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Legal Responsibility Under Tort Law
Of School Personnel and School Districts as Regards Negligent Conduct Toward Pupils†

By Reynolds C. Seitz

The title selected for this article is likely to startle the discerning reader. It is rather apparent that adequate treatment of the suggested subject matter would more readily lend itself to a full length volume

† The thrust of this article is the discussion of the law as it touches public school personnel and school districts. The material, however, which deals with the duties that rest on individual teachers has equal application to teachers in the private school. Of course, in the religious school the individual teacher who is a religious has no money and is, therefore, judgment proof. The recourse, however, may be against the corporation that operates the private school unless the jurisdiction holds to the immunity doctrine of non-profit, eleemosynary, charitable institutions. The article will reveal that more school districts are losing governmental immunity against tort action. The tide of judicial thinking is also beginning to run in the direction of abrogating immunity of private schools, even one operated by a church. The many cases involving liability of private hospitals are of significance in this respect. See for a more direct example the 1963 Wisconsin case, Widell v. Holy Trinity Catholic Church, 19 Wis. 2d 648, 121 N.W.2d 249, 254 (1963), which, although involving a church corporation, gives indication that the rule of immunity of a private school against actions based on a claim of negligence is very likely abolished. The language of the court is significant:

There can be no quarrel with the argument [that] the public benefits generally from the work of religious institutions. . . . [T]he question is whether the benefit to the many should be at the expense of the innocent sufferer of injuries caused by the negligence of an agent of the religious institution. . . . Certainly institutions teaching divine justice, the dignity of man and his obligation to his fellowmen . . . would not claim . . . they ought to be exempt from repairing the injury done by themselves or their agents to another. . . .

We do not believe the result of abolishing immunity . . . casts any insuperable financial burden upon them. . . . [They can minimize the burden by insurance.]
rather than a law review article. Realistically, therefore, the approach has been to select for discussion those areas of exposure which may likely present the greatest possibility of risk of liability.

A further technique has suggested itself. An article of this nature will have maximum usefulness if in addition to being a helpful guide to school board attorneys, it has meaning to teachers, administrators and school board members. Since many of the individuals in the latter categories do not have a professional foundation in legal education, the approach will at times present basic material which may not be customary in articles which are designed to be read almost exclusively by trained legal scholars and lawyers.

There is full justification for giving enough slant to an article of this type so that teachers, administrators and school board members can find meaning in it. The primary reason, although the danger does exist, is not to alert school personnel and school boards to the threat of recovery of money damages. The basic justification is that school personnel have as much reason to safeguard children against injury resulting from harm induced by breach of duty as they have to protect young people from the result of an improper psychological approach to teaching.

The Position of the Individual Teacher
And School Administrator

In society generally an individual must take reasonable care to avoid acts or omissions which he can reasonably foresee would be likely to injure his neighbor. If he does not, he subjects himself to the probability that he will be required by a court to pay money damages to an injured party. Under tort law a neighbor is one who is so closely and directly affected by an act that an individual ought reasonably to have had him in contemplation when he was directing his mind to acts or omissions. A negative statement serves to emphasize the principle. There are some people to whom an individual owes no duty to be concerned about his conduct. The concept of whether a duty is owed is a question of law for a court to determine. Courts have generally recognized that pupils fall within the category of neighbors so as to cause teachers and administrators to have them in contemplation when they act or omit to act.

Under familiar principles of tort law the concrete duty imposed by this attitude is that teachers and administrators must act toward pupils as would the reasonable, prudent person or parent under the circumstances. This standard does not make teachers the insurers of the safety of children. If school personnel have acted as the reason-
able, prudent parent under the circumstances and nevertheless a child is injured, the teacher or administrator cannot be held responsible. The teacher and administrator are not liable for pure accidents.

It is obvious that the determination of negligence measured by the yardstick of whether teachers and administrators acted toward pupils as the reasonable, prudent parent would do under the extremely complex circumstances found in varied school situations is not simple. It is far more difficult than the application of the same yardstick to the conduct of the driver of an automobile.

Since a great majority of fact situations alleging negligence on the part of teachers are going to present an issue which will not warrant a court directed verdict either in favor of the plaintiff or the defendant, a jury is most frequently going to be directed to work with the yardstick of determining whether a teacher or administrator did such acts or omitted "to take such a precaution that under the circumstances present he, as an ordinarily prudent person, ought reasonably to [have foreseen] that he will thereby expose the interest of another to an unreasonable risk of harm."1

In facing up to the difficult question of whether in a particular situation liability should attach because of the conduct of a school teacher or administrator there are some principles of tort law that may have significant application.

In discussing probability of harm resulting from a certain type of conduct authorities in tort law have pointed out that as the gravity of the possible harm increases, the apparent likelihood of its occurrence need be correspondingly less.2 This explains why, although the odds may be 1,000 to 1 in favor of an automobile driver going 90 miles an hour not meeting a train at a railroad crossing, the risk of death is sufficiently serious to impose upon him more caution. Does this principle suggest, however, that often a teacher or administrator, as a defense to an allegation that his action was negligent and produced harm to a pupil, could assert that since the gravity of possible harm is not great, it is proper to think in terms of statistical odds on harm?

Another concept in tort law expresses the attitude that against the probability and gravity of risk must be balanced the utility of the type of conduct in question.3 The recognized problem here is whether the game is worth the candle and the realism of appreciating that sometimes risk may reasonably be run with the full approval of the community.

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2 Prosser, TaRs 121-22 (2d ed. 1955).
3 Id. at 122.
The disclosure of the yardstick which will be put into the hands of jurors and the particular principles to which attention has just been drawn suggests the difficulty of predicting the jury reaction to a particular school fact situation in which negligence of school personnel is alleged. Even appellate courts may differ on the matter as to whether a jury verdict should be let stand.

This uncertainty as to outcome points to the reasonableness of giving advice to school personnel which leans toward the conservative, with the qualification that the advice should not be so cautious as to put the educator in the kind of a legal strait jacket which would have an undesirable effect upon the ability of children to learn and develop responsibility.

