## CHAPTER 14

**School District Liability**

*A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.*

—Oliver Wendell Holmes Jr.

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■ Introduction

All sovereign governments have the inherent prerogative to protect themselves from liability. This power of the state has been exercised by differing means and in varying degrees, ranging from erecting virtually impenetrable shields to near total abrogation of immunity. Although the

common law defines the nature and extent of im- munity generally, statutory law may change and modify it as legislatures see fit. The extent of the legal variations in this area is almost limitless, as evidenced by the precedents among the 50 states. Immunity is further complicated by the interac- tion of the states with the central government in our federal system. Because of the uncertainty of

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the prerogatives of government in the federal sys- tem, the Eleventh Amendment of the U.S. Con- stitution was enacted to define the limitations of federal power on states as well as the boundaries of liability between citizens and states.

This chapter discusses both the common law and the statutory precedents regarding aspects of governmental immunity. Considerable atten- tion is given to the Eleventh Amendment as it affects the state and local educational agencies.

its employees.6 Later, this rationale was applied to schools in England when a court held that if negligence occurred resulting in student injury, either the teacher or the school could be liable.7

The sovereign immunity doctrine may have been transported across the Atlantic to the United States directly under the precedent of *Russell v. The Men Dwelling in the County of Devon,*8 as re- lied upon by a Massachusetts court in *Mower v. The Inhabitants of Leicester* in 1812.9 It is unlikely, however, that the concept traversed the Atlantic

through a single precedent, especially since the

### Sovereign Immunity

School districts, as agencies of the state, have historically been immune from tort liability. As a general rule, common law asserts that gov- ernment is inherently immune unless the legis- lature specifically abrogates the privilege. The immunity concept evolved to this country from England, where the king could, theoretically, do no wrong. Various legal scholars maintain the concept was a product of the Dark Ages, when custom established that the lord of the fief was also the lawmaker and judge. As such, the lord was solely responsible for all laws and justice, and since he made and implemented the laws, he could not be sued without his permission.1 As the feudal era drew to a close and fiefdoms became consolidated into larger governmen- tal units, immunity became enmeshed with the “divine right of kings,” placing the king in a su- perior and preferred legal position.2 Sovereign immunity became formalized in English law at least as early as the thirteenth century, at which time the king could not be sued in his own courts.3 Sovereign immunity apparently reached its zenith in fifteenth-century England, where it stabilized as a prerogative of the monarch. Judi- cial recognition of this power was taken when an English court held in 1607 that the king was not liable for damages to private property caused by the government’s digging for saltpeter that was to be used in the manufacture of gun- powder.4 In spite of his judicial sanction affirming sovereign immunity, the great jurist Coke held in the same year that the king could not sit as a judge in his own case.5 Effectively, this began the whittling away of sovereign immunity. This process would culminate over 250 years later in 1866, when the House of Lords held that a public entity is liable for the damages caused by acts of

*Russell* court attributed its holding of nonliability to: (1) the lack of a public treasury; (2) general ju- dicial apprehension that imposing liability would encourage a flow of such actions; (3) the belief that public inconvenience should be avoided; and

1. the fact that no legislation existed imposing such liability. No direct judicial notice was taken of the Crown Prerogative, or the “king can do no wrong” doctrine. It seems more likely that sov- ereign immunity came to be commonly accepted in this country through the use of English legal books and materials such as *Blackstone’s Commen- taries,* which were used as standard references by early lawyers and judges. Also, of course, many of the notable early American jurists received their legal training in the Inns of Court in Lon- don. Regardless of its origin, however, the U.S. Supreme Court and state courts adopted the principle that the sovereign could not be sued without its permission. The Supreme Court in 1869 commented that “[i]t is a familiar doctrine of the common law, that the sovereign cannot be sued in his own courts without his consent.”10 In another case in the same year, the Court stated that “[e]very government has an inherent right to protect itself against suits. . . . The principle is fundamental [and] applies to every sovereign power.”11 The federal government abrogated im- munity to a statutorily prescribed extent in the Federal Tort Claims Act of 1946.

With regard to tort immunity of public schools themselves, some courts have enunci- ated the overriding reasoning that desirable public policy dictates immunity. The *American Law Reports* summarized the public policy ratio- nale as follows:

The tort immunity of governmental agencies in their operation of schools has also been supported on public policy grounds, the courts having taken

the position that public education is for the benefit of all, that the welfare of the few must be sacri- ficed in the public interest, and that school funds and property may not be diverted to pay private damages, since such diversion may impair public education.12

Beginning at the point of nearly universal adherence to the immunity doctrine, some state courts have moved away from the doctrine. Most significant is the *Molitor* case, which abolished immunity in Illinois and directly refuted the legal rationale that supported sovereign immunity.13 In *Muskopf,* the California Supreme Court ob- served the trend away from immunity:

Only the vestigial remains of such governmental immunity have survived; its requiem has long been foreshadowed. For years the process of erosion of governmental immunity has gone on unabated. The Legislature has contributed mightily to that erosion. The courts, by distinction and extension, have removed much of the force of the rule. Thus, in holding that the doctrine of governmental im- munity for torts for which its agents are liable has no place in our law, we make no startling break with the past but merely take the final step that car- ries to its conclusion an established legislative and judicial trend.14

Since *Molitor,* sovereign immunity has been in a state of considerable change. Some state courts have abrogated immunity only to have it re- instated by the legislatures, whereas other courts have approached the issue in a piecemeal way by creating exceptions for proprietary functions or nuisances, or different standards for licensees and invitees. Several courts have dissected the school program, abolishing immunity for trans- portation injuries, while maintaining it for the regular school program. Also, a trend exists for courts to sanction a consensual waiver of immu- nity by school boards through the acquisition of liability insurance.

Yet, in spite of the many exceptions, for vari- ous reasons the general rule prevails that the state and its agencies are immune from tort liability, such immunity being grounded on the sovereign character of the state.15 Thus, school districts, school boards, and other similar local governmental agencies whose responsibility it is to operate public schools have generally been held to be immune from tort liability, either for their own torts or for those of their agents,

officers, or employees, while engaged in school functions of a governmental nature. This rule prevails in the absence of abrogation by a state legislative body or by a state court, as in *Molitor*.

*Court Will Defer to the Legislative Authority*

*in Statutorily Establishing Governmental Immunity*



#### Richardson v. Rankin County School District

*Supreme Court of Mississippi, 1989.*

*540 So.2d 5.*

PRATHER, Justice, for the Court.

This appeal revisits the doctrine of govern- mental immunity abandoned by this Court in *Pruett v. City of Rosedale,* 421 So.2d 1046 (Miss. 1982), and seeks total and final abandonment of such doctrine again by this Court. Plaintiff Alma Jane Richardson suffered personal injury in an accident between her vehicle and a Rankin County school bus driven by Darlene Collier. . . . Richardson filed her complaint alleging that on May 1, 1986, she was injured as a result of a collision involving her automobile and a school bus owned by the Rankin County School District and being operated by its employee, Darlene Collier. Richardson bases her theory of liability upon the statutory liability of the Rankin County School District, et al., as provided under Miss.

Code Ann. § 37-41-37, et seq. (1986 Supp.) and upon the theory of negligence. . . .

On March 31, 1987, all of the defendants filed their answer setting forth their defenses, includ- ing the defense that the defendants are immune from liability under the theory of sovereign or governmental immunity and denying all mate- rial allegations of the complaint and denying that Richardson is entitled to recover any sums whatsoever. . . .

The question of whether or not the doctrine of governmental or sovereign immunity should be totally abolished has come before this Court on a number of occasions. Finally, in *Pruett v.*

*City of Rosedale,* 421 So.2d 1046 (Miss. 1982), this Court recognized that the doctrine of sovereign immunity was a creature of the judiciary, and it was time for the judiciary to abolish it. The Court recognized, however, that it was the leg- islature, not the judiciary, that had the duty and responsibility of controlling and policing sover- eign immunity.

[T]he control and policing of sovereign immunity is a legislative responsibility and not that of the ju- diciary. The sovereign immunity doctrine is a crea- ture of the judiciary. . . . As has been said by many of the State’s highest courts, the judicial branch is leaving the matter to the legislative branch. It was judicially created and necessarily should be judi- cially abrogated.

*Pruett* made clear that the immunity that was being abolished was the immunity of the sov- ereign, which means the state, the county, the municipality or any other local subdivision of the sovereign. This Court expressly noted that the abolition of sovereign immunity did not “apply to legislative, judicial and executive acts by individuals acting in their official capacity, or to similar capacities in local governments, either county or municipal.” . . .

The legislature, in response to the *Pruett* deci- sion, enacted what is now codified as Miss. Code Ann. § 11-46-1, et seq. (1988 Supp.) (1984 Immu- nity Act). The intent of the legislature is clear. Section 11-46-3, Miss. Code Ann. (1988 Supp.) states:

The Legislature of the State of Mississippi finds and determines as a matter of public policy and does hereby declare that from and after July 1, 1989, the “state” and, from and after October 1, 1989, its “political subdivisions,” as such terms are defined in Section 11-46-1, shall not be liable and shall be immune from suit at law or in equity on account of any wrongful or tortious act or omis- sion, including libel, slander or defamation, by the state or its political subdivisions, or any such act or omission by any employee of the state or its politi- cal subdivisions, notwithstanding that any such act or omission constitutes or may be considered as the exercise or failure to exercise any duty, obligation or function of a governmental, proprietary, discre- tionary or ministerial nature and notwithstanding that such act or omission may or may not arise out of any activity, transaction or service for which any fee, charge, cost or other consideration was received or expected to be received in exchange therefore.

The Immunity Act grants general legislative immunity to the State and its political subdi- visions, including local school districts. It also waives such immunity of the State and its political subdivisions from claims for money damages arising out of the torts of such govern- mental entities and the torts of their employees while acting within the course and scope of their employment. Such immunity is waived only to the extent of the maximum amount of liability as provided under the provisions of the above quoted statutes. Miss. Code Ann.

§ 11-46-15 (1988 Supp.) provides the limits of liability of a governmental entity of its employee. . . .

Thus, it is clear from the above statute that the Mississippi Legislature has, by appropriate legislation, given the state and its political sub- divisions immunity from suit on account of any wrongful or tortious act or omission by any em- ployee of the state or its political subdivisions, except as to the extent of liability permitted by statute.

There is no challenge to the constitutionality of the statute itself, only a request that this Court finally abolish governmental immunity. This re- quest infringes upon the policy-making author- ity of the legislature, and this Court refrains from infringing upon this legislative prerogative.

The trial court did not err in granting the Mo- tion for Partial Summary Judgment below, and should, therefore, be affirmed.

Affirmed.

###### CASE NOTES

1. Within constitutional limitations, the legisla- ture is empowered to control the extent of liability to which the state and its agencies may be subjected. *Bego v. Gordon,* 407 N.W.2d 801, 808 (S.D. 1987).
2. A state may have sovereign immunity at com- mon law, but a statute may provide for spe- cific exceptions. One such exception to the general governmental immunity rule is for “injury caused by the negligent act of . . . an employee acting within the scope of his of- ficial duties.” Where a student’s finger was severed when his shirttail caught in a scroll power saw while he was cleaning it, and the facts showed that on previous occasions the shop teacher had turned off the main power

switch but failed to do so this time, the court held the school district liable for damages. *Cureton v. Philadelphia School District,* 798 A.2d 279 (Pa. 2002).

