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THE ORIGIN AND EVOLUTION OF THE GOVERNMENTAL IMMUNITY FROM TORT LIABILITY AS RELATED TO SCHOOLS
WITH EMPHASIS ON UTAH
by
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A seminar report submitted in partial fulfillment of the requirements for the degree of
MASTER OF EDUCATION
in
Secondary School Administration

Approved:

UTAH STATE UNIVERSITY
Logan, Utah
1965
ACKNOWLEDGMENTS

The writer wishes to express his indebtedness to all of his committee members, Dr. Terrance E. Hatch, Dr. Basin C. Hansen, and Dr. Homer M. Johnson, for their valuable assistance and guidance during his course work and the development of this study.

He further wishes to thank his wife, Charlene, for her constant help, encouragement and consideration.

Charles F. Scholes
INTRODUCTION

The common-law, as it has evolved from the Eighteenth Century, is that school districts are immune from tort liability because they are a functioning part of the state. At this time, however, there are a great many changes taking place in the laws throughout the country. Some states have completely abrogated the doctrine of tort immunity while others have done so only in part. In Utah the laws have only recently been changed but are not in effect until July 1, 1966.

There are divided feelings, even among administrators, as to whether or not schools should be liable for tort. The magazine *The Nation's Schools* reported an opinion poll taken in 1961 that brings out this fact. The findings were as follows:

1. As a question of ethics (regardless of your present state statutes) do you believe that school districts should be liable for property damage or personal injuries (torts)?
   - Yes, 42%
   - No, 58%

2. Should school districts be required to carry insurance covering such liabilities?
   - Yes, 49%
   - No, 50%
   - No opinion, 1%

As a matter of ethics school districts should not be held liable for property damage or personal injuries, believes 58% of the administrators responding to the February opinion poll. Nor should districts be required to carry insurance covering such liabilities, according to 50% of the respondents. (*The Nation's Schools*, p. 112)

Need for study

It is important for school officials and employees to understand the various facets of the immunity law. Today more than ever the governmental immunity law is being challenged and a few states have
abrogated it, in total or in part, either by statute or by judicial decree.

**Purpose of study**

This study will review the literature with respect to changes in the concept of tort liability of governmental agencies for act of negligence. Emphasis will be placed upon the public school district as one type of public agency.

**Delimitation**

This paper will be limited to landmark court cases, significant legislative acts in various states, and to specific legislation and court rulings in Utah.
HISTORICAL BACKGROUND

Many educators have little idea how or why schools have become immune from tort liability. This immunity can be traced to the Eighteenth Century in England and in America to an 1812 case in Massachusetts. This origin is referred to in the Spanel v. Mounds View School District case, when the court commented as follows:

All of the paths leading to the origin of governmental tort immunity converge on Russell v. The Men of Devon, 100 Eng. Rep. 359, 2 T.R. 667 (1788). This product of the English common law was left on our doorstep to become the putative ancestor of a long line of American cases beginning with Mower v. Leicester, 9 Mass. 247 (1812). Russell sued all of the male inhabitants of the County of Devon for damages occurring to his wagon by reason of a bridge being out of repair. It was apparently undisputed that the county had a duty to maintain such structures. The court held that the action would not lie because: (1) to permit it would lead to "an infinity of actions," (2) there was no precedent for attempting such a suit, (3) only the legislature should impose liability of this kind, (4) even if defendants are to be considered a corporation or quasi-corporation there is no fund out of which to satisfy the claim, (5) neither law nor reason supports the action, (6) there is a strong presumption that what has never been done cannot be done, and (7) although there is a legal principle which permits a remedy for every injury resulting from the neglect of another, a more applicable principle is "that it is better than an individual should sustain an injury than that the public should suffer an inconvenience." The court concluded that the suit should not be permitted "because the action must be brought against the public." (Italics supplied.) There is no mention of the "King can do no wrong," but on the contrary it is suggested that the plaintiff sue the county itself rather than its individual inhabitants. Every reason assigned by the court is born of expediency. The wrong to plaintiff is submerged in the convenience of the public. No moral, ethical or rational reason for the decision is advanced by the court except the practical problem of assessing damages against individual defendants. The court's invitation to the legislature has a familiar ring. It was finally accepted as to claims against the Crown in 1947, although Russell had long since been overruled. (Garber, 1964, p. 235-236)

The meaning of the theory that "the king can do no wrong" is the concept that the crown could not be summoned in his own courts without
his consent. This is still applied today. Inasmuch as school districts are considered instrumentalities of the state, they share the sovereign immunity enjoyed by it under this theory.

School districts are quasi-corporations as provided for in the constitution and set up by the legislature of the state. As such they are clothed with the same degree of immunity as any other political subdivision of the state. In short, school boards are part of the machinery of state government operating at the local level as an agency of the state in the performance of public function. The character of their functions, the extent, and duration of their power rests exclusively with the state legislature. (Garber, 1964, p. 235)

The immunity rule protects school districts from suits unless liability is expressly imposed upon them by the legislature or by court decision. Some courts have expressed grave doubt as to whether the legislature could validly authorize the bringing of tort action against school boards without amending the constitution. This ruling is predicated upon the requirement of the constitution and statutes that school funds be disbursed solely for the support and maintenance of public schools, and the provisions prohibiting the enactment of any law authorizing the diversion of school funds to any other than school purposes. It was established in the Buck v. McLean, 115 So. (2d) 764 (1959) case, that courts have assumed the immunity of torts before them on this point. The assumption is that the use of funds to pay damages caused by the negligence of school officials or employees is not a use of those funds for school purposes.

