



Development of school district immunity doctrine
by Henry Keating DuGarm

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Abstract:

The purpose of this study was to provide a better understanding of the school district immunity doctrine by showing the development of the doctrine from earliest times to present and its development in American law as applied to education and its educational implication.

Four main procedures used in the investigation were: (1) The use of legal textbooks for tracing the development of the immunity doctrine from earliest times to present. (2) The use of cases for tracing and discovering the development and present status of the immunity doctrine. (3) An examination of cases and legal writings from 1812 to the present to discover, if possible, trends with educational implication. (4) The study of cases to see if there was a clue for a plan to be made that would give protection to the school district, district employees, and student.

Sovereign immunity was the legal doctrine of the English common law that held that the king or state could not be sued for the torts (wrongs) of its servants. This doctrine was later applied to municipalities and school districts and is commonly called the immunity doctrine. This doctrine was first applied to municipalities in *Russell v. Men of Devon*, 100 Eng. Rep. 359 (1788), an English case. In 1812 the doctrine was applied to municipalities in an American court when the *Russell* case was used in *Mower v. Inhabitants of Leicester*, 9 Mass. 247, by the Massachusetts Supreme Court. The doctrine was regularly applied to school districts by American courts until the early twentieth century when there was a trend to modify the doctrine by state courts and legislatures. By the 1950's and 1960's this trend has grown so that there was much confusion concerning what had been a long time rule of law; that is the school district immunity doctrine.

The following conclusions were made: (1) The school district immunity doctrine is a common law doctrine extending the sovereign immunity of the state to school districts. (2) The present status of the doctrine is confused. (3) There is a trend toward modification but the majority of the states still adhere to the doctrine. (4) Many state courts adhere to the doctrine because they feel the legislatures should change the law. (5) It was concluded that some change was needed to unify the doctrine.

It was recommended that a model law be drawn that would make clear the status of the immunity doctrine, provide for the purchase of liability insurance by school districts to protect school funds, and provide fast and equitable relief from tort losses for the victims of school accidents.

DEVELOPMENT OF SCHOOL DISTRICT IMMUNITY DOCTRINE

by

HENRY KEATING DUGARM

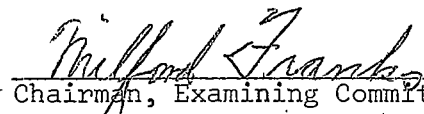
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H. K. D.

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ABSTRACT

The purpose of this study was to provide a better understanding of the school district immunity doctrine by showing the development of the doctrine from earliest times to present and its development in American law as applied to education and its educational implication.

Four main procedures used in the investigation were: (1) The use of legal textbooks for tracing the development of the immunity doctrine from earliest times to present. (2) The use of cases for tracing and discovering the development and present status of the immunity doctrine. (3) An examination of cases and legal writings from 1812 to the present to discover, if possible, trends with educational implication. (4) The study of cases to see if there was a clue for a plan to be made that would give protection to the school district, district employees, and student.

Sovereign immunity was the legal doctrine of the English common law that held that the king or state could not be sued for the torts (wrongs) of its servants. This doctrine was later applied to municipalities and school districts and is commonly called the immunity doctrine. This doctrine was first applied to municipalities in *Russell v. Men of Devon*, 100 Eng. Rep. 359 (1788), an English case. In 1812 the doctrine was applied to municipalities in an American court when the *Russell* case was used in *Mower v. Inhabitants of Leicester*, 9 Mass. 247, by the Massachusetts Supreme Court. The doctrine was regularly applied to school districts by American courts until the early twentieth century when there was a trend to modify the doctrine by state courts and legislatures. By the 1950's and 1960's this trend has grown so that there was much confusion concerning what had been a long time rule of law; that is the school district immunity doctrine.

The following conclusions were made: (1) The school district immunity doctrine is a common law doctrine extending the sovereign immunity of the state to school districts. (2) The present status of the doctrine is confused. (3) There is a trend toward modification but the majority of the states still adhere to the doctrine. (4) Many state courts adhere to the doctrine because they feel the legislatures should change the law. (5) It was concluded that some change was needed to unify the doctrine.

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CHAPTER I

INTRODUCTION

In spite of the fact that the immunity doctrine has been established in this country for years, cases in this area are becoming more and more numerous every year. The general rule as fixed by judges and textbook writers and reported by Hamilton is that: "Since school districts are instrumentalities of the state, and the state is immune from suit unless it consents, the state's immunity extends to the district."¹ The immunity doctrine refers to the field of law called tort. A tort is a civil wrong caused by negligence for which damages may be collected. For instance, if a person slips on a slippery floor this might be a tort if the owner responsible was negligent. School districts can not be sued for such negligent acts because, as organs of the state, they can not be sued. This is called the immunity from tort doctrine, or simply, the immunity doctrine.

There is at the present time great concern about the immunity doctrine. The general rule as stated boldly in case after case does not seem difficult. The doctrine is well known and is the law in most states. Why, then, is there great concern?

The reason is that the doctrine is in the process of change. This change is what makes this whole subject complicated. When any long established doctrine in the field of law is changed, there is, by the very nature of change, confusion. This remains until another doctrine takes

¹Biweekly School Law Letter, R. R. Hamilton, Editor, March 1, 1954.

its place. If the change is desirable and acceptable, a new doctrine is developed and the confusion ends. Sometimes this process of change is long and years are required to establish a new doctrine. Lawyers do not like the uncertainty caused by change. The nature of law makes it highly desirable that certain guide lines be kept so that lawyers know where they stand. If lawyers become confused, the plight of the layman who is trying to make sense out of the doctrine is critical.

The doctrine now is being changed by several different processes. In some states, most notably California and Washington, the change was made by legislative action backed by the courts. In other states, Illinois for instance, courts have taken action on their own and made changes in the doctrine. Some legislatures have been reluctant to see courts act on the doctrine and have taken action to prevent such a move. Minnesota is a good example of this sort of action. Other states have allowed school districts to purchase liability insurance and be liable for the amount of the insurance. Still other states have taken the immunity doctrine off for certain actions but left it operative for others.

It has not been only the reluctance of some legislatures to take action on this doctrine that has caused confusion; there has been much confusion in its application. Some courts have divided the functions of school districts into two parts, governmental and proprietary. The line between the two types of functions are far from clear, and courts often are in complete disagreement as to what is proprietary and what is governmental. Courts that try to follow this rule in applying the immunity doctrine have held that when the school was engaged in its governmental

functions it was immune from lawsuits resulting from negligent actions of its employees, but when it was engaged in strictly proprietary functions there was no immunity and regular rules of tort law took over.

There can be no doubt that changes are occurring in the immunity doctrine. Legal concepts, which can rise to a very high philosophical level, do not change quickly. Case after case is decided today on the basis of the immunity doctrine without any apparent change in the attitude of the court. This is because of the ancient doctrine of stare decisis. This doctrine means the court will stand by decided cases, keep precedents, and maintain former adjudications. This doctrine rests firmly on the principle that the law by which men are governed should be fixed, definite, and known; and that when the law is declared by a court of competent jurisdiction authorized to construe it, this should, in the absence of error or mistake, be the law. This is not to say that this doctrine is slavishly adhered to. If it were there would be no changes in the law. The law would be static. It does mean, however, that court-made law does not and will not change as rapidly as other fields of human endeavor.

In California the immunity doctrine has been expressly abrogated by statute. In Washington it has been abrogated to a certain extent by broad interpretation of a statute that was rather vague in some of its language and was rather sweeping in the scope of its application. New York has abrogated the doctrine by various court actions which step by step were completed by the decision in *Domino v. Mercuria*, 234 N. Y. S.,

2d 1011, (1962), which ended the doctrine.² Before this decision was reached in an Appellate Division of the Supreme Court of New York, liability had been limited to damages caused by the negligent school boards and had not been extended to the negligent acts of district employees such as teachers. Under this case employees of school districts are also held liable and unless this case is reversed by the New York Court of Appeals, the immunity doctrine is void in the state of New York.³

In addition to California, New York, and Washington, a few other states have modified the immunity rule. Alabama has created a State Board of Adjustment to consider claims for damages done by the state or any of its agencies, commissions, boards, institutions or departments.⁴

In Mississippi, no more than \$5,000, exclusive of court costs, may be recovered by a school pupil for accident or injury resulting from the negligent operation of any school bus.⁵

In North Carolina, the State Industrial Commission was constituted a court by statute for the purpose of hearing and passing upon tort claims against the State Board of Education, the State Highway Commission, and all other departments, institutions and agencies of the state.⁶

In some states the immunity rule may be modified by indirect action:

²Ibid., Vol. XIII No. 11, August 1, 1963.

³Ibid. p. 2.

⁴Robert R. Hamilton and Paul R. Mort, The Law and Public Education, p. 206.

⁵Ibid. p. 207.

⁶Ibid. p. 209.

through the operation of what have come to be called "save harmless" statutes. Laws of this type either authorize or require school districts to defend at district expense suits which are or may be brought against teachers as a result of damages caused by their allegedly negligent acts. Under laws of this type districts also are required to pay any judgment which may be rendered against them and for the cost of defending the action. Among states having such statutes are Connecticut, New Jersey, and Wyoming.⁷

However, the most dramatic changes in the immunity doctrine are found in the few but important cases that have completely abrogated it. The first case in this series was *Molitor v. Kaneland Community Unit District No. 302* which is cited as 163 N.E. 2d 89. This Illinois case abrogated the immunity doctrine without any thought for legislative action. This case was followed by *Holytz v. City of Milwaukee*, 115 N.W. 2d 218, where the Supreme Court of Wisconsin expressly abrogated the doctrine. In *Spanel v. Mounds School District No. 621*, 118 N.W. 2d 279 (1962) the doctrine was abrogated in the state of Minnesota. The Minnesota case was overruled by the legislature in 1963 and district immunity was restored.

The effect of the immunity doctrine on education has been very difficult to determine. The head of an educational institution does not set up his curriculum with the view in mind that he or the district might be sued. However, in areas where the cases have been decided, and

⁷Ibid. p. 289.

more and more school cases are going to court, education has been affected tremendously.

Schools are getting larger and larger and activities such as athletics, school lunch programs, bussing children longer and longer distances, field trips, concerts and related school functions are becoming more and more complicated and as a result schools are being brought into the legal arena more and more. They are expected to do things today that would have been unbelievable even a few years ago. With the increase in any human activity the chances of an accident increases. Along with the growing incidences of tort liability in other walks of life, more and more school cases are coming to court involving both personnel and districts. People in the United States are becoming more aware of their legal rights in the fields of law including tort law. They can, and indeed should, assume that their children are well-supervised at school; that they are in a safe environment. When a tragic situation arises and the shocked parent finds his child has not been safe, he wants to find out why, and seeks a legal remedy.

As cases come before the courts throughout the nation, more changes are bound to be made. As these changes occur, school districts have to accommodate themselves to the decisions of the courts. California is the only state that has held school districts completely liable by action of the state legislature, and the resulting changes in the running of schools in California have been tremendous. These have been mainly in the extra care taken to make sure that the students are protected from the negligence of the school district and/or their employees.

Very few school men have taken the possibility of legal action into consideration in preparing their school curriculums for the simple fact that this possibility seldom, if ever, arose. Today this situation has changed dramatically.

To sum up the situation that faces the school men and women today the following statement can be made. Schools are getting larger and activities, such as field trips, bussing school children long distances, school lunch programs and other related school programs, are becoming more and more complex and the possibility of accidents involving district employees and the consequent possible legal action becomes more than a mere freakish occurrence. Possible legal action becomes a fact of life. No longer can school administrators assume that school district immunity will always be the law as this law is in the process of change.

Chances for accidents are greatly increased in schools because they are getting larger and the activities are more varied and complicated. Because of this fact, school men can easily find themselves and their school districts involved in lawsuits as a result of an alleged tort committed by the district or one of its employees. For these reasons it was felt that a study should be made that would give a better understanding of the immunity doctrine, its status, and its implications for the school administrators.

Purpose of This Study

The purpose of this study was to provide a basis for a better understanding by the schoolman of the immunity doctrine by: (1) showing how

the immunity doctrine evolved from the Anglo-American common law from the earliest times to the present, (2) showing its development in American law as specifically applied to American education, and (3) determining the trends in the direction the immunity doctrine might take with attention as to the implication for the future of American education.

Procedures

The procedures used in this study were the usual investigative ones used in the field of law. They have involved the use of legal textbooks, the study of the work of experts in the field of school law, and the study of cases showing the trends with implications for the future operation of educational systems in the United States. The four procedures used may be summed up in the following four propositions:

1. The use of legal textbooks and cases for tracing the development of the immunity doctrine from ancient times to the present. Only by following the evolution of the immunity doctrine can the interested person understand its present status.

2. The use of cases for tracing the development and present status of the immunity doctrine in the United States.

3. An examination of cases and legal writing from 1812 to the present time, but with more emphasis on cases since the early 1950's, for the purpose of discovering trends that might have important implications for educational planning in the United States.

4. A study of the trends of the cases concerning the immunity doctrine to find a clue that might enable a plan to be made that would

give protection to the school district, district employees, and more especially the student.

To enable the educator to understand better the immunity doctrine, the second chapter reviews the development of the common law and the beginnings of the immunity doctrine in Great Britain and the United States.

CHAPTER II

HISTORICAL DEVELOPMENT OF THE IMMUNITY DOCTRINE

The immunity doctrine had its beginnings in early English history. When law was in its infancy all wrongs were private and were dealt with by the family of the person wronged. Everyone in those days belonged to a family. If by some freak of chance he did not belong to a family he was in actuality a "non-person." Naturally feuds were common and the most powerful families always made their will prevail. With rise of powerful kings wrongs became divided into two categories: public and private wrongs. Public wrongs were deemed to be wrongs against the king and punishable by his judges in courts set up for this purpose. Private wrongs eventually went into the king's court and became known as "torts" or "wrongs." The customs of the communities and the rules laid down by judges in court cases became generally recognized as the basis for deciding cases. These customs and rules became known as the "common law." This study has been concerned with the immunity doctrine. This doctrine is a common law doctrine applied in the field of tort law. It would be wise for the reader to keep in mind the general definition of a tort.¹

Prosser defines a tort as follows: "A tort is a civil wrong, other than a breach of contract, for which the court will provide a remedy in the form of an action for damages."² This is the general

¹For the development of this chapter the writer has made extensive use of Radin on Anglo-American Legal History, West Publishing Co., St. Paul, Minn. and Hall, James Parker, American Law and Procedure, Vol. I.

²Prosser, William L., Handbook of the Law of Torts, p. 2.

definition usually given for a tort and is accurate enough for the purpose of this study.³ However, the field of torts is a large and technical field of law, and no single definition has been found that would cover all aspects of this body of law.

For the reader who wishes a more comprehensive understanding of the law of torts, any of the general texts listed in the bibliography will be of value.⁴ The "field of torts" is only a particular area under the general mass of principles, legislation, court decisions, and customs that we call law.

As defined by the Random House Dictionary of the English Language, law is "...the principles and regulations established by a government and applicable to a people, within the form of legislation or of custom and policies recognized and enforced by judicial decisions." This is a good definition as it defines law as not only regulations established by a government but also as regulations established by custom. To put it another way, law is a rule of human conduct enforced by the state.

The reason this definition is given and will be the one used in this study is that the term law is used for many different things. We speak of economic laws, laws of nature, laws of God, moral laws, laws of logic, as well as the laws of man.⁵ The law that concerns this study is

³For legal terms please see the Glossary of Legal Terms, Appendix D. at the end of this study.

⁴Professor Prosser's Handbook of the Law of Torts gives a comprehensive overview of the law of torts and is considered a classic in this field.

⁵Hall, op. cit. p. xxii.

the Anglo-American common law which is the law of man.

To explore the development of the common law and hence of the immunity doctrine, one must first look into Anglo-American legal history.

Common Law Development in England

Of the two great systems of law belonging to the civilized world, that is Roman or civil law and the English common law, the most ancient is Roman law. It was a very highly developed form of law well adapted to a civilized community interested in progress and justice. When the Roman Empire fell to pieces in the middle ages under the attacks of less civilized neighbors, the barbarian tribes adopted to a degree the Roman law. Napoleon adapted the Roman law in his Code Napoleon and in this form Roman law has become, in general, the law of continental Europe. All of the states in the Union, with the exception of Louisiana, have based their law upon the Anglo-American common law. Other countries that are English in origin have also adopted the English common law.

Early Influences Affecting English Law. Although Rome conquered the island of Britain in the first century of our era and held it in a high degree of civilization for about three hundred years, very little of Roman law, or, indeed, Roman civilization lasted for very long. This was due to the invasions of the Jutes, Anglos and Saxons. The contest between the British and the invaders was so bitter that the former were almost exterminated, and with them perished the ancient British laws and customs as well as the veneer of Roman civilization. For this reason, English law from the time of the Anglo-Saxon conquest developed quite free from the

Roman influences that so thoroughly displaced the Teutonic laws of the conquering Northmen of the continent. Whatever influence Roman law had upon the English system came at a much later date.⁶

For two and a half centuries after the conquest of Britain, about 700 A.D., the Teutonic invaders were divided into a number of rival warring kingdoms. At first seven such petty kingdoms emerged, later diminished to three, and finally united into the single kingdom of Wessex in 828. About this time the Danes began to harry the kingdom by coming in private ships from the Scandinavian peninsulas; and, after a struggle of varying fortunes, the Danes became rulers of England in 1013.⁷

The Anglo-Saxons and their kinsmen were a fierce, independent, liberty loving people, not readily subjecting themselves to any centralized government. This tendency toward separation was increased by the strife between their kingdoms in Britain. The whole Anglo-Saxon and Danish period was marked by the growth of an immense variety of local customs in England that had some similarity but which prevented the formation of a true national law. A considerable number of collections of laws of the various kingdoms at different times have come down to us.

The earliest of these, the law of Ethelbert, king of Kent, was put in writing about the year 600; and most of the important rulers between then and the Norman Conquest of 1066 also published sets of laws in their names such as the laws of Inne, Offa, Alfred, Edward the Elder,

⁶Radin, op. cit. pp. 1-2.

⁷Hall, op. cit. p. xxii

and the Danish King Canute.⁸

These written laws did not deal much with matters of private right except in instances of preservation of the peace. Private feuds were frequent, and legislation strove to compel the acceptance of money damages in place of private vengeance. Private law doubtless depended largely upon local custom.⁹

Gradually decentralization of the law gave way to a more centralized application of the law, and private rights began to find a place in the written laws. These slow reforms led to the rise of the great Anglo-Norman Kings who gave much attention to the centralization of the law.

To summarize the affect of early influences on English law it can be said that English law developed independently of Roman law and civilization; and that local customs gradually gave way to centralization which in turn led to the great reforms of the Norman kings.

Great Legal Reforms of the Anglo-Norman Kings. Immediately after the Norman Conquest of 1066, the Normans introduced a centralized administration over fiscal, military, and judicial matters very foreign to Anglo-Saxon rule. The feudal system was greatly strengthened and elaborated by the Normans. The confiscation of estates made by King William enabled him to make grants of land to his followers upon terms binding them into a compact feudal organization. Commissioners were sent out to find the exact value of the conquered lands and to claim revenue for the crown.

⁸Ibid. p. xxiii.

⁹Radin, op. cit. p. 107.

These particulars are recorded in the famous Domesday Book.¹⁰ Even the church and its holdings were made dependent upon the crown. English laws and customs were respected and confirmed even though the local courts were subjected to the jurisdiction of the king's courts which heard appeals from them. This naturally tended toward unification of the law.

The first truly great English legislator was Henry II. In 1154 he became king of England and ruled for thirty-five years. This most interesting man had both industry and brains. More interested in the administration of his immense holdings, that included a good part of France, than in abstract justice, he set out to make some great reforms. He endeavored, with some success, to draw the line between the jurisdiction of the temporal and the ecclesiastical courts in order to retain in the royal hands the power necessary for a strong national government. Better remedies were provided for land holders in the king's courts, so the actions concerning the possession of lands were usually brought there instead of to the local courts which tended to produce a really uniform national law upon the subject of land ownership. This was by far the largest class of lawsuits during this period. He also introduced the practice of having the judges of his courts go upon regular judicial circuits throughout the country so that the common law would be enforced uniformly all over England by a single body of well-trained lawyers. The development of the jury system and the deepening of legal records were probably started during this great reign.¹¹

¹⁰Hall, op. cit. p. xxii.

¹¹Hall, op. cit. p. xxiv.

One noteworthy achievement of Henry's reign was the extension of criminal law so that deeds of violence were regularly punished in the royal courts by action of the crown in place of by mere private vengeance, or even by an accusation brought by the person wronged.¹²

Edward, the "English Justinian," was another great legislator. He completed the judicial reforms begun by Henry II during his reign from 1272 until his death in 1307. Under his direction, the King's court was definitely separated into three courts of law; the King's bench, the common pleas, and the exchequer. The King's bench had jurisdiction over criminal cases, controlled various royal officers, and had a civil jurisdiction over all actions where there was a breach of the peace. The common pleas was the court of general jurisdiction for actions between private persons. The exchequer originally dealt with cases concerning the revenue of the crown. The chancellor also had separate judicial powers which we know today as equity.¹³

The statute of Westminster I was the most important legal event in Edward's reign. The statute provided for new forms of remedy in the royal courts for causes of action not included under the old writs. It also provided for Parliament, in something like the present form, to be the regular legislative body of the kingdom.

Other important legal statutes were also passed during Edward's reign. Frederick Maitland, an authority on the English Constitution,

¹²Ibid. p. xxv.

¹³Ibid. p. xxvi.

has said that the importance of Edward's statutes was that they interfered in countless ways in the ordinary course of law of the time between subjects and that his statutes made vast changes in the law which remained unchanged for centuries.

The main characteristic of Edward's statutes is that they interfered at countless points with the ordinary course of law between subject and subject. They do more than this...many clauses of the greatest importance deal with what we should call public law...but the characteristic which makes them unique is that they enter the domain of private law and make vast changes in it. For ages after Edward's day, king and parliament left private law and civil procedure, criminal law and criminal procedure pretty much to themselves...We may turn page after page of any statute book from the fourteenth to the eighteenth centuries, of property, or the law of contracts, or the law about thefts or murders, or the law as to how property may be recovered or contracts may be enforced, or the law as to how persons accused of theft or murder may be punished.¹⁴

During the reign of Henry VIII an attempt was made to change the common law of England to make it conform more closely to the Roman law. The Roman law by this time was well established on the continent and better fitted Henry's despotic temperament. He found great opposition to this policy. This was due largely to two things. One was the Englishman's love for the common law; another was the fact the English lawyers were highly trained in the common law and were not to be put down by the imported lawyers trained in Roman law.¹⁵

The Stuart period brought about the downfall of the doctrines of

¹⁴Maitland, Frederick W., Constitutional History of England, 1931, p. 212.

¹⁵Radin, op. cit. p. 168.

the "divine right of kings" and the "king can do no wrong" once and for all. The important event of the 17th century was the great statute call the Bill of Rights enacted on the accession of William and Mary to the throne in 1688¹⁶. By this act and the Act of Settlement a few years later all power was taken from the crown to tax, to interfere with existing laws, or to control the administration of justice by removing judges.

To summarize: it can be said that it was the intervention of the Anglo-Norman kings with their reforms that changed English law into the English Common Law that we know today. Henry II (reign began 1154), the first great legislator, provided reforms that led to the unification of the Common Law. Edward I (1272 until 1307) finished Henry II's work and established the Common Law about the way we know it today. Henry II and Edward I did their job so well that when Henry VIII wished to establish the Roman Law in England he ran into wide-spread resistance upon the part of common law lawyers and had to give up the attempt. The Stuarts, with their "divine right of kings" also attempted to subvert the English Common Law but they were defeated also because of the opposition of common law lawyers.

Growth of Judge-made Law and the Rise of the Common Law. Because of the difficulty of getting legal reforms passed in Parliament, common law judges made reforms on their own. These great judge-made reforms kept English justice a by-word in the countries of Europe even when its politics were corrupt and the social system aristocratic and selfish.

¹⁶Ibid. p. 170.

From the time of Edward I until well into the nineteenth century, a period of five hundred years, the English law of private rights, other than those concerning the transfer of real property, was very little affected by legislation. It was altered slowly from generation to generation as legal precedents were clipped or expanded to meet the more pressing social needs and changes. In many important particulars the law of private rights changed very little during this long period. The harshness of the criminal law and the technical procedure used in civil suits increasingly lessened the efficiency of the common law. But for the system of equity, which had a large development in the latter part of this period, some of the legal reforms of the nineteenth century would have, of necessity, come much earlier.¹⁷ When legislatures met regularly and many laws were passed the necessity for judge-made law was not so great.¹⁸

The term common law is still widely used today in the legal profession. It is important to know what this term means for several reasons. One reason is because the common law is used to interpret cases and define legal terms not found in state statutes. Another reason is that in cases where a legal situation arises that is not covered by a statute most states hold by statute that the common law will prevail and will be used as a basis for deciding such a case. Louisiana is one state where this rule does not pertain because the basis of their legal system is not the common law but is the Roman or civil law.

¹⁷Ibid. p. xxx.

¹⁸Ibid. p. xxxi.

The following definition of common law is the one that is most often used in a general sense. In its widest sense the term common law is used to contrast the entire system of English or Anglo-American law with other great systems, usually the Roman or civil law. In this sense it includes not merely all unwritten laws, but such statutes as have been generally enacted in jurisdictions where it prevails and are so interwoven with the general principles of the unwritten law as to form a unified whole.¹⁹

Blackstone (1723-1780) spoke of the common law as the lex non scripta or the unwritten law.²⁰ Amendment VII of the Constitution of the United States refers to the common law but does not define it. The reference made follows:

In suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury shall be otherwise re-examined in any court of the United States, than according to the rules of common law.²¹

Mr. Justice Story referred to the Common Law in *Van Nees v. Pacard* (1829) when he said, "Our ancestors brought with them its (the common law) general principles, and claimed it as a birthright: but they brought with them and adopted that portion which was applicable to their situation."²²

¹⁹Ibid. pp. xvi, xvii.

²⁰Blackstone, Sir William, Commentaries on the Laws of England, Vol. I, p. 9.

²¹Article VII, Amendments, Constitution of the United States.

²²27 US 157, 1 pet. 137, 144.

To sum up this period of the growth of judge-made law and the rise of the common law it can truly be said that for a period of five hundred years the English law, except for some instances concerning the transfer of real property, was very little affected by legislation. The common law became increasingly inefficient over the years and would have broken down entirely but for the fact that judges made reforms and developed equity, a field of law that gave relief from injuries that the regular law could not provide. Thus it was judge-made laws that provided justice and reforms and made common law justice a by-word in Europe and the civilized world.

The beginnings of the immunity doctrine are found in the old common law cases. The first common law case that mentioned the immunity doctrine in England was *Russell and others v. Men of Devon*. As so often happens, in the common law a new situation arose for which there was no answer to be found in the precedents so the common law judges had to improvise and state what became a new common law rule. This rule we know today as the immunity doctrine.

Beginnings of the Immunity Doctrine

When judges set new precedents they are actually making new laws. The *Russell* case became precedent in England when they invented the immunity doctrine. As a result of this English case the doctrine became entrenched in the Anglo-American Common Law. *Ephraim Mower v. The Inhabitants of Leicester* in particular shows the nature and the strength of the immunity doctrine and its origins in the Anglo-American Common Law.

This case and other important cases will be reviewed to show how the immunity doctrine became so entrenched in American jurisprudence. The Russell and Mower cases are very good examples of judicial law-making.

Russell and others v. Men of Devon and Its Influence upon the Immunity Doctrine. In this case a certain Russell sued all the inhabitants of Devon because of damages occurring to his wagon. The cause of the damages was a defect in a bridge that was in need of repair. The immunity of the state was extended to a municipality as a result of this case. Lack of precedent, fear of an infinity of actions and no corporate funds to pay a judgment were the main reasons given for the decision. An excellent account of this old English case is given in a modern Minnesota case, *Spanel v. Mounds View School District* from which the following quotation is taken.

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 structure. 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 principle which permits a remedy for every injury resulting from the neglect of another, a more applicable principle is "that it is better that 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." There is

no mention of the "King can do no wrong," but on the contrary it is suggested that 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 sub-merged in the convenience of the public. No moral, ethical, or rational reason is advanced by the court except the practical problem of assessing damages against individual defendants.²³

This quotation was taken from a modern American case because it explains the grounds for the decision in *Russell v. The Men of Devon* extremely well. This was a very unusual case. The idea of municipal corporate entity was still in a very nebulous state.²⁴ One of the main problems was to decide whether the county as a unit could be sued. It almost seemed as if the immunity doctrine was extended to the county because the justices could not decide what to do with the case. The responsibility to keep the bridge in good repair was not denied by the defendants. In addition to the lack of precedent and the fear of an infinity of actions, the decision was based on the fact that there were no corporate funds out of which satisfaction could be obtained.²⁵

The *Russell* case was later overruled by the English courts in 1890 by *Crisp v. Thomas*, 65, LTNS, 756. In this case it was definitely established that in England a school board or school district was subject to suit in tort for personal injuries on the same basis as a private individual or corporation.²⁶

²³*Spanel v. Mounds View School District*, 118 N.W. (2d) 799 (Minn.).

²⁴*Prosser, op. cit.* p. 1004.

²⁵*Ibid.* p. 1004.

²⁶*Molitor v. Kaneland Community Unit District No. 302*, 163 N.E. 2d 89.

It is interesting, in view of the fact that one of the main criticisms of the immunity doctrine was that it was based on the medieval doctrine, "the king can do no wrong," that this idea was not even touched upon in the very beginning of the development of the doctrine. The court suggested that the county might be sued and also that the legislature was the place to find redress for damages suffered. It was the reluctance of American courts to "inconvenience the public" and to use public money for the payment of private damage claims that caused this doctrine to play such an important role in American tort law. Powerful arguments for and against the doctrine can be made.

To summarize the Russell case: the first attempt to attach the immunity from law suit of the state to a corporate entity was in the Russell case. Corporate entity was in a very nebulous state and the judges apparently did not feel they could properly sue such a nebulous corporation. The decision was made because of fear of many similar actions, lack of precedent and lack of corporate funds from which to pay a judgment. Thus the immunity doctrine was born from an obscure English case. Though overruled in England, it was destined to have a hardy life in the United States.

When confronted with a new situation judges wanted a precedent upon which to base their decisions. When a similar situation such as the Russell case arose in the United States the judges looked to England for a precedent. In Massachusetts, one of the leading states in 1812, such a case arose. In *Ephraim Mower v. The Inhabitants of Leicester*, 9 Mass. 247, the Massachusetts judges looked to England and in so doing made

Russell v. Men of Devon a precedent case in a principal jurisdiction and put the immunity doctrine in the common law of the United States.

Influence of Ephraim Mower v. The Inhabitants of Leicester on the Immunity Doctrine in the United States. The American legal system early took what it wanted from the English common law and left what it did not want. When early American judges found themselves faced with unusual situations, they naturally fell back on what the courts in the "old country" did. Such was the circumstance that brought about the Mower case. This was the first case in American jurisprudence that extended the immunity doctrine to quasi-corporations.

In Ephraim Mower v. The Inhabitants of Leicester, 9 Mass. 247 (1812), Mower owned a public stage coach which was constantly passing and repassing over a highway in the Town (township) of Leicester, Massachusetts. The inhabitants of the Town of Leicester were required by law, according to the declaration, to keep in repair that part of the highway that passed through the town. In crossing a bridge, one of Mower's horses fell into a large hole and died of its injuries. Mower's horse was one of several pulling his stage coach. The coach had crossed and recrossed the bridge many times in the course of taking passengers over the town road. It was alleged by the plaintiff that the negligence of the defendants was the sole cause of the accident and asked for damages in the amount of one-hundred and twenty dollars.

The plaintiff denied that the Russell case controlled in this situation. The main objections raised were that the town being sued was a corporation and could sue and be sued. The town also had a treasury out

of which a judgment could be paid and the individuals called upon to pay the judgment had their remedy against the corporation. The basis for the plaintiff's argument are given in the following quotation from defense counsel in the case itself.

None of the objections, which prevailed in the action of Russell & al. v. The Men of Devon..., apply in this case. Here the town are a corporation created by statute, capable of suing and being sued. They are bound by statute to keep the public highways in repair. They have a treasury out of which judgments recovered may be satisfied. They are called upon to answer only for their default. The objection, that a multiplicity of actions would be the consequence of levying the execution on one or more individuals of the town, can have no effect here; since it would equally apply to every action against a town or parish, and yet such actions are every day brought and supported without hearing of this objection. Besides, individuals so situated have their remedy over against the corporation for the sum paid by them; and are not put to their action against each inhabitant for his several proportions, as is the case of an English county.²⁷

The defendants argued that the Russell case was part of the law at this time. In the following quotation the counsel for the defendants argued that the Russell case expressly put counties and towns in England upon the same footing as counties and towns in Massachusetts.

The case of Russell & al. v. The Men of Devon has received the full consideration of this court in the case of Riddle v. The Proprietors of the Locks and Canals on Merrimack River..., and the court there expressly put counties and towns in this commonwealth, in relation to the question agitated in the case before the court.²⁸

The defendants also argued that negligence had to be proven before they

²⁷Ephraim Mower v. The Inhabitants of Leicester, 9 Mass. 247 (1812).

²⁸Ibid. P. 4.

could be held liable and that this was not even charged in the action.²⁹

The court held that the Russell case applied and thus became the first leading court to apply the immunity doctrine to American law. The following statement of the court reveals not only the reasoning of the court in making the Russell case part of the common law of Massachusetts and finally most of the states, but also is a good example of judicial law-making.

curia. The plaintiff has brought his action against the inhabitants of the town of Leicester for the loss of his horse, occasioned by the neglect of that town to keep a certain bridge in repair. The action is at common law, without alleging any notice to the inhabitants of the defect in the bridge, previously to the incurring of the damage by the plaintiff.--But it is well settled that the common law gives no such action. Corporations created for their own benefit stand on the same ground, in this respect, as individuals. But quasi corporations, created by the legislature for the purposes of public policy, are subject by the common law, to an indictment for the neglect of duties enjoined on them; but are not liable to an action for such neglect, unless the action be given by some statute. The only action furnished by statute in this case is for double damages after notice, & c.--This question is fully discussed in the case of Russell & al. v. the Men of Devon, cited at the bar, and the reasoning there is conclusive against this action.³⁰

So it happened the Mower v. The Inhabitants of Leicester established the immunity doctrine in the common law of one of the principal states of the Union. As the principle of immunity became established as far as towns and counties were concerned it was not long before the same principle was extended to cover school districts. The reasons given for this extension were the same reasons given in the Russell case. These

²⁹Ibid. p. 6.

³⁰Ibid. p. 9.

reasons were: (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) no funds were available to pay a judgment; (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) there was reluctance to inconvenience the public.

The state of Illinois was typical of the way the doctrine was established in the individual states. The rule laid down in *Russell v. the Men of Devon* was adopted by *Town of Waltham v. Kemper*, 55 Ill. 346, decided in 1898, eight years after English courts refused to apply the Russell doctrine to schools. In this case the Illinois court extended immunity to school districts. In *Kinnare v. City of Chicago*, 171 Ill. 332, 49 N.E. 535, it was held that the Chicago Board of Education was immune from liability for the death of a laborer resulting from a fall from the roof of a school building, allegedly due to the negligence of the board in failing to provide scaffolding and safeguards.