In the light of what has been stated, and to the extent that space will permit, it now seems desirable to discuss some of the kinds of fact situations which arise in the school field.

**Duty to Supervise in General**

It is obvious that many questions concerning liability can arise out of situations where it is alleged that the pupil was injured during a period when a teacher failed to supervise.

Fortunately the operation of schools has not produced anything like the amount of litigation found in the area of the use of the automobile. It is, therefore, often necessary to speculate as to outcome of cases alleging failure to properly supervise. This is done through the application of basic principles and by analogy suggested by certain decided cases. As previously indicated, the approach here adopted is a reasonably conservative one. In spite of the liberality of certain courts, as portrayed in immediately following paragraphs, prudence dictates offering advice to school personnel which will be calculated to keep them out of the hands of juries. Unless there is a meaningful educational goal to be attained, it does not seem wise to encourage teachers or administrators to probe to see if juries and courts will follow the pattern of some liberally decided cases.

The New York case, *Ohman v. Board of Educ.*,\(^4\) will serve as an introduction to a discussion of the responsibilities of teachers and administrators in respect to supervision. In *Ohman* the trial court had found a teacher negligent on evidence that she had been out of the room to which she was assigned for the purpose of sorting papers and storing materials for perhaps an hour and fifteen minutes. During the time she was gone a thirteen year old boy was struck in the eye by a pencil hurled by a pupil at a particular classmate who ducked to avoid

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\(^4\) 300 N.Y. 306, 90 N.E.2d 474 (1949).
the object. The appeal court felt the absence of the teacher was not the proximate cause of the injury and, therefore, concluded that the length of absence was immaterial. The court talked about the act of the third party as one which could hardly have been anticipated in the reasonable exercise of the teacher's duty toward the plaintiff. This, the court felt, was because there was no proof of similar accidents. Also, the court asserted that it could not be contended that a pencil in the hands of a school pupil is a dangerous instrumentality. The event, stressed the court, could have occurred equally as well in the presence of a teacher as during her absence. Two dissenters in the Ohman case argued most persuasively that the jury could properly conclude that if a teacher left a room full of children unsupervised, there could be horseplay which could result in injury to a pupil.

The position of the dissenters and the jury seemed utterly sound. Certainly the reasonable, prudent teacher can foresee that when she leaves a normal sized room containing thirteen year olds, especially for an extended period of time, the psychology of group behavior will induce some horseplay which would result in injury. It seems utterly immaterial that the pencil was thrown at one pupil and hit another. While it is true a similar event could have happened while the teacher was in the room, carefully supervising, and there would have been no liability, the chances of the episode taking place were greatly heightened by the absence of the teacher from the room. There is no requirement that the teacher foresee the exact injury that would take place in her absence. True, there must be a relationship between the absence from the classroom and the injury. The happening in Ohman is in no way similar to that where a boy might be injured because he bumped his head in a basketball game while the teacher was out of the gymnasium. It could realistically be said in such case that the absence of the teacher from the gymnasium had nothing to do with the injury.

If there is any rational explanation for the majority viewpoint in the Ohman case, it would seem to rest on the presumption that in terms of statistical odds the likelihood of possible harm was not great. It seems, however, that this principle, standing alone, should not be a valid defense to excuse lack of supervision. Some reasonable showing of the utility of the conduct would appear to be required.

All courts, however, are not requiring it. In Ohio the court held that a teacher who was out of the room was not negligent when one pupil threw a milk bottle which struck another pupil in the head, causing him eventually to lose the sight of one eye and impairing the vision of the other. On the other hand all courts do not accept the

philosophy of the Ohio and New York courts. In the state of Washington,\textsuperscript{6} where the ability to foresee the exact injury was more difficult than in the case just discussed, the court found no problem in finding a physical education teacher liable who left the gymnasium unsupervised when during his absence a boy dragged a girl into an adjacent room and perpetrated an immoral act.

**Supervision of Normal Size Classrooms**

In spite of many assertions of teachers that necessity prompts frequent leaving of classrooms unsupervised, a thoughtful analysis of most concrete situations points to the fact that there are actually few occasions when it can be said that worthwhile educational purposes support leaving the room for any appreciable period of time. It would be probable, although by no means certain, that courts would find more occasion to conclude that there was no negligence if the teacher was out of the room for a short period of time for a purpose connected with an educational matter.

**Supervision of Certain Special Groups**

The "under the circumstances" phrase in the basic test for negligence would often dictate that the make-up of certain groups was such that no prudent teacher would leave the group alone for even a brief time. On the other hand the utility of the endeavor might suggest that if the approach was that of the reasonable, prudent man, such things as unsupervised study halls might be set up. If they were, it would seem that prudence would dictate that only those pupils would be routed into such rooms that teachers had vouched for as reliable. It would also appear wise to support the unsupervised study hall by enlisting the aid of a student council willing to accept the responsibility of reporting infractions of study hall regulations.

Certainly small study groups of five to six could be left unsupervised provided there was not in the group a known and consistent trouble maker. This is because the reasonable prudent parent would not hesitate to leave certain small groups unsupervised in his home. As to the question concerning when a small group becomes too large, this presents the typical problem of the line of demarcation with which the law is often confronted and as to which the answer could vary from jury to jury and court to court.