###### STATE-AGENT IMMUNITY

In most tort actions against public schools, plaintiffs will not only name the school board as the defendant, but will also name the school su- perintendent, the school principal, and possibly a teacher or two, and probably other personnel, “individually.” The plaintiff’s strategy is to have the possibility of recovery of damages against the individual employees if the suit against the school board fails. However, school person- nel who individually act for the school district are also normally covered by what some courts call *state-agent immunity*. That is, school person- nel, as “agents” acting for the school district, come under the umbrella of governmental im- munity so long as the school personnel do not incur harm by exceeding their discretionary au- thority or fail to perform a ministerial function. The Supreme Court of Alabama,16 2007, has ex- plained in detail the parameters of “state-agent immunity”:

A State agent *shall* be immune from civil liability in his or her personal capacity when the conduct made, the basis of the claim against the agent, is based upon the agent’s: (1) formulating plans, poli- cies or designs; or (2) exercising his or her judg- ment in the administration of a department or agency, including but not limited to: (a) making administrative adjudications; (b) allocating re- sources; (c) negotiating contracts; (d) hiring, firing, transferring, assigning or supervising personnel; or (3) discharging duties imposed by rules and regulations . . .” of the school district, i.e., “educat- ing students.” A state agent *shall not* be immune from civil liability personally when acting willfully, maliciously, fraudulently in bad faith beyond his or her authority, or under a mistaken interpretation of law or contrary to the constitution and statutes of the state or the United States.17

The court applied this rationale to the factual circumstances where school officials errone- ously allowed an elementary school girl to leave the school with an older boy and she was sexu- ally assaulted. The court allowed immunity to extend to the school officials who had discov- ered the mistake in releasing the girl and had

pursued the attacker.18 In another example of the extension of governmental immunity to a school official, an elementary school principal was found to have immunity from personal dam- ages when she failed to identify and correct a physical plant situation where scalding water was released from a boiler pipe and an elemen- tary school child stepped into a hole containing the water and was severely burned. The court explained:

Whatever her (the principal) action might have been, any decision she might have made was re- lated to the performance of her duties as principal and called for personal deliberation(s), decision(s) and judgment(s) in performance of her job. Thus, in making that decision she was engaged in the performance of discretionary functions for which she possessed constitutional immunity.19

The Kentucky Supreme Court in *Yanero v. Davis*20 explained public school immunity as having three aspects: (a) *sovereign immunity* is absolute and applies to public officials sued in their rep- resentative (official) capacities when the state is the real party against which relief is sought. Such absolute immunity extends to legislators and judges in their official capacities, prosecu- tors, etc.; (b) *governmental immunity* protects state officials in the performance of their gov- ernmental functions in administering the de- partments of government. The theory here is that the separation of powers does not permit judges to second guess the discretionary deci- sions of administrators in the executive branch of government; and (c) *official immunity,* the third type, is divided into two categories, rep- resentative and individual. If a government official or employee is sued in a “representa- tive” capacity, then she or he is invested with the absolute immunity of the state agency itself. If sued in her or his “individual” capacity, then the immunity is not absolute, but rather quali- fied or conditional. This qualified immunity is the same as the “state-agent immunity,” explained above by the Alabama Supreme Court, that vests the school district administrator or teacher with immunity so long as alleged neg- ligent acts constituted “judgment calls” in the exercise of discretion, were made in good faith, and within the scope of the officer’s or teacher’s authority. Conversely, an officer or an employee is afforded no immunity from tort liability for

the negligent performance of a ministerial function.21

*The Doctrine of Sovereign Immunity May Protect Teacher from Liability for Pupil Injury*



#### Lentz v. Morris

*Supreme Court of Virginia, 1988. 236 Va. 78, 372 S.E.2d 608.*

COMPTON, Justice.

The sole question presented in this appeal is whether the doctrine of sovereign immunity pro- tects a high school teacher supervising a physi- cal education class from a negligence action for damages brought by a student injured while a member of the class. . . .

The plaintiff asserts that on November 9, 1984, the day of the injury, he was a student and defen- dant was a teacher of health and physical educa- tion at Kellam High School in Virginia Beach. He alleges that he was assigned to a physical educa- tion class conducted “under the supervision and in the presence of Defendant.” He further asserts that, while participating with the class in activi- ties on school grounds, he and other students were “playing tackle football without wear- ing any protective equipment,” which activity defendant knew or should have known posed danger to the participants. Plaintiff also alleges that as the result of the defendant’s negligent su- pervision and control of the physical education activities, he was “tackled with great force and violence” which caused his injuries.

. . . [P]laintiff contends that the trial court erred in ruling that a school teacher is entitled to immunity “for his own acts of negligence.” . . .

. . . [T]he plaintiff urges, “Insulation of this individual from responsibility for his own neg- ligent acts does not achieve any of the purposes for which immunity is ordinarily extended to governmental employees.” We do not agree.

*Messina v. Burden* [228 Va. 301, 321 S.E.2d 657 (1984)] was a watershed decision on the subject of sovereign immunity. In that case, we

reviewed our prior decisions stemming from diverse factual settings and attempted to recon- cile them. Reasserting the viability of the doctrine in the Commonwealth, we endeavored to explicate the circumstances under which “an employee of a governmental body is entitled to the protection of sovereign immunity,” given the facts of the cases under consideration in *Messina*. . . .

Initially, we focused upon the purposes served by the doctrine. They include “protect- ing the public purse, providing for smooth operation of government, eliminating public inconvenience and danger that might spring from officials being fearful to act, assuring that citizens will be willing to take public jobs, and preventing citizens from improperly influencing the conduct of governmental affairs through the threat or use of vexatious litigation.” . . . We then said that in order to fulfill those purposes, the reach of the doctrine could not be limited solely to the sovereign but must be extended to “some of the people who help run the govern- ment.” . . . We noted that because the govern- ment acts only through individuals, it could be crippled in its operations if every government employee were subject to suit.

In *Messina,* against the background of the purposes of the doctrine, the general principles applicable to the concept, and the facts and cir- cumstances of the cases at hand, we proceeded to engage in a necessary “line-drawing” exer- cise to determine which government employees were entitled to immunity. Thus, in one case, we held that a State supervisory employee who was charged with simple negligence while acting within the scope of his employment was immune, there being no charge of gross negligence or inten- tional misconduct. . . .

In the other *Messina* case, *supra,* we decided that an employee of a county, which shares the immunity of the State, was entitled to the ben- efits of sovereign immunity where his activities clearly involved the exercise of judgment and discretion. . . . In deciding that case, we outlined the test . . . to be used to determine entitlement to immunity. The factors to be considered include:

(1) the nature of the function the employee per- forms; (2) the extent of the governmental entity’s interest and involvement in the function; (3) the degree of control and direction exercised by the governmental entity over the employee; and

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1. whether the alleged wrongful act involved the exercise of judgment and discretion. . . .

We hold the trial court correctly ruled that the health and physical education teacher in this case was immune from suit. The facts expressly alleged, and the inferences flowing from those facts, state the following case. The defendant, an employee of an immune governmental en- tity, was charged with simple negligence in the supervision and control of the class to which he was assigned. The facts do not support a charge of either gross negligence or intentional miscon- duct. In addition, and contrary to the contention of the plaintiff on brief, implicit in the facts al- leged is the conclusion that the defendant was acting within the scope of his employment at the time of the injury.

Therefore, factors included in the *Messina* test for entitlement to immunity are present in this case. The employee is performing a vitally important public function as a school teacher. The governmental entity employing the teacher, the local school board, has official interest and direct involvement in the function of school instruction and supervision, and it exercises control and direction over the employee through the school principal. . . . And, a teacher’s super- vision and control of a physical education class, including the decision of what equipment and attire is to be worn by the student participants, clearly involves, at least in part, the exercise of judgment and discretion by the teacher.

Consequently, the *Messina* test, given the purposes served by the doctrine, mandates im- munity for this defendant. If school teachers per- forming functions equivalent to this defendant are to be hauled into court for the conduct set forth by these facts, fewer individuals will aspire to be teachers, those who have embarked on a teaching career will be reluctant to act, and the orderly administration of the school systems will suffer, all to the detriment of our youth and the public at large.

For these reasons, the judgment of the trial will be

Affirmed.

###### CASE NOTE

In a case involving a charge of negligent super- vision against a teacher when a child fell from monkey bars in physical education class, breaking

her arm, a Georgia court held that both the teacher and the school board were immune from liability and that the presumption of immunity could not be defeated without evidence of actual malice. *Crisp County School System v. Brown,* 487 S.E.2d 512 (Ga. App. 1997).

* Abrogation of Immunity As observed earlier, there has been a progres- sion of statutory and judicial modifications of

the original common-law doctrine of sovereign immunity. State legislatures have, at times, acted to redefine the law at the impetus of the courts, and at other times, legislatures have responded to what they have perceived to be social neces- sities. Keeton et al. note that the great major- ity of the states have now consented to at least some liability for torts.22 Only two states have retained what may be classified as total sover- eign immunity,23 whereas seven or eight other states technically retain immunity in the courts but have statutorily established administrative tribunals to hear and ascertain whether the state should be held liable.24 Another group of states has waived tort immunity in certain classes of cases, usually those in which the state or locality has secured liability insurance that will pay for judgments against the governmental entity, or have adopted specified waivers of immu- nity for particular functions, such as injuries caused by motor vehicles or by negligence in the upkeep or oversight of real property owned by the school.25 Further, some states have drawn a distinction between governmental and propri- etary functions performed by school districts.26 The largest group of states, about 30, has com- prehensively abrogated immunity. In these states, governmental units at the state and local levels may be liable for both misfeasance and nonfea- sance.27 Even in these states, however, there may be a distinction between acts that are discretion- ary and those that are ministerial in nature.

The general rules that apply are given by the

*Restatement (Second) of Torts* as follows:

* 1. A State and its governmental agencies are not subject to suit without the consent of the State.
  2. Except to the extent that a State declines to give consent to tort liability, it and its governmental agencies are subject to the liability.
  3. Even when a State is subject to tort liability, it and its governmental agencies are immune to the liability for acts and omissions constituting
     1. the exercise of a judicial or legislative func- tion, or
     2. the exercise of an administrative function involving the determination of fundamen- tal governmental policy.
  4. Consent to suit and repudiation of general tort immunity do not establish liability for an act or omission that is otherwise privileged or is not tortious.28
* Discretionary Functions Judicial and legislative functions of state govern- ment are typically immune from liability. Courts

reaching an erroneous judicial decision cannot be held liable in damages. Neither can a legislature be held liable in damages in tort for an injury resulting from legislation. State and local agen- cies, such as state educational agencies and local school districts, do not necessarily have immu- nity for all their acts and omissions, however.29

The U.S. Supreme Court has said that, “of course, it is not a tort for government to govern.”30 Thus, tort liability does not automatically arise from a failure of the state to act in providing a benefit or a service.31 There is no liability for fail- ure to provide police protection or for failure of the local government to enforce fire-safety codes or building codes or for issuance of a driver’s license to one who drives a car unsafely.32

Most states draw a distinction between dis- cretionary and ministerial acts in the application of immunity. Discretionary acts are afforded a qualified or conditional “malice-destructible” immunity, while no immunity at all is provided for failure to properly perform “ministerial” acts. Discretionary and ministerial functions of pub- lic officials are discussed earlier in this text, but specificity as to liability is particularly important here. The *Restatement (Second) of Torts* says that there “is no single test” to distinguish between discretionary and ministerial acts.33 The term *discretion*, when applied to public functionaries, means “power or right conferred upon them by law of acting officially in certain circumstances according to the dictates of their own judgment or conscience, uncontrolled by the judgment or conscience of others.”34

A ministerial act, on the other hand, is one that leaves nothing to judgment or discretion. It constitutes a simple and definite duty, imposed by law, involving only obedience to instruc- tions.35 The theory prescribes that if a public offi- cial is charged with exercising judgment, then no liability can accrue from error in that judgment. Liability may result, however, from not properly performing a ministerial function.