There are only a few other principles of jurisprudence criticized as much as the doctrine of governmental immunity for tort. How could a
modern country like the United States keep a common-law rule without change for so many years? Tort immunity was so deeply entrenched in case law from its beginning in the Eighteenth Century England that even the beginning of change was slow. In Utah, for example, the immunity laws will not have any change until July 1, 1966, and although the Supreme Court of Minnesota announced the abrogation of a common-law rule of immunity in that state for a short time, the Minnesota 1963 Legislature stayed the abrogation until 1968 in order to allow an appointed committee to complete their report to the Legislature.

In recent years some of the states have changed this common-law ruling which, as Professor Borchard puts it, is "one of the mysteries of legal evolution." (Borchard Governmental Liability in Tort, 34 Yale L.J. 1, 4)
HOW NEGLIGENCE IS DETERMINED

An act or omission which violates the private rights of an individual is called a tort. The appropriate remedy for this violation is a court action for damages. In the main, torts are based upon or grow out of negligence. When school districts are affected, it is usually the result of negligence of school officials or employees. Therefore it is important that negligence be better understood.

What constitutes negligence

Negligence is placed in two categories, (a) misfeasance, an act which a reasonable man would have realized involved an unreasonable risk of injury to others, and (b) nonfeasance, failure to do an act which is necessary to protect or assist another and which one is under duty to do.

Negligence, then, is any conduct which is not up to the standards that a regular prudent employee or official would exercise in the same or similar circumstances. The negligence is inherent in the act, whether it involves unreasonable risk of harm to others even though it is done with reasonable care, skill, preparation, and warning.

In order to establish negligence it must be shown that the defendant is the legal cause of the injury. The legal cause is "that cause among all the antecedent events which in the natural and continuous sequence of events, without the interference of an independent superseding cause, provided the dame." (NEA Research Division, 1963, p. 12)

An employee or official may not be held personally liable unless
it be alleged and proved that his act, or failure to act, was corrupt or malicious, or that he acted outside of and beyond the scope of his duties. This rule is sound. If it were otherwise, few persons would be willing to accept positions as members of boards of education, and assume the risk of personal liability if they were proven to have acted negligently, though in good faith, in the performance of their duties. (Hamilton and Mort, 1959, p. 292)

The courts, in deciding whether there is negligence, consider three main factors: the nature of the conduct, the legal cause of the injury, and the foreseeability of the harm. (NEA Research Division, 1963, p. 10)

**Interpretation of negligence is unpredictable**

Every year the courts have many cases where they must try to find the line of demarcation between a negligent act or a pure accident where no individual is legally at fault. While pure accidents compose the largest percentage of cases, each case must be examined separately to establish whether or not negligence was involved. The interpretation of negligence by the courts can be very unpredictable. The cases cited show to some extent the variations that court rulings have had.

In the case of Domino v. Mercurio, 234 N.Y.S. (2d) 1011, a playground supervisor and his district officials in New York were found negligent because they did not control the spectators. Injuries were sustained by a minor who fell over a bench and broke his leg when playing softball. The spectators, it was alleged, pushed the bench too near the third-base line.

In another New York case, the court would not take the initiative
to determine negligence but placed the case before a jury. The charge of negligence was that a principal instructed pupils to remain on the playground during an interval between examinations and did not provide adequate supervision. This action was brought by a pupil who was assaulted by a fellow student, while the pupils were on the playground between examinations. The court ruled that there was imposed upon the principal, by common-law, "both the duty to be reasonably vigilant in the supervision of the pupils and the liability for her negligent performance of such duty." (Ceanci v. Board of Education, 238 N.Y.S. (2d) 547)

Even when corporal punishment is involved, the verdict of negligence is not clearly defined. For example, in an Iowa case the Iowa Court of Last Resort reversed the lower court's decision and remanded the case for trial by jury. In this case the teacher had allegedly struck the plaintiff on both sides of his face, breaking the pupil's eardrum when the pupil did not obey his orders. The lower court had directed a verdict for the defendant but the plaintiff appealed. The Iowa Court of Last Resort stated that a teacher is immune from liability for corporal punishment if it is reasonable, but that the reasonableness of the punishment is a question of fact to be determined by the jury as was this case. (Tinkham v. Cole, 110 N.W. (2d) 258 (Iowa)

Foreseeability of harm

The courts, in determining whether or not negligence is involved, try to determine if the defendant could have foreseen the consequences of his action or lack of action. For example, a home economics teacher may not be able to foresee that a student would get cut on a broken
dish left by another student, where she could probably foresee the danger imposed by careless placing of sharp knives in a drawer.

