A Study of the Tort Liability of the School Districts and the Illinois Common Law Principles

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A STUDY OF THE TORT LIABILITY OF THE
SCHOOL DISTRICTS AND THE ILLINOIS
COMMON LAW PRINCIPLES

by
Amado Garcia, Jr.

A Thesis Submitted to the Faculty of the Graduate School
of Loyola University in Partial Fulfillment of
the Requirements for the Degree of
Master of Arts

February
1964
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CHAPTER I

INTRODUCTION

With the Molitar decision, the Supreme Court of Illinois abrogated the Immunity Doctrine and ruled that the Illinois School Districts were liable in tort for injuries to pupils resulting from the negligent acts of the school employees. Since recovery can be obtained for injuries to pupils, an increase in tort litigation can be expected in the Illinois Public Schools. Parents are becoming more litigation-conscious, and the expanding school program in Illinois will multiply the number of instances in which the student will be exposed to greater risk of harm. An increase in litigation may be evident by the great numbers of cases brought against the school districts in California, New York, and Washington, where the Immunity Doctrine has been abrogated.

There is need for school administrators and educators to become aware of their legal responsibilities and the liabilities which can be imposed for their negligent conduct. Through an understanding of liability, administrators and educators can take precautionary measures to prevent injuries to pupils and avoid litigation against the schools.

The Master-servant relationship between the school districts
and teachers was established in Illinois in 1959, and the school districts will respond for the negligence of a teacher. There may be no financial loss to a teacher, but educators have a professional duty to keep the school district out of the courts. Moreover, educators have a legal and moral duty to protect school pupils from harm. In the event that action is brought against a teacher, and the suit proves unsuccessful, there is still the mental stress, loss of time, and the possible loss of reputation, not to mention the burden brought upon the district.

To this effect, Burrup states, "Probably the most important reason why a teacher should know something about school law is that he will be more careful of the interests of children if he realizes the possible implications involved in his teaching assignment."¹

The purpose of this study is to reveal and interpret the legal liability for the injury of pupils in the public schools in Illinois. A preliminary study revealed that records of court cases brought against the school districts in Illinois are too limited to effect a significant study of liability. School cases from other states are used to show the reasoning of the courts in applying the common law principles in litigations involving the school. Illinois cases from out-of-school situations are used to reveal and interpret the common law principles which are followed by the Illinois Courts.

similarities and differences in the application of these principles will be revealed in the study.

It is not the purpose of this study to speculate precedent. At most, the reader may take the presumption that the reasoning of the courts in school cases from other states may affect the decisions arising from future actions in the Illinois School System. "Cases decided from courts of last resort in other jurisdictions are not binding in the Supreme Court of Illinois, but they would be persuasive in any case of first impression in Illinois."²

This study is intended for administrators, teachers, and students in the field of Education. Chapter two forms a general background for the study of liability. Chapter three presents a case analysis of the immunity of the Illinois School Districts and the abrogation of this principle. Chapter four includes a study of the recent Illinois Statutes which pertain to school liability. Chapter five is devoted to an analysis of the common law principles as they apply to actionable negligence in school situations. Chapter six is an analysis of the legal defenses which are employed in actions against the school districts. Conclusions and recommendations derived from this study are presented in chapter seven.

A study of tort liability for the injury of school pupils in

²Information from a personal interview of the writer with John C. Hayes, Dean of Law School, Loyola University.
Illinois involves an analysis of legal principles. The following are a pertinent part of the study:

What common law principles are followed by the courts of other states in rendering decisions in tort actions for negligence in the school?

What common law principles are followed by the Illinois Courts in rendering decisions in tort actions for negligence?

Which similarities are found in the extension and application of these principles between the Illinois Courts and the courts of other states?

Some of the questions involved in this study are briefly summarized:

Are school employees in Illinois liable for negligence?

Are school officers in Illinois liable for negligence?

Are the schools in Illinois insurers of safety?

What limitations did the Illinois Legislature provide for actions brought against the school districts?

What provisions did the Illinois Legislature pass for the protection of the school district personnel as a result of the Molitar decision?

What are the elements of actionable negligence?

What degree of care is required of teachers for the protection of pupils?

What degree of care is required of bus drivers for the protection of students?

What degree of care is required of students for their own protection?

What constitutes negligence in the schools?

Which legal defenses are available for the school districts against actionable negligence in Illinois?

The scope of this study will be limited to cases arising from
injury to pupils through the negligent conduct of school district employees. The study applies to teachers, school administrators, supervisors, school custodians, and other employees. Teachers, by sheer numbers, comprise the greatest number of employees who come in contact with school pupils, so that the majority of the cases which are presented deal with teachers and pupils. School board members, while in their official capacity, are state officers, not employees, and are exempt from liability.

Corporal punishment will not be included in this study since it has been adequately described from the social and the legal standpoint.

This study is not intended as a substitute for legal advice. Those who need legal advice should seek counsel.

No study which bears any similarity to the study which the writer proposes has been completed. A recent legal study was made in Illinois by Harry Smith. His dissertation summarized the legal status of teachers in regard to certification, appointment,


tenure, and retirement.

Studies in tort liability have been made in other states. Rosenfield, in his book, presented a study of the liability of school board members, school administrators, and teachers for injuries to pupils. Poe made a comparison of the legal liability for the injury of children in out-of-school situations with the liability for injury of pupils in the public schools. Leibee described the liability of school boards in the states which have abolished the Immunity Doctrine. His work dealt largely with cases arising out of the physical education department. These studies in liability include summaries or discussions and definitions of negligence and the defenses which are available. The proposed study, however, will exemplify the principles of negligence in greater detail and will not be limited to the way in which the accidents happened or the conditions which occasioned the accident.

Reference was made to the following legal indices and handbooks in order to locate citations to the cases which deal with Illinois Common Law Principles:

Illinois Annotations to the Restatement of the Law of Torts,

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II, Chapters 16 and 17, (§281-§503).

Illinois Digest, 3rd, - XXIX - Negligence
   XXXIV - Schools and Education.

Illinois Law and Practice - XXVIII - Negligence
   XXIV - Torts

After the cases were located, reference was made to the Illinois Reports and to the Illinois Appellate Reports where the information pertinent to the cases was located.

Reference was made to the following indices in locating the citations to school cases from other states:

   American Jurisprudence, XXXXVII - Tort Liability, (§56-§61).


After the citations are located, reference was made to the Reports of the states and the National Reporter System to locate the cases and obtain the information. Reference was made to Shepard's Citations to obtain an analysis of the history and treatment of the cases. The Index to Legal Periodicals and Shepard's Citations were used in locating legal articles pertaining to cases and legal theories. The American Law Reports and the American Digest System were used as a check in the organizing and writing of the material.
CHAPTER II

SCHOOL DISTRICT IMMUNITY IN GENERAL

In order to understand the reasoning of the courts' decisions in dealing with school cases, the reader should understand the basic characteristics of a corporation, since the courts, in dealing with the school districts, recognize these as public corporations.

School districts are corporations created by the state to administer the educational programs on a local level. Although locally administered, school districts are subdivisions of the state, and school board members are state officers while acting in their capacity. School districts possess limited powers or those powers expressed by statute, hence they are called quasi or incomplete corporations. In addition, school districts are granted the use of discretion in performing activities essential to their local needs. School boards in the exercise of discretionary powers have occasioned much litigation. The plaintiff's contention generally questions the board's authority to exercise such powers.

Whenever it seems the better policy or for the matter of convenience and economy, municipalities are often delegated authority to perform certain duties in relation to education. Municipal
authorities, when in the performance of educational activities, are actually performing for the state because municipalities have no vested powers in relation to education. Moreover school districts may also hold the same geographical boundaries as a city, but when this is the case, the two corporations retain their distinct identities.

The doctrine of Sovereign Immunity in this country has been criticized as being too antiquated and unjust in our modern society, but a majority of the states uphold the immunity of school districts against tort liability. The immunity of the school districts was born in the common law when the early courts decided that a school district, being a subdivision of the state, should share the state's immunity. The courts, in following precedent, have expressed dissatisfaction with this ruling. Other courts have gone farther by diverting from prior decisions and abrogating the ruling. In jurisdictions where the immunity doctrine has been abrogated, the school districts are liable for the negligent acts of their officers, employees, and agents.

The immunity doctrine has also been abrogated by statute, and secondary sources often state that "in the absence of statutes to the contrary," school districts are not liable to pupils for injuries resulting from the negligent acts of its officers, agents, and employees. This indicates that where there is no statute abrogating the immunity doctrine in a state, the school district in that
state is immune by common law. Because of recent court decisions, sources should probably state, in the absence of statutes, or court ruling, to the contrary.

The immunity doctrine provides immunity to school districts while they are engaged in governmental activities. School board members, while acting in this capacity, are immune from liability, but immunity does not extend to the school district employees such as principals, teachers, custodians, and supervisors. Employees are answerable for their own negligent acts when dealing with pupils in states where the districts are immune. Employees are also liable in states where the districts themselves are liable, but actions are usually initiated against the districts because the districts become responsible for the torts of their employees. Actions are initiated against employees in states which have "save harmless" statutes because the statutes state that employees should be reimbursed for judgments passed against them.

The courts and legislatures have provided exceptions to the immunity doctrine, and while these are not a direct abrogation of the doctrine, they have almost the same effect.

Exceptions to the doctrine are found in the "save harmless" statutes and in the "safe place" statutes which the courts have applied to school districts. Some courts have allowed judgments against school districts which have liability insurance, contending that the damages awarded to the plaintiffs would not constitute
harm to the defendant districts. Other courts have awarded damages to plaintiffs where school districts, in acting beyond their authority, have engaged in proprietary functions, therefore being liable as a private corporation would be. The courts have also held the school districts liable in cases where the school districts have engaged in activities which constitute a nuisance. There has been much litigation on these two counts, the first being a technical transgression beyond the district's immunity, and the second one being a legal principle in the common law. This chapter does not include an exhaustive study of liability, but cases are used in illustration of the significance of these points.

The Corporate Nature of School Districts

School districts are public corporations created by the state in order to facilitate the administration of government. Their primary function is the execution of state policy: public education.

A corporation is defined by law as "an artificial being, invisible, intangible, and existing only in the contemplation of the law." Remmlein pursues the definition further: "Being the mere creation of law, it possesses only those properties which the

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113 American Jurisprudence 154. This definition was handed down by Justice Marshall during the celebrated Dartmouth College Case. (Dartmouth v. Woodward, 4 Wheat U. S. 518, 636 4th Ed 629, 659) According to the American Jurisprudence, this definition "has frequently been approved."
charter confers upon it. . . . Among the most important are immor-
tality, and . . . individuality: properties by which a perpetual
succession of many persons are considered the same, and may act as
a single individual."^2

Thus a corporation is not, in the law, the individual members
which comprise it, but instead it is a separate and distinct legal
entity. The succession of individuals in no way alters its charac-
ter, but insures its existence. A school district is likewise a
corporate entity, separate and distinct from the persons comprising
it: the school board members and the local inhabitants.

Private corporations in general are created through charters
granted by the state upon request or petition. In this way an ar-
tificial being is created for the legal benefit of the members.

Citizens of a locale ordinarily exercise the right to petition
in creating a new school district as the need arises. This however
is a matter of policy, not an inherent right. Legally the state
can create a school district without the consent of the residents.3
It can create any agency or select and authorize any existing sub-
division of the state to carry out the educational policy.

School districts are public corporations created for the sole

2Madaline Kinter Remmlein, The Law of Local Public School

3Newton Edwards, The Courts and the Public Schools, (Chicago,
purpose of carrying out the educational policy of the state, and they are granted limited powers, or only those powers deemed necessary for the accomplishment of this purpose. The courts, for this reason, have classified school districts as being quasi or incomplete corporations. The term quasi, according to Black, is applied to corporations which are created involuntarily.

Confusion often arises as to the true identity of school districts when these are called municipal corporations by the courts. Constitutional or statutory provisions ordinarily make reference to municipal corporations. The question of whether these provisions were meant to include school districts is left to the courts. If it is found that these provisions were meant to include school districts, the school districts are then defined as municipal corporations in court. The variation is named for the purpose of interpretation of the statutes only, and the status of school districts as quasi corporations is in no way changed.

Edwards cites several examples from cases which involve the courts' interpretation of a municipality. The following is used as

4 Remmlein, Local Public School Administration, p. 7-8. According to Remmlein, the statutes of most states refer to the school district merely as corporations or corporate bodies. The task of classification has been left to the courts.

5 Henry Campbell Black, Black's Law Dictionary, 4th ed. (St. Paul, Minn., 1951), p. 411. The term applies to corporations "possessing a low order of corporate existence or the most limited range of corporate powers."
an illustration:

The question arose as to whether a contractor who was erecting a school building could employ labor for more than eight hours a day. 'Strictly speaking,' said the court, 'cities are the only corporations in this state. We have no doubt, however, that the lawmakers, by the use of the word "municipality" in the connection in which it is employed in the eight hour law, intended to include school districts.'

Distinction of School Districts and Municipalities

In establishing school districts to carry the educational function, the state does so without regard to boundaries of political subdivisions. If the better policy or convenience dictates, the state may make use of existing subdivisions such as counties, townships, towns, or cities. It is not uncommon then to find a municipality and a school district superimposed over the same geographical area. Confusion arises because of the failure to distinguish between a city as a municipal corporation and the school district as a quasi corporation. When the two corporations are geographically superimposed, it cannot be assumed that the two have merged, or that one is subordinate to the other. The two corporations retain their distinct identities, each with a different function to perform. Edwards states that a municipal corporation is created primarily for the purpose of local self government, and a school district is a quasi corporation, a political or civil subdivision, created as an instrumentality of the state for its

The main distinction between school districts and other public corporations is the limitations placed on the powers granted by the state. Corporations generally possess common law and specific or special powers as authorized by charter or statute. School districts have no common law powers, but only those expressed by law.

A municipality is restricted to the exercise of those powers which are authorized by charter or statute, namely expressed powers. Municipalities can also exercise powers which are incident to, or are fairly implied by these expressed powers, and also those powers which are considered essential for the accomplishment of the purpose of the corporation. School districts, in the exercise of their powers, are limited to those powers expressed by statute and those implied to be necessary for the function of the expressed powers.8

Where a municipal corporation can exercise those powers which are fairly implied to be necessary by statute or charter, a school district can exercise only those which are implied to be necessary. Remmlein states that a school board must be able to point to a statute conferring power upon it directly or be necessary implication when its authority to exercise a power is challenged.

7Ibid., p. 93.

8Remmlein, Local Public School Administration, p. 9-10.
Statutes receive a strict interpretation, and further implication cannot be interpreted by a school board. Any doubt concerning the existence of power is resolved by the courts against the school district.  

Statutes which confer power on school districts cannot possibly cover all phases or activities necessary for the complete educational program. Discretionary powers allow for some flexibility in the educational program and enable a school board to meet the needs of the community:

It is usually within the discretion of the board to determine whether or not to furnish preschool, junior college, adult, vocational, or other kinds of education; to repair an old school building; to have French, Spanish, Polish, or any other language taught in high schools; to require physically normal pupils to take physical education; to offer agriculture, music, or home economics courses; to accept tuition pupils; to employ teachers within the legal requirements for certification and salary payments; and to make hundreds of other decisions within the provisions of law and the requirements of the state board of education.  

For a comprehensive study of the discretionary powers of the school boards as defined by judicial interpretation, consult The Discretionary Powers of School Boards.  

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9Ibid., 11-13.


Theories of School District Immunity

It is a common law ruling in this country that school districts are not liable in the absence of statute for damages resulting from the negligent acts of their officers or employees. In order to be held liable, there must exist a statute expressly making the school district liable. The power "to sue and be sued," which is common to all corporations does not overcome this immunity because it refers to suits arising out of contracts.

This ruling, which is deeply ingrained in our common law, is referred to as the Doctrine of Sovereign Immunity, and its development can be attributed to several theories in law to which courts often refer in their decisions. The most prominent of these is the theory of Divine Sovereignty or the Divine Right of Kings, developed in English Common Law during the Middle Ages. The doctrine stated that the king, being infallible, could do no wrong, and hence was immune from punishment.

In this country the state replaced the king, but the doctrine persisted because the state was assumed to be sovereign. The doctrine now holds that no liability can be attached to the state for negligence in the performance of governmental functions. School districts are creatures of the state, performing a governmental function, therefore they share this immunity. Some jurisdictions which follow this ruling have stated that school districts are capable of performing only governmental duties, since they are not
granted the powers to perform proprietary duties. In order that the courts hold a district liable, the state must consent to it in "clear and express terms." 12

Private corporations do not share this immunity because their activities are for profit or self gain rather than governmental. Municipalities generally share this immunity while in the performance of governmental functions. However, municipalities are as liable as private corporations are while in the performance of proprietary functions. 13 The operation of a business, such as a transportation system, which is operated as if privately owned and derives an income, is considered a proprietary function. 14

In this country the case of first impression regarding governmental immunity of a state involved a suit against a county in Massachusetts. In holding the county immune from liability, the court declared that the county was a quasi corporation created by legislature for the purposes of public policy and not voluntarily, like a city, and that as a state agency it was therefore immune. 15

A similar reasoning, which substantiates the doctrine of

12 Edwards, p. 394.

13 Warder v. City of Grafton, 128 S. E. 375. "Almost universally, the police, school, health, and fire departments are classified as governmental."

14 Remmlein, Local Public School Administration, p. 243.

immunity, is that the relationship of master-servant does not exist between the school district and its employees. According to Edwards, this relationship does not exist "between a municipality and the agent it appoints or employs in the execution of its governmental powers."16

In private employment, the employer is usually held responsible for the negligent acts of his employees while in the course of their employment.17 The assumption of responsibility of an employer is founded in the doctrine, Respondeat Superior: let the master answer. The doctrine was developed in English Common Law, where the master was held "vicariously liable for the torts committed by his servants in the course of their employment."18

The application of this doctrine has been largely restricted to private employment, but it has been applied to school districts in states where the immunity doctrine has been abrogated.

The Supreme Court of Washington, in refusing to attach liability to a school district stated:

But this presupposes that the county superintendent in this case is the agent of the county, and that as such, the courts must respond under the maxim of respondeat

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16 Edwards, p. 396.

17 For a comprehensive study of this doctrine, consult Outlines of the Law of Agency, by Floyd R. Mechem, 4th ed. (Chicago, 1952), Chapters XII, XIII, and XIV.

superior for the tort or negligence of the county superintendent. The relationship of principal and agent does not exist however between a municipality and the agents it appoints or employs in the execution of its governmental powers.¹⁹

In upholding the immunity of school districts some courts have stated that school districts have no funds out of which to pay damages. This reasoning stems from the Trust Fund Theory, a doctrine initially applied by the courts in the defense of charitable institutions against liability. Funds for charitable institutions like hospitals were held in trust for charitable purposes. This reasoning was later applied to the schools by some courts which held the school funds were set aside to provide public education and could not be used to satisfy damages.

The following citations will serve to illustrate the application of the doctrine of trust funds to hospitals:

But it is manifest that if we uphold a rule which would make an institution of charity liable to a patient who has been injured by an incompetent servant, negligently selected, we destroy the principle we have endeavored to make plain, that charitable trust funds cannot be directed from the purposes of the donor.²⁰

It was similarly stated by the Supreme Court of Missouri:

The law has been fairly established by the great weight of authority that the funds of a charitable

¹⁹Smith v. Seattle School District No. 1 et al., 191 Pac. 858, 112 Wash. 64, (1920).

