuries to pupils of the public schools. He concluded that there was a strong trend toward the assumption by the school district of liability for personal injuries occurring under the responsibility of the school. He stated that this assumption would not be a financial burden to the schools. He recommended that the states pass legislative
enactments providing for the assumption of this responsibility, and that the cost of such be considered an integral expense of public education.

A pamphlet by Schaerer and McGheehey on the tort liability of school districts, school officials, and school employees was published in 1960. Among the many questions this study asked, was one which tried to distinguish between acts of negligence on the part of the school district itself (such as trespass), and acts of negligence of their employees for which the school districts might also be held liable. After a general discussion of the problem, the study took up the exceptions to the rule of liability. The schools have been held liable for nuisances, but this was an unclear area with divided opinions. Some states permitted recovery under various statutes such as "safe places," "save harmless" and small tort claims acts. At times the court made a distinction between governmental and proprietary functions of the school districts. Such a distinction was difficult to make and was not frequently used. In examining liability in the various states, five states had by express statutes imposed liability on the school for personal injuries. These states were New York, California, Washington, Oregon, and Minnesota. There were three states (Alabama, Arkansas and West Virginia) which had clauses in their constitutions which forbade the the bringing of suit against the state. Since the schools were considered extensions
of the state, this coverage was automatically extended to them. The remainder of the states fall into a compromise category where immunity was held, but liability insurance could be purchased. The carrying of liability insurance did not waive the immunity of the school district in most cases. At the time of writing only three states (Illinois, Kentucky, and Tennessee) had deviated from the general rule and had allowed recovery to the extent of coverage.

A pamphlet published by the Research Division of the National Education Association in 1950 dealt with the subject of who is liable for pupil injuries. The pamphlet stated the legal philosophy behind tort liability and negligence. The second part of the publication dealt with the school board's responsibility for personal injuries to students. It documented the common-law immunity of school districts and gave reasons for this rule. The states of New York, California, Washington, Oregon, Minnesota, New Jersey, and Connecticut had enacted statutes which imposed liability upon the school district. Wisconsin had a "safe place" statute but this rule was confused and subject to different interpretations by the courts.

An annual compilation of cases relative to school law was published by the Research Division of National Education Association. Of the seventy-six cases reported in the year 1961, pupil injuries gave rise to twenty-two of these actions.
FOOTNOTES


6 160 A.L.R. 85.

7 J. Frederick Weltzin, The Legal Authority of the American Public School (University of North Dakota, 1930).


CHAPTER II

LEGAL STATUS OF THE SCHOOL DISTRICT, TORT LIABILITY IN GENERAL AND NEGLIGENCE IN PARTICULAR

A. THE LEGAL STATUS OF THE SCHOOL DISTRICT

In order to comprehend intelligently the problem of this investigation, it is necessary to understand where a school district is situated in the legal scheme. It is axiomatic that school districts are creatures of the state, but what type of creatures are they? Upon this classification rests the courts' and legislatures' manner of dealing with the school district.

It is generally held that a school district is a corporation. Chief Justice Marshall in the famous Dartmouth case defines a corporation as follows:

A corporation is an artificial being, invisible, intangible, and existing only in the contemplation of law. Being the mere creature of law, it possesses only those properties which the character of its creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and, if the expression may be allowed, individuality; properties, by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property, without the perplexing intricacies, the hazardous and endless necessity, of perpetual conveyance for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men, in succession, with these qualities and capacities, that
corporations were invented, and are in use. By these means, a perpetual succession of individuals are capable of acting for the promotion of the particular object, like one immortal being.  

Black's Law Dictionary defines a corporation as:

An artificial person or legal entity created by or under the authority of a state or nation . . . ordinarily consisting of an association of numerous individuals, who subsist as a body politic . . . , which is regarded in law as having a personality and existence distinct from that of its several members, and which is, by the same authority vested with the capacity of continuous succession, irrespective of changes in the membership, either in perpetuity or for a limited term of years, and of acting as a unit or single individual in matters relating to the common purpose of the association, within the scope of the powers and authorities conferred upon such bodies by law.

Courts have held the school district to be bodies corporate, political subdivisions of the state, and as public or political corporations. Since this is the case the school district has only the powers expressly granted it by the state.

Now that it has been established that a school district is a corporation with the powers of a corporation, it is necessary to determine what type of corporation the school district is. Corporations are of many kinds and may be classified in different ways.

The courts of the majority of the states have held that strictly speaking, school districts are quasi corporations. Quasi corporations are not full corporations in the eyes of the law but have a restricted being. They possess some of the powers of a corporation but they are primarily subdivisions
of the state. Counties, townships, school districts, and irrigation districts are examples of this involuntary division of the state. The school corporation was created for the express purpose of education without regard to the wishes of those who become members of this corporation.

B. THE THEORY OF TORT LIABILITY

The word tort is of French origin derived from the Latin "torquere" which means to twist or bend. It is quite difficult to define the word tort in all of its ramifications. In its simplest form it is a civil wrong perpetrated upon another, exclusive of contract. Prosser defines tort as:

A civil wrong, other than a breach of contract, for which the courts will provide a remedy in the form of an action for damages . . . It is not a crime, it is not a breach of contract, it is not necessarily concerned with property rights or problems of government, but it is the occupant of a large residuary field remaining if these are taken out of the law.8

Another classification of torts if made by Prosser in which he sets up three basic grounds for tort liability.

1. There must be an active intent to interfere with the plaintiff's interests. These are usually the basis for criminal action such as assault, battery, trespass, defamation, etc.
2. Negligences, the act or the failure to act as the reasonably prudent man would act.
3. Strict liability which is usually imposed as a manner of statute or policy such as with steam boilers, elevators, and automobiles. On this ground it is up to the defendant to prove that he has been careful in his conduct. The burden of proof is upon the defendant, since the principal of res ipsa loquitur is here applied.9
Research done by Rindle indicated that school districts were rarely charged with intentional acts to interfere with a plaintiff's interest. One can certainly agree that the majority of injuries are not caused by any deliberate act of commission or omission. The matter of strict liability is beyond the scope of this investigation. Ergo, the acts of alleged negligence of the school district provide the focal point of this study.

C. THE THEORY OF NEGLIGENCE

Negligence is defined as any conduct that does not measure up to the standards established by law for the protection of others. Salmond defines negligence as follows:

Negligence is the omission to do something which a reasonable man guided upon 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.

The American Law Institute states that:

Negligence is any conduct, except conduct recklessly disregardful of an interest of others, which falls below the standards established by law for the protection of others against unreasonable risk of harm.

Negligence implies the unintentional omission or commission of an act which results in injury or damage. Such actions are not in agreement with the standards established by the law.

In order to base a court claim upon the charge of negligence it is necessary to show the existence of four
elements necessary to a cause of action based upon negligence are:

1. A legal duty to conform to a standard of conduct for the protection of others against unreasonable risks.
2. A failure to conform to the standard.
3. A reasonably close causal connection between the conduct and the resulting injury.
4. Actual loss or damage resulting to the interests of another.13

The legal duty must be present and recognized by the courts. One cannot be negligent if he does not owe any care toward the injured party.

If the duty is present, the actor is obligated to act in a manner so as not to cause any unreasonable risks to the other party. It is in this area where the legal fiction of the reasonable and prudent man reigns supreme. Prosser discusses the reasonable man at length.

The standard required of an individual is that of the supposed conduct, under similar circumstances of a hypothetical person, the reasonable man of ordinary prudence, who represents a community ideal of reasonable behavior. The characteristics of this imaginary person include: (1) the physical attributes of the actor himself, (2) normal intelligence and mental capacity, (3) normal perception and memory and a minimum of experience and information, common to all the community, and (4) such superior skills and knowledge as the actor has or holds himself out as having, when he undertakes to act.

In the case of children and aged persons, a special standard of mental capacity is applied, based upon what it is reasonable to expect of one of the actor's age, intelligence, and experience.14

Related to the prudent man is the other test for negligence and that is the test of foreseeability. When a reasonably
prudent person would have foreseen the possibility of injury, the failure to act in accordance with this danger is considered negligent behavior. Even if a third party enters into the act, although innocently, and causes the direct injury, the second party may be liable for prior negligence if this was something that a reasonable and prudent person might have foreseen. Application of this principle is seen when a child does something that injures another child which a teacher might have foreseen and prevented. The DeBenedittis case involved a boy who was injured while extricating a piece of metal from a machine when another boy started the machine. The teacher was only nine feet away but the legal cause of the accident was the negligence of the teacher in failing to lock the machine and in not keeping other students away from the machine.

In our judicial scheme the determination of what a reasonable and prudent man is and whether a given act is foreseeable is a point of fact to be determined by the trier of fact. Each case is relative to place, time, and the circumstances at hand. According to Bohlen the reasonable man is the personification of the social conscience of the court or jury, whichever it is which passes authoritatively upon his acts and omissions.

The proximate or legal cause is the leaven which produced the event. There must be an unbroken causal chain between the act or omission and the result, without which the
aftermath would not have occurred. The factual cause of an injury is usually simple to ascertain but the proximate cause is another matter. Many insignificant intervening acts may occur without breaking the chain. If a new, independent, and supersecing cause breaks the chain, the negligent actor is relieved of his legal responsibility. For example, a boy who was standing on the playground was knocked down by three other boys and injured his hand on a clinker on the playground. The plaintiff attempted to collect from the district, charging the maintenance of the playground in an unsafe condition. The court held that the proximate cause of the injury was the intervention of the three boys rather than the maintenance of the playground in an unsafe condition. Frequently, the courts use the "but for" test to determine the proximate cause of an injury. That is to say, that the injury would not have taken place "but for" the negligent act of the defendant.

As previously stated the facts of negligence are specific and relative to each case; however, an abstract of some of the general principles of negligent behavior are as follows:

1. It is not properly done; appropriate care is not employed by the actor.

2. The circumstances under which it is done create risks, although it is done with due care and precaution.

3. The actor is indulging in acts which involve an unreasonable risk of direct and immediate harm to others.

4. The actor sets in motion a force, the continuous operation of which may be unreasonably hazardous to others.

5. He creates a situation which is unreasonably dangerous to others because of the likelihood of the action of third persons or of inanimate forces.
6. He entrusts dangerous devices or instrumentalities to persons who are incompetent to use or care for such instruments properly.
7. He neglects a duty of control over third persons who, by reason of some incapacity or abnormality, he knows to be likely to inflict intended harm upon others.
8. He fails to employ due care to give adequate warning.
9. He fails to exercise the proper care in looking out for persons whom he has reason to believe may be in the danger zone.
10. He fails to employ appropriate skill to perform acts undertaken.
11. He fails to make adequate preparation to avoid harm to others before entering upon certain conduct where such preparation is reasonably necessary.
12. He fails to inspect and repair instrumentalities or mechanical devices used by others.
13. His conduct prevents a third person from assisting persons imperiled through no fault of his own.
14. His written or spoken word creates negligent misrepresentations.

The school district is involved actively in many of these possibilities of negligent behavior, and it behooves the district to be cognizant of these considerations.

Assuming that the essential elements of negligence are present as set out on page 20, what defenses are available to the defendant school district? The following have been advocated as reasons in law for denial of recovery:

1. The doctrine of immunity from tort liability in negligence of a governmental body while performing a governmental function.

2. Statutory non-fulfillment of conditions precedent to liability, enacted by the legislature such as the date of filing the claim and form of the claim.
3. Contributory negligence means any causal want of care on the part of the injured party. The concurrence of want of care on the part of the plaintiff, and the negligence on the part of the defendant, are essential elements in a defense utilizing contributory negligence. The courts are usually quite harsh on the defense of contributory negligence on the part of infants because of their tender years. That is, the court will not hold an infant to the same standard of care as it will hold an adult.

4. Volenti non fit injuria or assumption of risk is sometimes utilized but rarely so in the case of schools. Either by express agreement or by implication the plaintiff takes his chances and thereby relieves the defendant of any responsibility.

5. Vis major, act of God, or pure and unavoidable accident, is another defense used. These are the events such as an uncontrollable snowstorm or rainstorm. In a Pennsylvania Supreme Court decision it was suggested that it was time to abandon this defense as being an example of loose usage of something that is beyond the comprehension of man.¹⁹ "The unavoidable accident is an unintentional occurrence which would not have been prevented by the exercise of reasonable care."²⁰ If this is the case, no
liability usually attaches.

All matters involve a certain amount of risk. So it is with negligence for the actors and the courts must balance the risks against the benefits derived therefrom.
FOOTNOTES

1Dartmouth College v. Woodward, 4 Wheat. 518, 634 L. Ed. 629 (1819).


13Prosser, op. cit., p. 165.
14Ibid., p. 124


1650 Harvard Law Review 725, 1225.


18National Education Association, Research Division, Who Is Liable for Pupil Injuries, op. cit., p. 7


20Prosser, op. cit., p. 117.
CHAPTER III

THE DEVELOPMENT OF THE SCHOOL DISTRICT'S IMMUNITY
FROM LIABILITY FOR THE TORT OF NEGLIGENCE
AND ITS SUBSEQUENT MODIFICATION

A. THE HISTORY OF SCHOOL DISTRICT IMMUNITY

In order to comprehend fully the modification of tort liability of school districts for the tort of negligence, it is necessary to examine the historical development, rationale and philosophy behind the concept of governmental immunity. This approach will be a general discussion of this issue without any attempt to be exhaustive or comprehensive, but merely to set the stage for subsequent discourse. There are many sources of information on this subject if the reader wishes to pursue this vein of thought.

Ample evidence is available at this moment to justify the statement that generally speaking, school districts, as quasi corporations, are immune from suits in the area of tort liability. More specifically, the districts are usually held immune from suits charging negligence. "Although there is authority to the contrary, it is a general rule that school districts or their governing boards are not liable for torts or for injuries resulting from their negligence, unless such
liability is imposed by statute." According to Edwards, "The common-law principle, almost universally applied by American 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 municipality." Weltzin states the rule as follows:

The school corporation as a branch of the state engaged in the execution of the governmental function of furnishing education to the public, a duty involuntarily imposed upon it by the state, is in the absence of statute to the contrary, protected to the same extent as is the sovereign state from responsibility for its own torts or those of its servants, resulting either from misfeasance or non-feasance in the execution of public duty.

As previously stated school districts are extensions of the state and therefore are not liable for torts committed while exercising their governmental functions. To state it in a different way, no action can be maintained against a school district for personal injuries by charging negligence unless there is a statute or judicial ruling to the contrary.

The doctrine of immunity from torts had its origin in the Middle Ages. This stemmed from the Divine Rule of the kings or as sometimes expressed "the king can do no wrong." The state has assumed the sovereign powers of the king and has inherited this immunity. The school district, being an arm of the state has traditionally shared the principle that it can do no wrong.

As a historical fact, the first time the doctrine of
Sovereign immunity was applied to a subdivision of the state in the case of Russell v. Men of Devon, 2 Term Rep. 671, 100 Eng. Rep. 359 (1788). It might be noted that the English courts later overruled this case and by 1890 the schools of England were held liable for torts. The infiltration of this doctrine of sovereign immunity into the law controlling the liability of local governmental agencies has been described as one of the mysteries of jurisprudence. In the early stages of the development of our legal system the ruling of Russell v. Men of Devon was taken over, and under the concept of stare decisis became a barrier to bringing any action against a governmental agency such as the school district.

The United States Supreme Court stated that no action could be brought against a sovereign without its permission.

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 and 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 the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it.

Such was the thinking of the Supreme Court in 1857 in reference to immunity of the state.

There are hundreds of cases that support this doctrine of immunity based upon the theory of "the king can do no wrong." Some cases are given in the footnote.
B. REASONS GIVEN FOR THE IMMUNITY DOCTRINE

Different authors give varying reasons for the continuation of the doctrine of immunity. Davis listed a total of eighteen reasons for the maintenance of this doctrine after the Civil War. Fuller in his analysis of court decisions listed ten reasons given by the courts for school district immunity. Some of the leading causes will be abstracted and discussed briefly as follows:

1. The most fundamental and the one most frequently cited is that the school is an agent of the state carrying out a governmental function and therefore shares the sovereignty of the state. This is an extension of "the king can do no wrong" doctrine. Governmental functions are done for the benefit of the public, and the school does not receive any benefit from such functions.

2. The rule of precedent or stare decisis which implies the following of previously decided cases of a similar nature has meant that the court continues to apply the immunity of quasi corporations. Lower courts are bound to follow the rulings of higher courts and a doctrine, once settled, is very difficult to alter.

3. Reasons related to finance, trust funds, impairment
service, and expense of litigation are given as other reasons for immunity. The prohibitive costs, the legal inability to pay these claims, the number of law suits, etc. are items that could seriously affect the operation of the school.\textsuperscript{15}

4. The principal of \textit{respondeat superior} does not usually apply to school districts. This principle means that the master or principal (not used in an educational sense) is responsible for the acts of his servant or agent. It is enunciated in some courts that this principle is not applicable to school districts.\textsuperscript{16} "If a school district is not liable for the negligent acts of its officers, it is not liable for the negligence of its employees."\textsuperscript{17}

5. The defense of \textit{ultra vires} is stated as a reason for maintaining the immunity of a school district. An \textit{ultra vires} act is an act above and beyond the power of the school district. It is held that since the school district has only those powers delegated to it by the legislature, the district is not authorized to commit a tort. One is not liable for acts committed \textit{ultra vires}.\textsuperscript{18}

6. School districts which are acting \textit{nolens volens} are sometimes considered as being immune from suit.
Nolens volens means that no profit or advantage obtains to said actor from the performance of his duties.\textsuperscript{19}

7. Some authorities cite the reason that the schools will be embarrassed and lose rapport with the public if court actions are allowed and damages are awarded for alleged negligence on the part of the school district. While this may be a true statement, it does not seem to justify the suffering inflicted upon individuals which the immunity rule now permits.

C. MODIFICATION OF THE DOCTRINE OF IMMUNITY

While the doctrine of immunity from liability of governmental agencies, such as school boards, seems to be almost impregnable, the last hundred years, and in particular, the last six decades have seen the wall beginning to crack and in a few cases completely crumble. Many legal experts have denounced immunity as being unjust and illogical. Some of the following quotations illustrate this point of view:

The doctrine of state immunity in tort survives by virtue of antiquity alone... The doctrine is not only an historical anachronism, but, under our present rules, works gross injustice to all parties concerned and manifests an inefficient public policy. The nonresponsibility of the employing state, accompanied by the theoretical responsibility of the mistaken or wrong-doing employee - the limit of the vaunted "rule of law" - is unfair to the victim of the inquiry, to the subordinate officer or employee and to the community.\textsuperscript{20}
The whole doctrine of governmental immunity from liability for torts rests upon a rotten foundation. It is almost incredible that in this modern age of comparative sociological enlightenment and in a republic, the medieval absolution supposed to be implicit in the maxim, the king can do no wrong, should exempt the various branches of government from liability for their torts, and that the entire burden of damage resulting from the wrongful acts of the government should be imposed upon the single individual who suffers the injury, rather than distributed among the entire community, constituting the government, where it could be borne without hardship upon the individual, and where it justly belongs.\textsuperscript{21}

It may be that the common-law rule of immunity is harsh and unjust in requiring the individual to suffer the wrong in the instant case, and that society, in keeping with the modern trend, should offer relief, but this is a legislative and not a judicial question.\textsuperscript{22}

The Illinois Supreme Court in the leading Molitor case had this to say about immunity:

We are of the opinion that school district immunity cannot be justified on this theory. (The theory of sovereignty). Likewise, we agree with the Supreme Court of Florida that in preserving the sovereign immunity theory, courts have overlooked the fact that the Revolutionary War was fought to abolish that "divine right of kings" on which the theory is based.

We do not believe in this present day and age, when public education constitutes one of the biggest businesses in the country, that school immunity can be justified on the protection-of-public-funds theory....Nor can it be properly argued that as a result of the abandonment of the common-law rule the district would be completely bankrupt. California, Tennessee, New York, Washington, and other states have not been compelled to shut down their schools....Neither are we impressed with the defendant's plea that the abolition of immunity would create grave and unpredictable problems of school finance and administration...."Tort liability is in fact a very small item in the budget of any well-organized enterprise."\textsuperscript{23}
We are of the opinion that none of the reasons advanced in support of school district immunity have any true validity today.24

There does appear to be a trend toward relaxation of immunity in the United States as will be documented in the following chapters. The development of governmental liability is on the increase, witness the Federal Tort Claims Act, 60 Stat 842, passed in 1946. Other contributing factors are the increase in the number of private corporations doing governmental work and the need to protect them in some way and the increase in the amount of liability insurance being purchased by these bodies in an attempt to protect against negligent suits.25

It is somewhat of an anomaly that in the United States the doctrine of immunity has been retained while in other countries closely allied with the Western European culture the concept has been abolished. In England, the school districts have been held liable for their torts since 1890.25 In Germany the schools under the Weimar Republic are held liable for their torts.26 "In fact practically all the western countries of Europe have abandoned the rule of immunity."27 The Canadian school boards do not enjoy the freedom from tort liability that the majority of the states of the union have traditionally held.28

As Lincoln said on the occasion of his first annual message, December 3, 1861, "It is as much of a duty of government to render proper justice against itself, in favor of its
citizens, as to administer the same between private individuals."

D. STRUCTURAL FORMS OF MODIFICATION

It is the prime purpose of this dissertation to point out and analyze the various means that are being developed and used to change the traditional doctrine of governmental immunity on the part of the school district.

Two forms of classification relating to the modification of immunity rule are made. One categorization relates to the genesis of the power allowing suits to be brought against the school board. In this system the source of the authority may be in the hands of the legislature of the state, or the source may come from the rulings of the courts. For the sake of brevity these are referred to as either statutory or judicial authority.

The second form of classification relates to the specific charges that are brought against the school board. The type of activity engaged in by the defendant at the time of the act, the place where the act was committed, and the relation of the school district to the act determine what form the modification may take. Examples of this type are: "safe places" statutes, "save harmless" statutes, governmental or proprietary functions, nuisances, and trespass to property.

Of course the two classifications are not dichotomous in
actual practice. Generally, a case will involve firms from both categories as they are applicable to the instant case.

"The greatest abrogation of governmental immunity has been in the area of school (bus) transportation and workmen's compensation. These two special areas have been singled out by the legislatures as special fields of injury and have been granted relief and protection for damages."29 The field of workmen's compensation is not a part of this investigation. Pupil injuries in addition to school bus accidents provide the major causes of court action against school boards for negligence.

It is the purpose of the remaining chapters to examine the various forms of modification of immunity by each state that has so modified. In this examination the philosophy and rationale of the legislatures and courts are analyzed. From the opinions and dictas of the courts the operational procedure necessary to defend against a charge of negligence are found. Different authors have viewed this classification in other lights. Davis gave the following reasons found in case law for allowing recovery against a school district for personal injury:

Recovery against school districts has been granted under four distinct sets of circumstances, three under which immunity had not been abrogated and one under which it had. School districts have been held liable for pupil injuries (a) in New York in spite of the existence of the immunity doctrine, (b) in California, Washington, and New York where statutes have abrogated common law immunity, (c) because special statutes in states adhering to the common law doctrine have been interpreted
to allow recovery, and (d) because of special circumstances arising in states adhering to the common law doctrine. The arguments raised in the cases allowing recovery were identical in many instances to those used in the cases denying recovery. However, whereas in the cases where recovery was denied, the courts were often over-zealous in interpreting statutes to exclude recovery, in the jurisdictions where recovery has been favored every effort seems to have been made to interpret facts and statutes to grant recovery.30

The following chapters study the states which grant recovery under statutes and case law. These statutes have provisions which directly impose liability on school districts to pay claims, damages, or judgments stemming from personal injuries. The states which by judicial interpretations have allowed recovery are also analyzed. Also the states which permit the purchase of liability insurance but maintain the immunity doctrine are studied. Finally, the states which by some special circumstance or ruling have granted recovery receive analysis. The above examination of the various states and their types of recovery allowances provide the outline for the remainder of the investigation.
FOOTNOTES

134 Yale L. J. 1.
9 Law and Contemporary Problems 182, 214.

278 C. J. S. 1321


4J. Frederick Weltzin, The Legal Authority of the American Public School (University of North Dakota, 1930), p. 94.


6See Appendix A.

7160 A. L. R. 7, 84.

834 Yale L. J. 1, 6, 38 Ill. L. R. 355, 356.
54 Harvard L. R. 438, 439.


1024 R. C. L. 604.


16Smith v. Seattle School District No. 1, 112 Wash. 64, 191 P. 858.

17Edwards, op. cit., p. 399.

18Ibid., p. 401


20A. B. A. J. 495.

2175 A. L. R. 1196.


2338 Ill. L. Rev. 355, 378.


25160 A. L. R. 7, 84.


28Robert L. Lamb, Liability of School Boards and Teachers for School Accidents, Canadian Teachers Federation, Research Division, Research Study No. 3 (Ottawa, Canada: Canadian Teachers Federation, 1959).