**Supervision During Recess**

The responsibility to supervise elementary school pupils during recess periods rests upon the individual teacher. Surely if a teacher must supervise her group within a classroom, she would have to do

\textsuperscript{6} McLeod v. Grant County Dist. No. 128, 42 Wash. 2d 316, 255 P.2d 360 (1953).
the same on a recess playground. Negligence has been found when a teacher fails to enforce adequate play rules, which the court felt was the cause of the injury.\textsuperscript{7}

\textit{Supervision of Shops, Laboratories, Gymnasiums, Swimming Pools, Playgrounds}

A particular responsibility rests upon teachers who instruct in areas where students work with equipment, materials and machines which are inherently dangerous if care is not used. Specifically, shop, physical education, science and home economics teachers work in such areas. The teacher not only has the duty to supervise carefully. He also has the duty to instruct in the proper use of equipment.\textsuperscript{8} There is often a tendency on the part of shop, science and home economics teachers to concentrate on the work of a few conducting a particular experiment in a laboratory or shop. In view of the potential danger that exists, conservative advice suggests that such concentration should not be too obvious for an unreasonable time. On the other hand a New York court made clear that there is no requirement that the teacher have under constant and unremitting scrutiny the precise spots wherein every phase of activity is being pursued. Nor is there any compulsion that the general supervision be continuous and direct.\textsuperscript{9} This philosophy is simply a frank recognition of the practicalities of the situation.

\textit{Supervising at Dismissal and During Movement Between Classes}

Particular supervisory duties exist at times of dismissal and movement between classes. Under certain circumstances the duty rests solely on the individual teacher. Since, for instance, it can reasonably be foreseen that very young children in the primary grades jostle and push by nature, a teacher in control of such group would be prudent to accompany her children down stairs and along corridors at dismissal time. As the child becomes more mature, the factors previously discussed, of the probability of harm and the utility of the type of conduct, should often excuse a teacher from accompanying her group out of the building at dismissal time and at the time of movement.

\textsuperscript{7} Germond v. Board of Educ., 10 App. Div. 2d 139, 197 N.Y.S.2d 548 (1960); Forgnone v. Salvadore Union Elementary School Dist., 41 Cal. App. 2d 423, 106 P.2d 932 (1940), involving a situation where during recess one pupil twisted another pupil's arm; Miller v. Board of Educ., 291 N.Y. 25, 50 N.E.2d 529 (1943), presented a pupil injured when playing on a fire escape at recess. Improper supervision was found in the latter two cases.

\textsuperscript{8} Mastrangelo v. West Side Union High School Dist., 2 Cal. 2d 540, 42 P.2d 634 (1935).

\textsuperscript{9} See Nestor v. City of New York, 28 N.Y. Misc. 2d 70, 211 N.Y.S.2d 975 (1961), involving supervision on a playground, but the philosophy would be equally applicable to supervision of shops and science laboratories.
between classes. But as indicated hereafter in connection with the discussion of the responsibility of administrators, some strategic supervision seems necessary. The planning for this rests primarily upon the administrator.

**Supervision During Lunch Periods—Before and After School**

In addition to the problem of supervising children at dismissal time and during movement between classes there exists the question of responsibility for supervision of lunch room and playground during lunch periods. It is obvious that because of lack of manpower, foolproof supervision cannot be furnished during the time allotted for lunch. Teachers must have time to eat and relax. Prudence, however, dictates the need for some strategic supervision. The duty to plan for such supervision rests primarily on the administrator.\(^{11}\) It appears probable that if the administrator sits down with his staff and faces up to the problem of the strategic use of manpower that is available, a court will not find any personal liability on the part of the administrator on the ground that the plan devised was the best possible under the circumstances. Unless the plan devised is utterly arbitrary, it is obvious that teachers must perform the duties assigned to them or face the risk of liability if a child is injured while the teacher is not supervising.

Later in this article discussion will deal with the matter of school district liability. If the state of the law in a particular jurisdiction permits the imposition of such liability, the way is open to act to establish that the district did not make enough personnel available for supervision of lunch room and playgrounds. It has been held, for instance, that one teacher cannot supervise a large playground where 150 pupils of various ages play.\(^{12}\)

There appears to be no need to supervise just because groups gather before school and remain after school.\(^{13}\) The school will fulfill its responsibility in respect to pupils who so gather by making reasonable endeavors to acquaint the student body and parents as to when supervision will begin and end. This will place upon those who come early and remain late the assumption of the risk.

**Supervision by Uncertified School Personnel**

Questions have arisen as to liability of school teachers or administrators if a child is injured while some individual other than a certified

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10 Leibowitz v. Board of Educ., 112 N.Y.S.2d 698 (Sup. Ct., Trial Term, 1952).
teacher is supervising in the room or on the playground. Such indi-
viduals may be a parent, an older child, a custodian or a guest lecturer. Although there may occasionally arise fact situations which might seem
to give hope of using the justification of little probability of harm and utility of the use of such supervision, it would appear that teachers and school administrators should generally recognize the hazard in such decision. Surely it can be foreseen that individuals without par-
ticular training in child psychology and the handling of young people in groups will generally not have the skill to control the group. If, therefore, horseplay results in injury, it seems likely that the teacher or administrator would be vulnerable to liability. Illustrative is the New York decision holding a school custodian not qualified to super-

vise a play area.\textsuperscript{14}

Indeed, the legal adviser of the San Francisco Board of Education sounds a note of caution concerning the use of practice teachers unless there is protection granted by statute.\textsuperscript{15} It is submitted that this would be too conservative a viewpoint to be accepted by many courts. It would seem that most courts could be convinced that it is necessary to give practice teachers experience in controlling the room on their own and that such courts would only find negligence if those who are charged with observing the work of the practice teacher allowed her to be on her own before it was prudent to do so.

\textit{Supervision on Field Trips}

Certainly if it is necessary to supervise within classrooms, it is even more so on field trips. It is likely that the reasonable prudent parent yardstick will often suggest that a teacher cannot supervise the same size group on a field trip that she can in a classroom. The utility of such trips, when weighed against the likelihood of harm, should influence courts to permit teachers to enlist the aid of other adults who will go along as assistants. The responsibility of the teacher would then be realistic orientation of the duties expected from helpers and acceptance of the responsibility to see that the assistants selected actually do live up to their commitment to help supervise. A standard of due care will often require that a teacher avoid taking children on certain trips if it can be foreseen that the reasonable prudent parent would not present his child with the dangers involved. Of course, in any decision of such sort the age of the child will be an important factor.