Because so many factors interplay in most court decisions on the subject, the *Restatement (Second) of Torts* has concluded that liability will be determined by a series of considerations, not merely by strict adherence to the definitions of the two terms. The factors gleaned from various precedents revealing whether immunity will lie for discretionary acts are given by the *Restate- ment (Second) of Torts* as follows:

1. The nature and importance of the function that the officer is performing. How important to the public is it that this function be performed? That it be performed correctly? That it be performed according to the best judgment of the officer, unimpaired by extraneous matters? . . .
2. The extent to which passing judgment on the ex- ercise of discretion by the officer will amount nec- essarily to passing judgment by the court on the conduct of a coordinate branch of government. . . . Is the action at the planning or the operational level? What is the level of the government?. . .
3. The extent to which the imposition of liability would impair the free exercise of his discretion by the officer. Is this function peculiarly sensitive to the imposition of liability? . . . How far is the mere threat of vexatious suit, which the atten- dant publicity and the possible need of testifying as to the basis on which the decision was made, likely to affect the exercise of discretion? . . .
4. The extent to which the ultimate financial re- sponsibility will fall on the officer. . . .
5. The likelihood that harm will result to members of the public if the action is taken. Is this action certain or substantially certain to impose dam- age on some people? . . .
6. The nature and seriousness of the type of harm that may be produced. Is it a loss that can be easily borne by the injured party? . . . How far is the extent of the harm known or apparent to the officer? . . .
7. The availability to the injured party of other rem- edies and other forms of relief. . . . Could he have insured against it? Can he obtain some other kind of judicial review of the correctness or validity of the officer’s action? Is specific relief available?

Beneath all of these factors is the general attitude of the jurisdiction and of the court to- ward the subject of governmental tort liability. Does the court think first of the heavy respon- sibility and severe financial burden that may be imposed on the government, or does it regard, primarily, the harm to the injured party and as- sume that the loss should be spread among all the taxpayers? To spread the loss in this fashion, however, the government must be willing to take it off the shoulders of the government official.36

*Statutory Immunity for Discretionary Acts Absolves School District from Liability*



#### Mosley v. Portland School District No. 1J

*Supreme Court of Oregon, 1992.*

*315 Or. 85, 843 P.2d 415.*

GILLETTE, Justice.

In this personal injury case, plaintiff brought an action against defendant school district for injuries sustained in a fight on school grounds during lunch period. A jury returned a verdict in favor of defendant on the ground that defendant was not negligent. . . .

On November 13, 1987, plaintiff was a stu- dent at one of defendant’s high schools in Port- land. She was cut by a knife during a fight with another student at her high school during lunch period. Plaintiff brought this action against defen- dant, alleging that defendant was liable for her injuries because it was negligent in: (1) failing to exercise proper supervision of students; (2) failing to provide proper security and sufficient security personnel for protection of students when defen- dant knew that students carried weapons at the school; (3) failing to prevent weapons from being carried into the school building; and (4) failing to stop the attack before the knife was used. Defen- dant asserted, among other things, the affirma- tive defense of discretionary immunity under the Oregon Tort Claims Act. ORS 30.265(3)(c). . . .

The only question before us concerns plain- tiff’s theories of negligence as to which the Court of Appeals held that defendant was not immune—allegations one and four. (The Court of Appeals held that defendant was immune as a matter of law with respect to plaintiff’s other theories, and she has not sought review of that holding.) The parties present the same argu- ments that they did before the Court of Appeals. With respect to plaintiff’s remaining theories, we turn to a consideration of whether defendant is immune as a matter of law under the “discretion- ary function or duty” provision of ORS 30.265(3)

* 1. from liability for plaintiff’s injuries.

Because the defense that defendant claims under ORS 30.265(3)(c) is statutory, we must determine the statute’s meaning. To be immune under ORS 30.265(3)(c), the decision at issue must be “a policy judgment by a person or body with governmental discretion.” . . . The statute pro- vides immunity “to decisions involving the mak- ing of policy, but not to routine decisions made by employees in the course of their day-to-day activ- ities, even though the decision involves a choice among two or more courses of action.” . . .

“[N]ot every exercise of judgment and choice is the exercise of discretion. It depends on the kind of judgments for which responsibility has been delegated to the particular officer. Discre- tion, as this court has noted in other contexts, involves ‘room for policy judgment,’ . . . or the responsibility for deciding ‘the adaptation of means to an end, and discretion in determin- ing how or whether the act shall be done or the course pursued’. . . .”

. . . A public body that owes a particular duty of care (such as that owed by a school district to its students who are required to be on school premises during school hours) has wide policy discretion in choosing the means by which to carry out that duty. . . . The range of permissible choices does not, however, include the choice of not exercising care. . . . Normally, a choice within the permissible range, in order to qualify for im- munity, is one that has been made by a supervisor or policy-making body. . . . On the other hand, the choice to follow or not to follow a predetermined policy in the face of a particular set of facts in- volving the safety of a particular individual nor- mally is not a discretionary policy choice entitled to immunity under ORS 30.265(3)(c). . . .

Under the foregoing principles, plaintiff’s first allegation—that defendant failed to exercise proper supervision of students—concerns what is, on the face of it, a matter of discretion, i.e., the location of security personnel to supervise the general student body at the school at any par- ticular time. Thus, on its face, the first allegation should not have been submitted to the jury. . . . “‘Discretion,’ as this court has noted in other contexts, involves ‘room for policy judgment’ or the responsibility for deciding ‘the adaptation of means to an end, and discretion in determin- ing how or whether the act shall be done or the course pursued.’” . . . The principal’s decisions on the number and allocation of his security per- sonnel were matters involving “room for policy judgment” and “the adaptation of means to an end.” . . .

Plaintiff’s fourth allegation—that defendant was negligent in failing to stop the fight before the knife was used—is not as clearly a policy judgment as are the facts asserted in plaintiff’s first allegation. Nonetheless, we hold that, on this record, defendant’s actions were immune. Plaintiff’s fourth allegation can be read in two ways: (1) Defendant failed to anticipate that there would be a fight between students at the particular location within the school where this fight occurred, and to allocate security person- nel accordingly; or (2) having observed the fight, defendant did nothing to break it up before the other student stabbed plaintiff. The first possible reading is simply an alternative way of criticizing the principal’s policy choice in the way in which he allocated security and supervisory person- nel within the high school building; it therefore adds nothing to the first allegation of negligence. Under such a reading, the allegation was insuffi- cient for the reasons already discussed in connec- tion with plaintiff’s first allegation. The second possible reading, however, alleges knowledge of a kind that would remove defendant from the scope of the immunity afforded by ORS 30.265(3) (c), i.e., it alleges *specific* knowledge concerning the incident involved in this case that, if acted on in a timely manner, would have enabled defen- dant to protect plaintiff.

That possible second reading does not aid plaintiff here, however. The evidence at trial, viewed in the light most favorable to plaintiff, would not permit a jury to find that defendant had

specific knowledge that the fight was occurring or would occur and that defendant then failed to intervene in a timely way. In other words, there is no evidence that defendant acted negligently. Without such evidence, plaintiff could not prevail under her fourth allegation, even if it were read as extending to nondiscretionary acts.

Because plaintiff’s claims and the record in this case related only to acts for which defendant either is immune for liability as a matter of law or as to which there was no evidence that defen- dant was negligent, we need not reach the issue whether the availability of the immunity defense under ORS 30.265(3)(c) may at times depend on factual questions that properly could be submit- ted to a jury. We hold that the trial court properly entered judgment in favor of defendant.

The decision of the Court of Appeals is af- firmed in part and reversed in part. The judg- ment of the circuit court is affirmed.

*School Trip Director’s Decision Under Zero Tolerance Policy to Send Student Home Was Not Shielded*

*by Discretionary Immunity*



#### Ette *ex rel.* Ette v. Linn-Mar Community School District

*Supreme Court of Iowa, 2002.*

*656 N.W.2d 62.*

NEUMAN, Justice.

Linn-Mar High School has adopted what is commonly known as a “zero tolerance” policy concerning students’ use or possession of to- bacco, alcohol, and drugs. This case involves a ninth grader who was caught with ciga- rettes while on a school band trip to San Anto- nio, Texas. He was returned home, alone, via Greyhound bus. The youngster survived the 1100-mile journey, but his distraught father sued the school district for negligent endangerment and other alleged wrongs. This appeal follows the district court’s directed verdict for the school district.

The principal question on appeal is whether the discretionary function exception of our municipal tort claims act, Iowa Code section 670.4(3) (1999), immunizes the school district for its decision, right or wrong, to send the young- ster home. The district court believed the statute barred the parent’s negligence claims. Because we do not believe section 670.4(3) was designed to shield the school from an alleged breach of its duty of care and supervision toward students in its charge, we reverse that portion of the district court’s decision and remand for a new trial. We affirm, however, the dismissal of the plaintiffs’ other claims.

The material facts are largely undisputed. Plaintiff, Tony Ette, attended Linn-Mar High School and played musical instruments in both the band and orchestra. In order to participate in these activities, Tony and his father, plaintiff Robert Ette, were required to sign a Co-Curricular Conduct Policy which prohibited the possession or use of “tobacco, alcohol or other drugs at any time (year round)” during his high school career. A first-time violator risked forfeiture of 20% of public performances and mandatory counseling. Both Tony and his father signed the agreement knowing full well that, even as a freshman, Tony regularly smoked cigarettes. He was otherwise a good student and not a discipline problem.

During the spring semester of his freshman year, Tony signed up for the music department’s trip to San Antonio, Texas. It was an event of major proportions—405 students, eleven buses, and over seventy chaperones. . . .

Both Tony and his father read the rules and acknowledged their understanding of them by signing a written trip agreement. The agreement specifically noted that the signing parties under- stood “violations of some of these rules (such as use or possession of alcohol, drugs, or weapons, or repeated failure to comply with the enclosed rules) will cause [the student] to be sent home at his/her own expense.” The rules further provided, and the plaintiffs agreed by their tes- timony, that final decisions regarding inappro- priate student behavior rested with the music directors.

Contrary to his father’s wishes, and in know- ing violation of the rules, Tony took cigarettes with him and discreetly smoked them on the way down to Texas whenever the opportunity

arose. Upon the group’s arrival in San Antonio, Tony went out for some food and a smoke. When he returned to his hotel room, he discovered that not only had his roommates been smoking in the room but two girls had been invited in, an- other violation of the rules. Tony criticized their risky behavior and a brief argument ensued. The roommates and their friends then left the room. Tony lay down for a nap.

Meanwhile, a chaperone had smelled cigarette smoke wafting from the boys’ room. The trip directors, defendants Steve Colton and Kevin Makinster, proceeded to investigate. They found Tony in the room, advised him of the report and asked to conduct a search. Tony emptied his pockets, revealing his lighter and cigarettes. He explained that his roommates had been smok- ing in the room, not him. Makinster attempted to verify Tony’s claim, but Tony’s roommates successfully concealed their cigarette possession and denied any misconduct. Colton and Makin- ster then made the decision to send Tony back home on the next available Greyhound, in keep- ing with the trip rules.

At this point the parties’ recollection of events diverges somewhat. Colton telephoned Tony’s father. Robert says he asked Colton to put his son on an airplane instead of a bus or, at the very least, to have one of the chaperones accompany Tony on the bus ride home. Colton countered that he was the one who suggested the airplane trip as an alternative. He claimed that Robert did not respond to that offer, most likely for financial reasons. Colton acknowledged that he consid- ered and rejected Robert’s request for a chaper- one due to a variety of concerns, financial and otherwise, that such an alternative presented.