To summarize the influence of the Mower case it was this: case adopted the Russell rule and applied it to a leading legal jurisdiction in the United States. As a result of this decision the immunity doctrine was firmly established in American common law by most of the states.

The Effect of Judicial Law-making and the Doctrine of Stare Decisis on the Immunity Doctrine. When judges find themselves confronted with a new situation they have to improvise occasionally. They sometimes have to create a new rule as they did in the Russell case. When a new rule is accepted this is judge-made law. When a high court creates a rule

or "makes" law the ancient doctrine, stare decisis becomes important. This doctrine means abide with what has been decided. It is because of the doctrine of stare decisis that lower courts are very reluctant to go against the ruling of upper courts and this fact makes changing the law a very slow process.

Law as enforced in the courts may be derived from custom, from legislation, or from judicial precedent. The purpose of this section is to discuss law-making by judicial precedent.

A court must decide in one way or another each case brought before it, and it must decide according to some general rule the quality that distinguishes law from individual whim.³¹ In deciding a case, the judge or judges try to tie the case in with some acceptable custom, properly proven; or it may find the rule in some act of legislation, ranging all the way from a constitution to a municipal ordinance or the rules of a governmental department; or the court may find a rule to decide a case in some precedent established by the former decision of some similar case.³² For many years, even centuries, lawyers and judges have denied most vehemently that law was ever judge-made. According to these authorities, law is discovered and judges merely apply the right legal decision.

Oliver Wendell Holmes Jr. did not believe that judges discovered law and never made it. In his book on the common law Holmes pointed out that experience not logic had been the life of the law.

³¹Hall, op. cit. p. xll.

³²Ibid. p. xll.

The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have had a great deal more to do than the syllogism in determining the rules by which men would be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.³³

Occasionally, no rule applicable to the precise case before the court can be discovered from these sources, and then the court itself must establish a rule. It seems likely that if a lawyer looked long enough and hard enough he could find some existing rule of law to back up his desired opinion. Cases frequently arise, however, where there are conflicting analogies, no one of which is clearly stronger than the others. Here the court must decide between the rival analogies, and in so doing it really makes a new rule of law which may become a precedent for future decisions of similar cases. Periods of many social changes rapidly coming one upon another are likely to present many cases where two separate analogies vie for attention. So rapid might be these changes that the court is hard put to make a decision or to enforce the ones they do make. In such cases today, recourse is made to the legislatures and necessary reforms are made. However, important social changes have been made by courts within the last several years. Many of these court-made changes have completely reversed the long-time attitude of judges and legal writers. Although the important social changes brought on by court decisions are much better known, many minor ones are constantly being

³³Holmes, O. W. Jr., The Common Law, p. 1.

made, although often unrecognized.

When after due consideration a court has laid down a new rule of law, it will ordinarily follow this rule in dealing with succeeding cases that are sufficiently similar in their facts to seem rather clearly to involve the same principle. That is, the rule once laid down in a decided case becomes a precedent for future decisions.³⁴

As precedents accumulate, the law becomes constantly less flexible. As a result an increasing number of changes must be made by legislation. Under the most intelligent direction it is often difficult to frame a statute that will cover no more and no less than was intended; and the conditions under which much legislation is enacted in this country are unfavorable to a high degree of either care or skill in this respect. On the other hand, the advantage of following general rules laid down in previous decisions is that it secures some degree of certainty in the unwritten law. A known rule, though not the best one imaginable, is far more preferable in treating each case as a new problem than in treating each case independently of all that have preceded. Many lawyers and judges are intellectually and even emotionally involved in keeping established precedents and in insisting that if changes are to be made in established precedents such changes must be made by legislatures. This argument comes up again and again when attempts are made to change judge-made laws by court action.

There is a strong argument that can be made in favor of following.

³⁴Hall, op. cit. p. xiv.

precedent in making decisions at law. For over six hundred years in American and English law the doctrine has been well established that decisions create precedents which the courts are ordinarily bound to follow as the existing law. This is called the principle of stare decisis (abide by what has been decided). One may say, generally speaking, that a case becomes a precedent only for such a general rule as is necessary in reaching the actual decision.

A statement of law by a court which lays down a rule wider than is required by the particular case before the court is called a dictum (plural dicta), and the same term is applied to any statement of law not necessarily connected with some point actually involved in the case. Dicta, while not treated as precedents, are given some consideration in the decision of future cases, depending upon the reputation and the rank of the court or the judge uttering them and upon the amount of deliberation with which they were uttered. Where a case involves several points, and the decision is based upon more than one of them by the court, each point may have only the future weight of a dictum, though it is perhaps not strictly such.³⁵

Although the courts usually follow the precedents of former decisions, they are not absolutely bound to do so. Sometimes they do not. There may be a variety of reasons for this. Where precedents are not clear or have been conflicting, they may be disregarded with considerable freedom. Perhaps this might better be called a case where no real precedent exists. A real precedent, however, may be disregarded if it has

³⁵Ibid. p. xlix.

become obsolete through lapse of time and changed conditions. In this respect, precedent law differs from statute law, which in English and American practice remains operative until repealed. More frequently, a precedent may be overruled when a subsequent court is clearly convinced that the ruling was founded upon wrong reasoning. This is especially so when the previous error was due to insufficient argument, mistake as to previous condition of the law, peculiar circumstances surrounding a case, or to some inadvertence which prevented proper deliberation. The effect that judge-made law and stare decisis have upon the immunity doctrine becomes quickly apparent when cases on this subject are reviewed.

The immunity doctrine is now under attack from many sources. The critics of the doctrine attack it by calling it a "musty theory," an unjust rule, and generally outmoded. A recent article in Time magazine on "Sovereign Immunity" illustrates this type of attack.

Sovereign Immunity. Insurance companies confronted with Detroit claims can try to sue the city, but in the absence of statutes, nothing in common law makes a city, county or state liable for riot damage unless it has somehow acted negligently. Even then many governmental bodies are protected by sovereign immunity, a musty theory that public monies can be used only for the general public, not to compensate individuals, such as riot victims. But legal scholars contend that sovereign immunity is an unjust rule and that courts have gradually eroded or discarded the doctrine in several states. Once sovereign immunity is removed as a defense, a city or county is liable much like an individual with negligent performance of duty.³⁶

The immunity doctrine may be a "musty theory" according to Time but it is the law in most states and the reason is because of the reluctance

³⁶Time, August 4, 1967, p. 68.

of legal authorities to go against stare decisis.

Robert R. Hamilton, Dean Emeritus of the College of Law at the University of Wyoming, has attacked the doctrine from the standpoint that it is obsolete and should be abrogated in its entirety. Dean Hamilton states that school districts can no longer take refuge from their negligent acts behind a rule the "foundation and soundness of is...open to serious question." The following quotation explains his view:

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 is, to put it mildly, open to serious question.³⁷

So Dean Hamilton views the immunity doctrine as obsolete because education has become big business and can no longer justify sending students into dangerous situations without any responsibility for their injuries. He feels that immunity doctrine has no justification in a modern society and should be completely abrogated in its entirety.

To summarize the importance of judicial precedents: it can be said that judicial precedents are, in fact, judge-made laws. Because of the legal maxim called stare decisis, abiding with what has been

³⁷ Bi-weekly School Law Letter, R. R. Hamilton, Editor, March 1, 1951, p. 2.

decided, courts are obligated to follow precedents. This fact has much significance for students of the immunity doctrine because it is a judge-made rule and courts following stare decisis are reluctant to change judge-made rules. Nevertheless the immunity doctrine has been under attack from several directions. It has been called a "musty theory" by Time and "obsolete" and "unsound" by Dean Hamilton.

Summary

The immunity doctrine is a common law doctrine based on the proposition that a unit of government can not be sued in the absence of a statute granting such permission. Since school districts are quasi-corporations set up by the state for the specific purpose of providing education for its citizens it is a unit of government and shares in the immunity of the state.

The extension of the immunity doctrine can be traced to Russell et. al. v. The Men of Devon.³⁸ This eighteenth century English case was tried under the rules of English common law. The English court declared that the men of Devon could not be sued because of the following reasons: (1) it would cause an infinity of actions; (2) there was no precedent for such an action; (3) only the legislature should impose liability of this kind; (4) there were no funds available for the purpose of satisfying this claim; (5) neither law nor reason supported the action; (6) there is a strong presumption that what has never been done can not be done; and (7) it is better to inconvenience one party than to inconvenience the public.

³⁸100 Eng. Rep. 359, 2 T. R. 667 (1788).

The immunity doctrine was first applied in America in 1812 in *Ephraim Mower v. The Inhabitants of Leicester*.³⁹ The Massachusetts court extended the Russell rule to townships and counties in Massachusetts. As the Massachusetts court was one of the most important courts in the United States, this rule was adopted as the common law rule in America. By this rule, as now applied in the United States, no unit of government such as a county or a township could be sued for its negligent actions without an act of the legislature permitting such action.

By a process of analogy the rule was extended to school districts. The reasoning was that if counties, townships, and other units of government were immune for negligent acts then school districts, being units of government, shared in this immunity. This was the genesis of the school district immunity doctrine.

In the years following the Mower case, state courts adopted the Russell rule and applied it to school districts. Typical of the way the immunity doctrine was applied to school districts was in the state of Illinois where in *Town of Waltham v. Kemper*⁴⁰ this doctrine was adopted and applied to schools. This case was decided in 1898 eight years after England refused to apply the Russell doctrine to schools.

The immunity doctrine became a firmly established rule of law in the United States by the end of the nineteenth century. At about the turn of the century the rule began to be modified and from the 1950's

³⁹9 Mass. 247 (1812).

⁴⁰55 Ill. 346.

on changes began to take place quite rapidly. Because of the changes made it becomes necessary to take the next step in the study which is to determine the present status of the immunity doctrine in the United States, if this is possible.

CHAPTER III

STATUS OF THE IMMUNITY DOCTRINE IN THE UNITED STATES

The statement may be made, backed by ample evidence, that generally speaking school districts are immune from suits in the area of tort liability. The districts, as quasi-corporations, are usually held immune from suits charging negligence. As Corpus Juris Secundum states: "Although there is authority to the contrary, it is a general rule that school districts or their governing boards are not liable for torts or for injuries resulting from their negligence, unless such liability is imposed by statute."¹ This quotation gives, in general, the status of the immunity doctrine at the present time. According to Newton Edwards, "The common-law principle, almost universally applied by American courts, is that school districts and municipalities are not liable to pupils for injuries resulting from the negligence of the officers, agents or employees of the district or municipality."² To state it a different way, no action can be maintained against a school district for personal injuries by charging negligence unless there is a statute or judicial ruling to the contrary.

The next two paragraphs review briefly the second chapter. The doctrine of immunity from torts had its origin in the Middle Ages. This stemmed from the "Divine Right" of the kings or "the king can do no wrong." The state has assumed the sovereign powers of the king and has inherited this immunity. The school district being an arm of the state has

¹78 C.J.S. 1321.

²Edwards, Newton, The Courts and the Public Schools, p. 393.

traditionally shared the principle that it can do no wrong.

As an historical fact, the first time the doctrine of sovereign immunity was applied to a sub-division of the state was in the case of *Russell v. Men of Devon*, 2 Term Rep. 671, 100 Eng. Rep. 359 (1788). The infiltration of this doctrine of sovereign immunity into the American legal system was begun in 1812 by *Ephriam Mower v. The Inhabitants of Leicester*, 9 Mass. 247. As a result of this case in the early stage of the development of our legal system the ruling of *Russell v. Men of Devon* was taken over and under the concept of stare decisis became a barrier to bringing any action against a governmental agency such as a school system.

It was thought that the status of the immunity doctrine in the United States could best be understood by examining some of the influences upon the present day immunity doctrine. Principles for and against the doctrine were first examined. After this the "safe place" and "save harmless" statutes were investigated to see if they had influenced the doctrine in any way and if so how much and in what way. Since some courts applied the governmental/proprietary rule in deciding cases involving the doctrine it was decided to study this rule to see what influence it had upon the status of the immunity doctrine. Some school districts bought liability insurance and it was thought that this fact could have made some difference in the status of the doctrine. Cases involving liability insurance and the immunity doctrine were studied to see if buying liability insurance made any difference in the status of the doctrine. The last section dealt with the present status of the doctrine.

Principles in Support of the Immunity Doctrine

To better understand the reluctance of courts to change the immunity doctrine it would be wise to review some of the reasons and principles used to support the doctrine. These principles are taken mostly from leading cases touching upon the doctrine. Other sources include law journals, legal text books such as *Corpus Juris Secundum*, and text books on school law. These reasons and principles can be summed up in eight propositions. Some courts have emphasized one reason and some another. Usually they use one or more of the eight following propositions.

1. The most fundamental legal reason and the one most frequently cited is that the school is an agent of the state carrying out a governmental function and therefore shares the sovereignty of the state. This is generally called "the king can do no wrong" doctrine. Governmental functions are carried out for the benefit of the public, and the school does not receive any benefit from such services. *Dahl v. Hughes*, 347 P. (2d) 208, illustrates this point very well.³ This case and the Anderson case footnoted rested their decision favoring the immunity doctrine squarely on the "king can do no wrong" doctrine. Many other cases may be cited that support the immunity doctrine using this reason.

2. The second reason is a legal principle well established in law called stare decisis. This principle means "abide with what has been decided." Using the principle of stare decisis courts apply rules used in similar cases. Lower courts are bound to follow the ruling of higher

³See also *Anderson v. Board of Education*, 49 N.D. 181, 190 N.W. 807.

courts and a doctrine once settled is very hard to change.

3. The third proposition concerns the financial responsibility of school districts. Courts are reluctant to allow legal judgments to impair the service of finances of the school district. Some courts feel that the legal expenses are prohibitive and the schools are not legally able to pay damages. Some courts also feel that large numbers of law suits could seriously affect the operation of the school. These reasons really boil down to the reluctance of the courts to "inconvenience the public" and so they uphold the immunity doctrine to avoid doing this. *Foid v. School District of Dendal Borough*, 121 Pa. 543, 15 A 812, cites this reason for upholding the immunity doctrine in Pennsylvania.

4. The fourth proposition concerns the principle called respondeat superior. This means that the master or principal is responsible for the acts of his servant or agent and does not usually apply to school districts. *Smith v. Seattle School Dist. No. 1*, 112 Wash. 64, 191 P. 858, cites the proposition that as long as school districts are not responsible for the acts of their officers they are not responsible for the acts of their employees. If, on the other hand, respondeat superior applied to the school districts they should be liable for the acts of their employees. As Edwards puts it, "If a school district is not liable for the negligent acts of its officers, it is not liable for the negligence of its employees."⁴

5. When an act is committed above and beyond the power of the school district it has been held that the district is not liable. This

⁴Edwards, Newton, op. cit. p. 394.

sort of act is called an ultra vires act. It is held that since the school district has only those powers delegated to it by the law passed by the legislature, the district is not authorized to commit a tort. One is not liable for acts committed ultra vires.⁵

6. Some courts have held that when districts are acting for no profit or advantage they are sometimes considered as being immune for tort. In the State of Washington *Redfield v. School District No. 3*, 48 Wash. 85, 92 P. 770 (1907), took this position, upholding the immunity doctrine on this ground in 1907.⁶

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

8. A very frequent argument for retaining the immunity doctrine is that courts have no power to lift immunity unless their liability is expressly provided by statute. *Leviton v. Board of Education*, 374 Ill. 594, 30 N.E. 2d, used this reason for upholding immunity in Illinois in 1940. This decision was later reversed.

So it can be said that the basis for retaining the immunity doctrine lies in these eight propositions. Stated very briefly these propositions are: 1. Governments can not be sued without their own consent.

⁵Ibid. p. 401.

⁶In 1892 *Rand v. Brainerd*, 49 Minn. 106, 51 N.W. 814, took this same position.

School districts are a governmental unit so they can not be sued except with permission of the legislature. 2. Courts are reluctant to go against the principle called stare decisis. Stare decisis means "abide with what has been decided." 3. Some courts hold that allowing legal judgments would impair the service or finances of the school district and uphold the immunity doctrine for this reason. 4. The fourth proposition holds that as long as school districts are not liable for the acts of their agents or principals under respondeat superior they can not be held liable for the actions of their employees. 5. This proposition says that when district commits a tort is is acting ultra vires; that is, beyond the scope of the powers given to them. One is not liable for such acts. 6. When a school district is acting for no profit or advantage many courts find that they are immune for tort. 7. Some courts evengo so far as to state as a reason that the schools will lose rapport with the community if sued for their tort actions and uphold the immunity doctrine on this basis. 8. A very frequent reason used by courts in upholding the immunity doctrine is that the legislatures have to give permission before this immunity can be lifted.

Though the preceding stated reasons are used in case after case upholding the doctrine, not all courts uphold the doctrine and many legal writers are against the immunity doctrine. Courts in Wisconsin, Minnesota, California, New York and Illinois have ruled against the immunity doctrine. Writers on school law such as Mort and Hamilton, Newton Edwards and many law journals and legal textbooks, for instance Corpus Juris Secundum, have also come out against the doctrine. The reasons and principles used to

support the preposition that the immunity doctrine is outmoded and must be modified or nullified are given in the next section.

Principles Supporting Modification or Abrogation of the Immunity Doctrine

Though the immunity doctrine forbidding action for torts against school districts is the law of the land in most of the states in the Union, there are indications that some courts are having second thoughts about this doctrine. In *Molitor v. Kaneland Community Unit School District*, No. 302, 18 Ill. 2d 11, 163 N.E. 89 decided in 1959 the Supreme Court of the State of Illinois reversed many years of stare decisis and abrogated the doctrine. Though this abrogation was somewhat modified by the state legislature, it was a stunning reversal of an established rule of law by a major state court held in high respect by lawyers and judges all over the nation. Minnesota also made a startling reversal of previous decisions in *Spanel v. Mound View School District* No. 621, 118 N.W. 2d 795. This case was decided in 1962 and was reversed by the state legislature. California, New York and Wisconsin have also greatly modified or abrogated the immunity doctrine. A later section of this study will deal with these states and their effect on the immunity doctrine.

Many writers have also come out against the immunity doctrine. A writer in the *American Bar Association Journal*, Vol. 11, p. 495, calls the doctrine an "historical anachronism" that does "injustice to all parties concerned" and "manifests an inefficient public policy." The following quotation presents this view.

The doctrine of state immunity in tort survives by virtue alone...The doctrine is not only a historical anachronism, but, under our present rules, works gross injustice to all parties concerned and manifests an inefficient public policy. The non-responsibility of the mistaken or wrong-doing employee - the limit of the vaunted "rule of law," is unfair to the victim of the inquiry to the subordinate officer or employee and to the community.⁷

A recent article in the American Law Reports also comes out very strongly against the immunity doctrine. The writer in this article says that the doctrine "rests upon a rotten foundation" and thinks that it is "almost incredible" that in a republic such a mediæval view would be upheld. The following quotation reveals this viewpoint.

The whole doctrine of governmental immunity from liability for torts rests upon a rotten foundation. It is almost incredible that in this modern age of comparative sociological enlightenment, and in a republic, the mediæval absolutism supposed to be explicit 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.⁸

The courts do not have to accept the writings in law reviews and law journals, however, these articles are written by experts in the various fields of law and are read by judges and lawyers. This particular article has been quoted in several cases to bolster an argument or legal principle against the doctrine of school district immunity.

⁷A.B.A.J. Vol. 11, p. 495.

⁸75 A. L. R. 1196

Not only legal writers but judges also have made devastating criticism of the school district immunity doctrine. The doctrine of school district immunity has been the law in the State of Illinois for many years when in 1959 the Supreme Court of Illinois reversed all previous decisions upholding the doctrine. In *Moliter v. Kaneland Community Unit School District* the Supreme Court of Illinois would have none of the doctrine. The court took various reasons for upholding the doctrine and demolished them one by one. The court said that upholding the doctrine on the theory of sovereign immunity was not justified because it overlooked the fact of the American Revolution which was fought to abolish the "divine right of kings" on which the theory is based. The court also felt that immunity could not be justified for the protection of public funds "since public education constitutes one of the biggest businesses in the country." It also gave short shrift to the idea that school districts would become bankrupt if immunity were lifted pointing out that "Tort liability is in fact a very small item in the budget of any well organized enterprise."

The following quotation from this case gives the tenor of the opinion that school district immunity cannot be justified on theory of sovereign immunity.

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

We do not believe that in this present day and age, when

public education constitutes one of the biggest businesses in the country, that school immunity can be justified on the protection of public funds theory...Nor can it be properly argued that as a result of the abandonment of the common law rule the district would be completely bankrupt. California, Tennessee, New York, Washington and other states have not been compelled to shut down their schools...Neither are we impressed with defendants plea that abolition of immunity would create grave and unpredictable problems of school finance and administration...Tort liability is, in fact, a very small item in the budget of any well organized enterprise.⁹

There does appear to be a relaxation of the rule of school district immunity. More cases will appear in this report to document this assertion. The reasons for abrogation or modification of the immunity doctrine are based on simple justice. It is manifestly unjust for a school district to be immune for the same sort of negligent action that a business or a corporation or a private individual would be held strictly accountable for in a court of law. It seems an anomaly that in the United States the doctrine of immunity has been retained while in other countries closely allied with the Western European culture the concept has been abolished. In England, the school districts have been held liable for their torts since 1890.¹⁰ Its disappearance in Europe has been indicated by Rosenfield who writes: "In fact practically all the western countries of Europe have abandoned the rule of immunity."¹¹ The Canadian school boards do not enjoy the freedom from tort liability

⁹Moliter v. Kaneland Community Unit School District No. 302, 18 Ill. 2d 11, 1963 N.E. (1959).

¹⁰160 A. L. R. 7, 84.

¹¹Rosenfield, Harry M., Liability for School Accidents, p. 110.

that the majority of the states of the Union have traditionally held.¹²

One method that some states have used to attempt to modify the school district immunity doctrine is the "safe place" and "save harmless" statutes. The next section reviews the relationship of these statutes to the immunity doctrine.

Safe Place and Save Harmless Statutes and Their Relationship to the Immunity Doctrine

One of the means used by states in attempting to modify the school district immunity doctrine has been by applying "safe place" and "save harmless" statutes.

"Safe place" statutes provide in general that every owner of a public building shall so construct, repair, and maintain such public building as to render the same safe to employees and frequenters thereof.

"Save harmless" statutes provide for the board of education's assumption of the liability of certain school employees while acting within the scope of their duty. If a teacher or other employee is sued for negligence while acting within the scope of his duty the school board will pay the judgment and court costs. Four states (Connecticut, New Jersey, New York, and Wyoming) have "save harmless" statutes at this time.

These "safe place" and "save harmless" statutes and their effect upon the immunity doctrine will be reviewed in the following sections.

Safe Place Statutes. In the statutes of California and New York

¹²Lamb, Robert L., Liability of School Boards and Teachers for School Accidents, Canadian Teachers Federation, Research Division, Research Study No. 3, p. 4.

the school district is held liable for unsafe maintenance of building grounds and premises. The state of Washington has only partially restricted this liability for a "safe place." Two states (Colorado and Wisconsin) have enacted special statutes which impose liability upon the school district to build and maintain its buildings and/or equipment so as to render them safe for general usage.

The state of Wisconsin has a definite statute concerning a "safe place." The "safe place" statute defines the place of employment, employer and a frequenter. Some of the subsections applicable here are:

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

A frequenter shall mean and include every person other than an employee who may go in or be in a place of employment or public building under circumstances which render him other than a trespasser. The frequenter must have freedom from danger to the life, health, safety or welfare of employees or frequenters or the public, or tenants or firemen and such freedom from danger... as will reasonably permit.

The term public building as used in sections 101.01 to 101.29 shall mean and include any structure used in whole or in part as a place of resort assemblage, leading trade, traffic occupancy or used by the public or by three or more tenants.

The term owner shall mean and include...school districts...¹³

In keeping with the general trend of adhering to the immunity doctrine by the courts, schools in Wisconsin were exempt from suit until the amended "safe place" statutes which expressly mentioned school districts were passed.

¹³West's Wisconsin Statutes Annotated, ch. 101.01-101.19.

An example of a Wisconsin case where the court ruled to bar recovery was the Lawver case. In this case a boy was killed when struck by a falling flagpole on the evening of October 11, 1938. The Wisconsin Supreme Court affirmed the decision of the circuit court which had dismissed the case. The court held that a flagpole was a true structure, but that it was not used as a resort assemblage as indicated in section 101.01.¹⁴

In 1940, in another case, the Supreme Court of Wisconsin ruled to allow recovery. In *Eckerson v. Ford's Prairie School*¹⁵ the plaintiff fell down a very steep staircase. In order to stop himself he threw out his hand. At this moment someone shut the door at the bottom of the staircase and the plaintiff injured his hand by ramming it through a glass panel of the door. The court ruled that the plaintiff's injury was caused mainly by falling down the steep staircase and not by the negligent action of a third party closing the door. In other words the steep staircase was the cause of the accident and plaintiff won under the "safe place" statute.

On June 5, 1962, in *Holytz v. City of Milwaukee*, 115 N.W. 2d 218, the Supreme Court of Wisconsin abrogated the school district immunity doctrine. The city of Milwaukee operated a playground for the use of pre-school-age children. On the playground the city had constructed a drinking fountain on top of a concrete slab. On the slab was a steel trap door weighing approximately fifty pounds which was used to cover a water meter pit. An employee of the city negligently allowed the trap door

¹⁴*Lawver v. Joint District*, 232 Wisc., 608, 288 N.W. 192 (1939).

¹⁵*Eckerson v. Ford's Prairie School District No. 11 Lewis County*, 101 P(2d) 345 (1940).

covering the pit to remain open. It fell on a child's hands, severely injuring her. The child's father sued the city to recover damages for the child's injury.

The immunity rule had been in effect in Wisconsin since 1873. Realizing this fact, the attorneys for the child sought to recover under two well-known exceptions to the immunity rule, (a) that the trap door was created and maintained by the city in its proprietary as distinguished from its governmental capacity, or (b) that the trap door constituted a nuisance. The lower court held that no cause of action was asserted because the immunity doctrine was firmly established by the Supreme Court of Wisconsin in a long line of decisions.

The Supreme Court reversed the decision of the lower court and held that the city was not immune from liability for its torts, whether they were by omission or commission. The court stated that the abrogation of the immunity doctrine included school districts.

Though the Holytz case was not based on the "safe place" statute in Wisconsin, the statute may have created a good "climate" for the decision of the Supreme Court. The decision will have to be backed up by further court actions and by legislation if it is to have full effect. It is still too early to know what far-reaching effect this decision will have.

Colorado also has a "safe place" statute that provides for safeguards in any schoolhouse where laborers are employed or machinery used. It reads as follows:

Any person, firm, corporation, or association operating a...schoolhouse...or place of public assemblage or any kind of establishment wherein laborers are employed or machinery used... shall provide safeguards...and if machinery is not safeguarded as provided by this act, the use thereof is prohibited.¹⁶

The statute also provides that in order to establish liability of the defendant and to recover damages it shall be sufficient for plaintiff to prove that death or injury resulted from failure to provide safeguards as required by statute. So far this statute has not affected the immunity doctrine in Colorado to any significant degree.

Save Harmless Statutes. The purpose of the "save harmless" type of act was "to save harmless" and protect all teachers and members of supervisory and administrative staff from financial loss..."¹⁷ "These statutes are based on the assumption that the business of education has become so big that it is unfair to saddle teachers and administrators with liability risks which may be involved in their respective duties."¹⁸

It has been a generally accepted point of law that teachers are liable for their acts of tort. Four states (Connecticut, New Jersey, New York and Wyoming) have "save harmless" statutes effective at this time. California does not have a "save harmless" statute, but "the governing body of any school district is liable as such in the name of the district for any judgment against the district on account of injury to person or

¹⁶School Laws of the State of Colorado, ch. XI, sec. 539.548 (1941).

¹⁷Robert W. Schaerer and Marion A. McGhehey, Tort Liability of School District, p. 20.

¹⁸Ibid. p. 21.

or property arising because of the negligence of the district or its officers or employees."¹⁹

In New York section 1709 of the Consolidated Education Laws of New York charge boards of education with the responsibility to establish rules and regulations concerning discipline and to supply adequate supervision. Other subdivisions of this act made it the duty of the school board to furnish proper equipment and supplies and to provide and care for school property such as buildings and grounds. A subsequent subdivision empowers the district to pay any judgment and if necessary to levy a special tax to pay the same.²⁰ Section 2550 deals with the liability of a board of education of a city with more than one million population. This act provides that the board shall be "liable for and shall assume liability to the extent that it shall save harmless any duly appointed member of the teaching or supervising staff, officer, or employee of such board..." This liability shall be for negligence "resulting in personal injury or property damage..."²¹ Section 2561 provided "save harmless" benefits to personnel working with needy children.²²

In 1949 Connecticut passed its "save harmless" statute. It was very similar to the statutes of New Jersey and New York in as much as it provided the "each board of education shall protect and save harmless

¹⁹West's Annotated California Education Code, Sec. 903.

²⁰McKinney Consolidated Education Laws of New York Annotated, Sec. 1709.

²¹Ibid. sec. 2550.

²²Ibid. sec. 2561.

any member of such board or any teacher...from financial loss..."²³

However, the statute appeared to be more comprehensive by emphasizing in general the precise area where the people covered by the act would be protected and specifically included student teachers.²⁴

Each board of education shall protect and save harmless any member of such board or any teacher or other employee thereof or any member of its supervisory or administrative staff and the state board of education, the board of trustees of each state institution and each state agency which employs teachers, and the managing board of any public school, as defined in sec. 10-161, shall protect and save harmless any member of such board, or any teacher or other employee thereof or any member of its supervisory or administrative staff employed by it, from financial loss and expense, including legal fees and costs, if any, arising out of any claim, demand, suit or judgment by reason of alleged negligence or other act resulting in accidental damage to or destruction of property, within or without the school building, providing such teacher, member or employee, at the time of the accident resulting in such injury, damage or destruction was acting in the discharge of his employment or under the direction of such board of education, board of trustees, state agency, department, or managing board. For the purpose of this section, the term "teacher" shall include any student teacher doing practice teaching under the direction of a teacher employed by a town board of education or by the state board of education.²⁵

Section 10-236 of the Connecticut Annotated Statutes gave the power to the school districts to insure against liability provided for by sec. 10-235 given in this statute.

A case came up in 1955 under this statute. In *Swainbank v.*

²³Connecticut General Statutes Annotated, Title 10, ch. 170, sec. 10-235.

²⁴Ibid. sec. 10-235.

²⁵Ibid. sec. 10-235.

Coombs,²⁶ the charge of assault and battery was brought against the principal with the school board and the members of the board of education as defendants with the principal. The principal slapped a boy on the ear when the boy was whistling at his desk. The court held that a judgment must first be secured against the principal. The purpose of the statute was not to abolish immunity but to protect teachers from loss by civil misconduct. The statute was an indemnification from loss, not indemnification from liability.

In 1937 New Jersey enacted a statute which allowed the board of education to provide legal counsel at the expense of the board for legal action brought against teachers. An action which alleged the use of corporal punishment on the part of the teacher was excluded from this benefit.²⁷ In 1938 New Jersey enacted its "save harmless" statute. It was almost identical to the other states. The act provided protection from financial loss for any employee of school boards from any claim or judgment arising from their negligence. Its provisions are:

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

²⁶Swainbank v. Coombs, 19 Conn. Supp. 391, 115 A. (2d) 468 (1955).

²⁷New Jersey Statutes Annotated, Sec. 18:5-50.2.

any insurance company authorized by law to transact business in State, or such board may elect to act as self insurers to maintain the aforesaid protection.²⁸

The New Jersey courts have held the "save harmless" statutes did not create a liability on the part of the school district.²⁹ This statute did not create a new cause of action against a school board even if the board of education failed to insure against such liability.

In 1955 Wyoming also passed a "save harmless" statute. This statute provides for the school district to save harmless and protect all teachers and supervisors from suit arising from negligence provided that they are acting within the discharge of their duties. This statute also provides authority for the purchase of appropriate insurance by the school district for their protection. It specifically does not exempt the school district from immunity. The appropriate sections follow:

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

²⁸Ibid., Sec. 18:5-50.4.

²⁹*Tripens v. Peterson*, 11 N.J. Supr. 282, 178 A. (2d) 149 (1950)
Thompson v. Board of Educ., City of Millville, 11 N.J. 207 94 A(2d)
206 (1953).

This act (21-158-159) shall not be construed as creating or tending to create a liability of the school district so protecting or insuring its teachers or staff members nor shall the failure to procure such insurance as is authorized by this act be construed as creating any liability of the school district.³⁰

The total impact of the "save harmless" statutes has been negligible in Connecticut and New Jersey because of the reluctance of the courts to apply the statutes to change in any way the immunity of the school district. In Wyoming the statute specifically retains the immunity of the school district. Only in New York has the "save harmless" statute brought forth fruitful results and this has been because it was coupled with a more widespread move toward abrogation of the immunity doctrine. This will be touched upon in another section.

As far as changing or modifying the immunity doctrine as a whole, except for New York, there has been little change.

Effect of the Governmental and Proprietary Rule Upon the Immunity Doctrine

One of the techniques used by plaintiffs to crack the wall of immunity has been to make the distinction between governmental and proprietary functions of the school district. Edwards has brought this out in this statement:

Recognizing that a school district cannot, under common law, be held liable for the negligence of its agents or employees in the performance of a governmental function, plaintiffs in numerous cases have claimed liability on the ground that the school district was engaged in the performance of a proprietary or private function.³¹

³⁰Wyoming Statutes, 21-158, 21-159.

³¹Edwards, Newton, The Courts and Public Education, p. 403.

According to this rule, if it can be proven that the school district is performing a proprietary function then the district can be held liable for its negligent acts or the negligent acts of its employees. Some jurisdictions try to apply this rule; others do not.

Corpus Juris Secundum points out that some authorities hold that the immunity doctrine applies regardless of whether torts were committed in the exercise of government functions. Some authorities, however, hold a district liable for torts committed in the exercise of proprietary functions.³²

The main trouble most courts have with the governmental functions as opposed to proprietary functions is to distinguish between the two. When is a school acting as a government and when is it acting as a private corporation? Is it acting in its proprietary or private capacity when it puts on an activity for public entertainment and charges admission? Some courts say this is proprietary but others say that all actions of the school are of a governmental nature.

In a hard-hitting dissent in a 1943 Montana case Justice Erickson called the governmental-proprietary test an arbitrary one. Justice Erickson expressed the belief that the trend of court decisions is to make more functions proprietary rather than governmental to ease the harshness of the immunity rule. He condemns the doctrine by declaring that neither logic nor justice supports the rule. The following quotation shows how strongly Justice Erickson feels about the attempt to apply the governmental-proprietary rule.

