1965

Tort immunity and Iowa school districts

Fred John Rohde

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Iowa State University of Science and Technology
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TORT IMMUNITY AND IOWA SCHOOL DISTRICTS

by

Fred John Rohde

A Dissertation Submitted to the
Graduate Faculty in Partial Fulfillment of
The Requirements for the Degree of
DOCTOR OF PHILOSOPHY

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Ames, Iowa

1965
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CHAPTER I

THE PROBLEM

School law, as well as Supreme Court decisions, is an area which is worthy of increased attention from both teacher and administrator. According to Hamilton and Mort (31, p. 3), "Constitutional provisions, statutory enactments, and judicial decisions determine the structural pattern of education and the mode of its operation." Formerly each state was considered sovereign, recently this has been modified by United States Supreme Court decisions, therefore it becomes increasingly important to study State Supreme Court decisions in order to determine more accurately the origin and extent of numerous principles and practices in the field of education.

Public schools are educating more pupils than ever before, for longer periods of time, and at a greater cost to the public. Litigation involving public schools is at an all-time high.
The Immunity Doctrine and Its History

One of the time honored concepts of the common law in the United States is the doctrine which holds that governmental agencies are not liable for their torts. The field of torts is that branch of law which protects the rights of a person against injury to his body, reputation, character, conduct, manner, and habits. In brief, a tort is a private injury. Cooley indicated the ways in which one may become liable for torts (16, p. 85):

"1. By actually doing to the prejudice of another something he ought not to do.
2. By doing something he may rightfully do, not wrongfully or negligently but doing it by such means or at such time or in such manner that another is injured.
3. By neglecting to do something which he ought to do, whereby another suffers an injury."

While it is a general principle of law that a school district is not liable for injuries resulting from the negligence of its employees in the absence of a statute making it liable, the individual employees are not covered by this cloak of immunity. The question of what constitutes negligence is moot and must be answered anew in each case in light of the pertinent facts. Immunity from liability is based on the theory that the state is sovereign and cannot be sued without its consent. Bochard, in his study, Governmental
Liability for Tort, points out that the doctrine had its origin in the maxim that "The King can do no wrong." He states that how it came to be applied in the United States is one of the mysteries of legal evolution and seriously questions the validity of the doctrine (32, p. 279).

While the immunity of the state governmental units from liability in tort is said to be based upon the concept of sovereignty, many courts have assigned other grounds to support the rule. Some authorities sustain that the result reached on the grounds that the relation of the master and servant does not exist, hence, the rule that a master is liable for the acts of his servant or agent while acting within the scope of his authority is not applicable. Others point out that no liability is attached due to the fact that the law provides no funds for the payment of such claims against the school district or governmental unit. It is also said that funds raised for school purposes may not be legally diverted to the payment of tort claims against the school district or governmental unit, the assumption being that payment of such claims is not an expenditure for educational purposes.

The soundness of the reasoning in all these cases may well be questioned. There is nothing inherent in the nature
of municipal or quasi-municipal corporations which prevents
the operation of the rules which holds a master liable for
the acts of his servant while acting within the scope of his
authority. The argument that there is no liability because
the law does not provide a means for raising funds to pay
judgments if they are obtained is not sound. The fact that a
judgment may not be satisfied is not a legal basis for non-
liability. The courts taking this view have apparently con-
sidered it useless to render judgments against districts
since they cannot be satisfied.

Chief Justice Taney of the United States Supreme Court
in 1875 stated (4):

"It is an established principle of jurisprudence in all
civilized nations that the sovereign cannot be sued in
its own courts, or in any other without its consent or
permission, but it may, if it thinks proper, waive this
privilege and permit itself to be made a defendant in a
suit by individuals or by another state. And as this
permission is altogether voluntary on the part of the
sovereignty, it follows that it may prescribe the terms
and conditions on which it consents to be sued, and may
withdraw its consent whenever it may suppose that
justice to the public requires it."

The common law rule of immunity persists in the United
States through stare decisis, not reason.
The Background of the Study

The tort liability of school districts in recent years has become a matter of growing concern in Public Education. The great increase in the number of pupils entering and remaining in the public schools, and the broad expansion of school activities in past decades has been accompanied by liability implications. Pupil transportation operations have become magnitudinal in scope; interscholastic athletic events have drawn large numbers of persons into stadiums, gymnasiums, and other school facilities; the public in many areas has responded to the encouragements of school officials to participate actively in school functions; and the schools have generally broadened the scope of their educational offerings to meet the needs of an expanding pupil population with a wide range of interests and abilities. The potenti­al­ity for accidental injury to participants exists in every school activity; and in some areas, such as pupil transportation, interscholastic athletics, and vocational education, risks of injury to pupils and other participants abound. The responsibility for safeguarding from personal harm or injury pupils and others who may be in or about the schools rests heavily on the school districts.
Injuries to pupils and others have occurred in many instances in the course of school activities, and out of these occurrences, questions concerning the legal liability of school districts for the torts of their officers and employees have risen. The courts on occasion have been called upon to determine the legal liability of school districts. Legal principles derived from their decisions have had and will continue to have a great influence on the manner in which school activities are conducted.

Until several decades ago, boards of education could be reasonably certain of the school district's position in regard to tort liability. Judicial opinions were almost unanimous in holding that the school districts were immune from liability for the negligent acts of their employees and officers which caused injuries to others. The decisions of the higher courts supporting this principle were based largely on the rule of governmental immunity—an inheritance of the English common law which dictated that the courts hold immune from tort liability the state and subdivisions.

Applied to tort law, the principle of governmental immunity acts as a shield to protect governmental units from liability in tort. It nullifies the doctrine of respondeat superior, which requires a master or employer to respond in
damages for the torts committed by his servants or employees while acting in the scope of their employment. It disregards the rule, applicable to all other persons and corporations other than governmental units, that one who is proven negligent or otherwise guilty of tortious conduct is liable for the damages and for injuries to others resulting from such conduct. Theories usually applicable in tort cases, such as standard of conduct of the "reasonable man" and proof of negligence by means of showing proximate cause, are of no avail against the rule of governmental immunity. Indeed, by demurring complaints charging them with tortious acts in order to invoke application of the immunity doctrine, governmental units admit as a matter of law that they are guilty of the torts alleged.

The immunity doctrine has received much advance criticism from writers of legal articles and textbooks, from educators, and from jurists, some of whom have reluctantly adhered to the doctrine in rendering decisions. It has been said that the doctrine is unjust; that it rests on the rotten foundation of the divine rights of kings; and that it has no place in the modern society. In regard to its application to the tort liability of school districts, it has been thoroughly condemned. Edwards wrote in the Encyclopedia of Educational
Research following his summary of the status of school districts to tort liability, "...the doctrine of governmental non-liability in tort is indefensible and should be superceded by statutory enactments" (1, p. 1096). Hamilton termed the immunity doctrine "old, obsolete, and unjust", and called for "the abolition by appropriate legislation" (29, p. 5). Rosenfield set forth his opinion of the rule in the following words (83, p. 110):

"From the point of view of a realistic analysis of the modern social scene, the doctrine that 'the King can do no wrong,' is utterly untenable and indefensible and simply is not true. Sentiment alone, not reason, can justify the retention of the rule of governmental immunity upon the authority of this justification."

Recently authorities in school law heralded the appearance of a trend away from the application of the rule of governmental immunity in regard to the tort liability of school districts. In 1957, Remmelein reported both legislative and judicial trends away from the rule (27, p. 192-217). Reutter reported in 1958 that legislative enactments and court decisions reflected a decline in the immunity doctrine (84). Discussing the implications of a 1959 court decision involving the tort liability of a school district, Bolemeir wrote, "There can be no doubt...that the armor of immunity has been severely cracked" (8, p. 38).
Statement of the Problem

The problem of this study is to determine the extent to which the patterns of court decisions and statutory enactments are changing away from the legal immunity of school districts and to identify implications these patterns have for:

1. Iowa public schools
2. Teacher preparation institutions
3. School officials
4. Taxpayers.

To clarify and provide direction for the study, the following questions have been posed:

1. What do school officials do when faced with the possibility of greater vulnerability under liability laws?

2. Do school officials, upon clashing with the apparent liability risk, circumscribe the activities of the pupils and parents?

3. When confronted by apparent liability risks, what measures are taken by school officials to protect the school district and its employees from possible hazards?

The question of whether liability or non-liability results in any differences in the standard of care provided children also needs to be investigated, for the interest of the children is of primary importance. This factor should be
of interest to those responsible for changes in the law.

The problem of liability is frequently approached from a study of the statutes, judicial opinions, and court cases which tend to offer solutions in terms of legal cause and remedy. This approach has been effective in identifying dangers, pointing out relative importance, and establishing a general awareness of liability.

The problem of liability is one of growing importance due to general trends to be found in the area of liability cited previously, and those trends concerning the probable future direction of the modern school programs. Risk of liability could possibly impede progress in the future expansion of the school program for the very activities most likely to be found outside the scope of immunity protection. The personnel to operate these activities have the least defined legal roles regarding their legal position and responsibility. The activities engaged in are likely to be those most prone to divided responsibility, to lack of close organization, to distant supervision, and to accident; all factors increasing the hazards of liability risk.
Purpose of the Study

The purpose of this study is to present an analysis of Iowa Supreme Court decisions and Iowa Attorney Generals' Opinions which have been rendered in the area of public school law, as related to pupil injuries from 1846 through 1964. It is hoped in so doing, specific guide posts can be suggested for more efficient school administration based on an understanding and an awareness of principles as established by the courts. More specifically, the purposes of this study were:

1. To study past judicial thinking and action in order to better understand the present statute of school law for pupil injuries.

2. To make recommendations for better school administration as a result of knowledge of the development of case law in regard to pupil injuries.

3. To point out possible implications for the future as related to public school administration.

4. To present certain guiding principles in the court's rationale as a result of the study of case law.

Every administrator, at some time or another, has realized his limitations in dealing with everyday problems which have arisen in school, or has been asked by a member of the staff for guidance in dealing with serious problems which have arisen within the realm of his jurisdiction. Such
problems as the avoidance of pupil injuries need to be handled wisely and in accordance with existing law and the interpretation of the courts.

E. C. Bolemeir has wisely said (6, p. 3):

"A judicial interpretation of a school law is the origin of a legal principle. Until it is overruled, it serves as a precedent for subsequent court decisions. The more court cases that are decided in accordance with the precedent, the more firmly the legal principle is established. Therefore, the accumulation of court decisions regarding educational issues serves as a set of legal principles to guide school principals and other school personnel in the performance of their duties."

The Need for the Study

The effect of liability, both corporate and personal, on school practices, policies, and programs is of concern to the teaching profession, school officials, teacher preparation institutions, and to the public at large. The extent of the problem and relative urgency has engaged the attention of numerous professional writers in the field of school law and the subject has become increasingly popular as a topic of research by educators as the review of literature will verify.

At a first glance liability may appear unrelated and unimportant as far as the school program is concerned.
Reflect carefully on one fact only: the possible liability of the teacher in event of injury to a child in or out of the classroom appears as not merely incidental to the teacher's environment but rather as a factor which may modify and condition the pupil-teacher relationship.

Certainly teachers do not wish to become involved in liability suits nor would they choose to perform knowingly an act causing a suit to be brought against the school district. On the other hand, the school's curriculum and the program within any particular area or classroom may be limited by the deliberate cautiousness of teachers in their efforts to keep out of harm's way.

Even though the possible effect of liability on the school's program be disregarded, a study of the topic is justified by the increasing interest and attention being given the uncertain perplexities of liability connected with school operations. A growing interest nationally is evidenced by the increasing number of publications and articles in professional journals devoted to the subject. This greater concern has developed because of (1) a more liberal attitude in favor of the injured party by the courts, (2) an increased tendency by society in general to expect compensation for injury, accompanied by an apparently greater will-
ingness to seek compensation for damages through the courts; and (3) the successful liability suits (though limited to certain states) in which the injured have been awarded damages, in spite of school immunity, through court-declared exceptions. The partial abrogation of the immunity doctrine statute, statutes which appear to nullify school non-liability, and general dissatisfaction of governmental immunity by the courts are also factors.

The Supreme Court of Illinois recently made legal history when it overthrew the doctrine of governmental immunity as applied to school districts in actions for damages for tort. This nullified a 61-year old immunity that school districts in that state had enjoyed for damages suits arising out of negligence of their employees by saying (56):

"The doctrine of school district immunity was created by this court alone. Having found the doctrine to be unsound and unjust under present conditions, we consider that we have not only the power, but the duty to abolish that immunity. We close our courtroom doors without legislative help and we can likewise open them."

This case is particularly significant because, as well as can be recalled, this is the first time that the highest court of any state has taken such summary or precipitate action (26, p. 70).
As in Illinois before the quoted decision, immunity from tort liability of Iowa School districts has been based on the common-law rule, "The King can do no wrong." Recently the Iowa Supreme Court by the narrowest of margins refused to alter the doctrine of governmental immunity which bars attempts by citizens to bring suit against local units of government for injuries suffered as a result of negligence (9). The case before the Iowa Supreme Court involved an attempt by two spectators at a high school boys' basketball tournament game to recover damages from the Mason City Independent School District and the Iowa High School Athletic Association for injuries suffered when bleachers collapsed. The court ruled, in a five-to-four decision, that it should not overturn the doctrine of governmental immunity, "that abrogation of the doctrine should come from the legislative, not the judicial" (9).

A sharp dissent, written by Justice C. Edwin Moore, said, "the immunity rule is unjust, unsupported by any valid reason and has no rightful place in modern society" (9). The minority opinion further declared (9), "The injustices resulting therefrom caused by our rule....It is our responsibility and duty to alter decisional law to produce common sense justice....We have already waited too long." More details of
this case will be given in Chapter IV.

In Iowa, there is little doubt that a primary component of current concern is rooted in the recent decisions handed down by the Iowa Supreme Court which appear to have left the time-honored doctrine of governmental immunity from tort liability tottering and uncertain.

The laws of Iowa with respect to local governmental tort immunity are nearing the completion of a 180 degree turn. The change has been gradual, but its completion may leave local governmental units in Iowa in a worse position, liability-wise, than if the doctrine of immunity had never existed. This is the reason that the pending abolition of the doctrine has been preceded by various cases in which the court has given injured plaintiffs relief from the application of the doctrine by extending the statutory exceptions and then wiping out the defenses, which would be available to a private-party-defendant, within the area of exceptions.

The five-to-four margin by which local governmental immunity, or its remaining vestiges, was upheld by the decision of the Supreme Court of Iowa in the 1965 Bover case, indicates that it is not likely the existing common-law doctrine can survive many more attacks. This leaves local governmental units with the choice of riding the existing
doctrine, until the courts finally shoot it down or erode it away; or seeking legislation, to define the areas of immunity and liability, and to make some provision for financing in the areas of liability.

Illustrative of the desirability of such legislation is a 1964 case in Chatam, New Jersey, in which a verdict awarded $1,215,140 to a 17-year old student injured while doing a tumbling stunt in the high school gym. It is believed to be one of the highest negligence awards ever made (82, p. 63). The officials of this school district of 10,000 population estimate that insurance would cover less than half of the amount. The pertinent point to think about is can a city, town, county, or school district afford to pay such sums in the ordinary course of business without taxing the taxpayer out of house and home? Insurance is no solution as premiums are based on the preceding year's loss experience. This can delay the impact of current losses on taxes for up to one year, but this merely gives time to budget them and does not prevent their increase at an ever-accelerating rate.

The Public School is a State Agency

The following section examines the legal status of the public school district as a governmental agency. In legal
theory the public school is a state institution. The rule is well-established that a state, unless it has assumed liability by constitutional mandatory legislative enactment, is not liable for injuries arising from the negligent or other tortious acts or conduct of any officers, agents, or servants, committed in the performance of their duties. If the public school is a state institution, the school district is at least a quasi-governmental agency and thus partakes of the governmental immunity. As Rosenfield stated (83, p. 63):

"Thus, in the case of a school district, it is well nigh impossible for a court to label any of its functions 'proprietary' so as to impose liability therefore."

Various theoretical explanations for this immunity have been given by Garber (27, p. 195-196):

"1. Under common law the state and its political subdivisions are not subject to tort actions.

2. School districts have no power to operate a proprietary function; their only power is to operate the schools and all parts of the school program as applications of the governmental function of education.

3. Since school districts receive no profit or advantage from operating the schools and are required to do so under the state laws, they are acting nolens volens or involuntarily; therefore, they should not be charged with liability for their mistakes.

4. School districts ordinarily have only those powers given them by the state legislature or the state school officers, and they have not been given
permission to commit a tort.

5. School district money is tax revenue collected for educational purposes only, not to pay damages.

6. School property is exempt from attachment to pay damages for claims; so it is impractical, even if it were legal, to allow a judgment against a school district.

7. The injured's personal interest in collecting tax money as damage must give way to the public welfare, so that the money may be preserved for the operation of the schools."

Scope of the Study

Only decisions of the Supreme Court and Attorney Generals' Opinions for Iowa will be studied, but court cases against municipalities to show parallel cases and decisions will be included. Historical trends in other states will be shown as to the status of the states in regard to immunity from tort liability, legislative enactments or judicial abolition. Trends in the number of suits against school districts for bodily injury will also be shown.

The findings of this study will depend upon the validity of the legal principle of stare decisis. The term is derived from the legal maxim stare decisis et non quieta movers; freely interpreted, it means to "adhere to precedent and not to unsettle things which are settled" (73, p. 98).
The principle requires that a court decision on a question of law arising in a case and necessary to its determination be regarded as a binding precedent in the same court or in courts of lower rank within the same jurisdiction in subsequent cases where the point is again presented (73, p. 3-4). There would be no basis for this study if the courts followed this principle strictly. The courts can and do modify this prior ruling when conditions so warrant. Since this study is based on court decisions, its findings will reflect such modifications.

A further limitation is the inevitable fact that the writer is not learned in the law, but is by professional training an educator and school administrator. Thus, the study is confined and limited, as it deals with the technical and professional information peculiar to law to rather generally available knowledge and information within the scope of the writer's own specialized training in school administration.

Delimitations of the Study

Since each state has different statutes and legal interpretations, it follows that the status of tort liability of school districts and their employees will vary from state
to state. It was necessary to limit this study as follows:

1. The study was confined to the State of Iowa from the time of its admittance into the Union through the year of 1964, and thus any inferential generalizations from this study are contingent upon the particular circumstances to be found in each state.

2. Only Iowa Supreme Court decisions and Attorney General's Opinions have been considered.

3. This study was limited to suits for bodily injury only against public school districts and has not included non-public schools, institutional schools, and institutions of higher learning.

   a. In considering this liability, it is only the school district as a quasi-municipal corporation that has enjoyed the immunity from tort liability, and it is the only phase that has been studied.

   b. Related subordinates to this problem are:

      1. Governmental-proprietary functions.
      2. "Safe place" statutes.
      3. "Save harmless" statutes.

The primary emphasis of this study revolves around the modification of the immunity of school districts for tort liability in the area of negligence and the law to this effect. School districts are sometimes found liable for the maintenance of nuisance and for the trespass of property.
However, in this study negligence on the part of the school district received the intense treatment as such action creates a tort liability.
CHAPTER II

REVIEW OF RELATED LITERATURE

Chapter II consists of two principal parts—"Review of the Literature and the General Basis for Liability" and "Modifications of the Immunity Doctrine." Prior research in the area of school district liability has been edited and the writings of experts in the field of school law have been reviewed. The latter division of this chapter will present the modifications of the immunity doctrine in those states where it has been abrogated either by judiciary fiat or by legislative statutes. It includes a review of legal principles and essential information upon which liability of school districts and/or school employees is based, and recent attacks upon the immunity doctrine, and the results of these attacks.

Review of the Literature and General Basis for Liability

It is the purpose of this section to present a brief review of related studies and current literature, and, in addition, minimum essentials of the legal aspects of school-connected tort liability. Although generalizations pertaining to tort liability should be avoided, certain general
principles, legal research, and literature in the field of school law must be examined to provide an understanding of the problems of school tort liability.

Historical Perspective

Professor Charles W. Tooke of New York University Law School in 1940 wrote in the forward of Rosenfield's book, Liability for School Accidents, the following (83, p. ix):

"The field of tort in general municipal law has had its analysors and its crusaders. Their achievements have warranted their efforts as evidenced in remedial legislation, both adopted and proved, and in the more enlightened reception with which the progressive branches of the judiciary have acquiesced in their views. The highly specialized field of municipal law--that of the school district--is equally in need of such analysis and treatment."

Later in the same presentation Tooke states (83, p. xiii):

"The question of reform of the existing law of municipal tort liability has within the past few years been brought to the front largely through the efforts of men like Borchard, Harno, and Ascher. The present state of the law in our various states is generally recognized by the courts as confusing and inconsistent and often incongruous. The attempt by the courts do ameliorate (to improve) the harsh results within the framework of the common law and to reconcile modern concepts of tort liability between private persons with the archaic (obsolete) principle of governmental immunity has been impossible to realize. As in liability for industrial accidents, the only remedy seems to lie in broad and comprehensive legislation which will substitute for the existing technique, a governmental responsibility similar to that embodied in our workmen's compensation statutes."
Rosenfield in his book, *Liability for School Accidents* (83, p. vii), published in 1940, divided the contents of his book on liability into the following headings:

1. Negligence in the law
2. School board liability
3. Personal liability of school board members and officials
4. Personal liability of teachers, principals, and superintendents
5. Accidents in and about the school plant
6. Gymnasium, playground, and athletic activities
7. The classroom
8. Transportation
9. Health and medical services
10. Cafeterias and school stores
11. Off-school activities
12. School safety patrols
13. Non-school use of school buildings

Rosenfield at the time of his writing was Secretary to the Commissioner of the Board of Education of New York City and an instructor in school law in the School of Education at New York University and a member of the New York Bar. He concluded with the following (83, p. 126):

"There seems to be a growing realization that the general rule now being followed in approximately forty-five states in the United States is merely an antiquarian remnant of a barbaric system. Statutory deviations from the rule seem to be localized only in a few areas of the large field of tort liability for schools. Judicial deviations from the common-law rule, when analyzed, seem inadequate to cope with the generalized problem at hand. Although some states have had the judicial courage to depart from the rule of governmental immunity without statutory enactment, no thorough-going, clear-cut, and decisive judicial interpretation can be expected which will make a complete departure
Madeline Remmelein's *School Law* was published in 1950. At the time Miss Remmelein was Assistant Director of the Research Division of the National Education Association and a lecturer in school law at George Washington University. She devoted several chapters to liability in general and three specifically to pupil injuries (75, p. xv):

"1. Teacher liability for pupil injury
2. Pupil injuries
3. Transportation."

In regard to the present status of tort liability for school districts, she wrote (75, p. 255-256):

"...there does seem to be a theoretical trend toward the abolition or modification of the theory of non-liability. A number of courts opinions and legal authorities in their treaties have admitted the injustice of the common-law immunity. Yet, as mentioned by the Illinois court above, there are no practical reasons why the development of legislation imposing liability has been slow, and outside of one or two states, the lag of legal theory exemplified by judicial decisions has impeded the effectiveness of what little legislation has been attempted."

In 1955 Newton Edwards revised his classic textbook, *The Courts and the Public Schools*, from its earlier printing in 1933. The chapters in his book which were of importance to this study were entitled (18, p. xi-xv):

"1. The School and the State
2. School districts and municipalities
3. Tort liability of school districts
4. Personal liability of school officers
5. Transportation of pupils to and from school."

In his summary on tort liability of school districts, Edwards wrote (18, p. 41):

"The doctrine of nonliability for tort which is applicable to any agency of the state in the performance of a governmental function has been subjected to criticism as being illogical and unjust. A number of courts have expressed dissatisfaction with it on the grounds of social policy. But it is a long-and well-established principle, and the courts take the position that if it is to be changed, the legislature should do it."

The Law and the School Business Manager was published in 1957 with Lee O. Garber as editor. The purpose of this book was to delineate or point out some of the important legal pitfalls that can trap the unwary in the field of school business administration, and to suggest legal principles to guide the school business manager in making sound decisions concerning the problems that arise in these areas.

Each unit of the book was written by a noted author in school law. The following areas were of interest to this study (27, p. 215-216):

"1. School district status, organization, and control
2. Pupil transportation
3. Tort liability of school districts, boards, and employees."

Madeline Remmelein wrote the chapter on tort liability. This was just five years after her textbook on school law.
She listed the status of the states in regard to liability where it for tort had remained the same, but she concluded with (27, p. 195):

"The fact remains that an individual is legally responsible for his own negligence. It is also true that many school employees are judgment proof, that is, are not financially able to pay judgments assessed against them, while money payable by an insurance carrier impresses the injured as an impersonal and inexhaustible supply. Perhaps the answer is for school employees individually or collectively to carry liability insurance protection and thus turn the eyes of the injured away from the uncertainty of recovery through a school district. Perhaps the answer is for school districts to save harmless their employees and to pay their judgments out of insurance, the premiums of which are paid out of school funds.

No one knows the answer that the future will bring. At present, the law is in a state of confusion, possibly because it is in a transitory stage. Whatever develops, compensating the injured seems more important than the source from which the payment is made. In this day and age, tort immunity of governmental units and judgment-proof governmental employees are an anachronism. Yet these are the prevailing conditions today."

The revised edition of the Law and Public Education by Robert Hamilton and Paul Mort was published in 1959 (32, p. xiii-xiv). The original text was published in 1941. Hamilton was Dean of the Law School at the University of Wyoming, and Mort was Professor of Education at Teachers College, Columbia University. One chapter of this textbook dealt with the liability of school districts, officers, and
employees. The first part of the chapter, which was important to this study, was divided into the following categories:

"1. In tort
2. The doctrine of non-liability
3. Exceptions of the doctrine of non-liability
4. The New York Rule
5. Liability under the "safe place" statutes
6. The California Rule
7. The Washington Rule
8. Statutory modifications of the immunity rule
9. Insurance against district liability
10. Personal liability of district officials for torts
11. Liability of teachers in tort."

The authors confirm the works of others that the rule is well-established that school districts are not liable for the negligence of their officers, agents, or servants while acting in a governmental capacity, in the absence of a statute expressly imposing such liability; that the immunity from liability is based on the theory that the state is sovereign and cannot be sued without its consent; that school districts are instrumentalities of the state through which the state carries out its constitutional mandate to provide for a system of education and therefore falls within the category of state agencies immune from liability for torts committed while engaged in carrying out their governmental function.

Hamilton and Mort contest the various applications that the courts have used in upholding the sovereignty, such as:
the master is liable for the acts of his servant is not applicable, and funds raised for school purposes may not be legally diverted to the payment of tort claims against the district. In regard to these positions which the courts have used, they state (32, p. 280):

"The soundness of the reasoning in all cases may well be questioned. There is nothing inherent in the nature of municipal or quasi-municipal corporations which prevents the operation of the rule which holds the master liable for the acts of his servants while acting within the scope of his authority. The argument that there is no liability because the law does not provide means for raising funds to pay judgments as they are obtained is not sound. The fact that a judgment may not be satisfied is not a legal basis for non-liability. The courts taking this view have apparently considered it useless to render judgments against districts since they cannot be satisfied. The same may be said against any insolvent judgment debtor, but no case has been found in which the insolvency of a defendant has been stated as ground upon which judgment was rendered in his favor. Furthermore, it may be that failure to make legal provision for funds from which judgment may be satisfied is the result of non-liability rather than the basis of it."

Another outstanding textbook in school law, *School Law for Teachers*, was edited by Chester Nolte and John Linn in 1963. Nolte was Associate Professor of Education at Denver University and Linn was Assistant Dean of the Law School at the same institution. The authors devoted three chapters in their book to areas which are important to this study (69, p. xi, xiii):
1. Legal foundations of the American education system
2. Teacher liability for pupil injury
3. The student teacher in legal theory.