Colton took Tony to the bus station for an 11:55 p.m. departure. The trip from San Antonio to Cedar Rapids would include stops and layovers in Dallas, Tulsa, Kansas City, Des Moines, and Iowa City. Tony had just enough money to buy the ticket, so Colton insisted on paying one-half and taking an IOU so Tony would have money for food along the way. They called Robert again from the station. Colton reported that he sounded con- fused and distraught.

Colton stayed with Tony until he boarded the bus. At no time did Tony protest the arrange- ments. When Tony reached Tulsa and attempted to buy a meal, he discovered his wallet was

missing. He suspected he had been the victim of a pickpocket at the depot in Dallas. He was also solicited to buy marijuana there. Other than these two incidents, Tony arrived home safely some thirty hours after his journey began.

The Ettes filed suit against the Linn-Mar Com- munity School District and its superintendent, Joe Pacha, along with Colton and Makinster. Their petition, as finally amended, sought actual and punitive damages for breach of contract, negligent endangerment, defamation, tortious interference with contract and false imprison- ment. The defendants asserted a general denial as well as a number of affirmative defenses, among them the discretionary function immu- nity granted school districts and their employees under Iowa Code section 670.4(3). . . .

. . . In Iowa, “every municipality is subject to liability for its torts and those of its officers and employees, acting within the scope of their em- ployment or duties, whether arising out of a gov- ernmental or proprietary function.” Iowa Code

§ 670.2. By definition, “municipality” includes a school district. *Id.* § 670.1. Municipalities are, how- ever, statutorily immune from liability for “[a]ny claim based upon . . . the exercise or performance or the failure to exercise or perform a discretionary function or duty . . . whether or not the discretion is abused.” *Id.* § 670.4(3). Commonly known as the “discretionary function exception,” this immunity is intended to “prevent judicial ‘second guessing’ of . . . administrative decisions grounded in so- cial, economic, and political policy” through tort litigation, thereby protecting municipalities “from liability that would seriously handicap efficient government operations.” *Goodman v. City of LeClaire,* 587 N.W.2d 232, 237 (Iowa 1998). . . .

. . . [T]he Ettes have never challenged school officials’ right to punish Tony for his misbehav- ior. They merely contend that, in exercising their disciplinary function, the school district and its employees breached their duty of due care for his safety. In other words, the case arose out of a dis- ciplinary situation but plaintiffs’ theory of recov- ery turns on proof of inadequate supervision and the damages allegedly flowing from that harm.

Having identified the conduct that allegedly caused the plaintiffs’ harm, the question becomes whether the conduct is of the type that the leg- islature sought to immunize. . . . That brings us to the two-part test we recognized in *Goodman:*

* + 1. Did the challenged conduct involve an ele- ment of choice or discretion? (2) If discretion- ary judgment was involved, was the decision or course of action driven by public policy concerns grounded on social, economic or political consid- erations? . . . A negative answer to either question will defeat the application of the discretionary function exception. . . . And, because liability is the rule and immunity the exception, the burden rests on the governing body to prove entitlement to the statute’s protection. . . .

*Was the conduct discretionary?* Plaintiffs offer a variety of reasons why defendants allegedly fail the first test but—like the district court—we find none of them persuasive. In substance they argue that Colton’s and Makinster’s decision was ministerial, not discretionary. For example, they assert the decision to send Tony home alone was not a “permissible exercise of judgment” because it violated a number of administrative regula- tions governing discipline, detention and extra- curricular activities. None of these arguments were raised in the trial court, however, so they are not preserved for consideration now. . . .

. . . The rules in fact vested discretion in the trip directors regarding matters of discipline and supervision. And, as will be discussed further, the record is replete with testimony regarding the choices involved in Colton’s and Makinster’s judgment call. The first test is plainly satisfied.

*Is the discretionary judgment driven by pub- lic policy?* The controlling question is whether the defendants’ decision to send Tony on an 1100-mile bus trip, alone, was a judgment call driven by social, economic or political concerns. Here is where the important distinction between a school’s disciplinary discretion and its super- visory duty comes into play. We entertain no doubt that Colton’s swift decision to enforce the no-tobacco rules, rather than giving Tony a sec- ond chance, was a decision fraught with social implications. This was the first day of the trip, Tony showed little remorse for his misbehav- ior, and rumors were flying among the other students regarding the consequences to be im- posed. In Colton’s words, “if we hadn’t acted on it, I’m afraid that we would have had other rules broken, possibly [I] believe more serious rules, possibly more serious consequences.” This is just the type of policy-laden disciplinary deci- sion that courts are ill equipped to second-guess

and, hence, might enjoy the shield of the discre- tionary function exception. . . . Here the record reveals abundant testimony about the weighing of pros and cons incident to the decision to disci- pline Tony and, then, to send him home.

The weakness in the defendants’ position, and the source of error for the district court, is that the challenged conduct in this case is not the act of discipline but the decision to send a fifteen-

alleged intentional torts. As to each count, defen- dants were entitled to directed verdict because plaintiffs failed to tender substantial evidence on at least one of each claim’s essential elements.

Affirmed in part, reversed in part, and re- manded. [The court affirmed the lower court’s dismissal of the claims of Plaintiff alleging false imprisonment, intentional infliction of emotional distress, and tortious interference with a contract.]

year-old on a cross-country bus trip unsuper-

vised. That decision, right or wrong, is not one driven by public policy implications uniquely within the purview of school officials and em- ployees. In fact the policy governing such con- duct is well settled. . . .

The law charges school districts with the care and control of children and requires the school district to exercise the same standard of care toward the children that a parent of ordinary prudence would observe in comparable circumstances.

. . . Nearly any professional decision can be ascribed to policy. But a school district may not escape its overarching duty of care toward a stu- dent in its charge by merely claiming that an indi- vidual teacher’s decision, such as the one at issue here, was driven by social, economic or political forces and, hence, immune from suit. If that were so, a school district’s duty of ordinary care for the safety of its students would be rendered a nullity. We are confident this is not what the legislature had in mind when it enacted section 670.4(3).

We are mindful, of course, that a school district’s duty to supervise its students and protect them from harm is not unlimited; the law limits the duty to reasonably foreseeable risks. . . . But this weigh- ing of duty and foreseeable risks is a task regularly assumed by courts and juries on a case-by-case basis. Given the record made here, the district court should not have directed a verdict in defen- dants’ favor based on their alleged entitlement to discretionary function immunity. We therefore reverse that portion of the district court’s ruling and remand for a new trial on plaintiffs’ negli- gence claim.

Because the negligence claim must be retried, we need not address plaintiffs’ challenge to the verdict directed against them on their punitive damages claim. . . .

. . . We need only briefly address plaintiffs’ challenge to the dismissal of their claims for

###### CASE NOTES

1. *Immunity for Discretionary Decisions*. Courts may distinguish common-law immunity from statutory immunity. Common-law immunity protects public officials from individual liabil- ity in making discretionary decisions; however, a public employee must also perform ministe- rial duties as prescribed by school board policy or law. If a ministerial function is not carried out or performed properly, immunity is not a defense and liability may accrue. In other words, common-law immunity will not extend to failure to perform ministerial duties. On the other hand, if an employee makes a discre- tionary decision and it results in injury, then common-law immunity may protect the actor. If a teacher follows an official protocol and exercises discretion in teaching a class and a child is injured, then common-law official immunity will apply. *Anderson v. Anoka Hennepin Indepen- dent School District,* 678 N.W.2d 651 (2004).
2. *Common Law Sovereign Immunity versus Con- stitutional Rights*. The doctrine of sovereign immunity is a common-law concept that em- anated from English common law. As noted above in this chapter, sovereign immunity forecloses tort remedies against a state in the absence of state statutes that abrogate or modify sovereign immunity. The question, thus, arises as to whether a student’s funda- mental constitutional right to an education would prevail over common law should the two come in conflict. The North Carolina Supreme Court has held that the constitutional right to an education overrides the state’s defense of common law of sovereign immunity. The court, in 2009, said

It would be a fanciful gesture to say on the one hand that citizens have constitutional individual rights that are protected from encroachment actions by the State, while on the other hand saying that individuals

whose constitutional rights have been violated by the State cannot sue because of the doctrine of sovereign immunity. . . . Thus, when there is a clash between these constitutional rights and sovereign immunity, the constitutional rights must prevail.

*Craig v. New Hanover County Board of Educa- tion,* 363 N.C. 334, 678 S.E.2d 351 (2009).

1. *Discretionary Function of Teacher.* Supervision of students is considered to be a discretionary function of a teacher that is protected from liability by official immunity. Official immunity “protects individual public agents from per- sonal liability for discretionary actions taken within the scope of their official authority, and done without willfulness, malice or corrup- tion.” A teacher’s implementation of policies that relate to the monitoring, supervision, and control of students in and around school dur- ing school hours and during extracurricular activities is a discretionary and not a ministe- rial function. *Chamlee v. Henry County Board of Education,* 521 S.E.2d 78 (Ga. App. 1999).
2. Poor judgment on the part of a teacher does not deprive her of immunity in the exercise of a discretionary function. A Texas court was loathe to deprive a teacher of immunity because she helped students establish a fake newspaper article, which resulted in emo- tional distress for one of the students. The court permitted the teacher’s defense of statu- tory official immunity noting that there is no precise definition of the discretion that is vested in an individual teacher in performing her duties. The court thereby deferred to the school authorities, saying:

As long as the teacher’s mistake involves the exer- cise of judgment or discretion, she is protected by the [state] statute [granting official immunity for discretionary acts of public employees]. A teacher who uses poor judgment is nevertheless acting in a way that involves the exercise of discretion. . . , to be dealt with by her employer and the state licensing agency. . . . *Kobza v. Kutac,* 109 S.W.3d 89 (Tex. 2003).

### Insurance Waiver of Immunity

Several states have waived immunity, by statute or case law, if the school district purchases liability insurance. If it does not purchase insurance, then

the immunity remains in effect.37 The Montana Supreme Court has explained the issue as such:

We conclude that the Montana Legislature has reached the following conclusion: while a school district is granted immunity of various types, a school district still is granted authority to purchase insurance which may have the effect of waiver of immunity to the extent of the insurance proceeds. We do not find it necessary to imply a waiver, as the intention of the Legislature is clear. That inten- tion is reemphasized by its authorization of tax lev- ies sufficient to pay for insurance premiums. That intention is consistent with the legislative theory that a claim against a school district should be paid in a manner similar to payment required of a pri- vate party. We conclude that the Legislature has de- clared its intent to allow a school district to waive immunity to the extent of the insurance proceeds.38

A Virginia court, in 2001, followed the gener- ally accepted rationale that the statutory defense of sovereign immunity will not bar an action for recovery of damages in an amount up to the limits of the insurance policy.39 Similarly, the Oklahoma Supreme Court held that under the common-law defense of sovereign immunity, a school district that chooses to purchase liability insurance to cover a specific type of injury waives its immu- nity only to the extent of the coverage.40

Procedurally, where insurance is involved, it is assumed that a school district will attempt an administrative settlement before resorting to the courts.41

*Whether Sovereign Immunity Is Waived May Depend on the Specific Terms of Liability Insurance Policy*



#### Dugger v. Sprouse

*Supreme Court of Georgia, 1988. 257 Ga. 778, 364 S.E.2d 275.*

SMITH, Justice.

Appellee Anthony Plavich is an employee of Murray County school system. A suit was filed by a student, appellant Darin Dugger, for injuries he received when he was thrown from the back

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of a pickup truck while delivering wrestling mats from one county school to another. The appel- lee’s motion for summary judgment, based upon the defense of sovereign immunity, was granted. We affirm.