30Davis, op. cit., p. 94.
CHAPTER IV

VARIANT AND SPECIFIC FORMS OF MODIFICATIONS

In a number of states and in certain specific areas, recovery from the school corporation was permitted. Two special areas, which were frequent sources of litigation, were school bus transportation and workman's compensation laws. In this investigation these two areas were not studied except in an incidental relationship to the larger field of tort liability. In some of the states express statutory actions had been taken to abolish the immunity doctrine. For example, in Alabama, Mississippi, and North Carolina, claims for transportation injuries were handled by a special agency established by the legislature. In the opinion of the writer this area would be a fertile field for further research. Different states allowed claims under certain specific instances. It was difficult to generalize from these specific applications. Some of these areas of special application were: "safe place" statutes, "save harmless" statutes, proprietary and governmental functions, and the waiver of liability due to the purchase of liability insurance.
A. SAFE PLACE STATUTES

In states such as California and New York the school district was held liable for maintaining buildings, grounds, and premises in an unsafe manner. Washington has partially restricted this liability for a "safe place." Two states, Colorado and Wisconsin, have enacted special statutes which impose liability upon the school district to build and maintain its buildings and/or equipment so as to render them safe for general usage.

The state of Wisconsin had established a definite statute concerning a "safe place." The "safe place" statute of Wisconsin defined the place of employment, employment, employer, and a frequenter. Some of the applicable subsections are:

The employer shall mean and include every person, firm, corporation, state, county, town, city, village, school district, sewer district, drainage district, and other public or quasi public corporations....

The term "owner" shall mean and include...school district...

In keeping with the general trend of strict interpretation by the courts, schools in Wisconsin were exempt from suit until the above amended statutes which expressly mentioned school districts were passed. In one case the court of Wisconsin allowed recovery. The plaintiff fell down some stairs. At the bottom of the stairs a door was closed suddenly by another student. The district was held liable for the dangerous condition of the stairs and door. The boy injured his hand
by ramming it through a glass panel of the door. The shutting
of the door by another was not the proximate cause. In
another case in which a child was injured while playing with a
flagpole that was on the school grounds, the court held that
the flagpole was not part of the building as defined in sec-
tion 101.01.

A boy was killed when struck by a falling flagpole on
the evening of October 11, 1938. The Wisconsin Supreme Court
affirmed the decision of the circuit court which had dismissed
the case. The court held that a flagpole was a true structure,
but that it was not used as a place of resort assemblage as
indicated in section 101.01. The doctrine of the immunity of
a municipality in the performance of governmental functions was
affirmed. In another Wisconsin case the plaintiff was enrolled
in a vocational school. As a result of operating an unguarded
wood planer the plaintiff injured his arm, which was later
amputated below the elbow. He asked damages of $30,000.00.
The case was appealed from the circuit court which had over-
rulled the defendant's demurrer. The Wisconsin Supreme Court
reversed the circuit court. The court stated that the machine
was unsafe, not the building. A student was not an employee nor
was a school a place of employment for a student. This ruling
upheld the immunity of the school while discharging its govern-
mental functions, and the school district was not liable for the
acts of negligence of its employees. In a case tried in 1957
the court ruled that:

Under Wisconsin law an absolute duty is imposed on the occupant to make the place as safe as the nature and place of employment will reasonably permit and performance of the common-law duty to make it reasonably safe does not suffice.5

As it appeared, the courts of Wisconsin did allow recovery for violations of the "safe place" statutes, but the construction of the statute was of the strictest character thereby resulting in limited recovery.

In a decision handed down June 5, 1962 the Wisconsin Supreme Court upset the theory of municipal tort immunity.6 This decision abolished the 125 year old doctrine of immunity when the agency was performing a governmental function. However, in its ruling, the court said that its judgment did not apply to school districts. It would therefore appear that school districts still come under the old doctrine of immunity.

By comparison, the applicable statute of the State of Colorado reads:

Any person, firm, corporation, or association operating a....school house....or place of public assemblage, or any kind of establishment wherein laborers are employed or machinery used...shall provide safeguards... and if machinery is not safeguarded as provided by this act, the use thereof is prohibited.

It also provides that in order to establish liability of the defendant and to recover damages, it shall be sufficient for the plaintiff to prove that death or inquiry resulted from the use of machinery for which the defendant failed to provide safeguards as required by statute.7

However, as yet, no cases have tested this statute in this state.
B. SAVE HARMLESS STATUTES

Another technique, which was developed recently, was the enactment of "save harmless" statutes. These statutes have indirectly made the board of education liable for negligence. By the enactment of this type of law the board of education assumed the financial responsibility for the liability of certain school employees while acting within the scope of their duty. The purpose of this type of act was "to save harmless and protect all teachers and members of supervisory and administrative staff from financial loss...." These statutes are based on the assumption that the business of education has become so big that it is unfair to saddle teachers and administrators with liability risks which may be involved in their respective positions." It has been a generally accepted point of law that teachers are liable for their acts of tort. Four states (Connecticut, New Jersey, New York, and Wyoming) have "save harmless" statutes effective at this time. California does not have a "save harmless" statute, but "the governing body of any school district is liable as such in the name of the district or its officers or employees." The effect of the "save harmless" statute in New York is studied in Chapter V.

In 1949 Connecticut passed its "save harmless" act. It was very similar to the statutes of New Jersey and New York but appeared to be more comprehensive. It reads as follows:
Each board of education shall protect and save harmless any member of such board or any teacher or other employee thereof or any member of its supervisory or administrative staff and the state board of education, the board of trustees of each state institution and each state agency which employs teachers, and the managing board of any public schools, as defined in sec. 10-161, shall protect and save harmless any member of such board, or any teacher or other employee thereof or any member of its supervisory or administrative staff employed by it, from financial loss and expense, including legal fees and costs, if any, arising out of any claim, demand, suit or judgment by reason of alleged negligence or other act resulting in accidental damage to or destruction of property, within or without the school building, providing such teacher, member or employee, at the time of the accident resulting in such injury, damage, or destruction, was acting in the discharge of his employment or under the direction of such board of education, board of trustees, state agency, department, or managing board. For the purpose of this section, the term "teacher" shall include any student teacher doing practice teaching under the direction of a teacher employed by a town board of education or by the state board of education.\(^\text{11}\)

Section 10-236 gave the power to insure against the liability of the above section.\(^\text{12}\)

In searching the citator the only germane case was heard in 1955.\(^\text{13}\) The court named the principal, the school board, and the members of the board as defendants. The charge against the principal was assault and battery. The principal slapped a boy on the ear when the boy was whistling at his desk. The Superior Court of Connecticut, Litchfield County, sustained a demurrer dismissing the action against the board and its members. The court held that a judgment must first be secured against the principal. The purpose of the statute was not to abolish immunity but to protect teachers from loss by civil misconduct.
The statute was a statute of indemnification from loss, not from liability.

In 1937 New Jersey enacted a statute which allowed the board of education to provide legal counsel at the expense of the board for legal action brought against teachers. An action which alleged the use of corporal punishment on the part of the teacher was excluded from this benefit. In 1938 New Jersey enacted its "save harmless" statute. It was almost identical to the other states. New Jersey passed this act one year after New York and it was as follows:

It shall be the duty of each board of education in any school district to save harmless and protect any person holding office, position or employment under the jurisdiction of said board from financial loss arising out of any claim, demand, suit or judgment by reason of alleged negligence or other act resulting in accidental bodily injury to any person or damage to property within or without the school building; provided such person at the time of the accident, injury or damage was acting in the discharge of his duties within the scope of his office, position or employment and/or under the direction of said board of education; and said board of education may arrange for and maintain appropriate insurance with any company created by or under the laws of this State or in any insurance company authorized by law to transact business in this State, or such board may elect to act as self insurers to maintain the aforesaid protection.

The New Jersey courts have held that the "save harmless" statute did not create a liability on the part of the school district, and the courts have upheld the immunity of the district. This statute did not create a new cause of action against a school board even if the board of education failed
to insure against such liability.

In 1955 Wyoming passed a permissive statute authorizing the school district to "save harmless" and protect teachers from civil liability. This act was as follows:

Each board of directors in any school district is empowered and authorized to save harmless and protect all teachers and members of supervisory and administrative staff from financial loss arising out of any claim, demand, suit, or judgment by reason of alleged negligence or other act resulting in accidental bodily injury to persons within or without the school building; provided such teacher or member of the supervisory or administrative staff at the time of the accident or injury was acting in the discharge of his duties within the scope of his employment or under the direction of said board of directors, and said board of directors may arrange for and maintain appropriate insurance with any company created by or under the laws of this state, or in any insurance company authorized by law to transact business in this state, or such board may elect to act as self-insurer to maintain the aforesaid protection.

This act (21-158, 21-159) shall not be construed as creating or tending to create a liability of the school district so protecting or insuring its teachers or staff members, nor shall the failure to procure such insurance as is authorized by this act be construed as creating any liability of the school district.17

The total impact of the "save harmless" statutes upon the immunity of the school district has been negligible in two of the four states while in New York it has been coupled with a more widespread move toward abrogation.

C. GOVERNMENTAL AND PROPRIETARY FUNCTIONS

In order to successfully bring a suit against a school district, plaintiffs sometimes used the technique of attempting to divide the functions of a school. The two functions were
governmental and proprietary.

Recognizing that a school district cannot, under the common law, be held liable for the negligence of its agents or employees in the performance of a governmental function, plaintiffs in numerous cases have claimed liability on the ground that the school district was engaged in the performance of a proprietary or private function.18

If engaged in a proprietary function, vicarious liability may attach. Some jurisdictions attempted to apply this distinction; others did not. Corpus Juris Secundum comments:

The immunity of a school district or other local school organization from liability for torts applies to torts committed in the course of the exercise by the district of governmental functions. Some authorities held that such immunity exists regardless of whether the torts were committed in the exercise of governmental functions, but other authorities held a school district is liable for torts committed in the exercise by the district of proprietary functions.19

One of the chief disadvantages of this approach was the difficulty of distinguishing between the two functions. It was viewed as a "distinction without difference" by many courts and was not applied because of the problem of uniformity. The test, frequently used, was whether the act"is for the good of all without any element of special corporate benefit or pecuniary profit."20 The fact that a function yielded a pecuniary profit or produced revenue did not mean that this was a proprietary function.21

While the jurisdictions that applied this ruling appeared to be in the minority, it is of some interest. Pennsylvania has a statute as follows:

...
Municipal and quasi-municipal corporations, such as school districts, are not immune from liability in tort for the negligent acts of their servants committed in the course of proprietary functions of the municipal and quasi-municipal corporation.\(^{22}\)

A school district which operated a swimming pool as a summer recreation program was held liable when a boy drowned.\(^ {23}\) The Pennsylvania Supreme Court held that this was a proprietary function. When a school district purchased a tax delinquent house and the tenant, an eight year old girl fell, the school was engaged in a proprietary function for buying, maintaining, and possessing property.\(^ {24}\) However, the court held that a football game was an educational activity and therefore was a governmental function.\(^ {25}\) Also, the Pennsylvania Supreme Court held that a school district was not liable for negligence in performing the governmental function of maintaining the school grounds and fences.\(^ {26}\)

A case heard in Arizona held the school district liable for a proprietary function.\(^ {27}\) The Arizona Supreme Court reversed the lower court which had upheld immunity. The defendant had leased the football stadium to another school and had received a fee of $300.00. A paying spectator fell because of a faulty handrail. The court ruled that the school district had leased, received compensation, and was therefore engaged in a proprietary function and liable. The school districts of Arizona are immune as governmental agencies. The dicta of the court implied that it did not wish to extend the doctrine of
immunity any further than necessary. Judge Windes, dissenting, did not support the governmental proprietary distinction. He believed that other decisions showed that all functions are governmental.

Two cases heard in Illinois during 1961 and 1962 refused to make the distinction of dividing the functions. In the Thompson case tried in New Jersey, the distinction was made. In Oregon the district was held liable for performing the proprietary function of painting a flagpole.

The amount of litigation based upon this count is small in comparison to the total picture of tort liability. Within any one given jurisdiction, prudence would indicate the need for ascertaining if this division was attempted.

D. THE EFFECT OF LIABILITY INSURANCE

Another enigma that is difficult to unravel is the effect of liability insurance. Many states have statutes which permit the purchase of liability insurance. In some states liability insurance is purchased without the express statutory power to do so. It is doubtful if this expenditure would stand if subjected to a judicial interpretation. In the field of insurance law it is common knowledge that the mere possession of liability insurance does not imply the recognition of potential liability. In fact, in many jurisdictions the fact that the defendant may
have insurance is not admissible in evidence.

One of the reasons advanced for the immunity doctrine was the protection of the trust funds; however, if these funds were adequately protected by insurance, it might seem that this argument would be voided. "The great weight of authority seems to hold that the purchase of liability insurance does not waive governmental immunity, although there are some exceptions."31 A Kentucky court has said that "a statute giving a school district permission to carry liability insurance to cover torts . . . in no way makes the district itself liable for such torts."32

Despite this fact there were some exceptions to the rule. American Law Reports had this to say about removal of immunity to the extent of the coverage.

In a few jurisdictions the courts have taken the view (which is worthy of characterization as enlightenment) that to the extent that a liability insurance policy protects a governmental unit against tort liability, the otherwise existing immunity of the unit is removed.33

Tennessee and Kentucky were two states which have pioneered in this new legal area. Illinois allowed recovery at one time under insurance but has since changed to an even more liberal modification of tort liability. Oregon in 1961 allowed recovery to the extent of the policy. At the time of writing the picture in Indiana appeared to allow recovery.

In a leading case heard in Tennessee during 1932 the court did not allow the defense of governmental immunity
because the plaintiff and the insurance company had agreed to waive any excess damages over the limit of the policy. In 1936 a similar ruling was made which removed immunity to the extent of the coverage which protected the public funds of the school. In 1945 the court held that the reason for the immunity doctrine was that there were no funds available to pay the claims, but, if insurance was carried, recovery could be had, but only to the limits of the policy.

Kentucky has taken a similar view. In the Taylor case where a child was injured in a bus accident, the school had a policy with the immunity waiver clause. Recovery was allowed to the extent of the policy. Kentucky has taken the middle ground and "does not make the board liable for the torts of its agents and employees but does permit suits and a judgment to be obtained which, when final, shall measure the liability of the insurance carrier to the injured party for whose benefit the insurance policy was issued." This is a subtle distinction in that in effect, Kentucky is not admitting liability, but is allowing the case to be heard so that recovery can be made against the insurance carrier, and the amount of recovery is fixed by the court. An interesting case was heard in 1947. A school board member was legally riding a school bus and was killed in an accident. The defendant had a policy with the waiver of immunity rider attached. The deceased was held to be within the coverage of the policy and immunity was removed.
to the extent of the coverage. In another case an appeal heard in 1952 allowed a jury trial against a school district which had liability insurance.

In Indiana the Hummer case heard in 1953 ruled that the statute permitting the purchase of insurance was not a waiver of immunity. However, in 1960 in an action against a county board of commissioners, the liability for a proprietary function was set at the policy limits. The Indiana Supreme Court disapproved of the Hummer ruling by stating: "The opinion of the Appellate Court in the case of Hummer v. School City of Hartford City (1953), 124 Ind. App. 30, 112 N.E. (2d) 891 is disapproved insofar as it is inconsistent with the views herein expressed." In other words, that while the purchasing of insurance is not a waiver of immunity, it does allow recovery, but only to the limits of the policy. Hummer allowed full judgment recovery.

In Illinois the doctrine of immunity was modified for a period of time so as to permit recovery to the amount of insurance. The permissive statute allowing the purchase of liability insurance was passed in 1947. It was first applied to public schools in 1952. The Illinois appellate court held that it was public policy to protect public funds. If the funds were protected there was no need for immunity.

"Liability insurance, to the extent that it protects the public funds, removes the reason for, and thus the immunity to suit."
In 1959 the Molitor case further modified immunity in Illinois as will be discussed in a later chapter.

The Vendrell case heard in Oregon in 1961 constructed the statute allowing the purchase of insurance to mean that the immunity of the district was lifted only to the extent of the policy. If a district did not purchase insurance, it was still immune and not negligent for failure to do so.

It was apparent that a few states have taken this route as a means of alleviating some of the injustices of immunity without the violation of the trust funds or public money. It was a safe middle of the road technique which has had some limited application.

E. SPECIAL PROVISIONS

In the bulk of special legislation, the emphasis has been upon the field of transportation. Alabama and North Carolina have a special agency to handle these claims. Mississippi has established a special fund from which payment of not more than $500.00 can be made for bus accidents. In Louisiana a legislative resolution allowing a suit did not have the effect of waiving the state's immunity.

In several jurisdictions which theretofore have been immune, the doctrine has been shaken to some extent. In 1956 a Maryland court hinted at the liability of a school district. The court of appeals speaking to the appellant's contention
that the school board was a body corporate and a body politic which may not be sued in tort for the negligence of its employees and agents stated:

We find it unnecessary to decide whether this contention is correct and assume, without deciding, that it is, because, as we see it, the evidence shows no negligence on the part of Choate, the agent and servant of the board, and therefore no liability on the part of the board even if it is subject to suit. 48

As reported earlier in this chapter Wisconsin in 1962 overthrew the immunity of a municipal corporation. In 1961 the Supreme Court of Michigan handed down a decision relating to municipal corporations. The court "overruled the doctrine of governmental immunity for future cases by a majority of the court." 49

It was concluded that the rule of immunity has been chipped away in some states with some far-reaching decisions. The inevitable lag was also at work, and it will undoubtedly be many years before immunity disappears, if ever.
FOOTNOTES

1West's Wisconsin Statutes Annotated, Ch. 101.01-101.29.

2Eckerson v. Ford's Prairie School District No. 11 of Lewis County, 101 P (2d) 345 (1940).

3Lawver v. Joint District, 232 Wis. 608, 228 N.W. 192 (1939).


6News item in the Chicago Tribune, June 6, 1962.

7School Laws of the State of Colorado, Ch. XI, Sec. 539, 548 (1941).

8Ibid.


10West's Annotated California Education Code, Sec. 903.

11Connecticut General Statutes Annotated, Title 10, Ch. 170, Sec. 10-235.

12Ibid., Sec. 10-236.


14New Jersey Statutes Annotated, Sec. 18: 5-50.2.

15Ibid., Sec. 18:5-50-4.


17Wyoming Statutes, 21-158, 21-159.


2078 C. J. S. 1326.

Reed v. Shea County, 225 S.W. (2d) 49 (1949).
Dasskiewicz v. Board of Education of the City of Detroit, 301 Mich. 212.

22 24 P.S. Secs. 2.211-2.217.


29 Thompson, loc. cit.


31 Schaerer and McGhehey, op. cit., p. 31.

32 Wallace v. Laurel County Board of Education, 153 S.W. (2d) 915 (1941).

33 68 A.L.R. (2d) 1437.

34 Marion County v. Cantrell, 166 Tenn. 358, 61 S.W. (2d) 477 (1932).


38 Ibid.


42 Flowers v. Board of Commissioners of County of Vanderburgh County, 240 Ind. 668, 168 N.E. (2d) 224 (1960).

43 Ibid.


45 Ibid.


CHAPTER V

LIABILITY IN THE STATE OF NEW YORK

The state of New York although not the first state in the United States to grant recovery under judicial or statutory authority was one of the leading states in the number of suits allowing recovery.\(^1\) Schaerer in his classification rated New York as one of the liberal states in the field of modification.\(^2\) Of the sixty-four court cases reported in *The Pupil's Day in Court: Review of 1961*, twenty-two cases dealt with pupil injuries of which fourteen came from the state of New York.\(^3\)

A. HISTORICAL DEVELOPMENT

Davis stated the following regarding the development of liability in New York:

> New York has been the most liberal state with respect to granting relief to injured parties. It is the only state where tort liability has been imposed without statutory provision. Over a half century before its immunity from suit was abrogated, New York Courts held that a school board which is responsible for providing and maintaining school buildings cannot escape liability on the basis of governmental immunity. The school district is responsible for the torts of its officers (that is, for its own torts), but not for the torts of its servants or employees; that is, the doctrine
of respondeat superior does not apply.\(^4\)

At the time of writing New York did not have a statute which expressly made the school district liable for tort actions.\(^5\) Accordingly, New York was one of the few states which imposed liability by judicial authority. However, this condition has been modified by "save harmless" laws, a court of claims act, and a comprehensive education statute.

Development of tort liability in the state of New York followed rather an unusual path as compared with the majority of the other states. However, certain elements of this developmental pattern are being duplicated in other jurisdictions as they move toward the modification of immunity. New York at one time adhered to the doctrine established in Russell v. Men of Devon and followed this ruling under stare decisis. Two early cases were the vanguard of the coming change in judicial thinking in the state of New York. In the case of Bassett v. Fish, tried in 1878, where trustees were being sued individually, the court held that the school district was a complete corporation and therefore liable.\(^6\) This meant that if the trustees, acting as a board, committed an act which was judged to be negligent, they were liable for their tort, as a whole board of trustees and not just individually as members of the board. In other words, you had to sue the whole corporation. Decision later reversed in 12 Hun. 209. In another case heard in 1899 against the city of New York, the ruling was that a city was
never authorized to commit a tort in discharge of its governmental functions but may be liable for proprietary functions. 7

The leading and precedent case in New York which literally broke the back of immunity was the Wharman v. Board of Education case decided in 1907. 8 A twelve year old boy while sitting in a classroom was struck on the head by a piece of falling plaster. This blow fractured the skull of the boy. Action was brought against the school board for negligence in maintaining and permitting students to frequent a dangerous building. The defendant claimed that the repair of buildings was in charge of subordinates and that the rule of respondeat superior was not applicable to school districts. The court agreed with this point but held that the board had the power to close the school and remove the pupils from an inherently dangerous situation. A jury held the board negligent for permitting a dangerous building to be occupied by students. A governmental agency which must provide and maintain buildings and equipment cannot escape liability on the ground that it is a governmental agency. This decision was appealed to the Appellate Division and then to the Court of Appeals which sustained the trial court's verdict in favor of the plaintiff. From the ruling in this case the torts of agents, employees and servants were not imputed to the school district because respondeat superior did not apply. But for its own torts the school district was held liable. This condition held until
the enactment of the "save harmless" statutes in 1937 and their subsequent construction.

In 1910 New York legislated a comprehensive act which had applicable sections dealing indirectly with the tort liability of school districts. One subdivision of section 1709 provided that boards of education of every union free school district shall "establish such rules and regulations concerning the order and discipline of the schools, in the several departments thereof, as they deem necessary to secure the best educational results." In other words, the school district was charged with the duty of being in full control of not only the students and the educational program, but also with establishing a safe environment in which to carry on a program of education. A subsequent subdivision of the same section empowered the school district "to pay any judgment levied against the school district, and in the event there are no moneys otherwise available, to levy a tax upon the taxable property of the district to pay the same." Yet another subdivision made it the duty of the school district to furnish proper equipment and supplies. The definition of equipment has been interpreted rather liberally in the case of Edkins v. Board of Education of City of New York. Another subdivision of section 1709 mandated the care and provision of school property to the local board of education. "This section has been the basis of recovery on the part of pupils injured
due to the dangerous condition in which school buildings have been maintained when the condition is directly imputable to the negligence of the board." It was in section 1709 that the beginning of the "save harmless" statutes had their origin. From this section the board was given the mandate to establish rules and regulations, provide safe buildings and equipment, and pay claims arising from their negligence to comply therewith. But as a point of law the principle of respondeat superior was untouched. The board being liable for its own negligence but not for that of its agents, employees or servants was termed the "New York rule."

In McCarton v. City of New York, a rotten flag pole fell upon the decedent and killed him. The pole was on the school grounds but suit was brought against the city and the school district. The action was dismissed against the city, but the board was held liable for not performing its statutory duty to provide proper repairs. Another reason for holding the school liable was that, if the school had knowledge of the pole's unsafe condition, the district was maintaining a nuisance.

The philosophy and reasoning of the New York courts can be seen from two cases heard during the Twenties. In the first case a boy who was operating a power saw as part of the regular school program received injuries. A jury unanimously found the school district guilty of negligence in purchasing and
operating a dangerous instrument without proper safeguards.

To the defense that the board was a governmental agency the court said:

The board of education is a governmental agency of the state. It is not liable for the torts of its agents. Such agents, like policemen of a city, are personally liable for their torts done in the course of their employment, but the corporation is not chargeable with their defaults. It, however, remains liable for its own negligence.

When the state surrendered to the board a portion of its sovereign power and delegated to it a duty imposed upon the state by the constitution, and it accepted the trust, it undertook to perform with fidelity the duties which the law imposed upon it. It is not immune from suit. The state has not created an irresponsible instrumentality of government and invested it with the power to put children at work at dangerous machinery which it would be a statutory offense against its laws to use in private industries.16

Further, the court held that the board of education is a body corporate which may be sued. State and civil divisions while in the discharge of governmental functions are immune from tort actions. However, the board of education is a governmental agency not a civil division, and the board is liable for negligence and its own derelictions. The court of appeals upheld the appellate court's sustaining the trial court's decision in favor of the plaintiff.

In the second case, Williams v. Board of Education No. 1, the board of education had contracted for a farm woman to drive a wagon with an exposed rear wheel.17 In this device, children were transported to and from school. A child fell or was
pushed into the wheel and was permanently injured. The court held the school district liable for negligence in failing to foresee the hazards of such an omnibus. That the court was fully aware of the incongruity with the immunity doctrine and cognizant of the far-reaching implications of this decision is clear from its statement:

We fully appreciate the far-reaching effect the principle we have stated as to the liability of school districts may have on the matter of expense of rural education, and the particular consequences which necessarily fall on the residents and taxpayers of the district. But we deem the protection of small, helpless children from avoidable injury of still greater importance. Because of the rule that the district was liable for its own torts but not for those of its employees, recovery was limited. That is, the board could not be held liable for the negligent acts of employees, and yet, most suits were the product of employee acts. Consequently there was no recovery for many wrongs. Therefore, in 1929 New York passed the Court of Claims Act, Section 12-a. This act provided for tort claim against the state for the negligence of its officers and employees on the same basis as an individual or corporation. This statute has been held to subject the state to liability for the negligence of its employees under respondeat superior. Filing must be accomplished within ninety days unless a written notice of intention is filed and proceedings started within two years. The primary emphasis of this enactment rested upon the
liability of the state, not upon the liability of the school district.

