School District Responsibility for Negligent Supervision of Pupils

Reynolds C. Seitz

Follow this and additional works at: http://scholarship.law.marquette.edu/mulr

Part of the Law Commons

Repository Citation
Available at: http://scholarship.law.marquette.edu/mulr/vol25/iss3/1
SCHOOL DISTRICT RESPONSIBILITY FOR NEGLIGENT SUPERVISION OF PUPILS

Reynolds C. Seitz*

SCHOOL playgrounds, gymnasiums, rest-rooms, halls, classrooms, and manual training quarters are potential places of injury to children. School trips, recess periods, and errands also present times when children can be injured. The statistical fact that significant harm happens seldom is no reason for denying the truth of the opening statements. It is common knowledge that whenever children are gathered together there is always the threat of a disturbance which will produce injury to some boy or girl. Even when a child is alone and unsupervised he may injure himself. Certainly, there are enough actual times when these things have happened to remove the assumptions from the theoretical.

In the light, therefore, of such background this article has its justification. It has as its purpose a discussion of school district responsibility for the negligent supervision of pupils entrusted to its care. This discussion, however, will not concern itself entirely with the law as it exists. The broader objective of what the law should be will be undertaken, and in fact will be the fundamental goal. The present state of

*Professor of Law, Creighton University.
the law will be set forth, but only to furnish a springboard to aid in attaining the larger purpose.

With such ultimate end in view it is appropriate to start by noting the law which decides the question in the absence of statute. From the antiquated maxim, "The King can do no wrong" comes the common-law doctrine of immunity in tort of the state and its governmental agencies. And, even though there has been some breakdown of the rule when agents of municipalities are performing corporate or proprietary powers rather than acts of a political or governmental nature, there has never been any doubt about the non-liability of so-called quasi-municipal corporations such as school districts. In connection with school districts that are incapable of exercising the "corporate" powers of municipalities, the distinction developed with respect to "corporate" and "governmental" functions of municipal bodies is inapplicable. Certainly, therefore, under common law the district is immune as regards tort liability for an injury which grows out of the negligent act of a teacher in connection with the supervision of children. Such freedom from liability has its roots in the dogma about the King just previously quoted. In cases arising under the common law, court after court repeats that a school district is a governmental agency of the state possessing only delegated powers, and as such is not liable for torts of its agents unless such liability has been assumed or imposed by statute.

Unless expediency be the justification for such a condition of the law, there is no other sane explanation. The fallacy inherent in the dogma that the King or the state can do no wrong—if indeed anyone

1 Harper, Torts (1933) § 295; Borchard, Government Liability in Tort, 34 Yale L. J. 1, 129 (1925); 34 Yale L. J. 229 (1926); 36 Yale L. J. 1 (1927); 36 Yale L. J. 757, 1039; see also Notes, 39 Yale L. J. 550 (1930); 43 Yale L. J. 674 (1934).

2 On this point see Harper, note 1, supra.

3 Harper, Torts (1933) § 296.

4 See note, 17 Ore. L. Rev. 251 (1938) and cases cited therein; Kolar v. Union Free School Dist. No. 9, Town of Lenox, 8 N.Y.S. (2d) 986 (1939); Hines et al v. Bd. of Educ. of City of N.Y., 170 Misc. 745, 10 N.Y.S. (2d) 840 (1939); Lindstrom et al v. City of Chicago, 331 Ill. 144, 162 N.E. 128 (1928); Mokovich v. Independent School District of Virginia, No. 22, 177 Minn. 446, 225 N.W. 292 (1929); McDonell v. Brozo et al, 285 Mich. 38, 280 N.W. 100 (1938); Perkins v. Trask, 95 Mont. 1, 23 P. (2d) 982 (1933); Lawyer v. Joint Dist. No. 1, Mount Horeb and Blue Mounds, 232 Wis. 608, 288 N.W. 192 (1939), which even goes so far as holding that the statute requiring a school board to keep school buildings and grounds in good repair and safe condition, does not render the school district liable for the negligent failure to perform such duty nor abrogate the rule of a municipality's non-liability for negligence in performing governmental functions. Contra: Wodetzky et al v. Bd. of Educ. of City of N.Y. et al, 173 Misc. 136, 16 N.Y.S. (2d) 107 (1939) and cases cited therein.

ever did look upon the maxim as anything other than a rule of expediency—has been effectively exposed by so many authorities that it is not necessary to quote them. Indeed, if we did not have so many such utterances on the specific matter, the situation would be the same. For Dean Green has irrefutably clarified the danger to reason in courts continuing to heed generalizations when they are allowed to parade under the sacrosanct banner of principles. His argument is a clarion call to avoid the restricting influences of stereotyped legal phrases.