Their chapter on teacher liability was divided into the areas of torts; tort liability of public school districts, liability of school employees, negligence, teachers liability for inadequate supervision, defense against the charge of negligence, student assumption of risk, contributory negligence, liability waivers, school safety patrols, field trips, errands, transportation in privately owned cars, medical treatment of pupils, avoidance of tort liability, and "save harmless" legislation.

These authors concur with the previous writers as to the legal status of the school district in regard to the doctrine of immunity. They point out that very few legislatures have attempted to abrogate the common-law immunity of local school boards, and only New York, Washington, California, Illinois, and, to a limited extent, North Carolina and New Jersey, have provided by law for a waiver of sovereign immunity. In these states, school districts may be held liable under certain conditions for negligence of their officers and employees (69, p. 242).

Thus in the span of thirteen years the theoretical trend predicted by Remmelein in 1950 has become a reality.
Nolte and Linn indicated a further trend, notably in Wisconsin, Minnesota, and Pennsylvania, for the courts to denounce the theory of sovereign immunity and predicted that the trend to hold school districts liable for their torts would in all likelihood continue (69, p. 243).

They stated that there were two arguments advanced for the support of non-liability of school districts for their torts. The first argument rests on the concept that schools perform a governmental function, that is, the education of children, and hence are not liable because as involuntary agents of the state, they perform a service imposed upon them by law. They state the validity of this argument has been seriously questioned because (69, p. 244):

"Schools today are big business. Many of the functions which schools perform are not purely governmental in nature, nor do they relate directly to educational pursuits. Large spectator gatherings, such as athletic events sponsored by the schools, for which an admission fee is charged, can hardly be considered "governmental functions." Injuries incurred by spectators under these conditions should be directly answerable in damages by the schools, critics of this argument maintain. The injured party should not be made to suffer loss on the ground that the schools are performing a purely governmental activity.

In the majority of states in which the common-law rule of non-liability of school districts has not been abrogated by the legislature, school districts are not held liable for injuries caused by negligence of their officers and employees if they are engaged in a governmental function but may be held liable if they
engage in a proprietary function and injury results. The problem before the courts in these cases centers on the distinction between governmental and proprietary functions. The distinction must be found in the factual situation and it is no simple matter in each case to determine whether the board engaged in a governmental (educational) function or a proprietary (non-educational) function."

The second argument supporting district immunity is the trust fund theory, which is based on the contention that school districts have no monies out of which to pay damages. The concept being that the property which the schools possess is held in trust by local boards of education to be used solely for educational purposes. As stated by Nolte and Linn (69, p. 245):

"School boards have no power to raise money for the payment of judgments against them unless permitted to do so by the legislature. Furthermore, according to this argument, the payment of judgments arising from tort actions would be an illegal diversion of public funds, and could conceivably bankrupt the school district and greatly hamper the educational program. For reasons of convenience, therefore, it is better to invoke the doctrine of immunity and avoid the risks of illegal diversion of funds and bankruptcy of the district."

In challenging this theory, the critics maintain that no person should be made to bear the burden of injuries arising out of the tortious conduct of the school district on the pretext that there are no funds available from which to pay damages. The critics point out that there is liability
insurance available to guarantee that the educational program of the school district will not be jeopardized (68, p. 42).

A survey of the related literature would not be complete without mention of the many articles appearing in such professional journals as the American School Board Journal, Nations Schools, School Management, Research Bulletins of the National Education Association and many others. The writer searched the Education Index under the subheading Liability for all articles referring to the subject of personal injury. Twenty-five articles on this subject were found. Most of these articles were written by authors previously cited and were digest of larger works or recent changes of the immunity doctrine in certain states.

In 1958 a joint article which appeared in the School Board Journal was presented by two well-known authors in the field of school law. Edmund Reutter wrote on tort liability and the schools and E. C. Bolemeir wrote on the tort liability of school personnel.

Reutter in his article devoted space to the doctrine of respondeat superior, the basis for governmental tort immunity, modifications of the doctrine, the "safe place" statute and cases of nuisance. He concluded his article by stating that significant cracks are appearing (84, p. 30):
"This writer believes that some significant cracks are appearing....Also, a careful analysis of judicial opinions in applicable cases had indicated to the writer increasing reluctance of the courts through the years simply to invoke the immunity doctrine to dispose of cases involving injury on school premises, where there is evidence of negligence on the part of school authorities. This reluctance is noted to some extent in the final judgments but it is more apparent in the opinions supporting the judgments and in the dissenting opinions filed.

It is in the American tradition to discard doctrines as they become inappropriate to advancing civilization. Of the reasons cited earlier in this paper which purport to justify the doctrine of school district immunity from tort liability, only that related to funds for payment of damages has any practical significance today. But, with the advent of insurance, and with the substantially changed and changing governmental social policy, this reasoning is at best an extremely shaky support for the doctrine of such profound import."

Bolemeir in his article brought out that the modern school program reveals that more and more activities are being conducted in schools and away from the school which jeopardize the safety of pupils. Therefore (7, p. 30):

"The legal liability of school personnel for their tortious acts is a matter of growing concern. Especially is this true for acts of negligence which result in injuries to pupils and others."

He divided this article into the following areas: increase of hazards, allocation of liability--school districts--school administrators--bus drivers, meaning of negligence, responsibility following injury, avoidance of
liability, and contributory versus comparative negligence. Bolemeir contended there are more liability suits for damages resulting from pupil injury brought personally against the teacher than others of the professional staff. The reason for this obviously is because teachers constitute the greatest number on the professional staff and because they are in more direct contact with the pupils (7, p. 30).

Bolemeir concluded with a customary warning to administrators that they should be alert at all times for unsafe activities and conditions. A yearly safety inspection by the safety engineers of the liability insurance company is a recommended procedure. Periodic inspections by the building principal and the head custodian will detect dangerous conditions before catastrophe strikes.

When an unsafe or dangerous condition is discovered, maximum effort should be made to correct this as soon as possible. If the condition is critical, evacuation and the closing of school would be indicated. The maintenance of buildings, grounds, and equipment in a dangerous or defective condition is a situation which can be remedied more readily than some other conditions.

Schools have a duty to adequately supervise their students. Of course, what is adequate supervision is a
relative question, depending upon the time, place, and circumstances.

The Research Division of the National Education Association publishes several pamphlets each year in regard to school law. One of these Research Bulletins, published in 1958, titled, Plaintiffs and Defendants (64, p. 58), in the section on pupil injuries, reported that cases dealing with negligence on the part of teachers, resulting in pupil injury have increased. These are the reasons given for this increase:

"1) Parents of school pupils have become more conscious of the possibility of obtaining damages from school personnel who, with increased salaries are more able to pay damages today than a few years ago.

2) The expanded school program places pupils in a more varied environment which injuries may occur in.

3) Several states have enacted legislation which provides for the payment of judgments out of school funds, and parents are led to believe that the reservoir is bottomless.

4) The governmental immunity of school districts in almost all states has become more widely known, and with this knowledge parents are less likely in these states to initiate a tort action that is almost sure to fail. Hence, they turn for redress to the allegedly negligent school employees instead of the school board."

There were a total of 382 such cases from 1942 through 1957 involving bus drivers, athletic coaches, principals, and superintendents as well as classroom teachers.
Another publication of this division is titled, The Pupil's Day in Court (65). This is an annual compilation of cases relative to school law. Of the twenty-six cases reported in the year of 1961, pupil injuries gave rise to twenty-two of these actions. Fourteen cases were from New York.

The division also publishes annually The Teacher's Day in Court (66). This report contains digests of yearly court cases published in the National Reporter System and litigants in these cases are usually teachers or other professional school personnel. Madeline Remmlein is the current legal contributor. The publication is divided into ten topic areas and the area of interest to this writer was the topic on pupil injuries.

Twenty-four cases were reported in these pamphlets from 1959 through 1963 on pupil injuries. Thirteen of these cases were based on suits of negligence. This would tend to affirm earlier statements that the greatest amount of litigation arises in the area of negligence.

Summary

In summary, school law authorities in the past twenty-five years have:
1. Attacked the doctrine of tort immunity because of its social implications, the increased business aspects of public education, and greater risks.

2. Given a historical explanation of origin of the doctrine.

3. Traced the modifications of the original doctrine such as, the "safe harmless" statutes of New York.

4. Cited leading cases in states to demonstrate the need for modification.

5. Developed a definition of negligence, that is, a means of determining guilt and the basis of litigation.

6. Made a plea for closer administrative supervision.

7. Concluded with a strong recommendation for abrogation, by legislation, of the doctrine, and immediate provision for a required liability insurance and a limit on the amount of the claim.

Recent Studies

Searching the literature for similar investigation was fruitless. However, a number of studies were found, which in some manner related to the problem at hand. The bulk of the studies dealt with the larger area of immunity for the United
States as a whole, or for several selected states based on court cases and statutory enactments. In some dissertations a chapter or a section was devoted to the modification of the immunity doctrine in California, Minnesota, Oregon, Washington, and Illinois. The same can be said for the authors of the textbooks cited in the previous section.

Martin (51) in 1962 at Duke University with the supervision of E. C. Boilemeir analyzed court decisions affecting the tort liability of school districts from 1860 through 1961. The purpose of his study was to discover and identify the developments in court decisions which revealed trends in the tort liability of school districts in the United States.

In analyzing the status of school district tort liability by states in selected years Martin found that the immunity from liability once enjoyed by school districts had decreased markedly since 1930. Martin found, via case briefings, that the courts of twenty-three of the thirty states in which the litigation on the question had occurred adhered strictly to the non-liability rule; and, by the end of 1961, the courts of twenty-one states still adhered strictly to the non-liability rule, but in fifteen states school districts could be held liable under certain circumstances; and in five states the immunity of school districts had been virtually
removed altogether.

It is important to note that Martin's findings in his analysis of the development of court decisions studied indicate that the dominance of the principle that school districts are immune from liability has recently entered a period of decline, and if this trend continues to gather strength, school districts in a majority of the states will soon be subject to some extent to the law of torts which governs all private corporations and individuals.

A similar study was conducted by Fisher (23) at the University of Oklahoma in 1963. Fisher attempted to determine the extent which patterns of court decisions and statutory enactments were changing from legal immunity of schools, and to see what implications these patterns had for the Oklahoma Public Schools in relation to bodily injury.

Fisher studied court cases and statutory enactments in relation to bodily injury in the states of Arizona, New Mexico, Oklahoma, and Texas. In addition, he secured statements from the Attorney Generals of each of the selected states to secure the current thinking of this judicial group about school liability.

He concluded the following: (1) many school officials and employees are unaware of the liability dangers that exist
in various school activities of our schools; (2) school officials and employees may need protection from liability action which can be brought against them, arising from the scope of their employment; (3) school officials and employees are never immune from suit for financial loss due to injury arising from any judgment or claim by reason of negligence; (4) the permissive insurance law for transportation should be replaced with a compulsory insurance law; and, (5) school officials and employees should be alert to the greater number of injuries and deaths occurring in athletic programs.

It was Fisher's recommendation from his research that a sensible protective program for physical injury should be provided in the four states considered in his study.

The earlier stated tentative conclusions, which were supported by the remarks of the jurors, suggested the following as a legislative program for the Oklahoma Schools. This program might significantly clarify the legal responsibility for the public schools, school board members, and employees.

Fisher made five proposals and these are listed in a condensed form.

1. The common-law rules of exemption be abrogated.

2. Every school district receiving some form of state aid, be required to qualify for this aid by carrying compre-
hensive liability insurance covering the districts, agents, and school employees within reasonable limits to be determined either by the Legislature or the State Department of Public Instruction.

3. This cost be included in computing the cost of the minimum program in determining the amount of state aid which any school would receive.

4. That all schools be required to carry hospitalization and medical insurance coverage, covering injuries to children while engaged in school activities for which there is no legal liability against some other person.

5. That serious consideration be given to a study by the Legislature, based on the experience of the State Insurance Fund and other similar agencies, on handling both liability insurance and hospital and medical insurance through some state agency to reduce to a minimum the cost of the liability insurance coverage.

In 1963 Wood (98) at Michigan State University studied the tort liability in Michigan school districts. The purpose of his study was to identify and examine problems of school operation relating to school districts and/or school personnel and to determine the effect present liability laws have on school policies, practices, and programs in Michigan school
districts.

Wood used a unique approach for the study. An interview schedule was designed around three fictitious situations to allow interviewees free expression on realistic problems and to insure uniform consistent deliberation of certain aspects of the liability of school districts and school personnel. Appointed school administrative staff members were interviewed using essentially a case study approach. The data were stratified by school size and the school official's perception of school liability.

He concluded that Michigan public school administrators take an apprehensive view toward possible and potential school liability hazards under existing law. General liability insurance is purchased by approximately three fourths of the Michigan school districts. School officials appear to lean heavily on the advice of insurance agents and the expectation that insurance affords sufficient protection. Insurance appears to be over-rated by school officials as a means of protection to the injured and as a device for protecting the teachers and other employees from possible liability. Liability has not generally been the basis for school policies, rules and regulations, and operating procedures in Michigan school districts.
Wood made several recommendations that would agree with Fisher and would implement the reasons for the need of this study in Iowa.

It should be the duty of the legislature to clarify the confusing status of school liability; to pass legislation abrogating governmental liability, but giving protection to teachers from financial loss due to negligence under the save-harmless statutes; to grant school districts the authority to purchase liability insurance with the clarification and definition of school liability; and, to impose strict liability as opposed to liability with "fault" as a condition insofar as liability relates to the operation of public schools.

School officials, officers, agents, and employees should acquire a sound knowledge of their state's school tort liability laws. The teacher preparation institutions should include in their appropriate education courses a consistent concept of school district and personal liability. The local schools should make a periodic review of practices to eliminate activities and practices which are dangerous, either inherently or in the manner in which they are performed.

Finally, a handbook should be prepared for the use of school administrators and school personnel. This booklet
should summarize and review legal principles, statutes, and court decisions bearing on tort liability of school districts and liability of school personnel.

In regard to this last point it is worth mentioning that just such a practice is being used in Estes Park, Colorado. In 1964 the school law and its significance for the teacher became the core of an in-service improvement undertaking.

According to the author (20, p. 39):

"The exploration of this topic by the staff seemed to have results beyond the expected increased knowledge of legal aspects of education. Better teaching, a more harmonious school-community feeling, and improved staff morale seemed to come from the discussions of teachers and administrators.

Commonly, the responsibility for legal problems of the school has been assigned to administrators. Many states require formal training in the legal aspects of the public school as a prerequisite for certification of superintendents and principals; few states as yet impose a similar requirement upon classroom teachers."

Hartman (35) in 1964 at the University of Illinois analyzed the means and the rationale of the movement toward relaxation of the immunity principle. He stated that the greatest number of abrogations of immunity have been in the fields of school transportation and workmen's compensation, and that these two areas have received much attention from the judicial and legislative authorities.
His study was based on a review of the court cases and statutory enactments in the United States. He disclosed that there was a slight movement away from the traditional immunity. Three states, California, Illinois, and New York have been the leaders in the complete abrogation of immunity. Other states have developed specialized laws for granting recovery in limited areas. Kentucky, Tennessee, and Oregon allow recovery to the amount of liability insurance carried. School districts in the states of Washington were liable except for injuries occurring in certain specified locations. A few states attempted the division of the school's functions into governmental and proprietary categories. These findings would concur with the findings of Fisher and Martin.

Hartman concluded that it does not take much foresight to see that school districts and tort liability cases will be a fertile field for an ever-increasing amount of litigation and statutory concern. The immunity doctrine originated in times which were very dissimilar to the present. It was based originally on the divine right of kings and the principle that "the king could do no wrong." How this reasoning applied in the United States is a mystery to American jurisprudence. From the concept of the "king could do no wrong" the sovereign immunity of the state and of the school district
grew like "Topsy." Many reasons are given, but the most cog-
nent are the protection of the public funds and the laws of confidence. At the time of his writing, the vast majority of the states extend the protection of immunity to school districts for tort liability, but the trend toward the modifications of immunity will continue and grow in strength.

It is important to note that Hartman pointed out that school districts and personnel will become the target for ever-increasing accounts of litigation for tort liability. In the recommendations the emphasis was on the development of guidelines which would protect, limit, or mitigate the charges against the defendant.

Review of Iowa Literature

No general appraisal or survey of the Iowa Public School Districts in relationship to tort immunity has been done since Abels' work when he was Assistant Attorney General of Iowa in 1960 (1). Abels wrote an opinion on Iowa School Districts in relationship to tort immunity in the state education association's monthly journal and concluded that on the basis of Iowa cases what happened in Illinois is not likely to find immediate repetition in Iowa. The employees of a school district may be held liable for damage resulting
from their own personal negligence, but the district remains immune. Although the possibility exists that "it can happen here," a school district can protect itself against the eventuality by providing for an adequate insurance program for its employees.

In 1964 an editorial in the Des Moines Tribune, following the Iowa Supreme Court decision on the Boyer case, concluded that the majority opinion makes no attempt to defend governmental immunity. The disagreement of the court in this case is solely on the question of how it should be eliminated, rather than on the soundness of the doctrine.

"Iowa legislators find this opinion a clear invitation to take steps, in the interests of justice and fairness, to provide Iowans who suffer injury in the hands of government with the means for obtaining a just hearing and settlement" (17, p. 6).

Satterfield had one small unit in his study on the status of Iowa School Districts. He stated (86, p. 62):

"Some writers (71, p. 363) on the subject have created the impression that public school employees in the State of Iowa enjoy the same privilege of immunity from liability for tort as their employer, the school district. This is most emphatically not so. A single decision of the Iowa Supreme Court in 1933 gave rise to that impression (37).

A child named Hibbs was injured when he fell or was thrown from a school bus in which he was being transported from school to home. Action was brought against the school district and the bus driver. In deciding in favor of the school district and the bus
driver the court reasoned, 'exemption of school districts from liability for damages, resulting from negligence in performance of governmental functions, applies to school officers and employees thereof.' Such an opinion expressed by a court was unusual in the United States and it was promptly repudiated in succeeding decisions by the same court."

The Status of General Liability at Present

The tendency of the courts to perpetuate the common-law rule of governmental immunity has over the years been the dominant theme in decisions involving the tort liability of school districts. By virtue of this rule, many courts have repeatedly held that school districts, as agents of the state, engaged in the governmental functions of the executing the state's policy in education, are not liable for the torts of their officers, agents and employees.

The state's sovereign immunity from liability in tort was first extended to a state subdivision in Russell v. Men of Devon (75, p. 243), an English case decided in 1788. At the time the idea of municipality as a corporate entity was in a nebulous state and the suit was in effect against the lawful inhabitants of an entire country. The purpose of the action was "to recover" damages for injury done to the wagon of the plaintiffs in consequence of a bridge being out of
repair. The major factors which led the King's Bench Division to hold that the county could not be liable for negligence were (1) the fact that no corporate funds existed out of which damages could be paid, (2) the lack of precedent of "such an action having been before attempted", and (3) the fear that an "infinity of actions" would result if the judgment against the country were allowed.

The courts in the United States assimilated into American law the principles derived from the Russell case and the line of English decisions which followed it. According to Remmelein (75, p. 195):

"In the absence of statute, tort liability rests on common-law principles. Common law is the law that was in force in England at the time the United States was formed. Common-law principles remain the law in the United States unless changed for a particular state by its state legislature."

Remmelein states the corporate liability of a school district depends upon whether or not (75, p. 194):

"1. The statutes are silent
2. Existing state statutes preserve the district's governmental immunity
3. Existing state statutes abrogate the district's governmental immunity
4. Existing state statutes impose liability."

Robert Schaerer, writing in the American School Board Journal, summarized liability and liability insurance for schools up to 1964. He listed the school district liability
by states and divided it into three main categories as follows (87, p. 5-7):

"General liability

Immunity waived. Nine states have either directly or indirectly by state legislation or by court decisions, completely waived or partially waived their governmental immunity of school districts. New York waived its immunity first by court decision in 1907 and later by statute in 1923. Illinois first waived its immunity by court decision in 1959 and later by statute in 1959. Wisconsin waived its immunity by court decision in 1962. Minnesota court gave due notice that after the adjournment of the 1963 legislature, it will no longer recognize governmental immunity. New Jersey in 1938 and Connecticut in 1958 have indirectly waived their immunity by "save harmless" statutes. Washington in 1859 created limited liability for school districts by statute by eliminating liability for injuries which occurred in athletic, fieldhouse, playground, park, or industrial arts activities.

Immunity vigorously maintained. Three states, Alabama, Arkansas, and West Virginia, whose constitutions have in them provisions expressly prohibiting suits against the state or arms of state have vigorously maintained their immunity throughout the years.

Compromise. Thirty-eight states have immunity maintained but purchase of liability insurance is permitted. Eighteen state constitutions authorize suits in one form or another against governmental bodies. They are Arizona, Delaware, Florida, Idaho, Indiana, Kentucky, Louisiana, Nebraska, Nevada, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Dakota, South Carolina, Tennessee, and Wyoming. In other states, the permission to sue governmental bodies is so vaguely stated as to require court interpretation. In general it is concluded that all the other states fall into this category. In summary, it states that the courts uphold governmental
immunity of the school district, but by statute or other interpretation, schools have the right to insure. As long as the court cases are not taken through the appellate and supreme courts, lower courts have allowed judgments against the school district where the school district in its defense did not bring forth the principle of governmental immunity. The courts of Kentucky in 1942, Oregon in 1961, and Tennessee in 1933, 1936, and 1945, have deviated from this above rule and have stated that the purchase of insurance waives amount of the insurance but over this face amount of insurance carried the school district is immune.

Transportation liability

Immunity waived. Six states by special statutes have either totally or partially waived governmental immunity of school districts in the field of school bus transportation. They are Minnesota in 1938, Idaho in 1947, Oklahoma in 1951, Alabama in 1942, North Carolina and Mississippi in 1952. The latter three have not waived their immunity but by statutes have set up special state boards to hear claims and make payments out of certain designated funds if so-called negligence or liability does exist.

Immunity vigorously maintained. Four states are forbidden by court decisions, attorney general opinions, or other rulings from insuring school buses against liability. They are South Dakota, Texas, Alabama, and Mississippi. The latter two though have set up special state boards to hear such claims and funds from which to make payments of damage.

Workmen's compensation or employer's liability

The liability of school districts under Workmen's Compensation or employer's liability laws fall in three categories:

1. Those states where Workmen's Compensation
laws are compulsory on the school districts and where the school district is liable by statute. They are Arizona, Colorado, California, Delaware, District of Columbia, Georgia (in cities and towns), Illinois (only when engaged in extrahazardous work), Indiana, Iowa, Maine cities, Michigan, Minnesota, Montana, Nebraska, Nevada, New Jersey, New York (state employees only), North Carolina, North Dakota, Tennessee (state employees only), Utah, Virginia, Washington (for hazardous work only), Wisconsin, and Wyoming (for hazardous work only).

2. Those states in which the Workmen's Compensation laws allow the school districts, by option, to elect coverage under a statutory act or to reject coverage. The states in which the school district may elect or reject the coverage of its employees and accept liability are Alabama, Connecticut, Florida, Georgia, (counties), Kansas, Kentucky, Maine (towns), Massachusetts, Missouri, New Hampshire, New Mexico, New York (cities of one million population or more), Rhode Island, Tennessee (county and municipal employees), Vermont, and West Virginia.

3. School districts not liable are Arkansas, Mississippi, and Oklahoma. They stand alone as states where no teacher may receive the benefits of Workmen's Compensation. Mississippi does not have a Workmen's Compensation law. Oklahoma excludes school districts, and in Arkansas all public employees are refused coverage."

Negligence

Negligence is defined as any conduct that does not measure up to the standards established by law for the protection of others. Linn and Nolte define negligence as follows (69, p. 245):
"Negligence is defined as the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate human affairs, would do, or the doing of something which a reasonable and prudent man would not do."

According to Remmelein, negligence and carelessness are not synonyms, and negligence emerged as a separate tort in 1825 (75, p. 204). Remmelein states that there are certain elements necessary for an action based on negligence (75, p. 204).

"1. The duty to so act as to protect others from unnecessary risks
2. The failure to so act
3. The injury, of another, causing loss or damage, as the result of such failure."

Remmelein clarifies the difference between negligence and a pure accident thusly (75, p. 203):

"Throughout the discussion of governmental immunity and the abrogation thereof, negligence on someone's part has been assumed to have caused the injury. The reader must not gain the false impression that abrogation of governmental immunity means that a school district is liable for damages regardless of the existence of nonexistence of negligence. When there has been no negligence, the injury is said to have been caused by pure accident. If there has been no negligence, liability attaches to an individual or to a public body which has no immunity. The question of governmental immunity or the liability of school districts arises only when the injury has been caused by negligence."

In cases involving the possibility of negligence, the courts have generally sought to determine what a reasonable
and prudent man would have done under the circumstances, then apply this norm to the acts of the person alleged to have acted negligently. However, Remmelein points out that judges and juries differ as to what a reasonably prudent man would do in a given set of circumstances. Therefore, the facts of each case are important and are often the determining factors (75, p. 205).

The prudent man

If the duty is present, the actor is obligated in a manner so as not to cause any unreasonable risks to the other party. It is in this area where legal fiction of the reasonable and prudent man reigns supreme.

A case in point arose in a New York school. In a physical education class, the instructor permitted two husky boys untrained in the sport of boxing to fight through one round and part of another while he sat in the bleachers. One of the boys was fatally injured, and the parents brought suit for recovery of damages against the instructor. Said the court in holding that the instructor was negligent and personally liable for the injury (47):

"It is the duty of the teacher to exercise reasonable care to prevent injuries. Pupils should be warned before being permitted to engage in dangerous and hazardous exercise. These young men should have been taught the principles of defense if indeed it was a
reasonable thing to permit a slugging match of the kind which the testimony shows this contest was. The testimony indicates that the teacher failed in his duties in this regard and that he was negligent, and the plaintiff is entitled to recovery."

**Foreseeability or proximate cause**

Related to the prudent man is the other test for negligence, and that is the test of foreseeability. In deciding whether or not a person has been negligent, the court will first examine the evidence for the foreseeability of the injury. Thus, when a reasonably prudent person could have foreseen the harmful consequences, he is negligent and his negligence becomes the proximate cause of the injury. He is, therefore, liable for the injury.

Keesee, a 13-year old student in a New York City public junior high school, was injured in a game of line soccer played on the gymnasium floor as part of the physical education program. She was, apparently, given no choice in the matter and had to participate in the game.

The question before the court was on whom will liability rest when an inexperienced student is injured while participating in a game as part of the school's required physical education program, when the instructor changes the game rules from those appearing in the program syllabus.

The court found the board of education was negligent in
permitting the game to be played under the circumstances portrayed. The reasoning of the court was (41):

"That an injury would result to someone from the melee ensuing (when eight novices converged on the ball, at a run) was, if not inevitable, at least reasonably foreseeable. To permit such a large aggregation of novices to engage in such a dangerous sport evidenced a complete disregard by the teacher for the safety of her pupils...."

**Negligent supervision**

In response to compulsory attendance laws, parents have entrusted their children to the public schools for instructional purposes. The law does not take without giving something in return; the law anticipates that the children will be protected and their best interests looked after by those in charge. The law, however, does not guarantee that no child will not be injured while at school. Accidents will happen even when there is the teacher nearby and supervision is legally adequate.

According to Nolte and Linn, legally adequate supervision has no clearcut legal definition. It is rationally a matter for the courts to decide, and the courts use the three-way test for negligence (69, p. 255).

1. Was a duty owed the plaintiff by the defendant?
2. Was there a breach of that duty?
3. Was the breach of duty the proximate cause of the plaintiff's misery?
When all three questions are in the affirmative, the courts will declare the existence of defendant's negligence.