\textsuperscript{15}Breyer, \textit{The Power to Use Student Teachers and Special Non-Professional Lec-
Field trips impose upon school personnel the most careful planning. To avoid harassment from parents who may claim that they would not have consented to the child going on the trip, parents should be asked to sign permission slips. These slips should give parents complete details as to the method of transportation, approximate time of departure and return and the destination. There is no way in which verbiage can be put on a permission slip which will absolve teachers from the duty to carefully supervise on field trips. A parent cannot consent to a teacher being negligent toward his child. For the same reason a parent cannot consent to allow a teacher to take his child on a trip or to a destination which would not be approved by the reasonable prudent parent.

Contributory Negligence as Defense to Failure to Supervise

A teacher charged with negligence, especially that based upon an allegation of failure to properly supervise, may allege contributory negligence or in those jurisdictions which follow the doctrine try to reduce damages through a comparative negligence formula. Under some sets of facts the teacher can succeed. If, for example, strong evidence indicated that an older pupil had been thoroughly instructed in the danger of using certain chemicals and was warned not to use them but nevertheless did so while the teacher was out of the room and was seriously injured, the court would undoubtedly find contributory negligence. The problem with contributory negligence as a defense is that the court is going to face up to the fact that the yardstick it must use is that degree of care which the great mass of children of like age, intelligence and experience would ordinarily exercise under the circumstances. The prudent teacher would not want to take too many chances that a jury or court would be liberal in the application of such a standard. The problem is that the court may often conclude that although pupils recognize that a warning of danger has been given, they do not fully comprehend the extent of the danger. The court is likely to see in the failure to properly supervise the creating of an improper atmosphere of temptation to experiment. The duty of one charged with supervising to warn of danger often exists even though a pupil could recognize some danger. In a California situation the teacher failed to warn that the guard on a power saw was broken. Although the pupil could observe the fact and knew of the danger, the court held that although the pupil did know there was some danger, he did not know the amount of it.\footnote{Ridge v. Boulder Creek Union Jr.-Sr. High School Dist., 60 Cal. App 2d 453, 140 P.2d 990 (1943).}
Responsibilities Other than for Supervising

There are a number of occasions other than in the area of supervision which frequently present the issue of due care toward pupils.

First Aid and Medical Treatment

The mere plea of good Samaritan will not excuse the school man who gives medical attention when he should recognize that the injury is a serious one and appreciate that he does not know how to administer proper treatment. 17

Due care in such circumstances would be to take reasonably prudent steps to summon as quickly as possible the emergency attention that is necessary. Depending upon the circumstances this might range from calling a nurse, doctor, or first aid expert in the school building, contacting a physician or a police emergency squad. Parents or guardians should also be notified promptly.

If school personnel improperly treat an injury which does not present an emergency, it is even more apparent that due care has not been used. 18

Requesting Pupil Aid

Teachers and administrators subject themselves to liability for injury when they request aid which they should recognize is beyond the experience and physical capacity of the child. An obvious example would be asking pupils to move a heavy piano in a situation which requires lifting. Even though the pupils asked to help may be physically strong, it can be foreseen that since they do not have experience as movers of heavy equipment, they may injure themselves in the effort. Also it would not be prudent to ask students unused to climbing high ladders to decorate the high ceiling of a gymnasium for a school dance or other affair.

Sending Pupils Home During School Day

Several possibilities for incurring liability suggest themselves in connection with sending pupils home during the school day. If the parent is not contacted ahead of time and permission received a teacher who sent a child home for disciplinary reasons would likely be held capable of foreseeing that the individual might not go home and might go to places which would subject him to danger of harm. The parent would also need to be contacted before an ill child was sent home. If the child could not get into the home and his illness became more acute, the teacher would likely be vulnerable. Furthermore, in the

17 Conner v. Winton, 8 Ind. 315 (1856); Commonwealth v. Pierce, 138 Mass. 165 (1884).
instance of the ill child prudence would often dictate that he should not be allowed to leave the school without assistance.

If a teacher or administrator contemplates sending a young child home during school hours, she should, as a reasonable prudent person, reflect upon whether she is exposing the child to dangers to which it would not be exposed if it were dismissed at the normal hour. For instance, if the child would be exposed to a very dangerous crossing when no patrol help was on duty and it was injured, it would place the teacher in a precarious position as respects liability.

Keeping Pupils After School

The principle just previously enunciated should be kept in mind when a teacher or administrator is thinking of keeping a pupil after school. If by doing so the child is exposed to dangers to which he should not be subjected because of his age, the practice is hazardous. A danger in addition to exposing young children to an unpatrolled dangerous crossing is that which could exist in some neighborhoods if girls are kept after dark. Obvious hazards could arise if pupils traveling long distances miss bus connections. Of course if the teacher arranges for a child to be picked up by a parent or a reputable party whom the parent delegates, the problem is solved.

Sending Students on Errands

A liability problem can arise for the teacher in connection with sending pupils on errands. This would happen, however, only if the child is injured while on the assignment.

Caution would suggest not sending a student off the school grounds on any errand that was for anything other than an educational purpose. If the errand is for a good educational purpose it would seem the hazard of injury is small if the pupil selected is not put in a position which confronts him with dangers any more serious than is usual at his present age and experience. Naturally it would be unwise to select any student who had demonstrated irresponsibility. Teachers can incur liability for sending pupils on errands within a school building if the facts establish that the teacher could have foreseen that the child would encounter danger of harm. For instance, if an art teacher sent a child to the storeroom to secure some paint and knew that to get to the paint the child would have to move some stage equipment, the teacher would surely be found negligent if the child would move the equipment and it fell on and injured her.

There is another aspect to sending a pupil on an errand off the school grounds. If he is sent for a sound educational purpose it can be argued that he is made an agent of the school, and if he is negligent
and injures someone the school district may be liable under a doctrine that will be discussed hereafter.

