

STATUS OF LIABILITY LEGISLATION
IN MONTANA SCHOOL LAW

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CHAPTER I

INTRODUCTION

Montana school districts, at the present time, have immunity ¹ from liability for their acts or the acts of their officers, teachers and employees. This immunity is a reversion to the past when the "King could do no wrong", and to the Federal law, stating that a state cannot be sued without its consent. Since the school districts are acting as agents of the state in carrying out their duties, the rule of immunity or non-liability applies to them. ²

The officers and employees of the school districts attempt to keep the school facilities in a safe condition, to the best of their ability. They realize that they have a moral, as well as a legal responsibility, to safeguard the pupils, personnel and invitees ³ from personal harm or injury.

There is an old saying, which is never the less true, "Accidents happen in the best of families". Accidents happen also in the best of schools. Who then is responsible for these accidents? In Montana, if the responsibility can be traced to any individual, he is responsible and can be sued. If there is a financial recovery, the individual has

¹Immunity--The school district, as a division of the state, is immune from legal suit for tort.

²Remmlein, M. K., The Law of Local Public School Administration, McGraw Hill, 1953, p. 243.

³Invitees--Persons invited to the school publicly as to a football game or play production.

to pay it, or have a judgment against his wages until it is paid. The school district has immunity, but not the individual employee. The school district cannot be sued with the employee as is true in private business, where the employer is responsible for the acts of those in his employment.

Education is becoming "big business" without taking the same risk as other businesses. The districts are operating cafeterias, stores, sport arenas, theaters and bus lines. Should the school district not assume the liability inherent in the operation of these types of businesses?

Problem

It was believed that the school district should accept the liability for its torts⁴ in connection with non-instructional activities, and pass a "substitute defendant" ⁵ law to protect the school district's teachers and employees from financial losses due to suits, in connection with their services. The school districts should then be allowed to purchase liability insurance to protect themselves and the "substitute defendants." It was also believed that a ceiling should be placed on the amount for which they could be sued, to protect the district, and lower the premium cost.

⁴Torts--The commission or omission of an act by one without right, whereby another receives some injury directly in person, property, or reputation.

⁵Substitute defendant--These laws require or permit districts to pay judgments recovered against teachers, and other personnel while in the course of their duties.

Reasons for Study

The reasons for liability legislation were many, Montana has recognized one reason in transportation, and has allowed districts to take out liability insurance on the school busses. Montana needs this legislation for the purpose of improving instruction. A teacher would feel more free to go on field trips, if he knew that in case an accident did happen, he would be protected. This type of legislation would give more security to the coach, chemistry teacher, shop teacher, and other personnel. In the danger areas, even with the best of instruction in safety, some eager student may go too far in experimenting, and the teacher will be held liable. A guard may be removed on the shop saw, and a finger cut off. Who is liable? Probably the court would decide the teacher was responsible. Therefore, the teacher's livelihood should be protected.

The idea is not to protect the careless teacher but to give good teachers more security in their jobs, the same type of security that is granted to them when they are employed in private business.

The public should be protected; if someone is injured and loses time on his job, or has hospital bills, these should be shared by the community, either by acting as its own self insurer or having already purchased liability insurance.

Limitations

For this study, the sources of information have been limited to published literature and court cases. This study has the limitations of one not adept in law and the study of court cases. It is written because of an interest in a certain phase of school law.

An attempt was made to appreciate the teacher's place in the school system and the relationship of the school district to the community, in terms of the district's legal responsibility to the community in liability cases.

Some Cases Related To School District Liability

One of the more recent cases to come before the Supreme Court of Michigan, was an accident involving a practicing dentist and other spectators at a football game. The football game was played on Thanksgiving Day, a national holiday. The game was advertised publicly and admission was paid by the spectators. Some portable bleachers had been leased for the game, set up by school personnel. The spectators, in cheering the game, set up a cadence swaying of one of the bleachers. It collapsed into another, toppling it also, thus injuring the dentist. The injured person sued the local school district and the manufacturer of the bleachers. The injured person maintained that the school was engaged in a non-governmental or proprietary act. The jury brought back a decision for the injured party and awarded him \$45,000. The majority opinion of the Supreme Court of Michigan held

the act was a governmental act of education; therefore, covered by the governmental immunity rule. The case was also interesting for the dissenting opinion. These two opinions are quoted in part.