Some examples will serve to illustrate. In one of the New York City schools in 1963, groups of boys were placed on each side of the gymnasium and given certain corresponding numbers at random. When a number was called, two boys on opposite sides of the room would run to a ball in the center of the floor and attempt to kick it. Suit was brought against the board of education for negligent supervision (10). The boy whose number corresponded to that of the plaintiff had been taller and heavier. The result had been that the plaintiff sustained serious injury.

The Court of Appeals of New York held that the circumstances showed such negligent supervision. Two judges dissented. They were of the opinion that the exercise was not dangerous and that the alleged mismatching of the two boys did not constitute negligence. It is important to observe that the over-matching charge involves some very close questions as to the adequacy of supervision.

An opposite of this case was one decided by the Supreme Court of Colorado in 1963 which held that a teacher was not liable for injuries caused to a pupil when he was struck in the eye by a rock thrown by a fellow pupil. The teacher was
supervising the playground of an elementary school. It was alleged that the plaintiff was struck in the eye by a rock thrown by a fellow student and that the defendant teacher permitted the rock to be thrown.

The court held that the district could not be held liable, even if the teacher had been negligent, because of the tort immunity doctrine in Colorado (13). The court further held that this was not sufficient to state a legal claim against the teacher. It declined to impose liability upon the teacher because "there was no allegation of direct participation in the alleged injury to the child." This failed to take into account the possibility that the teacher may have been negligent in not providing adequate supervision, but there was no such allegation in the complaint. However, the court quoted with approval from a New York decision having to do solely with the degree of supervision required. That decision was that (13):

"There is no requirement that the teacher have under constant and unremitting scrutiny the precise spots wherein every phase of play activity is being pursued; nor is there compulsion that general supervision be continuous and direct."

Neither the school district nor school personnel are liable where supervision of areas is adequate and reasonable. Adequateness and reasonableness will continue to be legal
questions for the courts to decide.

**Contributory negligence**

In order to recover for a tort committed, the injured person must be free from "contributory negligence". That is, he himself must have used care in his conduct so that it was below the standard to which he should conform for his own protection. His conduct should not be such that, when combined and concurring with the negligence of another, it contributes to the injury as a proximate cause. In effect, the negligence of one person cancels the negligence of the other person.

Nolte and Linn define it this way (69, p. 255):

"When the negligence of a student contributes to his own injury, he is precluded from recovery against the teacher unless the act took place in one of the few jurisdictions applying the comparative negligence doctrine. The cases involving contributory negligence of younger children are not held to the same high standards of conduct as are older children and adults. The teacher of younger children should exercise a greater than ordinary amount of care, since younger children are unpredictable in their actions."

Obviously a minor cannot be expected to exercise the same degree of care as an adult. This fact is well-expressed in an opinion of the Supreme Court of Utah (40):

"A child of eight years cannot, as matter of law, be held guilty of contributory negligence, and it is not presumed to conduct herself as an adult person under similar circumstances."
The degree of care required of a child must be graduated to its age, capacity, and experience, and might be measured by what ordinarily is expected of a child of like age and capacity under similar conditions, and if it acts as might reasonably be expected of such a child, it cannot be charged with contributory negligence."

A twelve-year old boy was guilty of contributory negligence if a recent New York case (88) when he was injured while playing on a fence in the school yard.

The fence had a single horizontal pipe, two-and-a-half inches in diameter, attached about two feet above the ground to interspaced iron bars. There was no evidence that the fence was improperly constructed or maintained, or that it had been the cause of any prior injury to school children. It was not situated in the school playground area and obviously was not designed to serve an athletic or recreational purpose. There was no proof that the fence itself was inherently dangerous.

The boy injured himself when attempting to walk along the rail. He slipped and fell, fracturing his ribs and rupturing his spleen. On other occasions he had fallen from the rail without injury. At the time of the accident, no teachers were present to supervise the area. It was upon this alleged breach of duty that the boy rested his charge against the school board.
School children had been forbidden by school authorities to walk on the rail. Frequently announcements to this effect had been made to the pupils by means of the public address system and the teachers had personally told pupils to keep off the fence. The court held that the board's duty to provide adequate supervision within the school yard was discharged when the child was directed not to play on the fence. Constant surveillance of children to enforce a known rule was not required, according to the court, and the case was not the same as those in which boards had permitted obviously dangerous activities within the playground area.

Furthermore, in the court's opinion, this boy was guilty of contributory negligence. Since he contributed to his own injury and for other reasons stated herein, the board was not held liable.

**Intervention of third parties**

Where original negligence is followed by an independent act of the third party resulting in direct injury, the original negligence may constitute "proximate cause" if it is known that the intervening act was likely to occur; otherwise, the chain of causation is broken by the intervening act and the original negligence cannot be considered as "proximate cause".
Such intervention can best be illustrated by an instance where some high school juniors who were helping the custodian store equipment stole some chemicals from the store room. They gave the chemicals to a third boy who did not go to school. The third boy was seriously injured by an explosion of these chemicals. His parents unsuccessfully brought suit against the school district and the custodian. The court held that "the chain of causations" was broken when the chemicals were delivered by a third party (25).

Respondeat superior

This phrase is often used to indicate the responsibility of a principle for the acts of a servant or agent, or let the master pay for the faults of his servants. Reutter states it this way (84, p. 51):

"When a worker in private employment is negligent in the course of his employment or in the intended furtherance of his employer's business, the employer is liable to third parties thereby injured. This doctrine, known as respondeat superior, does not apply under common law to public employees whose employers are considered the people."

Nolte and Linn have this to say about the doctrine (69, p. 51):

"The immunity from tort liability which school districts generally enjoy does not extend to the district's employees. The individual employee may be held liable for torts arising from his own negligence. Even though the district is not liable under the doctrine of
**respondeat superior** (by which the master must answer for the wrongs of his servant), each teacher, bus driver, custodian, principal, and superintendent is held accountable, either singly or severally, for injuries caused by his negligence. The injured party, failing to have a cause of action against the school district, may seek relief by instituting suit against the employee."

Rosenfield put it this way (83, p. 74):

"...of more recent development is somewhat less current than others; in the commission or negligent and careless acts the employees of the board or school district are not board or school-district agents in terms of agency laws, and that consequently the master (the board or school district) is not liable for the acts of the non-servant (the employee.)"

Edwards substantiates what has been said above with (18, p. 398):

"School districts, in the absence of a statute making them liable, are not liable for injuries to pupils growing out of the negligence of employees. In such cases the rule of **respondeat superior** does not apply. Obviously, if a school district is not liable for negligent acts of its officers, it is not liable for the negligence of its employees. The principles applicable in the first case are equally applicable in the second case."

Briefly stated, the doctrine of **respondeat superior** does not apply to school districts since they are arms of the state created for the sole purpose of the administration of the commonwealth's system of public education.
Liability in the Transportation of Pupils

In a large number of school districts, perhaps the greatest proportion of school accidents occur in connection with the bus transportation system. Many pupils are daily transported. The rules of liability applicable to bus transportation are exactly the same in most respects as those applicable to any other proper activity of the school district.

The driver of the bus is not immune from liability by virtue of the fact that the school district is immune. This was illustrated in a North Carolina case in 1951 where a driver of a school bus contended that since the school district was not liable for injuries growing from negligent acts of its officers, agents, and employees, he, as an employee of the district was also exempt from liability. The court denied such reasoning and stated (33):

"Undoubtedly the county board of education, as an agency or instrumentality of the state, enjoys immunity to liability for injury or loss resulting from the negligence of the driver of its school bus...but the driver of the school bus, who is a mere employee performing a mechanical task is personally liable for his own negligence."

To implement the above statements Bolemeir presents the status of the school bus driver as follows (7, p. 31):
"Tort liability is applicable to nonprofessional school personnel who are entrusted with the care and protection of children just the same as it applies to teachers, principals, supervisors, and superintendents. School bus drivers especially are vulnerable to liability for negligence which causes pupil injury in the process of pupil transportation to and from school."

Bolemeir states that the status of the school district in regard to pupil injuries from transportation accidents are as follows (27, p. 181):

"In virtually every court case involving liability for personal injury accruing from the negligent act of an employee, the court rules out liability of the school district unless there is a specific statute indicating that the school district shall assume such liability."

Degree of care to be exercised

Since the purpose of the study is interested in the tort liability of school districts and not the employees or agents, specific cases will not be further cited as to negligence of the employees. However, the writer would like to mention some principles that are taken into consideration by the courts when these litigations do arise.

Courts vary in regard to the degree of care required of drivers of vehicles transporting children. Though terminology differs, the weight of authority is divided between requiring the school bus driver to exercise due or ordinary care, and demanding that he use the highest or extra-ordinary care.

Like any other person in our society, the driver must
refrain from being negligent. The rule of prudence and care governs the bus driver in all his relations with the pupils whom he transports to and from school. It governs the condition of the bus, the speed, the discipline of the pupils while on the bus, and the circumstances under which they are permitted to leave it. A bus driver will not escape liability by pleading that he did not foresee the precise injuries that the pupil sustained; he will be held liable if a reasonably circumspect person, under the circumstances, would have anticipated some injury.

Though the standard of care required is referred to as ordinary or extraordinary care, the court in measuring that care often looks to age, intelligence, and experience of an injured person as the determining factor as to whether or not the bus driver is to be judged negligent.

Bolemir, writing on pupil transportation, had this to say (27, p. 185):

"Much litigation concerning the liability of school bus drivers could be avoided if the statutory provisions were more carefully drafted and more rigidly adhered to. Every state now has some statute or statutes stipulating various requirements of the bus driver. These provisions vary from state to state. Persons responsible for the administration of the bus service should be familiar with the law of their respective states as it relates to the qualifications of bus drivers."
Briefly then, a school bus driver is liable for his own negligence. Although school districts as corporate entities may be exempted from liability injuries which may result from negligence in connection with transportation to or from school, the bus driver is held to be individually liable for the results of his own negligence, even though he is an employee of a district. Obviously, the school bus driver's only protection against suit is care and prudence.

**Modifications of the Doctrine and Recent Attacks on the Doctrine**

Since the doctrine of school district immunity is in the common-law, it can be abrogated or modified by statute or changed by judicial interpretations. It is possible to categorize the existing exception to the doctrine of non-liability in tort of school districts into seven broad classifications, three involving legislation, and four involving court interpretations.

Rosenfield explains it as follows (83, p. 24-25, 28-29, 30-31, 37-38):

"The general common-law rule states that a school district is not liable for injuries unless it consents. Only the state can consent to suit against school districts. Some states have attempted to pass such statutes. One provision which might appropriately be
called a 'safe-place' statute...it provides that any public agency shall be liable in damages for injury resulting from the dangerous or defective condition of public property.

Another interesting form of statute at present restricted to New York and New Jersey is the so-called 'save-harmless' statute which requires boards of education to indemnify teachers and others in their employ against financial loss resulting from judgments arising out of accidents while on duty and acting within the scope of employment.

Another judicial theory...escapes the governmental immunity of the common-law rule through the doctrine that a school district is liable if it creates or maintains a nuisance. In legal terminology, a nuisance consists in the existence or creation of a situation which by its very nature is likely to cause injury, harm or inconvenience to another. For example, if an owner so maintains his property that after every rain a large body of water which has been collected during the rain flows onto another's property, or if the chimney of his factory is so constructed that it continuously ejects smoke into another's window, he has maintained a nuisance.

Another avenue of escape from the common-law doctrine of immunity proceeds from one of the problems inherent in municipal law in general, that is, from the distinction between governmental and proprietary functions. For instance, when a school board operates a playground it has almost universally held that in so doing it is operating under governmental function; but when a city operates a playground it is generally held to be a proprietary or private function. Those courts resorting to this distinction permit recovery for injuries incurred in performance of proprietary functions but refuse it for injuries occurring during the performance of governmental functions. Basically the theory goes back to the principle that 'a king can do no wrong.' Accordingly, in the performance of proprietary functions there is no reason to establish immunity."
These same theories presented by Rosenfield were again presented by Remmelein (27, p. 195-201) in the textbook, The Law and the School Business Manager.

Legislative Approach

A few states have enacted legislation to modify the common-law principle of sovereign immunity and allow actions against the state and its subordinate agencies for tort. Unless there is some statute, however, the school district is not liable for injuries caused even by the negligence of its officers, the school board (63, p. 31).

Abrogation

One legislative approach, utilized in a few states, is to basically abrogate the doctrine. This has been done in California and there are no exceptions, except that claim for damages must be verified and presented in writing within ninety days after occurrence of the injury. In the state of Washington, the law on tort liability of school districts is different from that of any other state. Districts there are held liable for their torts with certain exceptions. The exceptions are accidents relating to playgrounds, athletic apparatus or appliance, and industrial arts equipment owned, operated, or maintained by such school district. Two recent cases in Washington help to explain this:
In 1963 the state supreme court considered whether a
district was liable for an injury suffered by a teacher on
the school premises (5).

It appeared that on the evening of November 15, 1960, a
teacher drove his automobile to the school for a night
function. It was a dark, rainy evening. He parked his car
in approximately the same place a number of times during
three previous years while attending night functions. The
district was engaged in certain construction on the school
property. For three or four days before the accident
occurred, employees of the district had been removing large
stones from the construction site. At least two of these
stones were left on the edge of the pavement which extended
to the wall in that area, which was not lighted. While
returning to his car later in the evening, the teacher was
injured when he stumbled and fell over these rocks. He con-
tended he did not see the rocks, but that by groping in the
dark, he discovered what he determined to be a rock about
eighteen inches high. There was evidence that the teacher,
when being taken to the hospital, said that earlier that
evening he had seen the rocks but had forgotten that they
were there upon returning to his car.

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

A case was decided by the Supreme Court of Washington in 1964 (3) which is an example of the exception to complete abrogation in that state. The court held that a baseball thrown by a member of a high school team while warming up on a public playground was not an "athletic apparatus or appliance" within the statute, and the statute did not preclude a spectator from suing the school district. The plaintiff was struck on the left side of his face and injured by a baseball thrown by a member of one of the high school teams of the district. He alleged that the school district had not exercised proper care in supervising the activity or conduct of the students relative to the game.

In the court's opinion, the words "athletic apparatus or appliance" as used in the statute, have a reference to more or less permanently located equipment--such as swings,
slides, traveling rings, teeter boards, chinning bars, etc. The words have no application to anything as highly mobile as a baseball.

Three of the nine judges dissented. The dissenting judges emphasized the word "relating" in the statute. In the opinion of the dissenting judges, athletic apparatus, appliances, and industrial arts equipment are all things pertaining to and relating to the activities of those engaged in athletics.

The doctrine has been modified in North Carolina so that it affects tort claims against county and city administrators for injuries arising out of the operation of public school buses. Power to decide such claims is vested in the North Carolina Industrial Commission. If the commission awards damages against a local school district, the damages are to be paid by the state board of education. A maximum of ten thousand dollars per claim is set by law.

At the time of this writing the school districts in the state of Illinois are liable for actions based upon tort. The Molitor decision, which reversed over sixty years of immunity, removed the judicial barrier to liability. Legislation was passed shortly thereafter which limited liability recovery to $10,000, and deadlines were established, and
notice of claims procedure was set.

Since the Molitor case has been cited by this writer on several occasions to date, it is worthwhile to make a careful survey of just what can happen when there is abrogation without limitation.

On May 23, 1959, the Supreme Court of Illinois handed down the decision in the Molitor v. Kaneland case (56). In this historic and unprecedent case the highest court in the state established that the district could be held liable in tort for negligence. Eighteen school children were injured March 10, 1958, when a school bus operated by an agent of the school district hit a culvert and burned. The fact that this decision did not say anything about retroactivity of this ruling, much apprehension was created among school people. In a rehearing held in December, 1959, the court ruled that this decision with the exception of Thomas Molitor, applied only to future occurrences. In a later decision the court said that all of the students included in this particular bus accident may have the immunity of the school district abolished (56). In the original complaint the district was charged with negligence through its agent and servant, the bus driver. As a result of the accident, the plaintiff, Thomas Molitor, received paramount injuries and sought
damages of $56,000. The record showed that the defendant carried liability insurance with limits of $20,000 for each person and $100,000 for each accident. However, in the complaint this was purposely omitted. The court considered many of the traditional and historical reasons for immunity. The court concluded (56):

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

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

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

The case was remanded to the Circuit Court of Kane County to determine the negligence of the school district. Four of the Molitor children and two other children asked for damages of $1,527,000. The Kaneland School District has been sued by seventeen of the eighteen involved pupils for more than five million dollars. The verdict awarded a sum of $2,500,000.

The General Assembly reacted quickly to this new and
somewhat alarming decision of the court. Two months later, on July 22, 1959, an act was approved which pertained to this subject (92). The Legislature of Illinois also appropriated $750,000 to assist the Kaneland District in paying the judgment.

Several cases have been heard in the courts concerning the effective date of the Molitor opinion. The court stressed the application of the Molitor ruling as to the effective date.

In a later case Price v. York (74) in 1960 the court held that new rules of negligence had been created by the Molitor ruling. The school district operated a school bus which picked up the defendant, an eight-year-old child. The route was such that the child had to cross a state highway in order to board the bus. If the bus had been routed on a rural road which ran in front of the defendant's home, it would have eliminated the need to cross the highway. The plaintiff charged the district with negligence in not using the rural road thereby giving rise to the proximate cause. The case was appealed to the appellate court from the Circuit Court, Coles County. The court stated that in order to claim negligence there must be a duty, a failure to perform the duty, and injury resulting therefore. The court held that
the district did not owe a duty to the child to protect her while walking from her home to the point of pick up. Nor was there duty imposed upon the district to reroute the bus so that no child would need to cross the highway. It is apparent from this decision that negligence still must be proven in Illinois before liability attaches to the school district.

**Save harmless**

A second legislative approach is known as the "save harmless" law. Connecticut, New Jersey, New York, and Wyoming have this on a local option basis only.

This technique, which was developed recently, was the enactment of "save harmless" statutes. These statutes have indirectly made the boards of education liable for negligence. By the enactment of this type of law the board of education assumes the liability of certain school employees while acting within the scope of their duty.

Reutter explains the law as (84, p. 29):

"Statutes known as 'save harmless' laws are found in a few states. They provide that the employee will be 'saved' by the district from 'financial harm' resulting from judgments for damages against him arising from his negligence while discharging his duties. It should be emphasized that this type of statute does not directly touch the doctrine of immunity of school districts. However, teachers are protected against financial loss, and a practical means of recovery is made available to those who are injured through the negligence of school employees acting
within the scope of their employment."

In Connecticut since 1957, it is mandatory that boards "save harmless" teachers who are liable for damages. Nolte and Linn have this to say about the Connecticut law (69, p. 267):

"The principle underlying the Connecticut law is sound. The teacher who must pay damages for a single mistake in conduct may be saddled with a judgment for the remainder of his professional life or be forced into bankruptcy proceedings. The growing complexity of the educational enterprise indicates that the number of pupil injury cases will doubtless increase. In the interests of school morals, boards will find it increasingly expedient to "save harmless" those who are "taking risks" in the classrooms throughout the land. State associations of school boards should therefore urge the enactment of mandatory save harmless legislation in their states. Teachers' associations can do no less."

In 1937, New York enacted a "save harmless" law for school districts which included authorization to carry insurance (27, p. 199). According to Remmelein (27, p. 214), the New York Courts interpreted the "save harmless" laws as, in effect, imposing direct liability on the school board, saying that it was unnecessary to sue an employee and obtain a judgment first and then seek settlement of the judgment from the school board.

These statutes in New York in no way make the school district liable for the employee's negligence. Neither do
they exempt the employee from his financial loss.

A pupil and his guardian sued a New York school district (50) for injury caused by the negligence of teachers. Action was based on the statute "to 'save harmless' and protect all teachers..., from financial loss" for claims for injuries to pupils resulting from the negligence of teachers. The court held that, "The statute does not make school districts liable for torts where no liability existed before, but merely provides that the district indemnify the teacher after she suffers loss by reason of injuring a pupil."

Accordingly, action could not be maintained.

Not only do "save harmless" laws usually pay the money damages awarded against those covered by such laws; they also frequently provide that the board of education is to furnish legal counsel and pay all expenses of defense of the accused.

In 1955 Wyoming passed a permissive statute authorizing the school district to "save harmless" and protect teachers from civil liability.

The total impact of the "save harmless" statutes upon the immunity of school districts has been negligible in two of the four states, while in New York it has been coupled with a more widespread move toward abrogation.
"Safe place" statute

A third category of legislative action is the "safe place" or "public liability" statute. Such a statute makes public bodies liable for injuries sustained as a result of faulty construction or maintenance of public buildings.

Hamilton and Mort explained the statute as follows (32, p. 285):

"Recovery is sometimes sought against a district under so-called 'safe place' statutes in effect in a number of states, on the theory that these laws have cut into the exemption previously enjoyed by public governmental entities in the performance of governmental functions. These statutes provide in general that every owner of a public building shall so construct, repair, and maintain such public buildings as to render the same safe to employees and frequenters thereof."

Rosenfield wrote (83, p. 28):

"The workmen's compensation statute is closely allied with another form of statute which appears in at least two states and probably in many others. This is the so-called 'safe place' statute, requiring public and private authorities to so construct, repair, and maintain buildings as to render them safe for people using them for lawful purposes. In Wisconsin, although the 'safe place' statute as first adopted was inapplicable to school districts, it was later amended to become so applicable."

Remmelein stated (27, p. 200):

"...in several common-law states (where school districts have governmental immunity in general) have enacted legislation which requires safe construction and maintenance of public buildings including schools. These laws are generally called 'safe place' statutes."
In states such as California and New York the school district was held liable for maintaining buildings, grounds, and premises in an unsafe manner. Washington has partially restricted this liability for a "safe place." Two states, Colorado and Wisconsin, have enacted special statutes which impose liability upon the school district to build and maintain its buildings and/or equipment so as to render them safe for general usage.

The state of Wisconsin had established a definite statute concerning "safe place." The "safe place" statute of Wisconsin defined the place of employment, the employer, and the frequenter.

In keeping with the general trend of strict interpretation by the courts, schools in Wisconsin, were exempt from suit until the above amended statute, which expressly mentioned school districts, was passed. In one case the court of Wisconsin allowed recovery. The plaintiff fell down an elevated stairs. At the bottom of the stairs a door was closed suddenly by another student. The boy injured his hand by ramming it through a glass panel in the door. The shutting of the door by the other student was the proximate cause (22). The district was held liable for the dangerous condition of the stairs and the door. In the other cases the court
had ruled so as to bar recovery. In the Lawyer case a flagpole was held not to be part of the building as defined in the section of the statutes (48).

A boy was killed when struck by a falling flagpole on the evening of October 11, 1938. The Wisconsin Supreme Court affirmed the decision of the circuit court which had dismissed the case. The court held that a flagpole was a true structure, but that it was not used as a place of resort assemblable as indicated in the statutes. The doctrine of immunity of a municipality in the performance of a governmental function was affirmed. In another Wisconsin case the plaintiff was enrolled in a vocational school (43). As a result of operating an unguarded wood planer, the plaintiff injured his arm, which was later amputated below the elbow. He asked damages of $30,000. The case was appealed from the district court which had overruled the defendant's demurrer. The Wisconsin Supreme Court reversed the circuit court. The court stated that the machine was unsafe, not the building. A student was not an employee, nor was a school a place of employment for a student. This ruling upheld the school while discharging its governmental function, and the school district was not liable for the acts of negligence. In a case tried in 1957 the court ruled that (34):
"Under Wisconsin law an absolute duty is imposed on the occupant to make the place as safe as the nature and place of employment will reasonably permit and performance of the common law duty to make it reasonably safe does not suffice."

As it appeared, the courts of Wisconsin did allow recovery for violations of the "safe place" statutes, but the construction of the statute was one of the strictest character thereby resulting in limited recovery.

**Judicial Opinion**

As pointed out previously, legislative action is one way which changes in the doctrine of school district immunity have been made. The other was through judicial opinions. Four distinct categories of exceptions to the doctrine are discernible from an analysis of court opinions.

Remmelein wrote (27, p. 196):

"Because governmental immunity has been considered inequitable under conditions, courts sometimes try to find a way around it. Some writers feel that the theory is on the wane, but the deviations of the courts to avoid it have been used on occasions for years back and the most that can be said is that, in the absence of statutory abrogation of the common-law principle, governmental immunity has less prestige today than formerly."

**Deviations**

Of these four categories of exception, the first is for a court simply to deviate from the long-standing precedent.
Reutter (84, p. 29) wrote that the New York courts have gone further than those of any other state in judicially declaring the doctrine inappropriate at points. This has been affirmed by Garber, Hamilton, Remmelein, and others. In the Herman case (36), tried in 1922, the court said that the school district was liable for negligence. In this leading case, a school district was held liable for its negligence in failing to provide a guard for a table saw used in an industrial arts class.

The New York courts have clearly indicated that all of the essential elements of a negligence claim must be present. The school was not the insurer of the welfare of the child and was bound to use only ordinary care. There existed a duty to maintain buildings, grounds and equipment in a reasonably safe condition, and a failure to do so was negligence.

Procedural matters have caused much litigation in the state of New York. The deadline of filing a claim within ninety days after the incident has been extended frequently by the courts if the rights of the defendant were not prejudiced.

Another example of this complete abrogation by judicial decision is the Molitor case in Illinois which was discussed
earlier. Here the Supreme Court of Illinois completely abrogated the doctrine. It did not take the Illinois Legislature very long to make a statute to this effect with limitations on recovery.

In the case of *Spanel v. Mounds View District No. 621* (93) in Minnesota in 1962, the Supreme Court of Minnesota abrogated the sovereign tort immunity rule. The abrogation was to become effective after the adjournment of the 1963 session of the state legislature, subject to any statutes the legislature might enact on the matter.

In this case a five-year-old boy was injured on a defective kindergarten slide. A suit was brought against the school district, the principal, and the teacher in charge. The case was dismissed in the lower court under the doctrine of governmental immunity from tort liability.

The Minnesota Supreme Court upheld the dismissal of this action, but prospectively overruled the doctrine of governmental immunity as a defense to tort claims against school districts, municipal corporations, and other governmental units, except the state itself.

The *Spanel* opinion concludes (93):

"It may appear unfair to deprive the present claimant of his day in court. However, we are of the opinion it would work an even greater injustice to deny defendant
and other units of government defense on which they have a right to rely."

The 1963 legislature restored the governmental immunity rule as a defense in actions against school districts, but provided that when a school district procures liability insurance, then during the period the insurance is in effect and to the extent of the coverage, it becomes subject to the statutory provisions relative to liability for torts committed by the school district or its officers or employees, acting within the scope of their employment and duties, whether arising out of a governmental or a proprietary function (55).

The Spanel decision was dated December 14, 1962. The reinstated rule of immunity expires on July 1, 1968. According to Hamilton (30), "This is the only instance to come to my attention in which tort immunity has been established in a state after having been abrogated by the state's supreme court."

In April, 1963, the Supreme Court of Arizona in Stone v. Arizona Highway Commission, abrogated the doctrine of tort immunity of governmental agencies, including school districts. From the title of the case it will be observed that schools or school districts were not involved in the decision, but Hamilton stated, "The court left no doubt that the abrogation
of the rule was applicable to school districts and it remains to be seen whether the Arizona legislature will reinstate the rule" (30).

**Liability insurance**

A second category of judicial exception of the school district immunity doctrine appears in connection with the purchase of liability insurance by the school district. Many states have statutes which permit the purchase of liability insurance. In some states liability insurance is purchased without the express statutory powers to do so. Reutter wrote (84, p. 29):

"It seems quite clear that the legislature has the power to permit or require school districts to purchase liability insurance and can waive governmental immunity of a district to the limits of the insurance. In the absence of a statute, however, the purchase of liability insurance has been judicially approved in some jurisdictions as an implied power of local boards and disapproved in others as an illegal expenditure. The effect of the purchase of liability insurance on district immunity has been considered in several jurisdictions. It is generally held that such a purchase technically does not constitute a waiver of immunity, although its effect is similar to an abrogation of immunity to the extent of the insurance."