3278 C.J.S. 1325.

Most of the states, in attempting to decrease the severity of the rule 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 support (the 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 could recover if she had gone to a theater and had there been injured.³³

Most of the jurisdictions apparently have not attempted to apply this rule because of its difficulty. Pennsylvania has an interesting statute that declares that school districts are not immune from liability in tort if the negligent acts of their servants were committed in the course of proprietary functions. The essence of the statute is given in the following:

Municipal and quasi-municipal corporations, such as school districts, are not immune from liability in tort for the negligent acts of their servants committed in the course of proprietary functions of the municipal and quasi-municipal corporation.³⁴

A school district which operated a swimming pool as a summer recreation program was held liable when a boy drowned.³⁵ The Pennsylvania Supreme Court reversed the lower court and held that this was a proprietary function. When a school district purchased a tax delinquent house and the tenant, an eight-year old girl fell, the school was engaged in a

³³Rhoades v. School District No. 9, 115 Mont. 352.

³⁴24 P.S. Sec. 2.211-2.17.

³⁵Morris v. School District 393, Pa. 633, 144 A (2d) 757 (1958).

proprietary function for buying, maintaining, and possessing property.³⁶ However, the court held that a football game was an educational activity and was therefore a governmental function.³⁷ Also the Pennsylvania Supreme Court held³⁸ that a school district was not liable for negligence in performing the governmental function of maintaining the school grounds and fences.

A case heard in Arizona held the school district liable for a proprietary function.³⁹ The Arizona Supreme Court reversed the lower court which had upheld immunity. The defendant had leased the football stadium to another school and had received a fee of \$300. A paying spectator fell because of a faulty handrail. The court ruled that the school district had leased, received compensation, and was therefore engaged in a proprietary function and liable. When this case had been decided (1955) Arizona still applied the immunity doctrine and the dicta of the court implied that it did not want to extend the doctrine. In 1965 the Arizona Supreme Court abrogated the immunity doctrine. Schools or school districts were not involved directly in this case but the court left no doubt that the abrogation of the rule was applicable to school districts.⁴⁰

Two cases in Illinois refused to make the distinction of dividing

³⁶Pintek v. County Board, 186 Pa. S. 366, 142 A (2d) 296 (1958).

³⁷Martin v. School District, 83 Pa. Dist. and Co. R. 196, 54 Lack. Jur. 57.

³⁸Michael v. School Dist., 391 Pa. 209, 137 A. (2d) 456 (1958).

³⁹Sawaga v. Tuscon High School District, 78 Ariz. 389, 281 P. (2d) 105 (1955).

⁴⁰Stone v. Arizona Highway Commission, 93 Ariz. 383, 381 P. 2d 107.

the functions.⁴¹ In Oregon the District was held liable for performing the proprietary function of painting a flag pole.⁴²

Though some jurisdictions have successfully applied this rule, it is extremely difficult to apply, and a close examination of any particular state should be made before one tried to make this type of distinction.

Effect of Liability Insurance Upon the Doctrine

Many states have statutes which permit the purchase of liability insurance. In some states liability insurance has been purchased without actual authority to do so by statute. It has been doubtful if such purchase of liability insurance would stand a legal test. In insurance law it is generally known that the mere possession of liability insurance does not imply liability. In fact, in many jurisdictions the fact the defendant may have insurance is inadmissible evidence.⁴³

One of the reasons advanced for the immunity doctrine has been the desire to protect trust funds; however, this does not seem a good enough argument if the trust fund is protected by insurance. The mere fact that liability insurance is purchased by the school district to protect it from law suit does not appear enough to waive the immunity doctrine. Although there are some exceptions to this, the great weight of authority seems to hold that such purchase does not waive governmental immunity.⁴⁴

⁴¹Garrison v. Community Consolidated School District 65, 34 Ill. app. (2d) 322, 181 N.E. (2d) 361 (1961) also Ludwig v. Board of Educ. 35 Ill. app. (2d) 401, 183 N.E. (2d) 401 (1962).

⁴²Lupe v. School Dist., 130 Ore. 409, 275 P. 686 (1929).

⁴³Bigelow, Harry A., Am. Law and Procedure, Vol. 7 p. 257.

⁴⁴Schaerer and McChehey, op. cit., p. 31.

In a few jurisdictions the courts have taken the view (which is worthy of characterization as enlightenment) that to the extent that a liability insurance policy protects a governmental unit against tort liability, the otherwise existing immunity of the unit is removed.⁴⁵

In a leading case in Tennessee during 1932 the court did not allow the defense of governmental immunity because the plaintiff and the insurance company had agreed to waive any excess damage over the limit of the policy.⁴⁶ In 1936 a similar ruling was made which removed immunity to the extent of the coverage which protected the public funds of the Schools.⁴⁷ In 1945 the court held that the reason for the immunity doctrine was that there were no funds available to pay the claims, but if insurance were carried, recovery could be had, but only to the limits of the policy.⁴⁸ So in Tennessee one can recover at least the amount of the insurance.

Kentucky has taken a view similar to that of Tennessee. In the Taylor case where a child was injured in a bus accident, the school had a policy with an immunity waiver clause. Recovery was allowed to the extent of the policy.⁴⁹ Kentucky has taken the middle ground and does not make the board liable for the torts of its agents and employees but does permit suits and a judgment to be obtained which, when final, shall measure the liability of the insurance carrier to the injured party for whose

⁴⁵68 A.L.R. (2) 1437.

⁴⁶Marion County v. Cantrell, 166 Tenn. 358, 61 S.W. (2d) 477 (1932).

⁴⁷Rogers v. Butler, 170 Tenn. 125, 92 S.W. (2d).

⁴⁸Taylor v. Cobble, 187 S.W. (2d) 648 (1945).

⁴⁹Taylor v. Knox County, 292 Ky. 767, 167 S.W. (2d) 700.

benefit the insurance policy was issued.⁵⁰ In a case that came up in 1947, a school board member was legally riding a school bus and was killed in an accident. The defendant had a policy with waiver of immunity rider attached. It was held the deceased came within the coverage and immunity was waived to the extent of the insurance.⁵¹ In another case an appeal heard in 1952 allowed a jury trial against a school district that had liability insurance.⁵²

In *Hummer v. School District of Hartford City* the Supreme Court of Indiana ruled that the statute permitting the purchase of insurance was not a waiver of immunity.⁵³ However, in 1960 in an action against a county board of commissioners, the liability for a proprietary function was set at the policy limits.⁵⁴ The Indiana Supreme Court disapproved of the *Hummer* ruling by stating: "The opinion of the Appellate Court in the case of *Hummer v. School City of Hartford City* (1953), is disapproved in so far as it is inconsistent with the views herein expressed."⁵⁵ In Indiana a plaintiff would have a chance of collecting judgment up to the amount of insurance.

⁵⁰Ibid.

⁵¹*Standard Accident Insurance Co. v. Perry County Board of Ed.* 72 F. Supp. 142 (1947).

⁵²*Pike v. County Board of Ed.*, 253 S.W. (2d) 253 (1952).

⁵³*Hummer v. School Dist. of Hartford City*, 124 Ind. app. 30, 112 N.E. (2d) 891.

⁵⁴*Flowers v. Board of Commissioners County of Vanderburg*, 240 Ind. 668, N.E. (2d) 224 (1960).

⁵⁵Ibid.

In 1962 another attempt was made in Pennsylvania to change the immunity doctrine in regards to the amount of liability insurance carried by the school district. In *Supler v. School District of North Franklin Township* the Supreme Court of Pennsylvania held that the rule making school districts not liable for negligence in their governmental functions was not rendered inapplicable by the districts coverage by liability insurance.⁵⁶

In the *Supler* case the parents of a child who was injured recognized the long and well established law of Pennsylvania, but asked the court to abrogate the doctrine as in Wisconsin and Illinois. The court refused to do this. It was also asked if the law would not be changed some by the court to hold it inapplicable where the district was held not to have waived its immunity even though it had "protected itself" by liability insurance. On the point that the district received nothing for premiums paid to the insurance company unless recovery was allowed the court said that this fact was not true because the court had held a district liable for a tort committed in the performance of a proprietary function. The court went on to say that even if plaintiff's assumption that the district did not receive its money's worth were true it was an insufficient legal reason to justify a change in the law. The following quotation is taken from the case.

Plaintiffs further argue the rule should be modified because otherwise a school district which purchases liability insurance

⁵⁶*Supler v. School District of North Franklin Township* 182 A 2d (1962).

receives no value for the money it expends on premiums, if the district is protected by the doctrine of immunity. The fallacy in this contention is demonstrated (by the fact that) this court held the school district liable for a tort committed in the performance of a proprietary function. It follows that a school district which purchases liability insurance does receive value since it protects itself against liability arising from its participation in proprietary functions. However, even if plaintiff's assumptions were correct, it would not be legally sufficient reason to justify a judicial change in the law.⁵⁷

Finally the court adhered to the view that if it is to be the policy of the law that the state or any of its agencies is to be subject to liability for its torts while engaged in governmental operations, the changes should be made by the legislature and not by the courts.⁵⁸

The Vendrell case heard in Oregon in 1961 construed the statute allowing the purchase of insurance to mean that the immunity of the district was lifted only to the extent of the policy.⁵⁹ If a district did not purchase insurance, it was still immune and not negligent for failure to do so.

The effect of liability insurance upon the immunity doctrine has been limited. A few states have taken this route as a means of alleviating some of the injustices of immunity without the violation of trust funds or public money. It seemed a safe middle of the road technique that had some limited application.

Present Status of the Doctrine

The present status of the immunity doctrine is that though the

⁵⁷Ibid.

⁵⁸Ibid.

⁵⁹Vendrell v. School District, 360 p. (2d) 282 (1962).

doctrine has been chipped away in some states with some far-reaching decisions, the inevitable lag was also at work, and it will be many years before immunity completely disappears.

Insurance for school district liability, even when authorized by statute, usually has limited application. In two of the four states having "save harmless" statutes the effect on the doctrine has been nil. In only one, New York, has the "save harmless" statute worked toward abrogation of the doctrine.

In only a few states (California, Illinois, New York and Wisconsin) had real changes come about to abrogate or otherwise change the doctrine. In only these states could the plaintiff go to court and be fairly sure of getting relief for negligent acts of the school district and/or their employees.

In three states (Minnesota, Oregon, and Washington) early movements to modify or abrogate the doctrine were either controlled or eliminated.

Summary

In the year 1788 the concept of sovereign immunity was promulgated in the case of *Russell v. Men of Devon*. Shortly thereafter it was incorporated into American jurisprudence by *Ephriam Mower v. Inhabitants of Leicester*, 9 Mass. 247 (1812). Schools have traditionally shared in immunity because they are governmental agencies. For such reasons as loss of public funds, public relations, stare decisis, ultra vires, and the belief that legislatures have to give permission to bring suit against governmental agencies, school districts in the United States have been

immune from tort liability for negligence.

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

The status of the immunity doctrine at the present time (late 1968) is confused because since the latter half of the last century a number of states have embarked upon a movement away from the traditional immunity.

Two types of legislation have been used to attempt to modify the harshness of the immunity doctrine. One is the so-called "safe place" statutes and the other is the "save harmless" legislation.

Two states (Colorado and Wisconsin) have enacted statutes which impose a liability upon the school districts to build and maintain their buildings and/or equipment so as to render them safe for general use. Generally, the courts have interpreted these statutes very strictly and recovery has been limited.

Four states (Connecticut, New Jersey, New York and Wyoming) have passed "save harmless" legislation. These acts which cause boards of education to assume the liability of school employees acting within the scope of their duties may or may not make boards of education liable in tort for negligence. Connecticut courts have interpreted this as one of indemnification from loss, not from liability. In other words, judgments must first be secured against employess. In New Jersey the courts have said this act did not create a liability upon the part of the district.

and the school district was held immune from suit. The statute of Wyoming contained within itself a statement to the effect that no new liability has been created.

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

Many school districts carry liability insurance with or without statutory authorization. The carrying of insurance would seem to void one of the reasons for immunity; the protection of public funds. The bulk of the states have not allowed recovery even if the district was fully insured; however, several states have departed from this concept. Kentucky and Tennessee have done so. At one time Illinois allowed recovery up to the amount of the policy. In 1961 the Oregon Supreme Court permitted recovery against a school district for the amount covered in the policy. However, on a re-trial of the case the court reversed itself and it now seems doubtful if one can collect even the amount of the insurance in the state of Oregon.

In brief, a recapitulation of the status of the immunity doctrine discloses that there has been a slight movement away from the traditional immunity. Four states (California, Illinois, New York, and Wisconsin) have been leaders in the complete abrogation of the immunity doctrine.

Other states have developed specialized laws for granting recovery in limited areas. Kentucky and Tennessee allow recovery to the amount of liability insurance carried. School districts in the state of Washington have been held liable except for injuries occurring in certain specified locations. A few states attempted the division of the schools' functions into governmental or proprietary categories.

In Chapter 4, a study of modern cases will be made to determine the trend of the immunity doctrine. A representative sample of cases throughout the nation will be reviewed to see if there is a significant trend.

CHAPTER IV

TRENDS IN DEVELOPMENT OF IMMUNITY DOCTRINE

The final step in this study was to examine the status of the immunity doctrine to determine trends. The best way to do this seemed to be to examine actions by courts of states that have acted upon the doctrine as reported in Chapter 3.

The first American case that established the immunity doctrine in the United States was *Mower v. The Inhabitants of Leicester*, 9 Mass. 247 (1812). From 1812 until about the turn of the century, the trend was toward extending the immunity to school districts because they were sub-divisions of the state. Reasons given by the state supreme courts were: (1) the school is an agent of the state and can not be sued, (2) lack of precedent, (3) lack of monies to pay a judgment, (4) school districts are not responsible for the acts of their employees and therefore not liable for their torts, (5) any act a school district performs that is a tort is ultra vires, that is outside its authority and the district is not liable for an act committed ultra vires, (6) schools do not act for profit and therefore are immune, (7) schools might be embarrassed and lose rapport with the public, and (8) only the legislature can lift immunity.

Starting about 1900 a trend began toward modification of the doctrine. The first modification came when state courts began making an artificial distinction between governmental capacity and the proprietary capacity.

If the school district was acting in its governmental or public capacity it was immune from liability; if it was acting in its proprietary or private capacity it was not. The difficulty in making this distinction made the governmental/proprietary rule unpopular with courts and it fell into disuse.

Another trend toward modification was the use of liability insurance to protect the finances of the school districts. School districts began to carry liability insurance because of the fear of being sued for a tort committed in its proprietary capacity. In the absence of a statute authorizing the purchase of liability insurance, it has commonly been held by courts all over the nation that a governmental agency does not have the power to take out insurance and because of this fact the mere purchase of liability insurance has no legal effect on the immunity doctrine.

In the late 1950's this indirect approach toward modification by insurance gave way to a more direct approach. This was a frontal attack on the immunity doctrine itself.

This chapter will examine the trends in the development of the immunity doctrine by looking first at the states that began to modify the doctrine but retrogressed. The states that abrogated the immunity doctrine will then be examined. The states that have had limited immunity will be examined next. Other states have neither abrogated the doctrine nor limited liability, but they have perhaps foreshadowed abrogation by their recent court decisions. These also will be examined. Finally the states that still uphold the doctrine will be studied to see if there is a trend in these states.

Early Movement Toward Modification of the Immunity
Doctrine and Retrograde Trends

In three states (Minnesota, Oregon, and Washington) there was a movement toward modification of the immunity of school districts. However, for one reason or another a retrograde movement has taken place, and these states now strictly control, if not completely eliminate, the liability of the school district for tort.

The highpoints of the development of the immunity doctrine in Minnesota, Oregon, and Washington are given in the next few paragraphs and may be found in Table 1, page 73.

Minnesota was the first of the three states that had a statute (1851) that allowed action to be brought against a school district. In 1892 in the Bank case the court ruled that school districts could only be sued on a contract and upheld the immunity doctrine. In 1962 the immunity doctrine was reversed by the Spanel case as archaic. The court withheld its action until the 1963 legislature adjourned to await any action the legislature might take. In 1963 the Minnesota legislature reversed the Spanel case and made the immunity doctrine a rule of law in Minnesota. In Minnesota there was a trend starting in 1962 toward abrogation but this was reversed in 1963 and since then no new cases have arisen at this time (late 1968).

Oregon had an 1862 statute that imposed liability on school districts. In 1914 the Oregon Supreme Court upheld the immunity doctrine declaring in the Wiest Case that schools can not commit a tort. In 1929 the supreme court declared that school districts could be sued for

TABLE 1. HIGHPOINTS OF KEY CASES IN DEVELOPMENT OF IMMUNITY DOCTRINE IN MINNESOTA, OREGON AND WASHINGTON

States	Highpoints in Development of Immunity Doctrine	Key Cases
Minnesota	1851 statute allowed action to be brought against a school district for tort.	
	1892 immunity upheld by court. Supreme court ruled statute applied only to contracts.	Bank v. Brainerd (Minn.) School District
	1962 immunity reversed as archaic.	Spanel v. Mounds View (Minn.) School District
	1963 immunity made rule of law by legislature.	
Oregon	1862 statute imposed liability on school districts.	
	1914 supreme court held that schools cannot commit a tort. Immunity doctrine upheld.	Wiest v. School District No. 24 (Ore.)
	1929 supreme court held school district could be sued for tort if act was proprietary.	Lupke v. School District (Ore.)
	1929 supreme court overruled itself and held all school district acts are governmental because the districts are quasi-corporations. Immunity still prevailed.	Antin v. Union High School District (Ore.)
	1961 supreme court allowed relief up to insurance carried.	Vendrell v. School District (Ore.)
	1962 on re-trial case over-ruled and relief not allowed even up to amount of insurance. Court ruling still in vogue.	
Washington	1869 statute abrogated the immunity doctrine.	

TABLE 1 (continued)

States	Highpoints in Development of Immunity Doctrine	Key Cases
Washington	1907 supreme court held a school district liable for tort under 1869 law.	Redfield v. School District (Wash.)
	1917 statute limited liability to actions except those arising from any park, playground, field house, athletic apparatus or appliance, or manual training equipment.	
	1920 supreme court held that statute of 1917 exonerated only athletic apparatus or appliances used in connection with any park or playground, or field house.	Stovall v. Toppenhish School District 49 (Wash.)
	1965 supreme court upheld limited liability and reaffirms Stovall case.	Perry v. Seattle School District (Wash.)

proprietary acts. This was the Lupke case. The Court almost immediately overruled itself in *Antin v. Union High School* and said that all school district acts are governmental. This was the legal situation until 1961 when the first *Vendrell* case allowed recovery up to the amount of liability insurance carried. On a retrial of the *Vendrell* case the supreme court held that recovery could not be given to the plaintiff even up to the amount of insurance carried. Between this decision in 1962 and late 1968 no key decisions have appeared that would change the direction set. In Oregon despite a slight trend set by the first *Vendrell* case allowing relief up to the amount of liability insurance carried, the supreme court reversed itself upon retrial of the case and would not allow relief even

up to this amount. This is the situation at this time in Oregon (1968).

In Washington an 1869 statute abrogated the immunity doctrine. This statute was not tested until 1907 in the Redfield case. This case held that school districts could be held liable under the 1869 statute. This brought many actions against school districts until the 1917 Washington legislature passed a bill limiting immunity to accidents arising from any park, playground, field house, athletic apparatus or appliance, or manual training equipment. In 1920 the supreme court in the Stovall case defined the statute as exonerating only athletic apparatus or appliances used in connection with any park, playground, or field house. A 1965 case confirmed this view and as of late 1968 no new cases have been found on the immunity doctrine. Starting from 1869 Washington had a trend toward abrogation that was strengthened in 1907 by the Redfield case but was limited by legislation in 1917. The 1917 statute was confirmed in 1920 and as recently as 1965 allowing limited liability of school districts.

To sum up briefly: Minnesota abrogated the immunity doctrine by supreme court action in 1962 only to have the 1963 Minnesota legislature reinstate it. Oregon originally had an 1862 statute that allowed school districts to be sued for tort but this statute was overruled by the supreme court by the Wiest case in 1914. The Lupke case in 1929 allowed schools to be sued if action was proprietary and in 1961 the Vendrell case allowed recovery up to the amount of liability insurance carried but upon retrial of the case reversed itself and would not allow recovery even up to the insurance carried. Washington had a 1869 statute that allowed

school districts to be sued. This was tested in 1907 in the Redfield case and suit was allowed. Because of the number of cases brought against schools the Washington legislature passed a 1917 statute that limited liability. This statute is still in affect and upheld by recent decisions in Washington.

The next sections will review the states of Minnesota, Oregon, and Washington to show how the movement toward modification of the immunity doctrine retrogressed in these states.

Immunity in the State of Minnesota. Minnesota had a statute as far back as 1851 which allowed an action to be brought against a school district for an injury to a plaintiff. By a strict interpretation of the statute the courts, for all practical purposes, annulled this statute.

In the leading case of *Bank v. Brainerd School District*, heard in 1892, the attitude toward governmental immunity was set.¹ The complaint alleged that the defendant negligently left two tree stumps, three inches high and two inches apart sticking up in the playground. The minor plaintiff tripped over these stumps, breaking a leg which was later amputated. The suit asked \$20,000 in damages. The Minnesota Supreme Court affirmed the lower court's dismissal of the suit in ruling that the statutes applied only to contracts and did not allow liability for negligence. The rights of the plaintiff in the statute were declared property rights. Although schools may sue and be sued, this fact does not change immunity. The schools are quasi-municipal corporations, organized for educational purposes.

¹*Bank v. Brainerd School District*, 49 Minn. 106, 51 N.W. 814 (1892).

In another case where a ten-year-old boy was run over by a school bus on the school grounds, the school was held not liable for the negligent operation of the school bus. The Minnesota Supreme Court affirmed the district court's decision in sustaining the defendant's demurrer.² The court said that the school was a quasi-governmental agency, performing a public function and was not liable.

A personal injury suit was brought by a plaintiff who had lost the sight of one eye and severely damaged the other.³ He alleged that the defendant's officers and agents had negligently used unslaked lime to line a football field. Again the Minnesota Supreme Court affirmed the district court which had sustained a demurrer to dismiss. The court brought out again that school districts were governmental agencies performing a public function and that the statute did not authorize suit for personal injuries due to negligence. It held that regardless of whether the term is nuisance or negligence: (1) it was not actionable, (2) there was no difference between mandatory and permissive governmental functions and (3) making a small charge did not impose liability.

In 1952 a plaintiff was injured in a collision with a school bus. The plaintiff contended that the school district carried liability insurance and that this was a waiver of immunity. The federal court held that the operation of a school bus was a governmental function and that municipal corporations were immune.⁴

²Allen v. Independent School District No. 17, 173 Minn. 5, 216 N.W. 292 (1929)

³Mokovich v. Independent School District No. 22, 177 Minn. 446.

⁴Rittmiller v. School District No. 84, 104 F. Supp. 187 (1952).

In 1962 the Supreme Court of Minnesota made a startling reversal of previous decisions upholding the immunity doctrine and appeared to have made a tremendous break-through toward complete abrogation of the immunity doctrine. In *Spanel v. Mounds View School District*⁵ the court held that the doctrine of immunity to tort action was archaic and would not be applied to cases arising after the 1963 Minnesota legislature adjourned, subject to any statutes presently or subsequently limiting or regulating prosecution of such claims. The result was to apply immunity in the case before the court and deny recovery by an injured child.

Suit had been brought to recover damages from the school district and a teacher and principal employed by it for injuries resulting from alleged negligence of the defendants in permitting a defective slide to remain in the kindergarten classroom of an elementary school. The only issue before the court was whether the doctrine of tort immunity should be overruled by judicial decision or permitted to remain in effect until repudiated by the legislature. The rule was very well established by previous cases. The court pointed out that despite its adherence to immunity, its impatience with perpetuating the injustice of the doctrine to injured individuals in this era of rapidly expanding governmental functions and services was apparent.

Referring to these previous cases the court said that "the handwriting has long been on the courtroom wall" and that the defense of school district immunity was based on neither "justice nor reason." The

⁵*Spanel v. Mounds View School District No. 621*, 118 N.W. 2d 795 (1962).

quotation below gives an indication of the reaction of the court.

Thus the handwriting has long been on the courtroom wall. We have been troubled for three generations by the unheeded petitions of the lamed Frederik Bank, the halt Jennie Snider and the blind Frank Mokovich. Since we have repeatedly proclaimed that this defense is based on neither justice nor reason, the time is now at hand when corrective measures should be taken either by legislative and judicial fiat.⁶

After reviewing the origins of immunity and its history in Minnesota the court said that the genesis of the immunity doctrine was accidental and was "characterized by expediency." The court also felt students have a special status because of the compulsory attendance statute and deserve more than ordinary protection. The court's reasons were as follows.

Our consideration of the origins of tort immunity persuade us that its genesis was accidental and was characterized by expediency, and that its continuation has stemmed from inertia. The development of governmental liability for proprietary functions was an acknowledgement that the original rule was unduly restrictive and reflected an uneasiness in the corporate conscience...It has been argued on behalf of defendants that if immunity is abolished public schools will be deluged with claims for injuries resulting from inadequate supervision, from frostbite while waiting for the bus, from blows struck by other children, from forbidden and mischievous activities impulsively and foolishly inspired and from a host of other cases. School children have a special status in the eyes of the law, and in view of the compulsory attendance statute deserve more than ordinary protection. Operating an educational system has been described as one of the nation's biggest businesses. The fact that subdivisions of government now enjoy no immunity in a number of areas has not noticeably circumscribed their usefulness or rendered them insolvent.⁷

⁶Ibid. p. 797.

⁷Ibid. p. 799.

The repudiation of the doctrine by the Minnesota Supreme Court was made prospective and not retroactive in application. In addition, it made its abrogation of the rule effective as of the date of the adjournment of the 1963 legislature.

Minnesota school men and other interested parties were waiting anxiously for the decision of the 1963 legislature as this would decide, perhaps for years to come, the fate of the immunity doctrine in the state of Minnesota.

The decision was not long in coming. During the 1963 session the Minnesota legislature enacted a statute making the doctrine of governmental immunity from tort liability a rule of statutory law of Minnesota and applicable to school districts of the state. The enacted statute was as follows:

The doctrine of governmental immunity from tort liability as a rule of the decisions of the courts of this state is hereby enacted as a rule of statutory law applicable to school districts and 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 town on or prior to Dec. 13, 1963.⁸

To sum up the highpoints of the immunity doctrine trends in Minnesota, it can be seen that as far back as 1851, Minnesota had a statute allowing action to be brought against a school district for tort. The supreme court practically annulled this statute in decisions arising from this statute. The Bank case (1892) was the precedent case and the court stated that the statute only applied to contracts and not to torts. So

⁸National School Law Reporter, R. R. Hamilton, Editor, Vol. XIII, No. 22.

the situation remained until 1962 when in the Spanel case the supreme court reversed the immunity doctrine as archaic but in 1963 the legislature reinstated the immunity doctrine as a rule of law. This was the situation in late 1968.

Immunity in the State of Oregon. In 1862 Oregon passed a law which imposed liability upon governmental agencies. It was not until 1914 in *Wiest v. School District (Ore.)* that this law was tested. In this ruling and subsequent rulings, the court nullified this statute. In 1929 in *Lupke v. School District (Ore.)* the court made one exception and allowed a judgment against a school district. However, within two months the court had reversed its thinking and was again applying the doctrine of immunity.

The statute granting authority to maintain an action or suit against public corporations was Section 30.320 which follows:

An action or suit may be maintained against any of the public corporations in this state mentioned in Section 30.310 in its corporate character, and within the scope of its authority, or for an injury to the rights of the plaintiff arising from some act or commission of such public corporation.⁹

The other public corporations designated were "incorporated cities, school districts, or other public corporations of like character."¹⁰ Section 332.180 authorized the purchase of liability insurance to cover negligence of the district or its officers and agents.¹¹

⁹Oregon Revised Statutes, Sec. 30.320

¹⁰Ibid. Sec. 30.310.

¹¹Ibid. Sec. 332.180.

The first case concerning Section 30.320 that granted authority to maintain a suit against public corporations was heard in 1914.¹² In the Wiest case the court stated that the board of education could not commit a tort, and if it did it was acting ultra vires: that is, outside its powers. This was the precedent setting case and has been followed consistently with one exception.

The exception was the case of Lupke v. School District where the plaintiff brought a personal injury suit against the district.¹³ The plaintiff had been employed to paint a flagpole and fell when the pole collapsed. The court ruled that the district was liable as the act was a proprietary function rather than a governmental one. However, a short time later the same court held that there was no sound basis for such a distinction and overruled the Lupke decision.

In Antin v. Union High School District (1929) the district was charged with negligence when a pneumatic water tank recently installed exploded and killed a nineteen-year-old boy.¹⁴ The Oregon Supreme Court affirmed the lower court's dismissal of the complaint. The court ruled that the district was negligent in not installing a safety device on the tank, but the tank which was used for school purposes was aiding a governmental function. The court appeared to favor the maintenance of a suit as prescribed by statute but was committed to stare decisis. This

¹²Wiest v. School No. 24, 68 Ore. 474, 137 P. 749 (1914).

¹³Lupke v. School District, 130 Ore. 409, 275 P. 686 (1929).

¹⁴Antin v. Union High School District, 130 Ore. 461, 280 P. 664 (1929).

doctrine means abide with what has been decided and many courts are reluctant to go against it. The court held that the school acts wholly as a governmental agency performing those duties imposed by statute. The school was held to be a quasi-corporation performing nothing but governmental functions, hence, immunity still prevailed.

A similar ruling was handed down by the Oregon Supreme Court in 1943. A boy fell on a wooden sidewalk and ran a nail into his knee, injuring it permanently. This case was *Lovell v. School District*, 172 Ore. 500, 143 P. (2d) 236, in which an appeal was filed from the circuit court which had dismissed the complaint. The suit alleged negligence on the part of the district for its failure to maintain the sidewalk in a safe condition. The demurrer admitted the truth of the allegation but pleaded immunity. The court stated "a school never performs anything except governmental functions since a school district can act pursuant only to statutory authority, express or implied, through its board of directors, and in so doing it is exercising a governmental function only."¹⁵ The court in the *Lovell* case made the following interesting comment:

It may be that the common law of immunity is harsh and unjust, in requiring the individual alone to suffer the wrong in the instant case, and that society in keeping with the modern trend, should afford relief, but that is a legislative and not a judicial question.¹⁶

¹⁵*Lovell School District*, 172 Ore. 500, 143 P. (2d) 236 (1943).

¹⁶*Ibid.* p. 5.

A 1961 case that seemed a modification of the immunity doctrine in Oregon was *Vendrell v. School District* (1961).¹⁷ In this case a high school football player was hurt and this injury resulted in paraplegia. The suit was brought when the plaintiff reached maturity. The school had a liability insurance policy in effect at the time. The plaintiff alleged that his injuries were due to the fact that as a 140-pound freshman he was matched against bigger and superior players. The lower court had dismissed the claim which was then appealed to the Supreme Court of Oregon. The defendants in the suit were the district, the superintendent, the principal, the coach and board members. The charges against all defendants except the district were dropped. The court ruled that the coach had failed to exercise reasonable care, and the district may be liable for the acts of its servants. The court held that the statute permitting the purchase of insurance was the expression of the legislature not to abandon the immunity doctrine but to permit some relief at least to the extent of the insurance coverage. The court re-emphasized that the school district was still immune from suit and disagreed with the *Molitor* case in Illinois that abrogated the doctrine and came out against immunity.

Even this little advance against the immunity doctrine in the state of Oregon was not to last. The *Vendrell* case was retried and reached the Supreme Court of Oregon again in 1962.¹⁸ The only additional point involved was whether there had been a failure to furnish the boy who was

¹⁷ 360 P. 2d 282 (1961) (Ore.).

¹⁸ *Vendrell v. School District No. 260, Malheur County*, 372 P. 2d 406 (1962) (Ore.).

injured with adequate equipment. It was held that the equipment was adequate, that there was no negligence by the board or any of the district employees, and that there could be no recovery even to the extent of the insurance carried by the district. In Oregon it is doubtful that the immunity doctrine is changed even to holding districts liable for tort to the extent of the insurance carried.

Let us review the highpoints in the development of the immunity doctrine in Oregon. An 1862 law allowed school districts to be sued in tort. In 1914 the Wiest case tested the 1862 law in the courts and the statute was nullified in effect. One exception was made in 1929, *Lupke v. School District* when the supreme court allowed a judgment against a school district. However two months later in the *Antin* case the supreme court reversed its thinking and again applied the immunity doctrine. In 1961 a minor deviation was noted in *Vendrell v. School District* in which the liability of the district was allowed to the extent of the liability insurance. In 1962 the *Vendrell* case was retried. The supreme court reversed its decision and would not allow a judgment even to the amount of insurance carried.

The pattern of the immunity doctrine in Oregon was first abrogation by an 1862 law; then a practical nullification of this law by 1914 *Wiest* case; later suit was allowed against a school district in 1929 *Lupke* case; but soon thereafter immunity was reinstated by a supreme court overruling; however liability to the extent of insurance carried by school district was allowed in 1961 *Vendrell* case which was overruled in 1962 retrial, completing the cycle of the immunity doctrine in Oregon by late

in 1968.

Immunity in the State of Washington. In 1862 Washington passed a statute that imposed liability upon school districts. The statute allowing recovery was not tested until 1907 in the Redfield case.¹⁹ In this case the court ruled that the school was liable for negligence under the statute. Following this precedent and the history of litigation as found in other states, many complaints were filed against school districts. The schools became concerned about the number of suits and the size of the damages awarded. In 1917 an act was introduced into the state assembly which would have exonerated the school districts from all liability, but this bill did not pass. A compromise form passed which limited liability to actions other than those arising from "any park, playground, or field house, athletic apparatus or appliance, or manual training equipment."²⁰ Since 1917 the courts have interpreted the law in Washington as meaning that a liability suit for other than the mentioned exceptions in statute may be maintained against a school district.

The Redfield case was the first Washington case to hold the district liable for negligence.²¹ The plaintiff was badly burned when a bucket of scalding hot water fell on her. The three gallon bucket was kept on top of a heating register. The action alleged the defendant and its agents, servants, teachers, and employees had carelessly and negligently left this bucket in a dangerous manner. The question was whether

¹⁹Redfield v. School District No. 3, Wash. 85, 92 P. 770 (1907).

²⁰Revised Code of Washington, sec. 28.58.030.

²¹Redfield, op. cit. pp. 78-95.

the district was liable for the negligent acts or omissions of its employees in the performance of their duties. The court ruled that an action against the district for negligence could be maintained and that the statute was designed to remove immunity and make the district responsible for an omission of duty.

The language of the act of 1917 was defined in the Stovall case.²² The plaintiff was injured while playing on a large water tank which had been removed from the basement of the school and left on the playground. The Washington Supreme Court affirmed the superior court's jury decision for the plaintiff. The court held that the terminology of the act of 1917 was rather ambiguous. The court ruled that this act exonerated only athletic apparatus or appliances used in connection with any park, playground, or field house. Since this was not so in this case, the district was liable.

In *Kidwell v. (Elma) School District*, the district was held liable for an accident which occurred after school and under the sponsorship of a community group.²³ Judy Kidwell, a nine-year-old girl, was permanently injured when an upright piano fell on her. The girl was attending a Campfire Girls meeting in one of the schools under the supervision of an adult. The piano was a top heavy instrument. Another child placed himself between the piano and wall and pushed the piano over on the

²²*Stovall v. Toppenhish School District No. 49*, 110 Wash. 97, 188 P. 12 (1920).