Mr. Justice Carr wrote the majority opinion. He said:

The football game played on November 25, 1948, must be considered as a part of the athletic activities of the school rather than as an independent contest. It thus appears that such activities of the physical education department did not, for the year in question, result in a net profit. On the record in the case it may not be claimed that such activities are carried on for the purpose of making money for the benefit of the defendant school district. Rather, the entire department is operated as a part of the school facilities and in furtherance of the objectives to be attained in educational lines. It may not be said that the defendant district, in allowing athletic competition with other schools, is thereby engaged in a function proprietary in nature. On the contrary, it is performing a governmental function vested in it by law.⁶

Mr. Justice Edwards attacked the immunity doctrine, in a bitter dissenting opinion. He said:

History would tell us that the doctrine, 'The King can do no wrong,' died at Runnymede in 1215. Yet in the court which tried this case the legal ghost of that doctrine strode forth and struck down a jury award of damages to an Oakland county dentist seriously injured at a Thanksgiving Day football game by the collapse of negligently erected bleachers. Basing his opinion largely on an immunity derived from that once held by the absolute sovereign, Justice Carr (the judge who wrote the majority opinion), would likewise hold

⁶ Hamilton, R. R., National School Law Reporter, Vol. 7, No. 24, February 5, 1958 (citing Richard vs. School District of City of Birmingham, 83 N.W. 2d 643, 1957).

that this school district cannot be sued for this wrong. And he holds this even though the tort was committed in the conduct of a revenue producing activity and the injured person was an invited, admission paying, innocent spectator.⁷

Justice Edwards points out that "some brave and persuasive voices have been raised from the bench to urge outright judicial abandonment of the ancient judge-made rule." One such voice is Justice Wolfe of the Supreme Court of Utah. His point is that all acts of school districts are governmental. His statement on this point is as follows:

Much of the confusion that has come into its discussion lies in the assumption that these (i.e. governmental and proprietary) are mutually exclusive terms. This, we believe, is not so. All activities performed by any governmental unit within constitutionally or legislatively assigned powers are obviously governmental. Of those governmental functions some are recognized in this distinction as being more customarily performed by private industry, less historically associated with government alone, and these, when they produce revenue or profit, have been termed 'proprietary'. There is no necessity, in order to find an activity 'proprietary' for the purpose of exemption from governmental immunity also to find that it is nongovernmental.⁸

In other words, the judge was of the opinion that when the high school charged admission to the game it was engaged in a business proprietary in nature and should be held for damages caused while so engaged.

⁷ Ibid.

⁸ Ibid., (citing Bingham vs. Board of Education of Education of Ogden City, 118 Utah 582, 223 P. 2d 432, 1950).

Mr. Hamilton pointed out his own view point on the government immunity rule:

I incline to the view that the immunity rule is wrong and should be abrogated in its entirety. I think it has become obsolete. Education has become big business. If educational programs subject pupils to the hazards of modern traffic, buzz saws, dangerous chemicals in the laboratory, injuries in athletic contests from which districts take a profit, and other dangers, the cost of compensating for injuries suffered in such programs should be assumed as a legitimate cost of education. It is submitted that public education can no longer justify sending children through life blind or maimed through the negligence of the districts, and smugly take refuge behind a rule the foundation and soundness of which is, to put it mildly, open to serious question.⁹

In a case before the Supreme Court of Utah, in October 1950, Judge Latimer expressed what seemed to be the general opinion of judges in the United States:

While the law writers, editors and judges have criticized and disapproved the foregoing doctrine of governmental immunity as illogical and unjust, the weight of precedent of decided cases supports the general rule and we prefer not to disregard a principle so well established without statutory authority. We, therefore, adopt the rule of the majority and hold that school boards cannot be held liable for ordinary negligent acts.¹⁰

Others have expressed dissatisfaction with the non-liability doctrine:

⁹Ibid., Vol. 1, No. 1, March 1, 1951.

¹⁰Ibid.

. . . in recent years there has been a growing dissatisfaction with the nonliability doctrine as it applies to school districts.

. . . many authorities in the fields of law and school administration have also expressed dissatisfaction with the application of the immunity principle to school districts. They strongly recommend abrogation of the immunity rule so that the state or a territorial subdivision of the state may be held liable for the torts of itself and its agent.

. . . if change in the principle of non-liability is to be achieved, it will most likely be by legislative enactment. Many judges have expressed their wishes that the various state legislatures would change, by statute, the common-law rule permitting immunity from liability.¹¹

Mr. Hamilton stated that in one instance a Montana judge expressed concern over our government immunity. Mr. Justice Erickson, of the Supreme Court of Montana, said in his dissenting opinion:

. . . most of the states, in attempting to decrease the severity of the rule, (i.e. the rule of immunity), have adopted the governmental proprietary test. The test is an arbitrary one, but the general trend of the decisions is to declare more and more functions proprietary rather than governmental so as to allow recovery. It is now generally agreed that neither logic nor justice supports the general rule which in this case denies recovery to the person injured as in this case where she goes for entertainment to a basketball game sponsored by the school district, while on the other hand for exactly the same injury under the same conditions she would recover if she had gone to the theater and had there been injured.¹²

¹¹Garber, L. O., and Bolmeier, E. C., School District Liability, AASA, Washington 6, D. C., pp. 15-17.