An actual case where the foreseeability of harm test was involved was that of a Washington school district which was held liable for injuries suffered by a nine-year-old girl when an old upright piano set on casters which she and other children were moving tipped over. Permission had been granted to use the school room where the accident occurred. The piano, a top-heavy instrument, had been placed with its keyboard side against a wall, with just enough space for a small child to squeeze through. The court stated it was foreseeable that some child or group of children would want to use the piano and would try to move it. Consequently, reasonable minds could conclude that it was negligent for anyone to leave the piano in such a position where it might overturn if moved. (Kidwell v. School District No. 300, Whitman County, 335 P. (2d) 805 Washington, 1959)

**Contributory negligence**

When determining negligence, the courts must decide if the plaintiff in any way contributed to the accident. Contributory negligence is defined by law as conduct on the part of the injured person that falls below the standard to which he should conform for his own protection and which is a legally contributing cause, co-operating with the negligence of the defendant in bringing about the harm of which the injured person complains. (NEA Research Division, 1963, p. 13)

A case in point is the Bensen v. South Kitsap District No. 402 386 P. (2d) 137 (1963) case where the State Supreme Court considered whether the district was liable for injury suffered by a teacher on the school premises. This happened to be in the State of Washington
which is one of those states in which a school district is liable for injury caused by the negligent acts of district officers and employees.

It appeared that on the evening of November 15, 1960, the teacher drove his automobile to the school building for a night function. It was a dark, rainy evening. He had parked in approximately the same place a number of times during three previous years while attending night functions.

The district was engaged in certain construction on the school property. For three or four days before the accident occurred, employees of the district had been removing large stones from the construction site. At least two of these stones were left on the edge of the pavement which extended to the wall in that area, which was not lighted. While returning to his car later in the evening, the teacher was injured when he stumbled and fell over these rocks. He contended he did not see the rocks, but that by groping in the dark he discovered what he determined to be a rock about 18 inches high. There was evidence that the teacher, when being taken to the hospital, had said that earlier in the evening he had seen the rocks but had forgotten that they were there upon returning to his car.

The case turned on whether there was contributory negligence by the teacher. An injured person may not recover damages from another who is negligent if the injured person's own negligence contributed to his injury. The question of contributory negligence is for the court or jury to decide. The court here said that there was sufficient evidence of contributory negligence by the injured teacher to call for a jury determination of whether that negligence in fact contributed to his injury.
Areas of negligence

Although the courts determine what constitutes a negligent act, each school employee should take it upon himself to know the danger areas in his state so as to avoid trouble. The following is a summary of some of the danger areas listed by Hamilton (1956).

(1) Corporal punishment, which is legal in most states. Any kind of corporal punishment should never be administered without another school employee present.

(2) Using a pupil as an agent, for example sending a pupil on an errand. This is a common practice for many teachers. There is no legal authority for this and must be used with caution.

(3) Field trips which are part of our educational training in all grades of school now. The teacher who tries to provide such meaningful experiences for his pupils should always be assisted by other personnel on field trips if there are any dangerous obstacles.

(4) Use of the personnel car by any school employee for transporting pupils or other faculty members. Every employee should follow the laws of the state as far as insurance policies and receiving payment from the riders.

(5) School patrols. The importance here is whether a teacher in charge of patrol operation is guilty of actual negligence if he places the safety of hundreds of school children in the hands of young, immature, school pupils.

Other danger areas brought out by Bell (1965) include:

(1) Supervision responsibilities. In order that parents realize that school personnel are responsible for the pupils only certain times of the day, parents should be informed of the hours when supervision is
provided in the school buildings and on the school grounds.

(2) Pupil illness or injury. The teacher is responsible to call the school nurse or the child's parents. Treatment other than emergency first-aid should not be given.

(3) Parental permission slips. These slips have little legal value as responsibility can not be "signed away." The only value of these slips is knowledge of the parents' willingness to allow the students to participate in activities.

Administrators and other employees must use an ounce of prevention in each decision they make to keep from living in constant fear. Even though they cannot guarantee that accidents will not result from their acts, they can assume the responsibility of acting as a reasonably prudent person would under the same or similar circumstances.
EVOLUTION OF THE RULE OF TORT IMMUNITY

Criticism

Many states are beginning to revise their thinking about governmental immunity. More and more judges are speaking out against tort liability. The courts, when changing the immunity doctrine, have had many criticisms of the traditional rulings. Two major injustices are reviewed by the California Law Review (1961) as follows:

The first injustice mentioned by the court was the unfairness of allowing an individual to go uncompensated simply because a governmental body happened to be the employer of the person who committed the tort.

The second injustice noted is that which inheres in a legal system which superimposes upon normal rule of immunity a patchwork of legislative and judicial exceptions, so that some victims of governmental torts are compensated for their injuries while others are not. (California Law Review, p. 772)

The following cases show how some of the most prominent courts are tending away from this doctrine of immunity.

Florida courts stated their objection when they spoke out against tort liability by saying, "We therefore, feel that the time has arrived to declare this doctrine anachoristic sic not only to our system of justice but to our traditional concepts of democratic government." (Hargrove v. Town of Cocoa Beach, 60 A.L.R. (2d) 1193 (1951)

Another well quoted statement is from the California case Nuskoph v. Corning Hospital District 359 P. (2d) 457, (1961). "After a revaluation of the rule of governmental immunity from tort liability we have concluded that it must be discarded as mistaken and unjust."
Guided by reason which ran head-on into established precedent of tort immunity, the State Supreme Court of Michigan as recently as 1960 stated:

... Our concern is not with the family of the Middle Ages, with its tyrannies and abuses, but with the family of today. If this is the interest to be protected, and we conclude that it is, the law's protection should extend as well to the negligent as to the intentional injury. In each case, the loss is equally severe and the importance of the defendant's claims to immunity.