²³*Kidwell v. School District No. 300, (Elma)* 53 Wash. (2d) 831.335 P. (2d) 805 (1959).

plaintiff. The superior court had awarded damages of \$24,472.45 to the plaintiff, and the school appealed the case. The Washington Supreme Court affirmed the decision of the superior court stating that the school had a duty to use reasonable care, the event was foreseeable, and the child was an invitee to whom the school owed a duty.

In the 1960 Coates case²⁴ the school was held not liable when a student was injured in a traffic accident many miles from school following a club initiation. The accident happened at 2:00 A.M. Sunday, and there was evidence that the driver had been drinking. The court stated that the district was not liable for torts arising ultra vires.

In the Perry suit brought against the district in 1965 for damages, the Supreme Court of Washington held that the district was not liable for injury to a spectator at a football game.²⁵

The plaintiff was a 67-year-old grandmother. She had been invited by her grandson to attend a game between the third teams of two Seattle high schools. The grandson, one of the players, had been encouraged to invite his parents, relatives, and friends to this and other school-sponsored games. Though the plaintiff had attended previous football games and had sat in the grandstand, on the occasion of her injury she stood with the other spectators near the 50-yard line, one or two feet outside the side lines. The plaintiff was standing in the front row and the crowd was about four persons deep. In an end-run play, several

²⁴Coates v. Tacoma School District, 55 Wash. (2d) 293, 347 P. (2d) 1093 (1960).

²⁵Perry v. Seattle School District No. 1, 405 P. (2d) 589 (1965).

players ran out of bounds and into the crowd standing along the sidelines. Two players were knocked into the plaintiff and severely and permanently injured her. She had not been watching the player carrying the ball, and she did not see him until just before she was struck as the player was tackled.

In a suit brought against the district for damages the lower court concluded that: (a) the defendant was not negligent; (b) the plaintiff was contributorily negligent; and (c) the plaintiff had voluntarily assumed the risk of being injured by standing close to the sidelines. The Supreme Court of Washington affirmed this decision on every point.

The court referred to the general rule in such cases that, in so far as perception is concerned, a person must give to his surroundings the attention which a reasonable man would consider necessary under the circumstances.

In the state of Washington the immunity doctrine is abrogated by statute. This statute, however, makes certain exceptions. The act places under the immunity doctrine injury arising from athletic apparatus or appliances used in connection with any park, playground or field house.²⁶ The cases in Washington on the immunity doctrine have not interfered with the statute and courts have been quite liberal in construing the statute to give relief in damages when a school district has been negligent. The exceptions are still in force, however, and the plaintiff is seriously hampered in bringing tort action against a school.

²⁶See Revised Code of Washington, sec. 28.58.030 for these exceptions.

district in Washington because of them. It must be stated, then, that Washington still has the immunity doctrine in many instances involving school districts as long as the accident involves athletic apparatus or appliances used in connection with any park, playground or field house.

The trend toward abrogation of the immunity doctrine in Washington was started in 1869 when a statute was passed abrogating immunity. In 1907 *Redfield v. School District* (Wash.) held a school district liable under the 1869 law. As a result of the *Redfield* decision many cases were filed against school districts in Washington and in 1917 the state legislature passed a statute limiting liability to other than action arising from any "park, playground, or field house, athletic apparatus or appliance, or manual training equipment." The *Stovall* case in 1920 held that the 1917 statute exonerated only athletic apparatus or appliances used in connection with any park, playground, or fieldhouse. In *Perry v. Seattle School District* decided in 1965 the supreme court upheld limited immunity in the state of Washington. The trend toward abrogation of the immunity doctrine began with the abrogation statute of 1869, continued with the 1907 *Redfield* case that allowed suit under the 1869 statute; retrogressed with the 1917 statute that limited liability and which made specific exceptions to liability; the 1920 *Stovall* case restricted the statute of 1917 somewhat and in 1965 in the *Perry* case this limited immunity was reaffirmed. This was the situation by late 1968.

The three states of Minnesota, Oregon and Washington were chosen together for discussion because of their similar treatment of the immunity doctrine. There was an early movement toward modification in the three

states followed by retrograde trends. In all three states there were statutes allowing school districts to be sued. (Minnesota-1851, Oregon-1862, Washington-1869) These statutes were specific in allowing action to be brought against a school district. By 1892 the Minnesota Supreme Court had reinstated the immunity doctrine. In 1914 Oregon's Supreme Court had declared schools could not commit a tort. In 1929 there was a trend away from immunity when Oregon's Supreme Court allowed a school district to be sued but this was reversed two months later. The situation was a little different in Washington as the Refield case in 1907 allowed schools to be sued under their 1869 statute. In 1917 Washington passed a law restricting the liability of school districts by allowing districts immunity in accidents occurring in specific circumstances. In 1962 Minnesota's Supreme Court reversed the immunity doctrine as archaic but this ruling was overruled by the legislature that reinstated the immunity doctrine. In 1961 the Oregon Supreme Court allowed recovery up to liability carried but a retrial of this case brought a reversal. As late as 1965 Washington had upheld their limited liability.

Trend toward Abrogation of the Immunity Doctrine in Six States

In the states of Illinois, Wisconsin, California, New York, North Carolina, and Arizona, the trend is toward complete abrogation of the immunity doctrine. In these states the courts or the legislatures and sometimes, as in New York, both acting together have abrogated the doctrine.

The key cases showing the highpoints of the trend toward abrogation

TABLE 2. HIGHPOINTS OF KEY CASES IN DEVELOPMENT OF IMMUNITY DOCTRINE IN STATES ABROGATING OR ATTEMPTING TO ABROGATE THE DOCTRINE

States	Highpoints in Development of Immunity Doctrune	Key Cases
Arizona	1925, before this no statute passed, no cases tried, status of immunity doctrine unknown.*	
	1925 immunity doctrine first upheld.	School District No. 48 v. Rivers (Ariz.)
	1955 supreme court held school district liable when activity was proprietary.	Sawaya v. Tucson High School District
	1963 immunity doctrine abrogated.	Stone v. Arizona Highway Commission
	1968 no further cases.	
<p>*NOTE: The immunity doctrine is a common law doctrine. In all states except Louisiana this can be presumed to be the law in the absence of statute or cases but until supreme court of state decides, law is not definite.</p>		
California	1923, before this no cases on immunity doctrine, status unknown.	
	1923 statute abrogating immunity doctrine passed.	
	1961 court called immunity unjust anachronism. Established rule when there is negligence, there is liability. This still the rule in 1968.	Muskopf v. Corning Hospital District
Illinois	1870, before this status of immunity doctrine undecided by supreme court.	
	1870 supreme court first adopted the immunity rule.	Town of Waltham (Ill.) v. Kemper

TABLE 2 (continued).

States	Highpoints in Development of Immunity Doctrine	Key Cases
Illinois	1898 supreme court applied immunity to school districts.	Kinnare v. City of Chicago (Ill.)
	1959 supreme court abrogated immunity doctrine.	Molitor v. Kaneland Community Unit School District
	1959 legislature passed laws limiting school liability to \$10,000 if negligence proved.	
	1968 no change in immunity doctrine.	
New York	1878, before this status of immunity doctrine not decided by supreme court.	
	1878 court allowed school districts to be sued. Decision immediately reversed.	Bassett v. Fish, (1878) reversed
	1899 court held city could be sued in its proprietary functions.	Missano v. Mayor (New York City)
	1907 school board held liable for own negligence but not for employees. New York rule.	Wharman v. Board of Education New York City
	1962 immunity doctrine abrogated.	Domino v. Mercuria
	1968 no cases reported affirming or reversing decision. Abrogation still the law.	
North Carolina	1951, before this no cases reported on the immunity doctrine. Status of doctrine unknown.	

TABLE 2 (continued)

States	Highpoints in Development of Immunity Doctrine	Key Cases
North Carolina	1951 Tort Claims Act passed. Made North Carolina Industrial Accident Board a court of claims against school districts.	Lyons and Sons v. North Carolina Board of Education
	1953 supreme court construed act as waiving immunity.	
	1968 no further cases.	
Wisconsin	1873, before this immunity doctrine doctrine's status undecided by court cases.	
	1873 immunity doctrine established by this case.	Hayer v. the City of Oshkosh
	1962 immunity doctrine abrogated.	Holytz v. Milwaukee

of the immunity doctrine in these three states are shown in Table 2. In all the states except California, the immunity doctrine has been a rule of law of long standing. In Arizona the first case that supported the immunity without question was School District No. 48 v. Rivers in 1925. There were no reported school injury cases in California before the state legislature abrogated the immunity doctrine in 1923. In Illinois, on the other hand, the doctrine was of a much longer lineage. It adopted the doctrine in 1870 for municipalities and in 1898 applied the doctrine to

school districts. In 1878 New York had allowed school districts to be sued but this was quickly reversed. There were no reported cases in North Carolina before the Tort Claims Act. In 1953 the North Carolina Supreme Court construed the Tort Claims Act as waiving the immunity doctrine.

Wisconsin adopted the immunity doctrine in 1873 for the first time and the immunity of school districts remained the law in Wisconsin until immunity was abrogated in 1962.

The following sections will take these states in the order in which cases were decided. These states are interesting in the various ways in which they abrogated or attempted to abrogate the immunity doctrine. The qualification must always be made because in most of these states the issue was not entirely settled and the state legislature could overrule the state supreme courts as was done in Minnesota. Arizona is included in this section even though only one case abrogates the doctrine there. As of this time, 1968, this case has not been overruled.

The Immunity Doctrine in the State of Illinois. In Illinois the immunity doctrine was first applied to towns and counties in the case of *Town of Waltham v. Kemper*, 55 Ill. 346 in 1870. In 1898 the leading case of *Kinnare v. City of Chicago*, 171 Ill. 332, 49 N.E. 536, applied the rule of immunity to school districts. On May 22, 1959 the Supreme Court of Illinois handed down the decision in *Molitor v. Kaneland Community Unit School District No. 302*.²⁷ In this historic and

²⁷*Molitor v. Kaneland Community Unit School District No. 302*, 102 N. E. 89 (1959). The complete transcript of this case in Appendix C.

precedent setting case the highest court in the state of Illinois established that the district could be held liable in tort for negligence. Eighteen school children were injured March 10, 1958, when a school bus operated by an agent for the defendant hit a culvert and burned in Sugar Grove Township, Kane County. Because of the fact that the decision did not say anything about the retroactive condition of this ruling, much apprehension was created among school people. In a re-hearing held in December, 1959, the court ruled that this decision, with the exception of Thomas Molitor, applied only to future occurrences. In a later decision on a case brought up to test the point the court said that all the students included in this particular bus accident may have the immunity doctrine abolished as far as their situation was concerned. Their situation was the same, actually as that of Thomas Molitor.²⁸ In the original complaint the district was charged with negligence through its agent and servant, the bus driver.

As a result of the accident, the plaintiff, Thomas Molitor, received permanent injuries and sought damages of \$56,000. The record showed that the defendant carried liability insurance with limits of \$20,000 for each person and \$100,000 for each accident. However, in the complaint this was purposely omitted. The court considered many of the traditional and historical reasons for immunity. The court then concluded that the immunity doctrine had no validity today, and that if the immunity were lifted it might tend to decrease school bus accidents by coupling power with responsibility. It went on to say that the immunity doctrine

²⁸24 Ill. (2d) 467.

was unsupported by any valid reason and has no rightful place in modern day society. The following quotation taken from the case shows clearly how strongly the court felt about the immunity doctrine.

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

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

For the reason herein expressed, we accordingly hold that school districts are liable in tort for the negligence of their agents and employees and all prior decisions to the contrary are hereby overruled.²⁹

The case was remanded to the Circuit Court of Kane County to determine negligence of the school district. The United States Supreme Court refused to review the case.³⁰ Four of the Molitor children and two other children asked for damages of \$1,527,000. The Kaneland School District has been sued by seventeen of the eighteen involved pupils for more than five million dollars.

By late 1968, it appeared that a plaintiff would have a good chance of winning in an action of tort against a school district in Illinois. Legislation was passed shortly after the decision which limited liability of the school district to \$10,000 if the courts found them negligent.

²⁹Molitor, op. cit.

³⁰80 S.C.P. 955, 362 U.S. 868.

Special interests succeeded in pushing through other bills restoring total immunity on the part of park districts, counties and forest preserve districts as well as limited immunity for the school districts.³¹ Even though Illinois presents a bright picture for those who want a modification of the immunity doctrine, still the abrogation is far from being total and a study of the statutes is absolutely necessary before a plaintiff should begin an action with the idea of winning a judgement against a school district.

From 1870 when the immunity doctrine was adopted as law in Illinois and 1898 when the doctrine was applied to school districts, the immunity doctrine was the law in this state until 1959. In 1959 the Molitor case abrogated the doctrine. In 1959 legislature limited liability of school district for \$10,000. By late 1968 this was the situation in Illinois.

The Immunity Doctrine in the State of Wisconsin. Before 1873 the immunity doctrine's status was uncertain in Wisconsin because no case had been decided in the supreme court. In 1873, Hayer v. the City of Oshkosh, 33 Wis. 314, established the immunity doctrine for municipalities and school districts. This was the precedent case until 1962 when the Holytz case changed the precedent.

On June 5, 1962, the Supreme Court of Wisconsin in Holytz v. City of Milwaukee expressly abrogated the immunity doctrine. The City of Milwaukee operated a playground for the use of pre-school-age children. On a slab of a drinking fountain constructed by the city was a steel trap

³¹Ill. Rev. Stat. 1959, c. 105 & 12-1, 492, 33, 2a; c. 34, & 301, 11 c, 57 1/2, & 3a; c. 122.

door weighing about fifty pounds. Due to the negligence of a city employee, the trap door was left open and it fell on the hands of a child, severely injuring her. The child's father sued the city to recover damages for the child's injury.

Realizing the fact that the immunity rule had been in effect in Wisconsin since 1873, the attorney for the child sought to recover under two well-known exceptions to the immunity rule: (a) that the trap door was created and maintained by the city in its proprietary, as distinguished from its governmental capacity or (b) that the trap door constituted a nuisance. The lower court held that no cause of action was asserted and based its decision on the immunity doctrine firmly established by the Supreme Court in the state of Wisconsin in a long line of decisions.

The Supreme Court of Wisconsin reversed the decision of the lower court and held that the district was not immune from liability for its torts, whether they were by commission or omission. The court said it was in no mood to temporize further with the outmoded immunity doctrine. It was prepared, the court said, to disavow those rulings of the court which created and preserved the doctrine of governmental immunity from tort claim. The following quotation shows the court's attitude in disavowing governmental immunity:

However, we are now prepared to disavow these rulings of this court which have created and preserved the doctrine of governmental immunity from tort claims. This makes it unnecessary that we rest this case on the illusive issues mentioned in the foregoing paragraph: the case turns exclusively on our abrogation of the

principle of governmental immunity from tort claims.³²

The city urged that the court ignore the challenge to the doctrine of governmental immunity because it was not raised in the trial court. Ordinarily appellate courts will not consider matters which were not presented to the trial court. There are certain circumstances, however, under which a court will consider questions on appeal which were not presented in the lower court. This case falls in to that category because it would have been futile to have expected the lower court to abrogate the doctrine in view of the rulings of the court in a host of cases. The court said that the tort immunity is "knee-deep in legal esoterica" and felt that the dogma of the rule was so deeply ingrained in the case law of Wisconsin that it was necessary to consider the historic origins of the rule.³³

A very interesting point that the court in the Holytz case brought out was the fact that the immunity doctrine was a common law doctrine and as such could be changed or even abrogated by the courts without any reference to the legislature. After reviewing the historic background of the doctrine and its beginnings by various courts, the court in the Holytz case said that they were satisfied of the judicial origins of the immunity doctrine and that they were satisfied that the court could change the doctrine without reference to the legislature. The quotation that follows shows some of the reasoning of the court.

³²Holytz v. City of Milwaukee, 115 N.W. 2d 218 (Wisc.) 1962.

³³Ibid. p. 10.

Not only have we previously expressed the view that any proposed change should be directed to the legislature, but we also have expressed the view that the legislature's failure to enact a bill which had been introduced constituted an expression by the legislature that no change should be made.

We are satisfied that the governmental immunity doctrine has judicial origins. Upon careful consideration, we are now of the opinion that it is appropriate for this court to abolish this immunity notwithstanding the legislature's failure to adopt corrective enactments.³⁴

The Wisconsin court went further to show the scope of its decision. It pointed out that so far as governmental responsibility for torts is concerned, the rule is liability...the exception is immunity. It stated that in determining the tort liability of a municipality it is no longer necessary to divide its operation into those which are proprietary and those which are governmental. It stated further that the abrogation of the doctrine applies to all public bodies within the state: the state, counties, cities, villages, towns, school districts, sewer districts, drainage districts and any other political subdivisions of the state, whether they be incorporated or not.

The new rule abrogating the immunity doctrine in Wisconsin was expressly made not applicable to torts before July 15, 1962.

The immunity rule has been in effect in Wisconsin since 1873. In a long line of decisions the immunity rule has been upheld in this state. The Holytz case reversed this long-time rule in Wisconsin and put in the rule that school districts along with other subdivisions of government

³⁴Ibid. p. 12.

were no longer immune from liability for tort. In Wisconsin, if the rule in the Holytz case holds up, a plaintiff might have a good chance of winning in an action of tort against a school district. At the time of writing, late 1968, there had been no leading case to either overrule or back up the Holytz ruling abrogating the immunity doctrine in Wisconsin nor has the Wisconsin legislature taken action to overrule the case. Time will tell whether the abrogation of immunity in Wisconsin will stand up or will be changed either by court or legislative action.

The Immunity Doctrine in the State of California. There were no cases decided in the California Supreme Court defining the immunity doctrine prior to 1923. In 1923 the abrogation of immunity doctrine was made by statute. The "Public Liability Act" made the district liable for injuries to persons and property caused by the dangerous or defective conditions of buildings, grounds, and property. At the same session of the legislature, but at a different time, the district was made liable for any pupil caused by the negligence of the district or its officers or employers.

Although the state of California did not enact its first abrogation of immunity statute until 1923, it holds one of the leading positions in the modification of tort liability.

Prior to 1923 a number of lawsuits had been filed against the members of school boards and school trustees. In some of these actions officers of school boards were found liable for personal injuries to pupils of the public schools. Quite naturally, these individuals became alarmed and apprehensive at this development. In addition to ...

consideration of their jobs, thankless tasks and without momentary compensation, the possibility of a costly court action was sufficient to cause many school board members to resign.³⁵

The court's ruling in the Muskopf v. Corning Hospital case in 1961 revealed the feeling of the courts in California toward liability.³⁶ It stated that the doctrine of immunity must be discarded as an unjust anachronism which exists only through inertia. Accordingly the rule is that when there is negligence, liability results. In fact, nonliability was the exception. In another case the court held that the district was liable for all damages caused by ordinary negligence.³⁷ The incident need not occur on the school grounds. In the Grover case the plaintiff, who was a student, was injured in an airplane crash while taking an aviation course.³⁸ Although the operator of the airplane was a private operator, the district was held liable since it was deemed that the district had sufficient control of the operator.

California is one of the most liberal states today in its interpretation of the tort liability of school districts. This is because statutes of the state of California permit plaintiffs to sue school districts on an action of tort. It is also the only state that views

³⁵Robert W. Schaerer and Marion A. McGehey, Tort Liability of School Districts, p. 26.

³⁶Muskopf v. Corning Hospital District, 55 Cal. (2d) 211, 359 P. (2d) 457 (1961).

³⁷Lehmuth v. Long Beach Unified School Dist., 53 Cal. (2d) 544, 343 P. (2d) 422 (1960).

³⁸Grover v. San Mateo Jr. College, 146 Cal. App. (2d) 86, 303 P. (2d) 602 (1956).

liability of school districts as the rule and not as the exception. This is not to say, however, that the filing of a suit in California against a school district is an automatic indictment of the district. Actual negligence on the part of the school has to be proven. The negligence has to be the direct cause of the accident. One can say, with a great deal of certainty, that a plaintiff would have a much better chance of winning an action against a school district in tort in California than in any other state in the Union.

The Immunity Doctrine in the State of New York. New York at one time (1878) adhered to the doctrine established in *Russell v. Men of Devon* and followed this ruling under stare decisis. Two early cases were the vanguard of the coming change in judicial thinking in the state of New York. In the case of *Bassett v. Fish*, tried in 1878, where trustees were being sued individually, the court held that the school district was a complete corporation and therefore liable.³⁹ This decision was later reversed in 12 Hun. 209. In another case heard in 1899 against the City of New York, the ruling was that a city was never authorized to commit a tort in discharge of its governmental functions but may be liable for proprietary functions.⁴⁰

The leading and precedent-forming case in New York which literally broke the back of immunity was the *Wharman v. Board of Education* tried

³⁹*Bassett v. Fish*, 75 N.Y. 303 (1878), reversed 12 Hun. 209.

⁴⁰*Missano v. Mayor, et. al. of New York*, 160 N.Y. 123, 54 N.E. 744 (1899).

in 1907.⁴¹ A twelve-year-old boy while sitting in a classroom was struck on the head by a piece of falling plaster. The blow fractured the skull of the boy. Action was brought against the school board for negligence in maintaining and permitting students to frequent a dangerous building. The defendant claimed the repair of the building was in charge of subordinates and that the rule of respondeat superior was not applicable to school districts. The court agreed with this point but held that the board had the power to close the school and remove the pupils from an inherently dangerous situation. A jury held the board negligent for permitting a dangerous building to be occupied by students. A governmental agency which must provide and maintain buildings and equipment cannot escape liability on the ground that it is a governmental agency. The decision was appealed to the appellate court and then to the court of appeals which sustained the trial court's verdict in favor of the plaintiff. From the ruling in this case the torts of agents, employees, and servants were not imputed to the school district because respondeat superior did not apply. But for its own torts the school district was held liable. This condition held until the enactment of the "save harmless" statutes in 1937 and their subsequent construction.

Because of the rule that the district was liable for its own torts but not for those of its employees, recovery was limited. This was called the "New York Rule." This was somewhat changed by the "save

⁴¹ Wharman v. Board of Education, 187 N.Y. 331, 80 N.E. 192, 116 Am. St. 609 (1907).

harmless" statutes, however. The Domino case seemed to complete the process of the abandonment of the immunity doctrine.

In this case⁴² action was brought to recover for injuries suffered by a pupil who fell over a bench while playing in a softball game on a school playground. The teachers assigned to supervise the game permitted a number of benches to be placed along the third base line for the use of the spectators. The injured boy fell over one of the benches while attempting to catch a foul ball. It was not contended that the board of education was guilty of negligence thus no liability could be imposed under the "New York Rule." It was therefore necessary for the court to abolish the limitation on the doctrine and extend district liability to acts of the employees in order to hold it liable for the injury the boy had sustained.

In changing the "New York Rule" that held school districts, but not employees of school districts liable for negligence, the court recognized that it was affecting a very important change in the law of New York on district immunity. It pointed out that for three-quarters of a century boards of education had been held liable for their own negligence but not for the negligence of their employees. They had been held liable for injury due to the defective or dangerous condition of the school premises, to their failure to promulgate suitable rules and regulations where necessary or to their failure to exercise reasonable care in the selection of competent teachers and supervisors of student activities.

⁴²Domino v. Mercuria, 234 N.Y.S., 2d 1011 (1962).

However, they were not held liable for the acts of teachers in the performance of their duties if the teachers had been selected carefully and appropriate rules for their conduct had been established. The court said that the familiar grounds upon which the limited doctrine has been founded "have been contrived as a front for the doctrine of governmental immunity."⁴³ The court declined any longer to sustain the limitations on liability.

Immunity in the State of North Carolina. Before 1951 the status of the immunity doctrine was unknown in North Carolina as no cases on this subject were decided by the supreme court. The North Carolina Tort Claims Act was adopted in 1951. Under its provisions the state of North Carolina has constituted the North Carolina Industrial Commission a court for the purpose of hearing and passing upon tort claims against the State Board of Education, the State Highway Commission, and all other departments, institutions and agencies of the state.⁴⁴ Negligence must be alleged and proven by the claimant, who must also show freedom from contributory negligence. The amount of damages is limited to \$10,000; the state and its agencies are made liable, as a private person would be liable, but sovereign immunity is declared to be waived only to the extent that negligence is shown and that there was no contributory negligence. However, the burden of proving the latter is placed on the state and its agencies and they cannot appeal awards of \$500 or less.

Claims against county and city boards of education involving the

⁴³ Ibid. p. 1023.

⁴⁴ General Statutes of North Carolina, 143-291.

negligent driving of school buses were included. Claims must be filed within two years after the accident, but if death results, they must be filed within two years after such death.

In *Lyon and Sons v. North Carolina State Board of Education*, (1953) 238 N.C. 24, 76 S.E. 2d 553, 559, the court construed the act to waive the sovereign immunity of the state.

In North Carolina at the present time, 1968, the immunity doctrine has been modified by the Tort Claims Act and by the *Lyon and Sons* case.

Immunity in the State of Arizona. Immunity was established in Arizona by 1925 when *School District No. 48 v. Rivera*, 243 P. 609, established the doctrine as applying to school districts. This case involved the death of a child in a playground accident and the court held that the district could not be sued for tort as it was covered by the mantle of immunity.

In April, 1963, the Supreme Court of Arizona, in *Stone v. Highway Commission*, 93 Ariz. 384, 381 P. 2d 107, abrogated the immunity doctrine. In this case the Supreme Court of Arizona held that the highway commission could be held liable for the negligent condition of roads when the cause of accidents. It can be seen by the title that school districts were not directly involved. The Supreme Court of Arizona left no doubt in its decision that it intended school districts to be covered. It remains to be seen whether the legislature will reinstate the immunity rule or not. The trend in Arizona is toward complete abrogation of the immunity doctrine. This case is significant because the immunity doctrine has been followed in Arizona since 1925. It was modified considerably by the fact

that the Arizona Supreme Court applied the proprietary/governmental rule often and found more actions of school districts proprietary than governmental and thus were actually finding school districts liable as often as not. *Sawaya v. Tucson High School District*, 281 P. 2d 105 (1955), was a good example of how the Arizona Supreme Court applied the governmental/proprietary rule. In this case the supreme court found that leasing a school stadium was a proprietary function and found the district guilty of negligence when some of the bleachers collapsed and injured several people.

Arizona started with the immunity doctrine established in 1925. The Arizona Supreme Court modified the doctrine considerably by finding more actions of school districts proprietary rather than governmental and therefore making school districts liable. Finally the Stone case completely abrogated the doctrine and by late 1968 this was still the law in Arizona in regard to school district immunity.

To sum up the immunity doctrine in Arizona, California, Illinois, New York, North Carolina and Wisconsin: Arizona had no cases on the immunity doctrine before 1925. In 1925 the Arizona Supreme Court established the immunity doctrine and applied it to school districts. Arizona modified the doctrine considerably by a liberal application of the governmental/proprietary rule holding many activities of school districts proprietary. Finally in 1963 in the Stone case, Arizona abrogated the immunity doctrine.

California had no cases on the school district immunity doctrine before 1923. In 1923 the immunity doctrine was abrogated by statute.

This started the abrogation trend in California. Today, 1968, liability of school districts for tort is the rule and immunity from suit is the exception in California.

Before 1870 Illinois had not decided the status of the immunity doctrine. In that year (1870) the Illinois Supreme Court established the immunity doctrine in *Town of Waltham v. Kemper* and in 1898 applied the doctrine to school districts. The immunity doctrine was the law in Illinois until 1959 when the *Molitor* case abrogated the immunity doctrine in the state of Illinois. By 1968, despite modifications by the legislature, the *Molitor* case is still the precedent case in Illinois.

The state of New York had not decided the status of the immunity doctrine before 1878. The *Bassett* case in 1878 first allowed school districts to be sued but was immediately reversed and the immunity doctrine was established. In 1899 and 1907 in the *Missano* and *Wharman* cases the New York Superior Court held that schools could be sued in their proprietary capacity and that school boards could be sued for their torts but not for the torts of their employees. This was the New York Rule and led to the complete abrogation of the doctrine in the *Domino* case decided in 1962. This case had not been overruled by 1968.

North Carolina had no cases involving the school district immunity doctrine before 1951. The Tort Claims Act was passed in 1951 and this act allowed claims to be made against school districts. This led to the 1953 *Lyons and Sons* case which construed the Tort Claims Act as abrogating the immunity doctrine in North Carolina. No further cases on this subject have been decided by 1968 in North Carolina.

The immunity doctrine was established in Wisconsin by 1873 in the Hayer case. Before 1873 there were no cases on the doctrine. Thus the immunity of school district doctrine was of long standing in Wisconsin when in 1962 the Holytz case abrogated the doctrine. This decision has not been changed by 1968 in Wisconsin.

Six states (Arizona, California, Illinois, New York, North Carolina, and Wisconsin) have abrogated the immunity doctrine. Three (Arizona, Illinois and Wisconsin) by court action, one (California) by legislative action, and two (North Carolina and New York) by combination of legislative actions. In these six states the trend is still toward abrogation as no changes have been made by late 1968.

The question should now be asked: Is there a trend in other states either toward modification of the doctrine or toward complete adherence to the immunity doctrine? Will the states follow the path set by California, New York, Washington, Wisconsin, Illinois, North Carolina and Arizona toward modification or abrogation of the doctrine or will they follow the lead of Oregon and Minnesota in reasserting or reaffirming the immunity doctrine?

The following section examines states where the trend seems to be toward limited liability usually provided for by a statute or by a broad interpretation of certain exceptions to the general rule of immunity.

States Where the Trend is Toward Limited Liability

Highpoints in the immunity doctrine in Minnesota, Oregon and Washington were discussed together because each state had an early trend

toward abrogation of the doctrine but for one reason or another this trend was slowed down or reversed. Table 1 presented the highpoints of cases from these states. Table 2 presented the highpoints in the six states that abrogated or were attempting the immunity doctrine. These states (Arizona, California, Illinois, New York, North Carolina and Wisconsin) all tended toward abrogation and in these states this trend is strong. Alabama, Connecticut, Louisiana, Mississippi and New Jersey have limited liability of school districts by one means or another. Table 3 will present the highlights of cases in these states.

There was little court action on the immunity doctrine in the five states discussed in Table 3 (Alabama, Connecticut, Louisiana, Mississippi, and New Jersey). The earliest case was a 1909 case in Connecticut which affirmed the immunity doctrine. The next earliest case in 1934 was a New Jersey case also upholding the school district immunity doctrine. Alabama, Louisiana, and Mississippi had no case reported on school district immunity before 1940. Alabama and Mississippi had statutes that limited liability and Louisiana had a statute that allowed direct action suits against insurance companies providing protection to school districts. Connecticut and New Jersey had no statutes but provided limited liability by court action; Connecticut by providing a large nuisance exception and New Jersey by providing that school districts could be held liable by committing an affirmative wrong. Each of these states provided limited liability for school districts but came to this conclusion by different routes. The next section will treat each of these states in detail to provide closer scrutiny of these states.

TABLE 3. HIGHPOINTS OF KEY CASES IN STATES WHERE THE TREND IS TOWARD LIMITED LIABILITY

States	Highpoints in Development of Immunity Doctrine	Key Cases
Alabama	1940, before this status of immunity doctrine unknown because no case had come before the supreme court.	
	1940 statute passed creating State Board of Adjustment to settle claims for damages caused by negligence of state or state agencies.	
	1943 supreme court held school districts fell within 1940 statute.	State ex rel McQueen v. Brandon
	1959 supreme court allowed action against school district for maintaining a nuisance.	Lauderdal County Board of Education v. Alexander
	1968 no cases up to date.	
Connecticut	1909, before this status of the immunity doctrine unknown. No cases came before supreme court.	
	1909 supreme court affirmed immunity doctrine when town (township) attempting to sue school district for overtaxing property.	State ex. rel. Town of Huntington v. Huntington Town School Committee
	1947 school district immunity confirmed in case where district was negligent in not providing lighted staircase.	State ex. rel. Board of Education v. D'Aulica
	1952 school district immunity reaffirmed where school was negligent in bus accidents.	Fowler v. Town of Enfield

TABLE 3 (continued)

States	Highpoints in Development of Immunity Doctrine	Key Cases
Connecticut	1954 supreme court held that immunity does not avail against nuisance created by positive act of school district. Case created large exception to immunity doctrine.	Sestero v. Glastonbury
	1968 no new cases involving immunity doctrine to this date.	
Louisiana	1950, before this status of immunity doctrine unknown. No cases involving school district immunity reported.	
	1950 Direct Action Statute allowed suits against insurance companies holding liability policies.	
	1956 supreme court allowed a direct suit against insurance company insuring school bus.	Fidelity and Casualty Co. of New York v. Talbot
	1962 supreme court affirmed another direct action suit against insurance company and required same standard of school bus drivers as of common carriers, that is, the highest degree of care.	Sepulvado v. General Fire and Casualty Company
	1966 supreme court declared clear negligence must be shown by bus driver before liability can be proved. Immunity modified by direct action statute and these cases to date.	Nash v. Rapides Parish School Board.
	1968 no new cases to this date.	

TABLE 3 (continued)

States	Highpoints in Development of Immunity Doctrine	Key Cases
Mississippi	1953, before this status of the immunity doctrine unknown. No cases reported in the supreme court.	
	1953 statute passed allowing suit for negligence arising out of school bus operation. Damages limited to \$5,000.	
	1957 supreme court allowed full amount of damages under 1953 statute.	Rankin v. Wallace
	1968 no further cases to this date.	
New Jersey	1934, before this status of immunity doctrine unknown. No reported cases before supreme court on school district immunity.	
	1934 first reported case upheld school district immunity. School district ruled quasi-corporation.	McKnight v. Cassady
	1963 supreme court established qualified liability of school districts. District could be held liable by committing an affirmative wrong.	Jackson v. Hankinson

Immunity Doctrine in Alabama. In Alabama the immunity doctrine is still the rule but limited liability is provided for under the supreme court ruling of 1959 (Lauderdal County Board of Education v. Alexander) which allowed action against school districts for maintaining a nuisance

and by operation of the State Board of Adjustment that handles most negligence cases before they come to the supreme court.

Before 1940 no reported cases involving school district negligence came before the Alabama Supreme Court. In that year the Alabama legislature passed a statute creating a State Board of Adjustment to settle claims for damages caused by negligence of the state or state agencies. The 1943 case, *State ex. rel. McQueen v. Brandon*, 1250 2d 319, held that school districts fell within that 1940 statute.

By setting up a Board of Adjustment to handle claims, Alabama has modified the immunity doctrine to a limited extent. *Lauderdal County Board of Education v. Alexander*, 110 So. 2d 911, (1969) reaffirmed the immunity doctrine in general but allowed an injunction against the school board for constructing a school bus barn under the nuisance exception. Alabama is one of the few states that have attempted to fit the nuisance doctrine into an exception to the immunity rule. Generally speaking, the nuisance doctrine applies only to property rights. An unsightly building, bad odors, objectionable noises, or house of ill fame could be enjoined upon the complaint of the plaintiff. Liability for nuisance in many cases is based upon negligence. Where the immunity rule is still the law a district cannot be sued for negligence. It can be easily seen that this is an almost hopeless attempt to distinguish between negligence and nuisance. To attempt to apply the nuisance doctrine to the immunity doctrine is an attempt by the courts to modify the immunity doctrine.⁴⁵

⁴⁵Prosser on Torts, *op. cit.* pp. 1009-1010.