¹²Hamilton, op. cit., Vol. 5, No. 15, September 15, 1955, (citing Rhoades vs. School District No. 9, 115 Mont. 352, 142 P. 2d 890, 1943).

One further point, and this frequently comes as something of a shock to administrators, teachers and other school personnel.

The immunity from liability enjoyed by school districts does not extend to school personnel! They are liable for their negligent acts just as if they were not engaged in school work. An athletic coach, an instructor in the laboratory or shop, a bus driver, and even the administrator, personally may be subjected to a suit for damages if his negligence can be established. This fact seems not to be realized adequately by school people, although many have realized it too late--after they are in court!¹³

Summary

Two questions have come to mind as the literature above has been reviewed. In this great humanitarian nation of ours do we really believe that we should "weep with those who weep"? In this nation, where thousands of dollars are given to charity, should we not share our dollars with an individual who is injured, in our common enterprise?

Montana school law has protected the school districts from their torts, by government immunity; however, the law does not similarly protect the school personnel. Should Montana continue to protect the districts, but not the personnel? There are many reasons for Montana people to re-examine the law that protects them, but does not protect their children's teacher and their own friends. The people, who go to the school premises as invitees, should be protected.

¹³Ibid., Vol. 1, No. 1, March 1, 1951.

If an injury is sustained by an invitee, due to the negligent acts of the school board or its personnel, the expense of such injury should be shared by the community.

CHAPTER II

TRENDS IN LIABILITY LEGISLATION IN THE UNITED STATES

There have been three major trends in liability legislation within the United States. Some states, while accepting one form in general, have a modified version. The attitude most generally accepted by school districts has been one of complete government immunity for liability of tort acts or the tort acts of officers, employees, and agents. This has given the school districts, as subdivisions of the state, immunity for negligent failure to perform duties, or for the performance of duties in a negligent manner, in the absence of a statute making them liable.

The second trend has sometimes been spoken of as the substitute defendant clause, or again as "save harmless" statute; which requires or permits school districts to pay judgments recovered against teachers.

The third trend, while it has not been widely accepted, is an important one; this was a statute which completely removed the state's school districts from the privileges of immunity.

Government Immunity Retained

In all but three of the states in our nation, government immunity has been the accepted doctrine of liability. It has come in for its share of criticism, but has stood the test of time. Many judges, school administrators, and

authorities in the field of law, have recommended changes, but to no particular avail.

This immunity need not be legislated; it has had its basis in common law. It grew out of the concept that the "king can do no wrong", which found its way from England into the judicial decisions of this country. Then, of course, under our Federal constitution a state cannot be sued, without its consent. This enactment has made it impossible for a school district to be sued, without a statute being passed by the state legislature.

Even in the states that have accepted complete immunity, school district, by statute, have been made responsible for the fulfillment of their contracts. They could sue and be sued in instances of broken contracts, as for payment of bonds, for example.

School districts could only operate through officers and employees, who were therefore their agents. The immunity doctrine meant that the district would not be made to pay for harm done by wrongful acts of its board members, teachers, or other employees. School districts may have allowed school grounds or buildings to become dangerous, and hired incompetent personnel from which injury resulted, yet they have been protected by the immunity rule.

School boards have had two types of duties: discretionary and ministerial. Discretionary duties involve one's own judgment; while ministerial duties are carried out in a

manner prescribed by statute. As long as discretionary duties are performed in good faith, the school board member is perfectly safe from any suit. There has been some doubt cast on the safety of board members who neglect to perform ministerial duties, as a corporate body; these being duties expressly stated in school law for them to carry out. In the court cases to date, the courts have been very liberal in protecting the districts, when this distinction has been attempted by attorneys. In a recent case, in Wisconsin, this distinction was attempted. A child was injured when he fell from a five-foot retaining wall. It was contended that the failure of the board to erect and maintain some sort of safety device atop the wall showed negligence; therefore, an action against the board was justified. The lower court agreed that the board neglected their ministerial duty. The Supreme Court of Wisconsin disagreed and overruled the lower court. They stated that at first the act might seem ministerial; however, on closer analysis the act involved the exercise of judgment, or discretion, and was not ministerial. School boards were again protected and their immunity strengthened by another judicial decision.¹