... We are now at the heart of the issue. In such circumstances, when her husband's love is denied her, his strength sapped, and his protection destroyed, in short when she has been forced by the defendant to exchange a heart for a husk, we are urged to rule that she has suffered no loss compensable at the law. But let some scoundrel dent a dishpan in the family kitchen and the law, in all its majesty, will convene the court, will march with measured tread to the halls of justice, and will there suffer a jury of her peers to assess the damages. Why are we asked, then, in the case before us, to look the other way? Is this what is meant when it is said that justice is blind?

No, we see the suffering. But it is urged, that the precedents tie us. A wife, said the ancient precedents, could not sue because she was a legal nonentity. And, even if she could, she had no cause of action to assert because a servant has no "right" to the services of her master. (Montgomery v. Stephan, 359 Mich. 33, 101 N.W. (2d) 227, 234)

The Arizona courts have clearly stood against tort immunity in at least two recent cases. In the first case in 1962 they stated:

It requires but a slight appreciation of the facts to realize that if the individual citizen is left to bear almost all the risk of a defective, negligent, perverse or erroneous administration of the States' functions, an unjust burden will become graver and more frequent as the government's activities are expanded and become more diversified. (Hernandez v. County of Yuma, 91 Ariz. 35, 369 P. (2d) 271 (1962)

Even more recently the Arizona Supreme Court stated its reason for changing the immunity doctrine.

We are of the opinion that when the reason for a certain rule no longer exists the rule itself should be abandoned. After a thorough re-examination of the rule of governmental immunity from tort liability, we now hold that it must be discarded as a rule of law in Arizona. (Stone v. Arizona Highway Commission, 381 P.
New Jersey has also overruled the immunity law in their state. The New Jersey Supreme Court stated their case in this manner:

The unmistakable fact remains that judges of an earlier generation declared the immunity simply because they believed it to be a sound instrument of judicial welfare of the people of the state. When judges of a later generation firmly reach a contrary conclusion they must be ready to discharge their own judicial responsibilities in conformance with modern concepts and needs.

It should be borne in mind that we are not dealing with property law or other fields of the law where stability and predictability may be of utmost concern. We are dealing with the law of torts where there can be little, if any, justifiable reliance and where the rule of stare decisis is admittedly limited. (Collopy v. Newark Eye and Ear Infirmary, 27 N.J. 29, 141 A. (2d) 276, 283)

Defense

Some courts believe a revision of the constitution would be necessary before the immunity rule could be changed because the immunity ruling is based on the constitution and statutes which have established that "school funds be disbursed solely for the support and maintenance of public schools, and the provisions prohibiting the enactment of any law authorizing the diversion of school funds to any other than school purposes." They feel that use of these funds to pay damages is not a proper use of the school funds. (Hamilton, 1959, p. 280)

When defending the immunity doctrine the courts very often refer to other cases where the precedence has already been set, as in the 1964 Utah case when the Utah Supreme Court denied Mr. Campbell, plaintiff in the case, the right to sue Granite School District and employees because of the precedence that public schools are protected by sovereign immunity. The court in this case quoted six other Utah cases that were denied the decision by the same opinion.
Another reason commonly offered in support of the doctrine may be found in the statement of Mr. Justice Holmes: "A sovereign is exempt from suit, not because of any formal conception or absolute theory, but on the logical and practical ground that there can be no legal right as against the authority on which the right depends." (Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907))

In the past the majority of judges have accepted the governmental immunity law from tort liability. More recently, however, a greater number of magistrates are questioning this ancient law.
LEGISLATION

Abrogation by statute

Since the doctrine of governmental immunity is in the common-law, it can be changed by legislative statute. One such approach, utilized in a few states, is to basically abrogate the doctrine.

California is one of the states that has imposed tort liability on school districts directly by statute. There are three statutes in this state relating to the question of liability.

First, (California Government Code Sec. 53051) One which imposes liability caused by the defective or dangerous condition of buildings, grounds, works, or property of the district if the condition is not remedied after reasonable notice; second, a section of the motor vehicle act (California Vehicle Code Sec. 17001) which makes a district liable for injuries or damage caused through the negligent operation of a motor vehicle owned by the district; and third, (California Education Code Sec. 903) a provision in the school code to the effect that a district shall be liable on account of injury to person or property arising because of the negligence of the district, its officers or employees. Taking these sections together they amount to a complete repudiation of the general rule and place school districts on the same basis as to liability as individuals or private corporations. (Hamilton and Mort, 1959, p. 286)

An injured pupil may recover damages under these California provisions provided the school district had knowledge or notice of the defect and failed to remedy the situation within a reasonable time thereafter.

The state of Washington has imposed tort liability on school districts by statute in most cases but they do not waive immunity for accidents involving playgrounds, athletic equipment, field houses, or manual training equipment. This modification from complete exceptions was passed in 1917. (Washington Sherwood v. Moxes School District 363 P. (2d) 138)
In addition to California and Washington, many other states have modified the immunity doctrine, to a limited extent, by statute. The legislature in Alabama created a State Board of Adjustment, which considers claims for damages done by the State or any of its agencies, commissions, boards, institutions, or departments. (Code of Alabama, 1940, Title 55, Sec. 333)

There was a case tried in Alabama that placed claims against the school districts within this category. The statutes limited the jurisdiction of the Board of Adjustment only to tort claims since they are the only ones to which the immunity rule would be applicable, and are the only cases of which the courts do not have jurisdiction. (Hamilton and Mort, 1959, p. 288)