Remmellein presented it this way (27, p. 197):

"Since one of the reasons advanced for justification of governmental immunity is that tax moneys should not be used to pay damages, many school boards carry liability insurance. When liability insurance is
carried, the damages, if judgment is obtained, are not paid out of school money. However, tax money is used to pay the insurance premiums and courts traditionally have held that a school district has no legal power to carry liability insurance unless the state legislature has authorized it. If the function is governmental, there is no liability to insure. This argument is rarely advanced today when carrying insurance is so prevalent in all phases of our life."

A Kentucky court has said that, "A statute giving a school district provision to carry liability insurance to cover torts...in no way makes the district itself liable for such torts" (95).

Despite this fact there are some exceptions to this rule. *American Law Reports* had this to say about removal of immunity to the extent of the coverage (2, p. 1437):

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

Tennessee and Kentucky are two states which have pioneered in this new legal area. Illinois allowed recovery at one time under insurance but has since changed to the extent of the policy. At the time of this writing the picture in Indiana appeared to allow recovery.

It is apparent that a few states have taken this route as a means of alleviating some of the injustices of immunity
without violations of the trust funds or public money. It is a safe middle of the road technique which has had some limited application.

Nuisances

A third classification of judicial exception to the doctrine of nonliability in tort through the years has been made by some courts in cases involving nuisance. There is no simple definition of nuisance, but Reutter said (84, p. 30), "Basically it is an intentional or negligent interference with the interest of an individual in the use or enjoyment of land."

Reutter implemented this definition by explaining that under the nuisance theory school boards have been held liable in some states in such situations as the following: snow falling from the roof of a school building onto adjoining land, balls being hit from a school playground onto adjoining property which was damaged by the balls and the pupils retrieving them, and the placement of a septic tank on school property with the result that the spring of a home adjoining the school was ruined due to pollution from the septic tank (84, p. 30).

Remmelein wrote (27, p. 196):
"Maintenance of a nuisance is another theory on which the courts have hung liability of school districts. For each such case, however, there are more wherein this pleading has not been accepted by the courts. A nuisance at law is a thing of rather narrow meaning. When the injury is to property, the injured are likely to be neighbors of the school and nuisance is not a general nuisance but merely a private inconvenience. When injury is to the person, the hazardous condition causing the injury is usually a part of the operation of the school and as such constitutes a governmental function for which the general rule of immunity applies."

In the Wisconsin case, mentioned in the "safe place" section, in which a flag pole fell and injured a child, the school district was held liable for maintaining a nuisance.

In Michigan in 1964 (72) the Supreme Court of Michigan considered whether a district is liable despite the immunity rule. The allegations were that a Mrs. Pound had been injured by falling on ice which had accumulated on a public sidewalk adjoining the school building. Water from the roof of the school building was drained through a downspout onto a cement culvert, which discharged the water onto and across the sidewalk. As a result the sidewalk became coated with ice. The trial court had dismissed all this on the familiar ground that the district was entitled to interpose the defense of governmental immunity. The trial court "reluctantly concluded" that upon the facts alleged the district could escape liability.
The Supreme Court cited one of its cases in 1899 where the school district had been held liable for nuisance. In the court's opinion, the allegations of the plaintiff's here were sufficiently similar to those in the 1899 case to meet that case's criterion of "a direct injury to the person of the plaintiff while outside the limits of the defendant's premises." They were, therefore, sufficient to state a cause of action to which the defense of governmental immunity may not be interposed. It follows that the case was remanded to the lower court to be tried on the alleged facts.

Hamilton and Mort concluded on the theory of nuisance by stating (32, p. 283):

"Although there are a number of cases in which recovery has been sought on the ground that a nuisance has been maintained, the fact that relatively few have permitted recovery on that theory demonstrates the indisposition of courts to subsume the facts under the exception."

**Proprietary function**

A fourth judicial exception to the doctrine is comprised of cases involving proprietary functions as distinguished from governmental functions. According to Nolte and Linn the distinction must be found in the factual situation, and it is no simple matter in each case to determine whether the board has engaged in governmental (educational) function or proprie-
tary (non-educational) function (69, p. 243). Remmelein stated (27, p. 196):

"Strict courts will say, however, that school districts have no power to operate a proprietary function; their only power is to operate the schools, and all parts of the school program are applications of the governmental function of education. Less strict courts have held that injuries resulting from the operation of a function for which the school district obtains funds on a fee basis impose liability on the school district because it is operating a proprietary function. Most courts have declared that merely collecting admission fees to a school function or charging rent for the use of a school auditorium or stadium does not put the school district into a proprietary business."

A school district which operated a swimming pool as a summer recreational program was held liable when a boy drowned (59). The Pennsylvania Supreme Court reversed a lower court and held that this was a proprietary function. However, the court held that a football game was an educational activity and therefore a governmental function (52). Also, the Pennsylvania Supreme Court held that a school district was not liable for negligence in performing the governmental function of maintaining the school grounds and fences.

A case heard in Arizona held the school district liable for a proprietary function (94). The Arizona Supreme Court reversed the lower court which had upheld immunity. The defendant had leased the football stadium to another school and received a fee of $300. A paying spectator fell because
of a faulty handrail. The court ruled that the school district had leased and received compensation and was therefore engaged in a proprietary function and liable.

One of the most recent cases on proprietary functions was heard by the Superior Court in Delaware in 1963 (90). According to the law of Delaware, school boards shall allow free use of school buildings for various public meetings and functions.

Persuant to this law, a local board leased a school auditorium to an amateur theatrical group. Mr. Solvin, a member of the group, alleged that the steps leading from the stage to a lower level hallway gave way and seriously injured him. He sued the board, the superintendent of schools, and the industrial arts teacher in whose class the steps were constructed. It was alleged that the teacher "gave" the group a set of steps to be placed for the convenience of the players. The steps were movable in the sense that they were not a permanent part of the building.

The district asserted certain defenses, among them immunity from liability under the doctrine of sovereign immunity, and argued that the relationship between it and the injured person was that of a landlord and tenant. Mr. Solvin took the premises as he found them, the board declared.
The board was held not liable on the ground that Mr. Solvin was no more than a licensee in his use of the building since he used it for his own personal benefit. He was not an invitee of the district, in which case it might have been possible to make a good case against the district. Since he was a licensee, he took the premises as he found them, and there was no evidence that there was a willful disposition by the board to injure or trap him. Of course, there is a duty not to do so even in the case of mere licensee. The board escaped liability on the ground that it owed no responsibility to the injured person to provide a safe place for theatrical activities.

The superintendent was also absolved from liability. It was shown that he was not at the school the night the injury occurred. The mere fact that he was superintendent was not sufficient to place liability upon him under the circumstances shown here. He was at best an agent of the board in leasing the building and if no liability existed as to the board, none could be placed upon the superintendent.

The industrial arts teacher also escaped liability. It was shown that all he did was "make available" the steps for the use of the players. He did not assume, and was not charged with, the responsibility of securing the steps in place. If
there was any responsibility in this regard it rested upon
the theatrical group of which Mr. Solvin was a member. The
court said that it found it difficult to understand why the
director of the play "was not intelligent enough to see to
it that the steps were made secure."

The amount of litigation based upon this count has been
small in comparison to the total picture of tort liability.
Within any one given jurisdiction, prudence would indicate
the need for ascertaining if this division was attempted.

Recent Attacks on the Doctrine

The Molitor decision in Illinois again illustrates the
fact that the law is not static and that the courts take
cognizance of changing social conditions.

As was stated in the introductory chapter and quoted
from Garber (26, p. 72), "...this case is particularly sig-
nificant because it is likely to encourage other courts to
take similar action. As a result, school administrators
should be aware of the fact that change is in the wind."

Recent changes and attacks in Minnesota, Michigan,
Wisconsin, Colorado, and Arizona have been cited previously.
In addition to these, the doctrine has been attacked during
the years of 1963 and 1964 in Colorado, Alabama, Utah,
Kansas, and Iowa. The writer will make mention of each of these attacks, except those involving Iowa which will be included in Chapter IV.

In 1963 the members of the Supreme Court of Colorado found themselves in violent disagreement as to what the state's law should be on tort liability of school districts (95).

Action was brought to recover damages in tort injuries sustained by a boy while practicing basketball. The suit was unsuccessful in the lower court under what that court found to be the settled pronouncements of the Supreme Court of Colorado. It was admitted on behalf of the injured boy that the doctrine of governmental immunity from liability in tort applied to school districts in the state. However, it was urged that these cases be overruled and that the law be changed as it had been in a number of states.

The court declined to abrogate the rule. In terse opinion, the majority of the court adhered to its former decisions on the ground that it was not within the provision of the judicial branch of the government to change long-established principles of law. This, the court said, is a legislative function.
Justice Moore wrote on a separate opinion especially concurring with the holding of the majority. He "respectively submitted" that there comes a time when the minority should recognize that an issue of law has been decided in Colorado, and the rule of stare decisis is applicable to a given situation. He recognized that under certain circumstance the doctrine should not be followed, but he was convinced that this was not true of the case in question. He felt that the court was here limited by both law and conscience to the judicial function of faithfully interpreting and applying the law as the court found it. It could not, according to him, "usurp the legislative powers of establishing public policy." He did not mention the fact that the doctrine was created by the courts and not by the legislature.

Justice Moore emphasized that there had been several sessions of the legislature since the minority members of the court "opened war on the doctrine of governmental immunity." He apparently thought that the legislature must have known of this "war" and by failing to take any part in it must have intended that the rule remain in effect.

Chief Justice Frantz, writing for the three dissenting members, made the point that the common law of America is evolutionary. It was his opinion that the courts have a duty
to keep the common law abreast of changes wrought by time. Courts should not be so averse to molding common law principles to meet the dictates of experience and observation. The Justice pointed out that in a number of cases the court had expressed dissatisfaction with the immunity rule. In his opinion, where once the doctrine had smooth sailing, it is now rocking along troubled waters. It will be indeed interesting to observe developments in this area in Colorado as the personnel of the court changes.

In Alabama, as in other states generally, a city may be held liable to an individual who suffers injury due to failure of the city to keep its streets safe and in good repair. At the same time, Alabama adheres to the doctrine of immunity from tort liability of school districts.

In 1963 the Supreme Court of that state decided on a case in which the City of Bessemer was sued for damages sustained by a boy when his motor scooter collided with a chain stretched across a driveway in front of a school in that city (15). The pivotal question was whether the driveway upon which the injury occurred was a public street. If so, a suit against the city would be admissible.

The driveway went through property owned by the City Board of Education, which had paved the road. The chains,
one at each end of the entrance, had been placed there by school authorities. The plaintiff contended that the Board dedicated the area for the use as a public street, or permitted it to be used for that purpose. Also, he contended that the city, by certain acts of traffic control, had accepted the dedication and thereby had subjected itself to liability for the injury. This contention was designed to show that the driveway was in fact a city street and that the city was legally bound to keep it safe.

The suit against the city was unsuccessful. In the court's opinion, the school board had no legal authority to dedicate for use as a public street or highway any portion of its real properties held in trust for school purposes. The pertinent statutes provided, in effect, that all real and personal property, acquired for school purposes be held in trust by the City Board of Education for the use of the public schools of the city. It followed that the plaintiff was not injured on a public street or highway. The court made it clear that the Board had the authority to establish and improve the driveway for the convenience of the school patrons and the children using them for school purposes. Such improvement did not free the area for general use by the public as a public street.
Utah is another state that has upheld the doctrine of immunity for school districts. This doctrine in Utah has been frequently and vigorously attacked but the Supreme Court of Utah has steadfastly refused to abrogate or modify it.

The latest decision in Utah on the subject was in 1964 (12). A boy, fourteen years old, sued to recover for injury impairing the sight of his eye caused by a metal particle thrown by a machine during a shop class in his school. The trial court dismissed the action on the grounds that the district was protected by the immunity doctrine. It was admitted on behalf of the boy that the dismissal was supported by the prior decisions of the court, and that the school districts of Utah are instrumentalities of the state and acting in its behalf in educating children. As such instrumentalities, the districts partake of the sovereign immunity of the state.

In what the court described as an "all and persuasive brief" counsel for the boy sought to persuade the court to change the rule. Decisions from other states showing the trend in law in the area was cited to the court. Among the cases referred to was the Arizona Highway case that was cited earlier, where the Arizona Supreme Court abrogated the doctrine.
Despite these decisions, the court indicated its belief that if there is to be a change which would have such an important effect upon public institutions and their operations, it should be left entirely to the legislature to determine. It followed that the immunity doctrine was sustained and the injured boy was not allowed to recover.

When the immunity doctrine prevailed in the majority of the states, numerous attempts were made on behalf of injured persons to bring cases under some exception of the rule. It will be remembered that the usual exceptions have been in the cases in which the board maintained nuisance or engaged in a proprietary function.

In 1964 the doctrine was attacked in Kansas on what is believed to be novel grounds (44). In this case, a fourteen year old boy, who had returned to school after the noon recess, had to wait outside the school building until 1:00 p.m., at which time classes were to resume. During the waiting period the boy was struck in the head when a fellow student picked up another student under the arms and swung him into the air. The injured boy, who was sitting on the ground, was knocked senseless, and the blow severely damaged his brain. As a result he suffered loss of speech and became a paraplegic.
Kansas law provided that district superintendents or principals shall have charge and control of the schools, subject to the rules and orders of the school board, which shall exercise general management over district affairs.

It was argued on the boy's behalf that the school board failed to comply with its statutory duty to take charge and control the student body, and to provide the plaintiff in this case with a healthful place to receive instruction.

The Kansas Supreme Court held that the statute referred to did not impose tort liability on the board. The court quoted and adhered to the rule that a school board is not liable for the consequences of a breach of public duty or for the neglect or wrong of its officers, unless there is a statute expressly imposing such liability. The statute in question did not have this effect.

Kansas has the so-called "mob statute." It was contended on the boy's behalf that a group of unsupervised students constituted a mob. The court rejected this, pointing out that the legislature had limited the statute's application to incorporated cities and towns, and that it could not be extended to include school boards.

For reasons which did not appear in the decision, the boy did not attempt to recover against the individual members
of the board or the school principal.

Summary

It was the prime purpose of this chapter to analyze the means and rationals of the movement toward relaxation of the immunity principle. The source of this movement comes from either the judicial or legislative authority. The greatest abrogation of immunity has been in the fields of school transportation and workmen's compensation. These two areas have received much attention from the judicial and legislative authorities. Workmen's compensation is a separate field and not a part of this study. Injuries to pupils provided the major source of litigation in cases charging the school district with negligence.

California, Illinois, and New York were the leading states in the modification of school districts' immunity for tort liability based upon a charge of negligence. Other means of recovery, usually quite limited and specialized, may be found in other states and in other jurisdictions.

The state of New York, while not the first state to move toward abrogation, was a leader in the field of modification. The New York courts have clearly indicated that all of the essential elements of a negligence claim must be present. The
school was not the insurer of the welfare of the child and was bound only to use only ordinary care. There existed a duty to maintain buildings, grounds, and equipment in a reasonably safe condition, and failure to do so was negligence. New York statutes imposed a duty upon the district to supervise its students. The failure to do so has been held actionable negligence. The adequacy of the supervision was a relative question and was usually a point of fact to be determined by a jury. Under permissive statute, the school districts may carry liability insurance or act as self-insurers. The matter of insurance has had little effect upon the tort liability of the school district.

California, a comparative late-comer to the field of modifications, was the first state to pass express statutes for the purpose of abrogation. California has maintained such a position up to the present. California and New York vied for the number of suits brought against the school districts. School districts were required to carry liability insurance; cities, over 500,000, may act as self-insurers.

Washington enacted its first abrogation statute in 1869. Following a rush of cases, the legislature in 1917 passed an act which permitted liability but excluded actions stemming from playgrounds, gymnastics, athletics or industrial arts.
Since this enactment the courts have allowed suits against the school districts for injuries occurring in ways other than the statutory exclusions.

In Illinois in 1959 the Supreme Court abrogated the doctrine of immunity. Immediately following this decision, legislation was enacted abrogating the immunity doctrine but limiting the amount of recovery and a deadline for filing such claims. Despite the furor caused by this decision, the appellate court has ruled that as of now basis for negligence has been created and that it was still necessary to show the essential elements of a negligence claim.

The Supreme Court of Minnesota abrogated the doctrine as of 1963 but the Minnesota Legislature immediately re-instated the doctrine of immunity and this is the only known state in which this has happened.

Arizona is the most recent state to have the doctrine abrogated by the courts. However, it is too early to ascertain what will happen in this state.

In certain states and in certain specific restricted areas, the school district may be held liable for tort negligence. While the school may be held liable for this specific charge, the general concept of immunity still prevails.

One of these areas was the so-called "safe place"
statutes. Two states, Colorado and Wisconsin, have enacted statutes which impose a liability upon the school district to build and maintain its buildings and/or equipment so as to render them safe for general use. Generally, the courts interpreted these statutes very strictly and recovery was limited.

Four states, Connecticut, New Jersey, New York, and Wyoming have passed "save harmless" legislation. These acts, which cause the board of education to assume the liability of school employees acting within the scope of their duties, may or may not make the board of education liable in tort negligence. Connecticut courts have interpreted this statute as one of indemnification from loss, not from liability. In other words, a judgment must first be secured against the employee. In New Jersey the court has said that this act did not create a liability upon the part of the district, and the school district was held immune from suit. The statute of Wyoming contained within itself a statement to the effect that no new liability had been created.

In a few jurisdictions the courts have attempted to classify the functions of the school as either governmental or proprietary. If the function was held to be proprietary, liability may attach. Such distinction is hard to make;
therefore, it is infrequently done.

Many school districts carry liability insurance with or without statutory authorization. The carrying of insurance would seem to void one of the reasons for immunity, the protection of public funds. The bulk of the states did not allow recovery even when the district was fully insured; however, several states have departed from this concept. Kentucky and Tennessee have done so.

Recapitulating in brief the status of tort liability of school districts in the United States, there has been a slight movement away from the traditional immunity. Three states have been the leaders in complete abrogation: California, Illinois, and New York. Other states have developed specialized laws granting recovery in limited areas. Kentucky, Tennessee, and Oregon allow recovery to the amount of liability insurance carried. School districts in the state of Washington were liable except for injuries occurring in certain specified locations. A few states attempted the division of the school's functions into governmental and proprietary categories.

The overwhelming preponderance of cases reported in this review indicates that the trend toward the modification of immunity will continue to grow in strength.
CHAPTER III

METHODS AND PROCEDURES

This chapter deals with the methodology employed for the legal research used in this study and the use of legal research tools. A short description has been given of each of these tools. Legal research is subject to the same general requirements as are other forms of research. In nature, it most closely resembles bibliographic research. The task has been to find and summarize pertinent statutes, to trace legal developments through related court decisions, and finally to analyze the decisions in light of the problem being investigated. The last step was the writing of the report which must convey legal information to educators and laymen who are not themselves legally trained.

General Methods

(1) A careful and extensive search was made for all cases in point which have been decided by the Supreme Court of Iowa. These were identified through the examination of the pertinent case listings in the "School and School Districts" section of the American Digest System. This Digest System is a series of digests or cases from 1958 to date. There are eight units
Cases in each of these digests are arranged in the same order according to subject matter. "Schools and School Districts" is in its alphabetical setting. Within each topic the subject matter is logically outlined and each item in the outline is given a number (this number is) called the key number. As an illustration of the detail used in the classification of a case for the American Digest System, the outline of topics on "Schools and School Districts" is shown below in part. The arabic number in front of each sub-topic is its key number.

II. Public Schools (9-178)
   F. Claims Against District, and Actions (112-126)
   G. Teachers (127-147)
      147, Duties and Liabilities

Thus, according to Remmellein (75, p. 341):

"The American Digest System constitutes a device for finding all cases on a point among the thousands of cases reported each year. The System consists of short digests of each case arranged in the order of the outlined topics."

In any digest under "Schools and School Districts", the number of the sub-topic in the outline is identified by a tiny key in front of it, and "for this reason it is referred to as the key number" (75, p. 341). At the beginning of each digest is the name of the state in bold face type; at the end
of each digest is the citation of the case, its name, and where to find it.

The American Digest System includes a "Table of Cases" which gives for each case the exact title, alphabetically listed, and all of the places where it may be found to be read, also the topic and key numbers of every point of law decided in each case and whether it had been affirmed, reversed, or modified. From the "Table of Cases" then, the key numbers of a familiar case may be noted, and other cases can be found in the digest by looking for those identified by the same key numbers.

According to Remmelein (81, p. 13):

"From the American Digest System one compiles a bibliography of cases for further study. The digests in the American Digest System aid in determining whether a particular case is likely to be in point; they may be followed in the research study. But, this is just the first step in making a legal study. The digests are only these short paragraphs on each point in the case....In order to know their application, it is necessary to read the entire opinion of the court in the reports. The holding of the case cannot be cited on the basis of the digests alone. Doing so is an error of many inexperienced school-law researchers. The opinion must be read in its entirety."

(2) Pertinent cases found in the Digest were read as they appeared in the volumes of the National Reporter System; the state reports were consulted only when a case did not appear
in a regional reporter. The National Reporter System includes all cases from all courts of record in all states and gives the actual opinions of the court in each. Remmelein said, "Using the National Reporter System, it is possible to read all the cases in all states on a particular point". The system is divided into nine geographical sections, for publication and citation purposes. An example is listed below:

The Northwestern Reporter, abbreviated "N.W." or "N.W. (2d)" covers Michigan, Wisconsin, Iowa, Minnesota, North Dakota, South Dakota, and Nebraska.

The National Reporter System also includes the Supreme Court Reporter covering cases decided by the Supreme Court of the United States.

Briefs which include the pertinent facts, the statement of the question before the courts, and the rational of the decisions, were made as each case was read. Extensive quotations were made of any statute construed to effect the court's determination of a question.

(3) American Law Reports and American Jurisprudence were consulted for the purpose of finding additional cases in point:

The American Law Reports, abbreviated A. L. R., began in 1919, and about six volumes appear each year. Alphabetical
indexes are furnished as well as indexes to cases and annotations. Remmelein writes on the values of this series, "This series is used primarily for annotation, although it can be used for reading of the opinion also" (81, p. 13). The annotations review the substance of what has been decided in other cases on the same point.

The section used for this part in the A. L. R. Annotations was Section IV, "Liability of School District or Authorities".

Annotations are extremely useful in obtaining a general understanding of a point, or in gathering loose ends of a topic after having read many, and possibly conflicting, cases.

Whenever a new decision warrants it, an annotation is published to bring the entire topic up to date. For example, an annotation may be cited as 146 A. L. R. 625, and then at the end of the annotation a remark would be made to this effect--"this annotation supplements those in 63 A. L. R. 413 and 118 A. L. R. 806". This means that the previous annotation was 118 A. L. R. 806, and, before that, 63 A. L. R. 413. Thus by tracing back the several annotations on a topic it is possible to study the history of the problem over the years. The same outline is used in each annotation on a particular subject, but "information found in one annotation is not
repeated in a subsequent one" (81, p. 13).

*American Jurisprudence* which is encyclopedic in format, includes textual material with footnotes giving citations to cases illustrating the settlement of principles in the text. The section of interest to this paper was Section V., "Tort Liability".

Remmelein has this to say about *American Jurisprudence* for use as a legal research tool for school-law problems (75, p. 347):

"...for the purpose of research in school-law problems, may be quite adequate coverage....*American Jurisprudence* is sufficient for most research in school law by school administrators, teachers or others who are not concerned with technical niceties and distinctions of interest to lawyers."

Point of issue was studied in the *Iowa Law Review*. This *Review* is a review of all Iowa cases and the issues of each case written by Law Schools for use in instruction and reference for practicing lawyers.

(4) The judicial history of all cases used in this study was verified by the use of *Shepard's Citators*. To find out what has happened to a statute since the date of the official state code publication, one must turn to *Shepard's Citation to Statutes*. To find cases more recent than those included in the annotated statutes, or those for any reason omitted
from the annotations, if any, or in a state where the code is annotated, the same citator is used.

Remmelein explains why the Citators are used (75, p. 356):

"By using Shepard's Citators one may discover every instance where any particular section of any law has been affected by subsequent legislation and every instance where it has been cited, applied, or construed by the courts."

The method used in these Citators is merely the listing of the section number of the statutes with reference to the later enactments and court decisions, each preceded by an abbreviation which tells the story of what happened in each instance. These abbreviations cover many situations; an example would be: A (amended) means that the statute was amended, U (unconstitutional) means that the court has declared the statute unconstitutional, and V (void or valid) means that the court has declared the statute invalid.

In addition to showing what has happened to each section of the statutes by subsequent legislatures, the Citators show where each section has been cited by a court; unless there is a symbol in front of these references to cases, it means merely that the court referred to that section. (5) Finally, in the absence of court cases, Attorney General Opinions were studied and used where appropriate.
In general it can be said that the procedure proposed in this study was the typical system used in legal research (81, p. 1-25). The *Citator* method of legal research was utilized by tracing through appropriate Shephard publication citations to the cases and statutes which cite or construe the manner of liability of school districts. After compiling a bibliography of cases and statutes from the search of books and other references as given above, note cards were prepared for each case and each statute. Each case and each statute was then carefully read and a brief prepared. The cases were read as they were found in the *National Reporter System* or the reports of various states. Accepted law research demands that each brief contain the citation, the date of the case, the court hearing the case, and who the plaintiff and defendant were. If the case was being appealed, the brief indexes include the court it originated from, the facts of the case, the congruity or discongruity with past decisions, and the dissenting opinion and other related data. A former Iowa Assistant Attorney General, currently chairman of a national committee for municipal tort liability, served as legal consultant.
Procedural Steps

The method used in this research was primarily a documentary one. It is part of a more general pattern for the criteria of historical research (61, p. 226). The procedure attacking this problem involved three steps:

1. Collection of data to determine patterns existing in the United States and in the state of Iowa. This was accomplished by the following:
   A. Collecting recent court cases in Iowa and other states and Attorney General Opinions in Iowa that pertain to the problem.
   B. Collecting all statutory enactments in other states pertaining to school liability for bodily injury.
   C. Examining textbooks, current literature, and other publications which refer to bodily injury cases of school liability by title.
   D. Examining statements from legal counsels of selected states pertaining to patterns of liability for municipal corporations.

2. Analysis of the data for determining whether there was a pattern toward eliminating immunity for school districts for liability responsibility. This was accomplished by the following:
   A. Investigating court records of cases that had been adjudicated and that referred to liability of public school districts and municipal corporations.
   B. Studying the statutory enactments of various states pertaining to school district liability.
   C. Reviewing current literature, textbooks, and
other publications which refer to school district liability by title.

D. Examining statements of legal counsels from selected states to secure the current thinking of this judicial group about liability for school districts.

3. Interpreting the data, drawing conclusions, making recommendations, and itemizing the implications for Iowa public schools, Iowa teacher preparation institutions, and Iowa taxpayers. (The following steps were followed in this process.)

A. Each case was identified as to principles or issue it illustrated.

B. The resulting principle and issue were assembled and studied, and those similar were grouped together.

C. The data were organized and tabulated, then presented to a legal counsel to see if legal patterns deviated from immunity.

D. Conclusions were drawn, implications for Iowa public schools, teacher preparation institutions, and Iowa taxpayers were identified, and recommendations for the Iowa legislature on school liability were made.

The findings of this study depend for their validity on the legal principle of stare decisis. This term is derived from the legal maxim stare decisis et non quieta movere; freely interpreted, it means "to adhere to precedent and not unsettle things which are settled". The principle requires that a court decision on a question of law arising in a case and necessary to its determination be regarded as a binding
precedent in the same courts or courts of lower rank within the jurisdiction in subsequent cases where the point is again presented.