That society through its elected representatives has deemed it wise to limit the effect of the maxim which produces governmental immunity is common knowledge. Much statutory law coming out of various jurisdictions has specifically provided for various kinds of tort actions to be brought against bodies performing governmental functions. This trend has manifested enough strength to cause pressure to be brought in Congress which looks toward a much greater extension of the tort liability of the United States.

Therefore, a basic need in this discussion is to determine whether expediency dictates a preservation of the common-law rule of school district non-liability for the negligent supervision of children, or whether social policy should produce a statutory change. The people in a very few areas have already answered this question. Illustrative of such attitude are the provisions of the California, Nevada, and Idaho statutes which provide that: "Every teacher in the public schools must hold pupils to a strict account for their conduct on the way to and from school, on the playgrounds and during recess," and then provides that boards of education should be liable for any judgment against the school district on account of injury to the person or property arising out of the negligence of the district, or its officers, or employees.

There are two major arguments on the side of expediency. There is the reasoning that communities should not be forced to shoulder the additional expense of paying damages for injury caused as a result of the negligent supervision of pupils when they exercised due care in appointing administrators and teachers. There is also the thinking

---

8 See note 4, supra.
7 Green, Fright Cases, 27 Ill. L. Rev. 761 (1933).
9 SCHOOL CODE § 5.543.
10 N. C. L. (1929) § 5687.
11 CODE (1932) § 32-1003; The wording of the Idaho Statute is slightly different.
12 As an example see § 2.801 of the SCHOOL CODE of California referred to in Forgnone v. Salvadore Union Elementary School District, 106 P. (2d) 932 (Calif. 1940).
13 It is recognized that liability even independent of statute, can rest on a school district if trustees or school boards are negligent in hiring incompetent officials or teachers. The negligence is too close to home to be overlooked in such
that in many instances to force the communities to pay damages might actually result in closing down a school. Both lines of thought simply represent dollars and cents reasoning. They do, however, differ a little in their weight.

The first argument above is in essence the very same thinking that is submitted to justify antiquated teaching methods as a result of poor equipment, materials, and over-crowded classes. It is the attitude that the rule must exist—just as the inefficient school must exist—because the people want only the kind of public service for which they desire to pay. Such a position, of course, carries the philosophy that each individual member of the community is willing to bear the risk of cost of injury to his or her child. The fact that the risk may develop into a back-breaking burden does not always seem to be considered.

Reflection produces the easily understood fact that the people of some communities may desire to give greater protection to the physical well-being of the child—to insure it adequate medical care and attention if an injury should grow out of the negligent failure to supervise during school hours. Certainly, if people feel that children stand forth as the saviors of democracy, they will demand statutory modification of the old maxim which throws the cloak of protection about school districts as regards their tort responsibility for negligent supervision of pupils. If they do make such demand it would seem that no one should regret the obliteration of a medieval rule of law. Rather, we should be glad that the people who by their democratic procedures have established the school are willing to take on the additional responsibility of protecting children injured in school because of careless supervision.14

The second argument based on expediency is the feeling that in some instances damages might be so heavy as to force a particular school district to close its doors. One could easily imagine negligent supervision permitting an explosion which would wreck an entire school building. The exponents of the “bankruptcy” philosophy have been quite forceful in their point of view, and in their language they have not been unmindful of social welfare.15 The Wisconsin16 court,

---

14 This last sentence expresses the feeling of Dr. A. J. Foy Cross, Director of Instruction, Omaha, Neb. Public Schools. It is not an unusual opinion. The writer's own experience in public school administration leads to the conclusion that there are large numbers of educators who share the same view.

15 In Ford v. School District of Kendall Borough, 121 Pa. 543, 15 Atl. 812 (1888) the court specifically points out that the public welfare can best be served by a rule of non-liability.