**Transporting Pupils**

School bus drivers are liable for injuries their negligence causes pupils. In addition to being required to use the care which is imposed upon the driver of any automobile, the bus driver should be prudent at times of loading and unloading. Opening the bus door before bringing the bus to a stop was held to be negligence.\(^{19}\) So too is the stopping of a bus away from the curb and not at the regular bus stop.\(^{20}\) Drivers must be alert for the presence of children on school grounds and drive with great caution. One court, pointing out that often the age of the child should be considered, indicated that a bus driver could be found to have a duty to warn pupils about approaching vehicles at the time of unloading.\(^{21}\) Failure to discharge pupils in a safe place is dangerous.

A driver who stopped his bus without drawing to the right side of the road was held to be negligent and responsible when a pupil was injured by a speeding car, even though the driver failed to stop for the school bus as required by statute.\(^{22}\) A North Carolina court found a duty resting on a bus driver to see that children who must cross the road after leaving the bus are in a place of safety before he starts his vehicle.\(^{23}\)

A driver was found negligent when he started his bus suddenly while a child was standing in the aisle.\(^{24}\) Similarly negligence was found when a driver pulled to a halt without warning after traveling at a high rate of speed and a pupil was thrown out of the bus.\(^{25}\)

Drivers have some responsibility for supervising as well as operating the vehicle. If rowdyism is such that a reasonable man would become aware of it the driver has a duty to stop the bus and quell the disturbance.\(^{26}\)

School administrators have the responsibility for setting up a plan for the orderly loading and unloading of buses.

As will be indicated hereafter, negligent bus drivers may impose liability upon school districts. Of course, if the transportation system is operated by a private contractor, liability would rest on the private

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\(^{19}\) Taylor v. Cobble, 28 Tenn. App. 167, 187 S.W.2d 648 (1945).

\(^{20}\) Webb v. City of Seattle, 22 Wash. 2d 596, 157 P.2d 312 (1945).

\(^{21}\) Cartwright v. Graves, 182 Tenn. 114, 184 S.W.2d 373 (1944).


contractor. The district might likely be held for direct negligence if it did not require the private contractor to carry adequate insurance.

Use of a School Patrol\textsuperscript{27}

There are a number of states which by statute sanction operating pupil patrols at crossings near schools. If the legislature does not sanction setting up a patrol, some responsible school board attorneys take the view that students should not be used on a patrol because it can be foreseen that in an emergency a young patrolman might, in the course of carrying out his duties, put himself in the path of danger. In practice many school administrators establish student patrols, even though they are not authorized to do so by a specific statute. This may be justified on the basis of utility and the greater good versus likelihood of harm. There is enough logic, however, in the position of those who argue for caution in setting up a student patrol to induce the advice that if a permissive statute does not exist, the school administrator should not set up a patrol unless efforts to get responsible adult help have failed. If funds are not available to secure adult assistance, if responsible volunteer adult help is not available, and if police assistance cannot be secured, it would seem that the courts would uphold as reasonable the decision to set up a patrol on the balance of utility versus probability of harm. In areas where a district has lost governmental immunity, it could be that courts would be induced to hold that the district had the responsibility to furnish adult assistance.

All authorities agree that a student should never be asked to stand in the street to direct traffic.

Responsibilities in Connection with Buildings, Grounds and Equipment

As respect liability of the individual teacher or administrator for defects in buildings, grounds and equipment which are the cause of injury to a pupil, the decision will be based upon whether under the circumstances the schoolman, as a reasonable prudent person, should have checked for the defect or have noted it. The shop teacher should be careful to frequently check the condition of his equipment for defects that could be discerned by ordinary inspection. The ordinary teacher would not be charged with the same duty of vigilance to check buildings and grounds. The administrator, in some school systems, may have more responsibility in such respect, although in large school systems the primary responsibility for periodic checks would undoubt-

\textsuperscript{27} For a more detailed discussion of the legality of the school patrol see Hetzel, \textit{State and Local Salary Legislation Applicable to Principals}, in \textit{Law and the School Principal} 105-19 (Seitz ed. 1961).
edly rest on a building or grounds department. However, teachers and administrators who become aware of dangerous defects have a duty to report them to the proper authorities. Often, to the extent it is physically possible, teachers and administrators would have a duty to block off the dangerous area or stop the use of the defective piece of equipment. It would also be their duty to warn pupils of known hazards.

Defects in buildings, grounds and equipment which induce injury to pupils seem particularly to stimulate legal action against the school district. If, as will be discussed hereafter, the law of the jurisdiction permits recovery against the district, it is vulnerable if it or its employees knew or should have known of the condition and failed to take corrective steps to remedy or protect against it within a reasonable time after actual notice. If the hazardous condition exists for an undue length of time, it may become difficult for the school district to rebut the presumption that it should have known of the situation.

It will be useful to present some fact situations which have produced liability as a result of injury to pupils who allege defects in buildings, grounds and equipment. New York imposed liability after a pupil fell on an unlighted stairway when there was also a gap in the handrailing. In California recovery was permitted when a loosened locker attached to a gymnasium wall fell on a pupil. Washington awarded damages when a top-heavy piano on casters was left in a playroom in such a position that children had to move it and when it was being moved it overturned and injured a pupil. In another Washington case the court found negligence in permitting an elevated step at an exit. A pupil recovered in New York when he was injured when his sweater caught in a shop machine. No aprons were furnished to protect against such happening. A pupil studying carpentry who fell from a scaffolding without a handrail was permitted to recover. However, when a boy was pulled down by another boy and injured because he fell on a clinker on a school playground, the New York court did not find the unsafe surface of the playground the proximate cause of the injury. Rather, the court said the cause was the intervention of another pupil. This New York case represents a court obviously

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bending over backwards. If the clinker was known to be on the playground, it is likely many courts would conclude that an event of the very type which happened could be foreseen.

The Position of the School District

The discussion to this point has established that individual schoolmen can be held to respond in damages for their negligent acts which result in injury to pupils.