²⁰Adams v. University Hospital, 122 Mo. App. 675, 99 S. W. 453, (1907).
hospital or association are trust funds devoted to the alleviation of human suffering, and cannot be diverted nor absorbed by claims arising from the negligence of trustees or their employees in administering the trust or charity.\(^1\)

In sustaining the immunity of a school district, a court justified the application of the doctrine to the district:

If it is against public policy as ruled in the foregoing cases to divert charitable funds, so called, from other than the purposes for which they have been collected, how much stronger is the case where the funds are the fruit of taxation, belong to the people, and are to be used for the beneficent purpose of free education. \ldots \) School funds are collected from the public to be held in trust by the boards of education for a specific purpose. This purpose is education. An attempt, therefore, otherwise to apply or expend these funds is without legislative sanction and finds no favor with the courts.\(^2\)

Of some importance is the theory which states that school districts are involuntary corporations created for public benefit, and not for gain or profit. It follows that if the functions of a school are purely governmental, they are then immune. In passing judgment for the defendant school district, Judge Brannon made reference to the rule stated by Illinois Municipal Corporations 966:

The municipal corporations are organized, not for gain, but for public weal, as important instrumentalities in government, and they are supported by the taxation of their people, and should not be made liable for acts of their officers, done in the performance of purely governmental powers for the benefit of the public, and not for

\(^1\) Michalos v. Evangelical, etc. Hospital, 219 S. W. 643, (1920)

\(^2\) Cochran v. Wilson, 287 Mo. 210, 229 S. W. 1050, (1921).
Exceptions to the Immunity Doctrine

The doctrine of immunity has been attacked by legal commentators as well as by the courts. Critical comments against this doctrine appeared before the turn of the century, but widespread criticism did not appear until 1924, when Professor Borchard of Yale University published a notable series of articles in which he challenged the foundation of sovereign immunity:

Yet it requires but a slight appreciation of the facts to realize that in Anglo-American law the individual citizen is left to bear almost all the risks of a defective, negligent, perverse, or erroneous administration of the state's functions, an unjust burden which is becoming graver and more diversified. . . . The reason for this long-continued and growing injustice in Anglo-American law rests, of course, upon a Medieval English theory that "the king can do no wrong," which without sufficient understanding was introduced with the common law into this country and has survived mainly by reason of its antiquity.24

Attacks and criticism against the doctrine appeared more numerous afterwards, and today many of the courts express dissatisfaction. Since the doctrine of immunity is in the common law, it has been abrogated and modified by statute and changed by judicial interpretations. The existing exceptions to the doctrine may be


classified into two categories: those involving legislative enact-
ments, and those arising from court decisions.25

The legislatures of the states have tried in various ways to
provide some compensation for those injured in the schools. Two
states, California and Washington, have abrogated the immunity
doctrine by statute, and both have imposed direct liability on the
school districts. The California statutes are by far the most
comprehensive and make no exceptions, but impose strict liability.
These statutes are found in the Government Code, The Education
Code, and The California Vehicle Code. The statute passed in 1917
by the legislature in Washington makes exceptions to liability by
"reviving" immunity if accidents occur on a playground, a park, or
a field house, or if the accident involved athletic apparatus, or
manual training equipment owned by the district. The statute
passed in 1917 severely limits the liability imposed by an earlier
statute which was passed in 1869. The first statute lay dormant
for many years until 1917 when a judgment was passed against a
school district for an accident on a gym ladder. A flood of school
cases followed, and the limiting statute was enacted in 1917. In
1953 an amendment to the Act of 1917 stated that counties and
corporations were not entitled to the "privilege of governmental
immunity," but the Supreme Court, in testing the amendment, stood

by the statute of 1917. In these two states the statutes have brought the status of the school district to the same level as private corporations.

Another legislative approach which is used by several states does not abrogate the doctrine of immunity, but it provides a means of recovery for those who are injured. The statutes are known as "save harmless" laws, and they provide that the employees be "saved" by the district from "financial harm" resulting from a judgment against the employees for damages.

Recent cases indicate that these statutes do not constitute a waiver of immunity although an earlier decision indicated that in New York action must be brought against the defendant employee for recovery. School districts maintain their status as quasi corporations and in this way teachers are protected from their negligent acts while in the course of their employment.


The statutes in Connecticut, New Jersey, and New York require the school boards to reimburse their employees against judgments, while those of Wyoming permit the school boards to do so.

In North Carolina claims may be filed indirectly against the state in certain cases. The North Carolina Industrial Commission has the power to decide upon tort claims brought against the county or other administrative units for injuries arising out of the operation of school buses. Those claims are filed against the state, and if damages are awarded for the plaintiff, the state board of education pays the damages, the maximum of which is set at ten thousand dollars.²⁹

"Safe place" statutes are again exceptions to the immunity doctrine although they do not constitute a waiver or abrogation of the doctrine. Under these statutes public buildings and public places of employment must be maintained in a safe condition. School buildings must be included under this legislation since these are public buildings. California enacted a statute known as the Public Liability Act of 1923 and suits were successfully brought against the school districts under this act prior to the state's abrogation of the immunity doctrine by statute. In Wisconsin, the "safe place" statute was inapplicable to school districts, but later it was amended in order that it would be applicable.

²⁹Reutter, p. 28-30.
A number of courts have expressed dissatisfaction with the immunity doctrine, contending that it is illogical and unjust. However the majority of the courts have generally taken the position that if the doctrine were to be abrogated, it would be done through legislation. A study of court cases has revealed that some courts have taken positive steps against the doctrine.

Some courts have provided a judicial exception to the immunity doctrine in connection with the purchase of liability insurance. Legislation has permitted or required the school districts to purchase liability insurance. While most courts have held that the purchase of liability insurance does not constitute a waiver of immunity, the Appellate Court of Illinois in a recent decision held that the carrying of liability insurance did waive the immunity to the extent of the insurance coverage.30

Other courts have deviated from precedent and have abrogated the immunity rule. The courts of New York were the first ones to depart from the immunity ruling. Prior to the passage of the Court Claims Act, which waived the immunity of the state, the courts allowed successful judgments to be brought against the school districts for injuries resulting from the negligence of school staff.31

The school boards in this state are liable, through these court decisions, in their own corporate capacity for injuries resulting from their own negligence. In cases arising from the negligent performance of nondelegable duties, the courts impute the act of negligence directly on the board itself rather than on the agent or employees. There are two kinds of duties imposed on the boards of education in New York: delegable and nondelegable. Delegable duties involve instruction and no liability is attached for any negligence which occurs during the teaching process. Among nondelegable duties are the maintenance of safe premises and equipment, the provision of competent personnel, and the provision of adequate supervision. It is only for the negligent performance of nondelegable duties that a board is liable in New York. The courts of New York have also interpreted the "save harmless" law in that state as imposing on the district in certain circumstances direct liability to persons injured as well as indemnity to the school employees should they suffer loss due to their negligence while discharging their duties.

The state of Illinois is the most recent to abrogate the doctrine of immunity. In a recent and prominent case, the Supreme Court of Illinois declared that the school districts were liable in

32Harry N. Rosenfield, Liability for School Accidents (New York, 1940), p. 34.
tort for the negligent acts of their agents and employees, over-
ruling all prior decisions, and stripping the state of its immuni-
ty. The legislature moved quickly to place statutory limitations on this decision.

Judicial exceptions to the immunity doctrine are also made by the courts in cases involving nuisances. The difficulty of distin-
guishing between negligence and nuisance has made the nuisance exception a difficult one to apply. Consequently the courts do not always agree on what constitutes a nuisance, and are not in accord with its application.

It can be said that where actions for negligence usually origi-
nate from injuries received by an individual through the careless actions of another, nuisance actions generally arise from harm done to property. A continuing danger whereby a child has been hurt has been called a nuisance by some courts.

Nuisances have been classified into two categories by law: public nuisances and private nuisances. The majority of the school cases involving nuisances are private nuisances. A private nuisance, as defined by Prosser, is an "interference with the interest of an individual in the use or enjoyment of his land."35

34 Molitar v. Kaneland Community Unit District No. 302, 18 Ill. (2nd) 11, (1959).

nuisance requires substantial harm to property, as distinguished from trespass, which consists of a technical invasion of one's property. A nuisance is defined as "everything that endangers life or health, gives offense to senses, violates the laws of decency, or obstructs reasonable and comfortable use of property."36

Some jurisdictions have held the school districts are not liable for personal injuries arising from nuisances created by the district's agents or employees. It has been held by the courts that a school district is not held answerable where a flagpole falls and injures a child,37 a pedestrian is hurt where children hold a race on a sidewalk,38 or where a child suffered a mild burn when seated near a radiator by the teacher.39 Neither have they been held liable where a football player suffered an eye injury upon contact with unslaked lime used to mark the field,40 or where a boy stepped on live coals left from a burning tree stump on the playground.41 Some jurisdictions have held steadfast and have

36Black, p. 1214.
denied recovery even in cases of death. A court found a school district not liable when a speaker, in mounting a speaker's platform lost his balance, fell backwards, and died as a result of his injuries, 42 and where a young boy wandered off the playground and drowned in a bayou adjoining the school grounds. 43

Other courts have stated the immunity doctrine does not apply in cases arising from nuisances: school districts would then be held liable for nuisance. School districts have been held liable in damages where a flagpole fell and fatally injured a boy, 44 and where a student was injured in a gym class when he fell off a "balance beam." 45 When a janitor contracted a disease as a result of breathing coal dust in a boiler room, a court stated that proper ventilation should have been provided and held the school liable. 46

Actions have been successfully initiated against the school district for trespass and damage to property. A home adjacent to a school playground was damaged by baseballs batted over the fence by the school children. A lower court decreed against similar

46 Estele v. Board of Education of Borough of Red Bank, 26 N. J. Sup. 9, 97 Atl. (2nd) 1, (1953).
activities by the school and made the district liable for damages. The supreme court later called this judgment "too stringent" and relieved the school on both counts. 47 In an early decision, Ferris v. Board of Education, 48 the defendant school district was held liable for involuntary trespass and subsequent injury to the plaintiff. In this case the defendant owned and occupied a house on a lot adjoining the school building. The roof of the building had no gutters, and during the winter months, snow and ice slid from the roof onto the adjoining lot and the sidewalks leading to the back part of the house. The owners had notified the board of education about this condition, but nothing was done. One evening, returning from work, the plaintiff was told by his wife that large quantities of snow and ice had fallen on his back yard and steps. While going out to investigate, the plaintiff slipped on the ice and was injured. In holding the school district liable, the Supreme Court stated:

the defendant, being a municipal corporation, could not be held liable for negligent injuries under the common law, and there being no liability created by statute, the plaintiff could not recover. . . . but it is contended that, where the injury is the result of the direct act or trespass of the municipality, it is liable, no matter whether acting in a public or private capacity.


In this decision, the Supreme Court stated that the immunity
doctrine did not affect the liability of school districts involved
in nuisance cases in jurisdictions where the doctrine was recog-
nized. School districts in Michigan would be held liable for tresp­
ass and subsequent harm and in this case, nonfeasance constituted
a nuisance.

In recent cases, school authorities have been held liable for
damages to property. In Vermont workers, in an effort to locate a
water supply for a school, exploded dynamite near the plaintiff's
spring, diverting the flow of water and drying up his spring.49
In a similar situation workmen blocked a waterway flowing past the
plaintiff's property in such a way that mud accumulated in the
stream and on his property and later sewage backed up due to the
operation of a raw sewage disposal device.50

The Supreme Court of Kansas recently held that a softball
game did not constitute a nuisance. When the game was played at
night, and the public address system and the flood lights were
operated after ten o'clock, a nuisance was created. An injunction
was placed against games conducted after ten o'clock at night.51

49Griswold v. Town School District of Town of Weatherfield, 88

50Ellen v. Board of Education, 242 N. C. 584, 89 S. E. (2nd)
144, (1955).

51Neiman v. Common School District No. 95, Butter County, 232
P. (2nd) 422, (1951).
A last exception to the immunity rule is found in cases where the school districts allegedly have engaged in proprietary functions. The courts again are not in accord. Some courts have stated that school districts are incapable of engaging in a proprietary function. Other courts have stated that a school district is answerable in damages if found to be engaged in a proprietary function.

In a majority of the actions initiated, the plaintiffs have contended that a fee was charged for some school function or activity on the school premises. The schools are engaged in a proprietary function and therefore are liable for damages. The majority of the courts have not agreed with this contention in the past. This can be attested by the numerous cases listed in legal and secondary sources where judgments have been passed for the defendant school districts. In granting immunity for the school districts, the courts have held that a function does not become proprietary because it produces some revenue, or yields a pecuniary profit. This is just one of the elements of a proprietary function. Some courts have made judgments on the basis of a test in deciding whether a school district is engaged in a proprietary function or a purely governmental one. The following cases illustrate the court's reasoning.

53 Edwards, p. 403-04.
The test was developed by the Supreme Court of Michigan, where a county, under contract to the state for maintenance and repair of a trunk highway, was being sued for the negligent operation of a truck which resulted in injuries to the plaintiff. The test states: "The underlying test is whether the act is for the common good of all without the element of special corporate benefit or pecuniary profit." The county in this case was found not liable because it was engaged in a purely governmental function.

The same test was later applied to a school by the Supreme Court of Oregon. Action was brought against a school district for the negligent operation of a school bus. The court, after applying the test, found the district not liable, and stated: "The school district, in the operation of the bus, pursuant to authority vested in it by statute was acting as an agency of the state."

The Supreme Court of Michigan applied this rule to a school district in the case of Daszkiewicz v. Board of Education of City of Detroit. The city school district owned and operated a medical college where a medical student fell down an open elevator shaft and received severe injuries. Action was based on the fact

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54 Gunther v. Board of Road Commissioners of Cheboygan County, 225 Mich. 619, 196 N. W. 386, (1923).


that tuition was paid, therefore the board was engaged in a proprietary function in maintaining the college. The court refused this contention and stated that this was a purely governmental function: the college was a "state agency."

Through this rule and similar contentions, the courts have agreed that an activity does not become a proprietary function because it produces a revenue or a profit to help maintain it.

The courts have in recent cases awarded damages to plaintiffs for injuries where it was found that the district was engaged in proprietary functions. Jurisdictions have held schools liable in Arizona and Pennsylvania. In the case of Sawaya v. Tuscon High School District,57 the Tuscon school authorities leased the school stadium to another school for the purpose of holding a football game. In the course of the game, a spectator fell as a result of a loose railing in the stadium. The court found the school authorities, in leasing the stadium and receiving compensation, were engaged in a proprietary function, and therefore liable for injuries sustained by the spectator.

In the case of Morris v. School District of Mount Lebanon Township,58 the school sponsored a summer recreation program. A

child, while enrolled in the recreation program, drowned in the swimming pool. In reviewing the case, the Supreme Court of Pennsylvania found that a fee was payable for admission, and the program was open to the public. Furthermore, the activities were not part of a regular curriculum as required by statute. These activities were "normal for a summer day camp" because they included arts and crafts, dancing, and swimming. On these facts, the court found the school to be engaged in a proprietary function, and held it liable for the child's death. Negligence was not mentioned in the opinion of the court, but the whole issue was decided on the proprietary function of a school district.
CHAPTER III

THE IMMUNITY OF THE ILLINOIS SCHOOL DISTRICTS TO 1959

The immunity of the state of Illinois from tort liability was guaranteed by the State Constitution of 1870: "The State of Illinois shall never be made defendant in any court of law or equity."\(^1\)

The political subdivisions of the state, or quasi-corporations, were not granted constitutional immunity, but instead achieved the same immunity through judicial decisions in the common law. The first political subdivision to receive immunity from the courts was the county.\(^2\) The courts later granted immunity in their decisions to a township,\(^3\) a drainage district,\(^4\) a school district,\(^5\) and a park district,\(^6\) and these have long since enjoyed complete immunity from tort liability.

The courts, however, made an early distinction between these

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\(^1\)Constitution of the State of Illinois, Article IV, Section 26.
\(^2\)Hedges v. County of Madison, 6 Ill. 567, (1844).
\(^3\)Town of Waltham v. Kemper, 55 Ill. 346, (1870).
\(^4\)Elmore v. Drainage Commissioners, 135 Ill. 269, (1890).
\(^5\)Kinnare v. City of Chicago, 171 Ill. 332, 49 N. E. 536, (1896).
corporations and municipal corporations in determining their liability. Quasi-municipal corporations, such as counties, townships, school districts, and park districts are recognized by the courts as being created by the state solely for the purpose of carrying out the state policies, and these have enjoyed immunity. Municipal corporations, such as cities, towns, and villages, have enjoyed immunity only when engaged in the exercise of governmental activities. While engaged in the exercise of proprietary functions, municipal corporations have been held liable to the same extent as private corporations.

According to Helfand, the early Illinois courts placed indiscriminate liability for torts on municipalities. It was not until 1883 that the Supreme Court of Illinois declared a city immune from tort liability while in the performance of governmental activities as distinguished from proprietary activities.

The immunity of school districts in Illinois is traced in this chapter through an analysis of the leading court cases. The study embraces two doctrines: the Doctrine of Governmental Immunity or Sovereign Immunity of the state, and immunity granted to charitable institutions which was based on the Trust Fund Theory.


8Wilcox v. Chicago, 107 Ill. 334, (1883).
Both are closely associated and both played an important role in the development of immunity of the school districts and in its final repudiation by the Illinois Supreme Court. Governmental immunity originally granted to the public schools by the Supreme Court formed an impregnable wall against liability, and school cases which followed crystalized the law in forming absolute immunity. Charitable immunity, initially applied in defense of a private school, was founded in the trust fund theory and afforded complete protection to the trust funds of charitable institutions. The courts in time softened or changed their attitude, and this doctrine was finally modified by the courts when it was found that liability insurance could be used to satisfy judgments without impairing the trust funds of private schools. Insurance was the "wedge" which also modified the doctrine of governmental immunity of the public schools when a court drew an analogy between the protection of trust funds of charities through insurance and the same protection granted to public funds in respect to the public schools: judgments were satisfied from insurance. The doctrine of governmental immunity, thus modified, was finally abolished in 1959 by a Supreme Court ruling.

Illinois Extends the Immunity Doctrine to School Districts

Immunity was first guaranteed to the school districts of Illinois in 1898, when the Illinois Supreme Court, in the case of
Kinnare v. Chicago,⁹ stated that a board of education was a "quasi-corporation charged with duties purely governmental."

The case had been dismissed by the appellate courts, and suit was filed on appeal to the Supreme Court.¹⁰ The administrator of the estate alleged that Kinnare, a workman in the construction of the roof of a "deaf-mute school," fell off the roof and came to his death as a direct result of the defendant corporation's negligence in failing to provide the proper safeguards such as railings and scaffoldings needed for the workmen's safety.

The appellate court sustained a demurrer entered by a trial court, but upon appeal, the Supreme Court was more explicit in reaffirming the immunity of the school district:

It therefore appears that the appellee board is a corporation or quasi-corporation created nolens volens by the general law of the State to aid in the administration of the State government, and charged, as such, with duties purely governmental in character. It owns no property, has no private corporate interests, and derives no special benefit from its corporate acts. It is simply an agency of the State, having existence for the sole purpose of performing certain duties, deemed necessary to the maintenance of an efficient system of free schools within the particular locality in its jurisdiction. The state acts in its sovereign capacity, and does not submit its actions to the judgment of courts and is not liable for the torts or negligence of its agents, and a corporation created by the state as a mere agency for the more efficient exercise of governmental functions is likewise exempted from the obligation to

¹⁰Kinnare v. City of Chicago, 171 Ill. 332, 49 N. E. 536, (1898).
respond in damages, as master, for the negligent acts of its servants to the same extent as in the state itself, unless such liability is expressly provided by the statutes creating such agency.

Thus the Supreme Court declared that school districts were quasi corporations created nolens volens or involuntarily and charged with duties "purely governmental in character:" the administration of the public school. The court also asserted that the state, being sovereign, was not liable in tort, and school districts, being agencies of the state, were likewise immune from tort liability.

The court then stated that the city, in co-operating with the board of education in erecting a school building, was actually working for the state and it was therefore not liable:

The erection of the school building was of no benefit to the city as a municipality, and whatever connection it had with the board of education in the matter of construction of the building was simply for the purpose of discharging a public duty cast upon it by the law-making power of the state. That duty, as we have seen it, is governmental in character and nature. It was performed in obedience to a statute which was enacted because it was deemed expedient by the legislature, in the distribution of the powers of government, to require the city, nolens volens, to perform a public service in which the city, as a corporation, has no interest. The intestate of appellant, and others engaged in the work of constructing the building, must be regarded as servants and agents of the State, and not of the City, and for that reason the doctrine of Respondeat Superior is not applicable against the city.

After passing judgment for the city of Chicago, the court stated that the city, in being cleared of damages, did not indicat
that a municipal corporation was held in the same status as a quasi-municipal corporation. This distinction made in a prior decision was upheld and cited in City of Chicago v. Seben:11

The reason for the distinction, as given by this court in the cases above referred to, is that cities and chartered towns and villages act under charters, at their request, these privileges being held to be a consideration for the duties imposed upon them; and for the performance of these duties, like individuals, they must be responsible in an action.

The immunity granted to the school districts by the court stood secure for over fifty years. In cases involving quasi corporations, the courts showed no intention of changing the law. In a late case, a court stated that the question of whether the law respecting tort liability of the counties was outmoded and should be changed was one for the legislature, and not for the courts.12

Illinois Grants Immunity to Charitable Institutions

Immunity was first granted to a charitable institution in Illinois in Parks v. Northwestern University.13 A medical student sued for damages arising from a laboratory explosion which cost him the loss of an eye. The court dismissed the case, stating that the university was a charitable institution, and would not be liable. The court stated that although it required its students

13Parks v. Northwestern University, 218 Ill. 381, (1905).
to pay tuition and was considered a private corporation, the university was organized for purely charitable purposes: the dissemination of learning. It declared no dividends and had no power to do so. It depended for its maintenance upon the income from its property and the endowments and gifts which were held in trust "for the object of its organization."

The Supreme Court granted absolute immunity to these institutions based on the Trust Fund Theory:

The funds and property thus acquired are held in trust, and cannot be directed to a purpose of paying damages for injuries caused by the negligent or wrongful acts of its servants and employees to persons who are enjoying the benefit of the charity. An institution of this character, doing charitable work of great benefit to the public without profit, depending upon gifts, donations, and legacies, and bequests made by charitable persons for the successful accomplishment of its beneficial purposes, is not to be hampered in the acquisition of property and funds from those wishing to contribute and assist in the charitable work, by any doubt that might arise in the minds of such intending donors as to whether the funds which are supplied by them will be applied to the purpose for which they were intended to devote them, or diverted to the entirely different purpose of satisfying judgments recovered against the donee because of the negligent acts of those employed to carry the beneficial purpose into execution.