A somewhat similar effect was brought about when the state of New York passed the "save harmless" statutes in 1937. These enactments placed the financial responsibility for the negligence on the part of teachers directly upon the board of education. These acts protect the teacher from financial loss as a result of injury caused by the alleged negligence of the said teacher while acting within the scope of his duties. New York has two "save harmless" statutes. One is applicable to cities having a population of more than one million; the other is applicable to cities of less than one million. In the Reeder case the statute applying to cities of more than one million was interpreted to impose direct liability upon the board, and it was not necessary to secure judgment against the teacher as a prerequisite. In another case the court ruled that this statute was passed for the benefit of teachers, and this right cannot be subrogated. Here, a teacher who had been negligent injured a student. The teacher's insurance company paid the damages and then sued the board of education to recover in the name of the teacher. The court did not allow this claim. In the case of Massimilian, section 3023, dealing with cities of less than one million in population, was held to be only a statute of indemnification. Thus it will protect the actor from loss only after actual financial loss has been
The status of liability of school districts in the state of New York for torts of itself and of its employees has stabilized, and many of the cases now deal with procedural matters.25

B. RELEVANT STATUTES

In the historical development some of the New York legislative acts and their provisions were noted. In this section a more comprehensive picture of the existing statutes will be given.

Section 1709 charged boards of education with the responsibility to establish rules and regulations concerning discipline and to supply adequate supervision. Other subdivisions of this act made it the duty of the school board to furnish proper equipment and supplies and to provide and care for school property such as buildings and grounds. A subsequent subdivision empowers the district to pay any judgment and, if necessary, to levy a special tax to pay the same.26

Section 2560 dealt with the liability of a board of education of a city with more than one million population. This act provides that the board shall be "liable for, and shall assume liability to the extent that it shall save harmless, any duly appointed member of the teaching or supervising staff, officer, or employee of such board. . . ." This liability shall be for the negligence "resulting in personal injury or
property damage. . . ."27 Of course the individual must be working within the scope of his duties.

Section 2561 provided "save harmless" benefits to personnel working with needy children.28

Section 2562 stated that claims against a board of education of a city having a population of four hundred thousand or more must allow thirty days before commencing legal action. This gives the board or its officers an opportunity to act on the claim before litigation.29

Section 3023 prescribed the liability of a board of education, trustee, trustees, or board of cooperative educational service in cities having a population of less than one million.30 This act was to "save harmless" teachers, student teachers, members of supervisory and administrative staff or employees from financial loss. It was noted that both "save harmless" statutes dealt with negligence of personnel. Section 3023 does not mention property damage as does section 2560. Section 2560 provided that the board shall be liable and shall assume liability; however, section 2560 was construed as an indemnification statute.31 Thus, it will indemnify personnel only after actual loss.

Section 3813 outlined the presentation of claims against the governing body of any school district. The claim must be filed within ninety days, and the board must have thirty days in which to act before court action is taken.32 Subdivision
two stated that the claim must be filed in compliance with section 50-e of the General Municipal Law.\textsuperscript{33}

The General Municipal Law, section 50-e, gives the procedural plan for filing a claim based upon a tort.\textsuperscript{34} The notice must be made in writing within ninety days of the injury. A sworn statement giving the name and address of the claimant, the nature of the claim, the circumstances of the injury, and the items of damage or injury was mandated. The notice shall be served personally or by registered mail. The court may grant leave to serve a late claim if the claimant is an infant, dies, or certain representations are made with authorized officers or insurance carriers. Such a late claim must be initiated within one year of the time of injury, and an affidavit must be filed stating the reason for delay.

C. CASE LAW IN NEW YORK

\textbf{Liability in general.} In the jurisdiction of New York the school district is held liable for its own torts.\textsuperscript{35} The board of education is liable for negligence in the exercise of its powers or in the fulfillment of its statutory duties. The board cannot plead on the grounds that \textit{respondeat superior} is not applicable to school districts.\textsuperscript{36} When the state waives its immunity, it may become liable for injuries to a state school pupil caused by the negligence of its teachers.\textsuperscript{37} Although the state has a duty to provide competent teachers,
this provision may not be adequate to avoid liability. In the state of New York this liability has indirectly been imposed by statute.

Liability for torts of officers, agents, and employees. In the majority of jurisdictions, school districts, in the absence of statutes, are not liable for the torts committed by its officers, agents, and employees in the discharge of their duties. The doctrine of respondeat superior is not applicable to school districts. However, the situation in New York is not the typical one. With the passage of the "save harmless" statutes, the indemnification of loss on the part of an employee was imputed to the board of education. Thus, while the board cannot be sued for the negligence of its employees, the employees can, and they in turn must be indemnified for their loss, by the board. These statutes cover practically all the individuals who work for the school as long as they are within the scope of their duties.

In the case of Massimilian v. Board of Education of City of Niagara Falls, section 3023 was held to be only a statute of indemnification. A young boy, who was injured while playing under the supervision of the board and teachers, alleged their negligence. The supreme court reversed a lower court's denial of dismissal of suit. The major question posed was whether section 3023 gives a cause of action against the school
district or is it a means of indemnification to protect the individual teacher, etc., from financial loss. The court said that it was the intent of the legislature only to protect the individual teacher from loss, and not to give a right of action to the injured party.

A leading case in this area is the Reeder case. The court of appeals in New York affirmed the lower court and its decision. A boy who was helping a teacher move a car motor on a dolly injured his hand. A jury awarded $5,000.00 to the boy and $200.00 to the father. This case interpreted section 2560. The court held that responsibility is imposed upon the board of education, first to the injured person and, secondly, to the employee by the way of indemnity. The statute is clear and unambiguous leaving no room for judicial interpretation. The statute states that the board is "liable and shall be liable for . . ." Since this case was heard, it has been followed in the state of New York.

The court held in the Sun case that section 2560 was passed for the exclusive benefit of teachers. Only the particular teacher may sue the board for indemnity as this right cannot be extended by subrogation, and the statute is personal and cannot be assigned. The plaintiff, an insurance company, had insured the teacher against liability while teaching. A pupil was injured by an act of negligence on the part of the teacher and collected from the insurance company by an out of
court settlement. The plaintiff tried to collect from the school district, but the court ruled this right could not be subrogated. An appeal was denied by the appellate court and also by the court of appeals. It would seem that there is no need for a teacher to have insurance or for an insurance company to sell it to teachers.

The school district is responsible for the negligence of its employees if they are acting within the scope of their duties.\(^4^4\) In order that a school district be liable the ordinary rules of determining negligence must be followed. If there is no negligence there is no liability. In other words, respondeat superior is applicable, but by statutory action.\(^4^5\)

**Essential elements of a negligence claim.** A legal duty must rest upon the school board before a claim of negligence will be allowed. Not only must there be a duty but a failure to conform to the standard expected must exist. An omission or commission of some act either general or particular is essential to negligence. In the case of Scully v. State the court held that statutory duties must be performed with care.\(^4^6\) The state was responsible for the provision of a safe building. As will be shown in the section dealing with supervision, the school board has a duty to adequately supervise students while at school.\(^4^7\) The board of education has a duty to establish adequate rules to protect students against preventable accidents.
In the Gove! case the failure to do so was considered a violation of statutory requirements and imposed a liability upon the district. The plaintiff, a boy, broke his leg while doing an extremely difficult acrobatic stunt. While this was not the cause of the suit, it was introduced in the case to try and show a history of negligence on the part of the school since the plaintiff claimed that there were not proper safety precautions taken in the gym. One month later he received a gunshot wound when a gun accidentally discharged. The gun was being repaired in an industrial arts class. The court held that the board was negligent because of its failure to establish rules concerning the inspection and regulation of dangerous instrumentalities. This decision was upheld by the court of appeals. In the ~case the plaintiff brought action against the school board charging negligence. A small girl was asked by her teacher to pick up a paper sack lying on the ground. She cut her hand on a broken pop bottle inside the sack. The city court awarded damages of $3,388.25 to the child and $124.50 to the father. The Supreme Court, Appellate Division, reversed this decision and dismissed the complaint. The appellate court denied recovery because of the failure to "establish that the latent danger was reasonably foreseeable in the exercise of reasonable care in supervising the infant plaintiff under the circumstances." In a similar decision the court held that, if the injury could not be reasonably foreseen, the school is
absolved of liability.51 A boy was struck in the eye by an eraser thrown by another boy. The teacher was out of the room. The boy had committed this act twice before, and the teacher had required him to stay out of the room until the teacher arrived. This rule was enforced for one and one-half months, at which time the boy was allowed back into the room even when the teacher was not there. The supreme court reversed the trial court's judgment on a jury verdict in favor of the plaintiff. The appellate court held that it was an error to ask the jury whether the school authorities were negligent in allowing him back into the room. The fact that the child was allowed back into the room was not causally connected to the injury. The question that a new trial must answer is whether the teacher could have reasonably foreseen the injury and so was negligent in not better supervising the room.

The Weiner case exemplified the second essential element of a claim for negligence. There must exist a close causal connection or proximate cause between the act and the resulting injury or damage,52 and none was found in this case. In the DeBenedittis case, an industrial arts student was trying to extricate a piece of metal from a machine when another student stepped on the activating button. At this time the teacher was only nine feet away. The Supreme Court, Appellate Division, affirmed the lower court's decision holding the teacher negligent. The teacher was negligent because of not warning the
student to stay away from the machine and not exercising enough supervision. In another case a boy was injured while standing on the playground by the conduct of three other boys in pulling him down on a clinker lying on the ground. The plaintiff attempted to secure a judgment against the school board, alleging negligence in not maintaining the playground in a safe condition. The court held that the proximate cause of the injury was the unforeseen act of the three boys, not the condition of the playground. In a split decision the Supreme Court, Appellate Division, affirmed the trial court's decision of dismissal. In another case the plaintiff, an eleven year old girl, was injured when stepping over a wire fence which was raised by another student. No teachers were assigned to supervise. Negligence was charged against the school board. The trial court entered a verdict for the plaintiff. However, the Supreme Court, Appellate Division, reversed and dismissed the complaint. The proximate cause of the injury was the unforeseen act of the student raising the wire, not the lack of supervision. An older case held that a school board is not liable to a pupil injured by another on the grounds that it had failed to provide guides for the safe conduct of pupils while playing, where no such duty was imposed by statute. Under section 2560 no new rules of negligence were created, and the teacher must use only such reasonable care as a prudent parent would. A third person's act was unforeseeable as the proximate
cause. In this case a boy was struck in the eye by a thrown pencil. The pencil was thrown to another boy who ducked and the pencil hit the plaintiff. The teacher was temporarily absent obtaining supplies. Conflicting evidence placed the time of the absence from a few minutes to seventy-five minutes. The Court of Appeals affirmed the appellate court's reversal of the trial court's decision for the plaintiff. Judge Conway in a dissenting opinion stated that the jury apparently believed that the teacher had been gone for a long time, and that there was much chaos and disorder. If so, this absence was the cause of the accident and could have been foreseen and prevented. Such a question is a question of fact to be determined by the jury.

The evidence must clearly show that negligence was present, and many cases have been dismissed for lack of evidence. Some of the following cases demonstrated the rationale of the courts. In the case of Pelcak v. Board of Trustees of Common School District No. 10 a dog bit a child while the child was playing on the playground. This was a rural school with only two teachers assigned to the building. The child's teacher, the only one present at the time, was inside having a conference with the parent when the injury occurred. A jury trial held for the plaintiff. The Supreme Court, Appellate Division, reversed and dismissed the complaint. The court held that the evidence was insufficient to show that
the teacher was negligent; therefore, the board was not liable. In another case the fact that the teacher was talking to another teacher in the hall while her class went up the stairs was not negligent. The passage of the class was orderly, and she could not have anticipated the misbehavior. In an action against a school district and an eleemosynary association a cerebral palsy child became petulant when refused permission to go with some other boys and fell over in his specially constructed chair. The Supreme Court of Nassau County ruled that there was no evidence of inadequate supervision or maintenance of a defective chair. Mere testimony by a child was held to be insufficient evidence establishing inadequate supervision.

A comparison of the record made at the time of the injury and at the trial exhibited some discrepancies causing the court to hold insufficient evidence. In the case of Vitagliano v. Board of Education of City of New York, a suit was brought against the board for injuries incurred by a pupil when struck in the eye by an eraser. The verdict of the lower court was reversed by the Supreme Court, Appellate Division, as against the weight of evidence.

**Standards of care.** The courts of New York have consistently held that the school must exercise only ordinary care in the operation of the schools, and that the schools are not
insurers of the safety of the child. The board of education is held to reasonable standards of care and is required to take only those steps reasonably calculated to protect the students and personnel. A jury had awarded $4,500.00 to the plaintiff, a teacher, for injuries incurred while settling a fight in the school cafeteria. In the Cambareri case a fifteen year old boy injured his knee when a mat slipped during a relay race. The complaint alleged the boy was rather awkward, the floor was slippery, and the mat was not secure. The Supreme Court reversed the jury verdict in favor of the plaintiff. The per curiam opinion of the court stated that the defendant was not the insurer of the plaintiff's safety and many hazards surround individuals. Injuries are suffered in spite of reasonable care and for which no legal liability can be attached. In the Leibowitz case a twelve year old girl had descended stairs and walked across the gym under supervision. In a small outer exit hall she fell or was pushed down three stairs. The Supreme Court, trial term, dismissed the claim of failure to supervise the outer exit hall. The court said, "The duty did not devolve on the defendant to have supervision every single step of the way. There were guards up to within a few feet of the doors leading to the three step staircase." Only a few children could get into the hall at one time. Negligence is relative to time, place, and circumstance. The district owed reasonable care such as a parent of ordinary prudence would have exercised
under like circumstances. To hold negligence in this case demanded a responsibility greater than reasonable caution. When a child fell from playground apparatus, the court held that the school was not required to provide specific supervision. General superintendence would not have prevented the accident. In the Conway case the Supreme Court, Appellate Division, reversed the jury award of damages in the sum of $2,500.00 for the infant and $75.00 for medical expense. The plaintiff was standing in a line extending from the vice-principal's desk out into the hall. A monitor was in the office at the moment. Several boys were scuffling and the plaintiff was thrown backwards into the jamb of a closing classroom door. The complaint alleged inadequate supervision. The court held that all movements of pupils need not be under constant scrutiny, and closer supervision might not have prevented the accident. Furthermore, negligence is relative to time, place, and circumstance. In the Sanchick case to impose negligence would be tantamount to insuring the safety of the child.

Buildings, playgrounds, and equipment. In New York the statutes impose a duty upon the board of education to provide and maintain buildings, playgrounds, and equipment in a reasonably safe condition. In fact, the Wahrman case, which was the first case to depart from the immunity doctrine, pertained to the unsafe condition of a building. Another leading case in
This area is the Lessin case. This decision held that the maintenance of school premises and facilities in a reasonably safe condition cannot be delegated, and the school is liable for the nonperformance of such maintenance. The court had this to say:

The Board of Education of New York is a governmental agency, not a civil agency of the State. Even where the rule is maintained that civil divisions of the state, when engaged as delegates of the state in the discharge of governmental functions are not liable for the acts of their agents and contractors, the rule has not been extended to exempt a governmental agent from liability for its dereliction. The state has created the board of education as a corporate agent to discharge governmental functions. No exemption from responsibility for dereliction in the discharge of a corporate duty has been granted. The responsibility of the individual agents and officers of the state has been transformed into a corporate liability.

The members of the board cannot discharge that duty collectively without the intervention of agents or employees, but the duty of the board is not complete when it appoints such agents or employees. It acts through them. If they fail to discharge properly the functions assumed by the board, the board is responsible for such failure, aside from any rule of agency. The board has in such case failed to perform a duty imposed upon it by law, and liability may be predicated upon its own wrong.

In the Scully case an elderly woman fell while descending the steps of an auditorium after watching a movie held at night. The complaint alleged the maintenance of the building in a dark and unsafe manner. The lower court held the state responsible; however, the appellate court reversed the decision because there was no defect in the stairs. When a six year old boy was injured while playing on a defective fire escape door, negligence on
the part of the school was shown and so the board was held liable. In the Edkins case an apron was defined as equipment to be furnished by the district. A fifteen year old boy while working on a lathe caught his sweater in the machine. In trying to extricate himself his thumb was amputated. No apron was furnished although this was the general practice. The trial court found for the plaintiff. The Supreme Court, Appellate Division, reversed on the law and directed dismissal. However, the Court of Appeals affirmed the trial court's decision. The Court of Appeals held that the statute required the board to furnish such apparatus, maps, globes, books, furnishings, and other equipment and supplies as may be necessary for the proper and efficient management of the school. It was its duty to provide such equipment, including aprons. When the school contracted for the use of an unsafe wagon as a means of transportation, the board was liable for failure to provide proper equipment. A kindergarten student fell from the stage of an auditorium while practicing rhythms. The court held the district not liable for maintaining a dangerous condition. The furnishing of a standard wheel chair was held to be permissible, if it was not defective. School districts were required to use ordinary care in maintaining school property.

Supervision of students. Under the statutes in New York it is the duty of the school to supervise the conduct of
the students while on the school grounds. In the Ferrill case a seven year old girl was on the slides during the noon hour recess under the supervision of two teachers. Near the top, the lead child did a "belly whopper" and kicked the defendant off the slide. There were between 125 and 150 children on the playground under the supervision of two teachers. Neither teacher saw the accident. The Supreme Court, Appellate Division, reversed the lower court and ordered a new trial. The court held that the school district owed no duty to provide more slides than now present. It was the board's duty to provide adequate supervision. The question of adequate supervision was a question of fact to be determined by a jury. The case was reversed because the appellate court could not determine if the jury found against the school district for failure to provide more slides or to provide adequate supervision. In another case the board was held not liable when it had appointed competent personnel. The board was not required to segregate a mentally retarded pupil into a special class.

A more fundamental question is the adequacy of the supervision. Negligence is relative as previously noted. In the Silverman case the plaintiff had attended a physical education class and was walking to the locker room. The instructor had gone into the locker room. There were 200 to 250 students present. Usually the "difficult" students were separated, but not on this occasion. Two of the students had a history of
trouble. The municipal court awarded $900.00 damages to the plaintiff. In an appeal, the Supreme Court, Appellate Division, affirmed the decision holding that the question of adequacy of supervision was for the jury. Further, there was ample evidence to show the foreseeability of the incident and, with adequate supervision, the accident would have been prevented. In another case a six year old boy was injured while playing on the defective door of a fire escape. The facts were that at the noon hour the class was playing outside without teacher supervision, although the superintendent had so instructed. The classroom teacher supervised by looking out the window and could not see the fire escape. The jury found the board negligent in not providing adequate supervision. The trial court set aside this verdict, which was later upheld by the Supreme Court, Appellate Division, in a split decision. The Court of Appeals reversed the appellate court. The court held the board negligent. The failure of the teacher to supervise did not break the causal relation between the defendant's conduct and plaintiff's injury. The board was not responsible for the negligence of the teacher except under section 3023. The court did not hold the teacher liable because of a lack of a motion, but as a matter of law she was clearly negligent. In the Fein case a high school student injured himself when he fell from a chinning bar. In an optional exercise he completed twelve chins and fell six inches to the floor. He lost his balance
and twisted his back resulting in a ten months' stay in the hospital. The complaint charged a lack of supervision and a failure to provide mats. The jury found for the plaintiff, but the trial court dismissed for lack of evidence. There appears to be some discrepancy as to whether he fell or jumped. The Supreme Court, Appellate Division, upheld the dismissal, but this was reversed by the Court of Appeals. The court held that there was adequate supervision, but the provision of a mat was properly a question for the jury. The supervision of the noon hour recess by a janitor was held to be inadequate.\textsuperscript{88} There were no rules for the noon hour. A boy broke his arm when he fell seven feet from the mat after being propelled into the air by the janitor. The Supreme Court, Appellate Division, reversed the lower court's dismissal of the suit. The court held that the board must select adequate persons to supervise. The board is responsible for the acts of the janitor as he was their representative. The reasonableness of this was a question for the jury. When the teacher was having a conference with the parent, the evidence was insufficient to show negligence on the part of the district.\textsuperscript{89} When a boy was injured in a scuffle while standing in a line and supervision was present, the court held that it was impossible to guard against every act.\textsuperscript{90} In the Barbato case a class of twenty-five kindergarten pupils was doing rhythms on the stage.\textsuperscript{91} The teacher was nearby playing the piano, when a child fell from
the stage. The students were under control, had been instructed, and the teacher was experienced. The court held that this did not constitute negligence nor was the activity inherently dangerous. In another case a boy was struck by a bat while chasing a ball.\(^9\) The supervising teacher was thirty feet away distributing milk. The complaint charged negligence because the teacher was not actually supervising. The jury found for the plaintiff, but the trial court reversed the verdict stating that general supervision was adequate. The teacher could not foresee the accident, and it would have happened even if the teacher were closer. The teacher is not required to constantly supervise every aspect of play at all times. In an action against a school district, the trial court held for the plaintiff, a six year old who fell from a horizontal ladder. The Supreme Court, Appellate Division, dismissed the claim on the grounds that more specific supervision was unreasonable and the apparatus was suitable for play.\(^9\) In an opinion by the counsel for the educational department the following was stated:

Where parents or other adults are used as chaperons or assistants to the teacher on field trips by school bus, and there is an accident causing injuries, the school district, in an action against it for negligence, may use the defense that the district had placed the children under the supervision of trained and competent individuals.\(^9\)

The presence of a competent and qualified teacher is generally construed as fulfilling the obligation of providing adequate supervision. In the Graff case a high school student was struck
in the eye by a soft rubber ball. The Supreme Court, Appellate Court, reversed the lower court's judgment for the plaintiff. There appeared to be no actionable negligence on the part of the instructor, and a rubber ball was held not to be an inherently dangerous instrument. In another case the county court reversed the lower court's payment of medical damages to the plaintiff. While exercising on a "gym horse", a fourteen year old boy fell and broke his arm. The complaint alleged negligence on the part of the defendant to provide adequate supervision and instruction. The facts showed that the boy had been given instructions, and performed the exercise before, and the instructor was only five feet away. The court held that the district is only liable if negligence is shown. Under section 2560 the court held the district not liable for injuries to an infant incurred by hitting another swimmer under the water. In this case the court did not feel the instructor was negligent. An interesting point of law was discussed in the Luce case. A young girl who had a history of broken arms previously had requested no rough games, but had not obtained a doctor's certificate to that effect. While playing "jump the stick" relay, she fell and broke her arm. The complaint alleged negligence on the part of the board, the supervising principal and the physical education teacher. The Supreme Court, Appellate Division, reversed the trial court's decision for the plaintiff. The court indicated that the rules must
be of a practical nature and cannot cover every detail. The principal did not have the authority to direct the gym class since this was a separate department. The physical education teacher was under a direct duty to exercise reasonable care and foreseeability. Such a question was for a jury; the other points confused the issue. In reference to section 3023 the court said: "In view of section 3023 to indemnify there seems to be little practical value in distinguishing the liabilities of the respective defendants. However, this case calls for it and individual liability must be determined without regards to the indemnification statute."  

Supervision relates also to the provision and enforcement of policies and regulations. Several cases dealt with this area and the board's responsibility therefor. In a 1960 case the plaintiff brought action against the school board for lack of alleged supervision. A second grade girl was struck in the face by a baseball bat, which was swung by another girl. The girl that swung the bat was from an older group. The second grade teacher was standing nearby when the accident occurred. The older girls, who had been excused from study hall, had obtained the softball equipment without procuring the permission required by the rules of the board. Contrary to the rules of the board, no teacher was supervising these older girls. In a lower court the jury found the district liable and awarded damages of $5,000.00. The reviewing court modified the
decision by ordering a new trial unless the board agreed to increase the damages to $10,000.00. The court said: "The mandate of the Legislature to establish rules means more than to write them in a book.... Reasonable efforts must be made by the Board to enforce salutary and adequate rules; and a liability may be incurred for a failure to enforce as well as make a rule."¹⁰¹ In a case where the plaintiff was injured by the accidental discharge of a gun, the board was held liable for failure to establish adequate rules.¹⁰² The board must establish rules concerning the inspection and regulation of dangerous instrumentalities.