Alabama has modified the immunity doctrine to the extent of establishing a Board of Claims to handle claims arising against school districts. There had been no changes up to 1968.

Immunity Doctrine in Connecticut. No cases were decided in Connecticut by 1909 that involved school district negligence and so the status of the immunity doctrine was unknown. Because Connecticut was one of the common law states and because the immunity doctrine was a common law doctrine it could be supposed that immunity was the law. However, there were no cases to confirm or deny this supposition until 1909. The 1909 State ex. rel. Town of Huntington v. Huntington Town School Committee, 74A. 882, the immunity doctrine was affirmed in a case involving the Town of Huntington's attempt to sue the Huntington Town School Committee for the return of an overpayment of taxes. The Supreme Court of Connecticut ruled that the school committee could not be sued because of the immunity doctrine. Though the immunity doctrine is still the rule in Connecticut, the supreme court of this state made such a wide exception based on the nuisance doctrine that it seems that the whole immunity doctrine is weakened. In Sestero v. Glastonbury, 19 Conn. Supp. 156, 110 A. 2d, 629 (1954), the plaintiff was a school boy who was pushed by classmates in such a way as to cause an injury from a "dangerous and hazardous condition" which is not further described by the court. The plaintiff had relied principally on negligence in his complaint, and the board of education based its defense on governmental immunity. The court said, however, that the defense of governmental immunity does not avail against a cause of action founded on a nuisance created by the positive act of

a governmental body and that while no nuisance was claimed by the plaintiff, the allegation of the complaint were broad enough to set forth the essential of the doctrine. In Connecticut the determining elements in nuisance cases are whether the natural tendency of the condition was to cause damage and inflict injury, and whether this was its effect in a given case.

The immunity doctrine has been the law in Connecticut since 1909 but the Sostero case of 1954 created such a large exception to this doctrine so as to create limited liability. No further cases have been reported to change this exception (1968).

Immunity Doctrine in Louisiana. The status of the immunity doctrine was unknown in Louisiana before 1950 because there had been no judicial notice taken of the doctrine. Since Louisiana is the only state in the Union that does not recognize the immunity doctrine it could not be presumed to be the law even without a supreme court case to clarify the legal status.

In 1950 a Direct Action Statute allowed suits against insurance companies protecting school districts and in 1956 the Louisiana Supreme Court allowed a direct suit against an insurance company insuring a school bus. This was Fidelity and Casualty Company of New York v. Talbot, 234 F. 2d 425. In 1962 in Sepulvado v. General Fire and Casualty Company, 146 So. 2d 428, the supreme court affirmed another direct action suit against an insurance company and required the same degree of care of school bus drivers as of common carriers, that is, the highest degree of care.

In Louisiana, under certain circumstances, school districts may

be held liable for the negligence of their employees. What must be proved in order to recover in such cases was considered by the Court of Appeals in *Nash v. Rapides Parish School Board*, 188 So. 2d, 508 (1966).

The plaintiff sued the district and its insurance company for damages for injuries sustained by the plaintiff's minor son. The lower court found that there was no evidence to sustain the allegation of negligence on the part of the district and recovery was denied.

This case is of particular interest since the appellate court states in some detail the degree of supervision required of district and their employees for the safety of the children. A boy had been injured when a girl struck him in the eye with a stick while he was playing with or teasing another girl. As a result of this injury the boy's eye was subsequently removed. The plaintiff charged that the district and its employees failed to supervise the children adequately on the school grounds after the close of school.

The court indicated that the board, through its agents and teachers, is required to supervise the children while they are awaiting their school bus. The applicable statute provides that teachers and artisans are answerable for the damage caused by their pupils or apprentices, while under their charge. However, in order to recover under such a statute there must be proof of a causal connection between the lack of supervision and the cause of the injury. The statute does not create liability without fault.

In the court's opinion, the teachers could not have prevented the injury even if they had been standing next to the injured child. Even if

no teachers were on duty, it still could not be said that the plaintiff had shown that there was any proximate cause whatever between the lack of supervision and the accident. No one can predict how children of eight or nine years of age will act while playing on the school grounds.

The plaintiff argued that the bus driver was negligent in not taking the boy directly to a hospital once he learned that he had been injured. There was some question as to whether the bus driver had been told that the child had been hurt. Instead of taking the boy to a hospital he took him home. The court said that the bus driver was not negligent, and that he, in good faith, with the limited knowledge he had at the time, acted correctly in taking the boy home.

In Louisiana, insurance companies protecting schools from liability may be sued if negligence can be proved against a teacher or an employee of the district. This action against insurance companies was made possible by the Direct Action Statute that in effect imposed limited liability upon school districts in Louisiana.

It would appear that in Louisiana there is a considerable modification of the immunity doctrine. If negligence can be proved against a teacher or employee of the district, direct action can be taken against the insurance company, if the school is covered, or against the district itself. Though there is no liability without fault, there is still a much better chance for the plaintiff in Louisiana than in states where the immunity doctrine is in full force.

Immunity Doctrine in Mississippi. Mississippi was another state where there were no early cases on the immunity doctrine though here,

as in other common law states, the immunity doctrine could be presumed the rule of law. The immunity doctrine is modified to the extent of limited recovery under a statute passed in 1953. The important provisions allow pupils to sue school districts for injuries due to negligence in the upkeep or driving of school buses.

The law further provides that school districts operating vehicles for the transportation of children shall annually contribute to a fund in the state treasury to be known as the "Accident Contingent Fund" on the basis of \$5.00 for each school bus or other vehicle used by the school district for the transportation of children. Any claim arising from a school bus accident is limited to \$5,000 for any one child. Under this law claims may be paid only from the Accident Contingent Fund thereby protecting the funds of the district. Rankin County v. Wallace, 92 So. 2d 661 (1957), allowed the full amount to be recovered under this statute. The case involved a bus accident that badly disfigured the face of a young girl. The district brought suit to prevent the paying of the full amount allowed under the statute as being excessive damages. The court disagreed and allowed the full amount.

Immunity Doctrine in New Jersey. McKnight v. Cassady, 174 A. 865, was the first reported case on the immunity doctrine in New Jersey. The court in this case upheld the immunity doctrine because it was a common law rule and ruled that school districts were quasi-corporations.

Although governmental immunity is still generally the rule in New Jersey, the courts in New Jersey have held that an affirmative act resulting in injury is sufficient to sustain municipal liability. This

was clearly shown in Jackson v. Hankinson, 94 N. J. Super. 505, 229 A. 2d 267 (1967). In this case the court said that in placing the injured party on the bus where he was injured, because of improper supervision the school district could have been held liable. In this particular case, however, the bus driver was not liable. So, though immunity is still the law in New Jersey it is modified by the court to the extent that an affirmative act that results in injury could create liability by a school district.

The five states of Alabama, Connecticut, Louisiana, Mississippi, New Jersey limited the immunity doctrine in various ways. Alabama limited liability by setting up a state board of adjustment to handle claims arising from suits against governmental agencies, including school districts. Connecticut granted limited liability, in effect, by allowing a very broad nuisance exception to the general rule of governmental immunity. Louisiana allows school districts to be sued under special circumstances if negligence is clearly shown. Mississippi provided for limited liability under a statute that allowed suits for negligence arising from school district bus accidents up to the amount of \$5,000. New Jersey has allowed school districts to be sued and held liable if they commit an affirmative wrong. The New Jersey Supreme Court calls this qualified immunity of municipalities and applies it to school districts. By these different methods the five states of Alabama, Connecticut, Louisiana, Mississippi, and New Jersey had limited the liability of school districts.

Among the states were three (Alaska, Florida, and Nevada) where

the trend may foreshadow the abrogation of the immunity doctrine. These are presented in the following section.

States Where Trend May Foreshadow Abrogation of
the Immunity Doctrine

Some states have neither abrogated the immunity doctrine nor have they limited liability of school districts, but they have, perhaps, foreshadowed the abrogation of the immunity doctrine by their handling of cases touching upon the doctrine. These states are Alaska, Florida, and Nevada. Though the cases in these states show a fairly strong trend toward the final abrogation of the immunity doctrine, only time will tell whether the courts and/or the legislatures will follow through with complete abrogation. Table 4, page 124, gives us a closer look at the development of the doctrine in these three states.

These three state (Alaska, Florida, and Nevada) have indicated a strong trend toward abrogation of the immunity doctrine. There has been a great shortage of cases involving school district immunity in these states. There had been territorial statutes by act of congress holding school districts liable in Alaska dating back to 1884. There was an 1850 case in Florida that inferred school liability. Only in Nevada was the immunity doctrine established by court cases; one in 1909 and affirmed again in 1934. In the late 50's and early 60's action was taken in these states that would seem to foreshadow the abrogation of the immunity doctrine.

All three states lifted the immunity of governmental agencies-cities in the case of Alaska and Florida- counties in Nevada.

TABLE 4. HIGHPOINTS OF KEY CASES IN STATES WHERE TREND MAY FORESHADOW
ABROGATION OF DOCTRINE

States	Highpoints in the Development of the Immunity Doctrine	Key Cases
Alaska	1884, before this date status of immunity doctrine unknown.	
	1884 Act of Congress allowed suits against school districts for tort injuries	
	1900 Act of Congress held action could be maintained against school districts for injuries.	
	1959 supreme court held that city did not enjoy immunity. No cases involving school districts reported as of now. Court indicated school districts might be covered.	City of Fairbanks v. Schaible
Florida	1850 supreme court maintained that English rule in Russell case meant that individuals should not have to bear all the burden of injuries caused by negligence of municipal corporations.	City of Tallahassee v. Fortune
	1957 supreme court held city liable for death of jail prisoner due to negligence of jailer. No case reported on school districts as of 1968.	Hargrove v. Town of Cocoa Beach
	1967 supreme court allowed appropriation for injury.	Bonvento v. Board of Public Instruction
Nevada	1909 supreme court held a municipality liable for accident caused by a break in a street.	McDonough v. Mayor etc. of Virginia City.
	1934 supreme court held county could not be sued without legislative permission for any reason.	McKay v. Washoe General Hospital

TABLE 4 (continued)

States	Highpoints in the Development of the Immunity Doctrine	Key Cases
Nevada	1963 supreme court reversed McKay decision and held county liable for negligent operation of roads. Last case reported. (1968)	Rice v. Clark County

The next section will examine these three states more closely to see if the trends are toward abrogation.

Immunity Doctrine in Alaska. Alaska had territorial laws enacted by Congress that allowed school district to be sued for torts. There was little or no legal action in this field, at least any that reached the Alaska Supreme Court. The only case reported up to 1968 involving the immunity doctrine was *City of Fairbanks v. Schaible*, 375 P. 2d 201. In this case, that involved action for damages against a city for the poor condition of city streets, the court held that the city could be sued and was not immune from tort liability. If the Supreme Court of Alaska applies the same reasoning to districts, that is, that state agencies are liable for their torts, this case may foreshadow complete abrogation of the immunity doctrine.

Immunity Doctrine in Florida. Even though the interesting old case of *Tallahassee v. Fortune* decided in 1850 and cited as 3 Fla. 19, gave an interpretation of the *Russell v. Men of Devon* case that held that the case really meant that the individual should not bear the brunt of

injuries caused by the negligence of municipal corporations, Florida did not come out against the immunity doctrine as such until the Hargrove v. Town of Cocoa Beach, 96 So. 130 case in 1957 where the Supreme Court of Florida held a city liable for the wrongful death of a prisoner in the city jail. The court went back to Tallahassee v. Fortune for precedent.

A more recent case decided in 1967 might give an indication of the continuing trend in Florida. In Bovento v. Board of Public Instruction, 194 So. 2d 605, the Supreme Court of Florida upheld the payment of school funds to an injured student. The court divided 4-3 on the decision and it is believed that this may be the first case on the specific question involved.

A school boy suffered a serious injury to his back when a "human pyramid" of which he was a part--and which was formed under the supervision of a teacher in a physical education class--collapsed. His spine was fractured and his lower extremities were completely paralyzed. The cost of medical treatments at the time the case reached the courts totaled \$25,000. The legislature appropriated \$50,000 out of the funds of the County Board of Public Instruction to compensate the boy for his injury. The state constitution prohibits the enactment of any law authorizing the diversion of appropriation of school funds to other than "school purposes." The lower court thought that the legislature in a magnanimous desire to assist the unfortunate boy overlooked the constitutional restriction. It declared the appropriation invalid and declared the payment of school funds to an injured student was not use of the money for "school purposes." The majority of the Supreme Court of Florida thought that

the use of this money was for proper purposes and allowed the appropriation.

This case could be the foreshadowing of the end of the immunity doctrine in Florida where municipalities are not immune even now.

Immunity Doctrine in Nevada. There were no cases on the immunity doctrine in Nevada until 1909. The immunity doctrine was ended for municipalities in Nevada in 1909 when in the case of McDonough v. Mayor etc. of Virginia City, 6 Nev. 90, the supreme court held a city liable for an accident caused by a break in the streets. In 1934 in McKay v. Washoe General Hospital, 33 P. 2d 755, the supreme court overruled the McDonough case and declared that counties could not be sued for any reason. Details of this case were not available as the supreme court ruled only on the one issue and not on the case as a whole. Finally in 1963 the Supreme Court of Nevada again overruled itself in the Rice case and declared that a county could be sued for its torts. In Rice v. Clark County, 382 P. 2d 605, decided in 1963 the supreme court held that Clark County could be sued for the negligent condition of their roads. The trend seems to be toward abrogation of the immunity doctrine in Nevada.

Supreme court action in Alaska, Florida, and Nevada indicate the possible end of the immunity doctrine in these states. Alaska had never tested the immunity in court until 1959 when in the Fairbanks case the supreme court lifted the doctrine as far as municipalities were concerned. Florida did the same in the Hargrove case of 1957. In addition the Florida Supreme Court allowed the legislature to set aside money for a

tort injury of a high school student. In Nevada immunity had been upheld in 1909 and again in 1934 but the supreme court lifted it for counties in the Rice case of 1963. All these cases did not directly involve school districts but indicate or foreshadow the abrogation of the immunity doctrine in Alaska, Florida and Nevada.

A brief recapitulation discloses that three states (Minnesota, Oregon and Washington) had an early movement toward modification of the immunity doctrine but for one reason or another a retrograde movement set in and these states strictly control or eliminate the liability of school districts. Arizona, California, Illinois, New York, North Carolina and Wisconsin have all been leaders in the modification or abrogation of the immunity doctrine by court action, by legislative action or a combination of both. Five states (Alabama, Connecticut, Louisiana, Mississippi and New Jersey) have established limited liability by court action or by legislative enactment. Finally, Alaska, Florida, and Nevada had lifted liability from cities or counties and their supreme court actions had clearly foreshadowed the abrogation of the immunity doctrine in these states.

The remaining states studied (twenty-four) retained the immunity doctrine. These states will be considered in the next section.

States Upholding Immunity Doctrine

Most of the states still uphold the immunity doctrine for one reason or another. These states have one reason in common for upholding the immunity doctrine. They appear reluctant to go against a well

established rule of law. Some states are more reluctant than others, however. Some states uphold the doctrine but one or more of the justices dissent. These dissents are often bitter and caustic. Colorado, Kentucky, Montana, Pennsylvania, and Utah all uphold the doctrine as well established laws in their states, but some of their justices strongly disagree and their dissents have been widely quoted by opponents of the doctrine. One state, Michigan, upholds the doctrine but is very dissatisfied with it and wishes the legislature would change immunity to liability. Arkansas, Delaware, Missouri, and New Mexico appear to uphold the doctrine but when applied squarely to school districts their cases appear ambiguous. These states uphold the doctrine in the cases decided but so far have not decided any directly affecting school districts. Iowa upholds the doctrine despite a statute that would seem to modify, if not abrogate, the doctrine. The other states strongly uphold the immunity doctrine.

Even in states that uphold the immunity doctrine it appears from actions within these states that agreement is not complete. In five states (Colorado, Kentucky, Montana, Pennsylvania and Utah) one finds the majority of the supreme court supporting the doctrine as well established law with a minority dissenting. The dissenting justices were, some of them, very caustic and bitter, calling the immunity doctrine "offensive," "an anachranism," "discredited" and drawing heavily on courts in states that have abrogated the doctrine for support. Despite these strong dissents the majority in these courts strongly support the immunity doctrine as shown by such rulings as Tesone case in Colorado, the Cullinan case in Kentucky, the Rhodes case in Montana, the Husser case in Pennsylvania

and the Bingham case in Utah where the majority vigorously upheld the immunity doctrine.

One state, Michigan, supported the doctrine but did so very reluctantly. The Supreme Court of Michigan felt that the legislature was the only body that could change the doctrine and felt also that it should be changed.

Arkansas, Delaware, Missouri, and New Mexico appeared to uphold the doctrine but no cases have directly been applied to school districts so there was some ambiguity about the doctrine in these states.

Iowa was in a singular position. Many state courts have indicated their willingness to accept the fact of abrogation of the immunity doctrine if the state legislature affirmed it. Iowa's legislature passed the Iowa Tort Claims Act allowing all state agencies to be sued in tort. In 1966 the Supreme Court of Iowa held that school districts were not included in this act.

The rest of the states reported (Georgia, Indiana, Kansas, Maryland, Massachusetts, North Dakota, Ohio, South Dakota, Tennessee, Texas, Vermont, West Virginia and Wyoming) strongly support the doctrine as good law with few or no dissents. Tennessee allows no exceptions though the rest allow the usual exceptions that is: proprietary/governmental rule and nuisance exception, but apply these exceptions sparingly. In these states it is not surprising that cases involving tort action against school districts are few and far between.

States Upholding Immunity Doctrine but with Strong Dissents.

Colorado, Kentucky, Montana, Pennsylvania, and Utah uphold the immunity

doctrine. In each of these states, however there are strong and often bitter dissents. Table 5, page 132, will present the highpoints and the key cases of these states for a closer look.

These states have all upheld the doctrine despite the fact that the dissents have ranged from caustic to bitter. The five states are similar in that the strong dissents have not, as yet led to a modification of the doctrine but has rather strengthened the majority point of view. The following section will present a closer look at these states to observe how they vary in detail.

Immunity in Colorado. Until 1904 governmental immunity could be presumed to be the law in the common law state of Colorado as the immunity doctrine is a common law rule. This was not confirmed until 1904 when in *Veraguth v. City of Denver*, 76 P. 539, the supreme court held that municipalities were not liable for torts when acting in a governmental capacity. It was reaffirmed in the *City of Denver v. Davis*, 86 P. 1027, where the City of Denver was held immune for the torts of its police superintendent. It has been steadfastly held since then but with strong dissents.

The immunity doctrine was upheld as late as 1963 in *Tesone School District No. Re-2*, in county of Boulder, 284 P. 2d 82. Action was brought to recover damages in tort for injuries sustained by a boy while practicing basketball. The writ was unsuccessful in the lower court under what the court found to be the settled pronouncements of the Supreme Court of Colorado. It was admitted on behalf of the injured boy that the doctrine of governmental immunity from liability in tort applied to school.

TABLE 5. HIGHPOINTS AND KEY CASES OF FIVE STATES UPHOLDING THE IMMUNITY DOCTRINE BUT WITH STRONG DISSENTS

State	Highpoints in the Development of the Immunity Doctrine	Key Cases
Colorado	1904, before this date no cases reported on the doctrine.	
	1904 supreme court held municipalities not liable for torts when acting in governmental capacity.	Veraguth v. City of Denver
	1906 municipality held immune for tort of its police superintendent.	City of Denver v. Davis
	1960 supreme court condemns immunity doctrine saying "its in limbo."	Stone v. Currigan
	1961 supreme court calls immunity doctrine "proper subject for students in mythology."	Colorado Racing Commission v. Brush Racing Association
	1963 supreme court upholds immunity of school districts despite bitter dissent by Chief Justice Frantz. Last case on this subject reported up to 1968.	Tesone v. School District No. Re-2 in Boulder County
Kentucky	1891, no reported cases before this date.	
	1891 supreme court held school districts immune from liability in condemnation proceedings.	Trustees of School District No. 1 v. Jameson
	1960 school district held not liable when accident occurred while building gymnasium. Immunity doctrine affirmed.	Thacher v. Pike County Board of Education

TABLE 5 (continued)

States	Highpoints in the Development of the Immunity Doctrine	Key Cases
Kentucky	1967 supreme court held immunity barred recovery from school district when plaintiff stepped in hole on school yard. Strong dissent by justice calling doctrine "offensive on its face." Last case reported up to 1968.	Cullinan v. Jefferson County
Montana	1930, immunity presumed to rule though no cases reported.	
	1930 supreme court held county liable for tort for an accident in running a ferry. Held running a ferry a proprietary function.	Jacoby v. Chouteau County
	1933 supreme court held school district immune from law suit because covered by immunity.	Perkins v. Trask
	1943 supreme court reaffirmed the immunity doctrine when plaintiff injured at basketball game. Justice Erickson made strong dissent attacking doctrine and governmental proprietary rule. Last case reported up to 1968.	Rhodes v. School District No. 9
Pennsylvania	1850; no cases before this date.	
	1850 immunity doctrine applied to municipalities in case involving illegal seizure of horse by city police.	Fox v. Northern Liberties
	1966 supreme court upheld immunity when school sued in case where plaintiff slipped on ice on school steps. Justices Roberts and Musmano dissented calling doctrine "discredited."	Dillon v. New York City School District
	1967 immunity doctrine again upheld	Husser v.

TABLE 5 (continued)

States	Highpoints in the Development of the Immunity Doctrine	Key Cases
	when school sued because of crime committed on school grounds. Justice Musmano dissented asking the court to bury "this legal charlantry in the grave of its discredited monarchical grandsires."	School District of Pittsburgh
Utah	1920, no cases though immunity presumed the rule.	
	1920 supreme court held school immune from tort liability for personal injuries to a teacher.	Woodcock v. Board of Education of Salt Lake City
	1950 supreme court again upheld the immunity doctrine in case where little girl fell into hot ashes left on school grounds. Justice Wolfe dissented saying he would "prefer to regard said principle (immunity doctrine) for the purpose of overruling it. This case is still the precedent case in Utah to date. (1968)	Bingham v. Board of Education of Ogden City

districts in the state. However, it was urged that these cases be overruled and that the law be changed as it had been in several states. In a terse opinion, the majority of the court adhered to its former decisions on the ground that it was not within the province of the judicial branch of the government to change long established principles of law. This, said the court, is a legislative function. This case is particularly

interesting because of the direct attack Mr. Justice Moore made upon the dissenting opinions of Mr. Chief Justice Frantz and Justices Hall and Pringle. In his concurring opinion, Justice Moore said that it was not the function of the court to create confusion and instability in well settled law of the state. It was the job of the legislature to change the law if it was to be changed.

Despite this vigorous upholding of the immunity doctrine by the Colorado Supreme Court in 1963, the dissent in the Tesone case by Chief Justice Frantz pointed out that a number of cases in Colorado have shown the Supreme Court dissatisfied with the immunity doctrine. For example, in *Stone v. Currigan*, 138 Col. 442, 334 P. 2d 740 1959, the court said "the doctrine of sovereignty in Colorado is in limbo; only the memory lingers on." In *Colorado Racing Commission v. Brush Racing Association*, 136 Colo. 279, 316 P. 2d 582, the court said "In Colorado 'sovereign immunity' may be a proper subject for discussion of students of mythology, but finds no haven or refuge in this court."

In Chief Justice Frantz's opinion where once the doctrine had smooth sailing in Colorado and other states, it is now rocking along in troubled waters. These opinions seem to foreshadow a modification of the doctrine in Colorado. As of now, late 1968, immunity is still the law in this state.

Immunity in Kentucky. Immunity of school districts was not confirmed in Kentucky until 1891. As in all other common law states immunity was presumed to be the law in the absence of statute. In *Trustees of School District No. 1. v. Jameson*, 15 S. W. 1, the Kentucky Supreme

Court affirmed the immunity doctrine and held school districts not liable for their own torts. This was reaffirmed in 1960 in *Thacher v. Pike County Board of Education*, 193 S. W. 2d 409, where a school district was held not liable when an accident occurred in an unfinished gymnasium.

In a recent case, (1967), *Cullinan v. Jefferson County*, 418 S.W. 2d 407, held that the school district was not liable under the immunity doctrine. Because of the interesting dissents in this case it is worthwhile to spend a little time on it.

A pupil who had broken his ankle by stepping into a hole on the school grounds brought suit against the school district. He sued for damages but was denied recovery in both the lower court and the Court of Appeals. The court said that the county board of education is a political subdivision of the Commonwealth, is clothed with the same sovereign immunity as the Commonwealth, and declined to extend the liability of municipalities for tort to school districts.

The court pointed out that the General Assembly had provided remedies for certain torts committed by agents of the Commonwealth. The remedy is in the form of legislative enactment recognizing the protection of sovereign immunity as it applies to the particular subdivisions, but authorizes the subdivisions to carry insurance to cover certain types of hazards. The court indicated that it should not invade the constitutional authority of the General Assembly by holding that the doctrine of sovereign immunity does not bar a tort action against the board of education. One of the dissenting judges said that it was offensive on its face for a person who is run down in the street by a reckless driver to collect

damages but one who is equally damaged by someone acting for one of the "myriad governmental agencies" not to collect equally.

The immunity doctrine is still strong in Kentucky even though there was a strong dissent in the latest case.

Immunity in Montana. Immunity is the well established rule in Montana. The rule was established in two cases. The first one was Perkins v. Trask. This held that parents could not recover for the wrongful death of their child. The Supreme Court of Montana held in Perkins v. Trask, 95 Mont. 1 (1933), that in the absence of statute imposing liability for negligence upon school districts or their trustees, they may not be held liable, although section 1022, revised codes of Montana 1921 contain the general provision that a school district may sue and be sued. Non-liability of trustees in tort action was also upheld.

Ten years later, in 1943, the Supreme Court of Montana reaffirmed the immunity doctrine. Rhoads v. School District No. 9, 115 Mont. 352, established that under the Perkins case that neither a school district nor its board of trustees is liable in damages for injuries sustained by one attending a basketball game held in a school gymnasium, who in endeavoring to gain access to a gallery provided for spectators, used a stairway of which one of the steps gave way causing the injuries complained of, since defendants were acting in a governmental and not in a proprietary capacity, the game being played having been merely a part of the physical education of the school, and that therefore the trial court properly sustained a general demurrer to the complaint and dismissed the action.

The Rhoads case has often been quoted by courts in other states, not for sustaining the immunity doctrine, but because of the blistering dissent by Justice Erickson who attacked the immunity doctrine and the Montana Supreme Court's attempt to distinguish between governmental and proprietary functions. So far the immunity doctrine holds strong in Montana.

Immunity in Pennsylvania. The immunity doctrine was established in Pennsylvania in 1850 when it was applied to municipalities in *Fox v. Northern Liberties*, 3 Watts & S. when the city police of Northern Liberties seized a horse illegally. The supreme court held that the city could not be sued because it was covered by immunity. This case also suggested very strongly that all government agencies including school districts were also covered by the cloak of governmental immunity.

The immunity doctrine is still upheld by the Pennsylvania Supreme Court despite vigorous opposition and frequent court tests. The last case found upholding the doctrine in Pennsylvania was *Husser v. School District of Pittsburg*, 228 A. 910, decided in 1967. Despite vigorous assaults upon the doctrine previously mentioned, the Supreme Court of Pennsylvania has declined to modify or abandon it. It sustained the rule again in the *Husser* case. Justice Musmano gave an uncompromising dissent against the doctrine as he had in several previous cases.

The plaintiff was leaving the school building at the end of the school day. While doing so he was accosted, assaulted, and seriously beaten by a group of rowdy youths when he refused their demands for money. Suit for damages was brought against the school district, but the lower

court dismissed the action because of the tort immunity rule in the state.

The complaint showed that similar criminal acts had occurred with great frequency in and about the same school during the period immediately prior to the attack upon the plaintiff. The school authorities knew of these occurrences and the danger to those attending the school. According to the complaint the authorities neglected and refused to take precautionary measures for the children's protection.

Here, as in many previous cases, counsel for the plaintiff argued that the Pennsylvania rule which protects school districts from tort liability for injury caused by their employees while engaged in the exercise of their governmental functions should be abolished.

Justice Musmano, in his dissent, suggested that if the district had permitted a Bengal tiger to roam the school yard and the boy had been mangled by the beast, he could not believe that the majority of the court would say that the district was not guilty of neglect in allowing the existence of such a peril. Their responsibility of holding in leash a raging mob of juvenile delinquents intent on ruinous mischief cannot be less, according to the Justice.

Despite the objections of Justice Musmano and others the rule is steadfastly maintained in Pennsylvania.

Immunity in Utah. Before 1920 there were no cases involving school district immunity in Utah though it could be presumed to be the law in the absence of a statute to the contrary. Utah still upholds the immunity doctrine despite a bitter dissent by Justice Wolfe of the Utah Supreme Court. Justice Wolfe's dissent is widely quoted by courts trying to mod-

ify or abrogate the immunity doctrine. The most famous and most quoted Utah case is *Bingham v. Board of Education of Ogden City*, 223 P. 2d 432. This case was decided in 1950 and upheld the immunity doctrine. Mr. Justice Wolfe dissented saying that he would rather regard the immunity doctrine "for the simple purpose of overruling it." He mentioned waiting for the dim distant future of the "never-never land when the legislature may act." He also pointed out that the rule rests upon the immortal and indefensible doctrine that the "King can do no wrong," and that a state should not be permitted to shield itself behind it.

Nevertheless, in 1964 in *Campbell v. Board of Education of Granite School District*, 389 P. 2d 464, the Supreme Court of Utah again sustained the immunity doctrine.

One State Upholding Doctrine but Indicating Dissatisfaction. One state is in a peculiar situation because the supreme court upholds the doctrine but feels dissatisfaction with it. This is the state of Michigan.

Immunity in Michigan. Though immunity could be presumed to be the law in Michigan as common law doctrine, it was not tested in the courts until 1937 in *Gaincott v. Davis*, 275 N.W. 2d 229, when the Supreme Court of Michigan upheld school district immunity. In this case the court held the teacher liable for tort when a child fell while performing a chore. The court did not hold the school district liable however. Table 6, page 141, presents the highpoints in the immunity doctrine in Michigan.

Several cases in recent years have upheld the immunity doctrine in Michigan. *Sayers v. School District No. 1*, 114 N.W. 2d 191 decided in 1962, again sustained the doctrine of governmental immunity of school

TABLE 6. HIGHPOINTS IN ONE STATE UPHOLDING DOCTRINE BUT INDICATING DISSATISFACTION

State	Highpoints in Development of Immunity Doctrine	Key Cases
Michigan	1937, before this immunity was the common law.	
	1937 supreme court held teacher liable for tort when child fell while performing a chore. Upheld district immunity and only teacher held for damages.	Gaincott v. Davis
	1957 supreme court upheld doctrine in case where school was sued for injuries sustained from falling bleachers. Justice Edward dissented saying doctrine "doctrine died at Runnymede in 1215."	Richards v. School Board of Birmingham
	1963 supreme court again upheld doctrine in case where boy stepped into a hole on school grounds. Court was reluctant to uphold the doctrine but felt obligated to keep it until the legislature overruled it. Last case reported up to 1968.	Sayers v. School District

school districts for the torts of its employees.

A pupil of the district was injured by stepping into a hole while playing on the school grounds. Suit was brought against the contractors constructing the building and against the school district itself. The school district raised the defense of governmental immunity. On behalf of the district it was argued that the suit was barred by the doctrine of governmental immunity and that the purchase of insurance did not :

constitute a waiver of this immunity. The supreme court was asked to reverse the trial court by holding the doctrine of governmental immunity as no longer available to a school district. There was no question that to do so it would be necessary for the court to reverse a number of its own decisions on the problem.

The court sustained the position of the district and held that the doctrine of governmental immunity was applicable to it. The court made it clear that it was not favorable to the doctrine. It indicated that if it were dealing with the obsolete "king can do no wrong" theory of governmental immunity established by the courts, it would not hesitate to strike it down. It was of the opinion, however, that it was concerned with the repeal of the doctrine of governmental immunity by the legislature and a subsequent statute which re-established it by repealing the former statute which deprived the districts of immunity and imposed liability upon them. The court had construed this action of the legislature as determining its intent to re-establish the doctrine by statute. In other words, it was the courts opinion that by repealing a statute which withdrew immunity from districts the legislature intended to restore the immunity.

It would seem that immunity of school districts is still the rule in Michigan despite the supreme court's reluctance to continue it.

States Appearing to Uphold Doctrine but Ambiguous. Four states—Arkansas, Delaware, Missouri, and New Mexico—uphold the immunity doctrine but the situation in these states is not clear. This is because there are so few cases on the doctrine in these states and the cases found

do not directly concern immunity. Therefore the immunity doctrine in these states is ambiguous even though we can assume immunity is the rule because the common law prevails in these states in the absence of statute. Table 7, page 144, gives the highpoints of the doctrine found in these states.

Immunity in Arkansas. Arkansas still holds to the immunity doctrine. Douglas v. Campbell, 89 Ark. 254, 116 S.W. 211 (1909) affirmed the doctrine though the case involved the expulsion of a student for being drunk on Christmas Day away from the school and not being under school supervision. The court upheld the school's right to do this and also affirmed the immunity doctrine. No new cases have been reported from Arkansas.

Immunity in Delaware. School district immunity is still the law in the state of Delaware. In Slovin v. Gauger, 193 A. 2d 452 (1963) a local board leased a school auditorium to an amateur theatrical group. According to the law of Delaware, school boards shall allow free use of school buildings for various public meetings and functions. Mr. Slovin, a member of the group, alleged that the steps leading from the stage to a lower level hallway gave way and seriously injured him. He sued the board, the superintendent of schools and the manual arts teacher in whose class the steps were constructed. It was alleged that the teacher "gave" the group a set of steps to be placed for the convenience of the players. The steps were movable in the sense that they were not a permanent part of the building.

The district asserted certain defenses, among them immunity from liability under the doctrine of sovereign immunity and argued that the relationship between it and the injured person was that of landlord and tenant. Mr. Slovin took the premises as he found them, the board said

TABLE 7. HIGHPOINTS AND KEY CASES IN STATES UPHOLDING DOCTRINE BUT
 AMBIGUOUS IN INTERPRETATION FOR SCHOOLS

State	Highpoints in Development of Immunity Doctrine	Key Cases
Arkansas	1909, before this date no cases reported on doctrine but immunity presumed in this common law state.	
	1909 only case reported allowed district to suspend child when drunk and disorderly while off school grounds. Upheld immunity by inference. No case has been decided since on the immunity doctrine.	Douglas v. Campbell
	1968 no further cases.	
Delaware	1963, before this no cases decided on the immunity doctrine but presumed to be the law.	
	1963 supreme court decided only cases involving tort action on school districts. Did not decide case on basis of immunity. Court indicated immunity was the law but wanted it "clearly to appear" it was not deciding a question of immunity. Only case to date. (1968)	Slovin v. Gaugher
Missouri	1955, before this no cases on immunity but presumed to be the law.	
	1965 supreme court held parochial school liable for tort injuries of girl hurt in unfinished church. By inference indicated that immunity covered public schools but not others. Only case reported to date. (1968)	Gruhalla v. George Moeller Construction Company
New Mexico	1958, before this no cases on doctrine but immunity presumed to be the law.	