The doctrine expressed by the Supreme Court to preserve the trust funds of charitable institutions was later reaffirmed in Hogan v. Chicago Lying-in Hospital, and the lower courts also

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14Hogan v. Chicago Lying-in Hospital, 335 Ill. 42, 166 N. E. 461, (1929).
stood by this decision. These were cases in which the plaintiffs sought relief on the basis of this insurance, the courts differed in their decisions. Two cases are shown in illustration. The first case involves a hospital where the court stood by Stare Decisis. The second case involves a private institution, and the courts rendered this corporation liable. This decision was not a repudiation of precedent, but an extension through a different interpretation of former Supreme Court decisions.

An appellate court in [Piper v. Epstein](#) followed the Supreme Court ruling. In this case, suit was brought against a hospital by a plaintiff for the death of his wife. The surgeon, the supervising nurse, and a student nurse were named co-defendants, and it was alleged that death had resulted from infection caused by their leaving a laparotomy sponge in her abdomen following a Caesarean section.

The appellate court dismissed the suit stating that the rule of non-liability for negligence was absolute in Illinois. It was pointed out during the case that the hospital carried liability insurance, and recovery could be had without depleting the trust

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funds. To this the court replied that the procurement of liability insurance did not affect the charities' non-liability for negligent injury. "Policy of insurance indemnifying charitable hospital against liability for negligence imposed by law does not effect an enlargement of scope of hospital's liability beyond that existing without insurance."

In the Piper case, the lower court stood by former decisions, and then ruled that the carrying of liability insurance in no way affected the immunity of a charitable institution. Shortly after, another appellate court ruled to the contrary.17

Suit was brought against the Servite Fathers by Wendt for injuries sustained by his son after falling from a roof of a ticket office at St. Phillip Stadium. The court review the Parks ruling, and then decided that exemptions from liability were not absolute. It contended that the only basis for the Supreme Court's decision was that if liability were admitted, the trust fund would be diverted to satisfy claims, thus thwarting the donors' intent. It added that the case went no further, stating that, "It does not hold or employ any language indicating the exemption from liability is absolute."

The court then reversed the trial court's judgment for the

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defendant, and remanded the case with directions stating:

The immunity doctrine was devised for the benefit of the charitable corporation, and if the corporation wishes to waive immunity, we know of no principle in law which would prevent it from doing so. To hold that the exemption from liability is "absolute" and that a hospital or charitable institution may not protect its beneficiaries as well as itself by insurance because it creates a new liability where none existed before is to extend the doctrine far beyond Parks v. Northwestern University or any other decision in this state. If the absolute immunity rule enunciated in the Piper case were to prevail, it would seem a sheer waste of money for a charitable corporation to purchase insurance protection. We hold that where insurance exists and provides a fund from which tort liability may be collected so as not to impair the trust fund, the defense of immunity is not available.

The ruling of the appellate court thus modified the doctrine to permit recovery when insurance proceeds were available for payment of damages.

Insurance Coverage Permits Court Action Against A Charitable Institution

The Supreme Court of Illinois, in deciding the case of Moore v. Moyle\footnote{Moore v. Moyle et al., 405 Ill. 555, 92 N. E. (2nd) 81, (1950).} in 1950, had its first opportunity to clear up the conflict of decisions which had developed in the appellate courts.

Bradley University had purchased a trapeze to be used in a college circus, and in May of 1940, while the plaintiff was practicing on the trapeze in preparation for the circus, it collapsed,
allowing her to fall some twenty-five feet to a hardwood floor.
Suit was brought against Bradley University, and against the individual instructors in its department of physical education. It was alleged that Bradley University was fully insured and had other non-trust funds from which judgment could be satisfied. A circuit court dismissed the suit, and the appellate court affirmed this judgment. The suit was then appealed to the Illinois Supreme Court.

In reviewing the previous decisions, the court found that the immunity granted in the Parks case did not impose a "disability to be sued in tort upon the charity," and the immunity could be waived. In other words, the Parks case provided a defense only against trust funds, but it did not destroy the right of action against charities. Once right of action against charities was established, the Supreme Court stated that in the Parks case immunity clearly extended to all funds held in trust, but nothing was mentioned in connection with non-trust funds. The court concludes by stating that it was not overruling or changing the Parks case, but instead, extending the rule; recovery would be allowed, provided that trust funds or trust property are not subjected to the payment of any judgment obtained for tort liability:

We are of the opinion there is no justification for absolute immunity if the trust is protected, because that has been the reason for the rule of absolute immunity. Reason and justice require an extension of the rule in an attempt to inject some humanitarian principles into the abstract rule of absolute immunity. The law is not static and must follow and conform to changing conditions.
and new trends in human relations to justify its existence as a servant and protector of the people and, when necessary, new remedies must be applied where none exist.

From a careful analysis of the many cases, we are of the opinion that the law of Illinois is that the trust funds of charitable corporations are immune from liability for the torts of the corporation's employees and agents. Beyond that, the rule of respondeat superior is in effect.

Thus the ruling of the Parks case was not reversed, but rather it was reaffirmed insofar as trust funds or charities were concerned. The court extended the ruling so that institutions which possessed insurance or other non-trust funds would be subject to the ordinary rules of negligence and respondeat superior. Judgments against these institutions would henceforth be satisfied from these funds.

The difference between this ruling and the Parks decision lay in the fact that the Parks case established absolute immunity, and the Moore decision established that charities were held liable for their torts. Judgment could be passed against the charities, but they would have to be collected from non-trust funds. This court did not define what constituted non-trust funds, but it regarded liability insurance as such. Liability insurance, being a non-trust fund, would only effect the collecting of judgments.

A School District Becomes Liable to the Extent of Insurance Coverage

Up to this time, the trust fund theory has been developed and
modified by the courts in cases involving hospitals and private schools only. The rule was finally applied to the public schools in Thomas v. Broadlands. 19

The plaintiff, a minor, sued the school district through his father for personal injuries received at the school playground. It was alleged in this complaint that the school authorities were negligent, and the injury received by the plaintiff cost him the loss of an eye. The trial court made a motion to dismiss the complaint on the grounds that the school district was created nolens volens. Thomas elected to stand by his complaint and the court then entered judgment against him. Appeal was brought on two questions of law: (1) Is the defendant school district immune from suit for negligence in this case? and (2) If immunity exists, does the carrying of liability insurance remove this immunity either completely or to the extent of such insurance?

The court first cited Kinnare, 20 and stated that, "Absent the question of insurance, the law in Illinois is clear that a school district, as a quasi-municipal corporation, is not liable for injuries resulting from tort." The appellate court then explained that immunity of quasi-municipal and municipal corporations existed from two theories in law. The first theory was the doctrine


20 Kinnare v. City of Chicago, 171 Ill. 332, 49 N. E. 536, (1898).
of sovereign immunity: the state is sovereign and cannot be sued without its consent, and the second one was one of public policy which dictated that public funds and corporate moneys devoted to government purposes could not be diverted to any other purpose.

The court was influenced by decisions in other states and stated that the doctrine of sovereign immunity did not apply to municipal or quasi-municipal corporations because it could not be justified in the present age, and society condemned it: "The whole doctrine of governmental immunity rests upon a rotten foundation." The court's treatment of the doctrine was also influenced by legal commentaries: "It seems, however, a prostitution of the concept of sovereign immunity to extend its scope in these ways, for no one could seriously contend that local government units possess sovereign powers themselves." The court then recognized that the only reason for granting immunity to school districts was public policy.

In reviewing the reasoning of the Moore case, the court then found direct application of that ruling, and followed precedent:

The only justifiable reason for the immunity of quasi-municipal corporations from suit for tort is the sound and unobjectionable one that it is the public policy to protect public funds and public property, to prevent the diversion of tax moneys, in this case, school funds, to the payment of damage claims. There is no justification or reason for absolute immunity if the public funds are protected. Their protection has been the real and historical reason for the absolute immunity, both

21 Barker v. City of Santa Fe, 47 N. M. 85, 136 P. (2nd) 480, (1943).
elsewhere and in Illinois. . . . Liability insurance, to the extent that it protects the public funds, removes the reason for, and thus the immunity to suit. The reasoning in the Moore case, supra, applied with equal force to the question before us. If the public funds are protected by liability insurance, the justification and reason for the rule of immunity are removed.

In a final defense the defendant declared that there was no statutory authorization in Illinois for the purchase of insurance by a school district, and therefore it could not be used to waive the immunity of the district. The court did not recognize "an illegal act" as a defense and concluded by stating: "We need not decide the question of waiver because immunity from tort liability of a quasi-municipal corporation is required or justified by the need for the protection of public funds. The reason for the rule of immunity vanishes to the extent of available insurance."

The court in this case relied on the Moore decision and drew an analogy between the trust funds and public funds. In both cases, the funds of the institutions were protected, and in both cases liability was imposed from non-trust and non-public funds. The Broadlands case was the first instance in which judgment was passed against a public school district. The decision of this case modified the immunity doctrine, and later affected legislation.

Allegations Against Schools are Limited to Non-Public Funds
The doctrine of limited immunity thus far developed was recognized in Tracy v. Davis, a case which originated in an Illinois court and was settled in a circuit court of the United States. In this case, a school district was named defendant in an automobile accident. The court held the school district liable, and added that tort actions against school districts should not be dismissed when it was not alleged that the school district had any means of paying judgments. It went further to state that funds need not be available at the time judgment was entered, as they could be acquired later. This theory was influential in this case because it was cited in the Moore case. It held that the properties of charities were tax exempt and exempt from tort liability, but property could probably later be acquired not exempt from tort liability or the status of some existing property could be changed to make it liable to taxation and tort. "No one can say what the future may bring forth."

This decision in essence held the school district strictly liable for torts, but it expressly limited the collection of judgments passed against charities and the school districts:

It is now clearly established that a charitable corporation is not immune from tort liability. However, the execution on the judgment, if obtained, is limited to non-trust funds. The allegations praying for a judgment

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in a complaint against a school district should probably allege and be limited to funds other than public funds.

The Supreme Court of Illinois Abolishes
the Immunity Doctrine in toto

The Supreme Court of Illinois in Molitar v. Kaneland Community District\textsuperscript{24} overruled all prior decisions, and declared school districts liable in tort for pupil injuries.

Suit was brought against the school district by the father of the plaintiff, a student in that district, who suffered injuries and severe burns when a school bus in which he was riding left the road, hit a culvert, exploded, and burned. It was alleged that the bus left the road as a result of the driver's negligence. It was not alleged in the complaints that the school district carried insurance, but plaintiff's abstract showed that the school carried liability insurance with limits of $20,000 for each person injured and $700,000 for each occurrence. The plaintiff purposely omitted such allegations.

Both the trial court and the appellate court dismissed the suit on the grounds that the school district was immune from liability for tort. The suit was then appealed. The plaintiff asked the court either to abolish the rule in toto or find it did not

\textsuperscript{24}Molitar v. Kaneland Community Unit District No. 302, 18 Ill. 11, 163 N. E. (2nd) 89, (1959).
apply to a school district such as Kaneland, which was organized through the voluntary acts of petition and election by the voters of the district, as contrasted with a school district created nolens volens by the state.

The court stated that no logical distinction could be drawn between a school district organized by petition and election of voters and any other district: all are quasi-municipal corporations created for the purpose of performing certain duties necessary for the maintenance of a system of free schools.

The court then admitted that the only problem to be decided was that of determining whether a school district should be immune from liability for personal injury to a pupil arising out of the operation of a school bus. The Supreme Court stated that while it had not re-evaluated the doctrine of immunity for over fifty years, the doctrine has almost unanimously been condemned by legal writers and scholars. The court then reviewed the history of the doctrine. Illinois adopted the theory of sovereign immunity from Russell v. Men of Devon, an English case which granted immunity to a county. The decision in this case was based chiefly on the fact that there were no funds out of which to pay a judgment. The case was later overruled. Illinois adopted the immunity doctrine in relation to

towns and counties in *Town of Waltham v. Kemper*\(^27\) from the *Russell* case. Eight years after the *Russell* case was overruled, Illinois courts extended the immunity doctrine to school districts in *Kinnare v. City of Chicago*.\(^28\) The court for this reason found the doctrine unsound.

The General Assembly had frequently indicated dissatisfaction with the doctrine: governmental units, including school districts, were now subject to liability under the Workmen's Compensation and Occupational Disease Acts.\(^29\) The article dealing with bus insurance of the Illinois School Code was found inapplicable because it authorized, but did not require, school districts to purchase insurance. It would therefore allow school districts to determine for themselves their financial responsibility for wrongs inflicted by them.

In searching for former decisions, the court stated that the issue would be decided on the basis of the *Moore* doctrine, or the immunity rule would be abolished. The court did not find the *Moore* decision applicable because that decision had implied that if it appeared that the trust funds could be impaired, suit would be dismissed. The Supreme Court reasoned that not only the collection

\(^{27}\) *Town of Waltham v. Kemper*, 55 Ill. 346, (1870).

\(^{28}\) *Kinnare v. City of Chicago*, 171 Ill. 332, 49 N. E. 536, (1898).

\(^{29}\) *Illinois Revised Statutes*, 1957, Chapter 48, paragraph 138.1, 172.36.
of judgment, but liability itself, would depend upon the presence of non-trust assets. There was a contradictory element in the Moore decision which the court found to be unsatisfactory in applying limited liability under that doctrine.

The Moore decision had found that the reasoning of the Parks case was based solely on the protection of trust funds. The Moore case stood by the Parks decision insofar as trust funds were concerned, but it allowed suit to be brought against a charity, where Parks held that immunity was absolute. The Moore decision held charities liable for torts, the judgments to be paid out of non-trust funds. It was argued that such a decision would give rise to a situation which would create liability only in the event that the charities were insured. The court answered that insurance had no bearing on the liability of a charity, but only on the manner of collection: "It is suggested that liability is predicated upon the absence or presence of liability insurance." By this statement the court implied that charities would be held liable for torts per se, and judgment would be pressed where found negligent. The collection of such judgments, however, would be another matter, and they would be limited to non-trust funds. The Supreme Court in reviewing this decision agreed with this opinion, but found the element of contradiction in the last part of the opinion of the Moore case.

In remanding the case, the opinion of the Moore case stated:

It appears that the trust funds of Bradley will not be impaired or depleted by the prosecution of the
complaint, and therefore it was error to dismiss it. The judgment, therefore, of the Appellate Court, in sustaining the motion to dismiss the complaint as to the appellee, Bradley Polytechnic Institute, is reversed and the case remanded to the circuit court of Peoria County.

The Supreme Court in Molitar interpreted this opinion as meaning that since Bradley Polytechnic was fully insured, the trial court should not have dismissed the case, but impressed liability. This then could later be interpreted by enlargement to mean that if a charity were not covered by insurance or possessed other than trust funds, suit against a charity would be dismissed, thereby reverting to immunity. Charities could then dictate their own liability.

The court in reviewing the Broadlands decision found it also objectionable where that decision stated, "It is the public policy to protect public funds and public property, to prevent diversion of tax moneys, in this case school funds, to the payment of damage claims." The Supreme Court interpreted this opinion as meaning that school districts would become bankrupt if called upon to compensate for their torts. The court further reasoned that immunity could not be justified on the protection-of-public-funds theory: school districts in which common law rule was abandoned have not been compelled to shut down.

In dictum the court stated, "We are of the opinion that none of the reasons advanced in support of school district immunity have any true validity today." In answer to defendant's appeal that
immunity should be abolished by legislature, not by the court, it responded, "The doctrine of school district immunity was created by this court alone. Having found that doctrine to be unsound and unjust under present conditions, we consider that we have not only the power, but the duty, to abolish that immunity."

The court finally concluded and established liability in toto by stating, "For reasons herein expressed, we accordingly hold that in this case, the school district is liable in tort for the negligence of its employee, and all prior decisions to the contrary are hereby overruled."

The Molitar decision presented some unique problems which deserve further consideration and clarification. There were eighteen children involved in the school bus accident, and only Thomas Molitar was allowed to recover damages. The Supreme Court, in its final opinion, announced that the new ruling which abrogated the doctrine of immunity would be applied prospectively. Schools would be held liable in future occurrences only. This application was based on the reasoning that school districts prior to the Molitar decision had relied on the doctrine of immunity and had not insured themselves: this was the "reliance test." If the rule were applied retroactively, the school districts would suffer undue hardship.

The court then announced that the ruling would apply to the "instant case," Molitar v. Kaneland. The court gave two reasons for this ruling. First, if the court were to merely announce the
rule without applying it, the ruling would amount to mere dictum. Second, and more important, to refuse to apply the new rule to the instant case would deprive the appellant, Molitar, of any benefit from his efforts and expenses. There would then be no incentive to appeal in future cases where an appellant received no benefit even though he had won a decision.

Since Thomas Molitar was the only child represented in that case, the decision in effect deprived the other children who were involved in the same accident of any benefit.30 Parties representing all children appealed, and the four appeals were consolidated into one.31 The appellate court stood by the Molitar ruling, and deprived judgment to the plaintiffs. This court based its decision on the fact that all parties had originally brought suit against the school district, and the suit was dismissed by the court. Thomas Molitar alone had elected to appeal to the Supreme Court.

"Future occurrences" meant accidents occurring after the Molitar decision. The accident occurred on March 10, 1958, and the case was heard on May 22, 1959. A rehearing was held on the


case and the ruling went into effect December 16, 1959. The new ruling excluded the children injured in the accident before the decision, even though their injuries were sustained in the same accident which gave rise to that decision. From an informal appeal, the Supreme Court has now modified its original decision again to hold that the children involved in the accident will not be barred by the ruling of December 16. The ruling has not been abrogated, but an exception to it was made in this case. The language of the opinion made this clear: "It should be evident that this holding in no way modifies or effects our holding in the Molitar case or the cut off date relative to governmental tort immunity as previously established in the case."32

Some school cases have been decided subsequent to and relating to the ruling of December 16. In Terry v. Mount Zion Community Unit School District,33 the appellate court dismissed the case, holding that the Molitar decision did not apply. In this case, a school boy sustained injuries from a fall while performing gymnastics. The accident, however, occurred on March 3, 1959, prior to the Molitar decision, and it was properly dismissed. The case of


Bergman v. Board of Education of Chicago\textsuperscript{34} was also dismissed because the decision of Molitar did not apply. The plaintiff in this case contended that the accident occurred on May 28, 1959, six days after the Supreme Court rendered its first opinion in the Molitar decision. The court pointed out that the original Molitar opinion was released on May 22, 1959, and a rehearing was held on December 16, 1959. The results of the rehearing were identical to those of the original opinion. The only difference was that the Supreme Court stated that its opinion would become law, effective December 16, 1959. The appellate court cited other cases in which the Supreme Court has reasserted its stand as to the effective date of the Molitar ruling.\textsuperscript{35}

Summary

Governmental immunity initially granted to school districts in Illinois was based on an extension of the doctrine of sovereign immunity.\textsuperscript{36} Decisions which followed and which involved the school districts and other quasi corporations stood by stare decisis and advanced additional explanations. The most common was that it was


\textsuperscript{36}Kinnare v. City of Chicago, 171 Ill.332, 49 N. E. 536, (1898)
public policy to protect the public funds and to prevent the diversion of tax moneys for payment of damages. It was sometimes added that the school districts, having limited powers, had no authority to spend money other than in ways specified by the legislature. Immunity granted to the school districts held firm for over sixty years, until the Supreme Court in a notable decision severed immunity and held the districts liable in toto, with no exception.37

The court's change in attitude toward the doctrine was not an abrupt one. In the interim the Illinois courts were influenced by decisions in other jurisdictions and by legal commentaries, but they were unwilling to abandon precedent.

Charitable immunity ran a parallel course to that of governmental immunity. The court's adherence is illustrated in the Piper case.38 However cases involving the charities were instrumental in the court's abandonment of the immunity doctrine.

The first break with tradition appears in Wendt v. Servite Fathers,39 when the appellate court used insurance proceeds to grant judgment while still adhering to the immunity of trust funds.


The Parks case, along with other cases from other states, was influential in the Moore decision, which is credited with the first breach in the total immunity of charities. Being a Supreme Court decision, it had the authority to challenge the Parks decision and establish precedent: charities were held liable, but their trust funds were protected.

The first break from total immunity concerning school districts appears in Thomas v. Broadlands. This court openly condemned the doctrine of governmental immunity, while holding that public policy was the only justifiable reason for granting immunity. The Moore case had been decided under similar circumstances and it was found to be wholly applicable in this decision. The importance of the Broadlands decision lay in the fact that it constituted the first breach in the total immunity traditionally granted to the school districts in Illinois. It held the school districts liable to the extent of insurance coverage. This case also was instrumental in amending the School Code in relation to insurance. This decision affecting the public schools was

40 Parks v. Northwestern University, 218 Ill. 381, (1905).
43 School Code of Illinois, 1959, Article 6, Section 35.1, Liability Insurance for School Board Employees, p. 89.
reaffirmed in *Tracy v. Davis*. According to Franklin, the court in this case interpreted the law so as to remove all tort immunity from the schools, and to substitute "immunity of collection."