Generally, when the board of education makes no effort to supply after school supervision, the board is not liable for any accidents that may occur. The contention invoked in many of these cases was that the plaintiff assumed the risk himself when committing the act resulting in the injury. In a case where a nineteen year old boy was injured while playing basketball, he should have known the conditions under which he played.¹⁰³ The plaintiff had played there many times. Assumption of risks consists of actually doing a deed with foresight of consequences. The boy, no infant, had knowledge of the physical arrangement of the gym and had an appreciation of the dangers involved. The court dismissed the complaint against the defendants. In another case a seventeen year old boy came onto the playground after school to play handball.¹⁰⁴ He was
struck by a bat slipping from the hand of a stick ball player. The Supreme Court, Appellate Division, reversed the trial court's jury verdict for the plaintiff. The court held that, when the school board kept the playground open after school, it was under no duty to supervise. The school district is not liable for damages caused by the conduct of a participant on a playground without supervision. The plaintiff had assumed the risk when he entered the playground. In another case a young boy was injured in the school yard after school when struck by a bicyclist. The trial court left the question of negligence to a jury which awarded damages of $250.00 to the infant and $371.45 to the mother. The Supreme Court, Appellate Division, reversed and dismissed the complaint. The court held that there was no duty on the part of the school board to prevent any particular kind of play. No supervision was attempted; no pretense of supervision was made. The parents knew of the hazards involved in sending their child to the playground. There are natural risks which are to be borne by whom they happen to strike.

Procedural matters. Almost fifty per cent of the cases reported in The Pupil's Day in Court: Review of 1961 pertained to some phase of procedure. The General Municipal Code outlines the statutory requirements for filing a claim against a municipal body, based upon the tort of negligence, in the
In most cases the issues revolved around the claim that was filed after the statutory deadline had elapsed and the sufficiency of the claim notice.

In the Sunshine case the claim was filed after the ninety day statutory period had passed. The plaintiff had injured herself in a fall in the gym. Since the statute gives the court discretionary power to permit the filing of a late claim, the claim was allowed insomuch as the claim was filed within eight months. The statute permits such claims if made within one year. In one case the court allowed a suit even though a period of three years and eight months had elapsed since the time of injury. After the statement of claims was made, the actual particulars of the claim were not filed for another two years. The statute which authorizes late notices stipulates that the claim must be filed within ninety days. The boy was injured in a football game October 17, 1952 and the final summons was served February 25, 1958. The lower court denied a motion to dismiss the motion upon the grounds of a late claim. The Supreme Court, Appellate Division, upheld this denial. The court stated that the board of education knew about the suit all the time. In fact, the board was negotiating a settlement most of the time; therefore, the rights of the board were not prejudiced. On the other hand a claim that was filed sixteen months after the injury was denied. In another late claim case the court approved a late claim although no court order
had authorized the filing of a late claim. The court noted that the board of education had received timely information about the case from several sources. The claim was filed four and one-half months after the accident, but the attorney forgot to get the court's permission to file a late claim. The court noted that this usually nullifies a claim but permitted an amended notice of claim because of the school's knowledge of the accident. In the Martin case a claim that was made nineteen months after the injury was denied under the statute which requires filing within one year. This seems to be consistent with the reasoning in the Brown case where the claim was filed sixteen months after the injury. The father petitioned for the service of the claim, nunc pro tunc. The Supreme Court, Appellate Division, unanimously affirmed the lower court's dismissal of claim. This action was later affirmed by the Court of Appeals. The dicta of the case commented upon the history of section 50-e. The Judicial Council wanted the state law to read, in the case of infants, that a reasonable time after the cessation of the disability be allowed for filing. However, the compromise bill which allowed one year was passed, much to the disapproval of the Judicial Council. In the Lambo case a late claim was permitted, but later reversed upon the submission of new evidence. On December 2, 1958 the plaintiff was injured in a fall during gym class. Upon the evidence that the father had suffered a stroke February 2, 1959,
the trial court permitted a motion to file a late claim. Upon appeal the evidence showed the stroke had occurred February 4, 1858. It was not possible to ascertain whether this was an erroneous belief on the part of the trial judge or a typographical error. The appellate court ruled that the case must be retried.

The sufficiency of notice accounted for a good share of the procedural points upon which litigation was based. Two subdivisions of this are found: (1) the proper receipt of the notice, and (2) material content of the claim.

In the Salner case a suit was initiated against the city of New York and the Board of Education of the City of New York.114 The claim was served upon the city comptroller. The lower court found for the plaintiff stating that the board had immediate notice of the injury. The Supreme Court, Appellate Division, held that the claim was not received by the person designated by the statute. Accordingly, the lower court's order was reversed.

In another case the court permitted a suit which was erroneously served on the city comptroller.115 By inference the court concluded that the school board had been notified in sufficient time, since the board's attorney had examined the plaintiff, and the item was verified by the secretary of the board of education.
After being assaulted by another pupil at school the plaintiff sought permission to file a late claim against the school board. The attorney had filed a claim with the comptroller, but his secretary had forgotten to notify the school board. The school was presumed to have knowledge of the occurrence because a teacher was present, a conference with school officials was held, and a letter was sent to the board informing them of the incident. Since the rights of the board were not prejudiced, the claim was allowed.

In a similar case when an eighteen year old girl was injured but neglected to file a claim within the ninety day period, permission was granted. The Oneida County Court held that the school authorities had knowledge of the injury. The purpose of the statute was to prevent fraudulent or stale claims. In this case the district had time to investigate the claim. Unless the school is definitely prejudiced by the late claim, the court may use discretion toward the claimant. The matter of her age is not too important, because she was a minor and her parents or guardian had to do the filing for her.

In another case the opposite ruling was given. A boy was injured in a bus accident, but no written notice was ever filed. The representatives of the district and the district's insurer investigated, discussed, and negotiated with the claimant. In fact, they arranged for his medical care.
No action was commenced on the case for two years. The court held that the investigation did not waive the statutory requirements of the formal notice. Certainly, it is the right of the board and its insurer to investigate without a formal claim. It may be possible to waive some forms of irregularity but not the notice itself.

An infant's statement of the accident was held not to be a notice of claim under section 50-e. The Supreme Court, Appellate Division, reversed the jury verdict for damages of $1,500.00 for the plaintiff.

When a seventeen year old suffered injuries at track practice, his guardian, ad litem, sued for damages in the sum of $150,000.00 for the infant and $20,000.00 for himself. The complaint alleged negligence on the part of the board, its agents, servants, and employees. At a later date the plaintiff sought to amend the claim to include the teacher. The school sought to block this because under section 3023 the district was bound to "save harmless" teachers, if acting within the scope of their duty. Since the teacher was not truly a real party to the case because of the above statute it was not necessary to amend the claim. In a like case it was held by the Court of Appeals that it was not necessary to serve the claim on the teacher when both the district and the teacher were parties to the suit. "For all practical purposes, even though the suit is in the name of the teacher it is the school
district which is the real party against whom the claim is made. The court granted leave to amend the notice of claim when a single copy of notice had gone to the business manager of the town. The board received the notice from the business manager. The school board was not prejudiced nor fraudently victimized. The court also permitted some change in the bill of particulars but would not permit an increase in the amount of damages asked.

In the case of Horowitz v. Board of Education the notice was sent by regular mail to the school board by the counsel for the plaintiff. The court dismissed the claim on the grounds that the service of the claim was improper because it was not served on a member of the board, nor any trustee or clerk thereof. The failure to comply with the statute could not be waived in any way by the court.

Abatement and/or diminishment of liability. The New York courts have established some principles which may be relied upon as means of defense against the suit based upon negligence. In many cases these defenses are combined or somewhat altered. In several cases the courts have said that the school is legally not responsible for the safety of the child. Nor is the school responsible for establishing elaborate and detailed rules of conduct. It is also held that it is not necessary to be with the students every moment.
The court in New York recognized the assumption of risk rule and made it available to the school as a defense.\textsuperscript{127} The school district is not liable for the acts of teachers, employees, agents and officers if they are acting beyond their scope. And in a few cases the court has ruled that pure accidents or "acts of God" occurred. Judging from the number of cases studied, the prime defense employed was that the omission or commission of the act must give rise to actionable negligence. In the final analysis the question of what is negligent behavior is a question of fact to be determined by the jury or the judge.

D. INSURANCE PRACTICES IN THE STATE

Section 3023 authorizes a board of education to procure insurance or to act as a self-insurer. No mandatory provisions are found for the purchase of liability insurance, but the majority of school boards carry insurance. Most of the policies are of the owner, landlord and tenant public liability type. Some of the awards of damages in New York have ranged from $500.00 to $45,000.00. In the latter case the board had a policy with a $25,000.00 limit. A tax levy was required to pay the remainder of the suit brought by a boy injured in an unusual bicycle accident.\textsuperscript{128}

In 1949 the state comptroller said the following about the purchase of insurance: "Boards of education in a city having a population of less than one million may insure against
its negligence and that of its officers and employees; such a board is not a general insurer of safety of pupils. 129 The matter of carrying insurance or not has had little importance in the development of tort liability in the state of New York.
FOOTNOTES


4 Davis, op. cit., p. 207.


7 Bassett v. Fish, 75 N.Y. 303 (1878), reversed 12 Hun. 209.


11 Ibid., Subd. 14.

12 Ibid., Subd. 14.

13 Ibid., Subd. 14.
14 Davis, op. cit., p. 208.


16 Herman v. Board of Education of District No. 8, 234 N.Y. 196, 137 N.E. 24 (1922).


18 Ibid.

19 McKinney, op. cit., Sec. 2560.

20 Ibid., Sec. 3023.


24 McKinney Consolidated General Municipal Laws of New York Annotated, Sec. 50-e.


26 McKinney Consolidated Education Laws of New York Annotated, Sec. 1709.

27 Ibid., Sec. 2560.

28 Ibid., Sec. 2561

29 Ibid., Sec. 2562.

30 Ibid., Sec. 3023

32. McKinney Consolidated Education Laws of New York Annotated, Sec. 3813.

33. Ibid.

34. McKinney Consolidated General Municipal Laws of New York Annotated, Sec. 50-e


39. Reeder, loc. cit.

40. Massimilian, loc. cit.

41. Reeder, loc. cit.

42. Ibid.

43. Sun, loc. cit.

44. Lee, loc. cit.


30 Ibid.


52 Ibid.


58 See also Lee, loc. cit.


61 Favala, loc. cit.


Ibid.


Sanchick, loc. cit.

Wahrman, loc. cit.


Ibid.

Scully, loc. cit.


Edkins, loc. cit.

Williams v. Board of Trustees, loc. cit.


Favale, loc. cit.


88 Garber, loc. cit.

89 Pelack, loc. cit.

90 Conway, loc. cit.

91 Barbato, loc. cit.


96 Kolar v. Union Free School District No. 9, Town of Lenox, 8 N.Y.S. (2d) 985 (1939).


99 Ibid.


101 Ibid.
102 Govel, loc. cit.


107 McKinney Consolidated General Municipal Laws of New York Annotated, Sec. 50-e.


110 Brown v. Board of Trustees of Hamptonburg School District No. 4, 303 N.Y. 484, 104 N.E. (2d) 866 (1952).


124 Lutzken, loc. cit.
Cambareri, loc. cit.
Kantor, loc. cit.
Leibowitz, loc. cit.

125 Germond, loc. cit.

126 Barbato, loc. cit.
Nestor, loc. cit.
Conway, loc. cit.

127 Fein, loc. cit.
Maltz, loc. cit.


CHAPTER VI

LIABILITY IN THE STATE OF CALIFORNIA

The state of California, which did not enact its first abrogation statute until 1923, holds one of the leading positions in the modification of tort liability. California was the only state that expressly passed legislation to abolish immunity and has maintained this role virtually unchanged since inception. Of the ninety-six cases granting recovery by statutory authority Davis reported that thirty-two came from the State of California.¹ In another classification Schaerer rated California as one of the liberal states in the United States.² "Because of these statutes abrogating immunity, California, through the years, has usually led in the number of damage suits brought against the school district, although it contests with New York frequently for this distinction."³

A. HISTORICAL DEVELOPMENT

Prior to 1923 a number of lawsuits were being filed against the members of school boards and school trustees on the theory that the board members were personally liable for any injury to students, due to negligence of any policy, building or employee of the school system. In some of these
actions these officers were found liable for personal injuries to pupils of the public schools. Quite naturally, these individuals were becoming alarmed and apprehensive at this development. In addition to being a thankless task and a job without monetary compensation, the possibility of a costly court action was sufficient to cause many school board members to resign.

In order to combat this alarming state of affairs, the state of California enacted a series of statutes designed to ameliorate this situation. Two statutes were passed by the legislature in the year 1923. The "Public Liability Act" made the district liable for injuries to persons and property caused by the dangerous or defective condition of buildings, grounds, and property. At the same session of the legislature, but at a different time, the district was made liable for injuries to any pupil caused by the negligence of the district or its officers or employees. A few years later the lawmakers passed an act making the district liable for injuries or damages caused by the negligent operation of a motor vehicle owned by the school.

"As has been the usual practice when the flood gates of school immunity are open and the flood of court cases tends to engulf the schools, some stopgap method must be made to plug the hold and save the schools." California reacted by passing
a statute in 1931 which restricted the claims by establishing procedural guidelines.

It was in this era that the school districts were given a mandate to purchase liability insurance to protect the district against tort liability. This was mandatory legislation as contrasted to the usual permissive provisions.

In 1931 the statute which made the district liable for injuries to pupils for negligence was amended. The words "to any pupil" were deleted and the words "on account of injury to person or property" were added, thus greatly broadening its coverage.

California has long provided for the payment of claims against the district. The statutes also provide for legal service.

In recent years California has added various acts to the already complex field of tort law. Article II of the Government Code was added in 1959. This article deals with the presentation of claims. In 1961 further amendments were added to this article.

It was not possible to arrive at a precise general statement of the law in California at this time. In fact, the area of claims procedures is vague, overlapping, and contradictory. "The present law of California governing the presentations of claims is complex, inconsistent, ambiguous,
difficult to find, productive of voluminous litigation, and often results in the denial of just claims."^5

From the historical data it appears that California has completely abrogated its immunity from tort liability, and in the subsequent sessions of the legislature has sought to refine and clarify its status. At this moment it appears that further clarification is needed. The break with immunity has been so thorough that the liability of the school district in California is quite similar to the liability of individuals or private corporations.

B. RELEVANT STATUTES

When looking at the statutes of California many major recodifications are found. Originally, the school laws were found in The Political Code in the year 1872. They remained in The Political Code until 1929. Since the 1929 Code two major recodifications are found, the 1943 Education Code and the 1959 Education Code. Because of these major rearrangements confusion results when looking for a given section under cross referencing. The location of desired materials was difficult to find.

The first abrogation statute passed in 1923 is sometimes called "The Public Liability Act." This bill which is similar to some "safe place" statutes read as follows:
Counties, municipalities, and school districts shall be liable for injuries to persons and property of public streets, highways, buildings, grounds, works and property in all cases where the governing or managing board of such county, municipality, school district, or other board, officer or person having authority to remedy such condition, had knowledge or notice of the defective or dangerous condition of such street, highway, building, grounds, works, or property and failed or neglected, for a reasonable time after acquiring such knowledge or receiving such notice to take such action as may be reasonably necessary to protect the public against such dangerous or defective condition.

During the same session of the state assembly, but at a different time, the following statute was passed:

Boards of school trustees, high school boards, junior college boards, and boards of education are liable as such in the name of the district for any judgment against the district on account of injury to any pupil arising because of the negligence of the district or its officers or employees, and they must pay any judgment out of school funds.

In the Ahern case it was held that these two statutes were separate entities and were to be construed individually. Section 1623 dealt with the negligence involved in injuries to pupils while "The Public Liability Act" dealt with the liability toward the general public.

In 1929 the school district was made liable for any damage or injury to persons or property caused by the negligent operation of a motor vehicle by any officer, agent, or employee while acting within the scope of his duties. At the same time that the district was made liable for the negligent operation of motor vehicles, the district was given the power to purchase
insurance to protect itself against the liability as given above. The payment of such a premium was considered a proper charge against the school district.

Because of the apprehension existing among the board members during the early part of the century, the statutes passed were very explicit in absolving these officers of personal liability. Two statutes were enacted in 1923 which pertained to the liability of board members. One dealt with negligence: "No member of any board of supervisors, board of trustees, city council or board of school trustees, shall be liable for the negligent act or omission of any appointee or employee appointed or employed by him in his official capacity." In a similar vein and contained in the same act, "No member of the board of school trustees and city boards of education shall be held personally liable for accidents to children going to or returning from school or on the playgrounds in connection with school work." In the same year the district attorney of the county was instructed to defend the district or any members of the board without fee or charge.

In 1931 the school district was given the power to insure against the liability of the district or board members for the negligence of the district or its officers, agents, or employees while acting within the scope of their duty.
The state assembly, in 1931, amended The Political Code of 1923, sec. 1623, p. 298. Formerly, the liability was limited only to pupils, but the new amendment expanded the coverage to "persons or property." 13

In an act designed to accompany "The Public Liability Act" of 1923, California enacted in 1931 the method of filing a claim based upon this liability. It read as follows:

Whenever it is claimed that any person has been injured or any property damaged as a result of the dangerous or defective condition of any public street, highway, building, park, grounds, works, or property, a certified claim for damages shall be presented in writing and filed with the clerk or secretary of the legislative body of the municipality, county, city, or school district, as the case may be, within ninety days after such accident has occurred. Such claim shall specify the name and address of the claimant, the date and place of the accident, and the extent of the injuries or damages received. 14

In a further effort to restrict the number of actions being brought against the school board, the state of California passed a restrictive statute pertaining to the liability for negligence.

The governing board of any school district is liable as such in the name of the district for any judgment against the district on account of injury to person or property arising because of the negligence of the district, or its officers, or employees in any case where a verified claim for damages has been presented in writing and filed with the secretary or clerk of the school district within ninety days after such accident has occurred. The claim shall specify the name and address of the claimant, the date and place of the accident, and the extent of the injuries or damages received. 15
This section was in effect until 1959 when the procedural aspects were shifted to another section of the code.

As the reader may be beginning to understand, the state of affairs in California is elusive and hard to elucidate with any feeling of accuracy and thoroughness. In fact an article entitled "Claims Against Public Entities: Chaos in California Law" was an apt title.\(^\text{16}\) The author of this article stated that there are more than 170 separate tort liability provisions dealing with the various types of government. They are of a great variety. Some of them duplicate each other, others contradict, and some establish variable requirements for the same type of claim. Since the beginning of the claim provisions, litigation has increased four times. There appears to be a desperate need for new legislation in this area.

Primarily, the statutes pertaining to the tort liability of school districts were found in two codes. The 1959 Education Code and The Government Code were the two major sources although the statute relating to the liability of the school district for negligent operation of a motor vehicle was found in The Vehicle Code. Some of the current enactments embodied parts of the previous laws which have been discussed above. In addition the new code utilizes a new and different numbering system. All of the following situations are from West's Annotated California Code.
Section 903 of The Education Code, formerly Section 1007, makes the district liable for negligence. It reads as follows:

"The governing body of any school district is liable as such in the name of the district for any judgment against the district on account of injury to person or property arising because of the negligence of the district or its officers or employees." 17 This statute had its derivation in The Political Code of 1923, sec. 1623.

West's Annotated California Education Code, section 904, outlines the payment of claims against the school district. 18 The board is given the power to pay claims out of the school funds subject to the constitutional limitations. If the claim is too large to be paid in one year, the board may budget it for the ensuing year. If this presents an undue hardship on the board, the board may amortize the payments over a three year period, and the rate of interest shall not exceed four percent per annum. (Rate of interest held unconstitutional in Welch v. Dunsmire, 326, P. 2d. 633, 1958). 19 This section also had its origin in The Political Code of 1923, sec. 1623.

Section 906 makes it the duty of the district attorney to defend suits against the district. "The district attorney of the county in which a school is located shall, without fee or other charge, defend the district in any suit brought for injury to any pupil for any cause." 20 Section 906.5, which was
added in 1961, authorized the services of an attorney and that compensation of said attorney was a proper use of funds.21

Very similar to the old statute was section 1041 which dealt with the personal liability of board members. "No member of the governing board of any school district shall be held personally liable for accidents to children going to or returning from school or on the playground or in connection with school work."22

Another section held the members of the board of education not personally liable unless there is negligence on their part.23

Section 1043 made it the duty of the district attorney to defend board members or district employees for any act, or omission, in the line of his official duty.24

The district was required to carry liability insurance for negligence. Section 1045 covers this area as follows:

The governing board of any school district shall insure against the liability (other than the liability which may be insured against under the provisions of Divisions 4 and 5 of the Labor Code) of the district and against the personal liability of the members of the board and of the officers and employees of the district for damages to property or damages by reason of the death of, or injury to, any person or persons, as the result of the negligent act by the district, or by a member of the board, or any officer or employee when acting within the scope of his office or employment, and may also insure against the personal liability of the members of the board of any officer or employee of the district as an individual, for any act or omission performed in the line of official duty. The insurance may be written in any insurance company authorized to transact the business of insurance in the state, or in a nonadmitted insurer to the extent and subject to the conditions prescribed by Sec. 1763 of The Insurance Code.25
In the case of cities having a population of more than 500,000, they may act as self-insurers and provide the money for the liability of the district, officers, agents, and employees from their own funds. 26

California imposed a strict manner of supervision upon the teachers. "Every teacher in the public schools shall hold pupils to a strict account for their conduct on the way to and from school, on the playgrounds, or during recess." 27

West's Annotated California Government Code spells out other provisions relative to the tort liability of local entities. In attempting to ascertain which statute is controlling, the reader should remember that as a point of law the specific statute usually is controlling over the general enactment. However, various parts of The Government Code do pertain to the school district. At this time the procedural matters seem to rest in this part of the California laws. The old "Public Liability Act" also has been transferred into this code.

Section 53050 defined the terminology of the act. A person is defined so as to include school buildings, playgrounds and property. A local agency means any school district. 28

Section 53051 makes the agency liable for dangerous or defective conditions of public property. This act is very similar to "The Public Liability Act" passed in 1923. It reads as follows:
A local agency is liable for injuries to persons and property resulting from the dangerous or defective condition of public property if the legislative body, board, or person authorized to remedy the situation:
(a) Had knowledge or notice of the dangerous or defective condition.
(b) For a reasonable time after acquiring knowledge or receiving notice, failed to remedy the condition or take action reasonably necessary to protect the public against the condition.

In section 53052 the claimant is told the manner of presentation of a claim.

When it is claimed that a person has been injured or property damaged as a result of the dangerous or defective condition of public property, a written claim shall be presented in conformity with and shall be governed by Chapter 2 of Division 3.5 of Title 1 of The Government Code.

At one time this procedure was given in sec. 53053 but is now found in Chapter 2 of Division 3.5 of Title 1.

The Government Code sec. 53054 reads that "the fees and expenses of defending the suit are lawful charges against the local agency."

Section 53055 deals with the payment of claims and compromise of disputed claims. "When a legal liability is admitted or disputed the local agency may pay a bona fide claim or compromise a disputed claim out of public funds, if the attorney for the local agency approves of the compromise."

The Government Code, Title 1, Division 3.5, Chapter 2, secs. 711, 715, and 716 are relevant to the filing of claims against local entities. The bulk of these sections were passed in 1959, 1961 and 1963.
Section 711, which was passed in 1959 and amended in 1961, outlined the content of a claim.

A claim shall be presented by the claimant or by a person acting on his behalf and shall show:
(a) The name and post office address of the claimant;
(b) The post office address to which the person presenting the claim desires notices to be sent;
(c) The date, time, place, and other circumstances of the occurrence or transaction which gave rise to the claim asserted;
(d) A general description of the indebtedness, obligation, injury, damage, or loss incurred so far as it may be known at the time of the presentation of the claim; and
(e) The amount claimed as of the date of presentation of the claim, together with the basis of computation thereof.

The claim shall be signed by the claimant or by some person on his behalf. Claims for supplies, materials, equipment or services need not be signed by the claimant or on his behalf if presented on a billhead or invoice regularly used in the conduct of the business of the claimant.

A claim may be amended at any time, and the amendment shall be considered a part of the original claim for all purposes.33

In 1959 the State of California passed a new law concerning the deadline for filing a claim. The prior statute established the deadline as of ninety days from the date of the occurrence complained thereof. The new act sets one hundred days after the occurrence as the deadline for filing.

A claim relating to a cause of action for death or physical injury to person or to personal property or growing crops shall be presented as provided in Section 714 not later than the one hundredth day after the accrual of the cause of the action. A claim relating to any other cause of action shall be presented as provided in Section 714 not later than one year after the accrual of the cause of action.34
Section 71G makes an allowance for presentation of claims after the expiration of the deadline, in the case of claimants under disability.

The superior court of the county in which the local entity has its principal office shall grant leave to present a claim after the expiration of the time specified in Section 715 if the entity against which the claim is made will not be unduly prejudiced thereby, where no claim was presented during such time and where:

(a) Claimant was a minor during all such time; or

(b) Claimant was physically or mentally incapacitated during all of such time and by reason of such disability failed to present a claim during such time; or

(c) Claimant died before the expiration of such time.

Undoubtedly, the change was precipitated in part by the strict interpretation of the deadline by the courts of California. In fact, one case was denied because it was filed on the ninety-first day. In this change of rationale the state of California appears to be doing by statute what the judicial authorities of New York are doing.

Section 801 describes the time and verification of filing a claim against an individual for his carelessness or negligence concerning the dangerous or defective condition of any public property. A verified claim must be filed with the proper officer within ninety days. The contents of the claim "shall specify the name and address of the claimant, the date and place of the accident and the extent of the injuries or damages received."
contains the act concerning the school district's liability for the negligent operation of a motor vehicle.