TABLE 7 (continued)

States	Highpoints in Development of Immunity Doctrine	Key Cases
New Mexico	1958 supreme court held no liability on city for failure to regulate street traffic. Liability only if permitted by legislature. No cases reported on school district liability.	Hammell v. City of Albuquerque

The board was held not liable on the ground that Mr. Slovin was no more than a licensee in his use of the building since he used it for his own personal benefit. He was not an invitee of the district, in which case it might have been possible to make a good case against the district. Since he was a licensee, he took the premises as he found them and there was no evidence that there was a willful disposition by the board to injure or trap him.

Apparently, there had been no previous case decided in Delaware on whether sovereign immunity from tort liability of school districts existed in the state. The judge wanted it "clearly to appear" that he was not deciding the question of whether districts were so protected. However, the court pointed out, it has been held in Delaware that the sovereign immunity doctrine is part of the basic law of the state and may be waived only by a law enacted by the legislature.

The immunity doctrine appears to still be the law in Delaware though technically it is still an open question as no case involving

school districts has appeared where this one point was decided.

Immunity in Missouri. Gruhall v. George Moeller Construction Co., 391 S.W. 2d 585 (1965), held that private schools do not enjoy immunity from tort liability. If a person is injured on parochial school property, the school's liability is determined by general tort law. This case upheld the immunity doctrine by inference and no case involving public schools has been reported from Missouri.

Immunity in New Mexico. The immunity doctrine was upheld in New Mexico as late as 1958 in Hammell v. City of Albuquerque, 63 N.M. 374, 320 P. 2d 304. In this case regulation of city traffic was considered a governmental function and the decision upheld the immunity doctrine. Though this case did not directly affect a school district, the direct implication was that governmental immunity was still the law in New Mexico.

One state Upholding Doctrine Despite Statute Modifying It. The immunity doctrine is still the law in Iowa despite the Iowa Tort Claims Act.

In numerous cases the courts have held that if the rule of tort immunity of school districts is to be abrogated, this action should be taken by the legislature and not by the courts. Since relatively few states have legislated in this area, the 1966 Iowa Tort Claims Act and its interpretation by the Supreme Court of Iowa are of particular interest.

Immunity in Iowa. The immunity doctrine has been the law in Iowa since 1868 when it was established in Soper v. Henry County, 25 Iowa 264, where the supreme court held that counties and school districts are not liable for negligence in the absence of a statute authorizing such

TABLE 8. HIGHPOINTS AND KEY CASES IN ONE STATE UPHOLDING DOCTRINE
DESPITE STATUTE MODIFYING IT

States	Highpoints in Development of Immunity Doctrine	Key Cases
Iowa	1868 supreme court held that counties and schools not liable for negligence in absence of statute.	Soper v. Henry County
	1964 supreme court affirmed immunity doctrine as to school districts.	Boyer v. Iowa High School Athletic Association
	1966 Iowa Tort Claims passed allowing all state agencies to be sued for tort.	
	1966 supreme court held school dis- tricts not included in the meaning of the act.	Graham v. Worthington

liability. Table 8 shows highpoints of the doctrine in Iowa.

The Iowa Tort Claims Act refers only to claims against the state, and subjects the state to liability for torts of officers, agents and employees of state agencies; and all political subdivisions of the state, such as towns, school districts, and counties. In *Graham v. Worthington*, 146 N.W. 2d 626 (1966) the question came up whether the Act expressly waived the common law immunity doctrine of the state as to certain claims for the torts of governmental corporations, their agents or employees. The court sustained the constitutionality of the Act but held that it was not applicable to all political subdivisions of the state. The court specifically said: "We are satisfied political subdivisions such as

cities, school districts and counties are neither agencies of the state nor corporations as those terms are employed and defined in the Act, and are not included within its clear intent and purpose."

There was a dissent in this case that is worth quoting as perhaps an indication that the Supreme Court of Iowa might change its mind. The dissent said that though the immunity doctrine had been part of the law of Iowa for one hundred years it was of judicial origin and not of constitutional origin. The dissent went on to say that it had little or no justification in modern law.

The immunity doctrine is still the law in Iowa despite the Iowa Tort Claims Act.

States Upholding Doctrine Strongly. The remaining states -thirteen- uphold the doctrine without any reservations and are reluctant to change the well established law of their states. There are no dissents in the cases coming before the courts. Because the law is so well established in these states there are few cases that come before the courts involving the negligence of schools. Table 9 presents the highpoints of the development of the doctrine in these states and key cases for closer scrutiny.

The thirteen cases that strongly uphold the doctrine do so mainly because they are reluctant to change the well established law in their state. In these states the immunity doctrine is presumed to be the law in the absence of specific legislation granting the right to sue state governments or agencies. All common law states have a statute specifically making the common law of England the rule of law unless changed.

TABLE 9. HIGHPOINTS OF THE DOCTRINE IN STATES THAT STRONGLY UPHOLD IT

States	Highpoints in Development of Immunity Doctrine	Key Cases
Georgia	1907, no cases though immunity presumed to be law.	
	1907 supreme court held county not liable for any kind of action because of immunity.	Brunson v. Caskie
	1952 supreme court held that school immune in action for damages for football injuries.	Hale v. Davis
	1966 supreme court held illegal for school district to expend money for other than educational purposes. In this case damages for athletic injuries.	Board of Education of the City of Waycross v. Bates
Indiana	1894, no cases before this but immunity presumed to be the rule.	
	1884 supreme court held county immune from lawsuit arising from personal injuries caused by defects in county road.	Cones v. Board
	1895 supreme court held school district immune from all law suits unless authorized by legislature. No other case reported up to 1968.	Freel v. School City etc.
Kansas	1929 no cases reported but immunity presumed to be law.	
	1929 supreme court held city not liable for negligence in running its fire fighting equipment.	Barcus v. City of Coffeyville
	1959 supreme court held school district not liable for action of custodian in leaving burning ashes from tree stump when child injured.	Rose v. Board of Education of Abilene

TABLE 9 (continued)

States	Highpoints in Development of Immunity Doctrine	Key Cases
Kansas	District not liable in absence of statute. Latest case reported up to 1968.	
Maryland	1925, before this common law immunity presumed to be law.	
	1925 supreme court held trustees of State Normal School not suable on breach of contract because of immunity doctrine.	Williams v. Fitzhugh
	1947 supreme court held state governments including school districts can not be sued without legislative permission	Jones v. Scofield Bros.
	1968 no cases.	
Massachusetts	1812, first case in United States giving immunity to municipalities.	Ephriam Mower v. The Inhabitants of Leicester
	1891 supreme court held city not liable for damage inflicted by horse frightened by blasts from city construction because city covered by immunity doctrine.	Howard v. Worcester
	1955 supreme court reaffirmed immunity and dismissed case in which child had been injured by hot steam pipe.	Molinari v. Boston
North Dakota	1922, no reported case but immunity presumed rule of law.	
	1922 supreme court held school district immune from liability for tort when	Anderson v. Board of

TABLE 9 (continued)

States	Highpoints in Development of Immunity Doctrine	Key Cases
Ohio	sued for death of child killed on defective playground apparatus. Only case reported but strongly supports immunity.	Education
	1876 supreme court applied immunity doctrine to school districts.	Finch v. Board of Education
	1905 supreme court reaffirmed immunity as applied to school districts.	Board of Education of Cincinnati v. Volk
	1966 a federal court held that Ohio school districts covered by the immunity doctrine and that this fact did not violate plaintiff's civil rights	Corbean v. Xania City Board of Education
South Dakota	1936, no reported case but immunity common law rule.	
	1936 supreme court held that school districts immune from tort liability when performing governmental function. Transporting students held governmental function. School districts can not be sued for tort except by legislative permission.	Schornack v. School District
	1944 supreme court affirmed immunity but held teacher must act with mature judgment in event of pupil injury in case involving injury at a club initiation.	DeGooyer et. al. v. Harkness et. al.
Tennessee	1902, nor cases reported before this immunity presumed to be law.	

TABLE 9 (continued)

States	Highpoints in Development of Immunity Doctrine	Key Cases
Tennessee	1902 supreme court applied immunity to counties.	Odil v. Maury County
	1954 supreme court applied immunity doctrine in case where child fell into a concrete stairway and injured himself. Court said that immunity prevailed even if condition described constituted a nuisance as school districts were immune from law suits. Last case reported up to 1968.	Barnett v. City of Memphis
Texas	1884 supreme court established immunity of municipalities when child fell on glass on sidewalk.	City of Galveston v. Posnainsky
	1930 supreme court upheld school district immunity when child fell off buttress of school entrance and was injured.	Braun v. Trustees of Victoria Independent
	1966 supreme court upheld immunity doctrine in case where teacher was discharged for belonging to teachers' union. Held that immunity can be lifted only by legislature.	Russell v. Edgewood Independent District
Vermont	1902, no cases reported prior to this time, immunity presumed to be law.	
	1902 supreme court held city of Rutland not liable for injury arising from an open ditch because city covered by the immunity doctrine.	Stockwell v. Rutland
	1943 supreme court held school district immune from liability where plaintiff fell from steps because of lack of light and no railing. Last case reported up to 1968.	Farmer v. Poultney School District 30 A

TABLE 9 (continued)

States	Highpoints in Development of Immunity Doctrine	Key Cases
West Virginia	1902, before this no cases reported, immunity presumed to be the law.	
	1902 supreme court held schools covered by immunity.	Krutile v. Board of Edu- cation
	1935 supreme court held that school districts covered by immunity doctrine and did not have applied authority to buy liability insurance in case involving injury to child boarding a school bus.	Board of Education v. Commercial Casualty Insurance Company
Wyoming	1959, before this no cases reported, immunity presumed to be the law.	
	1959 supreme court upheld immunity in only case on subject. Case involved negligence of town's police office in directing plaintiff to chase a felon. Court held school district also covered by immunity. No other cases reported.	Maffei v. Incorporated Town of Kemmerer

With this in mind and with the reluctance of courts to go against stare decisis it is no wonder plaintiffs hesitate to sue a state agency in tort. This is why there are very few cases available on the immunity doctrine. The following sections will review the doctrine in the thirteen states presented in Table 9.

Immunity in Georgia. Before 1907 the immunity doctrine was established as part of the common law of Georgia. It was not tested in the

courts until 1907 when *Brunson v. Caskie*, 56 S.E. 621, the supreme court held that counties were not liable for any action at law because of the immunity doctrine. The doctrine was confirmed in 1952 in *Hale v. Davis* where the supreme court held a school could not be sued for football injuries because of immunity. Georgia still upholds the immunity doctrine in the latest case found. In *Board of Education of the City of Waycross v. Bates*, 151 S.E. 2d 524, the court of Appeals of Georgia held that a public school district does not have the authority to pay the medical expense incurred as a result of an injury sustained by a boy in a football game.

The school district employed a team physician who was responsible for treating, in so far as practicable, all injuries sustained in football activities. The physician also had the authority to arrange for such treatment as required by a specialist if the injured student and his parents agreed.

In this action, the doctor arranged for an operation on the boy's knee. All of the medical services were contracted for by the district, acting by and through the team physician. The hospital and the doctors billed the boy's father who paid the costs. The doctor had told students participating in football and their parents that the district had an insurance policy adequate to cover all medical expenses resulting from athletic injuries. It developed that the policy did not cover this particular injury.

The court denied recovery. It said that if a public school is not liable for an action based on negligence it is even more obvious that it

would not have authority to pay claims for accidental injuries where no negligence was involved.

It would seem that immunity of school districts is still very solid in the state of Georgia.

Immunity in Indiana. The school district is immune from liability in Indiana. The leading case is *Freel v. School City etc.* (1895) 145 Ind. 27, 41 N.E. 312, 37 LRA 301. In this case a laborer was injured while repairing a schoolhouse and the court held that the school corporation was not liable since it was an involuntary corporation, organized, not for the purpose of profit or gain, but solely for the public benefit; that it had no monies out of which such damages could be paid, and that it did not have the power to raise money for such a purpose. Unless Indiana goes completely against this court pronouncement the law in that state is very clear. The immunity doctrine is still the law in Indiana.

Immunity in Kansas. In 1929 the first immunity case was decided in Kansas though it was part of the common law of Kansas before this date. In *Barcus v. City of Coffeyville*, 282 P. 688, the supreme court held the city was immune when an accident occurred while running their fire-fighting equipment. Immunity is the rule in Kansas unless it can be proved that the school district is performing a proprietary function or if what the district is doing is a nuisance. In *Rose v. Board of Education of Abilene*, 337 P.2d 652 (1959), the Kansas Supreme Court held that a janitor was liable for his negligent acts and was not covered by the immunity of the school district.

Immunity in Maryland. In this state the immunity doctrine is considered part of the common law but this was not affirmed by a court case until 1925 when in *Williams v. Fitzhugh*, 128 A 137, the supreme court held that the trustees of the State Normal School could not be sued on a contract because of immunity. Immunity is still very much the rule here. This is true even though the insurer has agreed not to raise the defense and has collected a full premium for doing so. *Jones v. Scofield Brothers*, D. Md., 1947, 73 F. Supp. 395 reaffirmed the immunity doctrine in every detail. In this case even though the insurer agreed not to raise the defense of immunity the court held the doctrine still applied.

Immunity in Massachusetts. In 1812, *Ephriam Mower v. The Inhabitants of Leicester*, 9 Mass. 247, established the immunity doctrine for the first time in the United States. In 1891, the supreme court held in *Howard v. Worcester*, 27 N.E. 11, that the city of Worcester was not liable when damages by a horse frightened by city construction because of the immunity doctrine. The immunity doctrine was part of Massachusetts common law. In *Molinari v. Boston*, 130 N.E. 2d 925 (1955), the Massachusetts Supreme Court reaffirmed the rule of immunity of school districts and dismissed a case in which a child had been injured by an extremely hot and dangerous steam pipe in a classroom. Also, the court refused to hold that the pipe was a nuisance for which the city would be liable.

It has long been the rule that a governmental agency is liable when it commits a nuisance, and recently several courts have seized upon this exception to hold the permanent, dangerous conditions constitute a nuisance so that injured children might recover. Some writers of legal

texts have protested that the concept of "nuisance" has become distorted; that courts have seized upon the term as a substitute for thought; that by categorizing something they do not like as a nuisance they impose liability without any real analysis of the problem.⁴⁶ The Massachusetts Supreme Court, however, restricted the term to its original meaning, that is, some activity on land which damages the property of another situated outside the limits of the land.

Immunity in North Dakota. The immunity doctrine was well established in North Dakota as a common law doctrine before 1922. There is only one precedent case reported. The leading case is *Anderson v. Board of Education* (1922) 49 N. D. 181, 190 N.W. 807-811. In this case a widowed mother sued for damages because of the death of her only son who was killed in an accident as a result of being hit by a playground swing. Though recognizing the injustice done to the widow the court upheld the immunity doctrine in its entirety and it has not been challenged in North Dakota since 1922.

Immunity in Ohio. Ohio first applied the immunity doctrine to school districts in 1876 by the *Finch v. Board of Education*, 30 Ohio St. 37, case. In this case the supreme court held that school boards could be sued for any reason. The immunity doctrine is still upheld in Ohio. The latest case was brought in a federal court. The complaint held that the immunity doctrine was in violation of civil rights. Federal courts are bound to follow the common law of the states where they are sitting.

⁴⁶ See Prosser on Torts, pp. 1009-1010 for a discussion on this point.

In *Corbean v. Xenia City Board of Education*, 366 F. 2d 480 (1966), the Federal District Court dismissed the action because they could not see where the application of immunity doctrine was in violation of the civil rights of the plaintiff.

Immunity in South Dakota. South Dakota is another state where common law doctrines are the rule of law in the absence of statutes or court cases modifying them. The immunity was the presumed law in South Dakota before 1936. In *Schornack v. Schornack School District*, 266 N.W. 141, (1936) the supreme court held that school districts were immune from tort liability when performing governmental functions. The immunity doctrine is still upheld in South Dakota, at least, since 1944 when *DeGooyer et. al. v. Harkness* was decided. In this case that is cited 70 S. D. 26, 13 N.W. 2d 815, the court upheld the immunity doctrine but said that a teacher might be liable if he failed to use mature judgment in the event of an injury to a pupil.

Immunity in Tennessee. In 1902 immunity was applied to counties. This was in *Odil v. Maury County*, 136 S.W. 2d 500. Tennessee is a common law state and upheld the immunity law doctrine as a common law doctrine. Tennessee still upholds the immunity doctrine and extends it to cases that might be called nuisance cases. In *Barnett v. City of Memphis et. al.*, 269 S.W. 2d 906, the court held that the district was not liable for torts, or for maintaining a nuisance. It did not ever attempt to decide if maintaining stairs in an unsafe condition was a nuisance because

the school is immune for law suits in any case. The Barnett case was decided in 1954.

Immunity in Texas. In 1884 the supreme court established immunity of municipalities when a child fell on glass on the sidewalk. The city of Galveston v. Posnainsky, 50 Am. Rep. 517, (1884) held that the city was immune from liability for its negligence. The immunity of school districts was affirmed in 1930. Braun v. Trustees of Victoria Independent School District, 114 S.W. 2d 947, (1930) upheld school district immunity when a child fell off buttress of school entrance and was injured. Texas still upholds the immunity doctrine. In a 1966 decision the Texas Supreme Court upheld the immunity rule in an action of a teacher who sued a superintendent of schools for tort. In Russell v. Edgewood Independent School District, 406 S.W. 2d 249 a teacher sued the district and its superintendent because she had been discharged from her position as teacher allegedly because she was a member of the Edgewood Federation of Teachers. She did not seek reinstatement but rather sought actual damages, exemplary damages, and damages for mental anguish and humiliation. The court said that the hiring and firing of teachers are duties of the school trustees. In the performance of these duties they are performing a governmental education function and neither they nor the district are answerable in a cause of action in tort nor for damages caused by the wrongful discharge of the teacher.

Immunity in Vermont. Governmental immunity was presumed

to be the well established law in the common law state of Vermont so very few cases were brought to court involving the liability of governmental units. One of the few was decided in 1902 when the Vermont Supreme Court held in *Stockwell v. Rutland*, 53A. 132, that the city of Rutland was not liable for an injury arising from an open ditch because the city was covered by the immunity doctrine. Vermont also upheld the immunity doctrine.

Vermont also upheld the immunity doctrine in *Farmer v. Poultney School District*, 113 Vt. 147, 30 A. 2d 89 decided in 1943 when a plaintiff was injured because the school district did not adequately light the school steps and negligently permitted a portion of the hand railing to be removed, the Supreme Court of Vermont would not allow the school district to be sued because of the immunity doctrine.

Immunity in West Virginia. In West Virginia the common law doctrine of school district immunity was considered the rule of all as were all common law doctrines in the absence of statutes or court cases modifying or superceding them. In 1902 in *Krutile v. Board of Education*, 129 S.E. 486, the supreme court held schools were covered by the immunity doctrine.

In *Board of Education v. Commercial Casualty Ins. Co.*, 116 W. Va. 503, 182 S.E. 87, decided in 1935, it was held that since a school board is not liable for injuries to pupils while being transported, it does not then have implied authority to carry insurance to protect itself against the negligence of its employees. Since this time the statute has been enlarged to allow a county board of education to provide at public expense

insurance against the negligence of drivers of school buses operated by the board.

Even though later statutes may provide for some measure of relief for the victims of negligence, at least up to the amount of the insurance purchased, the immunity rule is still law in West Virginia.

Wyoming. Immunity of school districts is still upheld in Wyoming. In *Maffie v. Incorporated Town of Kemmerer*, 80 Wyo. 33, 340 P. 2d 759, it was decided that mere authorization to expend public school money for insurance was not a waiver of tort immunity and that the insurance purchased had no effect upon such immunity. This case was decided in 1959 and upheld the immunity doctrine in every detail. As this was the only case decided on the immunity doctrine in Wyoming at that time (1959), the court discussed the history of the doctrine from its very beginning and concluded that it was a valid doctrine and was good law. The court saw no reason to change well-established law.

The states that support the immunity doctrine do so mainly because their courts are reluctant to change well established law. They are reluctant to go against the ancient rule of stare decisis, abide with what has been decided.

All states supporting the doctrine do not give complete agreement to it. Some support it with strong dissent by a minority of the justices. One (Michigan) supports the doctrine but reluctantly. Still others are rather ambiguous as their courts have not decided cases involving school districts. One (Iowa) still supports the school district immunity doctrine even though the state legislature abolished

the doctrine for all state agencies. The rest of the states covered support the doctrine with few or no reservations.

To sum up: the trends in these states are toward support of the doctrine. Even the states that have reservations or/and dissenting judges have powerful forces in favor of the doctrine.

Summary

The trends of the states in regard to the immunity doctrine can be summed up as follows:

1. The states of Minnesota, Oregon, and Washington started on an early modification of the immunity doctrine. For various reasons the modification was stalled and in Minnesota the state legislature made immunity a rule of law for the courts of the state of Minnesota. The Supreme Court of Oregon so modified a state statute that seemed to allow some relief from torts of employees of school districts that now it is doubtful if a plaintiff could win in a case involving the torts of school district employees. In Washington immunity still held if the accident arose from the use of athletic apparatus or appliances used in connection with any park, playground, or field house. If an accident occurs outside of these exceptions a plaintiff could sue and possibly win against a school district in the state of Washington.

2. There was a trend toward abrogation of the immunity doctrine in Illinois, Wisconsin, California, New York, North Carolina, and Arizona. In Illinois and Wisconsin the state supreme courts acted upon the doctrine and abrogated it. In New York a combination of

actions by the state Supreme Court and the legislature lead to the abrogation of the doctrine in this state. In North Carolina the Tort Claims Act of 1951 was declared by the North Carolina Supreme Court to have waived the immunity doctrine in a case decided in 1953. Arizona's supreme court acted in 1963 in one and abrogated the immunity doctrine as far as governmental agencies are concerned. School districts were specifically included in the court's ruling.

3. Alabama, Connecticut, Louisiana, Mississippi, and New Jersey provided for limited liability in their states. Alabama provided for a state board of adjustment to handle claims arising from tort actions against school districts. Connecticut modified the immunity doctrine by a very broad nuisance exception in court actions. Louisiana allowed action against school district if negligence is clearly shown while Mississippi allows recovery under a statute. Immunity in New Jersey was greatly weakened by a case that held that an affirmative act resulting in injury was sufficient to sustain municipal liability.

4. Alaska, Florida, and Nevada acted through their supreme courts in cases that seem to foreshadow the abrogation of the doctrine. In Alaska immunity is retained as far as school districts are concerned but municipal corporations are liable. The same holds true for Florida. In Nevada counties can be held liable for the torts of its employees but immunity is still the rule for school districts. If the courts continue this trend, abrogation of the immunity doctrine could be the result in these three states.

5. The rest of the states covered (24) supported the immunity

doctrine. The main reason given was the ancient rule of stare decisis, abide with what has been decided. However, not all states supported the doctrine with the same degree of fervor. Five states, Colorado, Kentucky, Montana, Pennsylvania and Utah supported the doctrine but with strong dissents by a minority of the supreme court justices. One state, Michigan, supported the doctrine but expressed dissatisfaction. Four states, Arkansas, Delaware, Missouri and New Mexico decided cases supporting the immunity doctrine but no cases directly concerned school districts. The thirteen remaining states supported the doctrine with few or no reservations. Despite strong dissents and some reservations the immunity doctrine appeared strong in these states.

In summary it can be said that there is a strong trend toward abrogation or modification of the immunity. Six states, Illinois, Wisconsin, California, New York, North Carolina and Arizona have taken strong action toward complete abrogation of the doctrine. Five states, Alabama, Connecticut, Louisiana, Mississippi and New Jersey have provided limited liability for school districts. Alaska, Florida and Nevada have lifted immunity from their municipalities or counties. The rest of the twenty-four states studied support the doctrine. The trend is running strongly for the abrogation or modification at this time (1968). The trend may change as indeed it did in Minnesota, Oregon and Washington.

In Chapter 5 the study will be summarized with conclusions that have been reached and recommendations.

CHAPTER V

SUMMARY, CONCLUSIONS, AND RECOMMENDATIONS

The purpose of this investigation was to provide the educator, particularly schoolmen and school board members, a better understanding of the school district immunity doctrine by: (1) showing how the immunity doctrine evolved from the Anglo-American common law from the earliest times to the present, (2) showing its development in American law as specifically applied to American education, and (3) determining the trends with attention to the implications for the future of American education.

Four main procedures were used in the investigation. These were the usual investigative procedures used in the study of legal subject and can be summed up in the following four propositions:

1. The use of legal textbooks and cases for tracing the development of the immunity doctrine from the earliest period to the present time. Only this way can the interested party understand the present status of the immunity doctrine.

2. The use of cases for tracing and discovering the development and the present status of the immunity doctrine.

3. An examination of cases and legal writing from 1812 to the present time, but with more emphasis on cases since the 1950's, so that if these were trends that might have implications for education they might be discovered.

4. A study of the trends of the cases concerning the immunity

doctrine to find a clue that might enable a plan to be made that would give protection to the school district, district employees, and more particularly the student.

Summary

The first step taken in the writing of this study was to investigate the historical development of the immunity doctrine. It was necessary to go back to the very beginning of English common law to find the genesis of the immunity doctrine. The common law developed slowly among the early Anglo-Saxons. After the Norman Conquest, 1066, the development was quite rapid. This was especially true during the reigns of Henry II, 1113-1189, and Edward I, 1239-1307. These great Anglo-Norman kings made reforms in the common law of England. It was during the period of Anglo-Norman reform, from about 1100 until about 1350, that the common law as we know it was formed. It was also during this period that the rule that the king, or state, could not be sued without his or its permission was formalized. Later it became a rule that the king or state could not be sued without the permission of Parliament for the wrongs or torts of its servants or agents. This later became known as the "sovereign immunity" doctrine or more simply, the "immunity doctrine."

The sovereign immunity doctrine was first applied to municipalities in England during the later part of the eighteenth century. In 1788 *Russell v. Men of Devon*, 100 Eng. Rep. 359, the court refused to allow a tort suit against the county of Devon. The reasons given were:

1. The fear of an infinity of law suits,
2. lack of precedent,

3. the feeling that only the legislature, Parliament, could or should impose this type of liability on municipalities,
4. lack of funds from which to pay a judgment,
5. the action was not supported by law or reason, and finally
6. the court felt it was better to inconvenience a person than to inconvenience the public.

The immunity doctrine was applied and adopted into American common law in 1812 when the Massachusetts Supreme Court used the Russell case as a precedent case in *Mower v. the Inhabitants of Leicester*, 9 Mass. 247. Later, by a process of legal analogy, school districts were considered agencies of the government and the immunity doctrine was applied to them, that is so far as the torts of their servants and agents were concerned. Thus by "judicial law-making" and the doctrine of stare decisis, abide with what has been decided, the school district immunity doctrine became the common law of America and thus the law in most of the states in the Union.

The immunity doctrine stated that no school district could be sued for its own torts or the torts of its servants or agents when acting within the course of their duties. A tort is rather hard to define but a usable definition follows:

A tort is not a crime but rather a civil wrong inflicted upon another exclusive of contract for which courts will allow injured parties to seek recovery in the form of damages.

The second step of the study was to attempt to determine the present status of the immunity doctrine. It was discovered that the

status of the doctrine was confused because since the beginning of the twentieth century several states attempted to modify or even abrogate the traditional immunity doctrine. This was done both by legislation and by court action. Two forms of legislation passed by several states were "safe place" and "save harmless" statutes. "Safe place" statutes required school districts to build and maintain its buildings and/or its equipment so as to render them safe for general use. The "save harmless" statutes generally cause school boards to assume the burden of liability of their employees when they commit a tort while acting within the scope of their duties. In most cases it was discovered that these statutes did not significantly modify the immunity doctrine.

Several jurisdictions attempted to classify functions of school districts as governmental or proprietary. If functions were governmental immunity prevailed; if proprietary the school district was held liable. Since this distinction was difficult most jurisdictions gave up attempting to make it.

Attempts to modify the doctrine by liability insurance were made by school districts. It seemed that carrying liability insurance by school districts was void if not authorized by the state legislature. When authorized by the state legislatures the fact alone does not generally change the immunity doctrine. Kentucky and Tennessee have allowed recovery to the amount of the insurance.

A brief survey of the status of the doctrine disclosed that the status of the immunity doctrine was confused. Five states, California, New York, Wisconsin, Illinois, and possibly Arizona, have abrogated the

immunity of school districts. Other states developed specialized laws for granting recovery in limited areas. Kentucky and Tennessee allowed recovery to the amount of insurance carried. School districts in the state of Washington were held liable for torts occurring in certain specified areas. A few jurisdictions attempted to make a distinction between proprietary and governmental functions of school districts holding districts liable for proprietary functions and not liable for governmental functions. Most states still held to traditional school district immunity.

The third step was to determine if there was a trend in the cases covering the school district immunity doctrine and if there was in what direction. In the study of cases covering forty states it was discovered that:

1. Arizona, California, Illinois, New York, North Carolina and Wisconsin had all modified or abrogated the immunity doctrine.
2. Alabama, Mississippi, and Washington had limited liability of school districts by statutes.
3. There was a trend toward modification in Connecticut, Louisiana and New Jersey though immunity was still upheld in theory.
4. Alaska, Florida and Nevada had held municipalities or counties liable for their torts and this may have foreshadowed modification of the doctrine as applied to school districts.
5. In the other states covered, the immunity doctrine was upheld.

Conclusions

The following conclusions were made on the basis of the study of the development of the school district immunity doctrine:

1. The school district immunity doctrine is a common law doctrine that extends the sovereign immunity of the state to school districts.

2. The present status of the immunity doctrine is confused because of the modifications of the doctrine occurring in several states.

3. There is a definite trend toward modification of the doctrine but most states still adhere to immunity of school districts from tort suits.

4. Many states that adhere to the immunity doctrine do so because their courts are reluctant to change a well known rule of law without permission from the state legislature.

5. Finally it was concluded because of the confusion of the status of the doctrine some change was needed to make some sort of sense out of the chaotic state of the doctrine.

Recommendations

The study showed that the immunity doctrine was in the process of change. Because of this change schoolmen, school board members and other people concerned with school operation were confused about the status of school district liability for tort. Because of this fact the following recommendations are made:

1. A model law should be drawn that would make clear the status of the immunity doctrine in the various states.

2. This model law should establish a separate agency to hear all tort claims of governmental agencies below the state level. This agency could be similar to a court of claims and could be set up by each state to judge tort claims coming before it. This agency would specialize in tort claims and would insure a more equitable settlement of such claims. An agency of this kind would speed up the handling of tort cases that are held up sometimes for years because of overloaded courts.

Liability insurance for the protection of school funds should be part of the general statutes setting up such an agency.

If legislatures would enact such a statute it would mean abrogation of the immunity doctrine and substituting for it a uniform way of obtaining protection and compensation for innocent parties injured by the torts of the employees of governmental agencies including school districts.

3. The final recommendation concerns the schoolman who is directly responsible for the operation of the school. He should be aware of the school laws of his state and particularly the status of the immunity doctrine. He should encourage the board to establish rules and regulations for the safety of the students and see that they are enforced. This reduces the chances of accidents occurring due to negligence. If there is no negligence a tort action will fail.

In conclusion it is felt that if a model law is drawn as recommended and state legislatures act upon it, this would go a long way toward clearing up the present confusion concerning the school district

immunity doctrine. This would also provide protection for the funds of the school district, protection for the school employee, and protection for the student who is most often the victim of school accidents.

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APPENDIX

APPENDIX A

Russell and others against The Men Dwelling
in the County of Devon

RUSSELL AND OTHERS against THE MEN DWELLING IN THE COUNTY OF DEVON. 100 Eng. Rep. 359, 2T.R. 667 (1788) Friday, Nov. 14th, 1788. No action will lie by an individual against the inhabitants of a county, for an injury sustained in consequence of a county bridge being out of repair. (Willes, 74. 16 East, 305)

This was an action upon the case against the men dwelling in the county of Devon, to recover satisfaction for an injury done to the waggon of the plaintiffs in consequence of a bridge being out of repair, which ought to have been repaired by the county; to which two of the inhabitants, for themselves and the rest of the men dwelling in that county, appeared, and demurred generally.

Chambre, in support of the demurrer, insisted that by the laws of this kingdom, no civil action can be maintained against the inhabitants of a county at large for any injury sustained by an individual in consequence of a breach of their public duty. No instance can be found of any attempt to support such an action as the present, which is a strong argument to shew that such an action will not lie, especially where the circumstances, which should give occasion to it, are in daily occurrence: for on principle there can be no distinction between any special injury arising from a neglect in not repairing a bridge and a highway. But this does not rest on general observation only; for if the principles, on which this action must be supported, are examined, it will be found equally clear. Consider, first who are the necessary parties to all civil suits; they must either be brought against individuals, who are to be particularly named, or against corporations, or against persons who are rendered liable by the provisions of particular Acts of Parliament: if it be brought against individuals, all of them

must be brought before the Court; they must appear before the Court or be outlawed. This mode of bringing actions against large bodies of men would render nugatory the privileges of the Crown of creating corporations, and would destroy the mode of suing corporations in their corporate capacity. And no Act of Parliament has yet made the inhabitants of a county at large liable in this case. Besides here the defendants are the men of Devon, who must be taken to mean the inhabitants of that county at the time of purchasing the writ: but the inhabitants of a county are a fluctuating body, and before judgment obtained, other persons may have come to reside in the county, when the whole damages may be levied on such innocent persons; whereas, if the action could be maintained at all, the damages should be paid by those who were inhabitants at the time the injury was sustained. And it is a principle of law, that no man shall be responsible for any injury unless occasioned by his own act or default. If it be contended that this mode of suing is founded on the analogy it bears to actions on the Statute of Hue and Cry, and actions on the case 9 G. 1, c. 22, s. 7, to recover damages sustained by fire, the answer is that the Legislature has given a remedy in those particular instances; and when an Act of Parliament renders any description of men liable to an action, the Courts of Law must devise some means by which they may be sued. But the Statutes of Hue and Cry furnish an argument to shew that the present action cannot be maintained. The obligation to make hue and cry subsisted at common law; 2 Inst. 172, or at least by the Statute of Westminster 1st..., which was prior to the Statute of Winton..., by which the inhabitants

of a hundred were subjected to an action. But if the hundred had been liable to a civil action by the common law or the Statute of Westminster, which raised the duty, the Statute of Winton would have been nugatory. But it was only on the ground of the hundred's not being liable before that time that the Legislature made them responsible in a civil action. The consequence of permitting these sort of actions to be maintained deserves the serious attention of the Court, since it must necessarily lead to a multiplicity of actions; for as the whole damages to be recovered might be levied on any one individual, he must have recourse to numberless suits in order to reimburse himself for the excess which he must pay beyond his own proportion. The principle which decides against this kind of action is in Bro. Abr. title "Accion sur le Case," pl. 93, where it is said that if a highway be out of repair, by which my horse is mired, no action lies, "*car est populus et surra reforme per presentment;*" which must be understood to mean that, as the road ought to be repaired by the public, no individual can maintain an action against them for any injury arising from their neglect.