16 Folk v. City of Milwaukee, 108 Wis. 359, 84 N.W. 420 (1900).
in discussing the situation if a rule of school board liability should prevail, said, "Results would be intolerable, and might necessitate the closing of schools by the exhaustion of funds to discharge judgments."\[^{27}\]

It can be frankly acknowledged that judgments should not be permitted to close school doors. Perhaps for that reason it will be necessary to put a statutory limit upon the sum that can be recovered for any one negligent act. Even if a number of people are hurt as a result of one careless act, the total amount of recovery can be limited and apportioned among the injured. Such a technique should make the financial breakdown of a school system almost an impossibility. It can hardly be expected that there will be such a great number of negligent acts in a period of time that bankruptcy will result.

One thing more needs clarification in connection with the arguments for non-liability on the basis of expediency. It has often been claimed that the funds gathered through taxation for the support of schools could not be diverted into the payment of damages. The New York\[^{28}\] and Washington\[^{19}\] courts have shown that there is no need to hold such a theory.

Another argument that can be raised against a charge of the status quo as respects school district liability, is that a relaxation of the common law by statutory change will produce a multiplicity of suits based on fraudulent claims. In logical refutation of such an argument we find much legal literature which condemns denying justice solely because of the fear of the possibility of more work or fraud. Surely what Professor Prosser\[^{20}\] has said is correct. "It is a pitiful confession of incompetence on the part of any court of justice to deny relief upon the ground that it will give the court too much work to do." And as regards fraud, as both Dean Green\[^{21}\] and Professor Prosser\[^{22}\] have pointed out, there exists a protection in the fact that the jury is still required (and as capable as always) to distinguish true claims from false.

The one remaining challenge to a social liberalization of the rules of tort liability in the area under discussion is the statement that the in-

\[^{17}\] Inferentially, to the same effect was Anderson v. Board of Education of Fargo, 49 N.D. 181, 190 N.W. 807 (1922).


\[^{20}\] Intentional Infliction of Mental Suffering: A New Tort, 37 Mich. L. Rev. 894 (1939). The statements here and those referred to infra, notes 21 and 22 were made in connection with a different problem, but their application to our discussion cannot be seriously questioned.

\[^{21}\] Green, Fright Cases, 27 Ind. L. Rev. 761 (1933).

\[^{22}\] See note 20, supra. And furthermore, as Fuller and Casner have demonstrated in their article, Municipal Tort Liability in Operation, 54 Harv. L. Rev. 437 (1941), enlargement of tort liability does not seem to result in fraudulent claims with a resultant loss that cannot be borne.
jured child can be recompensed from damages which may be recovered against a negligent teacher or employee of the school district. Such an outlook represents no more than a quarrel with the fictional nature of the rule which makes a master liable for the negligent acts of his servants as long as such servant is acting in the scope of his employment. It has long been admitted that such a rule is built entirely on fiction. No one has clarified the point more brilliantly than Harold Laski in his discussion "The Basis of Vicarious Liability."

There it is accurately said that the master-employer cannot actually control his servant-employee. For practical reasons, however, the party hurt by the negligent act of a servant was often permitted to recover damages from the master. It was felt that society must permit injured parties to recover from those with the deepest pockets. To hold otherwise would have meant that many injured people would fail to recover from judgment-proof employees. Furthermore, it was felt that the rule was not as unfair as it seemed. The party with the deepest pocket was in a position to spread the loss among members of the community. Hence the dogma based on a fiction—the fiction that the master could control the servant—was allowed to exist because it seemed necessary to produce the ultimate end—the greatest good for the community—justice for parties who suffer physical harms. By the very same logic it is possible to maintain that the law should make the school district liable if harm results to pupils because of the negligent supervision of children. The present rule of teacher responsibility can too often prove to be meaningless because of the lack of ability of the teacher to pay damages.

Before finally admitting, however, that statutory change can produce results which do not violate concepts of justness, it is necessary to deal with the question as to whether school districts will be made insurers of the safety of children during school hours. The answer has been given in the negative by the Supreme Court of California in Underhill v. Alameda Elementary School District of Alameda County et al.24 There it was set forth that school districts (under the type of statute previously alluded to in this discussion) are not insurers of the safety of pupils at play or elsewhere. They are only liable if injuries result from the negligence of their officers or employees. With that statement in mind, therefore, it appears logical to look into some of the cases to see whether or not the courts have set up too strict a standard of teacher care.