Any public agency owning any motor vehicle is responsible to every person who sustains any damage by reason of death or injury to person or property as the result of negligent operation of the motor vehicle by an officer, agent or employee or as the result of the negligent operation of any other motor vehicle by any officer, agent or employee while acting within the scope of his office, agency or employment.39

Section 17003 grants the power to purchase insurance to protect against the negligent operation of motor vehicles. "Any public agency may insure against liability under this chapter in any insurance company authorized to transact the business of such insurance in the State of California, and the premium for such insurance shall be a proper charge against the respective general fund of the public agency."40

C. CASE LAW

As contrasted with New York, California has an elaborate statutory framework upon which the tort liability of a school district rests. Due in part to the complexity and elusive character of the statutes, California courts hear a large number of tort liability cases each year. New York and California compete for the largest number of cases heard in this area of law.

Liability in general. A case heard in 1961 described
the general feeling of the courts in California toward liability. The court stated that the doctrine of immunity must be discarded as an unjust anachronism which exists only through inertia. Accordingly, the rule is that when there is negligence, liability results. In fact, nonliability was the exception. In another case the court held that the district was liable for all damages to persons or property caused by ordinary negligence. The incident need not occur on the school grounds. In the Grover case the plaintiff, who was a student, was injured in an airplane crash while taking an aviation course. Although the operator of the airplane was a private independent contractor, the district was held liable since it was deemed that the district had sufficient control of the operator.

From the above examples and from the general tenor of the statutory enactments, it may be said that California is one of the most liberal states in its interpretation of the tort liability of a school district.

Liability for torts of officers, agents and employees. California statutes impose liability upon the district for the torts of its officers, agents and employees provided that they are working within the scope of their assignment. The district was held liable for injuries occurring to a person as a result of negligence. This is a very unusual result because Respondeat Superior does not apply in relationship of an indepen-
dent contractor. In another case the district was held liable for the negligent act of a teacher. In this case a small group of junior college students practiced tennis after school as part of their physical education course. Since the school bus had gone, arrangements were made for students to drive these persons home, and the school would reimburse them for this travel expense. The car used in this case was a sports roadster, "a hot rod" with no fenders, no horn, no top, faulty lights and in general poor condition. On the way home a fatal accident occurred. The basic question was whether the teacher used ordinary care under the circumstances in permitting this means of transportation to continue. The evidence disclosed that the teacher knew of the unsafe condition of the car and of its "reckless" driver. The jury determined that this was negligence and that said negligence was the proximate cause of the accident. The court of appeals affirmed the lower court's judgment of damages of $5,000.00 to the plaintiff and $1,500.00 to another rider.

When an instructor gave a student a defective oxygen gauge on an oxyacetylene tank which exploded, the district was held liable under the "Public Liability Act." The plaintiff lost an eye in the accident. The decision held that the district was liable for maintaining a dangerous and defective condition. The supreme court upheld the decision but reduced damages from $35,000.00 to $16,000.00.
Even though the pilot who taught the cross-country flying was an independent contractor, it was held that the district had sufficient control of his actions so as to make the district liable for a student injured in a crash.47

Generally speaking, the statutes and judicial interpretations of the State of California have imposed liability upon the district for the negligent acts of its agents, officers, and employees as long as they were acting within the scope of their duty.48

Essential elements of a negligence claim. In order to maintain an action based upon negligence, the necessary ingredients must be present. These elements are: (1) a legal duty, (2) a failure to perform up to standard, (3) the act must be the proximate cause, and (4) actual damages.

Section 1623 of The Political Code of 1923 imposed the duty upon the school district to maintain its buildings and property in a safe condition. This act made the district liable for negligent acts which injured pupils. When the plaintiff lost two fingers in a saw, he charged negligence on the part of the defendant.49 The actual determination of negligence was put to the jury which awarded damages of $3,000.00. The supreme court affirmed the decision. The statutes of California impose a duty upon the schools to act in a reasonably safe and prudent manner.
The Ballman case illustrated the reasoning of the court as it pondered a negligence claim.\(^{50}\) The plaintiff, a student in a physical education class, fractured her skull while doing a "rolling over two" acrobatic stunt. The court specified the following test for negligence: (1) care is defined as what a person of ordinary prudence would do under the same circumstances; (2) ordinary care is relative to the instant case; and (3) no absolute standard can be determined, as individual abilities must be considered. The superior court awarded damages of $15,000.00 which, while affirmed by the supreme court, was reduced to $5,000.00.

When a fifteen year old girl was struck by a truck as she was running toward the athletic field for class, the school district was held negligent for allowing a dangerous condition to exist.\(^{51}\) The school permitted eighteen trucks a week to cross the grounds without any precautionary practices. The court held that this was not the conduct of a prudent person, and that the school must take steps to protect its students. After a long legal battle with two reversals, the supreme court affirmed the judgment and damages of $20,000.00.

Ordinary care is determined by the facts of the instant case. While playing a supervised game at recess time under the supervision of a teacher less than fifty feet away, the plaintiff was struck by a bicyclist.\(^{52}\) The teacher and the school
was aware of this practice of riding bicycles on the playground. The plaintiff alleged the maintenance of an unsafe and dangerous playground. The court held that the teacher was negligent for permitting the boys to ride their bicycles, and that sufficient evidence existed to permit recovery against the district. Again the test was what would a person of ordinary prudence do in the same situation. The appellate court affirmed the superior court's judgment and damages of $1,500.00.

Foreseeability is another factor that the courts look for in the determination of negligence. It is not essential that the specific event be foreseeable but that the possibility of damage is present. While a group of 100 to 125 children were playing under the supervision of one teacher, a boy had his leg twisted and broken. The trial court held the teacher negligent for not exercising ordinary care or prudence. The children were carelessly and improperly cared for and supervised; therefore, the district was negligent for not providing proper supervision. The fact that a third party was the immediate cause of the accident did not break the chain of causality. Even the willful misconduct of the actor did not absolve the district, because adequate supervision may have prevented the accident.

Some of these cases seem to drift away from the concept of foreseeability and into the concept of proximate cause, perhaps because there is relationship between these two concepts. In one sense, almost nothing is quite unforeseeable,
since there is a very slight mathematical chance, recognizable in advance, that even the most freakish accident will occur. In another, nothing is entirely foreseeable, since the exact details of a sequence of events never can be predicted with complete omniscience. What is meant is something between the two: that the consequence must be a normal, substantial part of the risk, which a reasonable man would recognize as fairly to be taken into account. But while it is comparatively easy to say that the aggregate of all possible consequences amount to a risk against which he should guard, it is a much more difficult thing to determine the importance of a particular result as a material part of that risk.

As has been said, there must be some reasonable connection between the act or omission of the defendant and the damages which the plaintiff has suffered. This connection usually is dealt with by the courts in terms of what is called "proximate cause." This is merely the limitation which the courts have placed upon the actor's responsibility for the consequences of his conduct. As a practical matter, legal responsibility must be limited to those causes which are so closely connected with the result and of such significance that the law is justified in saying that they were foreseeable. It is not surprising that courts have not found the problem easy of solution.

The negligence of a driver who struck and killed a school
boy was adjudged as not being foreseeable on the part of the school district. The proximate cause of the injury was the driver, not the failure of the school to provide transportation. Nor was the fact that the boy was enrolled in the wrong school sufficient to show negligence.

The court of appeals upheld the superior court's dismissal of a case where the chain of events was broken by an independent act. The plaintiff was injured by an explosion of chemicals which he had received from two boys who had stolen them from a high school supply room. The court held that if the defendant knew that the intervening act was likely, the original act may be the proximate cause. However, the stealing of the chemicals could not reasonably be anticipated; therefore, this broke the chain of events.

If a reasonably prudent person could not foresee the event, then liability does not attach. The plaintiff sought to prove negligence on the district when he was struck by a baseball bat while playing with other children. The court held that negligence must be proven and the school was not the insurer of the safety of the child. The charge must clearly state the facts of negligence. The appellate court affirmed the superior court's sustaining of a demurrer to the plaintiff's claim, and the supreme court refused to hear the case.
The question of the proximate cause came up on the Ziegler case. A thirteen year old boy fell or was pushed while sitting on a railing above a stairwell. The boy died from injuries. The school authorities knew that students would sit on this rail and had warned them of the dangers thereof. The court held that it was not necessary to foresee the specific accident but only a general type of trouble. Nor was the fellow student's intervening act more than a concurring cause. The case was first heard in 1959 where it was alleged that the school premises were in a dangerous or defective condition. This action was dismissed but a retrial was heard on the charge of inadequate supervision. In the second trial the critical question concerned the assumption of risk instruction that had been given the jury. The court held that the evidence indicated that the boy knew of the danger involved and had accepted this risk.

Ordinary negligence may be the proximate cause of an accident as was held in the Lehmuth case. The student body of a junior college had arranged a homecoming parade. A student employee was to pull a sound trailer behind his car. The driver failed to attach the safety chains as required by statute and the trailer broke away from the car and injured several pedestrians. The college was exercising supervision but it failed to see the lack of safety chains. The superior court had awarded damages in the sum of $277,844.00 for Virginia Lehmuth and $5,178.00 for Marcel V. Naret. The court
held that the district was liable for all damages to persons and property caused by ordinary negligence and this negligence is not limited to acts committed on the school grounds. The school must reasonably supervise the student body. An eighteen year old is not yet mature of judgment and needs supervision. The failure to require the safety chain constituted direct negligence and was the proximate cause of the accident.

However, the proximate cause must be under the control of the school district. A girl who was waiting for class to begin jumped up on a window ledge which was approximately three feet above the floor. While securely seated, another girl came by and pulled her off, breaking her leg. In this case the court ruled that the proximate cause was the willful misconduct of a third party.

The fact that the coach was not present when a boy was hit in the eye with a handball was held not to be the proximate cause. The game was not an inherently dangerous activity, nor were conditions such as to warrant stopping the game.

The question of the adequacy or inadequacy of supervision is a point of fact, and its resolution will determine whether supervision is the proximate cause. See the infra section on supervision.

Substantial evidence must be introduced before the court will allow a case based upon negligence to come to trial. An
elementary child became sick at school and the officials called home. An older brother who was also home ill answered and was told to come and get his younger brother. The older boy came on a bicycle and while on the way home overturned and injured himself. The plaintiff alleged that the boy was complying with the instructions of the school and was under the control, care and management of the district. The court rejected this claim because there was no evidence to indicate that the officials knew of the illness nor of the means of transportation. It was not held negligent to assume that the boys would walk. Although sec. 13557 holds teachers to a strict account of pupils for their conduct to and from school, the court said "... this section does not impose duty on the teacher or the district to supervise the pupils on the way home." This section refers to the behavior of children, not to their safe conduct to and from school. The court of appeals upheld this verdict upon appeal.

A superior court awarded damages of $17,000.00 to a boy for the loss of an eye when struck by a piece of metal in a shop. The count charged the district with failure to provide a safe place to work. The court of appeals reversed this finding. The court held that recovery depended upon a known danger, or an unknown peril which should have been known by the exercise of ordinary care under the same circumstances by a reasonably prudent person.
In the Underhill case the court held that the plaintiff must prove negligence and must clearly state the facts of the alleged negligence. 64

Standards of care. The courts of California have ruled many times on the question of what standards are to be applied. In general they agree that the standard is what an ordinarily prudent person would do under the same circumstances. Naturally, this is a question for the jury to decide in any one case. Some examples of this test are given below.

An eleven year old boy was playing football and ran into a protruding bolt on a flagpole and as a result of the injury charged the district with failure to provide safe property and negligence in maintaining said flagpole. 65 The superior court awarded damages in the sum of $250.00 for the minor and $179.00 for the father. However, the court of appeals reversed this decision and stated that it was not reasonable to build and maintain premises so as to preclude the possibility of injury. The plaintiff must prove that the defendant had knowledge of the alleged unsafe condition and had failed to remedy said condition. Authorities are required to use only ordinary care in maintaining property.

During the free play noon hour recess a touch football game between the boys of the seventh and the eighth grade was engaged in by boys ranging in weight from eighty-five to 190 pounds. 66 One of the boys was struck in the abdomen necessi-
tating removal of the spleen and one kidney. The superior court in a jury trial awarded damages in the sum of $7,500.00 for the minor and $800.00 for the father. Upon appeal the supreme court reversed the decision. In determining ordinary care the supreme court found the following facts. In physical education classes the boys were instructed in playing football. The two coaches acted as officials. The method of grouping was a convenient, practical and widely used procedure. The exponent charts may give a wide range in any one factor. Touch football is not an inherently dangerous activity. The instructors were carefully selected, experienced and competent teachers. Under these facts there could be no legal basis for negligence. Judge Carter, dissenting, maintained that this was a fact finding case for a jury and their reasonable minds.

In a case where the teacher was out of visual contact of his class for thirty seconds, the court ruled that this absence was not a violation of ordinary care.67 As a class ran around the corner and out onto the playground a boy was pushed, fell and lost two teeth. The lower court dismissed the charge against the teacher but awarded damages of $5,270.00 for the minor and $195.00 for the father. The court of appeals held that the evidence was insufficient to show that the lack of supervision was the proximate cause of the injury. The standard of care is what a person of ordinary prudence would do under the same circumstances. The school is not liable for
the misconduct of the third party. In a dissent by Judge Draper it was stated that, if the teacher had been present, it was a reasonable inference that the injury would have been avoided because there would have been no running. It is not necessary to prove that the very injury was foreseeable.

The school district was held to be using ordinary care when a third grade boy lost an eye while hiding in an ornamental palm tree in an isolated part of the playground.

There was a rule prohibiting playing in this area, the plaintiff was familiar with this rule, and there were two teachers supervising 200 pupils at the time. The court of appeals reversed the lower court which had awarded damages of $15,000.00 to the plaintiff. The count alleged the maintenance of dangerous or defective conditions. The court held that liability attaches only when using the public property in the ordinary and usual manner. The trees had been there for many years and no injuries had occurred.

Other specific examples of ordinary care were gleaned from other cases in brief. The court held that the teacher was negligent for not using ordinary care in permitting bicyclists to ride among children playing on the playground. When a girl fractured her skull doing an acrobatic stunt, the officials were held negligent for not using the same care as persons of ordinary prudence charged with the same duty.
a case where the teacher allowed students to ride home in a "hot rod" and with a reckless driver, the teacher was held not to be using ordinary care under the known facts. An action was brought by a kindergarten child alleging the maintenance of a dangerous and defective condition and a lack of supervision when the child lost his finger in a gate which was closed by another pupil. The court said that the amount of care shown by the district was that of a prudent person. In a case where a boy was injured by mixing two explosive chemicals, custom was not clear as to what ordinary care was and, therefore, the question should be resolved by the jury. When the school officials knew that the boys were playing "blackout" and did not prevent or try to prevent this, the court ruled that the school was not exercising ordinary care under the circumstances.

In the case of Satarino v. Sleight a seventeen year old boy, rushing from class to the gymnasium, had to cross a busy street and was struck by a car. The appellate court reversed the superior court's non suit and held that the question of liability was for the jury to determine. The court said that the school owed an amount of care to a seventeen year old because of the herd instinct and competitive spirit. The authorities are responsible for the safety of children commensurate with their maturity. In the instant case, children had to cross a heavily traveled street without any safety practices,
and the question of liability was for the jury.

Another principle that the California courts have followed consistently and in large numbers is that the schools are not insurers of the safety of the children or persons using the school. When a third party pulled a girl from a ledge causing her to break a leg, the court held that the school was not responsible. In a similar ruling the court held the school not responsible when a boy pushed another boy down on the playground knocking out two teeth. When an elementary school child was struck by a baseball bat and this event could not have been reasonably foreseen, the school was held not to be the insurer of the safety of the child. The school was held not responsible for the safety of a child when a piece of metal flew into the eye of the plaintiff.

A six year old boy who suffered from cerebral palsy and congenital heart disease fell from a piece of playground equipment and died. The court held that the question of supervision was for the jury, but that the school is not the insurer of the safety of any one child.

Dangerous or defective condition of buildings, grounds, and property. Section 53051 of the California Annotated Government Code imposes liability for the dangerous or defective conditions of public property. This section is very similar to "The Public Liability Act" passed in 1923. As one might
expect, much litigation has sprung from this section.

The school was held liable under this section when a faulty oxygen gauge on an oxyacetylene tank exploded and put out the eye of a student. 81

Property must be used only in the customary and usual way before liability attaches. When a boy ran into a bolt protruding from a flagpole, he charged the district with a dangerous condition of its property. 82 The court held that it is impossible to preclude the possibility of injury, and that the plaintiff must prove knowledge and failure to remedy, a dangerous condition.

The court of appeals affirmed the superior court's decision for the plaintiff who as a P.T.A. invitee fell on a waxed floor and broke her leg. 83 Testimony established that the floor was very slippery. The court held that the waxed floor must be reasonably safe, and the degree of slipperiness is a fact for the jury. The knowledge of conditions when performed by an employee is imputed to the employer. If dangerous conditions are produced by natural causes, acts of God, or third persons, proof of constructive knowledge must be established. That is, it must be shown that the defendant knew of the danger and did nothing to correct it.

The Novack case is an interesting one. 84 On Sunday a boy climbed over a fence to get into a locked playground, and while playing, a large equipment box fell on him. Action was
brought under "The Public Liability Act." The court of appeals affirmed the lower court's judgment of non suit holding that the principle of res ipsa loquitur does not apply, and that there was an absence of evidence of how the accident occurred or of any defect in the box.

A gate which was pushed shut on a pupil's fingers was held not to be a dangerous or defective instrumentality.85

In the Ziegler case an iron stair railing upon which students would occasionally sit was held not to be a dangerous condition despite the fact that students had been warned not to sit upon it.86

The violation of a safety regulation of the Division of Industrial Safety was considered negligence on the part of the school district.87 The plaintiff caught his hand in a printing press in the workshop of a junior high school. He charged the school with operating a press without the required safety device. The court held that the regulation applied to schools, and that this did not place the schools under the direction of the Division of Industrial Safety.

The school was held liable for permitting a dangerous condition to exist when it allowed eighteen trucks a week to cross the playground without any safety precautions.88 An ornamental palm tree with sharp thorns was held not to be a dangerous condition.89 This tree had grown for many years in an isolated part of the playground, and no injuries had resulted
until the instant case. Window ledges which were three feet above the floor and upon which students occasionally sat were not considered a dangerous condition. The liability of the school district is not limited to the school grounds as held in the Lehmut case.

**Supervision.** Under section 13557 of *The California* Annotated Education Code strict supervision is imposed upon the pupils "for their conduct on the way to and from school, on the playground, or during recess." There are many factors to be investigated in this cause of negligence. There must be a duty and a failure to fulfill this duty. Other related elements in this section include: adequacy of care, foreseeability, competent personnel, rules and enforcement, after school hours and location of incident.

The court has held that the purpose of the above statute is to prevent injuries. The court of appeals reversed the superior court's sustaining of a demurrer filed by the defendant. A girl, while eating lunch in the classroom of an elementary school, became engaged in a scuffle and had her arm broken. There was neither a teacher nor an adult present. The court held that the mere absence of a teacher was sufficient evidence of negligence, and that said improper supervision imposed liability upon the school district.

The supervision must conform to the standard of ordinary
care. When a boy had his leg broken by another boy twisting it, he alleged negligence on the part of the teacher. One teacher was supervising 100 to 150 students. The court of appeals affirmed the lower court's judgment of $2,500.00 to the plaintiff. The trial court held that the teacher did not use ordinary care or prudence, and that the children were carelessly, negligently, improperly, and insufficiently cared for and watched. The district was negligent for not providing proper supervision although the specific accident may not be foreseeable. Even though willful misconduct on the part of a third party was the immediate cause, this did not absolve the district of its liability. More supervision might have prevented this misfortune.

The question of adequate supervision was handled in the Lilienthal case. The court of appeals reversed the superior court dismissal of the case. A personal injury suit was brought by the plaintiff who was struck in the eye by a knife that was being played with by another student. The students were sitting outside in a semicircle reviewing a test. The teacher was in front of the class and testified that all the pupils were visible, there was no disorder and the knife was not visible until after the injury. The court ruled that the jury must decide whether the teacher knew or should have known. Did the teacher use the same care as a person of ordinary prudence would have used under the same circumstances? The jury could infer that he
saw the knife or if he had been using care should have seen the knife.

The adequacy of supervision was questioned in the involved Rodriques case. The court of appeals affirmed the superior court's judgment on a jury verdict in favor of the defendant. A six year old boy was found lying unconscious on the blacktop beneath a horizontal ladder. The boy suffered from cerebral palsy with seizures and a congenital heart disease. The teacher had discussed these handicaps with the mother who requested that no one else be told. The plaintiff also stated that he could not climb on things. The court stated that the question of closer supervision was one for the jury. The fact that there was one teacher per seventy-five to one hundred children in a lot 75 by 110 feet was for the jury. The purpose of the law requiring supervision is to regulate students' conduct so as to prevent disorderly and dangerous practices. If the supervisor could not have reasonably anticipated or prevented the accident, it may be immaterial if he was actually present.

The determination of the adequacy of supervision was for the jury in a case where a group of boys were playing "blackout." The boy was partially successful, slipped from his friend's grasp and hit his head and died. The basic issue was whether the defendant was using ordinary care. The court of appeals affirmed the verdict for the defendant although
it questioned this finding.

The teacher was held negligent for permitting boys to ride their bicycles among the children playing at recess time. The appellate court affirmed the superior court's judgment in favor of the plaintiff and awarded damages in the sum of $1,500.00. The teacher who was less than fifty feet away had known of this practice for several months. The court ruled that there was sufficient evidence showing negligence on the part of the teacher. Again, the test was whether a person of ordinary prudence under the same circumstances would do this. What is ordinary care is determined by the instant case.

The court held that the lack of supervision was not the proximate cause when a class went around the corner out of the view of the teacher for thirty seconds.

The school district must reasonably supervise the student body even though the activity may take place off the school premises. The establishment of a rule and the supervision thereof was deemed sufficient. The school is required to exercise reasonable supervision. The fact that matching of the boys involved in a touch football game was done and the game had been supervised by two trained and competent coaches was sufficient to disallow the charge of negligence.

One of the questions presented in the Ziegler case was the negligent supervision. The plaintiff, a thirteen year
old boy, was killed when he fell from an iron railing into a stairwell. The facts were not clear as to whether the boy was pushed by another student or merely jumped backward. The school authorities had warned the students about sitting on this rail. The jury found that the school was not guilty of negligent supervision of this activity. The issue in the second appeal dealt with the assumption of risk that the boy had taken by sitting on the rail. There was some evidence that the boy knew of the dangers involved.

Procedural matters. In a state where the machinery of bringing an action based upon tort liability of the school district was well established, one of the areas of frequent litigation was the interpretation of the procedures to be followed. Under procedures come such things as the filing deadline, improper notice, sufficiency of notice, content of the notice, and knowledge of the claim.

Until 1959 the statutes provided that a claim must be filed within ninety days after the occurrence of the event. In 1959 the deadline was raised to one hundred days. However, certain exceptions to this deadline were established.

In general the California courts had strictly adhered to the deadline of ninety days. A seventeen year old boy was injured in a wrestling accident on October 12, 1956. As a result of the injury he was unable to file until November 5,
1956, but did not file until January 11, 1957. This filing was accomplished sixty-seven days after the disability ended and ninety-one days after the injury. The court of appeals sustained the demurrer of the defendant. The court ruled that the suit was not timely filed nor did the fact of his minority make a difference. His disability ended in time for the suit to be timely filed.

In another suit the claim was denied because of the late filing. The plaintiff brought a personal injury suit against the district for an accident which occurred May 5, 1937. The claim was filed January 27, 1938. The court of appeals affirmed the superior court's decision to sustain the demurrer without leave to amend. The court said that the statute must be strictly construed, and unless it is in conformity with the requirements no action can be had. The supreme court in a hearing stated "that it is not necessary to strictly construe the rule but a liberal construction is valid and should be with a view to effect its objects and to promote justice." The object of the court seems to be to allow each case to be treated individually as to the timeliness of bringing the action, based on the facts, rather than to allow an injustice to take place because of a technicality.

When a boy ran his motor scooter into a barricade, placed in the street for driver education, and filed his claim five months after the accident, the claim was denied. The filing
date and other mandatory requirements were essential, and the plaintiff must have fulfilled these in order to file a verified claim even though he was a minor.\textsuperscript{108}

Despite the fact that the board knew of a claim, this did not negate the need for a verified claim. A minor boy was injured in a recreation program conducted by the board of education.\textsuperscript{109} The court of appeals affirmed the superior court's rejection of the suit. The board of education and the adjuster of the insurance company investigated the claim but did not tell the mother of the need to file a claim. The court held that this was not an excuse for a late claim. The defendants were not stopped from taking advantage of the failure to file a claim.

\textbf{Abatement and/or diminishment of liability.} The legislature and the judicial system of California have been very liberal in allowing relief to injured parties. Dogmatic defenses to the charge of negligence are not available. This is not to say that the filing of a suit is an automatic indictment of the school district. Several possibilities exist as avenues to the abatement and/or diminishment of the tort liability.

As stated above and with ample documentation the school is not the insurer of the safety of a child or person. This means that actual negligence on the part of the school must be the proximate cause of the injury.
The establishment and reasonable enforcement of adequate, proper, and reasonable rules and regulations will serve as an effective defense to the charge of negligence arising from inadequate supervision. When there was an enforced rule preventing playing in an isolated part of the playground, the school was held not liable when a boy lost his eye on a sharp branch of a tree. \(^{110}\)

Notice of the dangerous or defective condition of the building, grounds, or premises must be given. Natural causes, acts of God, third persons, and pure accidents are not foreseeable. \(^{111}\)

Contributory negligence is a defense many times used by the school as a defendant in a liability suit. In general, the courts are critical of this defense particularly when the plaintiff is a minor. The courts seem to feel that a school age child has not the maturity to be fully aware of his actions and their consequences.