The Illinois Supreme Court in the *Molitar* decision seems to have reasoned that the courts in prior decisions had not asserted themselves strongly enough, and the law was ready for a change. It found the *Moore* decision inapplicable because of the contradiction found in that opinion. It also repudiated the doctrine under the *Broadlands* decision because immunity was based on the protection of public funds, which was not justifiable in this age. It is probable that the Supreme Court in the *Molitar* case would have found the *Moore* decision unacceptable even if the contradictions were absent in that opinion. The Supreme Court had vigorously attacked immunity based on sovereignty, and also the policy of protecting public funds. If it had attacked immunity based on the protection of public funds, it could not possibly have reconciled immunity based on the trust fund theory.

Finding no justifiable reason for holding the school districts

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immune, the Supreme Court stated that school districts would be held liable with no exceptions. The State of Illinois then became one of the most recent states to abrogate the immunity doctrine.
CHAPTER IV

ILLINOIS LEGISLATIVE ENACTMENTS

Prior to the time that the courts challenged the immunity doctrine of the school districts in Illinois,¹ the school districts were provided with permissive legislation concerning health and accident insurance and liability insurance.

The first statute to be enacted provided liability insurance restricted to operation of buses, and purchased at the discretion of the school boards. This statute provided liability insurance coverage to the school districts, its agents, or employees in connection with the ownership or maintenance of school buses:

Any school district, including any non-high school district, which provides transportation for pupils may insure against any loss or liability of such district, its agents, or employees, resulting from or incident to the ownership, maintenance, or use of any school bus. . . . Every policy for such insurance coverage issued to a school district shall provide, or be endorsed to provide, that the company issuing such policy waives any right to refuse payment or to deny liability thereunder within the limits of said policy, by reason of the non-liability of the insured school district for the wrongful or negligent acts of its agents and employees, and its immunity from suit, as an agency of the state

performing governmental functions.  

Shortly thereafter, another statute was enacted which permitted the school districts to purchase medical insurance to protect pupils while participating in athletic activities. This insurance was not provided for by "public funds," but it was to be derived from admissions to athletic events:

The school board of any school district may, in its discretion, provide medical or hospital service, or both, through accident and health insurance on a group or individual basis, or through non-profit hospital service corporations or medical service plan corporations, or both, for pupils of the district injured while participating in any athletic activity under the jurisdiction of or sponsored or controlled by the district or the authorities of any school thereof. The cost of such insurance or of subscriptions to such non-profit corporations, when paid from the funds of the district, shall be paid from moneys derived from athletic activities.

The school district was held liable in Thomas v. Broadlands when it was found that the school district carried public liability insurance. Damages paid from insurance proceeds provided a means of recovery for injury of the plaintiff, while the public funds

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Illinois Revised Statutes, Chapter 122, Article 29, Section 9, Liability Insurance, p. 2015.
Smith Hurd Annotated Statutes of Illinois, Chapter 122, Article 29, Section 9, p. 449.

Smith Hurd Annotated Statutes, Chap. 122, Art. 15, Sect. 19, p. 95.
remained untouched. The Illinois school districts were not then authorized to purchase liability insurance. Statutes provided only for the purchase of school bus accident liability policies. Defendant's last plea to the court was based on this contention, adding that the school was not authorized to purchase this insurance, and therefore was not authorized to satisfy a judgment claim. The court refused this argument, held the school liable, and as a direct result, the legislature enacted a statute authorizing the school districts to purchase liability insurance to protect themselves in the face of liability:

To insure against any loss or liability of the school district or of any agent, employee, teacher, officer, or member of the supervisory staff thereof resulting from the wrongful or negligent act of such agent, employee, teacher, officer, or member of the supervisory staff, whether such wrongful or negligent act occurred within or without the school building, provided such agent, employee, teacher, officer, or member of the supervisory staff was, at the time of such wrongful or negligent act, acting in the discharge of his duties within the scope of his employment and/or under the direction of the Board of School Directors. Such insurance shall be carried in a company licensed to write such coverage in this State. Every policy for such insurance shall provide, or be endorsed to provide, that the company issuing such policy waives any right to refuse payment or to deny liability thereunder within the limits of said policy, by reason of the non-liability of the insured school district for the wrongful or negligent acts of its agents and employees, and its immunity from suit, as an agency of the state engaged in governmental functions.4

The legislature, fearing a broad application of the Molitar

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ruling to quasi corporations, passed a series of bills granting immunity to several state agencies two months after the first Molitar opinion was released. Total immunity was granted to park districts, counties, and forest preserve districts. The school districts had been declared liable, but the legislature extended limitations to liability with the passage of the Tort Liability Act.

The Tort Liability Act expressly includes religious and private "non-profit" schools. This would seem to include schools as well as colleges and universities. The Molitar decision made only the school districts liable, but it found the Moore doctrine inapplicable, and it is unlikely that courts in future decisions will allow these institutions protection under that ruling. In case that these institutions are found liable as were the school districts, they are granted protection under the same statute.

In regard to public education, the Tort Liability Act includes school districts only. This covers elementary and secondary schools, and probably includes junior colleges. A more specific

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6 Statutes, Chap. 34, Art. 301.1, p. 1498.
7 Statutes, Chap. 57½, Art. 3a, p. 268.
8 Statutes, Chap. 122, Sect. 821-831, p. 2100.
definition can only be provided through a court ruling. Public institutions of higher learning are not mentioned in the statute, but the University of Illinois and its branches are covered by the Court of Claims Act.10

It has been stated that the reference to purely governmental functions in the statute11 is somewhat puzzling because the governmental-proprietary test which is used in determining the liability of municipalities has not been applied to the school districts in Illinois.12 Other jurisdictions have used this distinction in deciding liability,13 but it is doubtful that the legislature intended to introduce this distinction into the law of Illinois. The term is probably meant to be descriptive and reaffirm the school activities which the Supreme Court initially recognized as being "purely governmental" in character.14

10Statutes, Chap. 37, Art. 439.8, Sec. 8, part D, p. 1693.


A recent (post-Molitar) lower court decision has stood by prior decisions, and has restated that school districts are charged with duties which are purely governmental in character and exist for the sole purpose of education.\textsuperscript{15}

Public Policy. Section 1. The General Assembly finds and hereby enacts the public policy of the State of Illinois that public schools in the exercise of purely governmental functions should be protected from excessive diversion of their funds for purposes not directly connected with their statutory functions, if there is liability imposed by any court. . . from injuries incurred as a result of negligence in the conduct of school district affairs; and that non-profit private schools conducted by bona fide eleemosynary or religious institutions should be protected from excessive diversions of their funds for purposes not directly connected with their educational functions. . . toward alleviation of the burden of individual loss arising from injuries incurred as a result of negligence in the conduct of such non-profit private schools.\textsuperscript{16}

The general statute of limitations for personal action allows a period of two years from the time of injury to the time of commencing the suit.\textsuperscript{17} The School District Tort Liability statute in this case decreases the time limit in that it requires action to be commenced within one year from the time the cause of action accrued.\textsuperscript{18} It also imposes a more severe limitation. The general

\textsuperscript{17}Statutes, Chap. 83, Art. 14, p. 692.
\textsuperscript{18}Code, Art. 2, p. 458. Statutes, Sec. 822, p. 2101.
Statutes of limitations allow exceptions to the two year limitation in cases where the plaintiff is a minor. Limitations do no run against a minor until he reaches majority, eighteen for a female, and twenty-one for a male. A minor can then bring suit within two years. The school statute expressly places one year limitation on all persons, regardless of age. In effect this means that a child, if hurt in any area outside the school, would have up to two years after reaching majority to commence suit, but failure to commence suit against the schools within one year would forfeit the right of action against the school.

**Limitation of Action.** Section 2. No civil action shall be commenced in any court against any school district or non-profit private school by any person for any injury to his person or property unless it is commenced within one year from the date that the injury was received or the cause of action accrued.

The school statutes require that a "claim" or motive must be filed with the school district authorities prior to the commencement of the suit, and within six months of the injury. Failure to file such notice would result in dismissal of the suit even if suit were brought within the one year limitation.

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19 Statutes, Chapter 83, Article 21, p. 693.

20 Code, Article 2, p. 458.
   Statutes, Section 822, p. 2101.

21 Code, Article 3, p. 458.
   Statutes, Section 823, p. 2101.

22 Code, Article 4, p. 458.
   Statutes, Section 824, p. 2101.
other jurisdictions have affirmed a similar restriction, and it is unlikely that the Illinois Supreme Court will go against this restriction.23

Filing Statement of Injury. Section 3. Within six months from the date that such injury was received or such cause of action accrued, any person who is about to commence any civil action in any court against any school district for damages on account of any injury to his person or property shall file in the office of the school board attorney... and also in the office of the clerk or secretary of the school board... a statement in writing... giving the name of the person to whom the cause of action has accrued, the name and residence of the person injured, and the date and about the hour of the accident, the place or location where the accident occurred, and the name and address of the attending physician, if any.

With respect to non-profit private schools the statement in writing required hereunder shall be filed in the office of the Superintendent or Principal of such school.24

Failure to File. Section 4. If the notice provided by Section 3 is not filed as provided therein, any such civil action commenced against any school district or non-profit private school shall be dismissed and the person to whom any such cause of action accrued for any personal injury or property damage shall forever be barred from further suing.25

Section five of the Statute limits the amount of recovery to ten thousand dollars for each separate cause of action.

Amount Recoverable. Section 5. The amount recovered

24Code, Article 3, p. 458.
Statutes, Section 823, p. 2101.
25Code, Article 4, p. 458.
Statutes, Section 824, p. 2101.
in each separate cause of action against a public school shall not exceed $10,000.00, except as is otherwise provided by law.

The amount recovered in each separate cause of action against a non-profit private school shall not exceed $10,000.00.26

It is suggested that the term "except as otherwise provided by law," in the statute is ambiguous, and that it could be interpreted to grant the courts the power to impose additional liability in future cases where the school districts purchase insurance in excess of ten thousand dollars.27 It is argued that it will probably have little effect since it is unlikely that school districts will purchase more insurance than is necessary to cover the maximum ten thousand dollar liability.

The ten thousand dollar limitation clearly applies to "non-profit" schools, colleges, and universities. It also applies to the public schools, but not to the University of Illinois and its branches. Limitations for this institution are fixed at twenty-five thousand dollars under the Court of Claims Act.28 Another exception to this limitation also appears in the case of death.

The statute expresses recovery for injuries sustained, but it makes

26 Code, Article 5, p. 458.
Statutes, Section 825, p. 2101.


28 Statutes, Chapter 37, Court of Claims Act, Article 439, part D, p. 1698.
no mention of injuries resulting in death. If such would be the case, the statute would be inapplicable, and recovery would be obtained up to a maximum of thirty thousand dollars under the Wrongful Death Act. The procedure for filing notice and commencing action against the school district would also be inapplicable, thereby allowing the plaintiff two years to bring suit as provided by the Wrongful Death Act, under the general statute of limitations.

Damages awarded through the Court of Claims are final because the Court of Claims is not a court of law and appeal is not available. The ten thousand dollar limitation on recovery placed on the school districts does not represent the full amount of recovery available to parties in future cases. The courts could award additional damages or declare this article unconstitutional or the legislature could amend the article. Ten thousand dollars represents an amount hardly adequate in a specific instance where a child is maimed for life. The limitation does not apply to individual employees of a school district, and the individual such as a teacher can be sued for any amount.

Articles six through nine of the Act state the same language as articles one through five, but they apply only to cases arising

30Statutes, Chapter 70, Wrongful Death Act, Article 2, p. 434.
prior to the act, and subsequent to the first Molitar opinion. The legislature had anticipated the application of the first Molitar opinion and enacted these sections in reference to those cases. These articles require that parties injured prior to the Act must file notice within six months of the effective date of the Act.\textsuperscript{31} Suit must also commence within one year of such date,\textsuperscript{32} and the ten thousand dollar limitation also applies.\textsuperscript{33} These articles were rendered void by the Molitar rehearing which stated that the ruling in regard to school liability would go into effect on December 16, 1959. This eliminated all suits prior to the Act, and following the first opinion.\textsuperscript{34}

Section ten states that the statute is not to be construed as authorizing the bringing of suit or the entry of judgment against a school district, indicating that liability does not fall under the statute, but under the common law.

\textbf{Construction. Section 10.} Nothing contained in this act shall be deemed to authorize the bringing of any action against any school district or non-profit private school,

\textsuperscript{31}Code, Sections 7 and 8, p. 458, 459. Statutes, Articles 827 and 828, p. 2101.

\textsuperscript{32}Code, Section 6, p. 458. Statutes, Article 826, p. 2101.

\textsuperscript{33}Code, Section 9, p. 459. Statutes, Article 829, p. 2101.

nor the entry of a judgment in any such action.35

Section eleven allows the courts to modify or declare unconstitutional any section without effecting other sections. If the statute were written in one paragraph, the whole statute would be jeopardized if part of it were found to be unconstitutional.

Severability. Section 11. If any section or part of any section of this act is held unconstitutional by a court of competent jurisdiction, all other sections or parts of sections shall remain in full force and effect.36

The Illinois legislature has been criticized for reacting so quickly in granting complete immunity to the different quasi-corporations. It has been suggested that there is need for further study and modification if these statutes are to appear realistic. The statute in regard to education cannot be regarded as a statutory frustration of judicial reform. The statute did not impede the court's intent, but set limitations to the school liability, the most prominent of which is the ten thousand dollar limit.37 Clearly it is a job for legislature. Thus the combination of judicial decision and legislative reaction creates a reform which encourages the use of liability insurance as a protection for accident victims while yet protecting the schools against disastrously

35Code, Section 10, p. 459.
Statutes, Article 830, p. 2101.

36Code, Section 11, p. 459.
Statutes, Article 831, p. 2101.

high judgments. The question as to whether ten thousand dollars is an adequate amount will have to be answered by court opinions in future cases.
CHAPTER V

ELEMENTS OF ACTIONABLE NEGLIGENCE IN THE SCHOOLS

Negligence deals with conduct which falls below or does not measure up to the standards of behavior established by law for the protection of others against unreasonable risk of harm. The idea of risk involves a recognizable danger based upon the existing facts at the moment; the danger must be apparent to the actor. Judgment of the actor's conduct is likewise made from the facts apparent to the actor at the time.

Negligence alone does not give rise to a cause of action. All elements of actionable negligence must be present and the absence of one element will bar recovery. These elements are:

a. A legal duty to conform to a standard of behavior or conduct for the protection of others against unreasonable risk of harm.

b. A breach of duty or the failure to conform to that standard.

c. Sufficiently close causal connection between that conduct or behavior and the resulting injury.

d. Injury or damage resulting to the rights or interests of another.¹

Duty can be defined as an obligation on the part of one person to conform to a particular standard of conduct toward another. The courts will recognize and enforce this obligation arising out of the relationship of two parties involved in a law suit. In the process of a law suit, a court will first establish the duty owed by the defendant to the plaintiff before it can determine whether the defendant has breached his duty. The concept of duty, however, must be established in regard to that particular plaintiff involved in the suit. Action cannot be based upon the breach of duty owed to some other person. In a sense, the duty owed to a plaintiff must be a personal one. Prosser states that the plaintiff must bring himself within the scope of a definite obligation so that it might be regarded as personal to him.2

Breach of duty is determined by comparing the defendant's conduct against a standard which is set by law. This standard bears purely on the actor's conduct and upon what was apparent to him at the time. It does not matter if the risk seems to be greater afterwards. On the other hand, it must be taken into account that the actor has no time to reflect. Thus all aspects are taken into view, and the actor's conduct is judged accordingly. The standard imposed must be an external one. It must not be based upon the individual's own notions of what is right and what is wrong. The failure to do so would bring about a multiplicity of "standards."

2Prosser, p. 167.
Prosser states that an honest blunder or a mistaken belief that no damage will result does not absolve the actor from the fact that the risk was still there and the harm to others was still as great.\(^3\)

In judging the actor's conduct, the gravity of the risk must be balanced against the purpose served by that conduct. Certain risks are accepted as common, everyday risks, and are justified by society as long as their benefit outweighs the risk of probable harm. In the interest of education, students are exposed to the apparent risks involved in physical education classes, science laboratory activities, and vocational arts classes. To eliminate these risks would mean curtailing these activities. Negligence is not absolute, but is relative according to the need and occasion.

In attempting to establish a uniform standard of behavior against which to measure the conduct of the actor, the courts have created a fictitious person: the *reasonably prudent person*.\(^4\) This person symbolizes the average prudent person of the community who is possessed of ordinary sense and skill, and who is always up to standard.

The conduct of the reasonable man will vary with the situation with which he is confronted, and in judging the actor's conduct,

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\(^3\)Prosser, p. 121.

\(^4\)Ibid., p. 124.
the jury is instructed to take the circumstances into account; negligence is the failure to conduct oneself in the same way that a reasonable man would "under the same or similar circumstances." This takes into account the external facts which surround the actor from one situation to another.

The characteristics of the prudent person itself are allowed to vary to some degree since persons or individuals will vary. Allowances are made as far as physical characteristics are concerned. If the actor is blind or deaf or is an amputee, his conduct must meet the standard of a reasonably prudent blind or deaf person or an amputee. Allowances are also made in the case of the aged and of children simply because they cannot meet the standard. The standard of conduct applied to a child is the conduct expected of a reasonable child of the same age, intelligence, and experience.

The conduct of a school teacher is held to be the conduct of a reasonable prudent teacher having the same physical attributes, the same training, and experience, faced with the same situation. The standard of conduct of a school child becomes important only when the facts in question bear upon contributory negligence, as will be discussed in the latter part of this paper.

If the actor has knowledge, skill, or intelligence superior to that of the ordinary man, the law demands a higher standard of conduct which is commensurate with these skills. Most of the cases involving these situations have involved professional people
such as doctors and nurses. The same could be true, however, of any teacher possessing a special skill or knowledge.

The term proximate cause is confusing and difficult to understand because it involves more than one problem. It is better understood if it is discussed from the viewpoint of causation and legal or Proximate cause.

Cause in fact deals directly with the problem and determines whether the injury or loss of the plaintiff was a consequence of the actor's conduct. This is a question of fact usually determined by a jury, and it covers all events which could have contributed to the injury. It entails the actor's nonfeasance as well as his misfeasance.

In determining whether an actor's nonfeasance has causal relation to an injury, the courts have formulated the sine qua non rule, commonly known as the but for rule, which states that the defendant's conduct is not a cause of the injury if the event could have occurred without it. This test is one of exclusion and is restricted to the question of causation alone. The test cannot be used in situations where two causes occur and bring about an event which either cause, operating alone, would have been sufficient to bring about the same result. While causation is an essential element of liability, it does not determine liability alone, since other considerations may prevent liability.
If a causal connection is found, the court must determine if the actor is legally responsible or not. The failure to find a causal connection ends further litigation and absolves the actor from tort.

**Legal cause** is a limitation which the courts have placed upon the actor's responsibility for the consequence of his conduct. This is done as a matter of practical necessity since an actor's conduct may have far-reaching effects. In a philosophical way, Prosser states that consequences could go forward to eternity: "The fatal trespass done by Eve was the cause of our woe."\(^5\)

In determining liability, the courts limit legal responsibility to those causes which are closely related with the results and significant enough so as to justify imposing liability. Prosser states that an attempt to impose liability without these limitations would result in infinite liability for all wrongful acts and endless litigation.\(^6\)

The problems involved in determining proximate cause are numerous and of a complex variety. At times, however, the problem is approached by determining whether the interests of the plaintiff are entitled to legal protection from the actions of the defendant. This, of course, routes the problem to the question of duty of

\(^5\)Prosser, p. 218.

\(^6\)Ibid., p. 219.
care owed by the actor to the plaintiff.

Some courts place the legal responsibility on the last wrongdoer where the cause is traced to several sources. The last wrongdoer is not, however, always held responsible. An earlier actor may be held responsible if he is under an obligation to protect the plaintiff against the conduct of the wrongdoer. This commonly happens in school cases where a student is injured by the negligent act of another student. The teacher always has the obligation to protect the students in his care from injury and is legally bound to effectively control pupils conduct so as to prevent injury to any.

The last element of actionable negligence is the injury or damage which constitutes the actual physical harm to the plaintiff. This is an element upon which a law suit is based and without which action cannot be initiated.

Duty of the School District

The Supreme Court of Washington stated that it is the legal duty of the school districts to protect the students under their custody. In defining the duty owed to the school child, the court also defined the standard of care required of the school district.7

The court made special reference to the supervision of games which are inherently dangerous for an age group, or could become dangerous if allowed to continue without supervision. In the immediate case a group of students were playing a game of football during recess. In the game, which was called "Keep away" football, it was required that the members of one team tackle any member of the opposing team who had possession of the football. This game was forbidden at the grade school, but at the time there was no teacher present on the playground. During the game an eleven year old boy was tackled and injured.