If insurance coverage is obtained by a gov- ernment entity, then the government entity (the county in this case) waives its sovereign immu- nity to the extent of such insurance coverage. . . . However, where the plain terms of the policy provide that there is no coverage for the particu- lar claim, the policy does not create a waiver of sovereign immunity as to that claim. Here the trial court found that the policy did not provide coverage for the appellant’s claim. Where there is no insurance coverage, there is no waiver of sovereign immunity.

Judgment affirmed.

profit. In following the rule that school districts are immune from liability for incidents arising during functions that charge fees, a Tennessee court said:

The mere fact that an admission fee was charged by the high school does not make the transaction an enterprise for profit. . . . The duties of a County Board of Education are limited to the operation of the schools. This is a governmental function. There- fore, in legal contemplation, there is no such thing as such a Board acting in a proprietary capacity for private gain.43

A Kansas court has said, *in dicta,* that if a school district can and does perform proprietary activities, then it must answer in damages when guilty in tort for injuries resulting from such functions.44 The Oregon Supreme Court has laid down a test for distinguishing proprietary from governmental functions: “The underlying test

is whether the act is for the common good of all

### Proprietary Functions

Some courts, being reluctant to totally abrogate immunity, have sought ways to avoid direct con- frontation with the issue. To sidestep the overall problem, courts have settled tort actions in sev- eral states on the basis of the activity or function that was being performed by the school district when the injury occurred. In this regard, we should note that school districts operate in a dual capacity—performing functions that are strictly governmental the majority of the time, they also, on some occasions, perform proprietary func- tions, or functions that may be performed by a private corporation.

Proprietary functions have been defined as things not normally required by law or things not governmental in nature. If a function is within the scope of the public school operation, as ex- pressed or implied by statute, then the function is governmental, not proprietary. Courts have generally held that school athletic contests are governmental functions.42 Although the courts have rather consistently held that municipalities are liable for injuries arising out of functions for which admission is charged or some financial gain is realized, they have been reluctant to gen- erally apply this standard to school districts.

Thus, if a spectator or participant is injured at an athletic contest, the courts do not usually im- pose liability on the school district, even when a fee is charged and the school has realized a

without the element of special corporate benefit or pecuniary profit.”45

The rule, therefore, may be summarized thus: as long as the purpose of the activity is educa- tional and for the common good, and the profit accrued is only incidental, the activity is govern- mental in nature.

This general rule is enunciated by a Michigan court in a 1984 decision:

We therefore conclude that a governmental function is an activity which is expressly or impliedly man- dated or authorized by constitution, statute, or other law. When a governmental agency engages in man- dated or authorized activities, it is immune from tort liability, unless the activity is *proprietary* in nature.46

Not all courts agree with this rule, however. It is, of course, an entirely appropriate rejoinder to assert that because public schools have no legiti- mate function except as authorized by law, they cannot legally perform proprietary functions. In this view, proprietary functions are *ultra vires* and, thereby, have no legal cognizance. This is precisely the position taken by a Texas appellate court, which concluded simply that public school districts, by their very nature, cannot perform proprietary functions. This court has stated:

Since a school district is purely a governmental agency and exercises only such powers as are del- egated to it by the state, it performs no proprietary functions that are separate from governmental functions.47

### Licensees and Invitees

A school district owes a greater degree of care to an invitee than to a licensee. A licensee is one who steps beyond the limits of invitation, enter- ing and using the premises by permission or by operation of law but without expressed or im- plied invitation.48 A licensee does not commit trespass because he or she has passive permis- sion to enter. Passive permission is not an im- plied invitation. On the other hand, an invitee is a person who enters the premises upon the in- vitation of the owner. Either the invitation may be “expressed,” when the owner invites another to come and use the premises, or the invitation may be “implied,” when the owner by his or her acts or conduct conveys the desire that the per- son enter the premises.

An owner of property normally does not owe a licensee particular duty and is therefore not responsible for exercising any particular stan- dard of care to protect the licensee. Some courts, however, have held that an owner may be liable for willful or wanton disregard for the safety of the licensee. In this regard, the owner should not knowingly let the licensee run upon “hidden peril or willfully cause him harm.”49 The standard of care owed an invitee is much higher, and the duty owed by the owner is substantially greater.

The *Restatement (Second) of Torts* defines an in- vitee test for liability purposes as follows:

* 1. An invitee is either a public invitee or a busi- ness visitor.
  2. A public invitee is a person who is invited to enter or remain on the land as a member of the public for a purpose for which the land is held open to the public.
  3. A business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land. 50

In a case where a parent volunteered to join the after-prom clean-up crew, fell from scaffold- ing, and was injured, the court considered the parent to be an invitee and not a licensee. There- fore, the school had a high duty to the parent to prevent injury that it did not properly perform. The court said:

A landowner owes a licensee a duty to refrain from willfully or wantonly injuring him of acting in a manner to increase his peril. . . . [L]icensees

and trespassers are those who enter the premises for their own convenience, curiosity or entertain- ment. Unlike trespassers however, licensees have a license to use the land. That is, licensees are privileged to remain on the land by virtue of the owner’s or occupier’s permission or suffrage. . . . A landowner owes the highest duty to an invitee: a duty to exercise reasonable care for his protection while he is on the landowner’s premises. 51

*Holder of a Free Pass to a Football Game Was an Invitee to Whom the School District Owed a Duty of Reasonable Care*



#### Tanari v. School Directors of District No. 502

*Supreme Court of Illinois, 1977.*

*69 Ill. 2d 630, 14 Ill. Dec. 874, 373 N.E.2d 5.*

UNDERWOOD, Justice.

Plaintiff, Flora Tanari, brought an action . . . seeking damages for injuries she sustained when she allegedly was knocked to the ground by a group of children engaged in horseplay at a high school football game sponsored by de- fendant on its premises. The complaint alleged ordinary negligence on the part of defendant in failing to provide adequate supervision and con- trol of children at the game. At the close of the evidence, the trial court granted the defendant’s motion for a directed verdict on the ground that plaintiff was a licensee on defendant’s premises; that defendant therefore only owed her the duty to refrain from willful and wanton misconduct; and that breach of such duty had neither been alleged nor proved at trial. . . .

Plaintiff, age 64, was employed as a bus driver by an individual who had a contract with the defendant school district to transport students to and from school. She had been so employed for twenty-seven years and had attended all of the local high school football games for the last twenty-five years. On October 13, 1972, plain- tiff attended the Hall Township High School homecoming football game with her daughter,

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son-in-law and grandchildren. The game was held on defendant’s premises at a sports stadium under defendant’s supervision and control. Plain- tiff entered the stadium using a complimentary season pass issued by the defendant. As she was walking toward her seat, she noticed a crowd of boys and girls playing near the northwest end of the stadium, and the next thing she knew she had been knocked to the ground by a “big” boy who fell on top of her. The boy, who was never identi- fied, got up, apologized and hurried away. . . .

The athletic director of Hall Township High School testified that he had hired off-duty police- men and teachers to keep order at all high school football games conducted by the defendant. . . . He responded in the affirmative when asked if he had seen boys and girls at almost every game “playing tag, or horseplaying and roughing it up” in the area in question. However, when he was later asked if there was “rowdiness and horseplaying by these kids in that area,” he re- sponded that he did not know whether it should be called rowdiness and horseplay, but the chil- dren were definitely there. He further testified that on previous occasions he had tried to “cor- rect” the children but that, as soon as he left, they were back at it again. He knew from his personal observation that a policeman was in the area of the accident on the night in question.

The trial court allowed the defendant’s mo- tion for a directed verdict on the sole ground that plaintiff was a licensee on the defendant’s prem- ises and that there was no proof whatsoever that defendant had breached its duty to refrain from willful and wanton misconduct. . . . Considering the state of the record before us, we are unable to concur with the appellate court’s conclusions regarding defendant’s immunity. . . .

It is unnecessary to dwell at length on the common law distinctions between invitees and licensees which have evolved over the years. It suffices to observe that the general definition of an invitee is a visitor who comes upon prem- ises at the invitation of the owner in connection with the owner’s business or related activity. . . . Licensees are persons who have not been invited to enter upon the owner’s premises and who come there for their own purposes and not those of the owner. . . . However, their presence is condoned by the owner, which distinguishes them from trespassers. The trial court concluded in the case

at bar that since the plaintiff had not purchased a ticket but rather had attended the football game using a complimentary season pass, there was an absence of “commercial benefit” to the defen- dant school district, and she must therefore be considered a licensee. For the reasons hereafter stated, we must disagree with that conclusion.

In determining whether or not a person is an invitee or a licensee in a given situation, ap- pellate courts in this State have often looked at the surrounding circumstances to determine whether, as between the visitor and the owner, there was a “mutuality of interest in the subject to which the visitor’s business relates” . . . , “a mutually beneficial interest” . . . , a “mutuality of interest” . . . , [or] a “mutuality of benefit or a benefit to the owner” . . . , or whether the visitor had come to “transact business in which he and the owner have a mutual interest or to promote some real or fancied material, financial, or eco- nomic interest of the owner.” . . . Such inquiries into the purpose and nature of the visit were deemed relevant, particularly in cases involving implied invitations, to ascertain whether the vis- itor was upon the owner’s premises within the scope and purpose of the invitation or for some other reason.

That type of analysis is not necessary here. In our opinion, the complimentary pass issued to plaintiff was tantamount to an express invitation to attend Hall Township High School football games, and there can be no question about the fact that at the time of her injury, plaintiff was act- ing within the scope of that invitation. Unlike a person who comes upon an owner’s premises for his own purposes rather than those of the owner and whose presence is merely condoned by the owner, plaintiff in this case was expressly invited and encouraged to come to the defendant’s foot- ball stadium to swell the crowd in support of its team. In this type of situation, it would be entirely illogical to conclude that a person attending the game using a complimentary pass provided by the school district should be owed a lesser duty of care than a person otherwise similarly situated who had purchased a ticket. In our view, both persons should be owed the same duty of reason- able care, and we so hold.

Upon application of a reasonable care stan- dard to the case at bar, we cannot conclude that all of the evidence, when viewed in its aspect

most favorable to the plaintiff, so overwhelm-

ingly favors the defendant that no verdict for the plaintiff could ever stand. . . . The question of whether defendant failed to exercise reasonable care in supervising children attending the foot- ball game and whether such failure, if found to exist, was the proximate cause of plaintiff’s inju- ries, should have been submitted to the jury. . . .

Reversed and remanded.

###### CASE NOTES

1. The *Restatement (Second) of Torts* makes the following distinctions between an invitation and permission to enter a premises:

An invitation differs from mere permission in this: an *invitation* is conduct which justifies others in believing that the possessor desires them to enter the land; permission is conduct justifying others in believing that the possessor is willing that they shall enter if they desire to do so. Any words or conduct of the possessor which lead or encourage the visitor to believe that his entry is desired may be sufficient for the invitation.

*See Howard County Board of Education v. Cheyne*, 99 Md. App. 150, 636 A.2d 22 (1994), quoting *Restatement (Second) of Torts*, § 332.

1. The *Restatement (Second) of Torts* emphasizes the “purpose” element of an invitation. It is immaterial that the admission fee is not paid or that the landowner is not mindful of a business purpose or that the visitor’s pres- ence will lead to no possibility of benefit to the landowner, pecuniary or otherwise. It is essential, however, that the visitor is on the premises for the purpose for which the land is held open to the public. The *Restatement* illus- trates the principle as follows: A visitor is an invitee at the free public library when she en- ters to read a book, but not when she enters to meet a friend or to get out of the rain. *Restate- ment (Second) of Torts,* § 332(d), illustration 2.

In addition to purpose, the *Restatement (Second) of Torts,* § 332(d), emphasizes the need for inducement or encouragement as in other instances of invitation. Thus, “the desire or willingness to receive that person which a reasonable man would understand as ex- pressed by words or other conduct of the pos- sessor” remains an important factor. *See also Restatement (Second) of Torts,* § 332.