Gibbs, contra. The general principle is, that where one person receives an injury by any other person or persons omitting to do what by law he or they are bound to do, he may maintain an action on the case to recover satisfaction for the damage he has received in consequence of that omission. If the present case the county were bound to repair this bridge; they omitted to do so; and the plaintiffs received a particular injury by that omission. It is true that this neglect in the county was a public nuisance and was an injury to all the King's subjects; and that

no individual could have brought an action for his share of the general injury: but this is a special damage sustained by the plaintiffs, who have therefore a right to recover a satisfaction in damages. In *Iveson v. Moore*..., it was held that an action on the case for stopping a public way, whereby persons were prevented from coming to the plaintiff's colliery, might be supported. So that there is no objection to this action from the nature of the injury. If any individual, or a corporation, ought to have repaired this bridge, there can be no doubt but that the action would have lain. Now there is no difference between an action against an individual, or a corporation, and the present which brought against the men residing in the county of Devon, who have been guilty of the same neglect. With respect to the plaintiffs, the injury is the same; they are equally innocent, and have suffered by the default of others, who were bound by law to perform a duty which they neglected: they therefore upon every principle of reason and justice ought to have reparation. With respect to the defendants, they are equally guilty of a breach of duty, and are at least equally able to make this compensation; they therefore on the same principles of reason and justice ought to make satisfaction to the plaintiffs who have suffered by their neglect. *Et ubi eadem est ratio idem est jus*. Upon principle, therefore, the plaintiffs are entitled to recover a satisfaction against the defendants; but the defendants wish to shelter themselves under the forms of law, and say that, though in justice they ought to make a compensation, there is no mode by which they can be compelled to do it. However there is no ground for such an objection, because they may be compelled to appear in

a civil action by the same process by which they are brought into Court in an indictment, namely, by venire and distringas. With respect to the Statutes of Hue and Cry, from which part of the defendant's argument was drawn, it will appear on consideration that the cases which have been determined on those statutes furnish an argument in favor of this action. All actions against the hundred are brought on the 13 Ed. 1, c. 2. 1 Ventr. 235. Yelv. 116, and not on the statute 27 Eliz. c. 13, and therefore if a declaration were to conclude contra formam statutorum it would be bad. The statute 13 Ed. 1. c. 2, enacts that inquests shall be made in the hundred, & c. where felonies are committed, so that the offender may be attainted, and if the county will not answer for the bodies of such offenders, every county, that is, the people dwelling in the county, shall be answerable for the robberies done, and also the damages, so that the whole hundred where the robbery shall be done, shall be answerable, and "by construction upon the Statute Winton, 13 Ed. 1, if the country do not apprehend the felon within forty days, an action lies against the inhabitants of the hundred, where the robbery was committed for the money or goods whereof the party was robbed." 3 Com. Dig. tit. Hundred, c. 2. Now it is to be observed that the statute does not prescribe the form of action or the mode of proceeding against the hundred; it merely declares that they shall be answerable; but the common law interfered and supplied the form of action and the process by which they are to be brought into Court. Then to argue by analogy; as in the case the common law furnished the form of action to recover against the hundred that satisfaction which the Legislature declared they should

make: so in the present case it will afford a remedy, and compel the county to make that compensation which it says on principle they are bound to do. It has been said that great injustice might be done to those who are not inhabitants of the county at the time when the injury was sustained, by making them responsible for the neglect of their predecessors; but that objection would apply with equal force to the Statutes of Hue and Cry as to this. With respect to the argument drawn from the novelty of the action, it may be answered by recollecting that the persons who are bound to repair bridges and roads are generally compelled by indictment to repair them before any special damage has been sustained. As to the case in Bro. Abr., perhaps it was not considered to be such a partial injury for which an action would lie; the instance put is only that of mining a horse: but it does not follow that, if there had been any serious damage, the action would not have lain. However it is to be observed that, at the time when that case was determined, doubts were entertained concerning other actions upon the case; which are now clearly held to be maintainable; for it was doubted by Baldwin, Ch.J. whether an action could be supported for a special damage arising from a nuisance in a highway; though Fitzherbert, J. was indeed of a different opinion.....

Chambre, in reply, was stopped by the Court.

Lord Kenyon. Ch.J. If this experiment had succeeded, it would have been productive of an infinity of actions. And though the fear of introducing so much litigation ought not to prevent the plaintiff's recovering, if by law he is entitled, yet it ought to have considerable

weight in a case where it is admitted that there is no precedent of such an action having been before attempted. Many of the principles laid down by the plaintiff's counsel cannot be controverted; as that an action would lie by an individual for an injury which he has sustained against any other individual who is bound to repair. But the question here is, whether this body of men, who are sued in the present action, are a corporation, or quasi corporation, against whom such an action can be maintained. If it be reasonable that they should be by law liable to such an action, recourse must be had to the legislature for that purpose. But it has been said that this action ought to be maintained by borrowing the rules of analogy from the Statutes of Hue and Cry: but I think that those statutes prove the very reverse. The reason of the Statute of Winton was this: as the hundred were bound to keep watch and ward, it was supposed that those irregularities which led to robbery must have happened by their neglect. But it was never imagined that the hundred could have been compelled to make satisfaction.., till the statute gave that remedy; and most undoubtedly no such action could have been maintained against them before that time. Therefore when the case called for a remedy, the Legislature interposed; but they only gave the remedy in that particular case, and did not give it in any other case in which the neglect of the hundred had produced any injury to individuals. And when they gave the action, they virtually gave the means of maintaining that action; they converted the hundred into a corporation for that purpose; but it does not follow that, in this case where the Legislature has not given the remedy, this action can be maintained. And even if we

could exercise a legislative discretion in this case, there would be great reason for not giving this remedy; for the argument urged by the defendant's counsel, that all those who become inhabitants of the county, after the injury sustained and before judgment, would be liable to contribute their proportion, is entitled to great weight. It is true that the inconvenience does happen in the case of indictments; but that is only because it is sanctioned by common law, the main pillar of which, as Lord Coke says, is unbroken usage. Among the several qualities which belong to corporations, one is, that they may sue and be sued; that puts it then in contradistinction to other persons. I do not say that the inhabitants of a county or hundred may not be incorporated to some purposes; as if the King were to grant lands to them, rendering rent, like the grant to the good men of the town of Islington.... But where an action is brought against a corporation for damages, those damages are not to be recovered against the corporators in their individual capacity, but out of their corporate estate: but if the county is to be considered as a corporation, there is no corporation fund out of which satisfaction is to be made. Therefore I think that this experiment ought to be encouraged; there is no law or reason for supporting the action; and there is a precedent against it in Brooke: though even without that authority I should be of opinion that this action cannot be maintained.

Ashurst, J. It is a strong presumption that that which never has been done cannot by law be done at all. And it is admitted that no such action as the present has ever been brought, though the occasion

must have frequently happened. But it has been said that there is a principle of law on which this action might be maintained, namely, that where an individual sustains an injury by the neglect or default of another, the law gives him a remedy. But there is another general principle of law which is more applicable to this case, that it is better that an individual should sustain an injury than the public should suffer an inconvenience. Now if this action could be sustained, the public would suffer a great inconvenience, for its damages are recoverable against the county, at all events they must be levied on one or two individuals, who have no means whatever of reimbursing themselves; for if they were to bring separate actions against each individual of the county for his proportion, it is better that the plaintiff should be without remedy. However there is no foundation on which this action can be supported; and if it had been intended, the legislature would have interfered and given a remedy, as they did in the case of Hue and Cry. Thus this case stands on principle: but I think the case cited from Brooke's Abridgment is a direct authority to shew that no such action could be maintained; and the reason of that case is a good one, namely, because the action must be brought against the public.

Buller, J. and Grose, J. assented.
Judgment for the defendants.

APPENDIX B

Ephriam Mower v. The Inhabitants of Leicester

EPHRAIM MOWER v. The INHABITANTS OF LEICESTER, 9 Mass. 247 (1812)

The declaration was "in a plea of the case, for that there is a certain post road and public highway, leading from New York to Boston, which passes through the town of Leicester; and the said inhabitants are, and on the sixth day of April last past were, by law obliged to keep in repair that part thereof, which lies within the said town, with all the causeways, bridges and sluices thereon; and the said Ephraim is the owner and proprietor of a certain public stage-coach, which is constantly passing and repassing over the said highway in the said town of Leicester; which said stage-coach, on the said sixth day of April, was passing on the said highway, within the said town of Leicester; and on the same day there was a certain stone bridge or sluice on the said highway, within the said town of Leicester, which was defective and out of repair, by reason of a large hole between the stones in said bridge or sluice, and the said stage-coach, with the horses therein, being then and there moderately passing and traveling over the said bridge or sluice, one of the said horses, being the property of the said Ephraim, and of the value of one hundred and twenty dollars, without any fault or negligence of the driver, by reason of one of his legs passing through the said hole, suddenly fell, and the said stage-coach pressing violently upon the said horse, he was then and there so severely injured, wounded and bruised, that he afterwards died by reason of the injury, wounds and bruises, which he then and there received."

The defendants pleaded not guilty, and upon issue joined by the plaintiff, a verdict was returned for the plaintiff, with one hundred and

twenty dollars damages.--After which the defendants moved in arrest of judgment.

Bigelow, for the defendants, was about to argue that the action was brought at common law, and that it did not lie; but the court called on the plaintiff's counsel to support the action.

Blake and Lincoln, for the plaintiff. An injury arising from the neglect of a duty enjoined by law, whether on an individual or a corporation, is a good foundation for an action at common law. Towns are by statute...enjoined to maintain in good repair all highways within their respective limits: and in case of their neglect of their duty in this regard, and a special injury happening to an individual in consequence thereof, they are made liable to double the damages sustained thereby..., after reasonable notice. That an action at common law, for the recovery of single damages only, will well lie for such an injury, was very candidly acknowledged by the learned counsel for the defendants in the case of Lobdell vs. New-Bedford...; although it was his duty in that action to contend that the evidence did not support an action for the double damages given by the statute.

None of the objections, which prevailed in the action of Russell & al. vs. The men of Devon..., apply in this case. Here the town is a corporation created by statute, capable of suing and being sued. They have a treasury, out of which judgments recovered against them may be satisfied. They are called upon to answer only for their own default. The objection, that a multiplicity of actions would be the consequence of levying the execution on one or more individuals of the town, can

have no effect here; since it would equally apply to every action against a town or parish: and yet such actions are every day brought and supported without hearing of this objection. Besides, individuals so situated have their remedy over against the corporation for the sum paid by them; and are not put to their action against each inhabitant for his several proportion, as the case referred to supposes in the case of an English county.

The provision for recovering double damages in a case of this kind, found in the seventh section of the statute before referred to, which applies after notice to the town, shew plainly the understanding of the legislature, that towns should be liable for fair and adequate damages, though no such notice be given, and that an action therefore will lay at the common law.

Bigelow, for the defendants. The case of Russell & al. vs. The men of Devon have received the full consideration of this court in the case of Riddle vs. The proprietors of the locks and canals of Merrimack river..., and the court there expressly put counties and hundreds in England upon the same footing as counties and towns in this commonwealth, in relation to the question agitated in the case first mentioned, which was similar in principle to the one before the court in the case at bar.

A town is not liable to indictment for insufficiency of roads or bridges, unless negligence be proved: and they cannot be liable to an action, where they are liable to indictment. But no negligence is charged in this action.--If a town is liable to the action of a party for damages sustained by the defect of a highway or bridge, without notice of such

defect, then if a sudden flood, or other violent natural cause should suddenly render a road impassable, the town would be liable, even before sufficient time had elapsed to make the necessary repairs

The action was continued nisi for advisement, and at the ensuing November term in Suffolk judgment was pronounced to the following effect.

Curia. The plaintiff has brought his action against the inhabitants of the town of Leicester, for the loss of his horse, occasioned by the neglect of that town to keep a certain bridge in repair. The action is at common law, without alleging any notice to the inhabitants of the defect in the bridge, previously to the incurring of the damage by the plaintiff.--But it is well settled that the common law gives no such action. Corporations created for their own benefit stand on the same ground, in this respect, as individuals. But quasi corporations, created by the legislature for purposes of public policy, are subject by the common law to an indictment for the neglect of duties enjoined on them: but are not liable to an action for such neglect, unless the action be given by some statute. The only action furnished by statute in this case is for double damages after.&c.--This question is fully discussed in the case of Russell & al. vs. the men of Devon, cited at the bar, and the reasoning there is conclusive against the action.

Judgement arrested.

APPENDIX C

Report of The Molitor V. Kaneland Community Unit
School District No. 302 Decision

MOLITOR v. KANELAND COMMUNITY UNIT DISTRICT NO.302 (Cite as 163 N.E.2d 89)

18 Ill.2d 11

Thomas MOLITOR, Appellant,

v.

KANELAND COMMUNITY UNIT DISTRICT NO. 302, Appellee
No. 35249

Supreme Court of Illinois
Dec. 16, 1959

Action for injuries sustained by pupil when school bus in which he was riding left road, allegedly as result of driver's negligence. The Circuit Court, Kane County, Charles G. Seidel, J., dismissed complaint, and plaintiff appealed. The Appellate Court, 20 Ill.App.2d 555, 155 N.E.2d 841, affirmed and case came before Supreme Court on certificate of importance. The Supreme Court, Klingbiel, J., held that school district would be liable in tort for negligence of its employee.

Reversed and remanded with directions.

Davis and Hershey, JJ., dissented.

1. Schools and School Districts (KEY)21

All school districts, including community unit school districts organized by petition and election of voters of district are created for purpose of performing certain duties necessary for maintenance of a system of free schools. S.H.A. ch. 122, § 8-9 to 8-13.

2. Courts (KEY)90(6)

Doctrine of stare decisis is not an inflexible rule requiring

Supreme Court to blindly follow precedents and adhere to prior decisions, and when it appears that public policy and social needs require departure from prior decisions, it is Supreme Court's duty as court of last resort to overrule those decisions and establish a rule consonant with present day concepts of right and justice.

3. Courts (KEY)100(1)

It is within Supreme Court's inherent power as highest court of state to give a decision prospective or retrospective application without offending constitutional privileges.

4. Schools and School Districts (KEY)89.15

School district would be liable in tort to pupil for personal injuries sustained when school bus in which pupil was riding left road, if accident resulted from driver's negligence.

Ried, Ochsenschlager, Murphy & Hupp, Aurora (Frank R. Reid, Jr., L. M. Ochsenschlager, William C. Murphy and Robert B. Hupp, Aurora, of Counsel), for appellant.

Matthews, Jordan, Dean & Suhler, Aurora, Burrell & Holtan, Freeport, and Carbary & Carbary, Elgin (John T. Matthews, Aurora, David M. Burrell, Freeport, and Roger W. Eichmeier, Aurora, of counsel), for appellee.

KLINGBIEL, Justice.

Plaintiff, Thomas Molitor, a minor, by Peter his father and next friend, brought this action against Kaneland Community Unit School District for personal injuries sustained by plaintiff 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.

The complaint alleged, in substance, the negligence of the School District, through its agent and servant, the driver of the school bus; that plaintiff was in the exercise of such ordinary care for his own safety as could be reasonably expected of a boy of his age, intelligence, mental capacity and experience; that plaintiff sustained permanent and severe burns and injuries as a proximate result of defendant's negligence, and prayed for judgment in the amount of \$56,000. Plaintiff further alleged that defendant is a voluntary unit school district organized and existing under the provisions of sections 8-9 to 8-13 of the School Code and operates school buses within the district pursuant to section 29-5 Ill.Rev.Stat.1957, chap. 122, pars. 8-9 to 8-13 and par. 29-5.

The complaint contained no allegation of the existence of insurance or other non-public funds out of which a judgment against defendant could be satisfied. Although plaintiff's abstract of the record shows that defendant school district did carry public liability insurance with limits of \$20,000 for each person injured and \$100,000 for each occurrence, plaintiff states that he purposely omitted such an allegation from his complaint.

Defendant's motion to dismiss the complaint on the ground that a school district is immune from liability for tort was sustained by the trial court, and a judgment was entered in favor of defendant. Plaintiff elected to stand on his complaint and sought a direct appeal to this court on the ground that the dismissal of his action would violate his

constitutional rights. At that time we held that no fairly debatable constitutional question was presented so as to give this court jurisdiction on direct appeal, and accordingly the cause was transferred to the Appellate court for the Second District. The Appellate Court affirmed the decision of the trial court and the case is now before us again on a certificate of importance.

In his brief, plaintiff recognizes the rule, established by this court in 1898, that a school district is immune from tort liability, and frankly asks this court either to abolish the rule in toto, or to find it inapplicable to a school district such as Kaneland which was organized through the voluntary acts of petition and election by the voters of the district, as contrasted with a school district created nolens volens by the State.

(1) With regard to plaintiff's alternative contention, we do not believe that a logical distinction can be drawn between a community unit school district organized by petition and election of the voters of the district pursuant to article 8 of the School Code (Ill.Rev.Stat. 1957, chap. 122, pars. 8-9 to 8-13), and any other type of school district, insofar as the question of tort liability is concerned. All are "quasi-municipal corporations" created for the purpose of performing certain duties necessary for the maintenance of a system of free schools. The reasons for allowing or denying immunity apply equally to all school districts without regard to the manner of their creation. We are unwilling to further complicate the law relating to governmental torts by now drawing highly technical distinctions between the various types of

Illinois school districts and making tort liability depend thereon.

Thus we are squarely faced with the highly important question-- in the light of modern developments, should a school district be immune from liability for tortiously inflicted personal injury to a pupil thereof arising out of operations of a school bus owned and operated by said district?

It appears that while adhering to the old immunity rule, this court has not reconsidered and re-evaluated the doctrine of immunity of school districts for over fifty years. During these years, however, this subject has received exhaustive consideration by legal writers in articles and texts, almost unanimously condemning the immunity doctrine. See, Borchard, Governmental Liability in Tort, 34 Yale L.J. 1; Green, Freedom of Litigation, 38 Ill.L.Rev. 355; Harno, Tort Immunity of Municipal Corporation, 4 Ill.L. Q. 28; Prosser on Torts, Chap.21, sec. 108, p. 1063; Pugh, Historical Approach to the Doctrine of Sovereign Immunity, 13 La.L.Rev. 476; Repko, American Legal Commentary on the Doctrines of Municipal Tort Liability, 9 Law and Contemporary Problems 214; Rosenfield, Governmental Immunity from Liability for Tort in School Accidents, 5 Legal Notes on Local Government 380; Approaches to Governmental Liability in Tort, 9 Law and Contemporary Problems 182; Note: Limitations on the Doctrine of Governmental Immunity from Suit, 41 Col.L.Rev. 1236; Note: The Sovereign Immunity of the States, The Doctrine and Some of Its Recent Developments, 40 Minn.L.Rev. 234; Tort Claims Against the State of Illinois and Its Subdivisions, 47 N.W.L.Rev. 914.

Historically we find that the doctrine of the sovereign immunity

of the state, the theory that "the King can do no wrong," was first extended to a subdivision of the state in 1788 in *Russell v. Men of Devon*, 2 Term Rep. 671, 100 Eng.Rep. 359. As pointed out by Dean Prosser (*Prosser on Torts*, p. 1066), the idea of the municipal corporate entity was still in a nebulous state at that time. The action was brought against the entire population of the county and the decision that the county was immune was based chiefly on the fact that there were no corporate funds in Devonshire out of which satisfaction could be obtained, plus a fear of multiplicity of suits and resulting inconvenience to the public.

It should be noted that the *Russell* case was later overruled by the English courts, and that in 1890 it was definitely established that in England a school board or school district is subject to suit in tort for personal injuries on the same basis as a private individual or corporation. (*Crisp v. Thomas*, 63 L.T.N.S. 756 (1890).) Non-immunity has continued to be the law of England to the present day. See: Annotation, 160 A.L.R. 7, 84.

The immunity doctrine of *Russell v. Men of Devon* was adopted in Illinois with reference to town and counties in 1870 in *Town of Waltham v. Kemper*, 55 Ill. 346. Then, in 1898, eight years after the English courts had refused to apply the *Russell* doctrine to schools, the Illinois court extended the immunity rule to school districts in the leading case of *Kinnare v. City of Chicago*, 171 Ill. 332, 49 N.E. 536, where it was held that the Chicago Board of Education was immune from liability for the death of a laborer resulting from a fall from the roof of a school.

allegedly due to the negligence of the Board in failing to provide scaffolding and safeguards. That opinion reasoned that since the State is not subject to suit nor liable for the torts or negligence of its agents, likewise a school district, as a governmental agency of the State, is also "exempted from the obligation to respond in damages, as master, for negligent acts of its servants to the same extent as is the State itself."

Later decisions following the Kinnare doctrine have sought to advance additional explanations such as the protection of public funds and public property, and to prevent the diversion of tax moneys to the payment of damage claims. *Leviton v. Board of Education*, 374 Ill. 594, 30 N.D. 2d 497; *Thomas v. Broadlands Community Consolidated School Dist.*, 348 Ill. App. 567; 109 N.E.2d 636.

Surveying the whole picture of governmental tort law as it stands in Illinois today, the following broad outlines may be observed. The General Assembly has frequently indicated its dissatisfaction with the doctrine of sovereign immunity upon which the Kinare case was based. Governmental units, including school districts, are now subject to liability under the Workmen's Compensation and Occupational Disease Acts. Ill. Rev.Stat.1957, chap. 48, pars. 138.1, 172.36; *McLaughlin v. Industrial Board*, 281 Ill. 100, 117 N.E. 819; *Board of Education, etc. v. Industrial Com.*, 301 Ill. 611, 134 N.E. 70. The State itself is liable, under the 1945 Court of Claims Act, for damages in tort up to \$7,500 for the negligence of its officers, agents or employees. (Ill.Rev.Stat.1957, chap. 37, pars. 439.24.) Cities and villages have been made directly liable for injuries caused by the negligent operation of fire department

vehicles, and for actionable wrong in the removal or destruction of unsafe or unsanitary buildings. (Ill.Rev.Stat.1957, chap. 24, pars. 1-13, 1-16.) Cities and villages, and the Chicago Park District, have also been made responsible, by way of indemnification, for the nonwillful misconduct of policemen. (Ill.Rev.Stat.1957, chap, 24, par. 1-15.1; chap. 105, par. 333.23k.) In addition to the tort liability thus legislatively imposed upon governmental units, the courts have classified local units of government as "quasi-municipal corporations" and "municipal corporations." And the activities of the latter class have been categorized as "governmental" and "proprietary," with full liability in tort imposed if the function is classified as "proprietary." The incongruities that have resulted from attempts to fit particular conduct into one or the other of these categories have been the subject of frequent comment. Rhyne, *Municipal Law*, p. 732; Phillips, "Active Wrongdoing" and the Sovereign-Immunity Principle in *Municipal Tort Liability*, 38 *Ore.L.Rev.* 122, 124; Davis, *Tort Liability of Governmental Units*, 40 *Minn.L.Rev.* 751, 774; Note, *Tort Claims against the State of Illinois and Its Subdivisions*, 47 *N.W.L.Rev.* 914, 921; Green, *Freedom of Litigation (III): Municipal Liability for Torts*, 38 *Ill.L.Rev.* 355. See also *Roumbos v. City of Chicago*, 332 *Ill.* 70, 163 *N.E.* 361, 60 *A.L.R.* 87.

Of all of the anomalies that have resulted from legislative and judicial efforts to alleviate the injustice of the results that have flowed from the doctrine of sovereign immunity, the one most immediately pertinent to this case is the following provision of the Illinois School Code: "And school district, including any non-high school district, which

provides transportation for pupils may insure against any loss of liability of such district, its agents or employees, resulting from or incident to the ownership, maintenance or use of any school bus. Such insurance shall be carried only in companies duly licensed and authorized to write such coverage in this state. Every policy for such insurance coverage issued to a school district shall provide, or be endorsed to provide, that the company issuing such policy waives any right to refuse payment or to deny liability thereunder within the limits of said policy, by reason of the non-liability of the insured school district for the wrongful or negligent acts of its agents and employees, and, its immunity from suit, as an agency of the state performing governmental functions." Ill.Rev. Stat.1957, c, 122, § 29-11a.

Thus, under this statute, a person injured by an insured school district bus may recover to the extent of such insurance, whereas, under the Kinnare doctrine, a person injured by an uninsured school district bus can recover nothing at all.

Defendant contends that the quoted provision of the School Code constitutes a legislative determination that the public policy of this State requires that school districts be immune from tort liability. We can read no such legislative intent into the statute. Rather, we interpret that section as expressing dissatisfaction with the court-created doctrine of governmental immunity and an attempt to cut down that immunity where insurance is involved. The difficulty with this legislative effort to curtail the judicial doctrine is that it allows each school district to determine for itself whether, and to what extent, it will be

financially responsible for the wrongs inflicted by it.

Coming down to the precise issue at hand, it is clear that if the above rules and precedents are strictly applied to the instant case, plaintiff's complaint, containing no allegation as to the existence of insurance, was properly dismissed. On the other hand, the complaint may be held to state a good cause of action on either one of two theories, (1) application of the doctrine of *Moore v. Moyle*, 405 Ill. 555, 92 N.E.2d 81, or (2) abolition of the rule that a school district is immune from tort liability.

As to the doctrine of *Moore v. Moyle*, that case involved an action for personal injuries against Bradley University, a charitable education institution. Traditionally, charitable and educational institutions have enjoyed the same immunity from tort liability as have governmental agencies in Illinois. *Parks v. Northwestern University*, 218 Ill. 381, 75 N.E. 991, 2 L.R.A., N.A., 556. The trial court dismissed the complaint on the ground that Bradley was immune to tort liability. The Supreme Court reversed, holding that the complaint should not have been dismissed since it alleged that Bradley was fully insured. Unfortunately, we must admit that the opinion in that case does not make the basis of the result entirely clear. (See Note, 45 Ill.L.Rev. 776.) However, the court there said, 405 Ill. at page 564, 92 N.E.2d at page 86: "...the question of insurance in no way affects the liability of the institution, but would only go to the question of the manner of collecting any judgment which might be obtained, without interfering with, or subjecting the trust funds or trust-held property to, the judgment. The question as to whether

or not the institution is insured in no way affects its liability any more than whether a charitable institution holding private nontrust property or funds would affect its liability. These questions would only be of importance at the proper time, when the question arose as to the collection of any judgment out of nontrust property or assets...Judgments may be obtained, but the question of collection of the judgment is a different matter." If we were to literally apply this reasoning to the present school district case, we would conclude that it was unnecessary that the complaint contain an allegation of the existence of insurance or other nonpublic funds. Plaintiff's complaint was sufficient as it stood without any reference to insurance, and plaintiff would be entitled to prosecute his action to judgment. Only at that time, in case of a judgment for plaintiff, would the question of insurance arise, the possession of nonpublic funds being an execution rather than a liability question. It cannot be overlooked, however, that some doubt is cast on this approach by the last paragraph of the Moore opinion, where the court said: "It appears that the trust funds of Bradley will not be impaired or depleted by the prosecution of the complaint, and therefore it was error to dismiss it." These words imply that if from the complaint it did not appear that the trust funds would not be impaired, the complaint should have been dismissed. If that is the true holding in the case, then liability itself, not merely the collectability of the judgment, depends on the presence of nontrust assets, as was pointed out by Justice Crampton in his dissenting opinion. The doctrine of Moore v. Moyle does not, in our opinion, offer a satisfactory solution. Like the provision of the School

Code above quoted, it would allow the wrongdoer to determine its own liability.

It is a basic concept underlying the whole law of torts today that liability follows negligence, and that individuals and corporations are responsible for the negligence of its agents and employees acting in the course of their employment. The doctrine of governmental immunity runs directly counter to that basic concept. What reasons, then, are so impelling as to allow a school district, as a quasi-municipal corporation, to commit wrongdoing without any responsibility to its victims, while any individual or private corporation would be called to task in court for such tortious conduct?

The original basis of the immunity rule has been called a "survival of the medieval idea that the sovereign can do no wrong," or that "the King can do no wrong." (38 Am.Jur., Mun.Corps., sec. 573, p. 266). In *Kinnare v. City of Chicago*, 171 Ill. 332, 49 N.E. 536, 537, the first Illinois case announcing the tort immunity of school districts, the court said: "The state acts in its sovereign capacity, and does not submit its action to the judgment of courts, and is not liable for the torts or negligence of its agents, and a corporation created by the state as a mere agency for the more efficient exercise of governmental functions is likewise exempted from the obligation to respond in damages, as master, for negligent acts of its servants to the same extent as is the state itself, unless such liability is expressly provided by the statute creating such agency." This was nothing more nor less than an extension of the theory of sovereign immunity. Professor Borchard has said that how im-

munity ever came to be applied in the United States of America is one of the mysteries of legal evolution. (Borchard, Governmental Liability in Tort, 34 Yale L. J. 1, 6.) And how it was then infiltrated into the law controlling the liability of local governmental units has been described as one of the amazing chapters of American common-law jurisprudence. (Green, Freedom of Litigation, 38 Ill.L.Rev. 355, 356.) "It seems, however, a prostitution of the concept of sovereign immunity to extend its scope in this way, for no one could seriously contend that local governmental units possess sovereign powers themselves." 54 Harv.L.Rev. 438, 439.

We are of the opinion that school district immunity cannot be justified on this theory. As was stated by one court, "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 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." *Barker v. City of Santa Fe*, 47 N.M. 85, 136 P.2d 480, 482. Likewise, we agree with the Supreme Court of Florida that in preserving the sovereign immunity theory, courts have overlooked the fact that the Revolutionary War was

fought to abolish that "divine right of kings" on which the theory is based.

The other chief reason advanced in support of the immunity rule in the more recent cases is the protection of public funds and public property. This corresponds to the "no fund" or "trust fund" theory upon which charitable immunity is based. This rationale was relied on in *Thomas v. Broadlands Community Consolidated School Dist.*, 348 Ill.App. 567, 109 N.E.2d 636, 640, where the court stated that the reason for the immunity rule is "that it is the public policy to protect public funds and public property, to prevent the diversion of tax moneys, in this case school funds, to the payment of damage claims." This reasoning seems to follow the line that it is better for the individual to suffer than for the public to be inconvenienced. From it proceeds defendant's argument that school districts would be bankrupted and education impeded if said districts were called upon to compensate children tortiously injured by the negligence of those districts' agents and employees.

We do not believe that in this present day and age, when public education constitutes one of the biggest businesses in the country, that school immunity can be justified on the protection-of-public-funds theory.

In the first place, analysis of the theory shows that it is based on the idea that payment of damage claims is a diversion of educational funds to an improper purpose. As many writers have pointed out, the fallacy in this argument is that it assumes the very point which is sought to be proved i.e., that payment of damage claims is not a proper purpose. "Logically, the 'No-fund' or 'trust fund' theory is without merit because

it is of value only after a determination of what is a proper school expenditure. To predicate immunity upon the theory of a trust fund is merely to argue in a circle, since it assumes an answer to the very question at issue, to wit, what is an educational purpose? Many disagree with the 'no-fund' doctrine to the extent of ruling that the payment of funds for judgments resulting from accidents or injuries in schools is an educational purpose. Nor can it be properly argued that as a result of the abandonment of the common-law rule the district would be completely bankrupt. California, Tennessee, New York, Washington and other states have not been compelled to shut down their schools." (Rosenfield, Governmental immunity from Liability for Tort in School Accidents, 5 Legal Notes on Local Government, 376-377.) Moreover, this argument is even more fallacious when viewed in the light of the Illinois School Code, which authorizes appropriations for "transportation purposes" (Ill.Rev.Stat. 1957, chap. 122, par. 17-6.1), authorizes issuance of bonds for the "payment of claims" (Ill.Rev.Stat.1957, chap. 122, par. 19-10), and authorizes expenditures of school tax funds for liability insurance covering school bus operations (Ill.Rev.Stat.1957, chap. 122, par.29-11a.) It seems to us that the payment of damage claims incurred as an adjunct to transportation is as much a "transportation purpose" and therefore a proper authorized purpose as are payments of other expenses involved in operating school buses. If tax funds can properly be spent to pay premiums on liability insurance, there seems to be no good reason why they cannot be spent to pay the liability itself in the absence of insurance.

Neither are we impressed with defendant's plea that the abolition

of immunity would create grave and unpredictable problems of school finance and administration. We are in accord with Dean Green when he disposed of this problem as follows: "There is considerable talk in the opinions about the tremendous financial burdens tort liability would cast upon the taxpayer. In some opinions it is stated that this factor is sufficient to warrant the courts in protecting the taxpayer through the immunity which they have thrown around municipal corporations. While this factor may have had compulsion on some of the earlier courts, I seriously doubt that it has any great weight with the courts in recent years. In the first place, taxation is not the subject matter of judicial concern where justice to the individual citizen is involved. It is the business of other departments of government to provide the funds required to pay the damages assessed against them by the courts. Moreover, the same policy that would protect governmental corporations from the payment of damages for the injuries they bring upon others would be equally pertinent to a like immunity to protect private corporations, for conceivably many essential private concerns could also be put out of business by the damages they could incur under tort liability. But as a matter of fact, this argument has no practical basis. Private concerns have rarely been greatly embarrassed, and in no instance, even where immunity is not recognized, has a municipality been seriously handicapped by tort liability. This argument is like so many of the horrors paraded in the early tort cases when courts were fashioning the boundaries of tort law. It has been thrown in simply because there was nothing better at hand. The public's willingness to stand up and pay the cost of its enterprises

carried out through municipal corporations is no less than its insistence that individuals and groups pay the cost of their enterprises. Tort liability is in fact a very small item in the budget of any well organized enterprise." Green, Freedom of Litigation, 38 Ill.L.Rev. 355, 378.

We are of the opinion that none of the reasons advanced in support of school district immunity have any true validity today. Further we believe that abolition of such immunity may tend to decrease the frequency of school bus accidents by coupling the power to transport pupils with the responsibility of exercising care in the selection and supervision of the drivers. As Dean Harno said: "A municipal corporation today is an active and virile creature capable of inflicting much harm. Its civil responsibility should be co-extensive. The municipal corporation looms up definitely and emphatically in our law, and what is more, it can and does commit wrongs. This being so, it must assume the responsibilities of the position it occupied in society." (Harno, Tort Immunity of Municipal Corporations, 4 Ill.L.Q. 28, 42.) School districts will be encouraged to exercise greater care in the matter of transporting pupils and also to carry adequate insurance covering that transportation, thus spreading the risk of accident, just as the other costs of education are spread over the entire district. At least some school authorities themselves have recognized the need for the vital change which we are making. See Editorial, 100 American School Board Journal 55, Issue No. 6, June, 1940.

"The nation's largest business is operating on a blueprint prepared a hundred, if not a thousand years ago. The public school system in the United States, which constitutes the largest single business in the country,

is still under the domination of a legal principle which in great measure continued unchanged since the Middle Ages, to the effect that a person has no financial recourse for injuries sustained as a result of the performance of the State's functions***. That such a gigantic system, involving so large an appropriation of public funds and so tremendous a proportion of the people of the United States, should operate under the principles of a rule of law so old and so outmoded would seem impossible were it not actually true." Rosenfield, Governmental Immunity from Liability for Tort in School accidents, 9 Law and Contemporary Problems 358, 359.

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

Defendant strongly urges that if said immunity is to be abolished, it should be done by the legislature, not by this court. With this contention we must disagree. The doctrine of school district immunity was created by this court alone. Having found that doctrine to be unsound and unjust under present conditions, we consider that we have not only the power, but the duty, to abolish that immunity. "We closed our courtroom doors without legislative help, and we can likewise open them." *Pierce v. Yakima Valley Memorial Hospital Ass'n*, 43 Wash.2d 162, 260 P.2d 765, 774.