There would be no basis for this study if the courts followed the principle strictly. The courts can and do modify this prior ruling when conditions warrant. Since this study is based on court decisions, its findings will reflect such modifications.
CHAPTER IV

FINDINGS--LIABILITY IN THE STATE OF IOWA

As of 1964 school districts in the state of Iowa still enjoy immunity from tort liability. It was during this year that the leading Boyer case was heard by the Supreme Court of the State of Iowa. The court ruled, in a five-to-four decision, that it should not overturn the doctrine of governmental immunity. It was the majority opinion that abolition of the immunity doctrine was a matter for legislative, rather than judicial, action.

However, with the opinion in the Boyer case was a warning to give consideration to the vigorous dissenting opinion as being indicative of the trend toward improvement of the harshness of governmental immunity. The feeling prevails that it is probable in some future case that the doctrine of governmental immunity will not be upheld.

Immunity was overruled in some non-school cases. This trend in Iowa toward greater liability was shown by recent Supreme Court decisions handed down against local units of government. It should be noted that a fundamental difference exists between school districts as quasi-corporations and municipal corporations proper. Municipalities are not
agents of the state except when utilized by the state for the performance of governmental functions.

In the 1963 case of Moore v. Murphy, three of the justices of the Iowa Supreme Court, in a concurring opinion, stated that although the doctrine of local governmental immunity had not been directly an issue before them in the case, they were serving notice that they contemplated abolishing it at the first opportunity.

This, of course, amounted to a courteous warning that the culmination of the trend manifested by the expansion of the "street defect" exception, the "nuisance" cases, and the "proprietary function" cases would mean the virtual abolition of the defense of contributory negligence.

In a short period of time the concept of immunity in the state of Iowa has undergone a series of developmental changes. In short, it has traversed the continuum from immunity to almost non-immunity.

In this chapter the historical development of liability in Iowa was studied by case law and Attorney Generals' Opinions. Each leading case was briefed as to the facts of the case, the issue at hand, the ruling of the Court, and the reasons for the ruling.

The first section will begin with the earliest cases and
build up to the doctrine in the broadest form on the Hibbs case. The second section will begin with the gradual erosion of the doctrine of immunity and the various doctrines that the Court has used to get around the legal principle to get a social principle that "good equity makes bad law". The exceptions occur where the Court has used the proprietary function rather than the governmental function, and nuisance rather than negligence. The final section indicates the culmination where the vestiges of the immunity doctrine appear rather small.

Early Cases

As was stated in an earlier chapter, the doctrine of "the King can do no wrong" was first applied to a subdivision of the state in Russell v. Men of Devon. In Iowa this was first applied to a school district in 1876, when it was held that a school district was not liable for injuries received by a child while playing about unguarded well-drilling equipment on the school ground (99).

WOOD V. THE INDEPENDENT SCHOOL DISTRICT OF MITCHELL. 44 IOWA 27, 1876.

FACTS: A party who had contracted with a school district to drill a well on the school grounds left his drilling machine unlocked and unguarded. In his absence a nine-year old boy, playing with other children on the school grounds during the
noon hour, caught his foot in the drilling rig and crushed it.

ISSUES: Was the district liable for acts of its servants and agents and was there a nuisance maintained by the district when it allowed the machinery to remain on school property?

HELD: Affirmed the verdict of the lower court because the danger arose not from the character of the work but from the machinery used and accordingly that the district was not liable for the negligence of its contractors. That machinery, although it may be dangerous if interfered with and left unguarded, was not a nuisance when properly stationed for a legitimate purpose.

REASON: If there was any liability in this case resting upon the district, it existed outside of the fact of the employment of the contractor to drill the well. The contractor was not agent for the district. Then, if the district was liable it must be upon some other grounds than its relation to the contractor, whose alleged negligence caused the injury.

The court was not prepared to hold that every person having upon his premises machinery, tools, or implements which would be dangerous playthings for children, and in their nature affording special temptations to children to play with them, was under any obligation to guard them in order to protect himself from liability for injuries to children received while playing with them, although the children were rightfully on the premises.

In 1880 this precedent of immunity was extended in a case holding counties not liable for injuries received in poorly lighted hallways (42).

KINCAID V. HARDIN COUNTY. 53 IOWA 430, 1880.

FACTS: The plaintiff was attending as a witness in a night session of the District Court held in the Hardin County Courthouse. The said courtroom was accessible only by a narrow stairway, which at night was extremely dangerous and unsafe to traverse, unless lighted by lamp or other artificial light, as the defendant well knew. The plaintiff sued
the county for $10,000 damages when he fell on the unlighted stairway.

ISSUES: Was a county liable in damages to a person injured by reason of negligent construction of a courthouse, and because of negligence in not lighting an unguarded and dangerous stairway leading to a courtroom?

HELD: Affirmed the verdict of the lower court and held that the county as a quasi-corporation cannot be held liable in damages for a personal injury sustained by reason of the defective construction of its courthouse, and the negligence of the county in failing to keep it properly lighted at night.

REASON: Counties, towns, school districts and the like are quasi-corporations, and as a result, are not liable for damages in actions of this character because they are involuntary territorial and political divisions of the state, created for governmental purposes, and that they give no assent to their creation, whereas municipal corporations proper are either specially chartered, or voluntarily organized under general acts of the legislature.

Thus, in 1880, the courts clearly defined the status of the school districts in Iowa as to their governmental stature and immunity.

Two years later, 1882, a school district was held not liable for personal injuries sustained on account of the negligent construction of its school building, or for negligence in failing to keep it in repair (45).

LANE V. THE DISTRICT TOWNSHIP OF WOODBURY. 58 IOWA 462, 1882.

FACTS: This was an action of law to recover for personal injuries sustained by the plaintiff, an infant, who was struck by lightning while in attendance at the public school. The plaintiff's petition was in two counts. The first alleged negligence of the school district in permitting the lightning
rods on the school building to become broken and out of repair, thereby causing the lightning to strike the building and inflict injury upon the infant. The second charged negligence on the part of the school district in that it failed to provide protection from lightning and therefore the infant was injured.

ISSUES: Was a school district liable for personal injuries sustained on account of the negligent construction of its schoolhouse, or negligence in failing to keep it in repair?

HELD: Reversed the judgment of the lower court in an order overruling a demurrer to the petition.

REASON: A school district was a public corporation, or a quasi-corporation, created by statute for the purpose of executing the general laws and policy of the state, which requires the education of all its youth. It was a branch of State government, an instrument for the administration of the laws, and was, so far as the people concerned, an involuntary organization. The education of the youth was the only purpose of the corporate school district. The powers were restricted to the execution of this purpose. There was no difference from the fact that the school district was far more limited in its functions and powers than a county.

The court proceeded to cite the ruling of the Kincaid case in defense of its position. Thus, the position of the school district in Iowa was defined by the Supreme Court of Iowa in 1882.

The Attorney General, in a 1912 opinion, ruled that a school district was not liable for injuries resulting from an explosion of a boiler in a school building (76).

ATTORNEY GENERAL'S OPINION, 1911.

FACTS: An individual was injured by an explosion of a steam boiler, connected with a school corporation's heating plant. This opinion was given at the request of the State Superin-
tendent of Public Instruction.

ISSUE: Was a school corporation liable for injuries to an individual caused by the explosion of a steam boiler?

ANSWER: No, a school corporation was not liable for injuries caused by the explosion of a steam boiler connected with its heating unit.

REASONS: A school corporation was a public corporation created by statute for the purpose of executing the general laws and policy of the state, which require the education of all its youth. It was well-established that when subdivisions of the state were organized solely for a public purpose, by general law, no action lies against them for injury received by an individual on account of defective facilities, nor for the negligence of its officers of such sub-divisions unless a right was expressly given by statute. In Iowa there was no statute giving this right.

In 1927 the opinion by the Attorney General ruled that school districts were not liable for injuries received by pupils engaging in school athletics programs (77).

FACTS: School undoubtedly failed to provide a mat for pupils while boxing in school.

ISSUES: (1) Was there a law concerning the use of a mat while boxing in school? (2) Could the school board be held liable for an injury to a pupil while in school? (3) Could the school board be sued, and if so, in what court? (4) Did the school board have a legal right to settle a claim for injury to a pupil while in school? (5) In case of neglect on the part of the coach or superintendent, could they be held liable?

HELD: No.

REASONS: (1) There was no statute requiring the use of mats. (2) The general doctrine was that a school corporation was not liable for non-contractual injuries. (3) A school was a corporation and could be sued in any court just the same as any individual.
(4) The school board was under no legal obligation to pay, but could make a legally reasonable settlement.

(5) A teacher, coach, or superintendent could be held liable to a student injured as to "direct" consequence of such instructor's negligence.

A 1930 opinion extended the immunity to cover injuries to visitors on school premises (78).

ATTORNEY GENERAL'S OPINION, 1930.

FACTS: Members of a school board rented school buildings to an individual and while being used for rented purposes, an individual was injured. This request for an opinion was for the Board of Education at Sioux City.

ISSUES: (1) Could an elector enjoin the directors from renting school facilities? (2) Was the school district or individual members of the school board liable for injuries sustained to individual or organization?

HELD: (1) Yes (2) No.

REASONS: (1) As provided by the statutes, the electors could or could not grant the directors the power to rent the school facilities. Since the power was vested in the electors, any elector or taxpayer could enjoin the directors from exercising this power.

(2) Neither the school board nor the school district was liable for resulting injuries from renting the school facilities, whether the authority had been granted by the electors or not.

The leading Iowa case on immunity for cities and towns was decided in 1931 (91). The ultimate facts relating to the injury were, in substance, that the city had established and, maintained through the park board a certain public square or commons, known as the city park. Within the confines of the
city park there had also been established and maintained a tourist camping ground. As part of the equipment of the park, there had been installed a combined teeter-totter and merry-go-round.

SMITH v. CITY OF IOWA CITY. 213 IOWA 391, 1931.

FACTS: On or about September 3, 1929, Geraldine Smith, a minor child of about nine years of age, went from the camp grounds to the park, and while engaged in playing with the teeter-totter was severely injured. Action was brought to recover damages on account thereof.

ISSUES: (1) Was the teeter-totter an attractive nuisance? (2) Was the park board maintaining a nuisance? (3) Can a municipality in the exercise of a purely governmental function be liable for negligence?

HELD: Affirmed the decision of the lower court. Ruled that a combined teeter-totter and merry-go-round erected and maintained in a city park by the city through its park board, for the sole purpose of amusing children, could not be deemed an attractive nuisance, even though the said instrument was not kept in repair.

That a city in exercising its governmental power through a park board to acquire and maintain public parks was not liable in damages consequent on the negligent failure to keep the instrumentalities in said parks in repair; nor were the members of the park board individually liable for such nonfeasance on their part.

REASON: The purpose of the establishment and maintenance of the park and of the particular, and perhaps other, devices therein was the use and pleasure of children. Such was the only purpose for which the device complained of was installed. It was in its nature and purpose designed to be attractive to children. It, therefore, very clearly did not come within the definition of nuisance.

The teeter-totter was in no sense, offensive or dangerous to the public. It affected neither the comfort, morals nor
health thereof. It was not an annoyance to anyone and in no way operated to disturb, inconvenience or injure the public. It did not, therefore, come within the common-law definition of a nuisance nor did it come within the statutory classification thereof.

The construction and maintenance of a public park by a municipality has been repeatedly held in this state to be a purely governmental function. The rule long established in this state is that a municipality in the exercise of its purely governmental function, was not liable for negligence.

It is interesting to note that the court specifically defines that with attractive nuisance charges there must be trespass, and that the history of the court shows it has always been reluctant to extend the doctrine of attractive nuisance.

Yet, the court acknowledged that the instrument was in poor condition and in need of repair but refused to consider negligence.

It should be remembered that in Chapter II the nuisance theory was explained and various definitions given by various authors. Also, given was the reasoning the courts have used when nuisance has been the charge. It should be noted that the court went into great detail trying to defend their stand in finding the city of Iowa City not guilty of the charge brought against them. Hamilton and Mort substantiate the position that the court held when they state (32, p. 283):

"Some courts refuse to recognize a distinction between
torts committed through the maintenance of a nuisance and other torts, and deny recovery against the district in tort cases. The refusal is based upon the judicial conviction that the doctrine of non-liability is so well established that it should not be permitted to be circumvented by resort to the law of nuisance. The difficulty in determining factually whether or not the act complained of constitutes a nuisance renders it easy for the courts to avoid a nuisance; it is automatically placed in the class of torts in general and the general rules applicable to them apply. Although there are a number of cases in which recovery has been sought on the ground that a nuisance has been maintained, the facts that relatively few have permitted recovery on that theory demonstrates the indisposition of courts to subsume the facts under the exception."

Application of the doctrine of immunity to school districts in its broadest form reached its peak in the Hibbs v. Independent School District of Green Mountain in 1933 (37). On October 8, 1929, Merle Hibbs, a pupil eight years of age, fell, or was thrown, from the school bus in which he was being transported from school to his home and received some serious injuries. The action brought on his behalf against the school district and Mary M. Wilson, the driver of the bus, to recover damages, resulted in a trial, in a directed verdict for the school district, and a verdict and judgment against Mary Wilson, appellant, for $750.

HIBBS V. INDEPENDENT SCHOOL DISTRICT OF GREEN MOUNTAIN, 218 IOWA 841, 1934.

FACTS: Merle, with his twin brother, was riding in the front seat with the driver of the bus. In some way not definitely
shown by the evidence, the right front door of the bus opened and Merle fell out and was injured. The negligence charged was the alleged failure of the driver of the bus to securely close the door; the latch of which, it was claimed, was defective. Mrs. Wilson owned the bus but the school district had contracted with her husband for the transportation of the students.

The trial court, upon motion of the school district, directed the jury to return a verdict in its favor but declined to so rule upon a motion of appellant upon the ground that she was also charged in the performance of a governmental duty at the time the accident occurred.

ISSUES: When acting in its purely governmental capacity, were municipalities liable in damages resulting from negligence on the part of its officers, servants, and agents?

HELD: Reversed the verdict of the lower court and ruled that the principle that when officers, servants, or agents of a municipality were engaged in performing a governmental act for and on behalf of the municipality, they were not liable in damages consequent on their negligence in doing the act, applied to a person who, with the knowledge and acquiescence of a school board, was operating for the school district a bus in the transportation of children to and from school, even though the person operating the bus was acting at the time in lieu of the person with whom the district had actually contracted for the transportation.

REASON: No case against an employee of a school corporation directly involving personal liability on his part for negligence causing injury had to exist for granting exemption from liability to the employees of other municipal corporations whose negligence had resulted in injuries or damages for which relief was sought, where the same arose while the municipality was engaged in the performance of a governmental function and to deny the same to an employee of a school corporation when similarly engaged.

A school corporation, being an independent agency of the state for the purpose, in part, of the education of the boys and girls residing therein in providing for the transportation of pupils to and from school were engaged in the performance of a governmental function.
Had the husband been driving the bus, it would have to be conceded that he, under the circumstances of this case, would be immune from liability. The appellant, with the knowledge and acquiescence of the school board, was performing the identical functions and rendering the same services as her husband could have rendered. Not technically an employee of the district, it was only because her husband, whose place she had taken, sustained a technical contractual relation thereto. The rule of nonliability existed because the function being performed was for the common good of all without any special corporation benefit or profit. No distinction in principle can be made upon the basis of which the general rule of nonliability shall not be applied to the facts of this case. The contract for carrying the pupils was not before the court at that time.

In addition, the court ruled that a school board of a non-consolidated school district had ample power to provide for the transportation to and from school of pupils living an unreasonable distance from the school.

A 1933 Attorney General Opinion reiterated that the district was not liable for negligent bus operation (79).

ATTORNEY GENERAL'S OPINION, 1933

FACTS: The school district at Alexander owned the bodies of the school buses, while the drivers furnished the chassis. The owner-drivers wanted to turn the chassis over to the school district to be exempt from paying license fees.

ISSUES: If the owner-drivers turned the chassis over to the school district, was the truck then exempt from a motor vehicle license fee? And if the school district owned and operated the school buses transporting children to and from school, was there any liability for resultant injuries?

HELD: On the first part of the question, the statutes provided that no license fee should be collected on motor vehicles owned by counties, municipalities, and subdivisions of the state. On the second part of the question, probably
not, if transporting children to and from school was a governmental function. There probably would be no legal liability for damages caused by the motor buses owned and operated by the school district, because a school district was a quasi-corporation in control of public funds for educational purposes and was in that respect an instrument of the state government. A school district being a governmental subdivision and not liable for injuries while engaged in a governmental function.

In 1938, the Supreme Court declined to extend the doctrine of immunity to an independent contractor operating school buses under contract with a school district (70). Mr. Ole S. Olson, administrator of the estate of his deceased son, commenced action against Paul Cushman, who was a driver of a school bus under written contract with the Consolidated School District of Lloyd Township, Dickson County, to recover damages for the death of his son.

** Olson v. Cushman, 224 Iowa 974, 1938.  

**FACTS:** Elmer Robert Olson was seventeen years of age and a student in the Terril, Iowa high school. Paul Cushman had been engaged by the school district, under a written contract, to transport to and from the school the pupils who lived in the country. On the morning of the accident, the bus was loaded with children on the way to the high school when the front part of the bus went into a ditch and the bus overturned on its side. Several students were injured. Olson and one of his companions walked towards school to secure help. There was evidence that within thirty minutes after the accident that Olson complained of a pain in the back of his head. For approximately two weeks thereafter he attended school, but each day his mother treated him for the trouble complained of in his neck and the back of his ear. This condition continued to grow worse; the pain and soreness were more severe each day. On the 20th of January his father took him to a doctor in Estherville, where the ear was
treated, and he was told to return the next day. When he returned, the doctor placed him in the hospital and the case was diagnosed as a middle ear infection with a mastoid involvement, and an operation was performed. Elmer remained in the hospital until his death on the 14th of February.

**ISSUE:** Was the bus driver engaged in the performance of a governmental function for the behalf of an agent of the state and therefore not individually liable for any negligence in such performance?

**HELD:** Affirmed the decision of the lower court and held that a school bus driver, furnishing his own bus, under a contract embodying certain conditions to transport children, but not under the supervision, control, and regulation of the board, was an independent contractor liable for his own negligence and not an employee exercising a governmental function.

**REASON:** Cushman was not an employee of the school district. He was an independent contractor. The contract that he had with the school district was set out in full. He was to furnish the school bus, pay all expenses, both operating and repair; he was to collect the pupils at certain hours and to return late in the afternoon to take them to their homes; he was either to drive the bus himself or furnish a suitable driver. For this service of collecting and delivering the pupils he was to receive so much each month. While not so engaged, he was at liberty to perform or do any other kind of work he saw fit.

Mr. Cushman claimed that he was engaged in the performance of a governmental function for and on behalf of an agent of the state and was not individually liable for any negligence in such performance. He used as his defense the results of the Hibbs case. The judge writing the opinion for the court said that he did not agree with the rule laid down in the Hibbs case, and his views were set out in a dissenting opinion in the case of Shirkey v. Keokuk County.
(which will be discussed later), but regardless of his views, the Hibbs case was still the law of the state.

Thus, the court reasoned that in view of the rule laid down in an earlier case, Paul Cushman was an independent contractor and not an employee of the school district, and was liable for his own negligence.

The significance of this case was that the court has indicated they were not in agreement with the decision of the Hibbs case, but it was still the law of the state. Secondly, Mr. Cushman was sued in this case as an independent contractor and the school district was not named in the suit, although Mr. Cushman claimed as one of his defenses, that he was an employee of the school.

The First Erosion of the Doctrine of Immunity

Commencing in 1938, a gradual erosion of the doctrine of immunity was noted. In a suit arising out of injuries suffered to a boy who was struck by a county-owned truck while riding his bicycle, the court overruled the Hibbs case and held the driver personally liable for his negligence (60).

MONTANICK V. MC MILLAN, 225 IOWA 442, 1938.

FACTS: This was an appeal from the Wapello District Court. Verne Montanick, who was sixteen years of age and a student at Ottumwa Senior High School, was returning to his home from
school on his bicycle. Fred McMillan was driving a truck belonging to Wapello County. He was crossing a sidewalk with his truck to enter a quarry when he struck the boy. As a result of the accident, this lawsuit occurred. It was brought by his father against Fred McMillan, the driver of the truck, and Wapello County, seeking damages in the amount of $27,075. There was a trial to the jury. Before the case was submitted, the plaintiff dismissed the cause of action against Wapello County. The jury returned a verdict of $5,000 against Fred McMillan. Being dissatisfied, McMillan appealed.

ISSUES: Was the boy guilty of contributory negligence? Was the driver guilty of negligence? Was their exemption for governmental bodies and their officers and agents from liability under the doctrine of respondeat superior? Was the principle of the master and servant involved?

HELD: Affirmed the verdict of the trial court and held that the boy was not guilty of contributory negligence, the fundamental and underlying law of torts was that he who does injury to the person or property of another is civilly liable in damages for the injuries inflicted. That every case which allows recovery against a servant can be based not upon any relationship growing out of the employment but upon the fundamental proposition that the servant violated some duty that he owed to the person injured. That the exemption accorded counties and other governmental bodies and their agents or employees was a limitation or exception to the rule of respondeat superior, and in no way affected the fundamental principle of torts that one who wrongfully inflicts injury upon another is individually liable to the injured person. That a governmental employee committing a tortious act which causes injury to another in violation of duty owed to the injured person, becomes, as an individual, personally liable in damages therefore. Hibbs case overruled.

REASONS: The liability of the driver was not predicated upon any relationship growing out of his employment, but was based upon the fundamental and underlying law of torts.

It was a well-established rule in this state that counties were not liable for torts growing out of the negligent acts of their agents or employees. Only, except in the Hibbs case, did they find that the agent or employee himself, when sued as an individual, rather than in his official capacity,
was not liable for acts of misfeasance, that is, a positive negligent act which caused injury and damage to another.

Every case which allowed recovery against a servant could be based upon the fundamental proposition that the servant violated or breached some duty he owed to the person injured. It may be an act of misfeasance, nonfeasance or malfeasance.

The exemption of governmental bodies and their officers from liability under the doctrine of respondeat superior, was a limitation or exception the rule of respondeat superior, and in no way affected the fundamental principle of torts. In this case they were confronted with an act of misfeasance on the part of an employee of a county.

Public service should not be a shield to protect a public servant from the consequences of his personal misconduct.

There was a well-marked distinction between an act of an employee, agent or officer of the state or arm thereof, which was done as an act per se governmental in its nature and an act which, though performed by the agent or officer while he was engaged in a public duty, was nevertheless unrelated to the performance of the duty in any other way. The fact that the negligent person was a governmental employee should certainly not exonerate him from the consequences of his negligence.

An act of misfeasance was a positive wrong, and every employee, whether employed by a private person or a municipal corporation, owed a duty not to injure another by a negligent act of commission. It was the breach of this duty which the law imposed on all men that was involved, and this general obligation to injure no man by an act of misfeasance was neither increased or diminished by the fact that the negligent party was an employee of a municipal corporation.

The laws of the state and nation must keep pace with conditions that exist. Where a rule had its origin in the decisions of the courts it may be changed by the courts in the light of experience unless it has become fixed by constitutional or legislative provision. If the old rule was found to be unsuited to present conditions or was unsound, it should be set aside and a rule declared which was in harmony with these conditions and meets the demand of changes. That
the common-law had within itself the quality and capacity for
growth and adaptations to new conditions, had been one of its
most admirable features. The law has the inherent capacity
to meet the requirements of the new and various experiences
which arise out of the development of the country.

Upon the question of the duty of the courts to correct their
own decisions when they are found wrong, no matter how long
these decisions have stood and notwithstanding there had been
no legislative change in the law as originally construed, they
had the authority of the Supreme Court of the United States
in an opinion handed down this same year. In this opinion
the Supreme Court of the United States overruled a case that
had been supported by other recent cases. The rule in that
case could have been changed by legislative enactment. In
fact, many bills were introduced to change it, but Congress
failed to act, and the Supreme Court of the United States,
believing the decision wrong, by a six to two opinion, re­
versed the holding of that same court more than one hundred
years before and followed continuously to the present time.

The court proceeded to make a distinction between an act
of governmental nature and an act being performed by a public
officer or agent while engaged in a public duty and said (60):

"There is a well-marked distinction between an act of an
employee, agent, or officer of the state or arm thereof,
which is done as an act per se governmental in its
nature and an act which, though performed by the agent
or officer while he is engaged in a public duty, is
nevertheless unrelated to the performance of the duty
in any other way. An employee of the county may, for
instance, during the hours of darkness step into the
driver's seat of an automobile, and without turning
on the lights and on the wrong side of the street, with
the lights at an intersection set aga.in.st him, at an
excessive speed, collide with a pedestrian lawfully
crossing at the intersection. The fact that the negli­
gent person is a governmental employee should certainly
not exonerate him from the consequences of his negli­
gence."

The Court then made a distinction between acts of non-
feasance and acts of misfeasance and quoted from the Smith v. Iowa City case, which was the defective playground equipment case cited earlier in this chapter. The court made the distinction between these two acts by saying (60):

"An act of misfeasance is a positive wrong, and every employee, whether employed by a private person or a municipal corporation, owes a duty not to injure another by a negligent act of commission. It is the breach of this duty which the law imposes on all men that is involved, and this general obligation to injure no man by an act of misfeasance is neither increased or diminished by the fact that the negligent party is an employee of a municipal corporation."

And so this Court, as now composed, after careful consideration, had come to the conclusion that the rule announced in Hibbs case was wrong, and the opinion in that case was overruled; that an employee of a city, county, or state who commits a wrongful or tortious act, violates a duty which he owed to the one who is injured, and is personally liable.

It was stated in Chapter III that the findings of this study depend upon the validity of the legal principle stare decisis, and that there would be no need for this study if the courts followed this principle strictly. The case just cited gives basis for the purpose of the study.

It was stated at the beginning of the Montanick case in 1938, that this was the beginning of the gradual erosion of the doctrine of immunity. However, the immunity of the
district itself had been reinforced by three 1937 court decisions.

In the first decision the district was held immune for the death of a speaker at school exercises which resulted when he fell from a shakily-constructed platform (46).

LARSEN V. INDEPENDENT SCHOOL DISTRICT OF KANE TOWNSHIP, 223 IOWA 691, 1937.

FACTS: Mrs. Emma Larsen, as administrator of the estate of Arthur Larsen, brought suit to recover for accidental death of her husband in a school building of the Independent School District of Kane located in Pottawattamie County for the amount of $30,000. Mr. Larsen's death came as a result of a fall in the school building. Mr. Larsen was to make an address to the school children on Armistice Day, 1935. Prior to that time, the school district had prepared a platform at one end of a hall in the said school building with three movable steps at the side of the platform where Mr. Larsen was to stand while making his address. Above this a curtain hung from the ceiling where it was fastened on rollers, but it was not fastened to the railing. Back of the curtain there was an opening space or stairwell to the floor below. The speaker, who had an artificial leg, as he mounted the platform, stepped back and lost his balance; as he clutched for the curtain, it tore away from its mooring. He fell over the railing to the floor below, sustaining injuries from which he died in a few days. The case was tried before a jury in the District Court of Pottawattamie County and a verdict for the defendant school district was entered.

ISSUES: Were the school district and its officers and employees guilty of certain acts and conduct consisting of omissions and commissions of negligence which negligence was the direct and proximate cause of the injuries to the decedent, which resulted in his death?

HELD: Affirmed the decision of the jury trial and held that a school district, organized, existing, and acting under the laws of the state as a governmental agency, was not liable in damages consequent on the negligence of its employees, or in
consequence of the maintenance by it, through its employees, of a nuisance.