### Nuisance

Another device used by the courts to partially skirt the boundaries of immunity is the nuisance doctrine. A *nuisance* has been defined as “the existence or creation of a dangerous, unsafe, or offensive condition which is likely to cause injury, harm, or inconvenience to others.” A more com- plete definition has been given by a Connecticut court:

[T]o constitute a nuisance there must have arisen a condition, the natural tendency of which is to cre- ate danger or inflict injury upon person or prop- erty. . . . [T]here must be more than an act or failure to act on the part of the defendant. . . . [T]he danger created must have been a continuing one.52

A leading case in which a school district was held to have created a nuisance was one in which snow had fallen from the roof of a school build- ing onto adjacent property, damaging the prop- erty. The owner was also injured when he fell on the ice. The court held that in this case there was both nuisance and trespass:

The plaintiff had the right to the exclusive use and enjoyment of his property, and the defendant had no more right to erect a building in such a manner that the ice and snow would inevitably slide from the roof, and be precipitated upon the plaintiff’s premises, than it would have to accumulate water upon its own premises, and then permit it to flow in a body upon his premises.53

In keeping with the legal definition, a danger- ous condition must be created by the school dis- trict for nuisance to exist. In Kansas, an action was brought to recover damages for injury sustained by a nine-year-old pupil who slipped and fell on a wet lavatory floor. Pupils had made the floor wet and slippery by throwing wet paper towels and splashing water. The plaintiff claimed the district was maintaining a nuisance and was therefore liable. In response, the court held that the school did not create the nuisance, since pupils could be expected to splash water and throw wet towels on the floor while using the lavatory, and that wash- basins were a necessary part of the school build- ing equipment.54

However, the adequacy of supervision on the part of school personnel is another matter. Adequacy of supervision is not a question to be dealt with in a nuisance action, since to consti- tute nuisance there must be a continuing hazard

and there must be more than a mere failure to act on the part of the defendant.55

It seems safe to conclude that although the “nuisance” theory is a viable method of avert- ing direct confrontation with the governmental immunity issue, the courts in other jurisdictions will not plunge headlong toward its use as piece- meal abrogation. This, of course, does not mean courts will never employ the device, since it is an acceptable legal doctrine, but it does indicate a reluctance on the part of the courts to tamper with the doctrine of governmental immunity in this limited fashion.

*Snow Pushed into Mounds on Playground Does Not Constitute Intentional Nuisance*



#### Hendricks v. Southfield Public Schools

*Court of Appeals of Michigan, 1989. 178 Mich. App. 672, 444 N.W.2d 143.*

PER CURIAM. . . .

On appeal, plaintiffs argue that the public building exception to governmental immu- nity applies to their case because piles of snow located on a school playground constitute a dangerous condition of a public building. We disagree. . . .

The public building exception to governmental immunity has been interpreted to include items permanently affixed to a public building. . . . Our Supreme Court has indicated that the pub- lic building exception will not be so expansively interpreted as to extend to all public places. . . .

We do not believe that the Legislature in- tended its immunity exception to include the temporary condition of snow piles. Accepting as true all of plaintiffs’ factual allegations con- tained in their pleadings and the conclusions to be reasonably drawn therefrom, plaintiffs’ claim was so clearly unenforceable as a matter of law that no factual development could justify plain- tiffs’ right to recovery. Hence the trial court did

not err in granting summary disposition on the basis that the piles of snow did not fall within the public building exception to the defense of governmental immunity. . . .

We are also unpersuaded by plaintiffs’ argu- ment that the mounds of snow should be deemed an intentional nuisance by which the claim of governmental immunity could be overcome.

To establish a claim of intentional nuisance against a governmental agency, a plaintiff must show that there is a condition which is a nui- sance and that the agency intended to create that condition. . . .

Because the injury of which plaintiffs com- plain resulted from the school’s failure to re- move the mound of snow from the playground after clearing the parking lot, we conclude that the trial court in this case did not err in granting summary disposition to defendant on the basis that plaintiffs’ well-pled facts involve circum- stances showing the school’s failure to act in re- moving the piles of snow.

Further, an intentionally created nuisance re- quires proof that the party creating or continu- ing the nuisance knew or must have known that harm to a plaintiff was substantially certain to follow. . . . Here, it cannot be said that harm was substantially certain to follow from the presence of the amount of snow at issue.

Accepting as true all of plaintiffs’ factual al- legations contained in the pleadings and con- clusions to be reasonably drawn therefrom, plaintiffs could not have proved an intentionally created nuisance. Accordingly, the trial court did not err in granting summary disposition on the basis that the piles of snow did not constitute an intentional nuisance. . . .

Affirmed.

### Attractive Nuisance

Nearly all states have adopted the common-law tort known as “attractive nuisance.” Sometimes called the “turntable doctrine,” this tort is so named for the dangerous condition of turntables at street car or train car terminals to which children were attracted and as a result suffered injuries to legs, feet, toes, and even death. The doctrine is consid- ered to be an exception to the rule that a trespasser is generally owed no duty by the property owner.

in intermeddling with it or in coming within the area made dangerous by it, and

ATTRACTIVE NUISANCE

*“Attractive Nuisance” is the theory that the occu- pier or possessor of property may be held respon- sible for bodily harm to trespassing or intruding children caused by dangerous conditions or in- strumentalities upon the premises. The expression “attractive nuisance” is also known in law as the “turntable” doctrine, “infant trespasser,” “dan- gerous instrumentality,” the “trap” or “implied invitation” theory and the “playground rule.”*

*—16 A.L.R.3d 25 § 2[a].*

* 1. the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved, and
  2. the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children.71

The following *Collomy* case applies the attrac- tive nuisance doctrine.

The rule originated in 187356 in a case where a child was injured on a railroad turntable and li- ability was attributed to the railroad company for creating a condition that allured and en- ticed children onto premises that had dangerous conditions. In most of these attractive nuisance cases the children have not been older than 12 years of age, the “age of mischief,” according to the courts, being between ages of 6 and 12. However, some courts have rejected age limits of “tender years” so long as the child is too young to appreciate the danger involved.57 Examples of attractive nuisances are swimming pools,58 cleaning fluids,59 ice cream trucks,60 unguarded skylights,61 fireworks found in a ballpark,62 smoldering ashes,63 municipal playground equipment,64 vicious dogs,65 lakes,66 mean dogs,67 school skylights,68 and high-voltage towers.69 Of all the attractive nuisance cases, there appear very few school-related incidences.70 Most of the school cases that fall into this tort category are instead treated under the law of negligence. In summarizing the attractive nuisance area of the law, the *Restatement of the Law-Torts,* states:

A possessor of land is subject to liability for physi- cal harm to children trespassing thereon caused by an artificial condition upon the land if

1. the place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass, and
2. the condition is one of which the possessor knows or has reason to know and which he re- alizes or should realize will involve an unrea- sonable risk of death or serious bodily harm to such children, and
3. the children because of their youth do not dis- cover the condition or realize the risk involved

*Twelve-Year-Old Who Understood the Dangers Before Suffering Burns on School Grounds Cannot Recover Damages Under the Attractive Nuisance Doctrine*



**Collomy v. School Administrative District No. 55**

*Supreme Judicial Court of Maine, 1998.*

*710 A.2d 893.*

WATHEN, Chief Justice.

Plaintiff Rhonda Collomy, individually and as mother and next friend of Trevor Carter, appeals from a judgment entered in the Superior Court in favor of defendant School Administrative Dis- trict No. 55 (the School District). Plaintiff argues on appeal that the court erred in failing to find a genuine issue of material fact whether Trevor was a trespasser; whether the School District owed Trevor a duty of care under the attractive nuisance doctrine; and whether the School Dis- trict acted willfully, wantonly or recklessly. Find- ing no error, we affirm.

The facts, viewed in the light most favorable to plaintiff, may be summarized as follows: On a Saturday morning in early June, Trevor Carter, a 12-year-old boy, and his 12-year-old friend, together with his friend’s younger siblings, were dropped off at the playground of Baldwin Elementary School by his friend’s father. Trevor believed that he had a little league game at the school that morning, but discovered later that the game was at a different school. While wait- ing, Trevor and his friend played soccer on the

field and played on the jungle gym and the swings on the playground.

After awhile, they became curious and en- tered a cinder block shed adjacent to the play- ground. The shed had two doors, a steel door secured by a large padlock, and a hollow core wooden door secured by an integrated lock and a smaller padlock and hasp. The boys en- tered through the wooden door that Trevor testi- fied was unlocked and ajar. His friend found a can of fluid, later identified as duplicating fluid, took it outside and set it on fire. His friend and his friend’s siblings played with the fire, while Trevor sat on the swings and did not participate. When his friend wanted to go play soccer, Trevor was concerned about the fire catching onto the trees or something else and recommended that they stay until the fire was out. When the fire was out, Trevor went back into the building be- cause it was cooler. His friend then took more of the duplicating fluid and this time half-filled the cinder block step in the doorway and tried to ignite it. The fluid did not ignite on the first try and his friend put more fluid into the block. Trevor told his friend not to do it and that he was going to get out of the building. When Trevor be- gan to leave, his friend threw another match into the block, the fluid ignited, flashed back, and ig- nited Trevor’s clothes, causing burns to his lower extremities.

Rhonda Collomy, individually and as mother of Trevor, filed a complaint against the School District alleging that the School District stored highly flammable substances in a negligently constructed, operated, or maintained storage shed on property adjacent to the playground and, as a direct and proximate result, plaintiff sustained injuries. After hearing, summary judg- ment was entered in favor of the School District and plaintiff appealed.

We review the court’s “entry of a summary judgment for errors of law, viewing the evidence in the light most favorable to the party against whom the judgment was entered.” . . . Plaintiff first argues that there is a genuine issue of ma- terial fact whether Trevor was a trespasser. The duty owed to Trevor is dependent upon his legal status and the determination of his legal status is an issue of fact. A trespasser is defined as “a per- son who enters or remains upon land in the pos- session of another without a privilege to do so

created by the possessor’s consent or otherwise.” *Restatement (Second) of Torts* § 329 (1965); . . . It is undisputed that the playground, the shed and the contents of the shed were in the possession of the School District and that Trevor entered the playground and the shed. It is also agreed that Trevor was not a trespasser on the playground, because children often played on the playground and fields when school was not in session.

Even though it may be agreed that Trevor was an invitee and not a trespasser on the play- ground; however, that status applies “only while he is on the part of the land to which his invi- tation extends—or in other words, the part of the land upon which the possessor gives him reason to believe that his presence is desired for the purpose for which he has come.” *Restate- ment (Second) of Torts*, § 332, comment *l* (1965). For example, “where one enters a part of prem- ises reserved for the use of the occupant and his employees and to which there was no express or implied invitation to go, there can be no recovery for resulting injury, even though he is an invitee to other parts of the premises.” . . .

. . . The swings and monkey bars were on the premises for students to play on during school and the School District gave children, including Trevor, reason to believe that their presence was also permitted for the purpose of playing on the playground equipment when the school was not in session. The School District, however, used the shed to store equipment and materials and plaintiff introduced no evidence that the School District allowed the children to play in the build- ing when school was in session or when it was not. Therefore, the court did not err in finding that plaintiff failed to raise a genuine issue of material fact whether Trevor was a trespasser when he entered the shed.

Plaintiff next argues that, even if Trevor was a trespasser when he entered the cinder block shed, there is a genuine issue of material fact whether the School District owed him a duty under the attractive nuisance doctrine. . . . [W]e adopted the attractive nuisance doctrine as stated in *Restatement (Second) of Torts* § 339 (1965).