North Carolina modified the immunity law so that it affects "tort claims against county and city administrative agencies for injuries arising out of the operation of public school busses." The power to decide such claims is vested in the North Carolina Industrial Commission. When any damages are awarded by the Commission against a local board of education, the damages are to be paid by the State Board of Education. The total amount of damages which may be recovered under this statute is limited by law to ten thousand dollars per claim. (Hamilton and Mort, 1959, p. 289)

The Mississippi statute waived immunity only within one area for schools, that is transportation. The recovery is limited to five thousand dollars, exclusive of court costs. This was protection given by the legislature for the general operating funds of the districts. The law requires each school district to contribute to the Accident Contingent Fund at the amount of five dollars annually for each school
bus operated by the district. Money from this fund is the only source authorized for payment of damages to injured children. (Hamilton and Mort, 1959, p. 288)

The Minnesota legislature, however, reinstated governmental immunity of school districts after the State Supreme Court had issued its decision to abrogate the tort immunity doctrine, leaving the action subject to the legislature. In an unprecedented move in its regular 1963 session, the legislature passed a statute which stays execution of the State Supreme Court decision with respect to school districts such that the immunity doctrine shall continue in complete force and effect to the same extent to which it had previously been applied prior to the court rulings in the Spanel v. Mounds School District No. 621 case.

(The statute) is hereby enacted as a rule of statutory law applicable to school districts or towns not exercising powers of villages in the same manner and to the same extent as it was applied in this state to school districts and such towns on or prior to December 13, 1962. The statute, unless amended, is law until July 1, 1968. (Minnesota Legislative Laws of 1963, Ch. 798, p. 795.

The period of years was provided by the legislature for a comprehensive study of the implications of repealing the tort immunity doctrine in Minnesota. This action of the Minnesota legislature is another chapter of what different states seem to be doing to equalize their rules pertaining to the tort immunity doctrine of school districts.

"Save-harmless" statutes

A second legislative approach to governmental immunity is abrogation in effect of that part of the immunity doctrine dealing with liability of a district for the negligence of employees, for example the "save-harmless" statutes that are found in a few states. In
New York, New Jersey, Connecticut, and Maine the laws are stated to the effect that a school district must hold any employee against whom a judgment for negligence is rendered, harmless. In Wyoming, the districts are authorized, but not required, to reimburse the employee under the "save-harmless" law. The laws of these states require the school districts to reimburse the employee for any judgment rendered against him even though the injuries are generally acts resulting from the negligence of the employee. Hence, the districts cannot be sued directly but they must "pick up the tab" if a judgment is awarded against the employee when the act complained of was committed while the employee was acting in the course of his assignment. (NEA Research Division, 1963, p. 23)

A typical "save-harmless" case is Swainbank v. Coombs 115 A. (2d) 468 (Conn.). This case grew out of a law, which in part reads as follows:

Each board of education shall protect and save harmless ... any teacher or other employee ... or any member of its supervisory or administrative staff ... from financial loss and expense of alleged negligence or other act resulting in accidental bodily injury to ... any person ... provided such teacher ... or employee, at the time of the accident resulting in such injury ... was acting in the discharge of his duties within the scope of his employment or under the direction of such board of education ... .

In this case, action for assault and battery was brought against Mr. Coombs, the high school principal, and the board of education for which he worked. This case is significant because the court held that "a save-harmless law that merely requires or permits a board to save a teacher harmless and to protect him from financial loss in case of injury received by another which resulted from a negligent act of the teacher does not do away with the governmental defense of
immunity from liability."

"Safe-place" statutes

A third category of legislative action comprises indirect exceptions to the governmental immunity doctrine covering schools. In this category is the "safe-place" statute. Such a statute makes public bodies liable for injuries sustained as a result of faulty construction or maintenance of public buildings. (Reutter, 1958, p. 28)

There are a few state laws that specifically require school playgrounds to be kept in safe condition; without such a provision, the "safe-place" statute may be interpreted to cover buildings only, and not to extend to the school grounds, as in the case of Wisconsin where "safe-place" statutes only cover public buildings. (Wisconsin Statutes Annotated, Secs. 101.01, 101.06)

A school district was held not liable under Wisconsin's statute when a flagpole on the playground broke and fell, killing a pupil. The court said that neither the school grounds, the sidewalk area surrounding the pole, nor the pole itself came within the meaning of the statutes. (Lawver v. Joint District No. 1, Mount Horeb and Blue Mounds, 288 N.W. 192 Wisconsin (1939)

Many of the state legislatures are taking second looks at their statutes concerning the immunity doctrine. Since there are so many changes taking place, it is wise for school personnel to be aware of them.
One of the ways through which changes in the doctrine of governmental immunity covering schools have been made is through judicial opinions. Exceptions to the doctrine are discernible from an analysis of court holdings when the courts simply deviate from the long-standing precedent.

The most publicized court decision by a Supreme Court is the Molitor v. Kaneland Community Unit District No. 302 18 Ill. (2d) 11 163 N.E. (2d) 89, 93 case in 1959 over a school bus pupil-injury action when the Court abrogated the Illinois immunity law.

Molitor, a minor, brought suit against the Kaneland Community Unit School District for permanent personal injuries sustained by him when the school bus in which he was riding left the road, allegedly as a result of the driver's negligence, hit a culvert, exploded and burned. Molitor sought judgment in the amount of $56,000.

In his complaint, the plaintiff made no allegation of the existence of insurance or other nonpublic funds out of which a judgment against the Kaneland District could be satisfied. Although the record showed that the District did carry public liability insurance with limits of $20,000 for each person injured and $100,000 for each occurrence, Molitor stated that he had purposely omitted such an allegation from his complaint.