(2) We have repeatedly held that the doctrine of stare decisis is not an inflexible rule requiring this court to blindly follow precedents and adhere to prior decisions, and that when it appears that public policy and social needs require a departure from prior decision, it is our duty as a court of last resort to overrule those decisions and es-

establish a rule consonant with our present day concepts of right and justice. Bradley v. Fox, 7 Ill.2d 106, 111, 129 N.E. 2d 699; Nudd v. Matsoukas, 7 Ill.2d 608, 615, 131 N.E.2d 525; Amann v. Faigy, 415 Ill. 422, 114 N.E.2d 412. As was stated by the New Jersey Supreme Court in overruling the doctrine of charitable immunity: "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 policy which would further the moral, social and economic 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 the 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. See Pound, *supra*, 13 N.A.C.C.A.L.J. at 22; Seavey, *Cogitations on Torts*, 68 (1954); Cowan, 'Torts,' 10 Rutgers L. Rev. 115, 119 (1955)." Collopy v. Newark Eye and Ear Infirmary, 27 N.J.29, 141 A.2d 276, 283.

In here departing from stare decisis because we believe justice and policy require such departure, we are nonetheless cognizant of the fact that retrospective application of our decision may result in great hardship to school districts which have relied on prior decisions upholding the doctrine of tort immunity of school districts. For this reason we feel justice will best be served by holding that, except as to the plain-

tiff in the instant case, the rule herein established shall apply only to cases arising out of future occurrences. This result is in accord with a substantial line of authority embodying the theory that an overruling decision should be given only prospective operation whenever injustice or hardship due to reliance on the overruled decisions would thereby be averted. *Gelpeke v. City of Dubuque*, 1 Wall. 175, 68 U.S. 175, 17 L.Ed. 520; *Harmon v. Auditor of Public Accounts*, 123 Ill. 122, 13 N.E. 161 (where decision sustaining validity of statute authorizing bond issue is, subsequent to the issue, overruled, overruling decision operates prospectively); *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 64 S.Ct 474, 88 L.Ed. 635; *People ex rel Attorney General v. Salomon*, 54 Ill. 39 (where public officers have relied on statutes subsequently held unconstitutional, decision given only prospective operation); *State v. Jones*, 44 N.M. 623, 107 P.2d 324 (Prospective operation given decision overruling precedent as to what constitutes a lottery); *Continental Supply Co. v. Abell*, 95 Mont. 148, 24 P.2d 133 (prospective operation given decision overruling prior cases as to corporate directors' liability to stockholders); *Hare v. General Con. Purchase Corp.*, 220 Ark. 601, 249 S.W. 2d 973 (prospective operation given decision changing prior rule as to what constitutes usury.) See also: Snyder, Retrospective Operation of Overruling Decisions, 35 Ill.L.Rev. 121; Kocourek, Retrospective Decisions and Stare Decisis, 17 A.B.A.J. 180; Freeman, the Protection Afforded Against the Retroactive Operation of an Overruling Decision, 18 Col.L.Rev. 230; Carpenter, Court Decisions and the Common Law, 17 Col.L.Rev. 593; Note, Prospective Operation of Decisions Holding Statutes Unconstitutional

or Overruling Prior Decisions, 60 Harv.L.Rev. 437.

Likewise there is substantial authority in support of our position that the new rule shall apply to the instant case. *Dooling v. Overholser*, 100 U.S.App.D.C. 247, 243 F.2d 825; *Shioutakon v. District of Columbia*, 98 U.S.App.D.C. 371, 236 F.2d 666, 60 A.L.R.2d 686; *Durham v. United States*, 94 U.S.App.D.C. 228, 214 F.2d 862, 45 A.L.R.2d 1430; *Barker v. St. Louis County*, 340 Mo. 986, 104 S.W.2d 371; *Farrior v. New England Mortgage Security Co.*, 92 Ala. 176, 9 So. 532, 12 L.R.A. 856; *Haskett v. Maxey*, 134 Ind.182, 33 N.E. 358, 19 L.R.A. 379; *Dauchey Co. v. Farney*, 105 Misc. 470, 173 N.Y.S. 530. At least two compelling reasons exist for applying the new rule to the instant case while otherwise limiting its application to cases arising in the future. First, if we were to merely announce the new rule without applying it here, such announcement would amount to mere dictum. Second, and more important, to refuse to apply the new rule here would deprive appellant of any benefit from his effort and expense in challenging the old rule which we now declare erroneous. Thus there would be no incentive to appeal the upholding of precedent since appellant could not in any event benefit from a reversal invalidating it.

(3) It is within our inherent power as the highest court of this State to give a decision prospective or retrospective application without offending constitutional principles. *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 53 S.Ct. 145, 77 L.Ed. 360.

Although ordinarily the cases which have invoked the doctrine of prospective operation have involved contract or property rights or criminal

responsibility, the basis of the doctrine is reliance upon an overruled precedent. Despite the fact that the instant case is one sounding in tort, it appears that the "reliance test" has been met here. We do not suggest that the tort itself was committed in reliance on the substantive law of torts, i. e., the bus driver did not drive negligently in reliance on the doctrine of governmental immunity, but rather that school districts and other municipal corporations have relied upon immunity and that they will suffer undue hardship if abolition of the immunity doctrine is applied retroactively. In reliance on the immunity doctrine, school districts have failed to adequately insure themselves against liability. In reliance on the immunity doctrine, they have probably failed to check past accidents which they would have investigated had they known they might later be held responsible therefore. Our present decision will eliminate much of the hardship which might be incurred by school districts as a result of their reliance on the overruled doctrine, and at the same time reward appellant for having afforded us the opportunity of changing an outmoded and unjust rule of law.

(4) For the reasons herein expressed, we accordingly hold that in this case the school district is liable in tort for the negligence of its employee, and all prior decisions to the contrary are hereby overruled.

The judgment of the Appellate Court sustaining the dismissal of plaintiff's complaint is reversed and the cause is remanded to the circuit court of Kane County with instructions to set aside the order dismissing the complaint, and to proceed in conformity with the views expressed in this opinion.

Reversed and remanded, with directions.

DAVIS, Justice.

I dissent from the decision of the court which, in one fell swoop, severs from the body of our Illinois law the ancient and established doctrine of governmental immunity from tort liability. The rule of immunity of the people collectively charged with a governmental function was well established by 1607, the fourth year of James I. (*Russell v. Men of Devon*, 2 Term Rep. 671, 100 Eng.Rep. 359.) The rule of decision was adopted prior to the constitution of 1870 and was incorporated in the Revised Statutes of 1874 in its present form. It appears today as section 1 of the act adopting the common law (Ill. Rev.Stat. 1959, chap. 28, par. 1), and provides: "That the common law of England, so far as the same is applicable and of a general nature, and all statutes or acts of the British parliament made in aid of, and to supply the defects of the common law, prior to the fourth year of James the First, excepting the second section of the sixth chapter of 43d Elizabeth, the eighth chapter of 13th Elizabeth, and ninth chapter of 37th Henry Eighth, and which are of a general nature and not local to that kingdom, shall be the rule of decision, and shall be considered as of full force until repealed by legislative authority." (Italics mine.)

Section 26 of article IV of the constitution of 1870, S.H.A. provides: "The state of Illinois shall never be made defendant in any court of law or equity." Until this decision Illinois courts have

recognized such immunity in both the State and its governmental agencies and these agencies and the legislature have relied upon such decisions.

In our present constitution we find the requirement that the General Assembly of this State shall provide a "thorough and efficient system of free schools, whereby all children of this state may receive a good common school education." (Ill. const. of 1870, art. VIII, sec. 1.) We have said that this provision operated "as a mandate to the legislature to exercise its inherent power to carry out a primary, obligatory concept of our system of government, i.e., the children of the State are entitled to a good common-school education, in public schools, and at public expense." *People v. Deatherage*, 401 Ill. 25, 30, 81 N.E.2d 581, 586.

In *Town of Waltham v. Kemper*, 55 Ill. 346, at page 351, we stated: "We are satisfied, on principle and authority, the town of Waltham was not liable to this action at common law, and none has been given by statute." We first applied the immunity rule to school districts in 1898 in the case of *Kinnare v. City of Chicago*, 171 Ill. 332, 49 N.E. 536, 537 on the ground that a school district is "an agency of the state, having existence for the sole purpose of performing certain duties deemed necessary to the maintenance of an 'efficient system of free schools,'" and, like the State, is exempt from tort liability to the same extent as the State itself, "unless such liability is expressly provided by the statute creating such agency." (Italics mine.)

The court erred in its statement that the question of immunity

of school districts from tort liability has not been reconsidered for over 50 years. This subject was thoroughly considered in *Leviton v. Board of Education*, 1940, 374 Ill. 594, 30 N.E.2d 497; and in *Lindstrom v. City of Chicago*, 1928, 331 Ill. 144, 162 N.E. 128. In these cases, the rule was reiterated that in this State, as generally throughout the nation, school districts are not liable for the torts or negligence of their agents unless their liability is expressly provided by statute. *Leviton* was cited with approval on the immunity question, as recently as 1944, in *Chicago City Bank & Trust Co. v. Board of Education*, 386 Ill. 508, 514, 54 N.E. 2d 498.

The opinion in the case at bar asserts that "the whole doctrine of governmental immunity rests on a rotten foundation" predicated on the maxim that the "king can do no wrong." The history of the common law in Illinois convincingly rebuts this epithetical charge. The doctrine of governmental immunity in Illinois was not founded upon a blind and unswerving application of the English common law or its maxims. Under our statute (Ill.Rev.Stat.1957, chap. 28 par.1), the rule of decision embraces more than the common law of England as it existed prior to 1606. We adopted a system of elementary rules and general judicial declarations of principles, which have continually expanded with the progress of society. *Amann v. Faidy*, 415 Ill. 422, 434, 114 N.E.2d 412; *Kreitz v. Behrensmeyer*, 149 Ill. 496, 36N.E. 983, 24 L.R.A. 59. The outstanding characteristic and the glory of our common law is its capacity for growth and adaptability. *People ex rel.*

Keenan v. McGuane, 13 Ill.2d 520, 535 and 536, 150 N.E.2d 699; Nudd v. Matsoukas, 7 Ill.2d 608, 131 N.E.2d 525. Sound legal doctrine need not be discarded because, in the evolutionary process of development, it may have once been justified by now anachronistic reasoning.

Neither Illinois nor any other State of the United States adopted the theory of governmental immunity from tort liability from the maxim the "King can do no wrong," as it existed in 1606, but rather predicated such immunity on various theories of the common law adaptable to the exigencies, customs, and usages of the people of our various States, as applicable under the particular governmental practices of each State.

In Lindstrom v. City of Chicago, 331 Ill. 144, at pages 147 and 148, 162 N.E. 128, 129, we states: "The reason for this rule lies in the fact that a school district of the character here considered is created merely to aid in the administration of the state government. It owns no property, has no private corporate interests and derives no special benefits from its corporate acts. It is simply an agency of the state having existence for the sole purpose of performing certain duties deemed necessary to the maintenance of 'an efficient system of free schools' within its jurisdiction. In creating such district the state acts in a sovereign capacity, for the more efficient exercise of governmental functions nesting in the state, and such district is exempted from the obligation to respond in damages, as master, for the negligent acts of its servants to the same extent as is the state itself, unless liability is expressly

provided by the statute. Nagle v. Wakey, 161 Ill. 387, 43 N.E. 1079; Wilcox v. City of Chicago, 107 Ill. 334; Town of Waltham v. Kemper, 55 Ill. 346." (Italics mine.)

McQuillin, in his work on municipal corporations, has stated a justification for the rule of immunity which is widely accepted: "The doctrine * * * is based on the familiar reason that the undertaking is not to promote the private interests of the municipality as a corporate entity, but rather for the public benefit, and in the performance of such obligation the municipality is a mere public agent, either of the state or of the local community. The reason, as often expressed, is one of public policy, to protect public funds and public property. 'Taxes are raised for certain specific governmental purposes; and if they could be diverted to the payment of damage claims, the more important work of government, which every municipality must perform regardless of its other relations, would be seriously impaired if not totally destroyed. The reason for the exemption is sound and unobjectionable.* * *'" 18 McQuillin, sec. 53.24. (Italics mine.)

We recognized this rationale in Leviton v. Board of Education, 374 Ill. 594, at pages 599 and 600, 30 N.E.2d 497, 500, and quoted directly from Elmore v. Drainage Com'rs, 135 Ill. 269, 25 N.E. 1010: "The nonliability of the public quasi corporation, unless liability is expressly declared, is usually placed upon these grounds: That * * * no corporate funds are provided which can, without express provision of law, be appropriated to private indemnification. Consequently, in such case, the liability is one of imperfect obligation,

and no civil action lies at the suit of an individual for non-performance of the duty imposed." This principle of the protection of public funds was likewise recognized in *Thomas v. Broadlands Community Consolidated School Dist.*, 348 Ill.App. 567, 109 N.E.2d 636.

Other State courts have held that school districts are not liable to pay damages since the funds in their hands have been placed there for the purposes of education only; that school districts are without power to raise money by taxation to pay damages in tort; and that to allow school funds to be used in such manner would be detrimental, and possibly even disastrous, to the public school system. *Finch v. Board of Education of Toledo*, 30 Ohio St. 37; *Ford v. School District of Kendall Borough*, 121 Pa. 543, 15 A. 812, 1 L.R.A. 607; *Freel v. School City of Crawfordsville*, 142 Ind. 27, 41 N.E. 312, 37 L.R.A. 301; *Cochran v. Wilson*, 287 Mo. 210, 229 S.W. 1050.

Such reasoning finds logical support under Illinois law. School districts are circumscribed in their power to tax. They are authorized by statute to levy certain taxes for educational and building purposes, and in event transportation is furnished, they may levy a given tax for this purpose. (Ill.Rev.Stat. 1957, chap. 122, par. 17-2.) They may issue bonds for the purpose of building or repairing school houses or purchasing or improving school sites, pursuant to the provision of article 19 of the School Code (Ill.Rev.Stat. 1957, chap. 122, par. 19-2), and the county clerk shall annually extend taxes against the taxable property of the district sufficient to pay the maturing principal and interest on said bonds in accordance with the

the certified copy of the bond resolution on file in his office. Ill. Rev.Stat. 1957, chap. 122, par. 19-9.

School districts may also issue bonds to pay orders for wages of teachers or claims against the district (Ill.Rev.Stat.1957, chap. 112, par. 19-10); to pay liabilities or obligations imposed on such districts resulting from a division of the assets where a new district is created from part of the original district (Ill.Rev.Stat.1957, chap. 122, par. 19-11.1); and to refund an existing legal bonded indebtedness (Ill.Rev.Stat. 1957, chap. 122, par. 19-16), and may levy taxes to pay maturing principal and interest thereon. (Ill.Rev. Stat.1957, chap. 122, par. 19-9.) And in addition to these limitations, a school district cannot become indebted for any purpose in excess of five per cent of the value of the taxable property therein. (Const. of 1870, art. 9, par. 12.) It is elementary law that school districts can levy taxes for only those purposes authorized by the legislature. *St. Louis, Alton and Terre Haute Railroad Co. v. People ex rel. Wolf*, 244 Ill. 155, 79 N.E. 664; *Chicago and Alton Railroad Co. v. People ex rel Wolff*, Ill. 625, 69 N.E. 72. They are without power to levy taxes to pay tort judgments, and without such authorization a tax for such purpose would violate section 9 of article IX of the State constitution which proscribes a municipal agency from levying a tax other than for a corporate purpose. *Chicago City Bank and Trust Co. v. Board of Education*, 386 Ill. 508, 54 N.E.2d 498; *Leviton v. Board of Education*, 374 Ill. 594, 30 N.E.2d 497; *Dimond v. Commissioner of Highways*, 366 Ill. 503, 9 N.E.2d 197; *Berman v. Board of Education*, 360

Ill. 535, 196 N.E. 464, 99 A.L.R. 1029.

The relationship of a school district to the State, under section 1 of article VIII of the Illinois constitution, is concisely stated in *People ex rel. Taylor v. Camargo Community Consolidated School Dist.*, 313 Ill. 321, at page 324, 145 N.E. 154, 155: "The appellee is a public municipal corporation created by legislative authority for the purpose of exercising such part of the governmental powers of the state as the law has confided to it. It is a part of the machinery of government. Its functions are wholly public, and it is merely a local agency of the state for the exercise of those functions. The character of the functions of such municipal corporations, the extent and duration of their powers and the territory in which they shall be exercised rest entirely in the legislative discretion. The governmental powers which they may hold and use for governmental purposes are equally within the power of the Legislature. Their powers may be enlarged, diminished, modified, or revoked, their acts set aside or confirmed, at the pleasure of the Legislature."

Thus under existing statutes, school districts have no authority to levy taxes or to issue bonds for the purpose of paying a tort judgment. The statutes which authorize the levy of a tax for transportation purposes and the issuance of bonds to pay claims were adopted when the doctrine of governmental immunity from tort liability was fully recognized by both this court and the legislature, and the suggestion of the court that such levies could be used to satisfy tort judgments is specious indeed.

If tort judgments secured against a school district are to be paid, the legislature alone must authorize their payment and provide a tax rate for the levy of funds for this purpose. Such are the teachings of section 9 of article IX of the Illinois constitution, the School Code, and all the cases heretofore cited.

The pronouncement in *Moore v. Moyle*, 405 Ill. 555, 92 N.E.2d 81, and *Thomas v. Broadlands Community Consolidated School Dist.*, 348 Ill.App. 567, 109 N.E.2d 636, that charitable corporations and school districts are subject to tort liability, to the extent that liability insurance is available to protect the charitable trust fund and the public school fund, is consonant with existing statutes and the decisions of this court heretofore cited.

The court urges that under the legislative effort to ameliorate the burden placed on the individual under the doctrine of governmental immunity, each school district determines for itself "whether, and to what extent, it will be financially responsible for the wrongs inflicted by it." This criticism of the judgment of the legislature, even if valid, cannot justify this court in imposing its peculiar predilection of sound legislative policy in an area clearly beyond its competence.

Since 1870, the legislature has repeatedly acted to relieve the hardship which may fall upon the individual by virtue of the doctrine of governmental immunity. Governmental agencies, including school districts, are now subject to liability under the Workmen's Compensation and Occupational Disease Acts (Ill.Rev.Stat.1957, chap

48, pars. 138.1, 172.36); the State, under the Court of Claims Act, is liable for damages in tort up to \$7,500 for the negligence of its officers, agents or employees (Ill. Rev.Stat.1957, chap. 37, pars. 439.24); cities and villages have been made directly liable for injuries caused by the negligent operation of fire department vehicles, and for actions wrong in the removal or destruction of unsafe or insanitary buildings (Ill.Rev.Stat.1957, chap. 24, pars. 1-13, 1-16); cities and villages, and the Chicago Park District, have also been made responsible, by way of indemnification, for the nonwilful misconduct of policemen (Ill.Rev.Stat.1957, chap. 24, par. 1-15.1; chap. 105, par. 333.23k); and under the School Code, any school district which provides transportation may insure against any loss or liability which may arise from or incident to the ownership or operation of the school bus (Ill.Rev.Stat.1957, chap. 122, par. 29-11a), and any school districts may insure against loss or liability resulting from the negligent act of any agent, employee, teacher, officer or member of the supervisory staff thereof resulting from the wrongful act of such person in the discharge of his duties within the scope of his employment. Ill.Rev,Stat.1957, chap.122, par. 6-35.1.

Thus, in accord with the theme of governmental immunity, unless "liability is expressly provided by statute" as announced in *Town of Waltham v. Kemper*, 55 Ill. 346, in 1870, and as reiterated in *Lindstrom v. City of Chicago*, 331 Ill. 144, 162 N.E. 128, and the other cases heretofore cited, the limitation of the scope of the doctrine of immunity,

with restricted exceptions, has been left to the discretion of the legislature.

I denounce the contention of the court that these legislative limitations on the doctrine of governmental immunity are a justification for its abolition by judicial fiat. The legislature, in restricting the scope of such immunity, is acting in its area of special competence. This court, in abolishing it, has unwisely ventured beyond the range of judicial action.

Justice Holmes, in his lectures entitled "The Common Law," stated that "the life of the law has not been logic, it has been experience." Over the years, our law in connection with governmental immunity has grown and developed in accordance with the experiences, practices, customs and mores of the times. The success and life of our republic are based upon public education. The necessity for such education and the magnitude of its endeavor offer grave reasons why this court should refuse to overturn the precedent of 89 years with reference to governmental immunity. This decision cannot but be the occasion for releasing a flood of litigation and legislation in order to establish new boundaries in this area of novel liability. During this period, school districts will be harassed by doubts and difficulties which will impair their ability to conduct an efficient system of free-schools. I regard as appropriate the following language of the United States Supreme Court in *Helvering v. Hallock*, 309 U.S. 106, 119, 60 S.Ct. 444, 451, 84 L.Ed. 604, 612: "We recognize that *stare decisis* embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychologic need to sat-

isfy reasonable expectations."

This decision, while here applicable to school districts, by its pronouncement extends to the State and all of its governmental agencies which have heretofore been within the purview of the doctrine of governmental immunity. The various statutes which heretofore restricted this doctrine in favor of the individual appear to be overridden by the full sweep of this opinion which, without limitation, overrules all prior contrary decisions and nullifies the immunity doctrine.

If the court is consistent in its future decisions, the immunity of charitable trust funds must likewise fall. I cannot but conclude that the action of the court in striking down this long established doctrine, buttressed by statutes predicated upon its existence, is grave error. We are not writing on a clean slate; we are dealing with the law as established and developed after 89 years of growth. In *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 221, 37 S.Ct. 524, 531, 61 L.Ed. 1086, 1100, Mr. Justice Holmes, dissenting, stated: "I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions." In the case at bar, the court has broken the recognized confines of judicial legislation, overruled existing precedent, and has, in effect, repealed the legislative policy and enactments of long standing.

In Federalist No. 78, Alexander Hamilton wrote that courts "must declare the sense of the law; and if they should be disposed to exercise will instead of Judgment, the consequence would equally be the substitution of their pleasure to that of the legislative body." I believe that

the court in the case at bar has exercised its will in an area outside the scope of judicial power and has invaded the field of legislative action.

In the recent case of O'Callaghan v. Waller & Beckwith Realty Co., 15 Ill.2d 436, 155 N.E.2d 545, we refused to declare that an exculpatory clause in a lease relating to residential property was void as against public policy. At page 441 of 15 Ill.2d, at page 547 of 155 N.E.2d we stated: "Other jurisdictions have dealt with this problem by legislation. McKinney's Consol. Laws of N.Y. Ann., Real Property Laws, sec. 234, vol. 49, part 1; Ann. Laws of Mass., vol. 6, c. 186, sec. 15. In our opinion the subject is one that is appropriate for legislative rather than judicial action." This opinion was adopted November 26, 1958, and rehearing was denied January 22, 1959. Thereafter the legislature promptly enacted a statute which declared such clauses in residential leases to be void as against public policy and unenforceable. Ill. Rev. Stat. 1959, chap. 80, par. 15a.

Prior to the decision in the case at bar, the governmental immunity rule in Illinois was in harmony with that of the other States of the Union in the absence of statute, except the State of New York, which adhered to the British rule of liability for tending immunity to the Board for the negligence of its agents or employees. Miller v. Board of Education, 1943, 291 N.Y. 25, 50 N.E.2d 529; Herman v. Board of Education, 1922, 234 N.Y. 196, 137 N.E. Education, 1907, 187 N.Y. 331, 80 N.E. 192; Williams v. Board of Trustees, 1924, 210 App. Div. 161, 205 N.Y.S. 742. However, even in New York the judicial rule was reinforced by statute

(N.Y. Education Law, McKinney's Consol. Laws, c. 16, §§ 2560, 3023), while the rule of liability was established by statute in the States of California and Washington. Calif. Education Code Ann. sec. 1007 (Deering 1952), West's Ann. Cal. Education Code, § 1007; Wash. Rev. Code, sec. 4.08.120 (1951). Illinois is the only State in the United States in which the rule of liability against school districts has been established by court decision.

If reason existed for legislative rather than judicial action to invalidate an exculpatory clause in a lease, as against public policy, as this court held in O'Callaghan, then, beyond doubt, the same rule should have been applied by the court in its decision in this case.

The basic wisdom of leaving changes and modifications in the law pertaining to governmental immunity to the action of the legislature is well illustrated here. In the present posture of the law, governmental agencies are subject to liability and judgment in tort actions without any attendant statutory authorization to levy taxes and thereby raise revenue for such purpose. Such liability should not be imposed upon the State or its governmental agencies without exploring and considering the complicated aspects of its impact, and without authorizing a tax levy and providing a tax rate for such purpose.

The legislature, through committees, hearings, and other of its processes, can adequately inquire into the complicated circumstances attendant upon the establishment of such liability and the raising of taxes for this purpose. These essential functions of investigation and inquiry are vested in the legislative branch of our government and this

court is neither practically equipped for such task, nor is it constitutionally authorized to enter upon it.

This opinion was adopted May 21, 1959, and we allowed petition for rehearing at the September, 1959, term. In the original opinion, the court made no reference to whether it would operate retroactively or prospectively. In *Braxton v. Bressler*, 64 Ill. 488, at page 493, we stated: "Legislation can only affect the future, but when courts vacillate and overturn their own decisions, the evils may be incalculable. They operate retrospectively, and may often disturb rights which should be regarded as certain and fixed." Consequently, such opinion operated retroactively. Also see: *Grasse v/ Dealer's Transport Co.*, 412 Ill. 179, 106 N.E.2d 124; *Duke v. Olson*, 240 Ill. App. 198.

Upon rehearing, the court modified its opinion by holding that, except as to the plaintiff in the instant case, the rule of liability should apply only to cases arising out of future occurrences. The inability of the judiciary to practically cope with this problem is demonstrated by the labored efforts of the court to resolve it and the unusual doctrine which the court announced as the solution of the enigma in which it was entangled.

The other jurisdictions, which have given prospective operation to decisions overruling cases long recognized as the law, have largely predicated such result upon the opinion of Mr. Justice Cardozo in *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 53 S.Ct 145, 77 L.Ed. 360.

It was there held that the choice of whether decisions should be

given prospective or retrospective application rested with the judges of the State court and that there was nothing in the United States constitution to preclude the Montana court from providing that its decisions overruling prior cases should be given prospective application only, "whenever injustice or hardship will thereby be averted." The basis of the Sunburst doctrine was reliance upon an overruled precedent and ensuing hardship therefrom.

In this case the court recognized that "In reliance on the immunity doctrine, school districts have failed to adequately insure themselves against liability" and "have probably failed to investigate past accidents which they would have investigated had they known they might later be held responsible therefor," and conceded that the reliance test had been met. Yet, the court included within the ambit of its opinion the action of the plaintiff, while the element of reliance and ensuing hardship were as real and present with this defendant as with other potential defendant school districts which escaped liability by virtue of the prospective application of the court's opinion.

The principle announced by the court is an aborted offspring of the Sunburst theory. It is without legal justification other than that the plaintiff should be rewarded for bringing the action, and it has thwarted the reasonable expectations of the well-intentioned governing body of defendant school district. While the court stated that its decision is in accord with a substantial line of authority, the cases cited, other than *Dooling v. Overholser*, 100 U.S. App.D.C.247, 243 F.2d 825, and *Barker v. St. Louis County*, 340 Mo. 986, 104 S.W.2d 371, offer no support for the

result obtained.

Eighteen pupils of defendant school district were riding on its bus on March 10, 1958, when the bus crashed into a culvert which resulted in an explosion of the gasoline tank whereby most of them were burned and injured. *Molitor v. Kaneland Community Unit Dist.* 302, 20 Ill.App.2d 555, 155 N.E.2d 841. When we consider that under the court's decision only Thomas Molitor can recover even though the other pupils were similarly injured in the same accident, the position of the court becomes even less tenable.

After this opinion was announced on May 21, 1959, and in response to it, the legislature, by an overwhelming vote, adopted five bills granting tort immunity to park districts (Ill.Rev.Stat.1959, chap. 105, par. 12.1-1 and par. 491), counties (Ill.Rev.Stat.1959, chap. 34, par. 301.1), forest preserve districts (Ill.Rev.Stat.1959, chap. 57 1/2, par. 3a), and the Chicago Park District (Ill.Rev.Stat.1959, chap. 105, par. 333.2a). It also passed a bill granting limited tort immunity to school districts and nonprofit private schools. (Ill.Rev.Stat.1959, chap. 122, pars. 821-831, inci.) These enactments became effective on diverse dates in July, 1959.

In view of this legislation, the decision of the court may be of limited significance relative to the liability of school districts in tort actions. Cf.: *O'Callaghan v. Waller & Beckwith Realty Co.*, 15 Ill.2d 436, 155 N.E.2d 545, and Ill.Rev.Stat.1959, chap. 80, par. 15a; *In re Estate of Day*, 7 Ill.2d 348, 131 N.E.2d 50, and Ill.Rev.Stat.1957, chap. 3, par. 197, wherein the decisions of this court were annulled by

legislative enactment; and *Jencks v. United States*, 353 U.S. 657, 77 S.Ct. 1007, 1 L.Ed.2d 1103, and 18 U.S.C. & 3500, wherein a decision of the United States Supreme Court was nullified by an act of Congress. See: *Palermo v. United States*, 360 U.S. 343, 79 S.Ct. 1217, 3 L.Ed.2d 1287.

The opinion of the court fails to make any reference to the action of the General Assembly concerning the question of tort immunity. This is significant in that we have frequently held that where the legislature has changed the law pending an appeal, the case must be disposed of by the reviewing court under the law as it then exists. *Fallon v. Illinois Commerce Com.*, 402 Ill. 316, 84 N.E.2d 641; *People ex rel. Hanks v. Benton*, 301 Ill. 32, 133 N.E. 700; *People ex rel. Askew v. Ryan*, 281 Ill. 231, 117 N.E. 992; *People ex rel. Law v. Dix*, 280 Ill. 158, 117 N.E. 496. Thus I believe the court erred in not reviewing this judgment in the light of the foregoing 1959 amendment to the School Code.

However, this epochal decision will be the source of much confusion and litigation. The statutes passed after the adoption of the opinion and within the last 40 days of the session, restoring the doctrine of immunity to certain municipal agencies, indicate to me that it is, and by future legislation will be, the policy of the legislature to restore governmental immunity in Illinois, subject to such modification as hearings, study and research under the legislative process may indicate desirable.

While this opinion determines the issues before the court, the problems which it has created remain and will continue to plague us until they are justly resolved.

I would affirm the trial and Appellate courts.

HERSHEY, J., joins in this dissent.

BRISTOW, Justice, concurring in part and dissenting in part:

I concur with the reasoning and the results reached by this court in the case of the instant plaintiff. But the dissenting opinion of Mr. Justice DAVIS reads the court's opinion as abolishing the immunity of school districts only as to the instant plaintiff but as retaining that immunity as to the other children who were injured with the plaintiff in the same accident. To the extent that the majority opinion is subject to the construction imparted to it by the dissenting opinion, I must withhold assent.

This is a test case brought by a father on behalf of one of his four children, all of whom were injured at the same time and under identical circumstances. It is clear that all of the children, having the same father and next friend and being represented by the same counsel, have identical interests in this appeal, which has been an important test case. There was a common question of law in the cases of all the children and it serves the interests of justice to encourage and entertain a test case respecting all of the children.

I would reject any intimation that the court's holding in this case is limited to the named plaintiff and would repel any inference that the court's opinion pretermits the rights of the other children. I also dissent from the court's order denying the leave of the instant plaintiff's brothers and sisters to intervene in this case and request a clarification of the court's present opinion.

With these reservations, prompted by the dissent, I join the majority of the court in its opinion and judgment in this case.

APPENDIX D

Glossary of Legal Terms

GLOSSARY OF LEGAL TERMS

(NOTE: All the following legal terms are taken from Black's Law Dictionary (1933) Third Edition. St. Paul, Minn.: West Publishing Company, 1933.)

Accident--An unforeseen event, occurring without the will or design of the person whose mere act causes it; an unexpected, unusual, or undesigned occurrence, the effect of an unknown cause, or the cause being known, by an unprecedented consequence of it; a casualty. In its proper use the term excludes negligence; that is an accident is an event which occurs without the fault, carelessness, or want of proper circumspection of the use of that kind and degree of care necessary to the exigency and in the circumstances in which he was placed.

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

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

Attractive Nuisance--A doctrine which holds a property owner liable when he knowingly leaves a dangerous instrumentality, which he may be charged with knowing is of a character to attract children, exposes in a place liable to be frequented by children, and as a result,

a child who did not realize the danger is injured.

Case Law--The aggregate of reported cases as forming a body of jurisprudence, or the law of a particular subject as evidenced or formed by the adjudged cases, in distinction to statutes and other sources of law.

Certiorari--The name of a writ issued by a superior court directing an inferior court to send up to the former some pending proceeding, or all the record and proceedings in a cause before the verdict, with its certificate to the correctness and completeness of the record, for review or trial; or it may serve to bring up the record of a case already terminated below, if the inferior court is not one of record, or in cases where the procedure is not according to the course of common law.

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

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

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

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

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

Contract--A promissory agreement between two or more persons that creates, modifies, or destroys a legal relation.

Contributory Negligence--Contributory negligence, when set up as a defense to an action for injuries alleged to have been caused by the defendant's negligence; means any want of ordinary care on the part of the person injured, (or on the part of another whose negligence is imputable to him,) which combined and concurred with the defendant's negligence, and contributed to the injury as a proximate cause thereof, and as an element without which the injury would not have occurred.

Corporation--An artificial person or legal entity created by or under the authority of the laws of a state or nation, composed, in

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

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

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

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

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

Employee--One who works for an employer; a person working for

salary or wages.

Employer--One who employs the services of others; one for whom employees work and who pay their wages or salaries.

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

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

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

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

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

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

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

Last Clear Chance--In the law of negligence, this term denotes the doctrine or rule that, notwithstanding the negligence of a plain-

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

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

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

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

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

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

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

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

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

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

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

Anything which is injurious to health, or is indecent or

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

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

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

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

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

Pro tanto--For so much; for as much as may be; as far as it goes.

Proximate Cause--That which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred. That which is nearest in order of responsible causation.

Quasi corporations--Organizations resembling corporations;

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

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

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

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

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

School board--A board of municipal officers charged with the administration of the affairs of the public schools. They are commonly organized under the general laws of the state, and fall within the class of quasi corporations, sometimes coterminus with a county or

borough, but not necessarily so.

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

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

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

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

citizens and subjects as a supreme power.

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

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

Tort-feasor--A wrong-doer; one who commits or is guilty of a tort.

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

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

Trespasser--One who has committed trespass; one who unlawfully enters upon another's land, or unlawfully and forcibly takes another's personal property. The term is generally used in a limited sense to designate one who goes upon the premises of another without invitation,

express or implied, and does so out of curiosity, or for his own purposes or convenience, and not in the performance of any duty to the owner.

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

Vested rights--Rights which have so completely and definitely accrued to or settled in a person that they are not subject to be defeated or canceled by the act of any other private person, and which it is right and equitable that the government should recognize and protect, as being lawful in themselves, and settled according to the then current rules of law, and of which the individual could not be deprived otherwise than by the established methods of procedure and for the public welfare.