School districts have been required to keep the premises reasonably safe when they have rented their football field to two other districts for a football game. This was

¹Garber, L. O., The Yearbook of School Law 1957, Interstate Printers and Publishers, Inc. Danville, Ill., p. 51. (citing Meyer vs. Carman, 73 N.W. 2d 514 Wis.)

considered to be a non-governmental function and the district was not protected by their immunity.²

In Illinois, the carrying of liability insurance was held to release the school districts immunity, to the extent of the liability insurance policy. The court held "no justification or reason for absolute immunity if the public funds are protected."³ However, in a case before the Appellate Court of Indiana, the same year, it was held the purchasing of liability insurance did not release the district's immunity from a liability suit.

In cases that have come before the courts, school districts have not been considered liable for the acts of their personnel. However, this immunity has stopped with the district, and the personnel have been held totally liable. If negligent or tortious acts were proven, the personnel were made to pay the judgment made against them by the court.

Most districts have enjoyed immunity from liability for injury to one of their personnel, caused by negligence or some act of the school board. In some states, however, statutes have been passed making school districts liable for tort acts leading to injury of personnel; Louisiana is an example of this point. The court decided that school districts, as

²Reutter, E. Edmund, Tort Liability and the School, American School Board Journal, p. 30, March 1958 (citing Sawaya vs. Tucson High School District, 78 Ariz. 389, 281 P 2d. 105 1955).

³Ibid., p. 29.

subdivisions of the state, were liable in compensation to their injured employees under a state workmen's compensation law.⁴ In four states: Alabama, Arkansas, Illinois, and West Virginia, the state constitutions prohibit suits against school districts.⁵

Substitute Defendant Laws

Some states have passed "save harmless" laws to protect school district personnel from financial loss, due to judgments against them; these were not only to save them from harm, but to defend them in court if the act was committed in the due course of their educational activity; this is completely true of three states: New York, New Jersey, and Connecticut. Wyoming has recently joined their number, nominally. The law of Wyoming stated the local districts may, or may not, save their school personnel harmless, according to local discretion or option. The "save harmless" laws were probably one of the greatest advances for school personnel made in recent years. In the states where they have been enacted, the same relationship exists between employer and employee in liability cases, as is enjoyed by people working in private industry. Since education has become such big business, common law that imposed tort liability upon the individual, rather than the corporation, has become definitely obsolete.

⁴Garber, op. cit., 1958, p. 55.

⁵National Education Association, Who Is Liable for Pupil Injuries, 1950, p. 13.

Governments Released From Immunity

The school districts in Washington, California, and New York State, have completely, or partly, been released from immunity. The districts are liable for negligent acts of school officers and personnel, which result in injuries to persons and property.

Washington, in 1869, released itself from the common law rule of immunity for its liability as a territory; this was retained in its state laws. The statutes were changed in 1917, forbidding suits against districts related to: playgrounds, fieldhouses, athletic apparatus, or appliances, or manual training equipment. However, the courts have been quite lenient in interpreting the changes made in 1917. Washington boards of education have been successfully sued for the negligent acts of their personnel.

California has the most complete release from government immunity in the United States; their law was passed in 1923. The school districts are definitely responsible for the negligent acts of their personnel. In 1931, California passed statutes permitting school districts to protect public money, by purchasing liability insurance.

In New York, the judicial division of the state pioneered in the release from government immunity by deciding several cases against school districts. By 1929 the legislature had passed laws waiving immunity from liability for the torts of state personnel. This was further strengthened

in 1937 with a law quoted in NEA bulletin, Who Is Liable for Pupil Injuries, which every school person should have.

This law is quoted as an example of good legislation. Strength is given to this conclusion because New Jersey and Connecticut have followed it extensively.

Liability of a board of education, trustee, or trustees: Notwithstanding any inconsistent provision of law, general, special, or local, or the limitation contained in the provisions of any city charter, it shall be the duty of each board of education, trustee, or trustees, in any school district having a population of less than one million to save harmless and protect all teachers and members of supervisory and administrative staff from financial loss arising out of any claim, demand, suit, or judgment by reason of alleged negligence or other act resulting in accidental bodily injury to any person within or without the school building, provided such teacher or member of the supervisory or administrative staff at the time of the accident or injury was acting in the discharge of his duties within the scope of his employment and/or under the direction of said board of education, or trustees; and said board of education, trustee, or trustees may arrange for and maintain appropriate insurance with any insurance company created by or under the laws of this state, or in any insurance company authorized by law to transact business in this state, or such board, trustee, or trustees may elect to act as self-insurers to maintain the aforesaid protection.⁶