In determining the duty owed to the child, the court stated:

a duty is imposed by law on the school district to take certain precautions to protect pupils in its custody from danger reasonably to be anticipated, among which dangers, we think, should fairly be included the dangers incurred from playing games inherently dangerous for the age group involved, or likely to become dangerous if allowed to be engaged in without supervision.

In an early case involving the duty of care owed to the school children in a school district, the Supreme Court of New York stated: "The Board of Education of the city of New York is charged with the duty of providing for adequate supervision of activities within the school yard."\(^8\)

The school district was not required to keep the children

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during the lunch hour in the case of Miller v. Board of Education.9

The primary school allowed the primary school children to eat
their lunches in the school building, and afterwards allowed them
to play on the playground for the remainder of the lunchhour.
While playing on a defective fire escape, a school child fell down
and injured himself.

The Supreme Court interpreted the statute referring to super­
vision and added:

What the board could not do under the statute was
to undertake the care and control of children during the
luncheon period and then, after they had lunched, turn
them out upon the school property upon which there exist­
ed a known dangerous and defective condition and provid­
ed no supervision for them although they were in the
school yard or playground, and it was during school hours.

In a recent decision, the Supreme Court of New York stated
that a school district has fulfilled its duty when it provides for
proper supervision.10 "Appellant's duty was to provide for proper
supervision of activities within the school, and its duty was ful­
filled when it provided adequate supervision in the person of one
or more competent instructors."

In a prominent case, a California court defined the duty owed


10 Ferrill v. Board of Education, Central School District No.
1, 174 N. Y. S. (2nd) 91, 6 A. D. (2nd) 690, App. Div., 175 N. Y.
to the child: "Every teacher in the public schools must hold pupils to a strict account for their conduct on the way to and from school, on the playground, or during recess." The courts in that state declared that in order to provide effective control and supervision of students, the school districts have the duty to provide, and to enforce, rules and regulations.

In the case of Taylor v. Oakland Scavenger Co., a girl was struck down by a garbage truck on the school grounds as she ran from the gym to the athletic field. A principal issue in the case was the failure of the school district to provide rules and regulations in view of the danger to which the students were exposed: "It is the duty of school authorities to supervise at all times, the conduct of the children on the school grounds and to enforce those rules and regulations necessary to their protection."

In the case of Brown v. City of Oakland, a young girl strayed away from her parents while attending a baseball game at the school. The child wandered into a sand pit used for the broad jump, and while playing in the sand, cut her hand on a broken glass.


The Supreme Court asserted the school district's duty in this regard: "It is the duty of school authorities to enforce or cause to be enforced rules and regulations in the supervision of pupils on school grounds."

It has been stated, however, that in providing for proper supervision, the school boards are not required to provide detailed regulations covering every aspect of a child's activity in school. "The legislature did not hereby intend to cast upon school trustees or boards of education the burden of an attempt to fashion guides for the safe conduct of pupils." 14

After the school day terminates, the school children are no longer in the custody or control of the school, and the school district owes no duty to protect children who might linger or play near school buildings. Plaintiffs bringing suit against school districts for injuries occurring in these situations have been denied relief by the courts.

In Kantor v. Board of Education, 15 the board of education permitted the gates of the school yard to remain open after school hours so that children could play their games in the yard instead of on the streets. While watching a stick ball game, a nine year


old boy was struck down by a boy riding a bicycle who was playing tag with other bicycle riders.

The court defined the school's duty toward the children:

We find that under the circumstances herein presented, there was no duty upon the board of education to have watchers in the yard to prevent any particular form of play. The purpose of the board of education in opening yards to the children is obviously to keep them off the street and to that extent to assist in avoiding street accidents. No supervision is attempted; no organized play is established. There is no pretense of having supervisors there.

In a similar situation, a seventeen year old boy entered a school playground after school hours for the purpose of playing handball. While he was watching a game of stickball, the stick used in the game as a bat slipped out of the batter's hands and struck the youth, causing severe injuries. In denying liability for the school district, the court stated: "The defendant was under no duty to provide supervision of the public users of its playground."16

In determining whether the school district has been negligent in regard to the care and supervision of the school children, the courts often refer to, and impose, the standard of ordinary care, or that care expected of the ordinary prudent person. The failure of the school boards to use ordinary care in providing supervision

for school children constitutes negligence on the part of the school district. School board members in creating policies and supervisory personnel in supervising school children must act in the same manner that a person of ordinary prudence would act in the same circumstances.

The Supreme Court of California, in determining whether a school district was negligent in providing supervision during a recess period employed a test: "The question is whether the school officials used the same care as persons of ordinary prudence charged with the duty of carrying on the public system would use under the same circumstances." 17

The court then defined ordinary care: "What is ordinary care depends upon the circumstances of each particular case and is to be determined as a fact with reference to the situation and knowledge of the parties." 18

The Supreme Court of Washington has referred to the same standard in determining negligence. "The extent of the duty thus imposed upon the respondent school district, in relation to its supervision of its pupils within its custody, is that it is required to exercise such care as an ordinarily prudent person

18 Ibid.
"would exercise under the same or similar circumstances."\(^{19}\)

School districts are generally held responsible for the protection of school children from dangers which are foreseeable to a reasonable prudent person. School districts are charged with foreseeability, and the failure of school board members to act in the face of a foreseeable danger constitutes liability on the part of the district.

The court in the case of Oakland v. Scavenger Co.\(^{20}\) based its decision upon this principle. In that case, the principal and the school officers had known for some time that students frequently ran across the area used by trucks, but they imposed no rules of conduct or supervised the students. The court in deciding this case imposed liability: "Their negligence is established if a reasonable prudent person could foresee that injuries of the same general type would be likely to happen in the absence of such safeguards."

The court then went farther and stated that in holding a school district liable it was not necessary that the supervisor or the school board foresee the specific injury. In order to prove negligence, the plaintiffs needed only to show that an injury of a


\(^{20}\)Oakland v. Scavenger Co., 83 P. (2nd) 948.
general type was foreseeable: "Nor is it necessary that the very injury which occurred must have been foreseeable by the school authorities in order to establish that their failure to provide additional safeguards constituted negligence." 21

In the case of Charonnat v. San Francisco, 22 two students were involved in a minor dispute in the school yard. One student walked away and started playing on the school fence. The other student followed him, grabbed his leg, and twisted it in such a way that the leg bone fractured. In holding the school liable, the court relied on the principle decided in the Oakland case: "It was not necessary that the injury to the pupil whose leg was broken by a fellow pupil must have been foreseeable by the school authorities or the yard supervisor." The court maintained that where arguments and fighting occur, injuries are likely to result, and it was not unreasonable to insist that the supervisor should have foreseen that injury could occur.

It is the common law duty of school districts to provide and arrange for the supervision of school students, and school districts which fail to do so are held liable for injuries received by students as a result of this neglect. Most states have enacted statutes requiring supervision and these are expressed in the

the school codes of the states. In the case of *Forgone v. Salvadore School District*, a group of students were left unattended to eat their lunch in a school room. During the lunch hour some of the students started to play and scuffle, and during the fray, a student twisted and injured a girl's arm.

The court stated that lack of supervision constituted cause of action against the school district. "In the present case the negligence alleged to have consisted of an omission to supply the supervision of students during an intermission of school which is required by law. . . . Indeed, we may assume that if the teacher had been present, the scuffling would not have occurred and the injuries would not have resulted."

Providing supervision, however, does not guarantee that the school district will be absolved from liability when pupils are injured. School districts can be held liable for failure to provide adequate supervision. The question as to what constitutes adequate supervision depends upon the facts of the particular situation. What would be adequate in one situation would not be in another. This is a question of fact, and when it is before the court, it is left for the jury to decide. Recent decisions have not brought an agreement on the question.

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The court in Charonnat v. San Francisco held that the school did not provide adequate supervision when it assigned one teacher to supervise some one hundred and fifty students in the school yard. It stated that one teacher could not account for the conduct of that number of pupils.

Other courts have not been as definite as to what constitutes proper supervision. "In determining whether the school district was negligent in affording supervision of its pupils, there is no absolute rule as to the number of pupils one supervisor may adequately oversee, nor is there any fixed standard of supervision." 25

The court in Ohman v. Board of Education, in which the art teacher went out of the room, stated: "Proper supervision depends largely on the circumstances attending the event."

School districts which use incompetent or untrained help in supervising students have been held liable by the courts. Students under such supervision are exposed to unreasonable risk of harm. The case of Garber v. Central School District is a good illustration.

During the lunch hour a school janitor was usually left to supervise the students in the gym and keep them out of the halls until the bell rang. The students were left alone to amuse themselves with no rules or regulations concerning discipline. On the day of the accident some of the students started playing "shoot the crow." One boy would lie down on a mat and draw his knees up against his chest. Another boy would sit on his upturned feet, and would be shot into the air, landing on a nearby mat. The janitor joined the game and "shot up" a small student who was not experienced with the game. The student was thrown five feet in the air, and came down head first on the gym floor seven feet beyond the mat, sustaining a fractured arm and other injuries.

The Supreme Court in holding the school liable stated that leaving young boys under the care of a person without training, skill, or experience amounted to a failure of the school authorities to meet the requirements of the common rule as well as neglect of duty as imposed by statute. "It is indicative not only of a disregard of the statutory mandate to make rules and regulations to establish order and discipline, but also to carefully select suitable supervisors to whom the safety of children was to be intrusted while under school restraint."28

It can be seen from the opinions that there are no binding

rules or fixed standards as to what constitutes adequate or proper supervision. However it can be certain that the courts will hold a school district liable for negligence if the jury should find that the school failed to provide the proper supervision.

Duty of the School Teacher

Under the common law a teacher owes the school child the duty to protect him from unreasonable risk of harm. Protection from physical harm involves the protection from the teacher's own negligence as well as from the child's acts or those of his classmates. School children require constant care and supervision because of their immaturity, their inability to recognize danger where it exists, and because of their impulsive nature.

A school teacher is in effect a supervisor whenever the teacher is in custody of a group of children. This responsibility is exercised while in the classroom and in any other instances where the teacher may be delegated supervisory duty.

The relationship of a school teacher to a school district is that of an employee, and a teacher does not receive immunity from tort liability the way a school officer would. Teachers are held liable in all cases where a student receives an injury as a direct result of the teacher's negligence. In holding a teacher liable the courts have used the same standards of conduct by which to measure a teacher's conduct as is used for school districts or the
common man. In special situations, a higher standard is used. In jurisdictions where the school districts are held liable for their torts, a teacher's liability reverts on the district, and the relationship between the teacher and the school district is that of master and servant.

A teacher's legal duty toward the school child is largely fulfilled through proper and effective supervision, and teachers have been held liable for breach of this duty because of improper or inadequate supervision.

In passing judgment in cases involving teachers, some courts have based their decisions on the legal relationship between the child and the teacher which is known as loco parentis. This relationship imposes upon the teacher a duty to care for the child in the same manner that a parent would. Under this theory the parents delegate their responsibility to the teacher.

A noted case which illustrates the duty of the teacher to the school child through this legal concept is the case of Gainscott v. Davies. In that case, the teacher had asked an eight year old pupil to water the plants which were located in the "conservatory," a room adjacent to the classroom, used to display biological specimens and plants. The plants in the room were in boxes which were suspended from the ceiling, and were too high for the child

to reach. With the knowledge of the teacher, the young girl took a chair, stood on it, and proceeded to water the plants with a milk bottle. In the process, the bottle slipped from her hand and broke on the cement floor. The girl slipped and fell on the broken glass and received severe cuts.

In passing judgment, the court stated that the relationship of a teacher to a pupil is that of one in loco parentis:

We are not concerned with the law applicable to the punishment of a pupil by a teacher, but rather with the law applicable to the duties of a teacher in the care and custody of a pupil. In the faithful discharge of such duties the teacher is bound to use reasonable care, tested in the light of the existing relationship. If through negligence, the teacher is guilty of a breach of such duty and in consequence thereof a pupil suffers injury, liability results.

Another court based its decision on the same relationship. In that case, a manual training teacher, with approval of the board, was constructing a vocational training building. Materials from a razed building were used, and boys were permitted to volunteer for this work during their manual training classes. A temporary stage was erected entirely around the building and the boys would stand on it to finish the walls. The plaintiff, Brooks, was working with a companion when the stage collapsed and Brooks received severe injuries.

The court cited the Gainscott case and stated that duty was

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based upon the teacher-pupil relationship of in loco parentis, and that because the teacher had the care and custody of his pupils with the right to govern and control them, he must so act as not negligently injure them, whether the act is one of misfeasance or nonfeasance.

In instances where negligence can be shown, the courts will hold a teacher liable for nonfeasance, the failure to act as required in order to prevent injury to the child, as well as for misfeasance, the wrong conduct causing injury. The following case illustrates the breach of duty under loco parentis by misfeasance. It also indicates the limit of the teacher's authority under this legal concept.

In the case of Guerrieri v. Tyson, a teacher noticed that a boy who was playing baseball had an inflamed finger. She told the boy to report to the office after school was out. After school she heated a pan of water to the boiling point, and with the help of an assistant, held the hand of the student under the water for about ten minutes. The boy was then sent home, and later taken to the hospital by his parents. The burns required treatment and an infection complicated the affair. The boy was required to stay in the hospital for twenty-eight days. The scalding aggravated the infection, and scar tissue permanently disfigured the hand.

The court did not judge the teacher's good intent, if there was one, but her lack of prudence in treating the student. In holding the teacher liable, the court stated the limitations of the teacher's authority under this relationship:

Under the circumstances, we think it clear that these defendants are legally liable for the damages resulting from their tort. These teachers stood in loco parentis to the child, but there is nothing in that relationship which will justify the defendant's acts. Under the delegated parental authority implied from the relationship of teacher and pupil, a teacher may inflict reasonable corporal punishment on a pupil to enforce discipline, but there is no implied delegation of authority to exercise her lay judgment as a parent may in the matters of the treatment of injury or disease suffered by a pupil.

The court then added that the teachers were not acting in an emergency, and furthermore, neither had any medical training. A teacher's authority over a school child does not extend beyond supervision, and matters which require medical attention should be referred to the medically trained personnel. The above case was an extreme one, and teachers have been held liable in cases of a less serious nature.

Apart from the legal relationship of loco parentis, a teacher has the common law duty to protect all students which are under the control or custody of the teacher and a dereliction of this duty will bring about liability. In the case of Hoose v. Drum, a group of children were playing among some goldenrods growing in

a field adjacent to the school grounds. The children were out on recess, and were under the supervision of their teacher. While playing with a goldenrod stalk, one pupil struck another pupil in the eye, causing him the loss of the eye.

The court stated:

Teachers have watched over the play of their pupils time out of mind. At recess periods, not less than in the classroom, a teacher owes to his charges to exercise such care of them as a parent of ordinary prudence would observe in comparable circumstances. . . . The effective cause of the plaintiff's injuries was a failure to protect the boys against themselves. Any dereliction in this aspect was the fault of the teacher.

Other courts have held teacher liable for omission of their duties. The court in Miller v. Board of Education ruled in a similar manner.

After taking lunch a group of grade children was told by their teacher to go play in the playground. The teacher remained inside of the building, and watching the children through a window. While playing, a girl climbed over a defective fire escape, fell down, and received injuries. The court later held that the teacher had failed her duty of supervision because she had not adequately supervised the children.

A student obtained permission from his teacher to bring a gun

to the school workshop for repairs in the case of Govel v. Board of Education.\textsuperscript{34} The gun consisted only of the barrel and the breach mechanism. In the days which followed, the teacher failed to supervise the work on the gun. One day the student brought live ammunition to test the mechanism and the teacher took no notice. While trying out the mechanism, the gun discharged accidentally and wounded a student standing nearby.

The court did not hold the teacher liable, saying:

\begin{quote}
Without ammunition the portion of the gun which was brought presented no more of a hazard than any other metal cylinder with attachments. \ldots It was obvious to anyone who looked that Taylor was using live ammunition in testing the gun. Duffy (the teacher) was negligent in not adequately supervising the work and for not warning the plaintiff and others who were within range of the danger.
\end{quote}

In determining liability of school teachers for their negligence, the courts have imposed the standard of conduct required of an ordinary prudent person. Teachers are required to use reasonable care, and their failure to do so will bring about liability.

In Govel v. Board of Education,\textsuperscript{35} the boys physical education classes were required to somersault over a set of parallel bars by bouncing on a springboard placed on one side of the bars and landing on the opposite side where some mats were placed on the floor.

\textsuperscript{34}Govel v. Board of Education of City of Albany, 48 N. Y. S. (2nd) 299, 267 App. Div. 621, (1944). The school board in this case was not held liable because it was a delegated duty.

\textsuperscript{35}Ibid.
While attempting this maneuver a pupil caught his foot on the bars, fell on the bare floor, and broke a leg.

In stating negligence, the court said, "A teacher of physical education has the duty to exercise reasonable care to prevent injuries, to assign pupils to such exercises as are within their abilities, and to properly and adequately supervise their activities, a breach of which duty constitutes actionable negligence on the part of the teacher."

In the case of Luce v. Board of Education, a school student had received previous fractures of the forearm, and on her return to school was permitted to forego her gym classes on doctor's orders. During the second school term her cast was removed and she was allowed to participate in gymnasium activities. While playing "jump the stick relay," a game in which the participants have to jump as a stick is swung under them, the plaintiff was pushed and fell down, breaking her arm in the same place again. In stating charges, the plaintiff contended that the girl should not have been allowed to play that type of game resulting in her fall.

The court cited the Govel case, and stated that a physical education teacher has the duty to exercise reasonable care to 36Luce v. Board of Education of Village of Johnson City, 157 N. Y. S. (2nd) 123, (1956).
prevent injuries and to assign pupils to such activities as are within their abilities.

Judgment was passed against a physical education teacher who allowed two unskilled boys to box without any previous instructions as to the proper method of boxing. As a result, one pupil received severe injuries and the court allowed recovery from the teacher.37

In passing judgment the court stated:

"It is the duty of a teacher to exercise reasonable care to prevent injuries. In this particular case the pupils should be warned before being permitted to engage in a dangerous and hazardous exercise. Skilled boxers at times are injured, and these two vigorous athletic young men should have been taught the principles of defense if indeed it was a reasonable thing to permit a slugging match of the kind which the testimony shows this contest was."

Under ordinary circumstances, the standard of conduct required of school teachers seldom goes beyond that of reasonable care. "A teacher may be charged only with reasonable care such as a parent of ordinary prudence would exercise under comparable circumstances."38

Under circumstances in which students are exposed to a greater degree of risk than the ordinary, the courts may impose care of the

highest degree upon a teacher because the safety of the students depends upon the precautions taken by the teacher. The case of *De Gooyer v. Harkness* serves as an illustration. An athletic coach joined in with a group of high school boys intent on initiating the new members of the football squad who had "lettered" that year. The initiation was customarily held towards the end of the school year, and consisted of giving the candidates an electric shock. The shock was produced by using wires connected to a transformer which in turn was connected to a set of batteries. The equipment was not available that particular year, and the current was drawn from an electric socket while a rheostat was improvised from a jar containing salt water. After the third candidate to receive the shock complained that it was too strong, the salt solution was diluted in half, and the wires were tested by the coach. The plaintiff, De Gooyer, received a shock and immediately collapsed. He could not be revived and died as a result of the shock. The coach was implicated by the fact that he was at the time in control of the situation and responsible for the safety of the initiates.

In the ensuing trial, the court stated that the coach was bound to use care of the highest degree:

The defendant, Gardner, must be charged with knowledge that electricity is dangerous. His duty in participating in the act of transmitting the electric current to the body of Gerald was to use the highest degree of care.

care that skill and vigilance could suggest. The facts disclose that the rheostat used was at best a very crude and hastily prepared contrivance; the shock was administered while the boy reclined on a wet damp floor (it is generally known that an electric shock is enhanced when a part of the person who receives the shock contacts a wet surface); the tests that were made included only two of the eight or more wires; the evidence disclosed that the boy proceeding Gerald had received a severe shock. These facts in our opinion are sufficient to support the finding of the jury that Mr. Gardner failed Gerald to observe the high degree of duty owing to Gerald.

Duty in School Transportation

In school districts where the school children are transported to and from school, the courts have imposed the duty of care for the children's safety. The same rules of negligence which apply to other school situations apply in transportation, and school districts have been held liable for injuries to pupils arising from their negligence. If all elements of actionable negligence are not present, liability cannot be imposed upon a school district.

In formulating a standard of care the courts are not in accord, but in all cases the degree of care was dependent upon the designation given to the vehicle used in transportation. A common carrier is a vehicle used in public transportation and under the

40 The liability of the school districts in Illinois was based on a school bus accident.

common law it owes the public the highest degree of care. While some courts have identified school buses as being common carriers, others have designated these as private carriers. The following cases are used in illustration.

