Development of school district immunity doctrine
by Henry Keating DuGarm

A thesis submitted to the Graduate Faculty in partial fulfillment of the requirements for the degree of DOCTOR OF EDUCATION
Montana State University
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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 appled 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

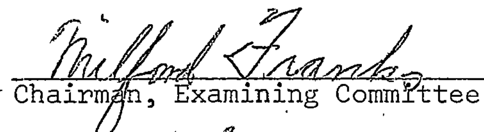
A thesis submitted to the Graduate Faculty in partial fulfillment of the requirements for the degree

of

DOCTOR OF EDUCATION

Approved:

Head, Major Department



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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 appled 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.

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

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[1]Biweekly 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 hald 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

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

[3]Ibid. p. 2.

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

[5]Ibid. p. 207.

[6]Ibid. 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

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[7] Ibid. 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 activites 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

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[1]For 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.

[2]Prosser, 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

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

[4]Professor 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.

[5]Hall, 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 kingdons. 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,

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[6]Radin, op. cit. pp. 1-2.

[7]Hall, 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.

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[8]Ibid. p. xxiii.

[9]Radin, 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]

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[10]Hall, op. cit. p. xxii.

[11]Hall, 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 Kings'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,

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[12]Ibid. p. xxv.

[13]Ibid. 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

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

[15]Radin, 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 1688.[16] 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.

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[16]Ibid. 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.

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[17]Ibid. p. xxx.

[18]Ibid. 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 controversey 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]

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[19]Ibid. pp. xvi, xvii.

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

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

[22]27 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 submerged 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]

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[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

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

[28]Ibid. 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 same 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 estab-ished 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

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[29]Ibid. p. 6.

[30]Ibid. 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 Walthan 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, alledgedly 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.

<u>The Effect of Judicial Law-making and the Doctrine of Stare Decisis on the Immunity Doctrine</u>. 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.

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[31]Hall, op. cit. p. xll.

[32]Ibid. 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

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