A boy with a weak leg slipped and broke his leg on a ramp connecting two parts of the school. \(^{112}\) The boy and the authorities knew of the condition of the ramp. The court of appeals reversed the superior court's nonsuit decision because of contributory negligence. The court of appeals held that inadvertent acts such as momentary forgetfulness did not constitute contributory negligence. The jury must decide if forgetfulness or abstraction was the proximate cause of the
accident. Forgetfulness must show a lack of care on the part of the plaintiff. A sixteen year old is bound only to that duty of care which a normal child of this age would sustain in similar circumstances. Contributory negligence is dependent upon the age and capacity of the actor. In a like ruling when a seventeen year old boy ran into the side of a car as he was going from class to class, the court ruled that a certain amount of care was necessary on the part of the plaintiff, but not the same degree as an adult.\textsuperscript{113} In comparison, when an eleven year old boy ran into a flagpole, the court ruled that the boy knew of the pole and had contributed to the accident.\textsuperscript{114} One of the early cases in California was a case where a boy lost three fingers in a saw.\textsuperscript{115} The plaintiff charged negligence and the district countercharged contributory negligence. The court ruled that the district was negligent and should have taken every precaution against known dangers.

Another defense occasionally used is the assumption of risk doctrine. A personal injury suit was brought against the school district when the plaintiff was struck in the eye by a tennis ball.\textsuperscript{116} The class was composed of members of the varsity tennis team. One day the coach needed the time to prepare for a tournament and told the class that there would be no supervised activity that day. Some of the boys started playing handball, and others were hitting tennis balls back and forth. When the bell rang, the plaintiff jumped into the
flight of the ball. The court of appeals upheld the superior court's judgment of non suit. The court ruled that neither handball nor tennis were inherently dangerous, and that the plaintiff was aware of the risk and was willing to assume it. In the Ziegler case the court ruled that the plaintiff had some knowledge of the danger of sitting on an iron railing from which he fell to his death. The giving of such instruction about assumption of risk was held not to be in error and that the jury needed this information for its deliberation.
FOOTNOTES


4 Ibid., p. 27

5 UCLA 205.

6 Session Laws, 1923, Sec. 2, Ch. 328, p. 675.

7 California Political Code, 1923, Sec. 1623, p. 298.


9 Session Laws, 1929, Sec. 1, Ch. 260, p. 565.

10 Session Laws, 1923, Sec. 2, Ch. 328, p. 675.

11 Ibid.

12 Acts of 1931, Ch. 1178, p. 2487.

13 California Statutes, 1931, Ch. 1178, p. 2487.

14 Acts of 1931, Ch. 1167, p. 2475.

15 California Education Code, 1974, Sec. 1007.

16 UCLA 205.

17 West's Annotated California Education Code, Sec. 903.
13 Ibid., Sec. 904.
20 West's Annotated California Education Code, Sec. 906.
21 Ibid., Sec. 906.5.
22 Ibid., Sec. 1041.
23 Ibid., Sec. 1042.
24 Ibid., Sec. 1043.
25 Ibid., Sec. 1045.
26 Ibid.
27 Ibid., Sec. 13557.
28 West's Annotated California Government Code, Sec. 53050.
29 Ibid., Sec. 53051.
30 Ibid., Sec. 53052.
31 Ibid., Sec. 53054.
32 Ibid., Sec. 53055.
33 Ibid., Sec. 711.
34 Ibid., Sec. 715.
35 Ibid., Sec. 716.
37 West's Annotated California Government Code, Sec. 301.
38 Ibid., Sec. 802.
39 West's Annotated California Vehicle Code, Sec. 17001.
40 Ibid., Sec. 17003.
41 Muskopf v. Corning Hospital District, 55 Cal. (2d) 211, 11 Cal. Rptr. 39, 359 P. (2d) 457 (1961).
42 Lehmueth v. Long Beach Unified School District, 53 Cal. (2d) 544, 343 P. (2d) 422 (1950).
47 Grover, loc. cit.
48 78 C. J. S. Sec. 320
49 Ahern, loc. cit.
50 Bellman v. San Francisco High School District, 11 Cal. (2d) 576, 81 P (2d) 894 (1938).
51 Taylor v. Oakland Scavenger Co., 17 Cal. (2d) 594, 110 P (2d) 1044 (1941).
58 Luhmuth, loc. cit.


62 Ibid.


64 Underhill, loc. cit.


66 Prikle v. Oakdale Union Grammar School District, City of Oakdale, Stanislaus County, 40 Cal. (2d) 207, 253 P. (2d) 1 (1953).


69 Buzzard, loc. cit.

70 Bellman, loc. cit.

71 Hansen, loc. cit.


76 Reithardt, loc. cit.
77 Woodsmall, loc. cit.
78 Underhill, loc. cit.
79 Goodman, loc. cit.
81 Maede, loc. cit.
82 Hough, loc. cit.
85 Luna, loc. cit.
86 Ziegler, loc. cit.
88 Taylor, loc. cit.
89 Ford, loc. cit.
90 Reithardt, loc. cit.
91 Lehmuth, loc. cit.
95 Rodriques, loc. cit.
96 Tymkowicz, loc. cit.
97 Buzzard, loc. cit.
98 Woodsmall, loc. cit.
99 Lehmuht, loc. cit.
100 Ford, loc. cit.
101 Reithardt, loc. cit.
102 Pirkle, loc. cit.
103 Ziegler, loc. cit.
104 Price, loc. cit.
106 Hearing denied by Supreme Court 105 P. (2d) 362.
110 Ford, loc. cit.
111 Lorenz, loc. cit.
113 Satariano, loc. cit.
114 Hough, loc. cit.
115 Ahern, loc. cit.
116 Wright, loc. cit.
117 Ziegler, loc. cit.
CHAPTER VII

MODIFICATION AS FOUND IN MINNESOTA, OREGON, AND WASHINGTON

In these three states there was an early movement toward the modification of immunity of the school district. However, for one reason or another a retrograde movement has taken place, and these states now strictly control, if not completely eliminate the liability of the school district for tort liability. Ergo, the amount of primary source material was limited.

A. MODIFICATION AS FOUND IN MINNESOTA

Minnesota was one of the first states to pass an express statute allowing an action to be brought against a school district for injuries to the rights of a plaintiff. Despite this, Minnesota has, by judicial interpretations, moved completely away from this position, and today the school districts in Minnesota enjoy governmental immunity.

Historical development. As far back as 1851 Minnesota had a statute which allowed an action to be brought against the school district for an injury to the rights of the plaintiff. By interpretation the courts have, in fact, annulled
this statute. One of the first and leading cases in the state was heard in 1892. In this case the interpretation was such that the doctrine of immunity was not altered. In 1935 legislation was enacted which authorized the purchase of liability insurance to cover negligence of employees in operating a motor vehicle and which permitted the payment of such insurance from public funds. In a case heard in 1952 the court upheld the immunity doctrine although the statute permitted the purchase of liability insurance in a limited area by the school district.

Minnesota statutes. The original statute passed in 1851 reads as follows:

An action may be brought against them (any school district) in their official capacity, either upon a contract made by such officers in their official capacity, and within the scope of their authority, or from an injury to the rights of the plaintiff, arising from some act or omission of such officers of the district.¹

The statute as it stands at the present is essentially the same in wording and intent. It is as follows:

An action may be brought against any school district either upon a contract made with the district or its board, in its official capacity and within the scope of its authority, or for any injury to the rights of the plaintiff arising from some act or omission of such board, whether the members of the board making the contract, or guilty of the act or omission complained of, be still in office or not.²

Section 471.42, enacted in 1935, authorized the school
district to carry insurance against the liability of its employees for bodily injuries, death, or property damage by reason of negligent operation of a motor vehicle. A following section gave the governing bodies permission to pay the above premium, but expressly stated that this did not impose a liability upon the municipality.

The opinions of the attorney general of Minnesota succinctly and precisely summarized the attitude toward modification. The school district was not liable for the torts of officers, agents or employees done in a governmental capacity. The school district was not liable for injuries to a pupil injured as a result of the negligent operation of a school bus. The school district was not responsible for damages for personal injuries or property damage by reason of negligence in the operation of a snowplow on a school bus route.

The 1963 legislature enacted Chapter 798 which, with limitations, essentially abrogated immunity for municipalities. However, the act specifically excluded school districts, until January 1, 1968. However, the only new action taken by the 1965 legislature was to extend the immunity limitation for school districts and certain types of towns, until January 1, 1970. It has been extended by each legislature since.

Case law. In the precedent case of Bank v. Brainard School District heard in 1892, the attitude toward govern-
mental immunity was established, and it has remained essentially the same today. The complaint alleged that the defendant negligently left two tree stumps, three inches high and two inches apart, sticking up in the playground. The minor plaintiff tripped over these stumps, breaking a leg which later was amputated. The suit asked $20,000.00 in damages. The Minnesota Supreme Court affirmed the lower court's dismissal of the suit. Ruling upon this case the court said that the statutes applied to contracts and did not allow liability for negligence. The rights of the plaintiff referred to in the statute were property rights. Although schools may sue and be sued, this does not change immunity. The schools are quasi municipal corporations, organized for educational purposes.

In another case where a ten year old boy was run over by a school bus on the school grounds, the school was held not liable for the negligent operation of the school bus. The Minnesota Supreme Court affirmed the district court's sustaining of the defendant's demurrer. The court said that the school was a quasi governmental agency, performing a public function and was not liable. The court rejected the plaintiff's contention stating that it must follow stare decisis. The court noted that the legislature has acquiesced in the face of the Bank v. Brainerd ruling for thirty-five years.
A personal injury suit was brought by a plaintiff who had lost the sight of one eye and severely damaged the other. He alleged that the defendant's officers and agents had negligently used unslaked lime to line a football field. Again the Minnesota Supreme Court affirmed the district court which had sustained a demurrer to dismiss. The court repeated that school districts are governmental agencies performing a public function. The statute did not authorize suit for personal injuries due to negligence. Regardless of whether the term is nuisance or negligence, it is not actionable. There is no difference between mandatory and permissive governmental functions. Nor did the fact that a small charge was made impose liability.

A more recent case was heard in 1952. The plaintiff was injured in a collision with a school bus. The plaintiff contended that the school district carried liability insurance and that this was a waiver of immunity. The federal court held that the operation of a school bus was a governmental function and that municipal corporations were immune. Although the statute allowed the purchase of insurance, the fact that the school district was the insured did not allow suit against the school district.

B. MODIFICATION AS FOUND IN OREGON

Oregon was also one of the first states to pass a statute
allowing an action against the school district for injuries to the rights of the plaintiff. Notwithstanding, the courts of Oregon have interpreted this statute so as to permit the doctrine of immunity to continue.

**Historical development.** As far back as the year 1862, Oregon has had a statute which imposed liability for negligence upon governmental agencies. It was not until 1914 that this law was tested in the courts. In this ruling and subsequent rulings, the courts have nullified this statute. In 1929 the court made one exception and allowed a judgment against a school district. However, within two months the court had reversed its thinking and was again applying the doctrine of immunity. In 1961 a minor deviation was noted. The liability of the district was allowed to the extent of the liability insurance carried by the district.

**Oregon statutes.** Only four relevant statutes were noted in this section. Section 30.320 reads:

An action or suit may be maintained against any of the public corporations in this state mentioned in section 30.310 in its corporate character, and within the scope of its authority, or for an injury to the rights of the plaintiff arising from some act or commission of such public corporation.

The other public corporations mentioned are "incorporated cities, school districts, or other public corporations of like character." Section 332.180 authorized the purchase of
liability insurance to cover the negligence of the district or its officers and agents. This legislation was permissive in nature. If the district did not elect to purchase insurance, this was not to be construed as negligence on the part of the school district.

In 1967, the Oregon legislature passed a "Tort Actions Against Public Bodies" abrogation of immunity law, effective July 1, 1968. This act also set up claim procedures and established limits of $25,000.00 for property damage, $50,000.00 per individual for bodily injury, and $300,000.00 maximum per occurrence. The law also provided for the proration of the awards if the total claims exceed $300,000.00.

Case law. The Oregon courts have interpreted these statutory provisions as the restatement of the common law rule that a school district is liable for negligence only when performing a private function. And then the courts ruled that the school only performs public functions.

The first case construing section 30.320 was heard in 1914. In this case the court stated that the board of education cannot commit a tort, and if they do they are acting ultra vires. The Wiest case was the precedent case and has been followed consistently with one exception.

In the case of Lupke v. School District the plaintiff brought a personal injury suit against the district. The
plaintiff had been employed to paint a flagpole and fell when the pole collapsed. The court ruled that the act of painting was a ministerial function, and the school district was held liable. A short time later the same court held that there was no sound basis for such a distinction and overruled the Lupke decision.

The district was charged with negligence when a pneumatic water tank recently installed exploded and killed a nineteen year old boy. The Oregon Supreme Court affirmed the lower court's dismissal of the complaint. The court ruled that the district was negligent in not installing a safety device on the tank, but the tank which was used for school purposes was aiding a governmental function. The court appeared to favor the maintenance of a suit as prescribed by statute but were committed to stare decisis. The school acts wholly as a governmental agency performing those duties imposed by statute. The school was held to be a quasi corporation performing nothing but governmental functions; hence, immunity still prevailed.

A similar ruling was handed down by the Oregon Supreme Court in 1943. A boy fell on a wooden sidewalk and ran a nail into his knee injuring it permanently. The appeal was filed from circuit court which had dismissed the complaint. The suit alleged negligence on the part of the district for its failure to maintain the sidewalk in a safe condition. The
demurrer admitted the truth of the allegation but pleaded immunity. The court stated that a "school never performs anything except governmental functions since a school district can act pursuant only to statutory authority, express or implied, through its board of directors, and in so doing it is exercising a governmental function only." An interesting comment was made:

It may be that the common law of immunity is harsh and unjust in requiring the individual alone to suffer the wrong in the instant case, and that society in keeping with the modern trend, should afford relief, but that is a legislative and not a judicial question. The legislature, if it so desires, has the power to make the suggested change.

A 1961 case perhaps points the way toward a relaxation of the immunity doctrine as it has been interpreted in the past. A high school football player was hurt and this injury resulted in paraplegia. The suit was brought when the plaintiff reached maturity. The school had a liability insurance policy in effect at the time. The plaintiff alleged that his injuries were due to the fact that as a 140 pound freshman he was matched against bigger and superior players. The lower court had dismissed the claim which was then appealed to the supreme court. The defendants in the suit were the district, the superintendent, principal, and individual board members were dropped. The court ruled that the coach had failed to exercise reasonable care, and the district may be
liable for the acts of its servants. The court held that the statute permitting the purchase of insurance was an expression of a legislative policy not to abandon the immunity doctrine but to permit some relief at least to the extent of the insurance coverage. The court re-emphasized that the school district is still immune from suit and disagreed with the Molitor case heard in Illinois.

C. MODIFICATION AS FOUND IN WASHINGTON

Washington passed its first abrogation statute in 1869. This statute read much the same as the statutes of Minnesota and Oregon. Unlike the other two states the courts of Washington did not interfere, but the legislature severely restricted the application of liability in a subsequent enactment.

Historical development. The state of Washington was the second state in the United States to pass express legislation allowing liability suits for negligence to be brought against a school district. The statute allowing recovery was not tested until 1907 in the Redfield case. In this case the court ruled that the school was liable for negligence under the statute. Following this precedent and the history of litigation as found in other states, many cases were filed against school districts. The schools became concerned at the number of suits and the size of the damages being awarded. In
1917 an act was introduced into the state assembly which would have exonerated the school district from all liability, but this bill did not pass. A compromise form passed which limited liability to actions other than those arising from "any park, playground, or field house, athletic apparatus or appliance, or manual training equipment." Since that time the court have interpreted the law in Washington as meaning that a liability suit for other than the mentioned exceptions may be maintained against a school district.

Washington statutes. The original statute passed in 1869 read as follows:

An action may be maintained against a county, or other of the public corporations mentioned or described in the preceding section (includes school districts) either upon a contract made by such county or other public corporation in its corporate character, and within the scope of its authority, for an injury to the rights of the plaintiff arising from some act or omission of such county or other public corporation.

The restrictive statute passed in 1917 is given below:

No action shall be brought or maintained against any school district or its officers for any noncontractual acts or omissions of such district, its agents, officers, or employees, relating to any park, playground, or field house, athletic apparatus or appliance, or manual training equipment, whether situated in or about any schoolhouse or elsewhere owned, operated or maintained by such school district.

There followed nearly a half century of litigation about the definition of "athletic apparatus or appliance" and the other "immune facilities" mentioned in the act. In 1961
the state legislature enacted Chapter 136,1 which reads as follows:

The State of Washington, whether acting in its governmental or proprietary capacity, hereby consents to the maintaining of a suit or action against it for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation.27

This did not answer the question and more cases followed. The legislature, meeting in 1967, then amended its civil procedure laws to include a section on actions against political subdivisions, municipal corporations and quasi-municipal corporations.28 Thus ended the saga of the "athletic apparatus and appliance."

Case law. The modification of immunity in Washington presented an interesting phenomenon. The pattern of liability has swung from a liberal approach to an attempted complete restriction and finally has settled near the center of the continuum.

The Redfield case was the first case to hold the district liable for negligence.29 The plaintiff was badly burned when a bucket of scalding hot water fell on her. The three gallon bucket was kept on top of a heating register. The count alleged that the defendant and its agents, servants, teachers, and employees had carelessly and negligently left this bucket in a dangerous manner. The question was whether the district was liable for the negligent acts or omissions of its employees
in the performance of their duties. The Washington Supreme Court reversed the superior court which had sustained a demurrer to the complaint. The court ruled that an action could be maintained and that the statute was designed to remove immunity and make the district responsible for an omission of duty.

In 1915 the court held that the intent of the legislature was to abolish immunity. A six year old girl fell from a horizontal exercise ladder suspended seven feet above a concrete floor. The plaintiff broke her arm and received damages of $500.00 in a lower court decision. There were no mats under the ladder, and the children had been warned not to play on the ladder. The court held that the statute abrogated common law immunity for negligence in the performance of governmental duties. The question of leaving the ladder accessible to children and the question of contributory negligence were properly submitted to the jury.

The district was held liable and the law of 1917 was held not retroactive in the Hold case. The plaintiff, a nine year old girl, fell from a slide and fractured her skull. The Washington Supreme Court affirmed the superior court's jury verdict in favor of the plaintiff. The injury occurred March 31, 1916 and judgment was rendered January 12, 1917. The act in question was passed in March of 1917. The Washington Supreme Court hearing the appeal in 1918 held the act not retroactive.
The language of the act of 1917 was defined in the Stovall case.32 The plaintiff was injured while playing on a large water tank which had been removed from the basement of the school and left on the playground. The Washington Supreme Court affirmed the superior court's jury decision for the plaintiff. The court held that the terminology of the act of 1917 was rather ambiguous. The court ruled that this act exonerated only athletic apparatus or appliances used in connection with any park, playground, or field house. Since this was not the case, the district was liable.

An apparent inconsistency was seen in the Morris case.33 The Washington Supreme Court reversed the lower court's decision dismissing the personal injury suit. A football player had injured his back and spine. Three weeks later the coach let him play again and the boy was reinjured. As a result of the injury he developed a tubercular condition. The dicta discussed the liability of the school district as found in stare decisis but did not mention the law of 1917. The district was held liable for the negligence of the coach. Judge Holcomb, dissenting, said, "I am not willing to concur in the majority opinion, at least until the effect of R.C.W. sec. 28.58.030 is determined, and it is not discussed therein."34 The dissenting judge was afraid of the far-reaching effects of this decision.
A football was held not to be an athletic apparatus or appliance in the Briscoe case. An eleven year old boy fractured his elbow while playing "keep away" using a football during recess. The plaintiff alleged negligence on the part of the district for inadequate supervision. The district had knowledge of the roughness of the game. Rules of the school prohibited football, but the school had furnished a football.

The lower court had directed a verdict in favor of the defendant. The Washington Supreme Court reversed this decision and ordered a new trial. The court ruled that the statute had reference to more or less permanently located equipment, not something as mobile as a football. When the act of 1917 was passed, there were a great number of cases pending which involved playgrounds. Accordingly, it was the intent of the legislature to restrict this liability.

In a rape case the school district was held liable for negligence and lack of supervision. The plaintiff, a twelve year old girl, sought to recover $25,000.00 in damages from the school. During the noon hour recess, several boys carried the plaintiff into a dark room near the gymnasium, and two of them forcibly raped her. There was a teacher appointed to supervise the noon hour recess, but he had absented himself. The court held that the school may be sued under R.C.W. sec. 4.08.120. The usual rules of negligence must be followed. It was apparent that a duty was owed to the child, but there was some
question as to the foreseeability of the rape. The questions were whether the actual harm came from a general field of danger such as the dark room and the lack of supervision. The allegation presented a question for the jury which was so ordered in a split decision. Judge Olson, dissenting, could not subscribe to the fact that the school could have foreseen such an eventuality.

The district was held liable for an accident which occurred after school and under the sponsorship of a community group.37 Judy Kidwell, a nine year old girl, was permanently injured when an upright piano fell on her. The girl was attending a Campfire Girls meeting under the supervision of an adult. The piano was a top-heavy instrument. Another child placed himself between the piano and wall and pushed the piano over on the plaintiff. The superior court had awarded damages of $23,372.45 to the plaintiff, and the school appealed the case. The Washington Supreme Court affirmed the decision, stating that the school had a duty to use reasonable care, the event was foreseeable, and the child was an invitee to whom the school owed a duty.

When a student was injured many miles from school following a club initiation, the school was held not liable.38 The accident happened at 2:00 A.M. Sunday, and there was evidence that the driver had been drinking. The Washington Supreme Court affirmed the superior court's sustaining of the demurrer.
The court stated that the district was not liable for torts arising *ultra vires*, and the complaint was demurrable if "the degree of proximity between the breach of duty complained of and the events in the causal chain resulting in the injuries sustained is so remote that it can be said, as a matter of law, that the breach of duty was not a proximate cause of the injury." There was no liability unless the act of negligence was the proximate cause, but the above act was so distant and remote that the assumed protective custody was with the parents and home.

The district was held liable when a boy was killed in an initiation ceremony conducted on the school grounds during the school day. The superior court had dismissed the complaint which alleged that the initiation ceremony of the high school lettermen society was under the auspices and supervision of the school district's agents, servants, and employees. The Washington Supreme Court reversed this decision and later denied a rehearing. The court said that the statute abrogating immunity made the district liable on the same basis as a corporation or individual with the exceptions as noted. A dissenting judge wanted to know what was within the scope and authority of the school.

In a 1964 case the court abrogated immunity for municipalities. However, in 1966, the courts held that the statute waiving its immunity from tort liability "was not
repugnant to or inconsistent with the statutory immunity afforded the schools by the 1917 statute.\textsuperscript{42}
FOOTNOTES

1 Minnesota Laws, Ch. 79. Secs. 12-16 (1851).
2 Minnesota Statutes Annotated, Sec. 127.03.
3 Ibid., Sec. 471.42.
4 Ibid., Sec. 471.43.
6 Ibid., 844-F-G, (1952).
7 Ibid., No. 50, p. 105, (1952).
12 Oregon Revised Statutes, Sec. 30.320.
13 Ibid., Sec. 30.310.
14 Ibid., Sec. 332.180.
15 Ibid., Sec. 30.260 - 30.300.
16 Wiest v. School District No. 24, 68 Or. 474, 137 P. 749 (1914).
20 Ibid.
21 Ibid.


24 Revised Code of Washington, Sec. 28.58.030.
25 Ibid., Secs. 408. 110 and 408. 120.
26 Ibid., Sec. 28.58.030.
27 Redfield, loc. cit.

28 Revised Code of Washington, sec. 4.92.090.
29 Ibid., sec. 4.96.
34 Ibid.
36 McLeod v. Grant County School District No. 128, 42 Wash. (2d) 316, 255 P. (2d) 360 (1953).
39 Ibid.


CHAPTER VIII

LIABILITY IN THE STATE OF ILLINOIS

Until 1959 school districts in the State of Illinois enjoyed immunity from tort liability. It was during this year that the leading Molitor case was heard by the Supreme Court of the State of Illinois. This decision reversed the status quo held in Illinois for over fifty years. In this chapter the historical development of liability in Illinois will be studied along with the relevant statutes and the case law. In a short period of time the concept of immunity in the State of Illinois has undergone a series of developmental changes. In short, it has traversed the continuum from immunity to non-immunity.

A. HISTORICAL DEVELOPMENT

As was stated in an earlier chapter the doctrine of "the king could do no wrong" was first applied to a subdivision of the state in Russell v. Men of Dover, 2 Term Rep. 671, 100 Eng. Rep. 359 in the year 1788. In Illinois this doctrine was first applied to towns and counties in the case of Town of Waltham v. Kemper, 55 Ill. 346 in the year 1870. The leading case of Kinnare v. City of Chicago, 171 Ill. 332, 49 N.E. 536
heard in 1898 applied the rule of immunity to school districts. The court reasoned that the school district, as a governmental agent of the state, was like the state in its immunity.