In the case of Shanon v. Central School District, a student stepped from the school bus, ran home, and was struck by an approaching car. The court in deciding liability held that the bus driver owed the children ordinary care: "We are of the opinion that a bus which is operated only for the convenience of a particular school under the circumstances of this case is a mere private carrier as distinguished from a common carrier, and that ordinary prudence for the safety of the children under similar circumstances is all that is required of the district or the driver of the bus."

The ordinary care of children, however, does not constitute a minimum of effort on the part of the district for the safety of the children. Ordinarily more stringent measures must be taken when dealing with children than when dealing with adults. In failing to warn, or to halt a student who was getting off a school bus, a driver was found guilty of negligence: "It is ordinarily


43This decision has been cited and upheld in more recent cases: Hanson v. Reedley Joint Union High School District, 111 P. (2nd) 415, 43 Cal. App. (2nd) 643, (1941); Foster v. Einer, 158 P. (2nd) 978, 69 Cal. App. (2nd) 541, (1945).
necessary to exercise greater care for the protection and safety of young children than for an adult who possesses normal and mature faculties. One would anticipate thoughtlessness and impulsiveness in the conduct of a young child."

Some courts have stated that the standard of care used in the transportation of children is **extraordinary care**:

While a carrier of passengers is not an insurer of the safety of his passengers in the sense that a common carrier of goods is said to be an insurer of the safety of goods carried, he is bound to exercise **extraordinary care** and discipline for the safety of his passengers, and it matters not the kind of conveyance used or the nature of the motive power employed. Hence, the operator for hire of a school motorbus who operates along a certain route every school day, taking all school children alike to and from a certain school is a carrier of passengers required to exercise **extraordinary care** and diligence for the safety of every one of such school children riding in his bus.

In the case of **Phillips v. Hardgrove** the courts in Washington imposed care of the **highest degree**, which is the care imposed on a common carrier: U. S. Lincoln City Lines, Inc. v. Schmidt, C.A.Neb. 245, Fed. (2nd) 600, (1927), and it was upheld in recent decisions in Washington: Leach v. School District No. 322 of Thurstone County, 85 P. (2nd) 312, 22 Wahs. (2nd) 596, 158 A. L. R. 810, (1945).

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on common carriers. A young girl was struck and killed by a car after alighting from a school bus. The court in deciding the case stated that the standard of care required of the school district in transporting children should be based on public policy. The standard of care in reference to school buildings and equipment was based on public policy, and the court saw no reason why standards imposed on school transportation should not be based on public policy as well. Public policy demanded the highest degree of care of public carriers, and the same would be demanded of carriers of school children.

If a school district is liable for the failure to exercise ordinary care with reference to the school building, school grounds, and manual training equipment, there would appear to be no reason why it should not, when it engages in the carrying of passengers by a school bus, be required to exercise the same degree of care that is exercised by passenger carriers generally. If the rule of the highest degree of care arises, as all authorities say, from the nature of the employment and on the grounds of public policy, there is no reason why it should not be applied to a school district the same as any other passenger carrier. Certainly school children are entitled to the same degree of care as are adults.

The standard of care was defined in Illinois prior to the Molitar decision. An appellate court in Van Cleave v. Illinois Coach Company 47 held that the highest degree of care was required in the transportation of school children. In the case it was alleged that the driver carelessly propelled the bus, and caused a

student standing in the aisle of the bus to be thrown forward and strike the plaintiff.

In holding the company liable, the court stated: "We believe that this sets up the proper standard of care and those engaged in the transportation of school children should be held to exercise the highest degree of care."\(^\text{48}\) There was no prior decision on this particular question in Illinois, and the court in handing down this decision made reference to Webb v. City of Seattle,\(^\text{49}\) a school case from Washington.

In Price v. York,\(^\text{50}\) an Illinois Appellate Court has approved the holding of the Van Cleave case. In this case a young child was crossing a highway in order to board a school bus, and was struck by a passing motorist. The court held the school district not liable because there was no breach of duty. It stated that school districts owed no duty to escort students. The court however went on to state that it recognized the prior holding in the Van Cleave case to the effect that those who convey children to and from school must exercise the highest degree of care consistent with the practical operation of a school bus.


Proximate Cause as Deciding Liability

After showing that a school district's officers or a school teacher has been negligent in some respect, a parent must allege and prove that the act of negligence was the proximate cause of the injury to the child.

In the case of Guyten v. Rhodes all indications show that the teacher was negligent, but the court held him not liable because his actions were not the proximate cause of the injury. In that case a student threw a milk bottle and injured another student during the teacher's absence from the classroom. The class was composed of incorrigible youths, and although the teacher knew of previous assaults upon the injured child, he placed no one in charge of the room during his absence. The teacher furnished the milk bottles to the class and allowed them to retain them. The court in deciding liability found that the teacher's actions were not the proximate cause of the injury, and absolved the district and the teacher: "The violent disposition of the pupil assaulting the plaintiff appears to be the first and proximate cause of the plaintiff's injury and the absence of the defendant is a remote cause only, if any."

In cases where the negligent act of a teacher is the proximate cause

51Guyten v. Rhodes, 29 N. E. (2nd) 444, 65 Ohio App. 163, (1940)
cause of a child's injury, the school teacher can be held liable. In the case of Benedetti v. Board of Education, a vocational arts teacher was found liable for negligence because his act was a direct and proximate cause of a student's injury. In that case the teacher failed to lock a machine and left it unattended for an unreasonable length of time. While a student tried to extricate a piece of metal from the machine, another student stepped on the foot threadle and caught his hand in the gears. Although the teacher was nine feet from the machine at the time of the accident, the court found him negligent because he failed to observe whether the machine was being used or tampered with and his negligence was the proximate cause of the student's injury.

In determining the proximate cause, the court used the "but for" test and established that the accident would not have occurred "but for" the teacher's concurring negligence in failing to observe whether the machine was being used or tampered with: "But for the negligence of the teacher, no act of a third person could have operated to cause the injury of the infant plaintiff." The teacher was found negligent and the school was held liable.

In an instance where a teacher's negligent act is the cause of an accident, an independent intervening cause may break the chain of causation between the teacher's negligent act and the

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injury. This act becomes the proximate cause of the accident, while the act of the teacher becomes a more remote cause.

In the case of Taylor v. Kevlin, a teacher of mechanical arts directed a student to clean a printing press. While the student was cleaning the press a classmate moved the flywheel and caught his hand in the gears. The court stated that the student's act was an independent act which intervened and became the proximate cause of the injury: "We conclude that the act of the fellow pupil in setting the gears in motion was such an independent intervening cause as to break the chain of causation between the accident and any conduct on the part of the defendant. It was the proximate cause of the injury."

This case bears some similarity to the Benedetti case; however in that case the instructor had the duty to lock the machine or watch over it so that no one tampered with it, and he did neither. In the Taylor case the instructor had asked a student to perform a normal operation. It should be noted that a third party being the immediate actor in causing an injury does not in all cases absolve a teacher or a school district from liability. This is specially true in instances where the school district failed to provide adequate supervision.54


In instances where an unforeseen act is the proximate cause of an injury teachers are not held liable. In the case of Ohman v. Board of Education, a student in the act of passing a pencil to another boy threw the pencil and struck another one in the eye when the student for whom the pencil was intended ducked out of the way. The teacher at the time was out of the classroom obtaining supplies. The court held that there was no liability because the proximate cause of the accident was the unforeseen act of the pupil, and not the absence of the teacher. The absence of the teacher was a remote cause, and in all probability the accident would have happened in the presence of the teacher.

The court stated:

Nonetheless, it does not follow such absence was the proximate producing cause of the injury, which was due, as we see it, to the tossed pencil. Whether it was done mischievously and heedlessly or wantonly and willfully, or with the serious purpose of returning the pencil to its owner, it was the act of an intervening third party, which under the circumstances could hardly have been anticipated in the reasonable exercise of the teacher’s legal duty toward the plaintiff.

In Pollard v. Board of Education, a girl had eaten lunch and gone to the playground for the remainder of the period. In returning to her classroom, she followed other pupils over a fence

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which separated the playground area. She placed one foot over the wire and was bringing the other over when a classmate raised the wire so that it struck her foot and threw her to the ground. The court stated that the proximate cause of the injury was the unforeseen act of the third party: "We find no evidence in the record to support a finding that the fence involved in the accident was negligently constructed or negligently maintained, or that defendant breached his duty to provide adequate supervision of the playground. In our opinion, the sole proximate cause of the accident was the unforeseen intervention of the plaintiff's classmate in raising the wire."

Extent of Liability of the School District

School districts are not held to strict liability, and they are not insurers of the children's safety. Strict liability is generally limited to situations where the plaintiffs are exposed to extraordinary risk, and the actor is "an insurer against the consequences of his conduct."57

In holding that the school districts are not insurers of safety, the courts have stated that liability cannot be imposed for injuries received by students which occurred through the fault of no one. Parents must allege and prove that the school district of their employees were guilty of some act or omission which

57Prosser, p. 338.
amounts to negligence. The school districts in effect are not liable for the "pure accidents."

School districts are ordinarily responsible for the injuries of students which are caused by their classmates because students can not always exercise mature judgment for their actions. The school districts, however, cannot be held liable for accidents which a person of ordinary prudence could not foresee. In the case of Reithardt v. Board of Education, a girl was sitting on a window ledge waiting for her physical education class to start. Suddenly and without warning a classmate grabbed her ankles, raised her legs, and pulled her off the ledge so that she fell on the floor and received injuries. The school district in this case was held not liable because the school personnel could not have foreseen the act in order to avoid the accident.

The court in the case, Underhill v. Alameda Elementary School District, held that a school district could not be held liable for injuries suffered by a student in the playground unless the school district failed to provide a safe playground or allowed the students to engage in games of a dangerous nature. The student in this case was struck by a bat which slipped out of the batter's


hand while watching a supervised game. The parents brought suit against the school district, but failed to prove that the school district had in any way been negligent toward the student. The court, in passing judgment for the defendant, stated:

The injuries which may result from the playing of said games are ordinarily of an inconsequential nature and are incurred without the fault or part of anyone. In such cases there is no liability and of course the fundamental rules governing liability remain the same, even though the particular injury may prove to be of a more serious nature. The law does not make school districts insurers of the safety of the pupils at play or elsewhere, and no liability is imposed upon a district under the above mentioned section, in the absence of negligence of the district, its officers, or employees.

In physical education classes where students are more likely to be exposed to risks, the courts have ruled in the same manner, maintaining that some of the risks are a natural part of the curriculum and the students must assume the risks involved.

In the case of Cambareri v. Board of Education,60 the students were participating in a relay race in the gym. After taking the roll or tumble, a student resumed his feet, and the mat slipped on the floor under his feet. The student received a bruised knee and sprained leg as a result, and the school district was named a defendant in a law suit.

The court stated that the defendant district, in meeting the

legal requirements towards providing a reasonably safe place, was absolved from liability. It maintained that slipping and falling were common occurrences in physical education classes despite proper care and supervision. "The defendant was not the insurer of the plaintiff's safety. Common experience teaches us that innumerable hazards surround the individual and injuries are thereby suffered despite the exercise of proper care and for which no legal liability attaches to anyone."

In the case of Walter v. Everett,61 a student was injured while performing gymnastics which were held in the school basement under the direction of a W. P. W. instructor. The court in absolving the district stated: "School children stand under the protecting arms of the school district while they are at school and while going to and from home. But a school district is certainly not an insurer of the safety of children in its charge."

In alleging that a school district has been negligent, the burden of proof rests on the parents, and all elements of negligence must be present. Failure to show negligence absolves the district from liability, no matter how grave the consequences.

The classical case is Friedman v. Board of Education,62 in

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which a New York school board was held not liable because it had not breached a duty where none existed. In that case a helper was employed by the "custodian engineer" of the school and his job consisted mainly of maintaining the school furnace and keeping the school warm. While working after school hours, the helper obtained the help of a fifteen year old boy who was not a pupil. While riding the ash hoist of the school building, the boy was accidentally crushed to death by the elevator. It was stated in court that the hoist had no safety devices to prevent such accidents, and the school was therefore negligent.

Although no one witnessed the accident and the boy's own negligence could have been involved, it was presumed that the accident could have occurred because the board failed to use reasonable care in the maintenance of the hoist. In deciding liability, the question was whether the board of education owed any duty to the boy. After reviewing the facts the court established that the board owed no duty to the boy because the board had not in effect invited the boy into the building:

The board of education, at the hour of the accident, had excluded the public from the building. It had given no authority, express, implied, or apparent, to invite or even permit others to come into the premises. . . . Not only was no permission or invitation extended by any person acting for the board, but the boys had no reason to believe that the helper had a right to extend such permission or invitation. The defendant owed no duty to persons introduced.
Summary

In jurisdictions where the school districts are liable in tort, the courts have clearly defined their duty and have imposed a standard of care on those districts.

School districts are required to exercise ordinary care for the protection of school children. Ordinary care is that care that a person of ordinary prudence would exercise under similar circumstances and negligence is determined on this basis by the courts. The question of whether a school officer has exercised ordinary care is a question of fact which is decided by a jury.

In negligence cases reference is commonly made to the supervision of school children, and the courts have insisted that the school districts provide proper and adequate supervision. The district's failure to do so may bring about liability. The courts have not agreed on what constitutes adequate supervision, but the school boards are required to act with prudence and foresight in providing supervision. Some courts have ruled that school districts must create and enforce rules and regulations in controlling student conduct. The problem of providing supervision is delegated to administrative personnel who assign the necessary supervisors from the staff.

School teachers are held responsible for the safety of school children in their custody. This applies to the classroom as well
as to other places where the teacher has been assigned to supervise, such as hallways, the playground, the gym, or the cafeteria. The failure to assign supervisors would be the fault of the district, and the failure to supervise as directed would be the fault of the teacher.

In determining negligence, the courts hold the teachers to the same standard of conduct applied to school boards: reasonable care. Teachers are required to foresee and prevent accidents which are foreseeable at the time. A teacher's failure to foresee and prevent an accident does not necessarily absolve the teacher from liability. The question is not whether the teacher could foresee the accident, but rather it is whether the teacher should have foreseen the accident in the same manner that a person of reasonable prudence would have.

Occasionally teachers or other personnel are required to exercise the highest degree of care. This, however, occurs only when the students are exposed to extraordinary risk, and when the teacher has complete control of the children's safety.

School boards and personnel are not ordinarily held responsible for accidents which are not foreseeable. School districts are not insurers of the children's safety. In order to hold a school board or school personnel liable, there must be an act or omission which amounts to negligence. The burden of proof rests on the parents, and all elements of actionable negligence must be
The ordinary rules of negligence are found in the Illinois Common Law, and they will be used by the courts in future cases involving school districts and school personnel. In order that there may be actionable negligence in Illinois, there must be a legal duty to exercise due care in favor of the person injured. This duty extends only to those consequences which are probable and foreseeable. There must be a breach or failure to perform such duty, and the defendant's actions must be the proximate cause of the injury. Proximate cause in Illinois is stated as the "direct causer of an injury, and not a mere possibility."

The duty of care of the school districts and of school personnel for the protection of school children is found in the Common Law. The standard of care of the school districts has not been defined in Illinois, but it can be anticipated that the courts will hold the school districts to the standard of reasonable care for the protection of school children. When dealing with children a person is required to take notice of the child's lack of judgment, caution, or discretion, and to reasonably guard against injuring him or causing the child to injure himself. The failure to do so may constitute a breach of duty. In regard to transportation, the Illinois Appellate Courts have held the school district to the highest degree of care.

The duty of care of school teachers is defined as loco
parentis by common law. The standard of care has not been defined in Illinois, but teachers may well be held to the standard of reasonable care, and be judged by the standard of a reasonable prudent teacher. A teacher may be held to the highest degree of care in situations where he exposes the pupils to a higher risk of harm than is customary and where the safety of the pupils depends upon his skill, and the pupils are under his control.
CHAPTER VI

LEGAL DEFENSES

Liability for damages is not conclusive in all cases where the parents of the plaintiff allege and prove negligence against defendant teachers and school districts for injuries to pupils. Teachers and school districts have recourse to legal defenses and the ordinary rules of negligence apply to school cases.

Two of the most commonly used legal defenses of school districts are contributory negligence and assumption of risk. In addition to these two defenses, *vis major*, an act of God, can be used as a bar to action. If it can be shown that an act of God, such as an uncontrollable act of the elements, is the prime factor in causing injury to a child, there is no negligence. If, however, reasonable precautions could have prevented the accident, *vis major* cannot absolve negligence.

The following chapter will be limited to a discussion of assumption of risk and contributory negligence. The discussion does not include *vis major* because of its rare application. Imputed negligence and comparative negligence are also omitted because imputed negligence does not apply to school cases, and comparative negligence does not apply in Illinois.
School cases from other states are used to illustrate the application of the common law principles in school situations by the courts. These cases may be persuasive in future Illinois school cases where the facts of these cases may be similar. The underlying legal principles, however, will be determined in accordance with the Illinois Common Law. For this reason, and in order to orient the reader in the proper direction, each section contains a brief summary of the Illinois decisions from out-of-school cases.

Assumption of Risk

Assumption of risk, according to Black's Law Dictionary, exists where none of the fault for injury rests with the plaintiff, but where the plaintiff assumes the consequences of injury occurring through the fault of the defendant, third person, or fault of no one.¹

Generally, the defense of assumption of risk relieves the defendant of liability. This assumption, however, rests upon the consent of the plaintiff to relieve the defendant of an obligation of conduct toward him, and to take his chances with the risks involved. Such consent may be founded by an express agreement between the parties, or by implication from the conduct of both parties. Where consent is implied, the plaintiff enters voluntarily

into a relation involving danger, assuming all risk, and thus relieving the defendant of responsibility. The scope of this study will be limited to implied agreement.

Implied assumption of risk requires that the plaintiff have full knowledge and appreciation of the risks, and a voluntary choice to encounter the risk.

The term assumption of risk has been surrounded by much confusion because it is used in at least four different meanings by the courts, and the distinctions are seldom clear. Implied assumption of risk is interpreted in at least three different meanings.

A meaning which is most commonly used by the courts is that "the plaintiff, with knowledge of the risks, has entered voluntarily into some relation with the defendant which necessarily involves it, and so is regarded tacitly or impliedly agreeing to take his own chances." This meaning is commonly applied in situations where a spectator entering a baseball park may be regarded as consenting that the players may proceed with the game without taking precautions to protect him from being hit by the ball. In school athletic events, both players and spectators assume the normal risks of the game.

Assumption of risk may also be implied in two other ways. A

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person may be aware of a particular risk created by the defendant, but voluntarily assumes the risk. This meaning is commonly applied to situations where workmen who, in finding that a machine is defective, continue to use it without protest, and by their conduct imply that they are willing to assume the risk involved. 3

In a different situation a plaintiff may assume a particular risk which is all out of proportion to the interest which he is seeking, such as dashing into a burning building to save a hat. Such conduct in itself is unreasonable, and, according to Prosser, 4 amounts to contributory negligence. In these cases, both assumption of risk and contributory negligence are available as legal defenses.

Implied assumption of risk requires two necessary elements: the plaintiff must have full knowledge and appreciation of the particular risk, and he must have a voluntary choice to encounter it. If either requirement is not met, the doctrine cannot bar action.

Where the requirements are met, the courts have applied the doctrine in school cases, but have restricted its use, because children are treated as a special class. Because of their immaturity and lack of judgment, children are not held to the same

3 This meaning is rarely used since Workmen's Compensation Acts have made the employer strictly liable.

4 Prosser, p. 303.
standards as are adults, and in many cases the doctrine does not apply to them. A child's capacity to recognize and appreciate a particular risk is determined by a jury according to the child's intelligence, maturity, and experience.

The defense of assumption of risk rests upon the fact that the defendant is relieved of any duty towards the plaintiff. In school cases, however, the teacher, standing in loco parentis, has protective custody of the child, and is never entirely relieved of his duty toward the child. This relationship may also limit the application of the defense in another way. The teacher has disciplinary authority over the child's conduct. An act by the child which places him into unreasonable risk may be interpreted by a court as the child's conforming to, or following, the teacher's authority, thereby being denied a free choice.

The following school cases illustrate the application of the doctrine of assumption of risk by the courts in school situations.

In the case of **Hale v. Davies**,

5 the plaintiff's son, a boy of sixteen, had been injured previously in football practice, and at the request of the coach again participated in football practice and received an additional injury to his arm and shoulder. Action was brought against the high school athletic association and the

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coach. It was alleged that the association was liable for the coach's negligence and resultant injury to the student. The court dismissed the case, stating that a master-servant relationship did not exist between the association and the coach. It went further to absolve the coach by stating that the boy was capable of, and had assumed the risks of the game:

He was 16 years of age and, in the absence of an allegation to the contrary, was a normal boy and of average intelligence for that age, and no doubt knew and realized that football is a rough and hazardous game and that anyone playing or practicing such games may be injured. A person of this age is presumed to be capable of realizing danger and of exercising caution to avoid it.