We adopted the attractive nuisance doctrine with the caveat that we would strictly interpret the doctrine, . . . In affirming the court’s sum- mary judgment in favor of the defendant, we fo- cused on whether the child appreciated the risk

at the time of the accident and noted one com- mentator’s statement that:

[t]he child, because of his immaturity, either must not discover the condition or must not in fact appreciate the danger involved. Since the principal reason for the rule distinguishing trespassing children from trespassing adults is the inability of the child to protect himself, the courts have been quite firm in their insistence that if the child is fully aware of the condition, understands the risk which it carries, and is quite able to avoid it, he stands in no better posi- tion than an adult with similar knowledge and understanding. . . .

This case also focuses on the third element, that is, whether Trevor appreciated the risk. We must consider at what point he should have ap- preciated the risk—when he entered the building the first time or when he entered the building the second time. Plaintiff focuses on the initial entry into the shed and argues that there is a genuine issue of material fact whether Trevor appreciated the risk of entering the cinder block shed and the dangers of the materials therein and that this issue is sufficient to deny summary judgment. Trevor testified that, before entering the build- ing the first time, he thought it was okay to play on the playground, and that he thought it was okay to enter the building because it was unlocked. Trevor also testified that, at the time he saw the cans, he did not see that the cans had writing that said they were flammable, but that his friend told him about the labels after the accident. Viewing Trevor’s testimony in the light most favorable to him, there is an issue of fact whether he appreci- ated any risk when he entered the building the first time. Trevor’s understanding at the time of the first entry, however, is not material because he was not injured at that point in time.

The determinative period of time for appre- ciating the risk was when Trevor chose to enter the building the second time, because this is when the accident occurred. Before entering the building the second time he had the knowledge

1. that there were flammable materials in the building and (2) that his friend had already ig- nited the materials once. He stated that he went back into the building because it was cooler. He acknowledged, however, that a teacher might ask him to leave. Asked why, he responded “because it’s not really that safe a place to be in.” Asked

why again, he responded “because of the flam- mable liquids.” Asked “and you knew that when you went back in,” he answered “right.” He also admitted that he knew fire could hurt you and burn you. He admitted that he knew it was dan- gerous to play with fire, but that he did not be- lieve that his friend understood it was dangerous. He testified that he had observed the effects of flammable fluids when his friend threw the match in the first time. He also admitted that he under- stood it was dangerous and that someone could get hurt. He testified that he never touched the cans or matches. To the question “you were wor- ried it would explode,” he responded, “right.” He testified that, when his friend poured more fluid into the step, he said, “I’m going to get up and get out,” and that when he started walking out, his friend threw a match and the fluid ignited.

Even viewed in the light most favorable to plaintiff, the evidence unequivocally reveals that Trevor appreciated the dangers before re- entering the building. Although Trevor clearly did not anticipate that his friend would throw a match onto the fluid while he was trying to leave the building, he did know that the fluid was in the building, that his friend would play with the fluid, that the fluid was flammable, and that the flammable fluid could hurt or burn him. Therefore, because plaintiff failed to generate a genuine issue concerning an indispensable ele- ment of the attractive nuisance doctrine, she was conclusively precluded from recovery under this doctrine. Thus the court did not err in granting the School District’s summary judgment on this theory of recovery.

Because we determine that Trevor was a tres- passer and was not within the attractive nui- sance doctrine, the duty owed to Trevor is only a duty to refrain from wanton, willful or reckless acts of negligence. Even viewed in the light most favorable to the plaintiff, the School District’s acts of leaving flammable materials in the cin- der block building on the playground, leaving the door unlocked, and failing to post warning signs on the property do not rise to the level of “wanton, willful or reckless behavior.” . . . There- fore, the court did not err in finding that plaintiff failed to generate a genuine issue of material fact whether the School District acted wantonly, will- fully, or recklessly.

The entry is: Judgment affirmed.

### Section 1983, Civil Rights Act Liability

“Section 1983 is the primary vehicle for obtain- ing damages and equitable relief against state and local agencies and officials who violate the constitutional rights of a person.”72 An individ- ual’s constitutional rights are protected through application of the Civil Rights Act of 1871, as codified in Section 1983 of Title 42 U.S.C. Thus, the “basic purpose” of a Section 1983 action for damages “is to compensate persons for injuries that are caused by deprivation of constitutional rights.”73 Under this statute, a denial of an in- dividual’s constitutional or statutory rights can result in damages assessed by the court against the school board, individual school board mem- ber, administrator, or teacher, or against any government official or employee responsible for the denial. This Act had been virtually dormant for almost a hundred years when it was revived in the early 1960s in the Supreme Court case of *Monroe v. Pape,*74 at which time the Court applied the Act to actions against public officials. The law itself states:

Every person who, under color of any statute, or- dinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.75

Congress enacted this law on April 20, 1871, after a month of debate, during which time it be- came clear that there was great sentiment toward providing legal redress against those southern- ers who repressed individual rights of southern blacks. The press at that time called the legisla- tion the Southern-Outrage Repression Bill.76

###### “PERSONS” UNDER THE ACT

As written, the law provides for both injunctive and monetary relief to be awarded by the federal courts. Offenders against whom action may be instituted are statutory persons—“persons” as the law is written.

A person acting “under color of” law is an in- dividual acting in an official capacity of the state, clothed with the power of the state, or one who

*Section 1983, Civil Rights Act Liability* 743

is the “repository of state power.”77 Accordingly, an official can act under color of law even when her actions are contrary to law, and she can be held personally liable in damages for her viola- tions of the Constitution.78 The U.S. Supreme Court has had difficulty in deciding exactly who a “person” is, whether it is a public board or an individual official or employee. In *Monroe,* the Court first held that Congress did not intend the word *person* to include municipalities or agencies of the government. Therefore, suits seeking re- lief under the Act were filed only against school officials and not against school districts as enti- ties. The result was that from 1961 to 1978 school districts insured school officials against dam- ages that may have been incurred by lawsuit in such cases, and the municipality was immune. On June 6, 1978, in *Monell v. Department of Social Services of City of New York,*79 this all changed when the Supreme Court voted seven to two to overrule *Monroe* insofar as it provided immu- nity for municipalities. The Court, in so ruling, did not upset the interpretation of the *respondeat superior* doctrine that a public school district is not responsible for the wrongdoing of its employ- ees, but it did say that the school district could be held liable under Section 1983 if it adopts an un- constitutional policy or acquiesces in an uncon- stitutional custom. Justice Brennan stated:

We conclude, therefore, that a local government may not be sued for an injury inflicted solely by its employees or agents. Instead, it is when execu- tion of a government’s policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under Section 1983.80

*Monell* therefore, taken in context with two other cases, *Wood v. Strickland* 81 and *Carey v. Piphus,*82 clearly permits courts to assess damages against either a governmental agency or indi- vidual officials of government if it or they sup- press one’s civil rights, whether it be a student, teacher, or some other party. *Wood* established the potential liability of school board members for the denial of students’ due process rights, and *Carey* clarified the nature and extent of the dam- ages that could be levied by the courts. In *Carey,* Justice Powell, writing for the Court, explained that there was a limitation to the damages that

were possible under this kind of action. Accord- ing to Powell, Section 1983 was not intended to provide purely punitive relief whereby the court would punish the wrongdoer for ill deeds, but instead the Act was designed to compensate the victim for the detriment and damage caused by the denial. Compensatory damages of this na- ture are quite difficult to prove, and the Supreme Court places this burden squarely on the shoul- ders of the plaintiff. In the absence of such proof, the individual is entitled to collect only nominal damages.

As discussed in Chapter 3, in the *Seminole Tribe of Florida v. Florida* case,83 the Eleventh Amendment prevents private parties from obtaining damages from a state government un- less Congress clearly and unambiguously ab- rogates sovereign immunity or the state itself waives immunity. Congress did not clearly abro- gate state sovereign immunity when it enacted Section 1983 in 1871. Although Section 1983 alone does not abrogate state Eleventh Amend- ment immunity, such immunity can be waived by specific enactments by Congress that work in tandem with Section 1983 to provide a remedy to specified constitutional violations. Such abro- gation, however, must be prescribed in the sub- stance of the legislation that specifically redresses the violation of a constitutional right for which Congress has valid reason to be concerned, such as the Individuals with Disabilities Education Act. Remember, however, that sovereign immu- nity protects only the state, state agencies, and other arms of the state, including public institu- tions of higher education. Perversely, however, Eleventh Amendment immunity has not yet been extended to local school districts.

###### SCHOOL BOARD LIABILITY UNDER SECTION 1983

As noted earlier, the Supreme Court in *Monell* held that municipalities cannot be liable under Section 1983 if the government itself does not cause the infliction of harm beyond the injury caused by one of the government’s employees. According to the Supreme Court, governmental liability can be imposed only when the injury is caused by “the execution of a government’s policy or custom, whether made by its lawmak- ers or by those whose edicts or acts may fairly be said to represent official policy.”84

In *Pembaur v. Cincinnati,*85 in 1986, the Supreme Court held that a school board cannot be held liable under Section 1983 unless there is actual or constructive knowledge that an em- ployee of the board has denied plaintiffs their constitutional rights.

The Fifth Circuit further clarified that by hold- ing that a municipality must have an “underly- ing knowledge” of a custom or a policy that is violative of a citizen’s constitutional rights.86 The Fifth Circuit explained:

Actual knowledge must be shown by such means as discussions at council meetings or receipt of written information. Constructive knowledge may be attributed to the governing body on the ground that it would have known of the violations if it had properly exercised its responsibilities, as, for example, the violations were so persistent and widespread that they were the subject of prolonged public discussion and a high degree of publicity.87

###### OFFICIAL NEGLIGENCE UNDER SECTION 1983

Even though the U.S. Supreme Court initially held that a civil remedy for negligence could be found under Section 1983,88 the Court later re- versed itself, holding that a lack of due care by a state official could not be the basis for relief un- der Section 1983.89 Mere negligence or an omis- sion causing injury cannot be used as the basis to invoke the protections of the statute. Thus, the so-called constitutional tort founded under Sec- tion 1983 has the important constraint of being inapplicable to cases of official negligence. The Supreme Court, however, has left open the ques- tion of liability if there is a callous or reckless disregard for plaintiffs’ rights and injury ensues. In applying this principle, the U.S. Court of Appeals, Eighth Circuit, in *Rubek v. Barnhart*90 found that parents seeking damages under Sec- tion 1983 could not prevail in an action for con- stitutional “negligence” against teachers and administrators for a violation of due process in administering corporal punishment to the plaintiff children. The court required plaintiffs to show that the defendants, in administering the corporal punishment, had demonstrated “a reckless disregard or deliberate indifference to

plaintiff’s constitutional rights.”91

Thus, the prevailing view appears to be that a governmental entity will not be liable unless

there is shown a “deliberate indifference” for a child’s rights. For a school board to be liable, the plaintiff must bear the difficult burden of prov- ing that constitutional rights were taken away as a result of overt official school district policy or custom. Moreover, the plaintiff must show that the board had knowledge of the policy or cus- tom that caused the deprivation. The plaintiff must also show that the injury was caused by the board’s “callous indifference” to the plain- tiff’s constitutional rights.92

###### INDIVIDUAL LIABILITY UNDER SECTION 1983

Under certain circumstances, an employee or an official of a school district may be found individ- ually liable even though a school board may not be. The individual employee or official cannot be liable unless the plaintiff shows that the action violated a clearly established law and that the individual exhibited a “callous indifference” for the rights of the plaintiff.93

In *Davis v. Scherer,* the U.S. Supreme Court held:

Officials are shielded from liability for civil dam- ages insofar as their conduct does not violate the clearly established statutory or constitutional rights of which a reasonable person would have known at the time of the incident involved.94

Therefore, employees and officials, in their in- dividual capacities, are immune from liability under Section 1983 unless they have exhibited a “callous indifference” to an individual’s consti- tutional rights and have demonstrated “a lack of objective good faith.”95

Horner has carefully summarized the law of liability as set forth in Section 1983 for both school boards and individuals:

Indeed courts generally look at two basic elements in determining whether Section 1983 should be imposed upon governmental entities and their employees. With respect to the liability of the entity, courts will impose liability only if a state official acts in a “callously indifferent” manner toward the rights of individuals pursuant to gov- ernmental policy or custom. In essence, a state of- ficial must not only perform an outrageous action, but such actions must also be common within that particular governmental entity. Individual liability revolves around the “callous indiffer- ence” standard. If an employee acts with “callous

indifference” toward the rights of an individual, he or she may be subject to liability in his or her individual capacity.96

### Constitutional Torts: Deliberate Indifference and State-Created Danger

Availability of the Section 1983 action for dam- ages for violating an individual’s constitutional rights has evolved into a kind of *constitutional tort*. This type of tort is based on two theories: First, if the school district omits to act to protect a constitutional right to the degree that it is “de- liberately indifferent,” then the possibility of a Section 1983 constitutional tort may be found. Second, if a school district violates its affirmative duty of care and protection and a student’s con- stitutional rights are violated by a “state-created danger,” then a school district may be subject to damages.