It now becomes appropriate to discuss the extent of the liability of a school district for its direct negligence and the extent to which the district will be held liable for lack of due care of teachers and administrators. Obviously if a school district is liable, since it has a deeper pocket than an individual schoolman, injured plaintiffs who feel they have a cause of action will most likely sue the district.

Statistically the rule in the vast majority of jurisdictions still clothes the district with governmental immunity. This immunity applies to the negligent act of the district itself and the negligent acts of its officers, agents, or employees. The immunity also protects in the case of injuries arising from dangerous or improper care of buildings, grounds or equipment.

The philosophy supporting this far-reaching protection of governmental entities is often explained by the old common law fiction that the king (the Government) can do no wrong. More realistically, the philosophy is grounded on the belief that school revenue is to be used only for educational purposes and not disbursed to pay for injuries to pupils. There is the analogous thinking that requiring school districts to respond in damages may impoverish the school district to the detriment of the educational program.

In a minority of jurisdictions developments have qualified or abrogated the rule of immunity. In Arizona the court imposed liability on the district after it found it was engaged in a proprietary function. In the particular case, a school district was required to respond in damages to reimburse one injured when a railing broke. The injured party had paid a fee to get into a stadium which the district leased for a football game. Admission was charged for the game. In Pennsylvania the school district, although not required by law to do so, operated a summer recreation program open to all who paid a fee. The court felt the effort was proprietary and permitted action against the district based on the allegation that its employee had been guilty

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TEACHERS’ NEGLIGENCE

of negligence in connection with the drowning of a child in a swimming pool which was used as part of the recreation program.

New York determined that a district was liable when a nuisance which it maintained caused injury to a pupil. In the case a pupil, while playing at recess, stumbled over a junk pile which the school maintained in a corner of its grounds. Connecticut followed the same nuisance doctrine and imposed liability for injury sustained through use of dangerous play equipment.

The vast majority of jurisdictions have not seemed willing to impose liability upon school districts through the nuisance theory. Furthermore, very few cases have recognized the exception grounded on proprietary function.

In 1959 a new development revealed a court doing away with immunity by judicial decree. The Supreme Court of Illinois bluntly disposed of many arguments which had been used to support governmental immunity. As to the divine right of kings the court stated:

The whole doctrine of governmental immunity from liability for tort rests upon a rotten foundation. It is almost incredible that in this modern age of comparative sociological enlightenment, and in a republic, the medieval absolutism supposed to be implicit in the maxim, "the King can do no wrong," should exempt the various branches of the government from liability for their torts, and that the entire burden of damage resulting from the wrongful acts of the government should be imposed upon the single individual who suffers the injury, rather than distributed among the entire community constituting the government . . . .

The protection of the public funds excuse for immunity was struck down with the reasoning that “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.” The feeling that abolishment of immunity would produce grave problems of school finance was countered with the statement, “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.” In facing up to argument that only the legislature could change the rule respecting immunity the

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37 Bush v. City of Norwalk, 122 Conn. 426, 189 Atl. 608 (1937).
38 Molitor v. Kaneland Community Unit Dist. No. 302, 18 Ill. 11, 21, 163 N.E.2d 89, 94 (1959) (quoting Barker v. City of Santa Fe, 47 N.M. 85, 88, 136 P.2d 480, 482 (1943)).
39 Id. at 23, 163 N.E.2d at 95.
40 Ibid. (quoting Greene, Freedom of Litigation, 38 Ill. L. Rev. 355, 378 (1944)).
I]llinois court pronounced, “We closed our courtroom doors without legislative help, and we can likewise open them.” In decisions which followed the one in Illinois, the States of Wisconsin, Minnesota and Arizona used judicial decisions to do away with the governmental immunity doctrine.

The legislatures of Illinois, Wisconsin and Minnesota have all reacted to the judicial decision of their courts abrogating immunity. Illinois limited to a maximum of $10,000.00 the amount of damages that can be recovered for each separate cause of action. Wisconsin placed its limit at $25,000.00. Minnesota completely nullified the decision of its Supreme Court.

In varying degrees certain states have by legislation imposed upon school districts tort liability.

It appears that New York has extended liability under the doctrine respondeat superior to school districts for the negligent acts of school personnel. This was the position taken in 1962 by the appellate division of the Supreme Court of New York. The court felt this was a logical extension of section 8 of the Court of Claims Act and, furthermore, noted that for a great many years boards of education have been held liable for their own negligence. The New York Supreme Court admitted that the Court of Appeals has as yet not passed upon the question of respondeat superior. New York also has “save harmless” legislation which places upon school districts liability for injuries due to negligence of teachers or other staff members acting in the discharge of their duties within the scope of employment. Interpreting the “save harmless” provision pertaining to districts having a population of less than a million, the New York court noted the legislative language indi-

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41 Id. at 25, 163 N.E.2d at 96 (quoting Pierce v. Yakima Valley Memorial Hospital Ass'n, 43 Wash. 2d 162, 178, 260 P.2d 765, 774 (1959)).
42 Holytz v. City of Milwaukee, 17 Wis. 2d 26, 115 N.W.2d 618 (1962).
46 West's Wisconsin Legislative Service, Chapter 198 Laws 1963 Regular Session, Wis. Stat. Ann. § 331.43, in . . . in addition to placing the limit at $25,000 provides that no punitive damages shall be allowed or recoverable in any action. Furthermore the legislation states that no suit shall be brought against a political corporation, governmental subdivision or any agency thereof or against its officers, officials, agents or employees for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions.
47 Legislation passed at the 1963 session re-establishes the governmental immunity rule. This legislation is to expire on July 1, 1968.
49 New York Educ. Law § 3023 pertaining to districts having a population less than one million; § 2560 relative to districts with a population over one million.
cating that "The Board of Education... shall not be subject to the duties imposed by this section unless such teacher, or member of the supervisory and administrative staff or employee, within ten days of the time he is served with any summons, complaint, process, notice, demand or pleading, delivers the original or a copy of the same to such Board of Education. . . ." This language and section 3813 of the education law of the State of New York induced the court to conclude that it was sufficient for a plaintiff to serve notice of claim only on the school district. It was not required to serve notice on teachers individually. However, as directed by the "save harmless" statute, the teachers must deliver the summons and complaint to the school district within ten days after the receipt of the same. The court explained that, unlike a municipal corporation, the teachers need no opportunity to investigate the claim and consequently need no advance notice thereof. The court stressed that the teachers would not have to pay any judgment against them.\(^{50}\) Connecticut and New Jersey\(^{51}\) also have "save harmless" statutes. These courts have decided that the legislature did not do away with the governmental immunity doctrine to the extent of sanctioning an injured party to sue a school district directly. It was indicated the injured party must first proceed against the individual charged with breach of duty.\(^{52}\)