The Judicial Attitude

The government immunity rule has come in for some very severe criticism from courts over the nation. Justice Wolfe, in a case before the Utah Supreme Court, makes his opinion quite clear. "I prefer to regard said principle for the

⁶Ibid., p. 11, New York Education Law, sec. 3023, 1949.

purpose of overruling it. I would not wait for the dim distant future in never-never land when legislature may act." ⁷

In Michigan, a district's immunity was only upheld by a single vote of the supreme court. A girl leaving a football game, walked around her car and fell over an 18 inch wall into a ramp out of the high school building basement. She suffered paralysis and died eight months later. The lower court allowed the plaintiff \$10,000 damages. When the case was taken to the Supreme Court of Michigan, the district's immunity from suit was upheld by the narrow margin of a single vote. ⁸

Another attack was made upon the immunity doctrine in a New Mexico case.

The whole doctrine of governmental immunity from liability for tort rests upon a rotten foundation. It is almost incredible that in this modern age of comparative sociological enlightenment, and in a republic, the medieval absolutism supposed to be implicit in the maxim, 'the King can do no wrong', should exempt the various branches of the government from liability for their torts, and that the entire burden of damage resulting from the wrongful acts of the government should be imposed upon the single individual who suffers the injury, rather than distributed among the entire community constituting the government, where it could be borne without hardship upon any individual, and where it justly belongs. ⁹

⁷Hamilton, R. R., Bi Weekly School Law Letter, Vol. 1, No. 1, March 1, 1951.

⁸Ibid., (citing Watson vs. School District of Bay City, 324 Mich. 1, 36 N.W. 2d. 195).

⁹Ibid., (citing Barker vs. City of Santa Fe, 47 N.M., 85, 136 P. 2d 480, 1943).

In a Pennsylvania case in 1888, the court upheld the immunity doctrine.

Moreover, to make school districts responsible for the misfeasance of their officers would in many cases prove injurious if not destructive to the public welfare. A weak and poor district is saddled with a heavy bill of damages . . . and as a consequence the schools must be closed, and the ordinary taxation, perhaps for years, together with the state appropriation, must be applied to the payment of the bill.

The rule heretofore has been that individual advantage must give way to the public welfare.¹⁰

It seems that while some judges were convinced that the immunity doctrine was not good, they wanted it changed by the people, rather than by themselves. While it is not known what would happen if immunity to suit were given up by school districts, it is felt that suits would increase. It is also feared that there would be a lack of funds to keep operating the schools and to pay the judgments.

Even though "save harmless" laws are comparatively new, there have been decisions handed down about them. An attempt to include the school districts as defendants in suits under the "save harmless" statute was important to the study. In every instance, that has been read by the investigator, the courts have refused to act on the case when the district was included with the "substitute defendant" as defendant.

¹⁰NEA, op. cit., p. 10, (citing Ford vs. School District of Kendall Borough, 15 atl. 812).

A case on this point is called to the readers attention. The attorney for the plaintiff contended that the "save harmless" law abolished the government immunity from tort, and made the district liable. The court answered simply and to the point, "it would have been a very simple matter to have said so directly unequivocally, and in a very few words", if the legislature had so intended. The only remedy was for the plaintiff to go back and bring the suit against the teacher (in this case) only. Then the board would defend, and pay any judgment that was ordered by the court. It should be noted in passing that the "save harmless" laws do not take away the local district's immunity.¹¹

In the states where the government has been released from immunity, the decisions are merely based on the facts presented by the two sides. This is not to say it is a simple solution because there are definite and observable weaknesses in this solution. These will be pointed out as an attempt is made to discuss the question: What should Montana do about liability legislation?

Summary

Attention has been called to the different trends in liability legislation in the United States. The common law doctrine of government immunity has most generally been accepted. It has the approval of age in its favor, but has

¹¹Garber, op. cit., p. 107 (citing Swainbank vs. Coombs, 115 A. 2d 463, 19 Conn. Sup. 391).

come in for much criticism recently. Next, the newest trend was noted, the "save harmless" laws. This has been considered by many to be the answer to the problem of liability legislation. The last trend considered was complete release of government immunity by school districts. The states with no immunity have had the most court cases to settle, but this practice has the approval of many judges. The next chapter will cover the course Montana legislatures may take in their liability legislation.

CHAPTER III

STUDY OF LIABILITY LEGISLATION PROPOSALS FOR MONTANA

In the preceding chapter the trends in liability legislation in the United States were considered. An attempt will now be made to apply the following ideas to Montana:

1. Continuing government immunity
2. The possibility of a substitute defendant law, with a save harmless clause
3. Releasing government immunity and the immunity of school districts
4. Outstanding advantages of each type of legislation for Montana

Government Immunity

There is no need of legislation for Montana to continue complete government immunity; it has been the accepted doctrine in the judicial system.