Since that decision other cases have given various reasons for the continuation of the immunity doctrine. The charitable trust doctrine immunizing private schools was given expression in the case of Parks v. Northwestern University, 218 Ill. 381, 75 N.E. 991 tried in 1905. From this case charitable and non-profit educational institutions have enjoyed the same immunity as governmental agencies in the state. The doctrine of respondeat superior did not apply to charitable institutions even though they may be private corporations.

In another case the similar protection of public funds was given as a reason for immunity.¹

As the schools and other agencies began to purchase liability insurance in greater amounts, the argument for the protection of public funds began to lose its urgency. Also, the social conscience of the people began to realize some of the hardships exacted by the immunity ruling. In 1947 the purchase of liability insurance by a charitable religious institution removed immunity.² In this case the court inferred that the purchase of insurance constituted a waiver of immunity.

In the leading case of Moore vs. Moyle, immunity was removed to the extent of the insurance carried.³ The suit alleged the negligences of a private institution, Bradley
The facts of the case were that the plaintiff fell from a trapeze on May 2, 1940 while preparing for a circus in a physical education class. Bradley University was fully insured. The Supreme Court overruled the lower courts which had dismissed the case. The court ruled that the trusts were not impaired or diminished by the judgment. The decision seemed to impose liability if insured. However, the decision did not really create a liability; it only fixed the manner of collection. That is, once liability is held, the judgment can only be collected from insurance proceeds. The law is not static; it must conform to changing conditions. The law needs humanitarian principles, for there is no justification for absolute immunity if the trusts are protected. This decision has been criticized as being liberal because it permits the wrongdoer to determine his own liability.

The removal of immunity to the extent of the insurance was first applied to the public schools in 1952 in the Thomas v. Broadlands case. The appellate court reversed the Circuit Court of Champaign County which had dismissed the complaint. The plaintiff had lost an eye while playing on the playground. The complaint alleged negligence on the part of the defendant's agents. After discoursing on the history of immunity, the court held that the only justifiable reason for immunity was to protect public funds. There was no justification if the funds were protected. If the funds were protected by insurance,
the rationale for immunity was removed. Although there was no statute allowing the purchase of insurance by a school district which would result in a waiver of immunity, this lack of express statutory authorization did not make any difference. John L. Franklin writing in the *University of Illinois Law Forum* said:

> In this case the law in Illinois was interpreted to remove all tort immunity from the school and to substitute one of collection only so that it was held to be unnecessary to aver that insurance existed, the resultant judgment being held to be collectible only from insurance proceeds.⁵

Although this case was not tested by the Supreme Court, it was followed by a district court of the United States in the *Tracy v. Davis* case,⁶ as required by Federal law.

In 1953 the legislature had enacted a law permitting the purchase of liability insurance to protect against any loss or liability upon the district and its employees resulting from negligent or wrongful acts on the part of the officials or employees of the district.⁷ The insurance companies were required to waive the defense of immunity.

The district court of the United States held that immunity existed because of the dissipation of public funds, but this was not a defense against a tort action if the payments were limited to other than public funds.⁸ "An individual injured by the tortious act of quasi-municipal corporation or a charitable institution should not individually suffer his
loss where there is a source of funds other than public funds, or trust funds, from which the judgment may be paid." The court cited rulings in Tennessee with approval. The school district's motion to dismiss on the grounds of immunity was denied.

In the State of Illinois, school districts are subject to liability under Workmen's Compensation Acts. The Court of Claims Act passed in 1945 made the state liable for torts up to $7,500.00. Cities and villages may be liable for the negligent operation of fire vehicles. Municipal corporations have been liable for proprietary functions. Illinois school districts may purchase liability insurance for their school buses with a rider waiving the immunity defense. If a school had such a policy, the injured person may collect; however, if the school was uninsured the party could not collect. In the above examples it can be seen that there was some dissatisfaction with the immunity doctrine, both on the part of the legislature and the courts.

On May 22, 1959 the Supreme Court rendered a decision which opened another chapter in the field of tort liability. In the Molitor decision the court held that school districts were liable for the torts caused by the negligence of their agents and employees.10

The General Assembly reacted quickly to this new and somewhat alarming decision of the court. Two months later on
July 22, 1959 an act was approved which pertained to this subject. This statute was essentially one of limitations. Deadlines were established, notice of claims procedure was set, and a limit of $10,000.00 recovery was instituted. In a series of decisions, the Illinois Supreme Court completely emasculated this statute, declaring its main provisions special legislation and so unconstitutional. Nevertheless, it has not yet been repealed. Because of the confusion in this area, the legislature in 1965 passed a comprehensive law designed to deal with this subject. This law, called the Local Governmental and Governmental Employees Tort Immunity Act, affects the application of sec. 821.

B. RELEVANT STATUTES

The most pertinent statute in Illinois was the act passed in 1959 relating to the tort liability of school districts. Section 821 provided that "public schools in the exercise of purely governmental functions" should be protected from extreme loss of their funds. The loss should be distributed among the public at large rather than upon one individual. This act also applied to nonprofit private schools. The reference to purely governmental functions was not too clear, as this distinction was uncommon in Illinois. Section 822 dealt with limitations of actions. It stated that an action must be "commenced within one year from the date that the injury
was received or the cause of action accrued." In Illinois the general statute of limitations sets two years as the period to file for a personal injury suit. The general statute did not apply against a minor until he reached majority. Apparently, this act applies to all persons regardless of age. A different view will be given later by another authority. Section 823 discussed the notice of injury. A written statement must be filed within six months of the injury. The notice must be filed with the school board attorney or the secretary of the board and shall state the particulars of the action. Section 824 stated that the failure to file as given above shall be cause for dismissal. The amount of damages for each cause of action shall not exceed $10,000.00 as set forth in section 825. This act only mentioned injuries; nothing was said about death. The Wrongful Death Act has a maximum recovery of $30,000.00. The procedure for filing under the Wrongful Death Act did not require a notice. Perhaps the answer was in the phrase "except as is otherwise provided by law."

The public policy provision found in section 821 covered losses arising from negligence but apparently ruled out intentional torts. The legislature also gave the court freedom to restrict this area. In section 830 the act provided that nothing "shall be deemed to authorize the bringing of any action against any school district or non-profit school, nor the entry of a judgment in any such action."
It was interesting to note that the legislature had granted immunity to other quasimunicipal corporations such as counties, forest preserves, park districts, and the Chicago park District recently. One may wonder why the legislature acted in such divergent ways. Schools were different from the others in that they were compulsory and that minors were the chief participants.

Friedman discussed this act as follows:

It has no application in situations wherein a death may occur. In a death action, under the law of the State of Illinois at the present time, the wrongful death act limits the amount of recovery to $30,000.00. It should be further pointed out that the notice requirements and the requirement that suit be filed within one year period cannot be effective against a minor. Certainly a person under a legal disability may commence his suit without meeting the requirement of bringing the action within one year. The person under legal disability may wait until he reaches his majority and at that time meet the requirements of the Statute for notice and time to file his action.

Prior to this time the legislature had enacted a law in 1953 which permitted the purchase of liability insurance. This insurance was to protect against any loss or liability on the school district and its employees resulting from any wrongful or negligent acts on the part of the district's officials or employees. Since 1963, school districts with a population of 500,000 or more (i.e., the Chicago Board of Education) have been required to purchase liability insurance, but have no indemnity obligation, nor do they have to include in the policy a "waiver of immunity" clause. All other boards of education
are required to indemnify their employees, but are not re-
quired to purchase insurance in order to do so.16

But, sec. 9-103 of the Tort Immunity Act of 1965 pro-
vides that "every policy for insurance coverage issued to a
local public entity shall contain a waiver of the defenses and
immunities provided in the act." Since this section was enacted
after the insurance provisions of the school code, and since
school districts do not have any "defenses and immunities" other
than those contained in the Tort Immunity Act, this section has
re-instated the waiver of immunity requirement omitted in the
school insurance statutes.

Since the abolition of liability announced in Molitor
applied to all units of local government, the Local Government
and Governmental Employees Tort Immunity Act of 1965 contains
comprehensive rules governing liability, limitations on lia-
bility, and procedure applicable to tort actions against all
units of local government. However, this study is only interest-
ed in how this act relates to school districts. An analysis
of this act in relation to court interpretations of cases
dealing with schools would be useful. But one must be careful
here since only about a dozen reported cases exist interpreting
this act, and many of these have nothing to do with school
districts.

The salient points of this act, as it relates to this
study are the following:
1. Article VIII creates a one-year statute of limitations and a six-month notice provision. But while the failure to serve notice within six months of the injury is a complete bar to the action, sec. 8-103,17 this notice provision is not applicable to minors.18

2. Articles III through VI create new immunities or codify pre-existing common-law immunities in certain specific situations, such as, except as otherwise provided by the act, neither a local public entity nor its employee is liable for failure to supervise an activity on, or the use of, any public property. A school class is an activity on "public property".19

3. Article II, sec. 2-301, specifically provides that it does not affect the duty of ... school boards to insure and indemnify their employees. The waiver of immunity requirement was omitted in the insurance statutes of the School Code, but sec. 2-301 and sec. 9-103 of the Tort Immunity Act have re-instituted it. This means that all insurance purchased by public entities must contain a waiver of immunity clause; and that virtually all of the statutory immunities are waived.

C. CASE LAW

As was noted in the beginning of the chapter the Kinnare case set the precedent of immunity of the school district in the State of Illinois. Within a short time other cases amplified this ruling and the doctrine of immunity was firmly established. It was in 1947 that the first crack in the wall appeared. In Wendt v. Servite Fathers, a charitable religious institution, the purchase of insurance was held to constitute a waiver of immunity.20 In the case of Moore v. Moyle insurance by a private non-profit educational institution was held to be a waiver of immunity.21 The facts of this case were given earlier in this chapter. In essence this ruling held that, if
the trust funds were protected by insurance, there was no reason for the immunity of Bradley University. The difficulty with this decision was that it allowed the wrongdoer to determine his own liability.

In the year 1952 the effect of carrying liability insurance was tested in the *Thomas v. Broadlands* case. This was the first case that directly tested the effect of liability insurance upon the immunity of the public school quasi municipal corporation. Again, the facts of this case were presented at the initial part of this chapter. The court stated some of the reasons for immunity as *nolens volens*, governmental functions, and the protection of funds. McQuillen was quoted, "The reason, as often expressed, is one of public policy, to protect public funds and public property." The court held in this case that, if the public funds were protected by insurance, the justification for immunity was removed. This ruling was interpreted to mean that indemnification could only come from insurance proceeds. As in the case of *Moore v. Moyle*, this ruling allowed the school to determine its own liability. This case was heard at the appellate level and was not carried to the Supreme Court of Illinois.

In a United States district court a similar ruling was made. In this case the plaintiff was injured in a school bus accident. The court stated that the reason for immunity was the protection of public funds. An individual need not stand
the loss if there was another source which would not dissipate the public funds. The defendant's motion for dismissal on the grounds of immunity was denied.

On May 22, 1959 the Supreme Court of Illinois handed down the decision in the Molitor v. Kaneland case. In this historic and precedent case the highest court in the state established that the district could be held liable in tort for negligence. Eighteen school age children were injured March 10, 1958 when a school bus operated by an agent of the defendant hit a culvert and burned in Sugar Grove Township, Kane County. Because of the fact that the decision did not say anything about the retroactivity of this ruling, much apprehension was created among school people. In a rehearing held in December, 1959, the court ruled that this decision, with the exception of Thomas Molitor, applied only to future occurrences. In a later decision the court held that all the students included in this particular bus accident may have the immunity of the school district abolished. In the original complaint the district was charged with negligence through its agent and servant, the bus driver. As a result of the accident, the plaintiff, Thomas Molitor, received permanent injuries and sought damages of $56,000.00. The record showed that the defendant carried liability insurance with limits of $20,000.00 for each person and $100,000.00 for each accident. However, in the complaint this was purposely omitted. The court considered many of the tradi-
tional and historical reasons for immunity. The court con-
cluded:

We are of the opinion that none of the reasons ad-
vanced in support of school district immunity have any
true validity today. Further, we believe that abolition
of such immunity may tend to decrease the frequency of
school bus accidents by coupling the power of trans-
porting pupils with the responsibility of exercising
care in the selection and supervision of the drivers.

We conclude that the rule of school district tort
immunity is unjust, unsupported by any valid reason,
and has no rightful place in modern day society.

For the reasons herein expressed, we accordingly
hold that school districts are liable in tort for the
negligence of their agents and employees and all prior
decisions to the contrary are hereby overruled.

Several cases have been heard in courts of record con-
cerning the effective date of the Molitor opinion. In the case
of Terry v. Mount Zion School District No. 3 the plaintiff was
injured while doing gymnastic stunts on March 3, 1959.28 The
final opinion of the Supreme Court was given December 16, 1959
which stated that the ruling applied only to cases arising out
of future occurrences. Two other cases dealt with injuries
which happened before December 16, 1959.30 In both cases the
court stressed the application of the Molitor ruling as of
December 16, 1959.

In the case of Price v. York the court held that no new
rules of negligence had been created by the Molitor ruling.31
The school district operated a school bus which picked up the
decedent, an eight year old child. The route was such that the
child had to cross a state highway in order to board the bus. If the bus had been routed on a rural road which ran in front of the decedent's house, it would have obviated the need to cross the highway. The plaintiff charged the district with negligence in not using the rural road thereby giving rise to the proximate cause. The case was appealed to the appellate court from the Circuit Court, Coles County. The court stated that in order to claim negligence there must be a duty, a failure to perform the duty, and injury resulting therefrom. The court held that the district did not owe a duty to the child to protect her while walking from her home to the point of pick up. Nor was there a duty imposed upon the district to reroute the bus so that no child would need to cross the highway. It is apparent from this decision that negligence still must be proven before a liability attaches to the school district.

In the Cook County Court, the Chicago Board of Education was held not guilty in the first court test of the act making the board liable up to $10,000.00. The plaintiff sought damages of $2,000.00 for a stab wound which occurred while he was attending Bowen High School.

In two cases the distinction between governmental and proprietary functions was attempted. In the Garrison case an action was brought against the school board and others when a "prop" cannon exploded during a theatrical performance. Damages were asked in the total of $465,000.00. The appellate
court affirmed the Circuit Court, Cook County, decision to dismiss the complaint against the school district. Leave to appeal was denied May 24, 1962. The court ruled that since the accident happened November 22, 1958, prior to the Molitor ruling, immunity held. There was no real distinction between governmental and proprietary functions even if a small fee was charged. The act of 1959 did not create a liability; it limited the amount of damages. In another case action was brought against the Chicago Board of Education for injuries sustained by an adult patron at a football game. The plaintiff was injured as a result of the fall at a football stadium. The motion to strike and dismiss was sustained by the Circuit Court, Cook County. In affirming, the appellate court held that "the difference between governmental and proprietary functions is not applicable to school districts...." A petition for leave to appeal was denied by the Supreme Court in September, 1962.

In many respects Illinois presented a rather classic picture of the modification of the tort immunity of the quasi municipal corporation, the school. From the traditional immunity the school district had moved gradually through a series of developmental stages to the point where the district can be held liable.

At the time of writing the school district in the state of Illinois is liable for actions based upon tort. The Molitor decision, which reversed over sixty years of immunity, removed
the judicial barrier to liability. Legislation was passed shortly thereafter which limited liability if the courts found the school district negligent. But subsequent litigation modified this legislation. First, the six month provision was invalidated. Then, the $10,000.00 limitation on damages recoverable from school districts was held unconstitutional, and the $10,000.00 limit applicable to non-profit private schools was ruled unconstitutional also.

While school districts are not liable for injuries arising out of the operation of a school safety patrol, the question of supervision was dealt with when a suit was brought on behalf of an eight year old girl who was severely injured when she was kicked in the head by a fellow pupil during class. It was alleged that the teacher had permitted the room to become unreasonably disorderly, and had failed to supervise her class properly. The court held that the suit was properly dismissed, since sec. 3-108 (a) made the public entity immune from liability for failure to supervise an activity on any "public property." The court said that a school class is an "activity" on "public property" and so covered by the Tort Immunity Act of 1965.

Two other statutes were also used by this court. First, the School Code, sec. 24-24, imposes a duty on the teacher to maintain order in a classroom, and places the teacher in loco parentis. This prevents liability in the absence of willful
misconduct, since this is the limit of parental liability. Also, this is true under sec. 2-202 of the Tort Immunity Act. So it would seem that in this case, the court used the very statute which imposes on the teacher the duty to maintain order, as a shield to protect the school from liability.

The same court used similar reasoning in a case where plaintiff sought to recover for injuries received in a basketball game where he was struck by one of the opposing players. It would seem that one of the most important problems which will have to be faced by the Illinois reviewing courts is the relationship between the special statutory immunities and liabilities and the Tort Immunity Act itself.

While the theory of sovereign immunity in the State of Illinois has been shattered, and school districts may be held liable, the law is still in its infancy. The liability-creating Molitor decision is barely fourteen years old, and the Tort Immunity Act is only seven years old. Less than a dozen reported cases exist interpreting this act. Many more will be necessary before its boundaries are charted.
FOOTNOTES


7 I.R.S. Ch. 122, Sec. 6-35-1 (1957).

8 Tracy v. Davis, loc. cit.

9 Ibid.

10 Molitor v. Kaneland Community Unit District No. 302, 18 Ill. (2d) 11, 163 N.E. (2d) 89 (1959).

11 Smith-Hurd Illinois Statutes Annotated, Ch. 122, Sec. 821-831.


Treece v. Shawnee Community Unit School District No. 84, 39 Ill. 2d 136, 233 N.E. 2d 549 (1968).


15 Illinois Revised Statutes, Ch. 122, sec. 34-18

16 I.R.S., loc. cit.


21 Moore v. Moyle, loc. cit.


23 18 McQuillan, Municipal Corporations, Sec. 53.05.

24 Tracy v. Davis, loc. cit.

25 Molitor v. Kaneland Community Unit District No. 302, loc. cit.

26 24 Ill. (2d) 467.

27 Molitor v. Kaneland Community Unit District No. 302, loc. cit.


32 Statement by Richard Girard, personal interview.


35 Ibid.

36 Illinois Supreme Court, Case No. 37337, September, 1962.


38 Treece v. Shawnee Community Unit School District No. 34, 39 Ill. 2d 136, 233 N.E. 2d 549 (1968).


40 Illinois Revised Statutes, Ch. 122, sec. 10-22.28 and ch. 35, sec. 2-211.


CHAPTER IX

SUMMARY, CONCLUSIONS AND RECOMMENDATIONS

A. SUMMARY

The concept of the sovereign immunity of governmental agencies was first promulgated in the year 1788 in the case of Russell v. Men of Devon. Shortly thereafter, this doctrine was incorporated into American jurisprudence. School districts are involuntary agencies created and controlled by the state. As such they have traditionally shared the immunity concept. For such reasons as "the king could do no wrong," loss of public funds, stare decisis, ultra vires, nolens volens, and public relations, school districts in the United States have been immune from tort liability for negligence. Since the latter half of the last century, a number of states have embarked upon a movement away from the traditional immunity.

Although school districts are considered agencies of the state, it was necessary to define this relationship very carefully. Generally speaking, the courts have classified school districts as quasi corporations or quasi municipal corporations. A municipal corporation proper is a city or town incorporated primarily for purposes of local government, therefore they must be granted considerable powers of a legislative and regulatory
nature. A quasi corporation, on the other hand, is purely a political or civil division of the state; it is created as an instrumentality of the state in order to facilitate the administration of government. As involuntary agencies, school districts are not full corporations in the eyes of the law, but have a limited being.

The legal meaning of the word tort was difficult to state. In its simplest form it is a civil wrong perpetrated upon another, exclusive of contract. It is not a crime but an action for which the courts may allow the injured party to seek recovery.

Although there were other grounds for liability in tort, this investigation was concerned with the area of negligence resulting in a liability. Negligence was defined as conduct which did not measure up to the "reasonable man" criteria established by law for the protection of others. There are four components prerequisite to an action based upon negligence. These essentials are: (1) a legal duty to conform to a certain standard, (2) a failure to conform to this standard, (3) a close causal connection between the conduct and the resulting injury, and (4) an actual loss or damage. The question of what was improper conduct was related to what a prudent person would do under similar circumstances. What a prudent person could foresee and do or not do was a question of fact for the jury.
It was a prime purpose of this dissertation to analyze the means and the rationale of the movement toward relaxation of the immunity principle. The source of this movement comes from either judicial or legislative authority. The greatest abrogations of immunity have been in the fields of school transportation and workmen's compensation. These two areas have received much attention from the judicial and legislative authorities. Workmen's compensation as a separate field was not a part of this study. Personal injuries to pupils provided the major source of litigation in cases charging the school district with negligence.

California, Illinois, and New York were the leading states in the modification of school district immunity for tort liability based upon a charge of negligence. Other means of recovery, usually quite limited and specialized, may be found in other states and in other jurisdictions. The leading states were analyzed and reported separately with the specific means of recovery treated individually.

The state of New York, while not the first state to move toward abrogation, was a leader in the field of modification. Liability has been imposed upon the school district in New York by judicial authority. Certain statutes such as "save harmless" acts, a court of claims act, and a comprehensive education section have contributed toward the abrogation. It was in 1907 that the first case was heard in New York which
held the school district liable for negligence. In 1910 a comprehensive act was passed which furthered the movement. In the Herman case, tried in 1922, the court said that the school was liable for negligence of the board of education. These rulings held that the school district was liable for its torts, but not for those of its employees and agents. The statutes provided a section which outlined the procedure for filing a claim based upon tort. A ninety-day deadline was established in order to limit the number of suits.

The New York courts have clearly indicated that all of the essential elements of a negligence claim must be present. The school was not the insurer of the welfare of a child and was bound to use only ordinary care. There existed a duty to maintain buildings, grounds and equipment in a reasonably safe condition, and the failure to do so was negligence. New York statutes imposed a duty upon the district to supervise its students. The failure to do so had been held actionable negligence. The adequacy of the supervision was a relative question and was usually a point of fact to be determined by a jury.

Procedural matters have caused much litigation in the state of New York. The deadline of filing a claim within ninety days after the incident has been extended frequently by the courts, if the rights of the defendant were not prejudiced. The purpose of the procedural statute was to prevent stale and
fraudulent claims.

Under permissive statute, school districts in New York may carry liability insurance or act as self-insurers. The manner of insurance has had little effect upon the tort liability of the school district in New York.

California, a comparative late comer to the field of modification, was the first state to pass express statutes for the purpose of abrogation. California has maintained such a position up to the present. California and New York vied for the number of suits brought against the school district.

The first California statute, passed in 1923, made the district liable for the dangerous condition of buildings, grounds, and property. Also in 1923, an act was passed which made the district liable for injuries to pupils caused by the negligence of officers or employees of the school. In the motor vehicle section, the school district was made liable for the negligent operation of a motor vehicle. Under such acts the liability of a school district in California was very similar to that of a private corporation. The deadline for filing a claim, based upon a tort, in California was set in 1959 as one hundred days. Prior to that time it had been ninety days. Certain exceptions have been made by the court if the claimant was a minor or incapacitated in some manner. The other parts of a claim were also contained in this statute.

The general approach of the courts of California may be
described as favoring a complete abolishment of the immunity doctrine. As in New York, the California courts have held that all the elements of a negligence claim must be found before a case can be heard. A reasonably prudent person must be able to foresee the event before negligence can be proven. The proximate cause of the injury must be under the control of the district. Only ordinary care was necessary, as the school was not the insurer of the safety of the children. A statute imposed the duty of supervision upon the teachers and the district. Again the question of the adequacy of the supervision was relative to the time, place, and circumstances of the incident and was a point of fact to be determined by the jury. Under the prior statute which provided a ninety day deadline for filing a claim, the courts strictly constructed this requirement. Under the recent statute a more liberal construction was possible.

School districts in the State of California were required to carry liability insurance. Cities, over 500,000, may act as self-insurers.

In the three states of Minnesota, Oregon, and Washington an early movement toward modification was noted. However, for one reason or another this movement has been controlled or eliminated.

Minnesota in 1851 passed an act which allowed an action to be brought against the school district for an injury to the
rights of a plaintiff. But in a case heard in 1892 the Minnesota Supreme Court interpreted the statute to mean property rights, and from that day on, the school districts in Minnesota were immune from vicarious tort liability in negligence.

Oregon has followed a similar path. In the statute authorizing suits, the courts have interpreted the authorization to mean property rights. A minor deviation from the precedent was seen in 1961. In the Vendrell case the district was held liable to the extent of the liability insurance policy.

Washington enacted its first abrogation statute in 1869. Following a rash of cases, the legislature in 1917 passed an act which permitted liability but excluded actions stemming from playgrounds, gymnasiums, athletics or industrial arts. Since this enactment the courts of Washington have allowed suits against the school districts for injuries occurring in ways other than the statutory exclusions.

Illinois was the latest state to hold the school district liable for tort. Since 1898 school districts in Illinois have been immune. However, in 1959 the Molitor case reversed this ruling and held that the immunity of school districts was waived to the extent of any liability insurance. Immediately following the Molitor decision the legislature enacted a bill which related to the damages collectible under a claim of negligence. The act established a deadline of six months for filing a claim, and the action must be commenced within one
year. This was followed by a patchwork of liabilities, immunities, and procedural rules, which did not help clear up the picture. In 1935, a joint committee of the Illinois State and Chicago Bar Association met to study the recently enacted California Tort Claims Act of 1963 and to adapt its provision for use in Illinois. The General Assembly of 1965, enacted the Local Governmental and Governmental Employees Tort Immunity Act (Ill. Rev. Stat. c. 35 sec. 1-101 through 10-101).