The District's motion to dismiss the complaint on the usual ground that a school district was immune from liability for tort was sustained by the trial court and, on appeal, by the Appellate Court.
Thereupon, an appeal was taken to the Supreme Court.

In his brief, Molitor frankly recognized the Illinois rule established by the Illinois Supreme Court in 1898 that a school district was immune from tort liability, but asked, in effect, that the rule be abolished in toto.

The trial court ruled in favor of the school district, as did the Appellate Court. However, when the case was taken to the Supreme Court, this court reversed the previous rulings and sent the case back to the trial court where the damages were to be established.

This case assumes importance for several reasons: First, because it deals with an issue that is assuming more and more significance for school districts. It raises the question of whether or not the long-accepted legal principle which grants tort immunity to a school district for the negligent acts of its employees and agents is an equitable one.

A second reason for the importance assigned to this case lies in the fact that the court here ruled squarely on the issue of district immunity per se without any qualifying conditions such as whether or not the district had applicable insurance coverage, or whether the acts complained of were governmental or proprietary in nature.

The final reason is that the Illinois Supreme Court is reported being a highly respected one; and its decisions have carried considerable weight in Wisconsin, Arizona, and Minnesota where they have had similar cases. (Roach, 1959, p. 53)

In Washington there is a statute limiting governmental immunity to injuries from athletic apparatus and manual training equipment. In
all other areas, tort liability made school districts liable upon precisely the same basis as the individual or corporation is responsible.

In a 1953 case, the judges abrogated the immunity law by stating:

> We closed our courtroom doors without legislative help, we can likewise open them. In holding a charitable institution liable for tortious conduct of an employee we stated: "The declaration of 'public policy' is primarily a legislative function. The courts unquestionably have authority to declare a public policy which already exists and to base its decisions upon that ground." (Washington Sherwood v. Moxee School District 363 P. (2d) 138, Washington)

New York having the "save-harmless" statutes and the rule that applies only to tort liability of district officers and not to district employees or servants shows that the New York courts are willing to modify the tort immunity doctrine but not to abrogate the doctrine completely. An early case in New York against a school board was the Wahrman v. Board of Education 80 N.E. 192 case. The case was for the plaintiff because the board of education has the duty to provide and maintain buildings and equipment and is liable for their upkeep which cannot be escaped because they are a governmental agency. (Hamilton and Mort, 1959, p. 285)

In Arizona, the Court abrogated the immunity doctrine on all governmental agencies in the case of Stone v. Arizona Highway Commission 381 P. (2d) 107. The action was based on a death resulting from an automobile accident caused by inadequate signs. Justice Lockwood held that the immunity doctrine was abolished not only for this case, but for all other cases that are not barred by statutes. The Arizona Supreme Court was also of the opinion that when the reason for a certain rule no longer exists, the rule itself should be abandoned. They supported this belief in an earlier case—Hernandez v. County of Yuma 369 P. (2d) 271 (1962)—when they re-examined the
immunity doctrine from tort liability and held that the doctrine must be discarded as a rule of law in Arizona. The court-made immunity rule is unjust or outmoded and is now under investigation. This doctrine was engrafted upon Arizona law by judicial decision and may properly be changed or abrogated by the same process.

In Colorado, however, the change in immunity doctrine was short lived, lasting only three years. The Colorado Racing Commission v. Brush Racing Association 316 P. (2d) 582 (1957) was the case which abrogated the law but the same court invoked the immunity theory in the case Liber v. Flor 353 P. (2d) 590 (1960)

The courts have played a large role in changing the common-law doctrine of immunity. In several cases they have completely abolished the tort immunity of school districts.
Court cases

The history of tort cases against governmental agencies in Utah usually follows the pattern of case dismissal on the basic grounds of sovereign immunity. The following are typical cases tried in Utah where the courts have turned their backs on the injured individuals.

At Provo, action was brought by a father as guardian of his minor son for damages sustained when his son was injured while coasting on a coasting area which was University property but which was controlled by the city. The lower court entered judgment for the University and for the city, and the father appealed. The Supreme Court, McDonough, Judge, held that although the city controlled the roadway and designated it a coasting area, the city was not liable for injury to the child who coasted into the path of an automobile, since the city, in providing recreational facilities, was fulfilling a governmental function rather than a proprietary function. (Davis v. Provo City Corporation 1 Utah (2d) 244)

In the Ramirez v. Ogden City 2 Utah (2d) 102 case, action was brought for personal injuries sustained when the plaintiff's dress came in contact with an unprotected gas heater and caught fire in the ladies' powder room of the city's community center. The lower court entered judgment for the city. The plaintiff appealed and the Supreme Court, with Corckett as Judge, held that the city was engaged in a governmental not a proprietary activity and was not subject to tort liability.
Another case where the immunity rule applied was Cobia v. Roy City 12 Utah (2d) 375. In this case, action was brought against the city for damage resulting in an isolated case from sewer stoppage. The lower court rendered judgment on the pleadings for the city, and the plaintiff appealed. The Supreme Court with Henroid as Judge, held that operation of the sewer was governmental and the city possessed governmental immunity from liability. The city did have a liability policy purporting to cover the loss, but still asserted the defense of sovereign immunity. Apparently the insurance was a waste of taxpayers money.