Montana, by statute, has released its immunity from suits in matters of liability while engaged in transporting pupils. School district immunity has been released in order for it to be legally responsible for the payment of loans and bonds.

School board members may feel a certain amount of security in knowing they can serve on the board, without being financially liable for the acts of the school personnel. This should make it probable that men with ability, but with financial means, will serve on the school board. If this protection were released, we probably would have no high

calibre men on the board of trustees.

In Montana, the people who buy school building bonds need never fear that the district will be forced to cease making payments, because of a large judgment against it. This should make them more willing to buy them, and at a lower rate of interest.

The administrators and school trustees of school districts in Montana are never faced with the problem of no money to currently operate the school, because of a successful suit against them. School districts are just not open for suits against them, unless a statute has been passed specifically saying they are liable.

School boards are free from liability although they may know that teachers are not properly supervising the playground during recess, and neglect doing anything about it. If after they have neglected to insist on proper supervision, a student is injured; are the school board members responsible? The school board members have the right to hire and fire teachers, but have no liability if the teachers job is done improperly. The courts have decided that once they have hired competent teachers to do the job, their responsibility ceases. How about the teacher who was to be on duty, at the time the student was injured? She would suddenly awaken to the fact that upon her lay all the burden for the injury, if negligence were proven.

The school may invite the public to attend a basketball game, and charge admission to the patrons; a person

walks in, a defective step breaks, and the person falls and breaks his hip; he has no protection whatsoever. No matter how the community may feel about the accident, it cannot through the moneys collected for the school, help pay the doctor or hospital bills. Yet, if such an accident were to happen in the local theater, the bills would be taken care of by the theater owner. In the case of the school above, the community cannot share the financial loss with the injured person, unless a special drive is made to collect the money for his assistance.

Food poisoning sometimes happens in cafes and homes; in the home, members of the family are their own self-insurers. If food poisoning happens in a cafe, the patrons are protected from financial loss of time and money by the owner or his insurance company. The grocer has to carry liability insurance against a customer purchasing a can of tainted goods, or risk the financial loss of being held liable for selling food that results in food poisoning. However, if this were to happen in a school lunch room, who would be liable? Surely the school personnel should not be sued because they would not negligently serve contaminated food. Would the employer be liable? No, because in this case it is the school district. The school board members can pull their cloak of immunity about them and cross by on the other side of the road.

It is believed by the investigator that while the school district is carrying out statutory commands, it should

enjoy government immunity. This is the constitutional provision, "It shall be the duty of the legislative assembly of Montana to establish and maintain a general, uniform and thorough system of public, free, common schools."¹

From this statute it is fairly difficult to understand how a district should be immuned from tort action, for an injury to a patron at a school play or basketball game. It will not be denied that the actors on the stage and the basketball players are learning, but what are the hundreds of patrons being taught?

It is believed that when Montana school districts are engaged in non-governmental acts, they should assume the liability for their acts. When the public is invited to the school, the school district should afford it the protection of an invitee. If the public is on the school premises as mere licensee,² it is responsible, rather than the school district. A statute should be passed safeguarding the public which come to the school premises, as invitee, as it would be protected if it entered a private business house, as an invitee. However, in any statute passed, the school board members must be individually protected from suit, except as they are already responsible in cases of malfeasance. Any

¹State Department of Public Instruction, School Laws of Montana, Tribune Printing and Supply Company, Great Falls, Montana, 1953.

²Licensee--One who enters premises without any enticement or inducement being held out to him. He enters at his own risk.

statute passed should also retain the district's immunity from suit, while it is carrying on the statutory duty of educating the youth of the community.

Substitute Defendant Law

It was noted in the chapter on trends of liability legislation that this type of legislation was considered a great stride forward, in teacher welfare legislation. If a pupil is injured as a result of an act of the teacher, while in the course of his duties, for example, and the teacher is sued, the school district will defend him. The school district will not only defend the teacher, but if judgment is placed against him, the district as his employer, will pay it. Three states, California, Connecticut and New York, have adopted such statutes, and Wyoming has recently adopted a permissive one. There, the district may, or may not, protect the teacher, according to local option. This appears to be poor legislation because it cannot accomplish uniformity throughout the state. The teachers, in the districts where they are protected, have a security that cannot help but make them more appreciative and effective teachers. Teachers, being human beings, surely cannot help feeling a little resentment in the districts where they are not similarly protected. The teachers in California, Connecticut and New York are defended if they are accused of negligent action.