In this respect the Supreme Court of Michigan has said that "at least in a limited sense the teacher stands in place of the parents, and

23 26 Yale L. J. 105 (1916).
that in the faithful discharge of her duties in respect to the care and custody of a pupil the teacher is bound to use reasonable care, tested in the light of the existing relationship. It is not essential to liability that the teacher's negligence be so extreme as to be wanton or wilful." Reasoning of that nature does not demand super-human conduct on the part of instructors. It takes cognizance of the dissenting justices' plea in Thompson et al v. Board of Education of the City of New York et al that "Boys will be boys." It heeds the pronouncement of Hack et al v. Sacramento City Junior College District of Sacramento that a teacher is not at fault "if pupils negligently carry out the teacher's instructions of a proper nature." All that is required, in the language of the New York Court, is that (the court is speaking about the factual picture of recess periods and class rooms) "a teacher owes it to her charges to exercise such care of them as a parent of ordinary prudence would observe in comparable circumstances." The thinking of the Nevada Supreme Court further clarifies the problem. That court has brought to light, "that teachers do not have merely the duty of disciplining pupils after learning of any misconduct on their part, but the further duty of observing their conduct to the end that they may be properly dealt with in the event of any misconduct. It is not sufficient that teachers apply disciplinary measures to pupils whose misconduct may be reported to them, or may come under their observation by mere chance. The duty of teachers extends farther, and they must, to a reasonable extent, watch the pupils for the purpose of seeing to it that their conduct while on the way to and from school, on the playgrounds, during intermissions and in the classroom, is proper."

Certainly the word "dealt" in the above quotation can be reasonably interpreted to connote that the teacher should hold herself ready to stop unruly activity before any serious injury can be consummated. But even though the court takes such an attitude the rules of causation cannot be overlooked. In the face of the truth that "children will be children" an interesting question arises. What if as much harm as was done would have been accomplished had the teacher been watching and alert to act? Under such facts should the school district be immune because the negligent supervision of the teacher did not cause the harm? The proposition would seem to require an affirmative answer. Suppose, however, it could be established that the obvious lack of atten-

---

27 To the same effect, McCloy v. Huntington Park Union High School Dist. of Los Angeles County, 139 Calif. App. 237, 33 P. (2d) 882 (1934).
30 Expressed by the dissenting justices in Thompson et al v. Board of Education of City of New York et al, 255 App. Div. 786, 6 N.Y.S. (2d) 921 (1938) as "Boys will be boys."
tion of the teacher induced the child-actor to become bold and attempt his unruly act. Would not the answer to the above questions be different? Rules of causation are not always easy to manipulate. Experience has, nevertheless, established that justice can be obtained.

As a result of the presentation in previous paragraphs some doubts may have arisen in connection with supervision during manual training and vocational courses, and during school trips. It would seem apparent that if the child is mature enough to take vocational work, and if he has received the permission of his parents to go on a school trip, the teacher only needs to exercise the care possible under the circumstances. A warning note, however, may be sounded about sending children on school errands unless there is a grave necessity for doing so.

Another question that might come to mind in connection with the responsibility to supervise is whether or not the duty to supervise would require inspection to determine if any equipment used in and about the school is in a dangerous condition. In Kelley v. School District No. 71 of King's County, the Washington Court imposed a duty of reasonable inspection. The New York court in a case which is not very useful because of its brevity came to a contrary conclusion.

Up to this point in the article the court's attitude has been analyzed from the side of school district responsibility for negligent supervision on the part of teachers. Completeness in logic dictates that we raise the question of responsibility for the negligent acts of principals or those persons who have immediate administrative control over a school. In Thompson et al. v. Board of Education of the City of New York the court said that "whether the principal was negligent in failing to promulgate more adequate regulations for the safe conduct of the pupils was a question of fact for the jury." A principal can, therefore, be negligent in respect to the supervision of children. Just, however, as was the case in connection with teachers the courts are going to test for negligence under a realistic and sane formula. The New York Court in reversing the Thompson case on the evidence made it clear that when the principal promulgated orderly rules for pupil conduct he acted as a reasonable man, and that since he had teachers supervising at the time of dismissal he should not be held responsible for the result of the act of an unruly boy who broke into a run on his way down the stairs. The justices specifically decided that "the appellant could not personally attend to each class at the same time, nor was any