Even in the case of a death, the courts have upheld the immunity rule. For example, Brinkerhoff v. Salt Lake City 13 Utah (2d) 214 was the case where action was brought against the city for the death of a child who drowned in a canal used by the city. The lower court rendered a judgment for the plaintiff and the defendant appealed. The Supreme Court held that the city was not negligent and could not be held liable for the death of the two-year-old child drowned therein or any theory that it was under a duty to fence or baricade the canal.

The most recent case in Utah that questions the governmental immunity doctrine is the case against the Granite School District, their officials, and employees. This was for an injury sustained by a pupil in class which impaired the sight of his eye. It was caused when a metal particle was thrown by a machine during a shop class. The trial court granted the motion of the doctrine of sovereign immunity. The plaintiff appealed but later conceded that the dismissal was supported by the prior pronouncements of the Supreme Court that school districts are acting as a state agent with the purpose of educating
children and therefore can partake of its governmental immunity.

In a convincing argument, plaintiff's counsel contended that this rule should now be judicially changed. However, despite the changes he cited of this immunity law by some states, the Utah courts were not persuaded of the propriety of changing this rule. The Supreme Court stated:

It has always been the law of this state and the activities, operations, and contracts of state government and other public entities protected by it are based upon that understanding of the law. For the reasons set forth in the cases heretofore decided by this court referred to above, we believe that if there is to be a change which would have such an important effect upon public institutions and their operations, it should be left entirely to the legislature to determine whether the immunity should be removed; and as to what agencies; when effective, and to what extent, if any, limitations should be prescribed. (Campbell v. Pack 15 Utah (2d) 161)

Deviation from general trend

A notable deviation from similar cases in Utah was the one in 1950 when the judge disagreed with the total reign of the school district being immune from tort liability. This case was against the Ogden City School District for a negligent act. Justice Wolfe in dissenting stated:

The doctrine is of judicial origin and judicial development growing out of the experience of a past age. Assuming that public policy at that time demanded the announcement of the doctrine, such is no longer the case. If the judiciary may develop law one way, it may also discard that law when conditions have changed so no longer make the rule applicable. (Bingham v. Board of Education of Ogden City 118 Utah 582)

Concerning this same case, however, the Utah Supreme Court stated that the legal power they have in tort cases is granted under the constitution. The power to make departments of the state respond in damages for torts rests with the legislature, and without legislative enactment they are unable to impose any liability or obligation upon
school districts.

Legislation

Utah's governmental agencies will lose part of their immunity from damage suits by injured citizens on July 1, 1966. After a long and extensive study, the Utah State Legislature has passed a law which in part abrogates tort immunity.

The new act which is a middle of the road law is a product of a study by a 21 member committee chairmanned by Senator Charles Welch, Jr. and composed of legislators, representatives of cities, counties, school districts, special taxing districts, and the legal profession.

The legislature provided a similar bill in 1961 but was vetoed by the past governor. The past governor's view stemmed primarily from fears that a waiver of immunity might bring on a rash of suits and judgments which could be ruinous to governmental units, particularly small ones. (Malmquist, April 4, 1965)

With the change in governors and more complete study between 1963 and 1965, the Utah Governmental Immunity Act 1965, Senate Bill Number Four cleared the legislature and was passed by the new governor.

Utah Senate Bill Number Four was patterned basically like a similar law enacted in California. Its cautious approach was to reassert the principle of governmental immunity from suit for injury or damage arising from the exercise or discharge of a governmental function.

Part of the bill deals with what will or will not be waived and the method the state agencies are to use in officiating the law. The total effect of the waivers and the reassertions of immunity still does not place the governmental agencies on the same level as the private citizen to suits for its negligent or malicious actions.
There are 38 sections to the bill. The following is a summary of the important sections pertaining to the public as well as school personnel.

1. Government will still be immune from exemplary or punitive damages.

2. A plaintiff shall file an undertaking in a sum fixed by the court, but in no case less than three hundred dollars, to reimburse a governmental agency for costs incurred by the agency if the plaintiff fails to prosecute the action or fails to receive judgment.

3. The amount of damages which may be assessed against a governmental agency is limited by this act.

4. A political subdivision, if unable to pay the claim during the current fiscal year, may pay the claim in ten equal installments or in such other installments as are agreeable to the claimant.

5. Any suit of any contractual obligation is waived by the governmental agency.

6. Immunity is waived for suits against the governmental agency for injuries resulting from negligent operation by any employee of a motor vehicle while on duty. But immunity is retained for the operation of emergency vehicles so long as they are being operated in accordance with the required law covering vehicles.

7. Suits against all governmental agencies for any defective road, sidewalk, public building or other public improvements are also waived.

8. The act retains government immunity from suits for damages or injuries arising out of the following:
   a. When an agency exercises or performs or fails to exercise or perform a discretionary function, whether or not the
discretion is abused.

b. Failure to make an inspection of any property or by reason of making an inadequate or negligent inspection.

c. Assault, battery, false imprisonment, false arrest, malicious prosecution, intentional trespass, abuse of process, libel, slander, deceit, interference with contract rights, infliction of mental anguish, invasion of privacy or civil rights.

d. The issuance, denial, suspension, or revocation of or failure to or refusal to issue, deny, suspend or similar authorization.

e. Institution of judicial or administrative proceedings, even if malicious and without probable cause.

f. Misrepresentation of any employee, even though it is negligent or intentional.

g. Results from riots, unlawful assemblies, public demonstrations, mob violence, and civil disturbances.

h. The act is in connection with the collection of and assessment of taxes.

i. The activities are by the Utah National Guard in the time of war or declared emergency.

j. The individual is incarcerated in any place of legal confinement.