REASONS: From the decisions of the courts of Iowa, there has been a line of distinction between incorporated cities and towns and such corporations as counties, and school districts, the latter being what are known as quasi-corporations, and only for governmental purposes. A school district is an organization simply for the purpose of carrying on the schools, for that and nothing else. They were only quasi-corporations, and in the face of the past decisions, it would be very disregardful of the law for the court to hold in a case of this character that the school district was liable.

The court stated that it had in the Kincaid case plainly marked the distinction between municipal corporations, as incorporated villages, towns, and cities, and those other organizations, such as counties, school districts and the like. The court had held for more than a half a century, persistently and consistently, that a county could not be held liable for negligence in the performance of its governmental functions, with the single exception of negligence in the construction and maintenance of bridges and approaches thereto.

Further in the Lane v. District Township of Woodbury case, the court had defined the status of the school district, and in the Smith v. Iowa City case, the court had defined the status of a municipal corporation. Therefore, after considering these cases and the principles laid down in
them and the authorities cited in these cases, the Court records clearly defined that the defendant was a school corporation for public purposes and, hence, immune.

In the second case in 1937, the court refused to award damages to a painter who fell from a negligently constructed scaffold while painting the ceiling of a schoolroom (24).

FORD V. INDEPENDENT SCHOOL DISTRICT, 223 IOWA 795, 1937.

FACTS: This case was an appeal from the District Court of Page County and involved two cases, but since the same school district was the defendant in each case and the facts and issues identical, the cases were consolidated for submission to the court. In February, 1934, the plaintiff was employed as a painter by the Civil Works Administration, an instrumentality of the Federal Government. That previous to the time of such employment the Civil Works Administration and the defendant school district had made an agreement and arrangement whereby the plaintiff, with others, were to be employed in the painting of a room in the high school building. A temporary scaffold was built and placed in room by the school district for the use of the painters. The scaffold broke and partially fell and the painters were injured. The petition alleged that because of the faulty construction the scaffold constituted an unsafe place to work and the school district was aware of this. The lower court dismissed the petitions and a judgment was entered in each case against the plaintiff for costs.

ISSUES: Was the act of repairing and painting, as it was, a ministerial act, and therefore, the rule of nonliability on the part of municipal corporations for negligence in performing governmental functions should be applicable?

HELD: Finding no error in the lower court's decision, the ruling was affirmed, and held, that a school district in causing its schoolhouse or the rooms thereof to be painted must be deemed as engaged in a governmental function with complete exemption from liability for negligence in so doing. So held where it was urged that the district had
contracted to furnish the workmen a "safe place" in which to work.

REASONS: An analogy existed between this case and the Larsen case which sustained the contention of the defendant therein that in the operation and maintenance of its school building the district was acting in purely governmental capacity. The painting of the ceiling was clearly one of those things incidental to the maintenance of a school building of the district and was not proprietary but governmental in nature. A school district was not liable on account of negligent construction or failure to keep in repair its school buildings, the district being an instrument of the state for the administration of the laws.

The third 1937 case involved a collision between a private automobile and a county road maintainer (89). Although the maintainer did not display statutory warning lights, the county immunity was upheld, and the court observed that school districts enjoy the same degree of immunity as counties.

SHIRKEY V. KEOKUK COUNTY, 225 IOWA 1159, 1937.

FACTS: This was an appeal case from Keokuk District Court in a suit to recover damages of the defendant Keokuk County, the members of the Board of Supervisors of the said county, and the operation of a maintainer in use by said county, asking for a judgment of $26,446.60 with interest. In the original hearing of the case by the Court, the decision of the lower court was upheld. The plaintiff was riding in an automobile owned and driven by her husband on a county road. William Kelley was pulling the maintainer with a tractor without lights of any kind thirty minutes after sunset on the left side of the road. A collision resulted whereby plaintiff was injured. The case was reheard by the court in 1938.

ISSUES: Was the county liable in cases of this character?

HELD: The decision of the lower court was upheld in the
immunity of the county and the supervisors, but the operator of the maintainer was held personally liable.

1. Neither a county as a quasi-corporation nor its board of supervisors is liable for the negligence of its employee in operating after dark a road maintainer without lights on the left-hand side of a highway, and in an action by a motorist who sustained injuries on account of such negligence demurrers to the petition by the county and its board of supervisors were properly sustained.

2. Counties and school districts, being political or quasi-corporations not clothed with full corporate powers as are cities and towns, cannot be sued for negligence, and the question of the exercise of a governmental function is immaterial.

3. Mandatory statutes requiring danger lights on road machinery and providing punishment for their violation of a duty owed to the injured person, becomes, as an individual, personally liable in damages therefore.

REASONS: The precise question before them had been recently ruled upon in the Montanick case and they were staying with that ruling. The reason for this rule had been exhaustively discussed and considered in that opinion, and there was no reason to pursue the discussion further. The court was not inclined to change the rule laid down therein.

MINORITY OPINION (one Justice): At the time of the Hibbs decision he was a member of the court. He did not agree then and does not now on the decision rendered. This was the only Iowa case where a driver and owner of a vehicle had been excused for negligent operation of his vehicle. The mantle of the protection of governmental immunity granted the driver of the school bus complete immunity for negligent operation of her own bus.

If this be the law, then the owner and operator of a motor vehicle need no longer pay attention to the law of the road, or traffic rules and regulations, if in such operation of his motor vehicle he is engaged in a governmental function. Such a rule has no basis in reason or authority. In fact, the general rule that the employee of a municipal corporation was liable to a third person injured by his negligent act of a
misfeasance was the law of Iowa until the decision in the Hibbs case.

This case was the first case in which there was a dissenting opinion by a member of the court. One member wrote a dissenting opinion of the first hearing of the case and then upon the re-hearing this member changed his opinion to an affirmation and a member who affirmed the majority opinion on the first hearing, dissented on the re-hearing.

It was also the first case in which the Court indicated that it was the duty of the legislature, not the courts, to change the statutes.

It is interesting to note that the judge indicated he was a member of the court when the Hibbs decision was made, and he did not agree with the decision; yet the record indicates there was no voting against this decision or dissenting opinions.

In summary, during this two-year period, the immunity of the quasi-municipal corporation still holds, but the immunity of the individual employee has fallen. The question still remains as to what was the function of the employee.
Nuisance Cases

The year of 1939 marked further erosion of the doctrine. Until then the immunity of public bodies included liability based on the nuisance theory, as well as that based upon negligent acts or omissions. In the first two nuisance cases an athletic field was held not to constitute a nuisance (14).

CASTEELE v. TOWN OF AFTON, 227 IOWA 61, 1939.

FACTS: This case was an appeal from the District Court of Union County. On June 24, 1936, the plaintiffs filed a petition, alleging that they were owners and occupants of a residential property in the town of Afton, that the said town was the owner of an adjoining property which was used as a public playground and athletic field, equipped with an electric outdoor lighting system; that the town permitted various persons to hold athletic contests and games on the said property at any time; that the playground was a nuisance; that the persons using the said grounds would bat, throw, and kick balls onto their property, knocking down and destroying gardens and plant life, and that they had come onto their premises to retrieve the balls, and while so doing had broken down and destroyed fences, vegetables, and fruit trees. They stated that the person used the grounds at night and that such grounds were lighted and the lights shown and reflected into their house; and that such persons using the grounds used vulgar and profane language that could be heard by the plaintiff. That because of these lights, profane and vulgar language, and the destroying of the plant life their health and working efficiency was jeopardized. They asked for an injunction, temporary and permanent. Trial was held to the court on April 27, 1937, and a decree rendered in favor of the town. The Casteels appealed.

ISSUES: Was there action in equity to enjoin and restrain defendant from maintaining a nuisance and continuing repeated trespassing on the plaintiff's property?

HELD: Affirmed the decision of the lower court and held that
the facts did not warrant issuance of an injunction to restrain such use as a nuisance.

REASONS: A person who lives in a city, town, or village must, of necessity submit himself to the consequences and obligations of the occupations which be carried on in his immediate neighborhood, which are necessary for trade and commerce and also for the enjoyment of property and the benefits of the inhabitants of the place, and matters which, although themselves annoying, are in the nature of ordinary incidents of city or village life and cannot be complained of as a nuisance.

Playgrounds and athletic fields are of advantage to the health and well-being of the community and are not \textit{per se} nuisances, though they can be conducted as to become nuisances.

In a second case in 1941, a school district was held liable for damages to windows and to shrubs of a private property owner whose home abutted the school playground, and the school district was ordered to provide better supervision of its playground (67).

\textbf{NESS V. INDEPENDENT SCHOOL DISTRICT OF SIOUX CITY, 230 IOWA 1159, 1941.}

FACTS: This case was appealed from the District Court of Woodbury County. Mr. Ness acquired his residence in Sioux City in 1913. Subsequently, the school district built a junior high school west of and adjacent to his home. The district maintained a playground south of his property. There was an alley between the two properties. Mr. Ness's complaint was that the students played baseball on the playground with the consent, encouragement and supervision of the school district; that the school children repeatedly trespassed on his premises and had destroyed his flower beds, gardens, trees and vegetation, and that baseballs had seriously damaged his property; that the playing of the ball games created artificial dust storms which interfered with the comfortable enjoyment of his home; that he had received
and was in fear of receiving personal injuries from balls batted onto his premises. The school district maintained that the operation of the playground was in the exercise of a governmental function and denied that it constituted a nuisance and that trespasses and damages, if any, were not caused by them.

ISSUES: Was the immunity of a governmental agency for liability for negligence in the exercise of governmental functions exempt from liability for a nuisance created and maintained by it?

HELD: Affirmed and modified the ruling of the lower court and granted the plaintiff $300 for damages.

REASONS: Where a school district conducts a playground in such a manner as to constitute a private nuisance to an adjoining property owner, it is liable for damages, since the majority rule is that the immunity of a governmental agency for liability for negligence in the exercise of governmental functions does not exempt it from liability for a nuisance created and maintained by it.

In an action to enjoin a school district from maintaining a private nuisance created by school children playing ball on property of the school district adjoining that of plaintiff, a decree that would compel the school district to prohibit the ball playing on the playground in order to avoid contempt of the injunction was too stringent. The playing of baseball on a playground is not a nuisance per se.

Nevertheless, in this same period, school district immunity for negligence was upheld in an Attorney General's Opinion in 1939 stating a school district was not liable for injuries to a visitor who fell from an unrailed porch of a school building when it was being used for a Grange meeting (80).
ATTORNEY GENERAL'S OPINION, 1939.

FACTS: The Independence Township School Board in Jasper County allowed the Baxter Grange to use the school facilities for meetings without compensation. After a meeting one person attending a Grange meeting departed by the way of the front porch. Instead of going off the front of the porch, where the steps were located, the individual turned to the left of the porch and fell off breaking his arm. The porch was unlighted and had no protective railing.

ISSUE: Was the school corporation liable for damages arising out of said injuries?

HELD: No.

REASONS: The statutes provided that the school directors could authorize the use of school buildings for the purpose of meetings of Granges. A school district was an organization simply for the purpose of carrying on the school. It would be very disregardful of the law to say that the school district was liable. The use of the school building by the Grange was authorized by law and did not in this case change the function of the school corporation from governmental to proprietary.

Proprietary Function

A decision by the Supreme Court of Iowa in 1951, in which a city was held liable for damages resulting from negligently killing bees of its tenant on a leased portion of a municipal airport, created a further inroad on the immunity doctrine, but only with respect to proprietary functions (11).

It should be noted in asking for the Attorney General's Opinion in 1939 that there was the question posed as to governmental or proprietary function.
BROWN V. SIOUX CITY, 242 IOWA 1386, 1951.

FACTS: C. A. Brown sued the city of Sioux City alleging in his petition that in 1948 he rented certain property located at the municipal airport for the purpose of maintaining and establishing colonies of bees thereon; that in August of that year the city was negligent in spraying the air base property with a poisonous substance called chlordane so that his bees were sprayed and the bees picked up the poisonous substance on their bodies and carried it back to the bee colonies with the result that his bees died, his honey was permeated with the poisonous substance and rendered unfit, and the hives also were rendered unfit for further use. His petition alleged that the city operated the Sioux City Air Base in its proprietary capacity. At the conclusion of the evidence the trial court submitted the questions of defendant's negligence, and whether defendant was acting in a governmental or proprietary capacity to the jury. After a verdict for plaintiff for $1500, the court sustained defendant's motion for judgment notwithstanding verdict on the ground "that the operation of the air base was a governmental function; that the farming operation in connection therewith was but an incident thereto."

ISSUES: Was the city acting in a governmental or proprietary capacity?

HELD: Reversed the ruling of the trial court and remanded a new trial and held, that there was nothing in the statutes which demands a holding that a city was acting in a governmental capacity when it leased a portion of its property which was not being used for the purpose of the airport.

REASONS: While as a rule a municipality in the exercise of its purely governmental functions is not liable for negligence, the rule is to be strictly construed, and where there is doubt as to whether the city is liable the question will be resolved against the municipality.

A city has the right to lease a portion of a municipal airport not required for municipal purposes, but in leasing its property to tenants, it assumes the duty of all landlords to exercise ordinary care so as not to injure a tenant in occupancy thereof. When renting such land the city is acting in a proprietary capacity.
When a city leased a portion of its airport land to plaintiff for the purpose of an apiary, it had the liability arising from a landlord-and-tenant relationship, and was therefore liable for negligent acts in spraying with poison land adjacent to that leased to plaintiff resulting in killing his bees and spoiling his hives and honey.

The city cannot accept and exercise the special privilege of leasing its property to tenants without assuming the responsibilities and liabilities flowing from that relationship. Surely the city in its capacity as landlord has the same duty all landlords assume, namely, to exercise ordinary care so as not to injure a tenant in the occupancy of the leased premises. When renting the land the city was acting in a proprietary capacity. A good example of two-fold actions, one proprietary and one governmental, performed by a city, is present in a city's operation of a municipal electric light plant.

Similarly, on the ground that it was engaged in a proprietary function, a county hospital was held liable, in 1957, for negligent injuries to a patient (97).


FACTS: This was an appellant case from the District Court of Washington County. Mrs. Wittmer's petition alleged the establishment, operation, and maintenance of the hospital in Washington County; that she was a paying patient therein and sustained injuries by a fall due to the excessive wax upon the floor of the hospital. The defendants were Letts, chairman of the Board of Trustees for Washington County, the individual hospital trustees, the superintendent of the hospital, the hospital, and the County of Washington.

ISSUE: Was a county liable in damages to one who, as a pay patient in a county hospital, sustains injuries due to the negligence of the hospital employee?

HELD: Reversed the ruling of the lower court and remanded for a new trial and held, that a county hospital established under the statutes was voluntary assumption of function by residents of the county and its operation was proprietary and
should be considered in the same light as a private hospital as far as liability to pay patient for injury was concerned.

REASONS: The law in this state is well settled that private hospitals, charitable or otherwise, are liable in tort for injuries to pay patients injured through the negligence of their employees.

The motion to dismiss as to all defendants, other than the county, rests upon the contention that they, being merely agents of the county and performing a governmental function, are entitled to the same immunity as is the county. There being no immunity in the county it must necessarily follow that there is no immunity as to them.

The question of immunity from tort liability by cities and incorporated towns, as well as by counties and school districts, had been before the court upon numerous occasions and involved many factual situations. The Wittmer case, however, appeared to be the first where the functioning of a county hospital was involved.

At first glance, these two decisions seem of little concern to Iowa school districts which have been held to have no proprietary functions as was decided in the Ford case and the Attorney General's Opinion in 1940.

However, it should be remembered that in Chapter II the position of proprietary function in regard to various states was discussed. It would appear that all activities performed by any governmental unit, within constitutionally or legislatively assigned powers, were obviously governmental. Of
those governmental, some are recognized in this distinction as being more customarily performed by private industry, historically less associated with government alone. These, when they produce revenue or profit, have been termed "proprietary" for the purpose of exemption from governmental immunity and have been found to be non-governmental.

Insurance

In Illinois, warning of the complete collapse of the doctrine of school district immunity marked by the Molitor case, seems to have been furnished in a prior case decision in which a school was held liable on the ground that it happened to be carrying a policy of insurance fully covering such liability.

In this leading case, immunity was removed to the extent of the insurance carried (59). The suit alleged the negligence of a charitable institution, Bradley University. The facts of the case were that the plaintiff fell from a trespass on May 2, 1940, while preparing for a circus in physical education class. The Supreme Court of Illinois overruled the lower court which dismissed the case. The court ruled that the trusts were not impaired or diminished by the judgment. The decision seemed to impart liability if insured. However,
the decision did not really create liability; it only fixed the manner of collection.

A search of the very recent Iowa case decisions for similar warnings brings to light a 1957 case decision in which the Supreme Court of Iowa stated that the purchase of liability insurance by a city did not amount to a waiver of its immunity from liability for negligent acts of its employees who were engaged in performance of a governmental function (53).

MC GRATH BUILDING C. V. CITY OF BETTENDORF, 248 IOWA 1386, 1957.

FACTS: The case as made by plaintiff's petition is that on October 18, 1956, the plaintiff was the owner of two houses located on Custer Terrace, an unpaved street in the defendant city. Several months prior to the date named, the Iowa-Illinois Gas & Electric Company, the holder of a franchise for furnishing natural gas in Bettendorf, had installed a main or pipe line in the street in front of plaintiff's houses, with a service line extending into the house known as 105 Custer Terrace and connecting with a meter in the basement. On the date in question, the city through its employees, was operating a road grader in the street in front of plaintiff's houses, for the purpose of deepening a ditch along the north side of the street and grading it. It was alleged that the gas main in the street was only five inches underground, and was struck by defendant's grader several times, causing the service line to be disconnected from the meter. This permitted gas to escape into the basement of 105 Custer Terrace; it became ignited and an explosion resulted which entirely demolished that house and severely damaged plaintiff's adjoining house, 109 Custer Terrace. Negligence of the defendant city was alleged in various ways and damages were asked. This case was an appeal from a ruling of the District Court of Scott County and concerned the alleged error of the trial court in striking three
affirmative defenses pleaded by the defendant.

ISSUES: Did the purchase of liability insurance by a city or town create a waiver of its immunity from the application of the doctrine of *respondeat superior* to the acts of its employees in performing governmental functions?

HELD: Affirmed in part, reversed in part the ruling of the lower court and remanded for a new trial and held, that the statutes empowering cities and towns to purchase liability insurance did not enlarge the liability of a city or town which purchases such insurance; and, the purchase of liability insurance by a city or town does not create a waiver of its immunity from the application of the doctrine of *respondeat superior* to the acts of its employees in performing governmental functions.

REASONS: The insurance the municipalities were authorized to purchase was for protection against any liability the municipal employees or the municipal corporation may incur. There was no expression on legislative policy. It was permitted only to insure against any liability which might be incurred and there were even at the time of the enactment of the statute, many potential liabilities which both the municipality and its employees might incur.

Neither the city nor its employees were protected against liability for negligence incurred in performing proprietary functions; and the city at least had liability for its failure to keep its streets and parks reasonably safe and free from nuisance. A legislative purpose to enlarge the potential liability of the city or town carrying insurance could not be found in the statutes. An indemnity policy was for the purpose of protection against liability and not for the creation or increase of liability.

It was interesting to note in this case that the plaintiff pleaded for the court to overrule the doctrine of immunity. The court replied that they had cited in several previous cases that in their opinion, though the doctrine was largely of common-law origin, any substantial modification of
doctrine must come from legislation.

It would seem the better part of prudence that all school personnel be protected as to their potential personal liability by insurance. Insofar as this concerns drivers of school buses and other school vehicles, authority exists for the local school board to pay for the policy. Whether additional authority exists for the board to purchase insurance for its employees against liability, arising out of other acts, is controversial by reason of ambiguity of the pertinent statute.

The Iowa State Education Association has adopted an insurance plan (see Appendix) providing general liability insurance for its members as part of their membership service since 1959. The insurance is underwritten by the Horace Mann Insurance Company and currently agrees to pay on behalf of the teacher all sums up to the amount of $50,000, which the teacher might become obligated to pay by reason of liability imposed by law for damages because of bodily injury caused by the teacher's personal acts arising out of and in the course of the teacher's duties as an employee of the board of education. The insurance company also agrees to pay for the teacher's defense in suit for damages even if suit is groundless, false, or fraudulent.
Recent Expansion of Exceptions

Recent Iowa cases tending to broaden the existing exceptions to the immunity doctrine occurred in 1963.

In the first case, the plaintiff was a truck driver delivering a sheet of plate glass to a residence (21).

ENGMAN V. CITY OF DES MOINES, 225 IOWA 1039, 1963.

FACTS: The driver parked his truck across the street from the house where he intended to make delivery and started across the street carrying a sheet of glass. Midway to the other side, he tripped in a chuck-hole and fell. The hole in which he tripped was not large enough to interfere with vehicular travel on the street. (1) There was evidence that the plaintiff was confined in the hospital and at home for sixty days following the injury. (2) An operation on the Lunar nerve was necessary and he was in the hospital and at home for twenty-four more days, for a total of twelve weeks in all. (3) There was evidence that he wore a body cast for an additional half month and worked part-time only, for many weeks. (4) His wages at the time of the injury were $100 a week. (5) The corporation of which he was one of the major stockholders, provided sick-leave benefits which paid his salary when he was off work. The jury in the lower court returned a verdict of $25,000 for the truck driver and the City of Des Moines appealed.

ISSUES: Was there contributory negligence on the part of the injured truck driver?

HELD: Affirmed the ruling of the lower court on the condition that the plaintiff should, within thirty days from the filing of the opinion, file a remitter of all the judgment in excess of $19,000 with interest on such excess; otherwise a new trial would be granted.

REASONS: Evidence, that plaintiff, who was not familiar with the portion of the street where he fell, was carrying a wrapped piece of glass and walking cautiously, did not see the hole in the street, was sufficient to generate a jury
question on the issue of contributory negligence. In an action for injuries to a pedestrian who fell over a defect in the city street, an instruction referring to plaintiff's duties in exercising the care of a careful and prudent person and the duty of the City to maintain the streets in a reasonably safe condition, did correctly advise the jury as to the law in sufficiently specific terms under the facts.

The Court affirmed the verdict of the lower court, but concluded a judgment of $19,000 was the largest amount which the rule of fair compensation would permit and that any amount in excess thereof would be excessive.

It was pointed out that there were no sidewalks on either side of the street and that in the absence of sidewalks leading to established crosswalks, the city should have foreseen that pedestrians would be likely to walk in the parts of the street intended for vehicular travel.

The decision appears to establish a duty to maintain the surface of all streets not paralleled by sidewalks in the same state of perfection for pedestrian use usually required in sidewalk cases.

Another 1963 decision of the Supreme Court of Iowa, the plaintiff was a twelve year old girl who was pushed into a creek by a five year old boy (62).

MURPHY V. CITY OF WATERLOO, 225 IOWA 557, 1963.

FACTS: This was an action for damages against the City of Waterloo. The creek formed part of the Waterloo storm sewer system. It was maintained by the city. Negligence was
claimed in failing to place a fence or barrier between the
creek and nearby sidewalk to obviate a serious hazard. When
pushed into the creek, she struck her head on some cement
clocks at the bottom of the creek and sustained a concussion
of her skull. The jury rendered a verdict in her favor in
the amount of $10,000 and a verdict for her father for
hospital and doctor bills paid by him in the amount of $736.80.
The city appealed.

ISSUES: Was the city guilty of negligence and was there
foreseeability of injury?

HELD: Affirmed the verdict of the trial court, and held that
the city was negligent in failing to erect a barrier near
the sidewalk, and to construe negligence, it was not neces­
sary that defendant could have foreseen the particular
injury that resulted provided it should have foreseen its
omission to act would probably result in injury of some kind
to some person.

REASONS: Cities shall have the care, supervision, and con­
trol of all public highways, streets, avenues, alley, public
squares, and commons within the city, and shall cause the
same to be kept open and in repair and free from nuisances.
The duty to maintain the streets in a reasonably safe condi­
tion for travel includes, when reasonably necessary, the
erection of barriers or guard-rails along grades and at
other dangerous places.

The creek ran through her father's back yard. There was
conflicting testimony as to whether the girl was standing in
the yard or on the sidewalk when pushed. The place where she
went into the creek was about twelve feet from the sidewalk.
After the accident, the city erected a snow fence along the
bank but it appeared it trespassed upon the private property
in so doing. Nevertheless, the court held that the act of
erec ting the fence after the accident, was admissable and
sufficient to show, for purposes of the claim, that the city had control of the property where the accident occurred.

This, of course, raised the practical question as to how far a city must go to remedy defects on private property.

In the third 1963 case, the court held a county sheriff guilty of negligence (58).


FACTS: The plaintiff, Moore, brought action for damages against Johnson County, the Board of Supervisors, and A. J. Murphy, sheriff, alleging he sustained personal injuries while in the custody of the sheriff. The plaintiff alleged that while he was a prisoner in the Johnson County jail, the sheriff removed him from his cell, contrary to the statutes of the State of Iowa, and ordered him to climb a ladder placed in position by the sheriff. He said that the ladder was wobbly and that he had complained to the sheriff of this fact. The sheriff then held the ladder and told the plaintiff to paint. The sheriff, Murphy, then walked away from the ladder and the ladder fell with the prisoner, and he was injured. The lower court held that the sheriff was in the performance of his duty as required by law and that he was working in his governmental capacity. If he were guilty of any acts of negligence, it was nonfeasance rather than malfeasance or misfeasance and under the numerous holdings of the Iowa Supreme Court, he was not liable for damages in case of nonfeasance. The plaintiff appealed.

ISSUES: Was an employee of a county not personally liable for a breach of duty to the general public?

HELD: Reversed the decision of the lower court and held the sheriff personally liable for breach of duty to an injured party.

REASONS: There was a duty to the public to keep custody of the plaintiff. And this duty included the right to require him to perform labor. The sheriff did, however, have a duty to furnish the prisoner safe equipment and a duty to refrain
from ordering him to climb an unsafe ladder, he also had the
duty to the prisoner to continue holding it as long as it was
necessary for the plaintiff's safety. The rule was well-
established that as to the county and the individual members
of the Board of Supervisors, there was no liability for non-
feasance in the exercise of a governmental function. As to
employees, the rule was that a tortious act which causes
injury to another in violation of a duty owed to the injured
party, makes the employee personally liable.

One narrow question was considered in the appeal; that
was, whether the plaintiff pleaded negligence constituting
nonfeasance or misfeasance. The opinion was that it was
misfeasance and as such, it brought the claim within one of
the many exceptions to the court-made doctrine of govern­
mental immunity from liability for torts.

The court reasoned that in recent years much had been
written by legal scholars criticizing the doctrine of
immunity, and that it has been abrogated by many other
courts. All seemed to agree that the concept originated
with Russell v. The Men of Devon case and came to this
country as English common-law, which the American courts have
continued to follow, although the English courts soon after
that decision, ceased to follow the rule. The court con­
cluded (58):

"With such a wide trend established by these and other
decisions those who rely on immunity as a defense must
realize our court made doctrine of governmental im­
munity may be subjected to a re-examination in the
near future. My concurrence in the present opinion
is based on the narrow issue decided. A re-evaluation of the entire immunity doctrine can wait until the question is properly presented."

The Culmination

Two decisions by the Supreme Court of Iowa in 1964 just about wiped away all of the remaining vestiges of the immunity doctrine for cities and towns and for school districts.

In February of 1964 the Supreme Court stated in Linstrom v. Mason City case that the theory of governmental immunity had faded in the face of statutory responsibility for streets and public places (49). The Court's opinion in the case was the complete opposite of earlier rulings in regard to municipalities.

LINSTROM V. MASON CITY, 126 N. W. 2d 292, 1964.