32 102 Wash. 343, 173 Pac. 333 (1918).
34 See note 31, supra.
such duty imposed on him." It is gratifying to realize that the courts are not going to nullify the educational usefulness of a principal and make him into a super sleuth. There is responsibility imposed on the principal which is commensurate with his function as a school man. Certainly he cannot shirk his duty as regards general features of administration. The intelligent planning and publicizing of orderly rules for school dismissal would certainly fall within his province as an administrator. General regulations to avoid congestion in rest rooms, lunch rooms, on the playgrounds, and at recess time would require the attention of a principal. A workable routine for, and compliance with the state law as regards fire drills would be a duty of a principal. If such routine was not explained to teachers and children, and if they were not allowed to become familiar with it through practice, it would seem that injuries might grow out of many factual situations and that the principal would be held liable for the harm caused.

One other fear has been expressed by those who shy away from enlarging school district tort responsibility. Thinking primarily of the accidents that might happen in the physical education or manual training room they are worried over the fact that juries might be able to determine choice of subjects in the curriculum. On this point the California court had a very intelligent answer. The court told the jury:

"You are instructed that you are not to substitute your judgment with regard to what is correct and sound educational policy in the conduct of physical education for that of the Board of Education, but you are only to determine whether or not in the carrying out of said physical education work there was any negligence by an employee of the defendant which was the proximate cause of the injury."

And then the court in its decision went on to say:

"It does not lie within the province of a jury to determine whether a certain subject should be taught. But school authorities may be negligent in requiring a student to take a particular course of study."

To round out the article reason dictates an analysis of the philosophy in respect to liability for negligent supervision in the light of some educational techniques and objectives. The goal of modern education is to develop to an optimum degree pupil initiative and independence. To those who are ultra-progressive this has meant in a great number of instances an attitude which wheedled little Johnny and Annabella and often allowed them to browse unsupervised like contented cows. Obviously, such an outlook does not jibe with a philosophy which would impose liability on school boards for negligent supervision. For the law would often condemn the technique of the ultra-progressives

as careless and negligent. It is doubtlessly true, however, that many of these ultra-progressives would be furnishing much of the impetus for the enlargement of school district tort responsibility. At the same time they would naively be influencing a vast army of school men and women who come under their influence in universities, summer sessions, lecture halls, and through the pages of professional literature to violate the law by careless supervision. This very situation—this inconsistency of approach is as good an argument as any to show the error inherent in the attitude of the ultra-progressive. In contrast it firmly establishes the sanely progressive on a sound foundation. For it can be understood that the forward-looking conservative type progressive never teaches careless or negligent supervision. Instead he holds that the curriculum must be lifelike and must be built around pupil activities which result in learnings with "carry-over-to-life" value. Such developments as initiative, independence, safety habits, and belief in fundamental truth and morality are the fundamental purposes of the school. In the words of a well known director of instruction\(^\text{37}\) for a large public school system, "They come first ahead of standardized academic achievement and completely displace such goals as perfect discipline under rigid supervision, or blind obedience to one's superiors." But supervision is not neglected. Modern educators who keep their feet on the ground readily admit that while increasing emphasis and training to develop self-reliance makes a pupil more capable of coping with everyday life and even emergency situations, the child is not a full-fledged thinking adult. Consequently, teachers have a responsibility of constant guidance and supervision.

From what has just been said the conclusion follows that if school board liability for negligent supervision is enlarged it will not be a hindrance to the sane, middle-of-the-road, progressive. The educator does not have to fear that the change will force him back to the old technique of a now thoroughly discredited era of excessive Prussian-like formalism. Only the unrealistic, radical will be curbed by the change. That is as it should be. From the standpoint of both educational and legal philosophy there would seem to be no reason why the public should not decide to enlarge school district responsibility in the manner set forth in this article. It should also be remembered that they can spread the loss by liability insurance if they find it more expedient than setting up a sinking fund.

\(^{37}\) Dr. A. J. Foy Cross, Omaha Public Schools, Omaha, Neb.