In Connecticut a teacher was defended when a student

brought an assault and battery charge against him. The teacher slapped the student on the ear for whistling in a corridor. The case was not decided by the Supreme Court because the boy sued the district also, which the higher court held to be illegal. In New York a teacher was successfully defended in court against a charge of negligence. This case involved injury of one pupil by another, in a classroom, while the teacher was in the hallway marching students into the room.

California, having a save harmless ruling, but not a substitute defendant law, has many cases involving teachers. This state does not need the substitute defendant law because of its release from immunity by statute. In one suit, the district was held liable for the negligent action of a laboratory teacher. The pupils were making gunpowder; due to failure to follow the instruction in the laboratory manual, there was an explosion and one of the students was injured. The instructor was present and should have noted the danger ahead of time and stopped the experiment. The district was unsuccessful in its defense, and was ordered to pay a judgment.

A New York case is another example of an instructor being saved from financial loss. Two strong, untrained boys were engaged in boxing; they were allowed to fight one round, and started the second. The plaintiff was struck on the head, and cerebral hemorrhage ensued. The court decided the instructor should have first taught the boys self defense techniques,

and should have stopped the match when it became a "slug fest". Reasonable care was not exercised; therefore, the district had to protect the instructor, but the boy received his judgment for the injury received.

Should Montana pass a save harmless and substitute defendant law? Such a law would do several things for the teacher and school personnel:

1. It would give the teacher more financial security.
2. There would be less apprehension about going on authorized field trips. This would make for better teaching.
3. The teacher would then be given the same protection as the employees of other corporations.
4. This would make for more job satisfaction.
5. A better relationship should exist between teacher and community.

What would the law do for the community?

1. It would give financial responsibility to the teacher. Many teachers are unable to pay a \$10,000 suit, without personal insurance.
2. The community would know they were doing the best they could by their employees, the teachers.
3. Happy, contented men and women make the best teachers for the community's children.

Where would the money come from for the liability insurance which would be necessary, if such legislation were passed? It would come from the same place it does today. Most teachers are carrying a liability policy to protect themselves from a financial loss, due to a suit against them

by parents and/or, the pupil. Each year parents all over the state of Montana are asked for approximately two dollars, to insure each child at school, and while going to or enroute from school.

Granting there are 1300 students in a district, \$2600 will be paid for this insurance. To this could be added the amount paid by teachers for liability insurance. Surely a blanket policy covering the school district, teachers, and students would not cost much more. It is not uncommon to learn of districts already carrying liability insurance.

Release of Districts from Immunity

Two states, California, and New York, have been released from government immunity; Washington has also followed this plan extensively, but not completely. Just as complete government immunity will be taken advantage of by unscrupulous persons, so will complete release from government immunity. In a recent case in California, the district was sued for over \$300,000 for the benefit of one individual; this seems very excessive. In another California case, the district was sued for \$100,000, but later it was cut to \$75,000; it would take some of our Montana schools years to pay such charges.

If the school district were as liable for its torts as private business, the board would be more careful in maintaining a safe place; it is thought that more care and consideration are given to keeping the grounds and building safe

from foreseeable hazards. Keeping the school grounds safe is very important because in many cases that come before the courts, the question usually considered is whether the personnel, or board have acted in a prudent manner in carrying out their acts.

The complete release of government from immunity has the advantage of making the state responsible for the acts of its employees. The school district then would be responsible for the acts of the teachers, and other personnel. In the gunpowder case, in California, the instructor was not even sued, only the district, or employer. In a New York case the court declared the school district was responsible for the negligent acts of its employees; in this case a guard had not been provided for a power saw.

A state, upon being released from government immunity completely, is open for suits without financial bounds save for the good sense of a jury. Unless the state prevented it by a statute, it would also be casting doubt upon the immunity of the individual board member. Another disadvantage of complete release from government immunity is undependable help may tend to become more careless, knowing they are not financially liable for any accident or injury, because of their negligent acts.

It is believed that the state of Montana should keep its government immunity, when the school district is carrying out statutory directives in providing educational instruction for the children of the community. Now some of the advantages

of the different types of legislation will be noted.

Advantages of Legislation

To the school district, with a fine school board, doing its job, the outstanding advantage of government immunity is that they do not have to waste time on legal litigation. They can go along doing their job to the best of their ability, knowing they will not be personally or financially liable for the acts of the school board as a corporate body; nor the acts of their personnel, committed in good faith. If one of the personnel commits a tort act, the district does not even have to defend him, that being the employees own responsibility.