FACTS: Mrs. Linstrom, accompanied by her daughter, visited the city library in Mason City. One of the librarians mentioned with pride the gardens in the rear of the library and how to get to them. Mrs. Linstrom and her daughter began an unattended tour of the garden area. While descending the rough hewn steps, Mrs. Linstrom fell and was injured. To recover for her injuries, she sued the city alleging negligence incident to the building and maintenance of the steps by the city, proximate cause, her own freedom from contributory negligence and damage. The case was tried and submitted to the jury and the jury returned a verdict for the city. In a motion for a new trial, Mrs. Linstrom attacked the propriety of these instructions given the jury in a case against a city. The trial court in a carefully considered opinion concluded that precedent, if not logic, made the limitations in an ordinary invitee case improper in a case against the city. A new trial was ordered and the city
appealed.

ISSUES: Was there a distinction between the responsibility of a city to persons using municipal facilities such as parks and the liability of other owners to invitees?

HELD: A higher degree of care was required in landlord-tenant common-way area matters than in ordinary business invitee cases.

REASONS: The duty to keep premises safe for invitees applied only to defects or conditions which were in the nature of hidden dangers, traps, snares, pitfalls, and the like, in that they were not known to the invitee, and would not be observed by him in the exercise of ordinary care. The invitee assumes all normal, obvious, or ordinary risks attendant on the use of the premises, and the owner occupant was not under duty to reconstruct or alter the premises so as to obviate known and obvious dangers.

It was an unquestioned rule in the state that cities and towns were required to keep all streets and public places within their limits, and open for public use, free from dangerous obstructions and pitfalls.

The statute did not make a city an insurer of safety of users of its streets and places, but it did impose a different standard of care than rests upon private owners. Municipal and private obligations not being the same, jury instructions peculiarly applicable to ordinary invitee cases were not appropriate in city cases.

Even though a city library may be administered by trustees, it was city property offering a service supported primarily by city taxes. It was not comparable to a city power or water department's selling a service or commodity.

Even though the garden area might be part of the whole library complex for the purpose of supervision, it was still a park area and not a library. It had the features of a park and none of the features of a library. The responsibility of the city for the safe maintenance of such areas had been well-settled.

The Court held that the sole question before it was the
distinction, if any, between the responsibility of a city to persons using municipal facilities such as parks and the liability of other property owners to invitees. Under court cases there was a clear line of demarcation between the responsibility of a city and that of a business proprietor or owner to an invitee. The limitations on liability appearing in business invitee cases do not appear in cases against a city.

The Iowa Supreme Court in a five-to-four vote, ruled on April 8, 1964, in the Boyer v. Iowa High School Athletic Association case, not to abolish governmental immunity at this time (9).

BOYER V. IOWA HIGH SCHOOL ATHLETIC ASSOCIATION, SUPREME COURT OF IOWA, APRIL 8, 1964.

FACTS: Marion Boyer and Carol Garland sued the Iowa High School Athletic Association and the Independent School District of Mason City for damages they sustained when bleachers collapsed at the high school district tournament basketball game in Mason City. The trial court returned a verdict in favor of the defendant. The plaintiffs appealed.

ISSUES: Should the entire burden of damages resulting from wrongful acts of the government be imposed upon the single individual who suffers the injury, rather than distributed among the entire community constituting the government, where it could be done without a hardship, and where it justly belonged?

HELD: Affirmed the decision of the trial court, and held that school districts were immune from liability in tort for the personal injuries or the death of pupils or other persons resulting from dangerous, defective, unsafe, or negligent
condition of school buildings, school grounds, or other school facilities or equipment on school-owned property.

The question of governmental functions was decided affirmatively by the trial court and the question was not raised here.

It had been public policy that the relaxation of governmental immunity should come about by legislative acts and by the Tort Claims Act which passed the Senate in the last session but not the House. The legislative acts, however, have not mentioned school districts and this may mean more than tacit approval of the Court's stand.

REASONS: The Court would not change the rule but believed that it was strictly up to the legislature to change the rule.

MINORITY OPINION (four justices): In the past the Court had suggested abrogation should come from the legislature. Nothing had been done to eliminate the court-made unjust rule. It should be abrogated now. Where this had happened in other states, legislative action soon followed.

It was of the greatest importance that the law should be settled in fairness to the trial courts, to the legal profession, and above all, to the citizens. The law should be progressive; it should advance with changing conditions. Legal authority must be respected; not because it was venerable with age, but because it was important that courts, and lawyers and their clients would know what the law was and order their affairs accordingly.

The law's emphasis generally was on liability, rather than immunity, for wrong doing. Charity was generally no defense. It was the legislature, not the courts, who should create and grant immunity. The fact that the courts may have at an earlier date, in response to what appeared good as a matter of policy, created an immunity did not appear as a sound reason for continuing the same, when under all legal theories it was basically unsound, and especially so when reasons upon which it was built no longer existed.

Chief Justice Garfield, who wrote the majority opinion
pointed to language in several Iowa statutes which he said demonstrated legislative recognition of the immunity doctrine. In view of such recognition, it was the majority opinion that abolition of the immunity doctrine was a matter for legislative rather than judicial action. The statutes cited were a 1951 statute providing that when a city fire department answered certain calls outside city limits, the same immunity applied as inside city limits. A 1959 statute authorized public bodies to purchase liability insurance for "proprietary" activities. The 1963 "home rule" statute referred to powers, privileges, and immunities of municipal corporations.

The majority opinion reviewed and commented upon past Iowa cases, as well as recent immunity cases in other states for the purpose of demonstrating within the prerogatives of the legislature rather than of the Court.

They were fully aware of the trend away from governmental immunity and they had made note of this in the Brown v. Sioux City case and other cases. In these cases, the Court had said that any substantial modification of the rule must come by legislation. Subsequent decisions had adhered to this rule. The consideration of the problems of legislative versus judicial abrogation of the rule left them satisfied the policy they had announced was the preferred one.
The majority opinion joined with the concurring opinion in the Moore v. Murphy case, which warned that the doctrine of governmental immunity might be re-examined in the near future. This had now been done. The conclusion reached from such re-examination was, that abrogation of the doctrine should come from the legislative, not judicial action. This was the position the Court had repeatedly taken, and in most instances by the other courts. In the words of the Court:

"Our problem is whether we should now interfere and by judicial decision overrule a public policy doctrine that is more appropriately left to the legislature. We think not."

The dissent in the Boyer case, written by Justice Moore, preferred Court abolishment to legislative abolishment. Several times in the past this Court had suggested abrogation should come from the legislature. Nothing had been done to eliminate our court-made unjust rule. They should abrogate the rule now. As demonstrated in the case in other states, where the immunity doctrine had been abrogated by the courts, necessary legislative actions soon followed.

He referred to a recent Missouri case where the Supreme Court of Missouri simply refused to follow the modern authorities on the subject of whether the court or the legislature
should abrogate the doctrine. That court held that the matter should be left to the legislature because several state legislatures had taken some action after abrogation by the court. "The fallacy of such an approach is clearly shown by the question--What has happened in Missouri? the answer--Nothing."

He continued that the problem before them now was whether more harm would be done by overruling their previous cases in order to install what they thought was clearly the correct principle, or adhering to an unsound decision in the interest of the rule of stare decisis. That it was of the greatest importance that the law be settled for all concerned.

Justice Moore concluded in fairness to the able trial court that he, like each trial judge in their last three cited cases, was duty bound to follow precedent. It was the Court's responsibility and duty to alter decisional law to produce common sense justice. As to Court's doctrine of governmental immunity, they had already waited too long, and he would join the vast majority of the other courts in abrogating it. The minority opinion concludes (9):

"Thus it is evident that times have changed and are now changing in business, social, economic and legal worlds. The basis for and the need of such encouragement is no longer existent."
CHAPTER V

SUMMARY, CONCLUSIONS, AND RECOMMENDATIONS

The purpose of this study was to discover and identify the developments in court decisions which constitute trends in the tort liability of school districts in Iowa. The accomplishment of this purpose was attempted through (1) the examination of court decisions on the question of school district tort liability, beginning with the date of the first decision on the question, and (2) the organization and presentation of an analysis of the decisions by means of which chronological and jurisdictional trends might be illustrated.

Summary

The laws of Iowa with respect to local governmental tort immunity are nearing the completion of a 180 degree turn. The change has been gradual but its completion may leave Iowa local governments in a more severe position of liability than if the doctrine of immunity had never existed. This untenable position resulted when the Supreme Court gave injured plaintiffs relief from the application of the doctrine by extending the statutory exceptions and then
wiping out the defenses which would be available to a
private-party-defendant, within the area of exceptions.

**Early cases**

The Supreme Court of Iowa held, in 1876, that a school
district was not liable for injuries received by a child
while playing about unguarded well-drilling equipment on the
school playground in **Wood v. Independent School District of
Mitchell**. In 1880 this precedent was extended in the case of
**Kincaid v. Hardin County**, holding counties not liable for
injuries received in poorly-lighted courthouse stairways.

Two years later, a school district was held exempt, in the
case of **Lane v. District Township of Woodbury**, where a pupil
was injured by reason of defective construction of a school
building. The attorney general, in 1912, ruled a school
district not liable for injuries resulting from boiler
explosion, and in 1928, he ruled that districts were not
liable for injuries received by pupils engaging in the
school athletic program. An opinion in 1930 extended the
immunity to visitors on school premises. In 1933 the
Supreme Court of Iowa extended the immunity in its broadest
form based on the **Hibbs v. Independent School District of
Green Mountain**. The court held that when officers, servants,
or agents of a municipality are engaged in performing a
governmental act for and on behalf of a municipality, they are not liable in damages consequent on their negligence in doing the act. This applied to a person who, with knowledge and consent of a school board, was operating for the school district a bus in the transportation of children to and from school, even though the person so operating the bus was acting at the time in lieu of the person with whom the district had actually contracted for the transportation.

Street exceptions broadened

For many years the leading Iowa case on a municipal tort immunity was the 1931 case of Smith v. Iowa City, in which it was held that a park board was not liable for injuries suffered by a child on a defective teeter-totter, even though it had notice of the defect and an opportunity to repair. However, in 1956, in the case of Florey v. City of Burlington, the city was held liable for injuries resulting from the steepness of a footpath in a public park. No reference was made to the Iowa City case and the court appears to have based the liability on breach of the statutory duty to keep all public highways, streets, avenues, alleys, public squares, and commons within the city in repair and free from nuisance. Bringing a park footpath within the category of failure to repair, would seem to be reaching rather deeply
into the barrel for a result. The handwriting on the wall took a clearer meaning the following year in the case of Hall v. Town of Keota. Having used the street exception to immunity rule to hold the city liable for injury in a park in the Burlington case as precedent to hold the town liable for injury stemming from a defect in street parking in the Keota case. A utility company had abandoned a pole in the parking area between the street and sidewalk. It fell, injuring a five-year-old boy who was playing on the sidewalk. At some time or another, the town had affixed a stop sign and a no U-turn sign to the pole. The court cited the Burlington case, held the town liable, and remedied its oversight in the Burlington case by overruling the Iowa City case.

Proprietary functions

In some cases the immunity doctrine has been eroded on the basis of distinction between "governmental" and "proprietary" functions. In the 1951 case of Brown v. City of Sioux City, the city was held liable for killing bees owned by a tenant on the leased portion of the municipal airport upon the ground that the city was engaged in a proprietary function. Evidently the governmental nature of airport operation does not include spraying for flies and mosquitos. Similarly, in the 1957 case of Wittner v. Letts, a county
hospital was held liable for injuries to a patient upon the ground that it was engaged in a proprietary function. The injured patient happened to be a paying patient, and it is not clear whether the function would have been held governmental, as is usually the case with public health matters, had the plaintiff been a relief case.

Nuisance cases

Commencing in 1939, actions brought on a nuisance theory, as distinguished from negligence, were held to be outside the rule of immunity. The theory was first announced in the case of Casteel v. Town of Afton, but the town was held not liable for the reason that there was insufficient evidence to prove the operation of the town athletic field amounted to a nuisance. The theory was put to work, however, in the 1941 case of Ness v. Independent School District of Sioux City, in which a school district was held liable for damages to windows and shrubs of a private property owner whose home abutted the school playground.

Sidewalk cases

As part of the streets, sidewalks have been held to be within the exception to immunity set forth in section 389.12, Code of Iowa. See Keota case, supra. However, the statutory exception has been broadened, by court decision, to what
approached a rule of absolute liability. In the case of *Beech v. City of Des Moines* in 1947, the city was held liable for injuries to a pedestrian who was tripped by a hole in the sidewalk even though she admitted she knew the hole was there and conceded she had previously passed over it some 1800 times on her way to and from work. In a more recent case in 1963, *Engman v. City of Des Moines*, the plaintiff stepped into a hole in the portion of the street used for vehicular traffic, not a crosswalk, while carrying a sheet of plate-glass from his truck to the job. He admitted that his head was turned and that he was not looking where he was walking. The district court jury awarded him $25,000 upon an instruction to the effect that a city was under a duty to maintain the portion of the street used for vehicular traffic in the same degree of perfection, for the benefit of pedestrians, as a sidewalk. The city appealed the decision to the Supreme Court which affirmed the decision of the lower court but stated that a judgment of $19,000 was the largest amount which the rule of fair compensation would permit.

The danger in the cases described above is that they appear to say there is no defense of contributory negligence available to the city within the area previously recognized as having exceptions to immunity. If the rule of immunity
were completely abolished, which amounts to the same thing as having all exceptions and no rule, it would be most desirable that the defense of contributory negligence be again made available to local governmental bodies in all cases.

**Moore v. Murphy**

In the 1963 case of *Moore v. Murphy*, three of the justices of the Iowa Supreme Court, in a concurring opinion, stated that although the doctrine of local governmental immunity had not been directly an issue before them in that case, they were serving notice that they contemplated abolishing it at the first opportunity. The court in 1933 in the *Hibbs* case held that the immunity doctrine applied to agents, officers, and servants of a municipal corporation. In this 1965 case, they reversed the decision of the lower court and held the servant, the sheriff, guilty of negligence.

This, of course, amounted to a courteous warning that the culmination of the trend manifested by the expansion of the "street defect" exception, the "nuisance" cases, the "proprietary function" cases, and the virtual abolition of the defense of contributory negligence was at hand.

**The culmination**

In *Boyer v. Iowa High School Athletic Association*, in 1964, the Supreme Court of Iowa, by a five-to-four decision
declined to abolish governmental immunity at this time. The plaintiffs, paying spectators at a high school basketball tournament game, sustained injuries when the bleachers upon which they were sitting collapsed. An action to recover for these injuries was brought against the Iowa High School Athletic Association and the Independent School District of Mason City. The district court dismissed the action against the school district on the ground of governmental immunity. On appeal to the Supreme Court of Iowa, the court ruled as noted above. Although there has been a trend away from the judicially created doctrine of governmental immunity, the Iowa Legislature has recognized the doctrine to be a policy of the state; therefore, abrogation of the immunity can be properly effected only by the legislature and not by the judiciary.

Yet in this same year, the court by unanimous decision held that a municipality can be held liable for its own negligence in the Linstrom v. Mason City case.

Legislation

In searching the statutes in Iowa nothing was found in changed legislation in regards to tort immunity for governmental corporations. This short-coming has long been recognized by the League of Iowa Municipalities. Bills (60th
General Assembly, Senate File 377) have been sponsored by this organization seeking corrective legislation.

Unfortunately the proposed bills always wound up being assigned to the legislative-judiciary committees of the legislature rather than the city and town committees of the respective houses. Since the judiciary committees are usually heavily populated by claimant-representing type attorneys, the League of Municipalities failed to get their bills out of committee at either the 59th or 60th session of the General Assembly. The bills they did not get out of committee took the following approaches to the problem:

1. Proposed enactment into statute of the common-law rule of governmental immunity leaving in force the traditional exception for street defects.

2. Imposition of a ceiling of $20,000 for bodily injury or death of two or more persons, $10,000 for bodily injury or death to one person, or $5,000 property damage on the liability of the city for each negligent act within the exception.

3. Authorization to expend public funds for liability insurance.

4. Extension of the existing notice and limitations statute on injury claims to property claims. The statute
provides that unless the injured party gives the city notice within sixty days from the happening of the injury, he must commence his action within three months.

Salient findings

1. School districts in Iowa were still protected from tort liability for governmental functions by the application of the principle of the common-law rule of governmental immunity by an insecure margin of a five-to-four vote of the Iowa Supreme Court.

2. Teachers and other employees were liable for their own torts as the principle of governmental immunity does not extend to offer individuals protection from liability if they were sued as individuals.

3. Legal principles and precepts regarding the liability of teachers and other school employees were applicable to school administrative personnel.

4. The purchase of general liability insurance may be held to be an illegal expenditure of school funds, according to opinions of the Attorney General.

5. Most writers on school law feel that governmental immunity in tort was outmoded and indefensible. Court dissatisfaction of the governmental immunity was evidenced in strong dissenting court opinions and supported by court exceptions allowing the injured to recover damages in spite of governmental immunity.

6. By statutes, municipalities were liable for injuries to persons or property caused by defects in public places under their jurisdiction of which they had actual or constructive notice.

7. Recently municipalities in Iowa were held to be liable irrespective of negligence or fault for the escape of dangerous forces confined on their property.
8. Local governments (including school districts) have been held not immune for injuries resulting from negligence in carrying on a proprietary function.

9. Local governments (including school districts) were liable for damages resulting from nuisances maintained by them.

10. If the doctrine of immunity were abrogated without accompanying controls or liability limits, large verdicts could result in oppressive property tax burdens upon local taxpayers.

Conclusions

The doctrine of sovereign immunity provides that the state and its subdivisions are immune from suit or liability for torts committed by a governmental unit. It also operates as an exception to the rule of "respondeat superior", since the governmental unit was not liable for the torts of officers and employees committed within the scope of their employment. The basis of the rule that the state cannot be sued has become so well-established that statutes allowing a governmental unit to sue and to be sued have usually been strictly construed as removing only the procedural obstacle to claims otherwise recognized but not as a waiver of substantive immunity from tort liability. However, the entire doctrine of sovereign immunity, particularly the rule extending immunity to the lesser subdivisions of government, has been
the subject of a great deal of criticism by both commentators and the courts.

The courts, in attempting to lessen the harshness of the doctrine of sovereign immunity, have developed the so-called governmental-proprietary distinction, which attaches tort liability to a proprietary function, but not to a function deemed governmental. The rationale given for the distinction was that many governmental units act in both a corporate capacity, similar to private corporations with local interests not shared by the state as a whole, and in a governmental capacity endowed with governmental powers and responsibilities.

The resort of the judiciary to the governmental-proprietary distinction is an effort to separate these functions and impose tort liability for torts committed in the corporate or proprietary capacity to the same extent as any private corporation would be held liable. This general exception was applied both to municipal corporations and to quasi-corporations, but it has not been extensively applied to the state.

Another judicially-created exception to the immunity doctrine is that the individually negligent employee or officer of the governmental unit may be personally liable.
In this situation the courts have distinguished between discretionary and ministerial functions of the employee and impose liability only for negligence which results from the performance of ministerial duties. Some courts have made the further distinction of ministerial misfeasance and non-feasance with liability for the former, but not for the latter.

The Supreme Court of Iowa has generally sustained state governmental immunity, although some tort recovery is allowed by means of a legislative claim. As in the majority of jurisdictions, the doctrine has become so embedded that a statute allowing a county to sue and to be sued has been held not to waive tort immunity upon the theory that the county is an extension of the state and thus derives the state's immunity. Similarly, statutes which allow all state agencies and political subdivisions to purchase liability insurance for themselves and their employees have been held to be permissive and to have no effect upon the immunity doctrine.

The Iowa court has developed the governmental-proprietary distinction in holding municipal corporations liable in proprietary functions for their torts and the torts of their employees committed within the scope of their
employment. Despite earlier decisions, it now appears that the Iowa court will likewise hold quasi-corporations liable for torts committed in proprietary functions. In the recent case of \textit{Wittmer v. Letts}, the Supreme Court of Iowa, in holding a county hospital liable to a paying patient for the negligence of its employees, disapproved earlier cases and stated the question to be whether or not the operation of a hospital by a county constitutes a governmental or proprietary function. This case appears to establish that quasi-corporation immunity will no longer be the absolute immunity afforded the state, but that it will now be determined on the same theory as municipal corporation liability. It could be argued this case indicated an increased willingness by the Iowa court to avoid the harshness of the doctrine by being more liberal in its determination of what constitutes a proprietary function.

In another recent Iowa decision, \textit{Conrad v. Le Moines}, the judiciary again indicated a willingness to limit the immunity doctrine. In that case the Iowa court held that a special appearance was not sufficient to raise the tort immunity of a state highway patrolman charged with negligence. It was stated that personal immunity from suit extended only to the governor and other high officials of the state. The court
reasoned that tort immunity of the officer was court created and, therefore, was a partial immunity which would be determined under the misfeasance-nonfeasance theory. While the main impact of the case is procedural, it seemingly indicates that the Iowa court will allow immunity from suit only for the benefit of the state and its highest officers. However, the lesser subdivisions of government and their officers are included only within the court-created immunity from liability—a partial immunity subject to the governmental-proprietary and misfeasance-nonfeasance distinctions. It would appear that the Iowa court has brought the immunity of both quasi-corporations and municipal corporations under the court-created immunity from liability, which the Iowa court should be free to alter or abolish.

In the recent case of Moore v. Murphy the Iowa court sustained another exception to the immunity doctrine: a public officer was personally liable for acts of misfeasance committed within the scope of his employment but was not liable for nonfeasance. The rationale of this exception was that immunity extends to the officer if the breach of duty is to the general public, but if the duty was owed to the individual injured, immunity does not attach and liability was imposed. The specially concurring opinion in the
Moore case was of particular interest for it briefly considered the question of abrogating the sovereign immunity doctrine. The three concurring justices stated that those who relied on immunity as a defense must realize our court-made doctrine of governmental immunity would be subjected to a re-examination in the near future. This dictum was an indication that the immunity doctrine was no longer favored by the Iowa court, and it invited the prediction that the Iowa court was ready to rid the law of this outmoded rule.

The Boyer case squarely presented to the court the issue of abrogation of the immunity doctrine. Despite the earlier indications of disfavor with the doctrine, upon re-examination of its status in Iowa, the five-to-four majority opinion concluded that abrogation of the doctrine should come from legislative, not judicial action. The majority explained its position by pointing out that even though the rule may have been judicially created, it was now the established policy of the state, as evidenced in laws authorizing the purchase of liability insurance covering proprietary functions and officers and employees of certain public bodies. In light of such limited legislative action in recognizing and relaxing the doctrine's application, its abrogation was considered by the court to be a legislative
function. A vigorous dissenting opinion, written by Justice Moore, emphasized the obvious inequalities resulting from the doctrine and the trend in other jurisdictions toward judicial abrogation of governmental immunity. In concluding that such immunity should be abolished, Justice Moore reasoned that legislative recognition of some of the doctrine's evils should not prevent judicial abrogation of a judicially created rule in order to produce common sense justice.

As in the *Boyer* case, whenever courts consider the modification or abolition of governmental immunity, the basic question was whether the judiciary or the legislature should take the initial action. In accord with the *Boyer* case, several jurisdictions have taken the view that the courts are bound by *stare decisis* and that any action must come from the legislature. The soundest argument for this position was that it would be necessary to use public funds to settle claims or pay judgments and only the legislature can properly provide for their collection by taxation, and authorize expenditures for liability insurance. Nevertheless, courts in several of the abrogating jurisdictions had not considered themselves bound by prior statements that any change must come from the legislature. Courts which had abrogated the rule had generally based their action on the
rationale that since a compelling reason for the court-made rule no longer exists, the courts had a duty to modify or abolish it.

Numerous courts, including the present court, have argued against judicial abrogation of governmental immunity by emphasizing the subsequent restrictive legislative reaction which had taken place in some abrogating jurisdictions. In contradiction to this argument, it had been advanced that subsequent legislative action was not necessarily statutory frustration of attempted judicial reform, but that the courts have overcome legislative inertia that would otherwise have delayed or defeated reform. Thus these developments may be viewed as illustrating not merely the possibility of clash between decisional and statutory creativity but also the possibility of their serving in combination to bring about reform that neither alone would have been likely to achieve.

In view of the fact that abrogation of the immunity doctrine would affect numerous, diverse governmental units and operations, legislative action would seemingly be preferable to a case-by-case development in providing any desired exceptions to complete abolition of the doctrine and in implementing a full-scale reform. However, it was likely that many of the courts which have sustained the rule have
not fully considered the possibility of a comprehensive legislative reform prompted by judicial action. After citing instances in which the doctrine had been abrogated by the judiciary in other jurisdictions, the present Court assumed that because restrictive legislative action followed those decisions, judicial action in the instant case would have been improper. The majority opinion avoided a discussion of whether a court should act with the intention of stimulating legislative consideration of a legal question. Although it may be argued that a tendency on the part of courts to decide cases with the attitude that the legislature will correct any mistakes results in judicial irresponsibility, this argument would not seem to preclude creative judicial action which had a strong basis in reason. As has been indicated, both case authority and current jurisprudential writings lend approval to positive judicial action in areas involving questions such as the abrogation of governmental immunity.

Judicial action aimed at speeding legislative reform would seem particularly suitable with respect to an inequitable and outmoded doctrine to which the courts themselves gave birth. Although the decision in the instant case settles the issue in Iowa for the present, it is suggested that if
the Court is faced with the issue again it should give careful consideration to the possibility of a combined judicial-legislative reform. In the meantime, whether the closeness of the present decision and the court's recognition of a trend to abrogate the doctrine of sovereign immunity will have any effect on the legislature was open to speculation. Hopefully, the present opinion will serve as a spur to complete legislative examination of the immunity doctrine resulting in remedial legislation for Iowa.

The primary assumption at the onset of this study was that judicial opinions on the question of school district liability had been changing in recent years. The findings of the study not only show that the assumption was valid, but also provides indications as to the directions these changes have taken.

These conclusions can be summarized as follows:

1. The trend throughout the United States was in the direction of abolishing local governmental immunity.

2. Where abolition comes about by court decision, the liability imposed was generally unlimited.

3. Abolition by act of the state legislature appeared the more desirable method for the reason that it could be accompanied by legislative controls.

4. The Supreme Court of Iowa has generally sustained state governmental immunity, although some tort recovery is allowed by means of a legislative claim.

5. In view of the recent decisions by the Court in Iowa,
the state governmental units are "ripe" for abroga-
tion of the doctrine should another case come before
the Court.

6. The possible financial consequences of the abolition
of the immunity doctrine in Iowa, by judicial fiat,
without enactment of suitable legislative safe-
guards could bring about verdicts that could bank-
rupt a school district.

7. To avoid the harshness of the doctrine, the Iowa
Court has used the erosion-by-exception approach.
This has proven entirely unsatisfactory.

Recommendations

It was noted that while the Iowa bills (60th General
Assembly, Senate File 377) languished and expired in commit-
tee, the Minnesota Legislature passed a bill which contained
many of the features sought in the Iowa bills, plus some
additional features not included in the Iowa bills. The
Minnesota Act imposed liability ceilings, notice and
limitations requirements, specific authority to purchase
insurance, and specific areas of immunity. Of particular
interest was the limitation of ice and snow claims to
situations caused by the affirmative negligence of the
governmental corporation.

The proper approach to the immunity problem in Iowa for
1965 and the years ahead would seem to involve:

1. Preparing of a bill similar to the Minnesota Act.
2. Incorporating in such a bill a section expressly making the defense of contributory negligence available in all cases.

3. Enlisting the aid of the County Officers Association.

4. Enlisting the aid of the Iowa State School Board Association, the Iowa Association of School Administrators, and the Iowa State Education Association.

5. Sounding out the insurance lobby to determine whether their interest in writing the proposed insurance coverage is sufficient to make them allies.