9. All governmental agencies are authorized to purchase liability insurance or establish by themselves or with other agencies, a fund for the purpose of purchasing insurance or acting as a self-insurer.

The insurance policies are specified that they must provide
minimum liability coverage of $100,000 for each person, $300,000 for each accident, and $50,000 property damage. A governmental agency may insure all or any of its employees against all or any part of his liability for negligent acts and all insurance authorized by the act must be purchased or renewed by competitive public bid.

Since the Utah legislature has seen the need for revision of the State statutes concerning tort liability, they have wisely studied the situation carefully. It remains to be seen if they have changed the laws for the greater good of the people.
CONCLUSION

Summary

The origin of immunity from tort liability stems from an Eighteenth Century case in England. In the famed 1812 Mower case, an American judge based his ruling on England's decision. Later cases were tried and based on these two cases where the precedence had been set. Governmental immunity from tort liability became the common-law. School districts, considered a function of the state, have not been liable in tort for injuries growing out of the negligent acts of their officers, agents, or employees.

In the Twentieth Century, beginning with New York and Washington, the courts and legislators of several states have seen the need to revise and update the common-law of tort immunity. Just recently Utah revised the laws of that state, making them effective on July 1, 1966.

As these Eighteenth Century rulings evolve into the Twentieth Century, many changes are taking place, and in all probability other changes will follow.

Recommendations

Perhaps the greatest opportunity for preventing the imposition of liability for negligence lies in safety education. A safety policy should implement procedures and practices that promote school safety through the instruction of school personnel. The standards formulated for the school policy would include the following:

1. Procedures for school personnel to report dangerous practices and unsafe conditions when they become cognizant of the hazard.
2. A system instituted for regular inspection of buildings, grounds, facilities, and equipment in order to uncover any dangerous condition.

3. Steps taken to promptly eliminate, repair, or correct defects and deterioration and to remove obstructions.

4. Selection and training of competent personnel by the school districts.

5. Training of all school personnel will include information on slander, false advice, and mental cruelty of students.

6. Regular meetings held with all school personnel to review and evaluate school accidents and to consider ways of avoiding their recurrence.

7. Development of reasonable regulations of student traffic in corridors, on stairways, and elsewhere on school premises.

8. Adequate supervision provided for educational activities away from the school.

9. Adequate supervision provided on the school grounds, gymnasium, and other areas in the school where large numbers of students congregate.

10. Rules and regulations maintained for safe school bus transportation.

11. A system provided for investigation of all accidents and the requirement of prompt reports on each accident.

Inasmuch as the statutes of each state do vary, it is necessary to be familiar with the application of these suggestions in each individual state and it is always wise to obtain legal counsel when there is a problem in any given situation.
LITERATURE CITED

Codes, Court Reports, Encyclopedias, and Law Digests


California Education Code, Sec. 903, Sacramento, California.

California Government Code, Sec. 53050 and 53051, Sacramento, California.

California Vehicle Code, Sec. 17001, Sacramento, California.

Code of Alabama, 1940, Title 55, Sec. 333, Montgomery, Alabama.


Utah Code Annotated, The Allen Smith Company, Publisher, Indianapolis, Indiana, 1953 (10 vol.).

Wisconsin Statutes Annotated, Sec. 101.01, 101.06, Madison, Wisconsin.

Wyoming Statute Sec. 16-301, WCS 1945, Cheyenne, Wyoming.

Books


Pamphlets


Periodicals


California Law Review, University of California, Berkeley School of Law 49:1.


### TABLE OF CASES

- **Bingham v. Board of Education of Ogden City** 118 Utah 582.
- **Brinkerhoff v. Salt Lake City** 13 Utah (2d) 214.
- **Buck v. McLean** 115 So. (2d) 764 (1959) Florida.
- **Campbell v. Park** 15 Utah (2d) 161.
- **Ceanci v. Board of Education** 238 N.Y.S. (2d) 547.
- **Cobia v. Roy City** 12 Utah (2d) 375.
- **Collopy v. Newark Eye and Ear Infirmary** 27 N.J. 29, 141 A (2d) 276, 283.
- **Davis v. Provo City Corp.** 1 Utah (2d) 244.
- **Domino v. Mercurio** 234 N.Y.S. (2d) 1011.
- **Hargrove v. Town of Cocoa Beach** 60 A.L.R. (2d) 1193 (1951) Florida.
- **Kauananakoa v. Polyblank** 205 U.S. 349, 353 (1907).
- **Lawver v. Joint District No. 1, Mount Horeb and Blue Mounds** 288 N.W. 192 (Wisconsin 1939).
- **Mofci v. Town of Kemmerer** 338 P. (2d) 808 (Wyoming).
- **Molitor v. Kaneland Community Unit District No. 302** 18 Illinois (2d) 11 163 N.W. (2d) 89, 93.
- **Mower v. Leicester** 9 Massachusetts 247 (1812).
Myers v. Genesee County (No citation as yet) March 1, 1965, Michigan.
Ramirez v. Ogden City 3 Utah (2d) 102.
Swainbank v. Coombs 115 A. (2d) 468 (Connecticut).
Woodcock v. Board of Education of Salt Lake City 55 Utah 458.