Permissive legislation is written into law in some states. Oregon\(^{53}\) permits "any county, city, town, district, board or other body" at its own expense to provide a defense for any public officer or employee who is sued in a civil action alleging negligence in the course of employment. In addition the public employer can also undertake to pay court costs, attorneys' fees and a judgment if one is rendered. The statute seems clearly to apply to school districts, and in 1962 the Oregon Attorney General gave an informal opinion that it did. Wyoming\(^{54}\) has a permissive "save harmless" statute. Provisions are quite similar to the mandatory law in New York. Massachusetts\(^{55}\) also has a permissive law.

Hawaii has by legislation waived its governmental immunity.\(^{56}\) As early as 1869 Washington passed generally worded legislation bearing upon governmental immunity. It provides, "An action may be main-


\(^{55}\) Mass. Gen. Laws Ann. ch. 41, § 100C.

tain against a county or other of the public corporations as described in (the preceding section which named school districts) . . . for an injury to the rights of the plaintiff arising from some act or omission of such county or other public corporation."57 Washington made clear by amendment in 1917 that it would not do away with immunity for claims arising out of manual training, playground and athletic situations.58 As recently as 1961 the Supreme Court of Washington emphasized that the liability of school districts for negligence is not shielded by the doctrine of governmental immunity but that the district does have absolute immunity as regards injuries resulting from negligence in connection with the use of athletic and manual training equipment.59

All states have not been as liberal in interpreting and doing away with governmental immunity under a statute that contains the general language of that found in Washington. In facing up to a quite similar provision Oregon concluded that the legislature merely re-enacted the common law rule that a public entity is liable for negligence only when it is performing a private function. It then suggested that school districts perform only public functions.60

The Position of the School District in California

The position of the school district in California will be of particular interest to the readers of this law journal. The statutory pronouncement which appeared first in 1923 decreed that "the governing board 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 property arising because of the negligence of the district, or its officers or employees."61 This pronouncement clearly indicated that school districts were liable for their own negligence and the negligence of the personnel of the school district. The California Supreme Court in 1961 in Muskopf v. Corning Hospital District62 made clear that it would no longer follow the doctrine of sovereign immunity. The court decided at the same time Lipman v. Brisbane Elementary School District.63 In a dictum it indicated that although public employees are not liable for their discretionary acts within the scope of their authority, the philosophy of immunity might not to the same extent protect a public entity as it does public employees.

57 Wash. Rev. Code § 408.120.
Following the two 1961 decisions just mentioned, the California Legislature in 1963 passed a new governmental tort liability statute. It specifically made clear that a public entity is immune from tort liability unless a statute can be found imposing liability in the particular situation. As indicated, a statute bearing on school districts does exist in California. The 1963 statute stresses that to the extent the employee is personally liable, the public entity is liable for injury approximately caused by an act or omission of an employee within the scope of his employment. This clarifies the pronouncement in the Lipman case because public employees have immunity from liability for discretionary acts.

By stating specifically that a public entity becomes liable for damages if it fails to exercise reasonable diligence to comply with a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the California Legislature indicated it did not premise all school district liability on a determination of whether the public employees would have been immune or liable. A lengthy part of the new 1963 California legislation deals with public entities as occupiers of land. An analysis of the provisions in this respect reveals that liability is premised on the failure of the public landowner to take reasonable precautions after it knows, or has reason to know, that the property is in a condition that creates a substantial risk of harm to individuals whom it can foresee will use the property.

The new 1963 legislation reveals California’s type of “save harmless” statute. The legislation requires detailed study. The salient provision is that “if an employee or former employee of a public entity requests the public entity to defend him against any claim or action against him for an injury arising out of an act or omission occurring within the scope of his employment as an employee of the public utility, and such request is made in writing in less than ten days before the day of trial, the public entity shall pay any judgment based thereon or any compromise or settlement of the claim or action to which the public entity has agreed.” Further, the legislation provides that if the public entity conducts the defense of an employee or former employee, it shall pay any judgment based thereon. There is a provision that the public entity can reserve the right not to pay the judgment until it

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is established that the injury arose out of an act or omission occurring within the scope of employment. The law also provides that the public entity can recover from the public employee any judgment which it may have paid if it is established that the public employee or former public employee acted or failed to act because of actual fraud, corruption or malice.

California has inserted a provision in its new law intended to insure that public entities will pay judgments recovered against them. There is a requirement that local public entities are to levy taxes or otherwise provide for revenue sufficient to pay outstanding judgments. An arrangement can be made to pay a judgment in installments over a period of ten years if current payment will produce an undue hardship. If local voters sanction, public entities in order to raise funds to pay judgments may issue bonds payable over forty years. Finally, such entities are given power to insure against liability and to enter into group liability insurance plans with other public entities.

Liability of Individual School Board Members

School Board members are not employees of the district but officers of the state. The rules of liability applicable to school personnel are, therefore, not controlling.

Generally, school board members are not personally liable for negligence when the negligence is that of the corporate body and not that of the individuals. Board members are not liable as a result of the negligence of school personnel.