6. Calling the attention of each of the members elected to the 61st General Assembly to the existence of the dissenting opinion in the Boyer v. Iowa High School Athletic Association and such subsequent decision, if any, as may have carried out the actual abolition of the immunity doctrine.

7. Distributing articles from professional magazines of the educational associations and municipal governmental associations for the purpose of making and keeping local officials aware of the problem and the need for its correction.
Termination of Immunity-Legislation Versus Decree

The trend indicated by this research indicates that school districts and personnel will become the target for ever-increasing accounts of litigations for tort liability. In order to protect justice in the field of school district liability and to prevent hardships inherent in the traditional immunity doctrine, this writer recommends that the immunity of the school district for tort liability be maintained; a virtual impossibility under the present situation.

Cases which are brought to the bar are expensive both in time and money. In addition they cast a bad light on the school and on the reputation of the staff and administration. Recent years have seen an increase in the number of tort liability suits brought against the school district.

The possible financial consequences of the abolition of immunity, by judicial fiat, without enactment of suitable legislative safeguards can bring about verdicts like the Molitor decision. How many districts could absorb such liability—even once—without substantially affecting their ability to function? When the Illinois Legislature appropriated money for the Kaneland School District, they more or less indicated that school districts could not afford this.
It is fairly safe to make the assumption that the court knows this now, too.

The deterioration of the doctrine to this extreme may cause taxes to rise fantastically unless we have legislative steps. As the costs go up, the following questions should be asked:

1. Who actually benefits from these suits? (The current rate of lawyers in Iowa for contingency fees is 33 to 50 percent in procedural trial.

2. Are ever-increasing awards justified?

It would seem prudent to protect all school personnel as to their potential personal liability. This could be accomplished by the purchase of liability insurance policies by the district. In-so-far as this concerns drivers of buses and other school vehicles, authority for the local school board to pay for the policy exists. Whether additional authority exists for the boards to purchase insurance for its employees against liability arising out of other acts is in doubt by reason of the ambiguity of the pertinent statute. Certainly such authority should exist, but in any event, there is nothing to prevent the board from taking the cost of its employees to purchase their own insurance into consideration when fixing salaries or, having made such allowance,
from requiring them to provide their own protection.

Liability insurance as a solution to the financial consequences of abolished immunity has its shortcomings. Judgments have exceeded a million dollars. In face of almost limitless liability it must be remembered that all public bodies have financial and tax limitations. (Only the Federal Government prints money or can authorize any size deficit that it wants.) Governmental bodies must either, take money from an existing fund, probably already committed, increase taxes, or hope the taxpayers will vote for a special assessment.

Abrogation of immunity coupled with required insurance is not enough. Protection can be secured through insurance; however, insurance premiums are based on loss record experience and the higher the exposure, the higher the premiums. A local governmental unit might have some protection against a catastrophic verdict such as the *Molitor* case but this will not solve the general day-today problems of liability. Besides verdict exposure the local governmental unit must also consider the litigation costs, processing claims, and preparation for trial. The public is going to pay this one way or another, either by larger staffs or attorneys or in the insurance premiums, and it is already established that the
volume of claims will increase many-fold.

No one can be certain about the full effect that unrestricted liability would have on the caliber of persons who would accept employment from a local governmental unit or the devotion with which they would perform their functions or, in fact, on how the school district would perform certain functions.

There could be too many inconsistencies as a result of outright abolishment of immunity, unless accompanying precedents were also overruled. These precedents were set when the Court was using the erosion-by-exception approach.

In summary then, if immunity is to be amputated from local governmental units, suitable additional devices should be provided concurrently with the operation. Courts may have the power to abrogate immunity, but they certainly do not have the power to levy taxes or otherwise provide funds to meet the resulting liability. They do not have power to limit the amount of recovery or to force contribution from the state or some other agency. What then is the final answer?

Several alternatives have been suggested: state participation, limits of liability, contributions between agencies, and controlled immunity through legislation.
From an analysis of the research data reported here-in, this writer recommends that controlled immunity through legislation is the best approach for Iowa.

Controlled Immunity Through Legislation

Legislation designed to fill the vacuum created by abolition of the immunity doctrine has been enacted in California and Minnesota. In 1963 the Supreme Court of Minnesota did abolish the doctrine in that state, and their legislature, which was then in session, immediately enacted a bill, which has worked well there and, which should serve for a model for Iowa. This law primarily does three things:

1. Defines the areas of tort liability and immunity for quasi-corporations.

2. Fixes the liability limits within the areas of defined liability.

3. Authorizes the purchase of insurance to protect against such liability.

Immediate and specific legislation is recommended to correct a dangerous liability situation in Iowa.
Need for Legislation

Local governmental immunity, or its remaining vestiges, was upheld by the 1964 decision of the Supreme Court of Iowa in the 1964 Boyer case, by a five-to-four margin. However, the closeness of the vote indicates existing common-law cannot survive many more attacks. This leaves local governments with the choice between riding the existing doctrine, until the Court finally destroys it or erodes it away; or seeking legislation at the forthcoming sessions, to define areas of immunity and liability, and to make some provisions for financing in the areas of liability.

The urgency of such legislation was demonstrated by a 1964 case in New Jersey in which a verdict of $1,250,000 was returned against a school district of 10,000 population, and the Molitor verdict of $2,500,000.

A bill providing for controlled immunity through legislation is recommended. A draft of such a measure has been prepared and is presented in the Appendix.

Suggestions for Further Study

1. An analysis of the current financial awards in personal injury actions against local governmental
units throughout the United States.

2. A state by state investigation of how professional teachers' organizations are providing protection for their members in tort liability suits.

In closing, school districts whose officers and employees exercise a reasonable degree of care in the maintenance of school facilities and in the supervision of school activities are not likely to incur liability. Liability is assessed only after negligence or other tortious conduct has been proven.

2. American Law Reports. 68 (2d) 1437.


25. Frace v. Long Beach City High School District et. al., 137 P. (2d) 60 Cal. (1943).


42. Kincaid v. Hardin County. 53 Iowa 430.


45. Lane v. the District Township of Woodbury. 58 Iowa 462, 12 N.W. 478.


55. Minnesota Statutes Annotated Sec. 466.02--466.09; 466.12.


58. Moore v. Murphy. 254 Iowa 969.


62. Murphy v. City of Waterloo. 255 Iowa 557. 123 N.W. 2d 49.


70. Olson v. Cushman. 224 Iowa 974.


89. Shirkey v. Keokuk County. 225 Iowa 1159. 275 N.W. 706.


91. Smith v. City of Iowa City. 213 Iowa 391, 239 N.W. 29.


sity Microfilms. 1962.

ACKNOWLEDGMENTS

The writer wishes to express appreciation and gratitude to Dr. Ray Bryan, Head of the Department of Education, who served as chairman of the doctoral committee and advisor, for his counsel and encouragement in undertaking the program.

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I wish to acknowledge my debt to Dr. Charles Faber, former advisor and now serving as Chairman of the Division of School Administration at George Peabody College for Teachers, for the inspiration to undertake the investigation reported in this dissertation.

The writer is especially grateful to Dr. Richard Manatt for the subsequent encouragement and criticism which enabled me to bring the investigation to a climax, and for the many hours of critical examination of the study and for his many helpful comments and suggestions.

The writer wishes to acknowledge the support given by
Mr. Leonard Abels, Corporation Counsel for the City of Des Moines and a specialist in tort liability. Mr. Abels aided the writer on the location of the cases and in the general sanction of the design and the findings.

Finally to my wife and sons for their understanding, encouragement and untiring effort on my behalf.
APPENDIX A
Definition of Terms

Accident - An event which takes place without one's foresight or expectation; an event that proceeds from an unknown cause and therefore is not expected.

Attractive Nuisance - A doctrine which holds a property owner liable when he knowingly leaves dangerous instrumentality, which he may be charged with knowing is of character to attract children, exposed in a place liable to be frequented by children, and as a result, a child who did not realize the danger, is injured.

Case Law - The aggregate of reported cases as forming a body of jurisprudence, or the law of a particular subject as evidenced or formed by the adjudged cases, in distinction to statutes and other sources of law.

Collateral Attack - Attempt to destroy the effect of a judgment showing reasons why the judgment should not be given.

Common Law - That body of unwritten law, founded upon general customs, usage or common consent, and in natural justice, or reason; it is custom long acquiesced in or sanctified by moral usage and by judicial decision.

Contributory Negligence - If the evidence shows that the plaintiff himself was guilty of negligence contributing to his injury, there can be no recovery.

Conversion - An unauthorized assumption and exercise of the right of control over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of the owner's rights.

Decision - A judgment rendered by a competent tribunal.

Defendant - A party sued in a personal action.

Derelict - Neglectful.
Diete - The opinions of a judge which do not embody the resolution or determination of the courts, and, made without argument or full consideration of the point, are not the processed, deliberate determinations of the judge himself.

Discretionary Powers - Powers or rights conferred to act according to the dictates or conscience of judgment.

Employees - Administration, teachers, bus drivers, custodians.

Immunity - Freedom from natural or usual liability.

Imputed Negligence - Negligence which is not directly attributable to the person himself, but which is the negligence of a person who is in privity with him, and with whose fault he is chargeable.

Indictum - Statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand are other diots, and lack the force of an adjudication.

In Loco Parentis - In place of a parent.

Jurisprudence - A system of laws of a country.

Liability - The state of being bound or obliged in law or justice to do, pay, or make good on something. The state of one who is bound in law and justice to do something which may be enforced by action.

Ministerial - It is a definite duty arising under circumstances admitted and imposed by law.

Misfeasance - Improper performance of an act.

Negligence - The omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or the doing of something which a prudent and reasonable man would not do.
Nolen Volens - Whether willing or unwilling; consenting or not.

Nonfeasance - Neglect or failure to perform a duty.

Nuisance - Anything that unlawfully causes hurt, inconvenience, or damage.

Opinion - The statement of reasons delivered by a judge or court for giving the judgment which is pronounced upon a case.

Plaintiff - He who complains.

Plenary - Meaning full, complete, unabridged.

Proprietary - One who has legal right to anything.

Proximate Cause - That cause of injury which, in natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury, and without which injury would not have occurred.

Quasi - A term used to mark a resemblance and which supports a difference between two objects. Indicates partial or part owner.

Quasi - judicatory - A judicial act performed by someone not a judge.

Respondeat Superior - A phrase often used to indicate the responsibility of a principal for the acts of his servant or agent.

Save Harmless - To exempt or reserve from harm. As where a statute reserves or saves vested rights.

School - An institution of learning of lower grade than a college or university.

School District - A public and quasi-municipal corporation, organized by legislative authority or directive, comprising a defined territory, for the erection, maintenance, government, and support of the public school within its territory in accordance with
and in subordination to the general school laws of
the state, invested, for these purposes only, with
powers of local self-government, and generally of
local taxation, and administered by a board of
officers, usually elected by the voters of the
district, who are variously styled school direc-
tors, trustees, commissioners or supervisors of
schools.

School Officials - School board members, trustees, clerks,
and treasurers.

Solvent - Having the power of dissolving.

Stare Decisis - To abide by, or adhere to, decided cases.

Statute - A law established by the act of the legislative
power.

Subrogation - The substitution of another person in the place
of the creditor to whose rights he succeeds in
relation to the debt.

Tort - In modern practice is used to denote an injury or
wrongful act. A private or civil wrong or injury. A
wrong independent of contract.

Ultra Vires - A term used to express the action of a corpora-
tion which is beyond the powers conferred upon it
by its charter, or the statutes under which it was
instituted.
APPENDIX B
April 10, 1964

Dr. R. R. Hamilton, Dean Emeritus
College of Law
University of Wyoming
Laramie, Wyoming

Dear Dr. Hamilton:

I am a Doctoral Candidate in school administration at Iowa State University at Ames, Iowa. I would like to do my thesis on "Tort Liability of School District Employees". To my knowledge, there has not been a historical study of this since about 1928. I am writing to you with the hope that you can give me some suggestions.

Would it be wise to continue the historical approach of this subject from 1928 on, or would it be more sound to do just a historical study of Iowa?

Any suggestions that you can offer me would be greatly appreciated. I know that you are a very busy person and that you are recognized as an authority in School Law. I have had the privilege of using your textbook and enjoy and appreciate your presentations of "The National School Law Reporter", distributed by Croft Publications.

Sincerely,

Fred J. Rohde
April 15, 1964

Mr. Fred J. Rohde, Superintendent
Ballard Community School District
Huxley, Iowa

Dear Mr. Rohde:

If there is sufficient tort liability of districts material in Iowa I think you might well limit your study to that area. However, if you should decide to work on this subject in the broader area, I would hope that you would attempt more significant interpretation of the cases than has appeared in much of the writing in this field in recent years.

I think there is little to be gained professionally in rehashing the material in this important area of school administration. The rapidly changing law on tort liability seems to have attracted some writers who have had little to offer, I regret to say. I am sure your study would not fall in this category if you should decide to work in the broader area.

Good luck to you.

Sincerely,

Robert R. Hamilton
APPENDIX C
Horace Mann Mutual Insurance Company
OF SPRINGFIELD, ILLINOIS
Policy No. Iowa 2-ELA
Effective Date July 1, 1964 Expiration Date July 1, 1965
Limit of Liability - $50,000 each occurrence.

The term of this policy shall be as shown under the effective date and expiration date and for such succeeding annual periods thereafter, as the required renewal premium is paid according to the provisions of the Basic Policy.

This is to certify that ______________________ who is a member of the Iowa Education Association, is entitled to the insurance coverage set forth and described herein and in the Basic Policy filed in the office of the Education Association designated herein, the terms and conditions of which by this reference are made a part hereof. A copy of the Basic Policy is also on file with the Insurance Commissioner of the State of Iowa for public inspection.

The Company agrees with the Association (hereinafter called the Policyholder), named in the declarations made a part hereof, in consideration of payment of the premium and subject to the limits of liability, exclusions, conditions and other terms of this policy:

INSURING AGREEMENTS

I. Coverage—Liability.
To pay on behalf of each and every insured member of the Association (hereinafter called the insured) all sums which he shall become legally obligated to pay as damages because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person, and as damages because of injury to or destruction of property, including the loss of use thereof, arising out of an occurrence in the course of his duties as an instructor, member of a faculty or teaching staff.

II. Defense, Settlement, Supplementary Payments.
As respects such insurance as is afforded by the other terms of this policy the Company shall:
(a) defend any suit against the insured alleging such injury, sickness, disease or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; but the Company may make such investigation, negotiation and settlement of any claim or suit as it deems expedient;
(b) pay all premiums on bonds to release attachments for an amount not in excess of the applicable limit of liability of this policy, all premiums on appeal bonds required in any such defended suit, but without any obligation to apply for or furnish any such bonds;
(c) pay all expenses incurred by the Company, all costs taxed against the insured in any such suit and all interest accruing after entry of judgment until the Company has paid, tendered or deposited in court such part of such judgment as does not exceed the limit of the Company's liability thereon;
(d) pay expenses incurred by the insured, in the event of an accident causing bodily injury, sickness or disease, for such immediate medical and surgical relief to others as shall be imperative at the time of the accident;
(e) reimburse the insured for all reasonable expenses, other than loss of earnings, incurred at the Company's request.

The amounts incurred under this insuring agreement, except settlements of claims and suits are payable by the Company in addition to the applicable limit of liability of this policy.

III. Policy Period.
This policy applies only to occurrences during the policy period.

EXCLUSIONS

This policy does not apply:

"(a) to the ownership, maintenance or use, including loading and unloading, of any motor vehicle, trailer, semitrailer, watercraft or aircraft, while away from premises wherein school sponsored and supervised classes of instruction are conducted;"
(b) to bodily injury to or sickness, disease, or death of (1) any employee of the insured while engaged in the employment of the insured, if benefits therefor are either payable or required to be provided under any Workmen's Compensation law; or (2) any resident employee of the insured while engaged in the employment of the insured has in effect on the date of the occurrence a policy providing Workmen's Compensation benefits for such employee;
(c) to injury, sickness, disease, death or destruction caused intentionally by or at the direction of the insured, except by corporal punishment of any pupil administered by or at the direction of the insured in the course of the insured's duties as an instructor, member of a faculty or teaching staff, if the administration of corporal punishment is not prohibited by state law;
(d) to injury to or destruction of property used by, rented to, or in the care, custody or control of the insured;
(e) to the rendering of any dental, medical, nursing or surgical services or the omission thereof.

CONDITIONS

1. Limits of Liability. The limit of liability stated in the declarations is the limit of the Company's liability for all damages, including damages for care and loss of services, arising out of one occurrence.
2. Notice of Occurrence. When an occurrence takes place written notice shall be given by or on behalf of the insured to the Company or any of its authorized agents as soon as practicable. Such notice shall contain particulars sufficient to identify the insured and also reasonably obtainable information respecting the time, place and circumstances of the occurrence, the names and addresses of the injured and of available witnesses.
3. Notice of Claim or Suit. If claim is made or suit is brought against the insured, the insured shall immediately forward to the Company every demand, notice, summons or other process received by him or his representative.
4. Assistance and Cooperation of the Insured. The insured shall cooperate with the Company and, upon the Company's request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits. The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of the accident.

Form No. ELA-2-9-55 1a.
5. **Action against Company.** No action shall lie against the Company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy, or until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the Company. Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this policy to the extent of the insurance afforded by this policy. Nothing contained in this policy shall give any person or organization any right to join the Company as a co-defendant in any action against the insured to determine the insured's liability. Bankruptcy or insolvency of the insured or of the insured's estate shall not relieve the Company of any of its obligations hereunder.

6. **Other Insurance.** If the insured has other insurance against a loss covered by this policy the Company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the declarations bears to the total applicable limit of liability of all valid and collectible insurance against such loss.

7. **Subrogation.** In the event of any payment under this policy, the Company shall be subrogated to all the insured's right of recovery therefor against any person or organization and the insured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The insured shall do nothing after loss to prejudice such rights.

8. **Changes.** Notice to any agent or knowledge possessed by any agent or by any other person shall not affect a waiver or a change in any part of this policy or estop the Company from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part of this policy, signed by the President, a Vice-President, the Secretary or an Assistant Secretary of the Company, and countersigned by an authorized representative of the Company.

9. **Policy Period.** All periods of insurance shall begin and end at 12:01 A.M., at the location of the insured's residence.

10. **The Basic Policy which by reference is made a part of all individual policies, together with the individual policy, shall constitute the entire contract between the parties. A copy of the Basic Policy shall be deposited in the office of the Education Association named herein and shall be open for inspection at all reasonable times. A copy of the Basic Policy is on file with the Insurance Commissioner of the State of Iowa for public inspection.**

11. **Cancellation.** This policy may be canceled by the Association by mailing written notice stating when thereafter such cancellation shall be effective. This policy may be canceled by the Company by mailing to the Association at the address shown in this policy written notice stating when not less than thirty days thereafter such cancellation shall be effective. The mailing of notice as aforesaid shall be sufficient proof of notice and the effective date of cancellation stated in the notice shall become the end of the policy period. Delivery of such written notice either by the Association or by the Company shall be equivalent to mailing. Earned premiums shall be computed pro rata. Premium adjustment may be made at the time cancellation is effected and, if not then made, shall be made as soon as practicable after cancellation becomes effective. The Company's check or the check of its representative mailed or delivered as aforesaid shall be sufficient tender of any refund of premium due.

12. **Terms of Policy Conformed to Statute.** Terms of this policy which are in conflict with the statutes of the State wherein this policy is issued are hereby amended to conform to such statutes.

13. **Premium, Inspection and Audit.** The Company shall be permitted to examine and audit the Association's books and records, or until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the Company. Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this policy to the extent of the insurance afforded by this policy. Nothing contained in this policy shall give any person or organization any right to join the Company as a co-defendant in any action against the insured to determine the insured's liability. Bankruptcy or insolvency of the insured or of the insured's estate shall not relieve the Company of any of its obligations hereunder.

**IN WITNESS WHEREOF,** the Horace Mann Mutual Insurance Company has caused this policy to be signed by its president and secretary at Springfield, Illinois, and countersigned on the declarations page by a duly authorized agent of the Company.

E. H. Mellow
President

Edna M. Libert
Secretary
A Proposed Bill for Legislative Adoption

An Act relating to the tort liability of cities, towns, counties, school districts and other governmental subdivisions of the State of Iowa.

Be It Enacted by the General Assembly of the State of Iowa:

Section 1. Definitions. As used in this Act, the following terms shall have the following meanings:

"Municipality" shall mean city, town, county, or school district.

"Governing body" means the council of a city or town, county board of supervisors, local school board, and other boards and commissions exercising quasi-legislative, quasi-executive, and quasi-judicial power over territory comprising a political or municipal governmental subdivision of the State of Iowa.

"Tort" means every civil wrong which results in injury to person or property and includes, but is not restricted to, actions based upon negligence, breach of duty, and nuisance.

Sec. 2. Tort Liability. Except as otherwise provided in this Act, every municipality is subject to liability for its torts and those of its officers, employees and agents acting within the scope of their employment or duties, whether arising out of a governmental or proprietary function.

Sec. 3. Exceptions. The liability imposed by section two (2) shall have no application to any claim enumerated in this section. As to any such claim a municipality shall be liable only to the extent liability may be imposed by the express statute dealing with such claims and, in the absence of such express statute, the municipality shall be immune from liability.

1. Workmen's Compensation Claims. Any claim for injury to or death of any person covered by the Workmen's Compensation Act.

2. Tax Claims. Any claim in connection with the
collection and assessment of taxes.

3. **Accumulations of Snow and Ice.** Any claim based on snow or ice conditions on any highway or public place, except where the condition is affirmatively caused by the negligent acts of the municipality.

4. **Execution of law.** Any claim based upon an act or omission of an officer or employee, exercising due care, in the execution of a valid or invalid statute, ordinance, or officially adopted resolution, rule or regulation of a governing body.

5. **Discretionary acts.** Any claim based upon the performance or the failure to exercise or perform a discretionary function or duty, whether or not the discretion be abused.

6. **Other immunity.** Any claim against a municipality as to which the municipality is immune from liability by the provisions of any other statute or where the action based upon such claim has been barred or abated by operation of statute or rule of civil procedure.

Sec. 4. **Maximum liability.** The liability of a municipality arising out of any tort claim within the scope of this Act shall not exceed the following limits:

1. Twenty-five thousand dollars ($25,000) when the claim is one for death by wrongful act or omission and fifty thousand dollars ($50,000) to any claimant in any other case;

2. Three hundred thousand dollars ($300,000) for any number of claims arising out of a single occurrence.

No award for damages or any such claim shall include punitive damages.

Sec. 6. **Disposition of multiple claims.** Where the amount awarded to or settled upon multiple claimants exceeds three hundred thousand dollars ($300,000), a party may apply to the district court to apportion to each claimant his proper share of the total amount limited by subsection two (2) of section four (4). The share apportioned to each claimant shall be in the proportion that the ratio of the award or settlement made to him bears to the aggregate awards.
and settlements for all claims arising out of the occurrence.

Sec. 7. Notice of claim. Every person who claims damages from any municipality for or on account of any loss or injury within the scope of section two (2) shall cause to be presented to the governing body of the municipality within thirty days after the alleged loss or injury a written notice stating the time, place and circumstances thereof and the amount of compensation or other relief demanded. Failure to state the amount of compensation or other relief demanded shall not invalidate the notice; but in such case, the claimant shall furnish full information regarding the nature and extent of the injuries and damages within fifteen days after demand by the municipality. No action therefore shall be maintained unless such notice has been given and unless the action is commenced within one year after such notice. The time for giving such notice shall include a reasonable length of time, not to exceed ninety days, during which the person injured is incapacitated by his injury from giving such notice.

Sec. 8. Notice—wrongful death. When the claim is one for death by wrongful act or omission, the notice may be presented by the personal representative, surviving spouse, or next of kin, or the consular officer of the foreign country of which the deceased was a citizen, within one year after the alleged injury resulting in such death; but if the person for whose death the claim is made has presented a notice that would have been sufficient had he lived, an action for wrongful death may be brought without additional notice.

Sec. 9. Liability insurance. The governing body of any municipality may purchase a policy of liability insurance insuring against all or any part of liability which might be incurred by such municipality or its officers, employees and agents under the provisions of section two (2) hereof and may similarly purchase insurance covering torts specified in section three (3). Such insurance may provide protection in excess of the liability limits specified in section four (4). If the municipality has the authority to levy or cause to be levied taxes, the premium costs of such insurance may be levied in excess of any millage tax limitation imposed by statute. Any independent or autonomous board or commission in the municipality having authority to disburse funds for a particular municipal function without approval of the govern-
ing body may similarly procure liability insurance within the field of its operation. The procurement of such insurance constitutes a waiver of the defense of governmental immunity to the extent of the liability stated in the policy but shall have no effect on the liability of the municipality beyond the coverage so provided.

Sec. 10. **Defenses.** A municipality shall be entitled to the benefit of the defenses of contributory negligence, supervening cause, and all other defenses available to a private party-defendant in like circumstances, to the same extent that such defenses are available to private parties in such circumstances.

Sec. 11. **Indemnification.** The governing body may defend any of its officers and employees, whether elected or appointed and, except in cases of malfeasance in office or willful or wanton neglect of duty, may save harmless and indemnify such officers and employees against any tort claim or demand, whether groundless or otherwise, arising out of an alleged act or omission occurring in the performance of duty. Any independent or autonomous board or commission of a municipality having authority to disburse funds for a particular municipal function without approval of the governing body may similarly defend, save harmless and indemnify its officers and employees against such tort claims or demands. This section is intended to confer power in addition to that conferred by sections three hundred sixty-eight. A point one (368A.1), and that conferred by sections three hundred twenty-one point four hundred ninety-five (321,495) to three hundred twenty-one point four hundred ninety-seven (321,497).

Sec. 12. **Compromise of claims.** The governing body of any municipality may compromise, adjust and settle tort claims against the municipality for damages under section two (2) and may appropriate money for the payment of amounts agreed upon. When the amount of a settlement exceeds twenty-five hundred dollars, the settlement shall not be effective until approved by the district court.

Sec. 13. **Payment of judgments.** When a judgment is entered against or a settlement is made by a municipality for a claim within the scope of section two (2), payment shall be made and the same remedies shall apply in the case of non-payment as in the case of other judgments against the
municipality. If the municipality has authority to levy or cause to be levied taxes and the judgment or settlement is unpaid at the time of the adoption of the annual budget, it shall budget an amount sufficient to pay the judgment or settlement together with interest accruing thereon to the expected date of payment. Such tax may be levied in excess of any millage limitation imposed by statute.

Sec. 14. Prior claims. This Act shall have no application to any claims arising prior to its effective date.

Sec. 15. This Act, being deemed of immediate importance, shall be in full force and effect upon publication in the ________, a newspaper published at ________, Iowa, and the ________, a newspaper published at ________, Iowa.

Explanation

In the 1963 case of Moore v. Murphy, 119 N.W. 2d 759, three of the justices of the Supreme Court of Iowa, in a concurring opinion, served courteous warning upon the municipalities of Iowa, that the commonlaw doctrine of local governmental immunity would shortly become a thing of the past, as has happened in recent years in several of the surrounding midwestern states. In the 1964 case of Bover v. Iowa High School Athletic Association the Court upheld, for the time being, the remaining vestiges of the immunity doctrine. In 1963 the Supreme Court of Minnesota did abolish the doctrine in that state and their Legislature, which was then in session, immediately enacted a bill, which has worked well there and, which served as the model for this bill. The bill primarily
does three things:

1. It defines the areas of tort liability and immunity for municipalities.
2. It fixes liability limits within the areas of defined liability.
3. It authorizes purchase of insurance to protect against such liability.

The purpose of this bill is to respond to the Court's courteous admonition by legislatively clarifying the status of the immunity doctrine in the same manner as was done in Minnesota.