As to the boy's choice of assuming the risk, the court stated that being a member of and playing on a high school football team was voluntary, not a mandatory endeavor. "It does not appear that he made any objection or entered any protest to engaging in the practice of the team."

Ordinarily where ball players assume normal risks of the game in which they are playing, spectators also are taken to assume the risks in watching the game.

In the case of Ingerson v. Shattuck School, the plaintiff, Mrs. Ingerson, was a spectator at a football game being played at the school football field. While she was standing near the side

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6Ingerson v. Shattuck School, 185 Minn. 16, 239 N. W. 667, (1931).
lines towards the end of the game, two players went out of bounds and rolled against her, fracturing her leg.

Suit was brought against the school alleging that the school was negligent in not providing a barrier in order to afford protection for the spectators.

The court stated that a rope placed along the sidelines would not have prevented the players from rolling over, and the use of a fence might have resulted in greater injury if the players crashed into it. The school was therefore not negligent. The court added that assumption of risk could not be established as a matter of law, but there were inferences that Mrs. Ingerson possessed knowledge of the risks and had a free choice to assume them. Mrs. Ingerson had attended three previous games, and during those games it was not uncommon for players to cross and go outside the lines of the playing field. This had happened several times during the present game. Furthermore, Mrs. Ingerson's son was a member of the football squad, and she elected to stand near the bench where he was seated.

The normal risks of a football game do not include the risks occasioned by a school employee's negligence. A player cannot assume the risk of receiving permanent eye injury when his face

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comes in contact with unslaked lime which is used to mark the lines on a football field.

The normal risks of a school baseball game run somewhat similar to those of a football game, the difference being that the ball itself instead of the players may cause injury to spectators. Courts have ruled that generally persons who know and appreciate the danger from thrown or batted balls assume the risk and cannot claim the management was guilty of negligence when a choice is given between a seat in the open and one behind a protective screen.8

In the case of Sayers v. Ranger,9 a fourteen year old boy was jumping over a gymnasium horse in a physical education class, and while doing so, he fell and broke his arm. It was alleged that the physical education teacher was negligent in failing to supervise the final jump and also in directing him to walk to the supervisor's office after he was hurt.

The court held that there was nothing negligent in the conduct of the defendant. The instructor demonstrated the proper way to jump, and set out mats to protect the students and supervised the jumps. The instructor also warned the students that it was

8Wells v. Minneapolis Baseball and Athletic Association, 122 Minn. 327, 142 N. W. 706, (1913).

dangerous, and that if they didn't think they could do it, they should not do it. The court commented, "If negligence was assumed in the defendant, still no right of recovery was established. Knowledge of the danger compels assumption of risk in such a case."
The warning from the instructor that the act was dangerous and the instructions that they were not to do it if they didn't think they were able, served to give the boy knowledge of the risk involved and a free choice to jump over the wooden horse.

In an earlier and similar case, a New York court ruled in the same manner. Although the case does not involve a public school, it was decided that a twelve year old minor assumed the risk when using a buck horse upon the invitation of an instructor: "plaintiff assumed the risk of jumping, the danger being open and obvious." 10

A pupil must not only know of the facts which create the danger, but must understand and appreciate the danger itself. 11 In cases where a minor is of such an age that he cannot comprehend or appreciate a danger, a minor is not capable of assuming the risk, and the doctrine of assumption of risk cannot be used as a bar to action. Cases involving minors seem to indicate that there is no arbitrary age at which a minor is capable of assuming a particular risk. Ordinarily a minor is declared capable of appreciating a

10 Kanofsky v. Brooklyn Jewish Center, 265 N. Y. 634, 193 N. E. 420, (1934).
11 Prosser, p. 309.
particular risk by a jury according to his individual experience and intelligence.

A person capable of assuming risk must have a free and voluntary choice. If a person is denied a choice or alternate course, the defense will be negated.

In the case of Bard v. Board of Education, the court ruled that assumption of risk was not applicable as a defense because the plaintiff was forced to assume the risks. In this particular case, the plaintiff was injured while taking a physical examination for the board of education. The examination was held inside a gymnasium and the plaintiff was required to show her ability in playing baseball. She batted a ball and ran to "first base." The base slid from under her on the slippery floor, and she fell and broke a leg bone.

The school board contended that, in taking the examination, the plaintiff had assumed any risk involved, but the court held otherwise on the ground that there could be no assumption of risk unless it was voluntary. She had to "proceed or forgo the examination."

Denial of a free choice or alternate course, as in the previous case, need not be so explicit. A court has interpreted a teacher's authority over a pupil as denying him a free choice.

In the case of **King v. Haley**, the physical education teacher ordered a group of pupils to perform an overhand climb on a frayed rope. The pupil was injured from a fall when the rope broke, and action was brought against the teacher for negligence. It was contended in the defense that the pupil had seen that the rope was frayed, but he had chosen to climb it. He had thus assumed the risk of injury. The court held that assumption of risk could not be used as a defense because, "a youth, acting under orders of an older teacher, set in authority over him and maintained in a position of superiority by means of class discipline, could not be considered to have consciously or unconsciously considered the possibility of risk of injury, or to have exercised a choice not to perform an act his teacher ordered him to do."

While most courts have not limited the application of assumption of risk, some courts have applied the doctrine only to master-servant cases. Since 1909 the Illinois courts have limited assumption of risk to master-servant cases. In dealing with such cases, the Illinois courts have defined the term master and servant. An extension of the doctrine to other than master-servant

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cases has recently been denied by the Illinois Appellate Court: "The doctrine of assumption of risk is applicable only in cases arising between Master and Servant." In another recent case which did not involve a master-servant relationship, the Appellate Court stood by its former decision. In refusing the doctrine as a defense where a master-servant relationship did not exist, the court stated: "The doctrine of assumption of risk was conceived in the law of contract, whereas the parentage of contributory negligence is in the law of torts."18

The Illinois courts apply the doctrine of contributory negligence in the place of assumption of risk in cases where the master-servant relationship does not exist. The law in Illinois imposes upon a person, sui juris, the obligation to use ordinary care for his own protection. One who unnecessarily assumes a position of danger, the hazards of which he understands and appreciates, can not recover from an injury incident to that risk. A bar to action is found under the doctrine of contributory negligence. 19

Contributory Negligence

Contributory negligence is an act or omission amounting to

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want of ordinary care on the part of the complaining party, which concurring with the defendant's negligence, is the proximate cause of the injury, according to Black's Law Dictionary.\textsuperscript{20}

Everyone is required to exercise care and caution for his own safety and contributory negligence is the conduct on the part of a plaintiff which falls below the standard to which the plaintiff is required to conform for his own protection. Such conduct will bar recovery if it contributes as a legal cause to the damages by exposing the plaintiff to the particular risks from which he suffers the harm. The plaintiff may fail to exercise reasonable care at the time of his injury, but unless his injury results from that particular risk, his conduct will not bar recovery.

Contributory negligence is determined in the same manner as negligence: the plaintiff is required to act as a reasonable person would under similar circumstances. The actor's conduct must conform to the conduct of a reasonable prudent person under similar circumstances.

In judging the reasonableness of the actor's conduct, the importance of the interest the actor is seeking to advance is balanced against the gravity of the risk of harm to which he exposes himself. It may be considered unreasonable conduct to dash into a burning building to save a hat, but it may not be unreasonable

\textsuperscript{20}Black, Law Dictionary, p. 1185.
to dash into the path of a train to save a child.  

Generally the burden of proof of contributory negligence of the plaintiff rests upon the defendant. A minority of jurisdictions, however, require that the plaintiff prove his freedom from contributory negligence. These courts have relaxed the rule, and require very little in the way of evidence to sustain the plaintiff's proof. Illinois courts follow this ruling.

Contributory negligence differs from negligence in that negligence constitutes conduct which creates unreasonable risk to others, while contributory negligence involves risk of harm only to the actor. Negligence involves an obligation of conduct to others, but contributory negligence involves no duty except to the actor himself.

Contributory negligence and assumption of risk are the two most common defenses in negligence actions, but they differ in that the plaintiff, in assuming the risk, relieves the defendant of any duty towards him, while in contributory negligence, the plaintiff is not entitled to action because of his conduct.

The courts do not hold young children to the same standard of conduct which is required of adults. Allowances are made for

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21Prosser, p. 283.

22Ibid., p. 283-284.
their immaturity and inability to "appreciate the facts." The same conduct which might be considered below standard for an adult may be reasonable for a child. This in effect makes it difficult to use contributory negligence as a bar to action in cases where children are plaintiffs.

In dealing with children on the issue of contributory negligence, two factors which are considered by the courts are the child's capacity, and the standard of conduct imposed on the child. Capacity is the child's ability to realize and appreciate a given danger and act accordingly. Capacity is related to the child's age, and the courts take this into careful consideration. If it is found that the child has the capacity, the court must then determine the standard of conduct to which the child will be held.

In allowing these considerations for children, there are two major views concerning the issue of contributory negligence of children. The two views are usually classified as the Illinois rule and the Massachusetts rule. The Massachusetts rule holds that a child, regardless of age, is held to the same standard of care which is exercised under similar circumstances by children of the same age, intelligence, and experience.

The Illinois rule, which is called the "arbitrary age limits rule," is a slight modification of the Massachusetts rule, and holds arbitrary age limits for children's capacity. Under this rule, children under seven years of age cannot be charged with
contributory negligence in school situations.

In the first case, Juntilla v. Everett School District, a school district employs a successful bar to action when it alleges and proves contributory negligence on the part of an eighteen year old student. The court took special note of the youth's age and his ability to appreciate a risk. In this case, a parent brought action for injuries received by his son (William Juntilla) in a fall from the school bleachers during a football game. On the night of the accident, a football game was being played between Everett High School and an out of town team. The attendance was large, and all the seats were taken. Young Juntilla, with several girls and boys, proceeded to the top seats of the bleachers, and there they took a standing position on the top seats. After standing there for a short time, leaning against the railing, Juntilla, with five or six others, sat upon the railing behind the top seats of the bleachers. The railing gave way under their weight, and Juntilla, with some others, fell to the ground behind the bleachers, sustaining severe injuries.

It was stated in the allegation that the defendant school officials failed to meet the standard of care required by law because they should have foreseen that many spectators would crowd upon the back seat of the bleachers, subjecting the railing to a

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pressure it was not constructed to withstand. This contention was not accepted because the railing did not yield to lateral pressure against it, but yielded from a downward pressure from persons sitting on it, a use for which it was not intended.

The court stood by a lower court ruling and held Juntilla guilty of negligence:

What we have said in our discussion of the question of the respondent's primary negligence to some extent disposes of the contention that young Juntilla was not guilty of contributory negligence. This case is not one involving the maintenance of an attractive nuisance enticing immature children into harm's way. Juntilla was 18 years of age, of mature judgment, and fully able to appreciate the risk he took in sitting, with numerous others, upon the railing. He testified that he knew it was not a seat. In taking his seat upon the railing, he assumed the attendant risk.

The court further asserted that an owner of a premises could be liable in damages to those invited if they were injured because of an unsafe condition of the premises. Unreasonable conduct on the part of those invited, however, constitutes a defense to action:

Where one voluntarily and willingly puts himself or his property in danger, there is the presumption that he assumes all the risks reasonably to be apprehended from such conduct. In cases of this kind, this assumption is called contributory negligence, and is as much a defense in these cases as any other to which it may be applied.

In the case of Hough v. Orleans an eleven year old boy was found guilty of negligence. In this case, Vernon Hough, a student

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at the school ran against a flagpole while playing a game of football in the school yard.

It was alleged by the plaintiff that the flagpole was supported by two braces on two sides running three feet high. The braces were attached by a bolt about thirty-four inches above the ground, and the end of the bolt extended two and one half inches beyond the brace, the washer, and nut. There was no covering or guard over this bolt in order to make it reasonably safe for the students. It was contended that injuries were received through the negligence of the school district.

The court stated that the plaintiffs failed to prove negligence on the part of the school district. It was necessary that they prove that there existed a dangerous and defective condition, and that the school district had had prior knowledge of this condition. In the court's opinion, however, the fact that the student ran into the flagpole and was injured did not show that the flagpole was dangerous.

Having found that there was no breach of duty, the court found it unnecessary to pass upon the question of whether or not there was contributory negligence on the part of the minor. However, it went on to state that had there been a breach of duty, or had the district been guilty of negligence, there would have been a bar to action because the student was guilty of contributory negligence:

However his testimony that while he and another boy
were throwing a football about, after he had been dismissed from school for the day, he ran into the flagpole, that he knew it was there and he "kind of seen it" when he ran for the ball, but did not think he was going to hit it, so kept going, would have justified a finding of contributory negligence on his part. He was nearly eleven years old and a child above average intelligence.

In the case of Hovey v. State, a defendant school failed to bar action because it failed to prove contributory negligence. In the present case, the parents of a student brought suit against the school for injuries received when she fell down an unlit stairway. On the day of the accident, the student had attended a musical rehearsal held after school hours in the auditorium on the second floor of the main building. After the rehearsal terminated, the student remained to talk to the teacher for a few minutes, and then left the auditorium. The lights had been turned off, and the girl had to descend through an unlit stairway. The girl descended the first set of stairs by using the handrail, and turned at the first landing. The handrail did not continue around the landing, but stopped several feet short, leaving about three steps with no handrail. While groping in the darkness for the other handrail, the girl slipped and fell down fifteen steps to the next landing.

Plaintiffs contended that if the girl was permitted or invited into the auditorium, she was entitled to a safe exit. The

characteristics of the handrail did not constitute a hazard, but the total lack of light constituted negligence.

The defendant school stated that the student had gone up and down the stairway daily and was familiar with the physical characteristics of the stairway.

The court did not accept this as proof that she was guilty of contributory negligence: "The fact that claimant went up and down the stairs daily in daylight is immaterial. There is no proof that she ever had been down them (the stairs) under the circumstances existing at the time of the accident. Darkness makes a difference in even the most familiar places."

In the case of Andre v. Allyn, the school district failed to prove contributory negligence on the part of a student, and hence failed to bar action for injuries received by the student. The basic question is to determine whether momentary forgetfulness or distractions constitute contributory negligence as a matter of law. This case is significant because the court's opinions give an insight as to the court's unwillingness to apply the principle as a matter of law.

Action was brought against the school district for injuries sustained by a sixteen year old student when he stepped and slipped.

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on a portion of a non-skid cork carpet which had worn off. The school building consisted of two floors, connected by ramps at both ends. The student left his locker and walked down the ramp on the way to choir practice. While walking on the ramp on the slippery spot, he hailed a fellow student, lost his balance, and his right foot slid from under him. He went down and broke his left leg above the knee where it had broken six months before.

Before passing judgment, the court expressed the opinion that contributory negligence is not readily applied as a matter of law:

But in cases in which it can be said that the negligence of the plaintiff contributes proximately to the accident as a matter of law are rare. The rule has been stated in various ways in a legion of cases, that contributory negligence is not established as a matter of law unless the only reasonable hypothesis is that such negligence exists; that reasonable or sensible men could have drawn that conclusion and none other; that where there are different inferences that may be drawn, one for and one against, the one against shall be followed; and before it can be held as a matter of law that contributory negligence exists, the evidence must point unerringly to that conclusion.

On the question of forgetfulness, the court stated that momentary forgetfulness of a known danger not induced by a sudden disturbing cause would constitute contributory negligence. To forget however, would not constitute negligence unless there was a want of ordinary care on the part of the plaintiff. The court then added that in the immediate case, momentary forgetfulness was indeed a sudden distraction.

The court terminated by expressing a standard of care for the
We cannot say as a matter of law that abstraction concerning choir practice, or forgetfulness due to hail­ing a school chum suddenly, is not an instinctive reac­tion or act of sudden impulse, or that it was out of character for the ordinary schoolboy of plaintiff's age and experience. Plaintiff is bound only to that duty of care which a normal child of the same age would be expected to exercise in such a situation.

This decision illustrates the fact that in the last few years the tendency of the Supreme Court has been away from the stricter view of preceding years, where frequently contributory negligence was established as a matter of law, to the present situation in which such cases are rare.

In the case of *Ridge v. Boulder Creek Union District*, the school district failed to bar action when it failed to prove contributory negligence as a matter of law.

The student, Ridge, injured the index finger of his right hand while operating a power saw without a guard or a fence over it. The student was aware that these parts were needed to prevent injury, but he had seen others use the power saw without the guard. The other students did not use the guard because the fence was broken. The fence guided the wood into the saw, and if the saw was


operated with the guard and without the fence, it was extremely
difficult to saw the boards on the markings. Ridge was not in-
structed not to use the power saw without the safety device, and
the instructor and other students used the saw without the safety
devices on several occasions.

The appellant school district alleged that the minor was
guilty of contributory negligence as a matter of law because he
knew that there was danger in using the saw in that manner. It
was stated further that the student's record attested to the fact
that he was a capable student in shop.

The court found the student not guilty because mere knowledge
of a danger was not conclusive that a minor was guilty of contribu-
tory negligence as a matter of law. The court stated that know-
ledge that danger existed was not knowledge of the amount of danger
which was necessary to charge a person with negligence in assuming
the risk caused by such danger. The doing of an act with apprecia-
tion of the amount of danger would be necessary to conclude as a
matter of law that a person was negligent.

The court concluded by stating, "We cannot say that the know-
ledge of danger which Walter Ridge had, in the face of the facts
that he received no instructions not to use the saw without the
guard and that the instructor used the saw in front of the students
without the guard attached, was a matter of law sufficient to
charge him with negligence contributing to his accident."
Thus the school failed to bar action, and the court sustained a prior judgment allowing recovery against the school.

To the writer's knowledge there are no cases involving school children on the issue of contributory negligence in Illinois. The legal principle, however, is well established and accepted in the Illinois Common Law. There are numerous cases involving children and the courts have formulated rules for applying the principle. The rules for the most part favor the minor plaintiffs.

The rule which has an immediate effect on contributory negligence concerning children is the Illinois Arbitrary Age Limits Rule, which makes special allowances for children.

This rule classifies a child's capacity according to three age levels:

(a) A child under seven years of age cannot be charged with contributory negligence,

(b) Children between the ages of seven and fourteen may be charged, but this is a question of fact for a jury to decide through careful consideration of the individual's age, intelligence, capacity, and experience.

(c) Children over the age of fourteen can be charged with contributory negligence.

It has been established in Illinois that a child under seven years of age does not have the capacity to realize or appreciate a given danger, and hence cannot be charged with contributory negligence. This rule is analogous to the rule regarding a child's
capacity to commit a crime. Thus a child under the age of seven is presumed to be not responsible for his acts.

This rule has been applied to children below the age of maturity in Illinois. Cases are recorded where the rule has been applied to specific age levels. The rule has been applied to children seven years old, between the ages of five and six, and five years old.

Children between the ages of seven and fourteen are also presumed not to be responsible for their acts. However, this presumption is not conclusive and may be overcome by proof of "requisite capacity and experience." A presumption of incapability has been found not applicable to children over eleven years of age. Where it has been found by a jury that a child between the ages of seven and fourteen is fully able to comprehend danger and use care to avoid injury, the courts have ruled that the child may be found

guilty of contributory negligence. The Illinois courts, in following this rule, have found an eight year old girl and a ten year old boy guilty of contributory negligence.

While children over the age of fourteen may be found guilty of contributory negligence, the courts do not hold them to the same standard of care as an adult, unless the age, intelligence, capacity, and experience of the particular child are such that he should be held to that standard of care.

In measuring the conduct of children who are capable of being found guilty of contributory negligence, there is no exact standard except "that degree of care which children of like age, capacity, intelligence, and experience would naturally use in the same situation and under similar circumstances."

Recent cases involving children between the ages of seven and fourteen have indicated that these children are not required to exercise as high a degree of care for their own safety as a person

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36Koehler v. Chicago City Railroad Co., 166 Ill. App. 571, (1911).
37Binder v. Chicago City Railroad Co., 175 Ill. 503, (1912).
of mature age and experience. They are required to exercise only that degree of care and caution for their own safety that a child of similar age, intelligence, capacity, and experience would exercise under the same or similar circumstances.

Children over fourteen are generally required to exercise that degree of care and caution which children of the same age, capacity, intelligence, and experience may be reasonably expected to use under like circumstances.

In presenting a cause of action in Illinois, the burden of proof of negligence rests on the plaintiff. Prosser states that freedom from contributory negligence is an essential part of the plaintiff's cause of action. This rule has no application to children under seven years of age, but it does apply to children between the ages of seven and fourteen who are found to have the capacity, as well as to those over fourteen years of age. Freedom from contributory negligence can be proven by the plaintiff if

42Prosser, p. 283.
it can be shown that the plaintiff exercised ordinary care.

Summary

Negligence actions are based upon the defendant's failure to exercise the required degree of care, and a subsequent damage, or injury to the plaintiff. In some cases defendants can bar action since plaintiffs are required to conform to a standard of conduct for their own protection. Two common legal defenses which are employed by defendants are assumption of risk and contributory negligence. A defendant can bar action under these doctrines if it can be shown that the plaintiff with full knowledge and appreciation willingly assumed a particular risk from which the harm accrued, or if the plaintiff acted in an unreasonable manner and contributed to the cause of the injury. Successful actions are partly based on the merits of the plaintiff's actions.