Two fundamental features of the act are: First, its provisions are applicable to all units of local government, including school districts. Second, the rule of the Molitor case is still the law of Illinois, except as modified by the Tort Immunity Act or some other statute.

The Supreme Court of Illinois has held that the Molitor decision applied only to cases arising after December 16, 1959. Despite the furor of this decision, the court has ruled that no new basis for negligence had been created, and that it was still necessary to show the essential elements of a negligence claim.

In certain states and in certain specific and restricted areas, the school district may be held liable in tort for negligence. While the school may be held liable for this specific charge, the general concept of immunity still prevails.

One of these areas was the so-called "safe place" statutes. Two states, Colorado and Wisconsin, had enacted
statutes which impose a liability upon the school district to build and maintain its buildings and/or equipment so as to render them safe for general use. Generally, the courts interpreted these statutes very strictly and recovery was limited.

Four states, (Connecticut, New Jersey, New York, and Wyoming) had passed "save harmless" legislation. These acts which cause the board of education to assume the liability of school employees acting within the scope of their duties may or may not make the board of education liable in tort for negligence. Connecticut courts have interpreted this statute as one of the indemnification from loss, not liability. In other words, a judgment must first be secured against the employee. In New Jersey, the court has said that this act did not create a liability upon the part of the district, and the school district was held immune from suit. The statute of Wyoming contained within itself a statement to the effect that no new liability had been created.

In a few jurisdictions, the courts have attempted to classify the functions of the school as either governmental or proprietary. If the function was held to be proprietary, liability may attach. Such a distinction is hard to make; therefore, it is infrequently done. Pennsylvania and Arizona have made this distinction recently. The Illinois Supreme Court as recently as 1962 would not attempt this artificial distinction. In general, this attempt to circumvent the immunity principle
has had little effect.

Many school districts carry liability insurance with or without statutory authorization. The carrying of insurance would seem to void one of the reasons for immunity, the protection of public funds. The bulk of the states did not allow recovery even if the district was fully insured; however, several states have departed from this concept. Kentucky and Tennessee have so done. In 1961 the Oregon Supreme Court permitted recovery against a school district for the amount covered in the policy. While immunity still prevails in these states, some of the hardships were eased.

In brief a recapitulation of the status of tort liability of school districts in the United States disclosed that there was a slight movement away from the traditional immunity. Three states, California, Illinois, and New York, have been the leaders in the complete abrogation of immunity. Other states have developed specialized laws for granting recovery in limited area. Kentucky, Tennessee, and Oregon allow recovery to the amount of liability insurance carried. School districts in the State of Washington were liable except for injuries occurring in certain specified locations. A few states attempted the division of the school's functions into governmental or proprietary categories.
B. CONCLUSIONS

In the conclusions of this study, the salient points have answered the questions posed at the beginning of the investigation. The conclusions are intended for students of educational administration, be they board members, superintendents, or principals. It does not take much foresight to see that school districts and tort liability cases will be a fertile field for an ever increasing amount of litigation and statutory concern.

The immunity doctrine originated in times which were very dissimilar to the time today. It was based originally on the divine rights of kings and that "the king could do no wrong." How this reason applied to the United States is a mystery of American jurisprudence. From the concept of "the king could do no wrong" the sovereign immunity of the state and of the school district grew like Topsy. Many reasons are given but the most cogent are the protection of the public funds and the loss of public confidence. At the time of writing the vast majority of the states extend the protection of immunity to school districts for tort liability.

While a majority of the school districts are immune, a number of states have moved toward nonimmunity. In attempting to understand the rationale of the courts and legislation, the authorities felt that it was better for the public to bear a
burden which would easily overwhelm an individual. Many authorities have referred to the social injustices of the immunity ruling. Immunity has survived as a historical anachronism and is not suitable for the current sociological world in which we live. This movement is symptomatic of the trend away from "classical liberalism."

As was noted in the summary, California, Illinois, and New York are the leading states in the abrogation of immunity. By various means, in a number of other states, the school district may be held liable in tort.

In a number of decisions, the courts noted that there were no express statutes enacted by the legislature permitting liability; therefore, the court, although it was dissatisfied with immunity, felt that it did not have the power to modify. Other courts noting the same role of the legislature, have proceeded to modify on judicial authority. New York and Illinois are examples of such modification. In the realm of municipal corporations, Michigan and Wisconsin have also so changed. In some cases it appeared that neither authority wished to take the initiative and responsibility for the abrogation of immunity.

In the bulk of the states the purchase of liability insurance has had little effect upon the liability of the school district for torts. However, in Kentucky, Oregon, and Tennessee the courts have allowed recovery to the extent of the limits
of the insurance policy carried by the school district. The purchase of liability insurance by a school in a state where the school is immune from suit is a questionable practice.

In all three of the leading states, the legislatures have enacted statutes which attempt to limit the liability of the school district. Generally, these statutes set the deadlines for filing a claim, designated the proper form of notice, and the person to whom the notice must be delivered. New York courts have interpreted the requirements very strictly; however, recent legislation has been enacted which authorizes a more liberal approach.

The trend of nonimmunity appears to be increasing. The three leading states have abrogated immunity within the century. New York in 1906, California in 1923, and Illinois in 1959, three of the more influential states, have moved toward liability of the school district. Other states have occupied an interim position which permitted recovery in specific areas. In the field of municipal corporations, recent decisions have been rendered which held these agencies liable. It is the opinion of this writer that the trend toward the modification of immunity will continue and grow in strength.

C. RECOMMENDATIONS

This writer believes that school districts and their personnel will become the target for ever increasing amounts
of litigation for tort liability in negligence. In the recommendations the emphasis will be on the development of guidelines which will protect, limit, or mitigate the charges against the defendant. Two types are made.

The first type of recommendation is legal in nature. Each administrator should know the statutes and case law of his state. The state's attorney or the legal advisor of the state department of education should be consulted for a particular case. Regardless, the advice of local counsel is essential. Many schools retain an attorney for legal advice. The legal experts will know what constitutes negligence as well as the bars to recovery. All legal questions should be referred to qualified attorneys at the earliest possible moment.

Justice as seen in the various cases and statutes points toward the responsibility of the public toward an individual. Contemporary social justice, as expressed in such ways as social security and workmen's compensation, demands a more just and equitable solution than an individual's assumption of the loss. All rights and obligations are conditioned by our society. This research shows that some of the legal community is accepting the view that it may be better for the public to undertake this responsibility.

In order to promote justice in the field of school district liability and to prevent the hardships inherent in the traditional immunity doctrine, this writer recommends that
the immunity of the school district for tort liability be abolished by legislative enactment. Because of the fact that the legislative branch is directly responsible to the people and less bound by precedent, it is clear to the writer that the legislature is the logical body to take the initiative.

In examining the legislation of California, Illinois, and New York and the judicial construction thereof, certain recommendations can be made in the manner of drafting new statutes. Of paramount importance is the need to write laws so as to protect the individual and also protect the school from fraudulent and stale claims. The statutes should clearly state the procedure of filing a claim. A reasonably flexible deadline for filing should be allowed for minors and persons incapacitated, if the school district is not prejudiced by such a late claim. Limit to recovery does not seem to have the flexibility desirable for the diverse needs of the injured plaintiffs. It would seem to the writer that this discriminates against children since they are the principal plaintiffs in these cases. If the damages are more than the amount of the limit fixed by law, the plaintiff must stand the loss.

In view of the fact that government in its many and varied forms has pervaded our daily lives in so many ways, it is the recommendation of this writer that a separate agency be established to hear the tort claims of all governmental agencies below the state level. Each state could establish an agency,
perhaps similar to a court of claims or special commission to adjudicate these claims. Such an agency would have the advantage of specializing in tort liability claims, thereby insuring a fairer and more equitable settlement of claims. Many civil courts are already overloaded with pending personal injury suits, and this would alleviate this condition to some extent. Since this agency would not be a court in the usual sense, cases could be disposed of more readily. By hearing all the cases related to governmental bodies, a balance and perspective could be maintained which is virtually impossible under the present situation.

Cases which are brought to the bar are expensive both in time and money. In addition they cast a bad light on the school and on the reputation of the staff and administration. Recent years have seen an increase in the number of tort liability suits brought against the school district. If the debilitating effects of such litigation are to be controlled, it is essential that all concerned become cognizant of this field of law.

The second type of recommendation relates to activities at the operational level which the administration may utilize to control, protect, or mitigate its tort liability.

If the school district may be held liable, the prudent administrator will see that the operating funds of the school are protected in some manner. Most school districts will elect
to carry a general liability insurance policy of suitable limits. In other cases, particularly in large cities, the school district may act as its own self-insurer.

The past history of tort liability indicates that school districts did not become bankrupt under the burden of paying liability claims. In fact, various references have stated that the percentage of money disbursed for personal injury claims was a small part of the total budget. Some states expressly provide authority for the payment of such claims. The cost of claims or insurance premiums is an integral part of the total cost of the educational system and should be so considered.

As was previously stated, the school is not the insurer of the safety of a child, and it is not reasonable to expect that no accidents will happen. Before the school district can be held liable for negligence, the defendant must be guilty of negligence. Certainly the school district has a duty to use care in safeguarding the well-being of the students. Various aspects of school activities present more danger of injury than others. It is recommended that the administration be especially aware of the dangers involved in the following: transportation, buildings and grounds, physical activities, vocational training, science laboratories, school patrols, and driver education.

The administration should be alert for all unsafe
activities and conditions. A yearly safety inspection by the safety engineers of the liability insurance company is a recommended procedure. Periodic inspections by the fire prevention department will be of value. Frequent inspections by the building principal and the head custodian will detect dangerous conditions before catastrophe strikes.

When an unsafe or dangerous condition is discovered, maximum effort should be made to correct this as soon as possible. If the condition is critical, evacuation and the closing of school would be indicated. The maintenance of buildings, grounds, and equipment in a dangerous or defective condition is a condition which can be remedied more readily than some other conditions.

Schools have a duty to adequately supervise their students. Of course, what is adequate supervision is a relative question, depending upon the time, place, and circumstances of the event. But perhaps some general benchmarks are in order. Such rules and regulations as are necessary for the conduct of the school should be made known, and the administration should ascertain whether the rules are being carried out. If a dangerous instrumentality or activity is involved, a higher degree of care would be indicated. A teacher should have the class under control, but it is not a proof of negligence to be away from the class for a short length of time.
Many accidents occur while children are playing on the playground. The question of the adequacy of the playground supervision has been the source of much litigation. Again, it is stated that the school is not the insurer of the safety of its students, and it is reasonable to expect that accidents will occur even if the supervision is adequate. The teacher should be in control of the situation so that if a dangerous condition develops it may be curbed. It would be recommended that the supervisor be in such a position so as to maintain visual contact with the students being supervised. It is not reasonable to expect one teacher to supervise great numbers of students. In several cases one teacher per 100 to 150 students was held to be a reasonable situation. However, the number will depend upon the location and the type of student involved.

If an accident or injury occurs there are certain steps that may be taken to protect the district. The provision of proper first aid may prevent more serious damage. All staff members should be instructed in first-aid procedures. If there is no emergency the teacher should wait for medically trained personnel. Each school should have on display, in a prominent location, the procedures to be followed in handling various injuries.

Complete records of the incident should be completed by the personnel involved in the case. All pertinent facts should
be recorded as soon as possible. Regular channels for reporting serious injuries should be established so that a centralized and responsible person is notified. Generally, this person would contact the insurance company, the attorney, and report this activity to the superintendent of schools.

If the above recommendations are implemented, the school districts need not fear the awesome specter of tort liability. *Ipso facto*, the school with this increased liability will find "necessity's sharp pinch" a stimulus toward providing the safest conditions ordinarily possible.
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GLOSSARY
GLOSSARY

Accident - An unforeseen event, occurring without the will or design of the person whose mere act causes it; an unexpected, unusual, or undesigned occurrence; the effect of an unknown cause, or the cause being known, by the unprecedented consequence of it; a casualty. In its proper use the term excludes negligence; that is, an accident is an event which occurs without the fault, carelessness, or want of proper circumspection of the person affected or which could not have been avoided by the use of that kind and degree of care necessary to the exigency and in the circumstances in which he was placed.

At law - For the suit; for the purposes of the suit; pending the suit. A guardian ad litem is a guardian appointed to prosecute or defend a suit on behalf of a party incapacitated by infancy or otherwise.

Agent - One who represents and acts for another under the contract or relation of agency.

Assumption of risk - A term or condition in a contract of employment, either express or implied from the circumstances of the employment, by which the employee agrees that dangers of injury ordinarily or obviously incident to the discharge of his duty in the particular employment shall be at his own risk.

Attractive nuisance - A doctrine which holds a property owner liable, when he knowingly leaves a dangerous instrumentality, which he may be charged with knowing is of a character to attract children, exposed in a place liable to be frequented by children, and as a result, a child who did not realize the danger, is injured.

Case law - The aggregate of reported cases as forming a body of jurisprudence, or the law of a particular subject as evidenced or formed by the adjudged cases, in distinction to statutes and other sources of law.
Certiorari - The name of a writ issued by a superior court directing an inferior court to send up to the former some pending proceeding, or all the record and proceedings in a cause before the verdict, with its certificate to the correctness and completeness of the record, for review or trial; or it may serve to bring up the record of a case already terminated below, if the inferior court is not one of record, or in cases where the procedure is not according to the course of the common law.

Common law - As distinguished from the Roman law, the modern civil law, the canon law, and other systems, the common law is that body of law and juristic theory which was originated, developed, and formulated and is administered in England, and has obtained among most of the states and peoples of Anglo-Saxon stock.

As distinguished from law created by the enactment of legislatures, the common law comprises the body of those principles and rules of action, relating to the government and security of persons and property, which derive their authority solely from usages and customs of immemorial antiquity, or from the judgments and decrees of the courts recognizing, affirming, and enforcing such usages and customs; and, in this sense, particularly the ancient unwritten law of England.

As concerns its force and authority in the United States, the phrase designates that portion of the common law of England (including such acts of Parliament as were applicable) which had been adopted and was in force here at the time of the Revolution. This, so far it has not since been expressly abrogated, is recognized as an organic part of the jurisprudence of most of the United States.

In a wider sense than any of the foregoing, the "common law" may designate all that part of the positive law, juristic theory, and ancient custom of any state or nation which is of general and universal application, thus marking off special or local rules or customs.

Condition precedent - A condition precedent is one which is to be performed before some right dependent thereon accrues, or some act dependent thereon is performed.

Contract - A promissory agreement between two or more persons that creates, modifies, or destroys a legal relation.
Contributory negligence - Contributory negligence, when set up as a defense to any action for injuries alleged to have been caused by the defendant's negligence, means any want of ordinary care on the part of the person injured, (or on the part of another whose negligence is imputable to him,) which combined and concurred with the defendant's negligence, and contributed to the injury as a proximate cause thereof, and as an element without which the injury would not have occurred.

Corporation - An artificial person or legal entity created by or under the authority of the laws of a state or nation, composed, in some rare instances, of a single person and his successors, being the incumbents of a particular office, but ordinarily consisting of an association of numerous individuals, who subsist as a body politic under a special denomination, which is regarded in law as having a personality and existence distinct from that of its several members, and which is, by the same authority, vested with the capacity of continuous succession, irrespective of changes in membership, either in perpetuity or for a limited term of years, and of acting as a unit or single individual in matters relating to the common purpose of the association, within the scope of the powers and authorities conferred upon such bodies by law.

Crime - A positive or negative act in violation of penal law; an offense against the State. Crimes are those wrongs which the government notices as injurious to the public, and punishes in what is called a "criminal proceeding," in its own name.

Damage - Loss, injury, or deterioration, caused by the negligence, design, or accident of one person to another, in respect of the latter's person or property.

Damages - A pecuniary compensation or indemnity, which may be recovered in the courts by any person who has suffered loss, detriment, or injury, whether to his person, property, or rights, through the unlawful act or omission or negligence of another.

Defendant - The person defending or denying; the party against whom relief or recovery is sought in an action or suit.

Dictum - See "obiter dictum."

Employee - One who works for an employer; a person working for salary or wages.
Employer - One who employs the services of others; one for whom employees work and who pays their wages or salaries.

Estop - To stop, bar, or to impede; to prevent; to preclude.

Imputed negligence - Negligence which is not directly attributable to the person himself, but which is the negligence of a person who is in privity with him, and with whose fault he is chargeable.

Independent contractor - One who, exercising an independent employment, contracts to do a piece of work according to his own methods and without being subject to the control of his employer except as to the result of the work.

It is very generally held that the right of control as to the mode of doing the work constructed for is the principal consideration in determining whether one employed is an "independent contractor" or servant. If the employee is merely subject to the control or direction of the employer as to the result to be obtained, he is an independent contractor; if he is subject to the control of the employer as to the means to be employed, he is not an independent contractor.

Infant - A person within age, not of age, or not of full age; a person under the age of twenty-one years; a minor.

Injury - Any wrong or damage done to another, either in his person, rights, reputation, or property.

Invitees - One who is at a place upon the invitation of another.

Last clear chance - In the law of negligence, this terms denotes the doctrine or rule that, notwithstanding the negligence of a plaintiff, if, at the time the injury was done, it might have been avoided by the exercise of reasonable care on the part of the defendant, the defendant will be liable for the failure to exercise such care. The doctrine cannot be invoked by a plaintiff unless he himself by his own negligence has proximately brought about the situation which put upon defendant an extraordinary duty which otherwise would not have rested on him. In many jurisdictions the rule is that for a person to be brought within the "last clear chance" doctrine, the evidence must tend to show that, while his negligence may have contributed toward getting him in the position of danger, all negligence on his part had ceased for a sufficient time prior to the accident to have enabled the defendant, after he knew
of his situation or peril, to have avoided the accident. In some jurisdictions, however, the "last clear chance" rule applies, although the plaintiff negligently exposes himself to peril, and although his negligences continues until the accident happens, if the defendant, with knowledge of his danger and reason to suppose that he may not save himself, may avoid the injury by exercise of ordinary care, and fails to do so.

Legal liability - A liability which courts of justice recognize and enforce as between parties litigant.

Liable - Bound or obliged in law or equity; responsible; chargeable; answerable; compelled to make satisfaction, compensation, or restitution.

Liability - The state of being bound or obliged in law or justice to do, pay, or make good something.

Licensee - A person who is neither a passenger, servant, or trespasser, and does not stand in any contractual relation with the owner of the premises, and who is permitted to go therein for his own interest, convenience, or gratification.

Malfeasance - The wrongful or unjust doing of some act which the doer has no right to perform, or which he has stipulated by contract not to do.

Master - One having authority; one who rules, directs, instructs, or superintends; a head or chief; an employer.

Misfeasance - The improper performance of some act which a man may lawfully do.

Negligence - The omission to do something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs, would do, or the doing of something which a reasonable and prudent man would not do.

Nolens volens - Whether willing or not; consenting or not.

Nonfeasance - The neglect or failure of a person to do some act which he ought to do. The term is not generally used to denote a breach of contract, but rather the failure to perform a duty towards the public whereby some individual sustains special damage....

Non obstante veredicto - Notwithstanding the verdict. A judgment entered by order of court for the plaintiff, al-
though there has been a verdict for the defendant, is so called.

Nuisance - That class of wrongs that arise from the unreasonable, unwarrantable, or unlawful use by a person of his own property, either real or personal, or from his own improper, indecent, or unlawful personal conduct, working an obstruction or an injury to the right of another or of the public, and the producing material annoyance, inconvenience, discomfort, or hurt.

Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, which unlawfully obstructs the free passage or use, in the customary manner, of any lake or river, bay, stream, canal, or basin, or other public park, square, street, or highway is a nuisance.

Nunc pro tunc. - A phrase used to express that a thing done at one time which ought to have been performed at another.

Obiter dictum - A remark made, or opinion expressed, by a judge, in his decision upon a cause, "by the way," that is, incidentally or collaterally, and not directly upon the question before him, or upon a point not necessarily involved in the determination of the cause, or introduced by way of illustration, or analogy or argument.

Officer - The incumbent in an office; one who is lawfully invested with an office. An "officer" is one who is invested with some portions of the functions of the government to be exercised for the public benefit.

Per curiam - By the court. A phrase used in the reports to distinguish an opinion of the whole court from an opinion written by any one judge.

Plaintiff - A person who brings an action; the party who complains or sues in a personal action and is so named on the record.

Pro tanto - For so much; for as much as may be; as far as it goes.
Proximate cause - That which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred. That which is nearest in the order of responsible causation.

Quasi corporations - Organizations resembling corporations; municipal societies or similar bodies which, though not true corporations in all respects, are yet recognized by statutes or immemorial usage, as persons or aggregate corporations, with precise duties which may be enforced, and privileges which may be maintained, by suits at law. They may be considered quasi corporations, with limited powers, co-extensive with the duties imposed upon them by statute or usage, but restrained from a general use of the authority which belongs to those metaphysical persons by the common law.

Quasi municipal corporations - Bodies politic and corporate, created for the sole purpose of performing one or more municipal functions. Public corporations organized for governmental purposes and having for most purposes the status and powers of municipal corporations... but not municipal corporations proper, such as cities and incorporated towns.

Remote cause - In the law of negligence, a "remote" cause of an accident or injury may be one which sets in motion another cause, called the "proximate" cause. The "remote cause" is the one the existence of which does not necessarily imply the existence of the effect. Remote cause is also defined as a cause operating mediately through other causes to produce effect.

Res ipsa loquitur - The thing speaks for itself. Rebuttable presumption that defendant was negligent, which arises upon proof that instrumentality causing injury was in defendant's exclusive control, and that the accident was one which ordinarily does not happen in absence of negligence.

Res judicata - A matter adjudged; a thing judicially acted upon or decided; a thing or matter settled by judgment.

Respondeat superior - Let the master answer. This maxim means that a master is liable in certain cases for the wrongful acts of his servant, and a principal for those of his agent.

School board - A board of municipal officers charged with the administration of the affairs of the public schools. They are commonly organized under the general laws of the state, and
fall within the class of quasi corporations, sometimes coterminus with a county or borough, but not necessarily so.

School district - A public and quasi municipal corporation, organized by legislative authority or direction, comprising a defined territory, for the erection, maintenance, government, and support of the public schools 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," or "trustees," "commissioners," or "supervisors" of schools.

Servant - A person in the employ of another and subject to his control as to what work shall be done and the means by which it shall be accomplished.

Stare decisis - To stand by decided cases; to uphold precedents; to maintain former adjudications. Doctrine of stare decisis rests upon the principle that law by which men are governed should be fixed, definite, and known, and that, when the law is declared by a court of competent jurisdiction authorized to construe it, such declaration, in the absence of palpable mistake or error is itself evidence of the law until changed by competent authority.

State - A body politic, or society of men, united together for the purpose of promoting for their mutual safety and advantage, by the joint efforts of their combined strength. A political community organized under a distinct government recognized and confirmed by its citizens and subjects as a supreme power.

Subrogation - The Substitution of one thing for another, or of one person into the place of another with respect to rights, claims, or securities.

Tort - A tort is a legal wrong committed upon the person or property of another independent of contract. It may be either (1) a direct invasion of some legal right of the individual; (2) the infraction of some public duty by which special damage accrues to the individual; (3) the violation of some private obligation by which like damage accrues to the individual. In the former case, no special damage is necessary to entitle the party to recover. In the two latter cases, such damage is necessary.
Tort-feasor - A wrong-doer; one who commits or is guilty of a tort.

Trespass - An unlawful act committed with violence, actual or implied, causing injury to the person, property, or relative rights of another; an injury or misfeasance to the person, property, or rights of another, done with force and violence, either actual or implied in law.

In the strictest sense, an entry on another's ground, without a lawful authority, and doing some damage, however inconsiderable, to his real property.

Trespasser - One who has committed trespass; one who unlawfully enters upon another's land, or unlawfully and forcibly takes another's personal property. The term is generally used in a limited sense to designate one who goes upon the premises of another without invitation, express or implied, and does so out of curiosity, and for his own purposes or convenience, and not in the performance of any duty to the owner.

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.

Vested rights - Rights which have so completely and definitely accrued to or settled in a person that they are not subject to be defeated or cancelled by the act of any other private person, and which it is right and equitable that the government should recognize and protect, as being lawful in themselves, and settled according to the then current rules of law, and of which the individual could not be deprived arbitrarily without injustice, or of which he could not justly be deprived otherwise than by the established methods of procedure and for the public welfare.

Vis major - A greater or superior force, an irresistible force. A loss by vis major is one that results immediately from a natural cause without the intervention of man and could not have been prevented by the exercise of prudence, diligence and care.

Volenti non fit injuria - He who consents cannot receive an injury.
APPROVAL SHEET

The dissertation submitted by Antonio Ignatio Torres has been read and approved by the members of the School of Education.

The final copies have been examined by the director of the dissertation and the signature which appears below verifies the fact that any necessary changes have been incorporated and that the dissertation is now given final approval with reference to content and form.

The dissertation is therefore accepted in partial fulfillment of the requirements for the degree of Doctor of Education.

January 23, 1973
Date

[Signature of Adviser]