Another protection is found for individual members of school boards in the judicial philosophy that damages resulted from the honest exercise of discretion. Illustrative is the North Carolina case where repairs were ordered on the school stadium. Under the direction of members of the board cement blocks were hauled to the stadium and stacked by direction of the board members. During the course of a game a spectator was severely injured when the pile of blocks fell on him. The spectator ultimately died. The court in finding no individual liability commented that “in the instant case the School Trustees and

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Park Commissioners were engaged in official, administrative acts involving the exercise of discretion. . . . It is not alleged that their conduct was either corrupt or malicious. Nor does it appear that they were acting beyond the scope of their duties.77

In contrast to the philosophy absolving from liability on the ground that the board was exercising discretion, we have a judicial pronouncement that board members are personally liable in tort when they fail to carry out ministerial duties. In some cases the ministerial duties are clear but in others it is hard to understand why the court found the act ministerial instead of discretionary.

In a Kentucky78 case a statute made it a duty of the board of education to require private bus drivers carrying school children to take out liability insurance. It is clearly understandable why the court found a ministerial duty and imposed liability on the individual board members when the facts revealed that an injured party stood to suffer because the board had not secured the insurance. On the other hand the finding by an Indiana court79 of ministerial duty is difficult to understand. Under a set of facts not essentially different from those in the North Carolina case just discussed the court placed liability on individual school board members on the ground that their acts were ministerial. Under the facts the school board had each year conducted a “field day exhibition.” Temporary stands were constructed in which spectators were seated. The board employed a carpenter to build the stands under the direction of the clerk of the board. There was a defect in construction which caused the seats to fall and seriously injure a number of people. The court stated that duty is discretionary “when it involves on the part of the officer to determine whether or not he should perform a certain act, and, if so in what particular way.”80

Turning to the facts of the case the court decided that the board was performing a discretionary act in determining that there should be field day exercises and the manner in which they should be carried on but that “the duties performed in making preparation for such field day exercises and the general management thereof were ministerial acts.”81

It is probable that most courts would not make the distinction as the Indiana court made it. Certainly most judicial bodies recognize that sound public policy dictates giving a high degree of protection to individual school board members. It is recognized that board mem-

77 Id. at 7, 68 S.E.2d at 788.
78 Bronaugh v. Murray, 294 Ky. 715, 172 S.W.2d 591 (1943).
80 Id. at 255, 124 N.E. at 720.
81 Id. at 258, 124 N.E. at 721.
bers for the most part serve the public gratuitiously. Certain it is that if board members were to be held to respond in damages for mere mistakes in judgment, it would be difficult to attract high calibre people to serve. It would be even more difficult if liability were to attach because of the negligence of school personnel.

Individual school board members will be liable for harm caused by acts which are corrupt or malicious.

**Use of Liability Insurance**

As this article works toward a conclusion, it is appropriate to discuss the use of liability insurance. There has already been some reference to its use in California.

The courts have been confronted with the question as to whether if a school district procures liability insurance, it waives its governmental immunity if the jurisdiction still affords such protection. The majority viewpoint holds that the coverage does not affect immunity. Unless a statute intervenes, most courts will not accept a suit against an immune school district even if there is insurance. The school district, of course, may overcome this result by seeing to it that the insurance policy contains a provision that a party claiming injury may maintain a direct action against the insurance company and that the company cannot raise the defense of governmental immunity. A few jurisdictions have held that when insurance coverage has been purchased, school district immunity is removed for tort liability to the extent of the insurance. The philosophy is that there is no longer any need for the immunity doctrine when insurance protection is secured.

Statutes in some states expressly permit the district to purchase liability insurance. Some of these statutes specifically provide that the immunity of the district is not waived and some clearly state that immunity is waived to the extent of the insurance obtained. Some make it definite that the insurer may not assert the defense of governmental immunity and that the insurance company is the party to be sued.

A 1961 United States Department of Health, Education and Welfare Office of Education publication reveals that twenty-two states required districts to carry liability insurance on publicly owned school buses. A number of states authorized school districts to provide with

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82 The scope of this section does not cover insurance which provides for compensation to the party injured through an accident. The section deals only with liability insurance which is designed to protect in instances where school personnel or school districts are negligent.


public funds liability insurance which will give protection to officers or employees who may be called upon to respond in damages as the outgrowth of a successful action based upon allegations of negligent acts or omissions in the course of school employment.

In respect to the wisdom of the purchase of liability insurance by individual teachers or administrators it is apparent that the decision will be based upon a number of factors. Does the state have a "save harmless" statute? Has the state purchased liability coverage which will adequately protect the individual school man? The state or local education association or school board attorney should be in a position to give the individual realistic advice as to the need for personal coverage. If the situation dictates the need, the individual should buy an adequate amount. Consultation with an insurance agent will reveal that the cost of adequate coverage is little more than that for an inadequate amount.

**Conclusion**

Since there has been so much discussion of liability in this article it seems necessary to stress again that neither the teacher nor the school district is the insurer of the safety of children against pure accidents. Teachers and administrators need not be apprehensive about the imposition of liability. The record reveals that courts recognize that the teacher and administrator work in a complex situation and have given every indication that they will reasonably apply the yardstick which tests for negligence when the allegation is that a schoolman has fallen down in his duty of care and a pupil has been injured. Teachers, however, would be ill-advised to rely upon the most liberal theory that can be presented. It is again suggested that the conservative approach of this article is best calculated to keep the schoolman out of the hands of juries. It is submitted that this approach will not put the educator in a legal strait jacket which will interfere with his ability to best develop the pupils under his charge.

The existence of "save harmless" statutes and liability insurance should not be looked upon by the truly professional schoolman as protection which will cause him to think less of his legal responsibilities to avoid negligence which may affect pupils. He will fully appreciate a professional need to do otherwise. He will understand that money damages do not fully compensate an injured pupil. From the utterly materialistic viewpoint he will realize that he may impair his standing with his employer if his negligence too wantonly and too often imposes a liability upon the employer and too often affects relations with parents and school patrons.