The main advantage of the save harmless law is the security given the teachers and other personnel working for the school districts; it elevates the teacher to the same high level as those working in private business or industry. There is some fear that the save harmless laws will encourage teachers to become careless. Does the liability responsibility relationship between employer and employee in industry create more carelessness? One would not deny that this could be true. However, others would argue that this relationship would attract more efficient and better workers in industry. Certainly some teachers may be encouraged to be careless, but better and more efficient people would also be attracted to the profession if the same liability relationship existed between the district and teachers. It might be said

that something good has never existed that was not abused. That however, does not take away the value of the good thing.

On first thought there is no advantage to the district being released from government immunity from tort actions or suits; the only way to observe any advantage is to realize that the public is partially protected. If an injury is sustained, one person will not have to suffer the full loss, but the community may share in the loss. In the next chapter the disadvantages, from which Montana should attempt to stay away, will be noted.

CHAPTER IV

SUMMARY

This study has attempted to show that there is a marked unrest under the states continued acceptance of the immunity doctrine. This unrest is found among both the judicial authorities and school people alike. It is noticeable particularly when school districts engage in what are considered non-governmental activities. Constantly in the limelight are such non-governmental activities as:

1. School Plays
2. Basketball games
3. Football games
4. Rental of auditoriums and other school facilities to non-school organizations

Some judges have expressed a desire to ignore the immunity doctrine, because of the fallibility of the grounds on which it rests. Others have indicated that they would like to see it changed, but prefer to see it done by statute. In some of the court decisions the immunity doctrine has been saved by margins as narrow as one vote. Some of the dissenting opinions have been rather harsh in the condemnation of the protection given subdivisions of the states.

The save harmless laws were considered to be a great boon to the teacher's position, financially and professionally. While some authorities have expressed a fear that the save harmless laws would be abused by negligent teachers, that relationship between employer and employee has existed

in the business world for years with no apparent damage. The improvement that would be made in the teacher's position would, in all probability, offset any abuse of the law.

The states that have, by statute, refused to accept immunity for themselves and their subdivisions were noted. Attention was given to the advantages of accepting governmental immunity. One outstanding disadvantage noted was the lack of a ceiling on the amount school districts could be sued.

Conclusions

Some conclusions which Montana should consider concerning liability legislation follow.

Since the judicial divisions of so many states have cast doubt upon the security of the immunity doctrine, Montana should, in the opinion of the writer:

1. Re-examine its position.
2. Allow school districts to retain government immunity while carrying out the instructional program of the state.
3. Pass statutes making it possible for school districts to save their personnel harmless in case of suit against them for acts done while carrying out their duties for the district.
4. Place a limit on the amount of liability for which the districts can be sued.
5. Protect school board members from suit individually, save as they already are subject to suit for malfeasance.

Recommendations

1. That the Montana legislature of 1959 study the possibility of enacting a "save harmless" law for the protection of its teachers.
2. That they consider thoughtfully the immunity of Montana and its subdivisions for torts committed while not engaged in governmental business or duties.

Suggested Liability Legislation For Montana

Below is a proposed "save harmless" law copied almost verbatim from New York legislation, which was followed extensively by New Jersey in 1938, and Connecticut in 1945, and which might well serve Montana's needs.

Liability of a board of education, trustee, or trustees; Notwithstanding any inconsistent provision of law, general, special, or local, or the limitation contained in the provisions of any city charter, it shall be the duty of each board of education, trustee, or trustees, in any school district . . . to save harmless and protect all teachers and members of supervisory and administrative staff from financial loss arising out of any claim, demand, suit, or judgment by reason of alleged negligence or other act resulting in accidental bodily injury to any person within or without the school building, provided such teacher or member of the supervisory or administrative staff at the time of the accident or injury was acting in the discharge of his duties within the scope of his employment and/or under the direction of said board of education, trustee, or trustees; and

said board of education, trustee, or trustees may arrange for and maintain appropriate insurance with any insurance company created by or under the laws of this state, or in any insurance company authorized by law to transact business in this state, or such board, trustee, or trustees may elect to act as self-insurers to maintain the aforesaid protection.¹

Limitations: These laws shall not be so interpreted so as to extend death benefit payment beyond \$10,000 for any one person, nor all payments for any one person beyond \$25,000 for hospital, medical, and doctor bills, loss of time and death benefit, nor will all payments for any one accident extend beyond \$100,000 for all persons involved.

That this law can not be interpreted by the courts so as to endanger the board of education members, trustee, or trustees, individually, except as they are already responsible in other statutes or laws.

That this law cannot be interpreted by the courts so as to take away Montana school districts immunity from suit when carrying out statutory directives to instruct the children of the community.

¹New York Education Law, section 3023, 1949.

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