The application of these legal defenses is more limited in cases where children are named plaintiffs. Children are treated as a special class because they are not presumed to possess the maturity of an adult, and consequently they are not required to conform to the same standards of care for their own protection which are required of adults. Generally where children are charged with the assumption of risk or contributory negligence, the issue becomes a question of fact, and the child's culpability is judged by a jury according to the child's age, intelligence, and experience.
The courts in Illinois restrict the application of assumption of risk to parties which are under a master-servant relationship. This relationship does not exist between the school district or teachers and pupils, and the doctrine is inapplicable to school cases. The school districts, however, have recourse to contributory negligence as a defense. There are instances where the two doctrines overlap and situations of assumption of risk are covered under contributory negligence.

The Illinois courts follow the Arbitrary Age Limits rule in applying contributory negligence as a legal defense, and the courts severely restrict its use against children who are named plaintiffs in litigations.

In following this doctrine, the Illinois courts have ruled that young children of ages seven or below cannot be charged with contributory negligence because they do not have the ability to realize and appreciate a given danger. In following precedent, the courts will deny the school districts the use of the doctrine as a legal defense in actions arising from injuries to children attending kindergarten, first grade, and to some extent those in the second grade. In effect there is no legal defense.

Defenses under these cases would be limited to disproving negligence, such as disproving causation or asserting non-breach of duty. A teacher could bar action of she could show that her actions were not the cause of the child's injuries. A teacher could
also bar action if she showed that she used reasonable care in the
discharge of her duties (acted as a reasonable prudent person would
under like circumstances). A teacher could not plead absence of
duty, since under loco parentis, a teacher is never relieved of
duty.

In cases involving children from ages seven to fourteen, or
from second to ninth grade, school districts have a recourse to
contributory negligence as a legal defense. In applying the doc­
trine against a child of this age level, a jury must show that the
child has the capacity, and comprehends the particular danger.

Children of ages fourteen and over may be charged with contri­
butory negligence, and while they are not held to the standard of
care required of adults, they are judged by the standard of care
required of children of the same age, capacity, intelligence, and
experience.
CHAPTER VII

CONCLUSIONS

The purpose of this thesis was to reveal and interpret the legal liability of the Illinois public schools.

It is expected that law suits will be brought against school districts in the future. In building a body of cases, the Courts in Illinois will invariably refer to cases from other states in applying the Common Law to school situations. In imposing the care of the highest degree on school buses, the Illinois courts cited a case from Washington. The Illinois courts may rule similarly to the courts of other states, except in the matter of legal defenses. The Illinois courts impose strict limitations on legal defenses when they are employed against children plaintiffs.

The Tort Liability Act may need to be amended in order to provide the same protection to school employees that it affords the school districts. A teacher may be sued to any amount. It may become common practice for plaintiffs to sue school teachers for unspecified amounts, while at the same time suing the school district in the hope of obtaining additional damages.

The conclusions derived from this paper are listed on the
following pages.

School districts are political subdivisions of the states, created for the sole purpose of public education.

A school district is a quasi public corporation, having only those powers incident to its purpose.

The doctrine of Sovereign Immunity, which renders the school districts immune from tort liability, is almost universally applied by the courts.

In states where the school districts are immune, school officers share their immunity, but employees do not.

The courts of several states have expressed dissatisfaction with the immunity doctrine, and several states have made exceptions to the rule, while four states have abrogated the rule.

In 1959 the Supreme Court of Illinois, with the Molitar decision, abrogated the immunity doctrine and made the school district liable for the negligent acts of its employees.

In 1959 the Illinois Legislature, with the passage of the Tort Liability Act, placed limitations of the liability of school districts. These statutes covered both public and private elementary and secondary schools and mainly consisted of:

(a) time limitation of one year from the date of injury to initiate civil action,
(b) a six month limitation in which to file a statement of injury,

(c) a recovery limitation of ten thousand dollars for each separate cause of action.

The individual teachers do not have the protection of the statute limiting the amount of liability, and a teacher can be sued for any amount.

The usual rules of negligence apply in Illinois: in order to bring action against a school district or a school teacher, parents must show:

(a) evidence of a duty on the part of the defendant,

(b) failure of the defendant to perform that duty,

(c) plaintiff suffered injury as a direct result of that duty.

From the records of cases which have been brought against teachers and school districts in states where the immunity doctrine has been abrogated, it can be concluded that actions will be brought against school teachers and school districts in Illinois.

School districts are held to the standard of reasonable care. Teachers may be held to a standard of reasonable care. Persons involved in the transportation of school children are held to the standard of the highest degree of care.

The doctrine of assumption of risk does not apply to school cases in Illinois because it is limited to master-servant
relationship, and this relationship does not exist between a pupil and his teacher.

Legal defenses applied to school cases are restricted to the doctrine of contributory negligence. Cases normally applying to assumption of risk may apply this doctrine, but the courts will restrict its use against school children.

The Illinois courts do not apply contributory negligence against children of ages seven and below. The Illinois courts will not permit the use of this doctrine as a defense against school children in Kindergarten, first grade, and some of those in second grade.

There may be some difficulty in applying the doctrine to children between the ages of seven and fourteen. Defendants must show that the actions of the child were below the standard for a child of the same age, capacity, intelligence, and experience.
Recommendations

Classroom teachers are more closely related to pupil activities than any other school employees, and for this reason they are most often named defendants in pupil injury actions. Knowledge of the principles of negligence and liability discussed in this paper will help the teacher protect himself against possible pupil-injury litigation. Teachers have the legal and professional obligation to protect pupils from the possibility of harm. If the teacher is negligent in this regard, he becomes liable for injuries to the pupil.

The areas where accidents are most likely to occur are the shop, the laboratory, the gymnasium, and the playground. The classroom, where dangers are ordinarily not inherent, is not exempt from the possibility of pupil injuries.

Recommendations are listed as an aid to teachers and administrators in preventing injuries to pupils in the schools. These recommendations are classified according to the subject areas, and constitute generalizations derived from the writer's research as well as recommendations proposed by the Research Division of the National Education Association Commission of Safety Education.

The majority of accidents occurring in the classroom are the result of lack of proper supervision. A number of cases arise because of misconduct or careless behavior of pupils resulting in
harm to fellow pupils. Injuries sometimes are inflicted on one pupil by another while the teacher is present. Sometimes these injuries occur while the teacher is out of the classroom. Under what circumstances will the teacher's inadequate supervision or lack of supervision constitute negligence? Generally it can be stated that when the conduct causing the harm could not have been foreseen or anticipated by the teacher, the teacher will not be held negligent. Action can be brought against a teacher, however, if the pupil's conduct could have been foreseen by the teacher with a reasonable exercise of prudence, and the teacher failed to regulate the conduct to prevent injury. The same rule holds true for injuries which occur while the teacher is out of the classroom. A teacher who leaves an unruly class to its own devices can anticipate a charge of negligence in the event that a pupil is injured.

It is the best policy never to leave the classroom unless it becomes absolutely necessary to do so.

When leaving the classroom, call on a fellow teacher or an administrator to take charge.

Maintain pupil conduct under control at all times. A teacher is expected to avert accidents which are foreseeable to a person of ordinary prudence.

Do not expose pupils to a greater risk of harm than is called for in the classroom.
Do not assign pupils to do chores where pupils can cause injury to themselves.

Do not send pupils on errands. Pupils become agents of the teacher and harm caused to the student or by the student becomes the teacher's responsibility.

Because of the danger inherent in the use of sharp hand tools, power tools, and power-driven machinery, shop teachers must act with great caution and prudence to prevent serious accidents in these classrooms. Generally a shop teacher may be held liable for negligence if an accident occurs, and the teacher has failed in his duty to properly supervise the activity, instruct the students on the proper use of the instrument or device, or if he has failed to warn the student of the dangers which are inherent in the use of the tools or devices.

In order to minimize the possibility of accidents in the shops, the following recommendations are proposed to the vocational arts teachers:

Report knowledge of hazardous conditions and defects relating to the shop, the machinery and equipment, and environmental factors for safety.

Regularly inspect machinery, equipment, and environmental factors for safety.

Post conspicuous notices or regulations, possible hazards,
safeguards, and precautions.

Make certain that appropriate safety devices and guards are available and used by students.

Make sure the students know and understand pertinent safety practices relating to activities in which they are engaged.

Require students to wear appropriate personal protective equipment, such as goggles, aprons, helmets, and gloves during hazardous activities.

Thoroughly instruct and demonstrate the use of power tools or other hazardous equipment before initially permitting such use by a pupil and permit initial use only under direct supervision.

Shut off power tools when leaving the shop.

Exercise continuous supervision to see that shop safety practices are observed.

Set the example for pupils to follow by personally obeying all safety rules and practices.

Never leave the shop while students are engaged in activities.

The greatest number of accidents which occur within the school building occur in physical education classes. These accidents result from a variety of causes. The following recommendations are proposed to physical education teachers:
Always maintain adequate supervision of physical education activities.

Make frequent periodic examinations of all equipment in the gymnasium and correct defective equipment.

Do not allow pupils to use defective equipment until the defect is corrected.

Do not allow pupils to attempt physical feats which are beyond their skills.

Give adequate instructions and warn pupils of the danger involved in gymnastics.

Allow a large enough area in which to conduct games and exercises. Overcrowding enhances the risk of one pupil injuring another.

Do not permit a student who has had a prior injury to participate in an athletic game if it is likely that his injury will be aggravated.

Take great care in the removal of an injured player from the scene of the accident in order not to aggravate his injuries.

The science laboratory is an area in which the activities are inherently dangerous, and pupils are usually more aware of the dangers in this area than in others. Nonetheless, teachers in the
science laboratories must provide adequate instruction and supervision of all laboratory activities. The mishandling of chemicals in the chemistry laboratory, for instance, may result in serious harm to the students. The following recommendations are proposed to science teachers:

Make certain that the pupils know and understand the nature of the experiment to be performed.

Make certain that they understand the dangers that may arise if proper procedures are not followed.

Give careful and adequate instructions on the use of the equipment and materials available for experiments.

Maintain proper supervision of the classroom tests and experiments at all times.

See that chemicals and other substances used in the laboratory are properly packaged, labeled, and stored.

Keep potentially dangerous chemicals under lock and key.

Do not hand out chemicals for experimentation at home.

Control access to the supply room so that pupils cannot take chemicals for private use without permission.

Never leave the classroom when an experiment is in progress.
Administrators, like teachers, are liable for personal acts of negligence causing harm to pupils. Lawsuits are seldom brought against administrators, such as superintendents or principals, but are usually directed against the person directly concerned with the accident, such as teachers. Teachers have direct contact with pupils, and administrators usually do not.

Administrators are not held liable for the negligent acts of employees because the employer-employee relationship does not exist between administrators and teachers. A teacher is an employee of the school board, not an employee of the administrator.

Although school boards are the employers of teachers, they do not respond for liabilities incurred by teachers, except in those states where the immunity doctrine has been abrogated. In these states suits are brought against the school district, a corporation.

Although school administrators are not legally liable for injuries resulting from the negligence of employees, they are in a position to protect the safety of pupils. Administrators may be held liable for the negligence of an employee if he employs the subordinate, knowing that he was incompetent. Administrators may also be held liable for failure to assign and provide proper supervision where it is needed or the failure to adopt and enforce rules and regulations for adequate supervision.
The following recommendations are proposed to school administrators to minimize accidents in the schools:

Adopt procedures for school personnel to report dangerous practices and unsafe conditions they become aware of.

Institute a system of regular inspection of buildings, facilities, grounds, and equipment to uncover hazards and dangerous conditions.

Take steps to promptly eliminate, repair, or correct defects and deterioration and to remove obstructions.

Select competent personnel.

Hold regular meetings with the professional staff and with maintenance and service personnel to review and evaluate school accidents and to consider ways to avoid their recurrence.

Develop reasonable regulations for student traffic in corridors, on stairways, and elsewhere on the school premises.

Provide adequate supervision for field trips and other educational activities away from the school.

Provide adequate supervision in play areas and other areas in the school where large numbers of pupils congregate.

Adopt rules and regulations for safe school bus transportation.
Require all school accidents to be promptly reported and investigate all accidents.

Initiate a complete system of accident reporting and analysis.

In regard to school transportation, the following recommendations are proposed to school administrators:

Use only safe and properly equipped vehicles. School buses should measure up to at least minimum standards and specifications set up by the state department of education.

Maintain a regular check of the mechanical condition of the buses by qualified mechanics.

Employ drivers who are competent, experienced and physically fit.

Give regular and systematic instruction to bus drivers on driving and traffic regulations, particularly as they relate to school buses.

Establish a definite pattern for school bus drivers to use in approaching loading, parking, and leaving the school grounds.

Adopt and enforce rules and regulations for supervising pupils during loading and unloading.

Promote safe bus riding habits among pupil passengers.
Instruct drivers to park in a safe place before discharging pupils and to caution pupils to use care in crossing streets and highways after alighting from the school bus.

Establish definite and well-understood procedures and regulations to safeguard the bus and its passengers from accident whenever the bus is used for field and other non-route trips.

In regard to the safety of children on the playground, the following recommendations are proposed to school administrators:

Provide adequate and competent supervision.

Schedule use of the play area to avoid crowding.

Separate older children from younger ones.

Prohibit bicycle riding and other inherently dangerous activities in the play area.

Formulate and enforce rules and regulations for the control of pupil conduct on the playground.

Maintain playground equipment and apparatus in good repair.

Keep the playground area free of obstructions and rubbish piles.

During the course of the school day, in spite of all precautions taken by the school staff, accidents will occur. These are
the accidents which occur through the fault of no one, and they are termed "pure accidents." These may range from the minor type of accident to those of a serious type requiring emergency treatment. Although a teacher is not held liable in cases of "pure accident," liability can attach if proper procedures are not followed in the handling of these cases. When a pupil is injured, the teacher in charge or one witnessing the accident should immediately call the school nurse. If a school nurse is not available, the action to be taken by the teacher depends upon the nature of the injury.

If the injury required emergency treatment, the teacher should render immediate aid. The teacher by his relationship to the pupil is obligated to aid the pupil. In some cases of emergency, prompt action may save a life. Lack of action in an emergency might lead to a charge of negligence against the teacher. First aid should be rendered until the injured pupil can receive a physician's services. Treatment should be restricted to first aid, and not medical treatment, which is the responsibility of the physician.

Care must be taken so as not to aggravate the condition. Liability will attach if additional bodily harm is inflicted by a teacher in rendering first aid, regardless of whether the acts were done in a proper or a negligent manner. In essence, a teacher may be held liable for not rendering first aid in cases where
it is needed. A teacher may also be held strictly liable for any additional injury which occurs as a result of first aid treatment. It is recommended that teachers learn first aid procedures.

In cases where an emergency exists and the school nurse is not available, apply emergency first aid. Notify the parents of the child immediately. Notify the family physician. If the injured pupil does not require emergency treatment, reference to a physician or the parents can be made at the discretion of the administrator.

In all cases where a school nurse is available, and an emergency exists, the following procedure is recommended: send for the nurse immediately. Notify the principal. Have the office staff call the parents. If the parents cannot be reached, notify the persons listed on the pupil's "emergency card." Have the office staff call the family physician indicated on the pupil's "emergency card."

In all cases where a school nurse is available, and an emergency does not exist, simply refer the pupil to the nurse.

The following recommendations are proposed to school administrators as an aid in handling pupil injuries requiring emergency medical aid:

Two or more designated school personnel should be qualified in first aid by taking American Red Cross First Aid Courses.
Emergency care procedures should be well planned so that proper first aid care can be given until a physician can be consulted. Everyone on the school staff should have a knowledge of the school first aid procedures and policy.

One or more completely equipped first aid kits should be strategically located in each school. The greatest need for these kits will be in the shop and in the laboratory.

A cumulative health record or emergency information card should be compiled for each pupil. Each record should list the family physician, and person to be notified when a student needs emergency medical attention. Plans should be made for engaging transportation for children.

Information concerning each illness or injury and what was done should be entered on the pupil's cumulative health card.

Field trips may be termed an extension of the classroom. Accidents are not as common as they are in the school, but there is the possibility that they may occur. This paper does not include research on field trips, but recommendations from Lee O. Garber's Yearbook of School Law are included in order to render a more comprehensive coverage of liability.

Administrators should develop a policy which will guarantee adequate planning for each field trip.

Administrators should have all teachers follow school policy
of the planning of field trips.

Students should be warned of dangers to be encountered on the field trip.

Provide adequate supervision of students. If one teacher is not able to adequately supervise the group, reasonably prudent adults who have been briefed as to their duties and potential dangers, should be used to supervise.

Determine whether the host for the field trip will assume liability in the case of an accident on his premises.

Parental approval should be obtained for each student going on the trip. While this gives the teacher no protection, it may prevent severe criticism of the school.

If there is no school policy regarding field trips, the teacher should obtain the approval of the administration before holding the trip.
BIBLIOGRAPHY

I. PRIMARY SOURCES

Legal Indices and Digests

American Jurisprudence
American Law Reports
Corpus Juris Secundum
Illinois Annotations to the Restatement of Torts
Illinois Digest
Illinois Law and Practice
Legal Periodical Index
School Code of Illinois
Shepard's Citations
Smith-Hurd Illinois Annotated Statutes

Legal Reports: National Reporter System

Atlantic Reporter
Northeastern Reporter
Southeastern Reporter
Southern Reporter
Pacific Reporter
Northwestern Reporter
Reference was made to the reports of the specific states: California, Connecticut, Arizona, Illinois, Georgia, Louisiana, Minnesota, New Jersey, New York, Pennsylvania, and Washington.

II. SECONDARY SOURCES


Articles


"District Liability for Injuries," Nations Schools, LVII (July 1956), 44-46.


"Legal Aspects in Shop Accidents," Industrial Arts and Vocational Education, XLIV (Sept. 1955), 207-211.


Pamphlets


DICTIONARY OF LEGAL TERMS

Abrogated - To annul, repeal, or destroy.

Action - An ordinary proceeding in a court by which one party prose­cutes another for the enforcement or protection of a right, the redress of a wrong, or the punishment of a public offense.

Actionable Negligence - The breach or non-performance of a legal duty through neglect or carelessness, resulting in damage or injury to another.

Appellant - The party who takes an appeal from one court to another.

Code - A compilation of statutes, scientifically arranged into chapters, subheadings, and sections, with a table of contents and index.

Common Law - As used in this paper, legal principles derived from usage and custom, or from court decisions affirming such usages and customs.

Damages - Pecuniary compensation or indemnity which may be recovered in court by the person who has suffered loss or injury to his person, property, or rights through the unlawful act, or omission, or negligence of another.

Defendant - The party against whom relief or recovery is sought in a court action.

Defense - That which is offered and alleged by the defendant as a reason in law or fact why the plaintiff should not recover.

Duty - Human Action which is exactly conformable to the laws which require us to obey them.

Equity - A branch of remedial justice, administered by certain tribunals, distinct from the common law courts and empowered to decree "equity" (impartial justice) between two persons whose rights or claims are in conflict.

Governmental Immunity - Immunity from tort actions enjoyed by governmental units in common-law states.
In Loco Parentis - In place of the parent; charged with some of the parent's rights, duties, and responsibilities.

Judgment - Decision of the court, usually that part involving the payment of damages.

Law - System of principles or rules of human conduct, which includes decisions of courts as well as acts of legislatures.

Liability - Legal responsibility.

Litigation - Contest in a court of justice for the purpose of enforcing a right.

Malfeasance - Commission of an unlawful act, applied to public officers, and employees.

Misfeasance - Improper performance of a lawful act; negligence.

Negligence - The omission to do something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs, would do.

Nonfeasance - Omission to perform a required duty.

Nolens Volens - With or Without Consent.

Nuisance - A continuous condition or use of property in such a manner as to obstruct the proper use of it by others lawfully having a right to use it, or the public.

Plaintiff - Person who brings an action.

Power - The authority to do something expressly or impliedly granted.

Precedent - A decision considered as furnishing an example or authority for an identical or similar case afterward arising on a similar question of law.

Prudence - Carefulness, precaution, attentiveness, and good judgment, applied to action or conduct. That degree of care required by the exigencies or circumstances under which it is to be exercised.

Quasi - As if; almost as if it were.

Regulations - Rules for management or government.
Respondeat Superior - The master is liable in certain cases for the wrongful acts of his servant. Let the master answer.

Stare Decisis - Principle that when a court has made a declaration of a principle it is the law until changed by a competent authority; upholding of precedents within the jurisdiction.

Statute - Act of the legislature.

Tort - Legal wrong committed upon the person, reputation, or property of another, independent of contract.
APPROVAL SHEET

The thesis submitted by Amado Garcia, Jr. has been read and approved by three members of the Department of Education.

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

The thesis is therefore accepted in partial fulfillment of the requirements for the Degree of Master of Arts.

20 Jan 1964
Date

Signature of Adviser