If a school official disregards a constitutional deprivation of an individual right and does so with deliberate indifference, then a constitu- tional tort may have been committed for which damages may accrue.

CONSTITUTIONAL TORTS: STATE- CREATED DANGER DOCTRINE

*A governmental actor may violate the Due Process Clause by allowing a third party to harm a person in government custody, or by creating a particular danger to the victim. Bad decisions by the govern- ment are not violations unless they are arbitrary, with no legitimate reason for them.*

*—Hunt v. Sycamore Community School District*

Such state-created danger may exist when the state takes a person into its custody and holds him there and fails to provide for his safety and well-being.97 One can see how a school district’s special relationship with a child could possibly give rise to a constitutional duty that the school district should perform reasonably.98

*Deliberate Indifference.* Concerning the first of these constitutional torts, “deliberate indiffer- ence,” a Montana federal court has explained

that a required relationship is necessary between the school’s “deliberate indifference” and the “state-created danger” for there to be liability to the school district. This court said that:

To establish the deliberate indifference element of a claim for (school district) liability under § 1983 based on the state-created danger theory, plaintiff must show: (1) unusually serious risk of harm;

1. defendant’s actual knowledge of, or at least willful blindness to, that elevated risk; and (3) defendant’s failure to take obvious steps to address that known serious risk.99

This court further explained additional requi- sites needed to establish school district liability under § 1983, the plaintiff must show:

(1) that plaintiff possessed a constitutional right of which he was deprived, (2) the school district had a policy, custom, or practice that was drawn into question, (3) such a policy amounted to deliberate indifference to the plaintiff’s constitutional right; and (4) that such policy was the moving force be- hind the constitutional violation.100

In defining “deliberate indifference,” the court said that, for purposes of § 1983, liability will occur when “the need for more or different action is so obvious, and inadequacy of current procedure so likely to result in violation of con- stitutional rights, that policymakers can reason- ably be said to have been deliberately indifferent to need.”101 Failure to adequately implement policy may be the basis for a violation. Or if the policy itself or its omission is the “moving force” behind the constitutional violation, then § 1983 liability may be imposed.

In a Montana case, male students, as towel boys, set up a videotaping system with cameras and two-way mirrors in the girls’ locker room. The boys videotaped the girls in various stages of undress before and after physical education and sports events. The girls and parents sued the school district claiming that laxness regard- ing access to dressing rooms, liberal school poli- cies toward access to buildings, and permitting males to be towel boys, combined to amount to a “moving force” behind the alleged constitutional violation.102 Moreover, the plaintiffs maintained that the school’s omissions amounted to delib- erate indifference where the evidence indicated that a teacher had told the superintendent that the girls think someone is videotaping them and

he did not follow through to investigate. After reviewing the law and the facts, the federal court ruled for the school district. The court found that the plaintiffs’ allegations of the school’s lax poli- cies and lack of control and supervision did not constitute the “moving force” violating the girls’ substantive due process rights, nor did the su- perintendent’s failure to investigate a rumor that he heard from a teacher. Neither rose to the level of deliberate indifference.103

*State-Created Danger*. A constitutional duty to protect a person may be imposed when state ac- tors have affirmatively acted to create a danger to the plaintiff.104 This duty is the predicate for a “constitutional tort.” Liability under the “state- created danger” theory of due process liability under § 1983 cannot be presumed without affir- mative acts by the state which either create or in- crease the risk that an individual will be exposed to violence.105 There are three necessary condi- tions to satisfy the elements of a “state-created danger” claim under the Due Process Clause that a state actor affirmatively used his or her authority that made a person more vulnerable to danger than had the state not acted at all:106

1. A state actor exercised his or her authority;
2. The state actor took an affirmative action; and
3. The act created a danger to the citizen or ren- dered the citizen more vulnerable to danger than if the state had not acted at all.107

Federal circuit courts have supplied the defi- nition for state-created danger. In a § 1983 ac- tion, U.S. Court of Appeals, Third Circuit, denied relief to a student who claimed damages for vio- lation of his substantive due process rights when he was punched in the eye and suffered trau- matic hyphema of the eye and a fracture of his facial bone. The student’s claim was based on the “state-created danger” theory. In reviewing the law, the court said that a viable state-created dan- ger claim rests on four salient elements: “First, the harm ultimately caused must have been foreseeable and fairly direct. Second, a state ac- tor must have acted with a degree of culpabil- ity that shocks the conscience. Such culpability exceeds that of a state actor acting in willful dis- regard for plaintiff’s safety. Third, a special re- lationship must have existed between the state and the plaintiff such that ‘the plaintiff was a foreseeable victim of the defendant’s acts,’ or is a

‘member of a discrete class of persons subjected to the potential harm brought about by the state’s actions,’ as opposed to a member of the public in general. Fourth, a state actor must have ‘used his or her authority in a way that created a danger to the citizen or that rendered the citizen more vulnerable to danger than had the state not acted at all.’ ” Regarding the fourth element, the court stressed that the state must misuse its authority, rather than merely omit to use its authority. In other words, the state-created danger doctrine has its basis in “affirmative” acts that establish a condition where the plaintiff is exposed to increased danger.108 In spite of the rigors of these requirements of law and the development of the stringent rules that govern § 1983 damage claims, this constitutional tort of state-created danger appears to be gaining increasing momen- tum as an instrument of choice for damages in school-related injuries to students.

*School Board Members Have Qualified Immunity, but May Be Liable, as Individuals, for Damages Under Section 1983 of the Civil Rights Act of 1871*



**Wood v. Strickland**

*Supreme Court of the United States, 1975.*

*420 U.S. 308, 95 S. Ct. 992.*

Mr. Justice WHITE delivered the opinion of the Court.

Respondents Peggy Strickland and Virginia Crain brought this lawsuit against petitioners, who were members of the school board at the time in question, two school administrators, and the Special School District of Mena, Ark., purport- ing to assert a cause of action under 42 U.S.C.A.

§ 1983, and claiming that their federal consti- tutional rights to due process were infringed under color of state law by their expulsion from the Mena Public High School on the grounds of their violation of a school regulation prohibit- ing the use or possession of intoxicating bever- ages at school or school activities. The complaint

as amended prayed for compensatory and puni- tive damages against all petitioners, injunctive re- lief allowing respondents to resume attendance, preventing petitioners from imposing any sanc- tions as a result of the expulsion, and restraining enforcement of the challenged regulation, declar- atory relief as to the constitutional invalidity of the regulation, and expunction of any record of their expulsion. . . .

The violation of the school regulation prohib- iting the use or possession of intoxicating bev- erages at school or school activities with which respondents were charged concerned their “spiking” of the punch served at a meeting of an extracurricular school organization attended by parents and students. At the time in question, respondents were sixteen years old and were in the tenth grade. The relevant facts begin with their discovery that the punch had not been pre- pared for the meeting as previously planned. The girls then agreed to “spike” it. Since the county in which the school is located is “dry,” respondents and a third girl drove across the state border into Oklahoma and purchased two twelve-ounce bottles of “Right Time,” a malt li- quor. They then bought six ten-ounce bottles of a soft drink, and after having mixed the contents of the eight bottles in an empty milk carton, re- turned to school. Prior to the meeting, the girls experienced second thoughts about the wisdom of their prank, but by then they were caught up in the force of events and the intervention of other girls prevented them from disposing of the illicit punch. The punch was served at the meeting, without apparent effect. . . . The board voted to expel the girls from school for the re- mainder of the semester, a period of approxi- mately three months.

The board subsequently agreed to hold an- other meeting on the matter, and one was held approximately two weeks after the first meeting. The girls, their parents, and their counsel attended this session. The board began with a reading of a written statement of facts as it had found them. The girls admitted mixing the malt liquor into the punch with the intent of “spiking” it, but asked the board to forgo its rule punishing such violations by such substantial suspensions. . . . The board voted not to change its policy and, as before, to expel the girls for the remainder of the semester.

The District Court instructed the jury that a decision for respondents had to be premised upon a finding that petitioners acted with malice in expelling them and defined “malice” as mean- ing “ill will against a person—a wrongful act done intentionally without just cause or excuse.” In ruling for petitioners after the jury had been unable to agree, the District Court found “as a matter of law” that there was no evidence from which malice could be inferred.

The Court of Appeals, however, viewed both the instruction and the decision of the District Court as being erroneous. Specific intent to harm wrongfully, it held, was not a requirement for the recovery of damages. Instead, “[i]t need only be established that the defendants did not, in the light of all the circumstances, act in good faith. The test is an objective, rather than a sub- jective one.”

Petitioners as members of the school board assert here, as they did below, an absolute im- munity from liability under § 1983 and at the very least seek to reinstate the judgment of the District Court. If they are correct and the Dis- trict Court’s dismissal should be sustained, we need go no further in this case. Moreover, the immunity question involves the construction of a federal statute, and our practice is to deal with possibly dispositive statutory issues before reaching questions turning on the construction of the Constitution. . . . We essentially sustain the position of the Court of Appeals with respect to the immunity issue.

The nature of the immunity from awards of damages under § 1983 available to school ad- ministrators and school board members is not a question which the lower federal courts have answered with a single voice. There is general agreement on the existence of a “good faith” im- munity, but the courts have either emphasized different factors as elements of good faith or have not given specific content to the good-faith standard. . . .

Common law tradition, recognized in our prior decisions, and strong public policy reasons also lead to a construction of § 1983 extending a qualified good-faith immunity to school board members from liability for damages under that section. Although there have been differing em- phases and formulations of the common law

immunity of public school officials in cases of student expulsion or suspension, state courts have generally recognized that such officers should be protected from tort liability under state law for all good-faith non-malicious action taken to fulfill their official duties.

As the facts of this case reveal, school board members function at different times in the na- ture of legislators and adjudicators in the school disciplinary process. Each of these functions nec- essarily involves the exercise of discretion, the weighing of many factors, and the formulation of long-term policy. “Like legislators and judges, these officers are entitled to rely on traditional sources for the factual information on which they decide and act.” . . . As with executive officers faced with instances of civil disorder, school of- ficials, confronted with school behavior causing or threatening disruption, also have an “obvious need for prompt action, and decisions must be made in reliance on factual information supplied by others.”

Liability for damages for every action which is found subsequently to have been violative of a school’s constitutional rights and to have caused compensable injury would unfairly im- pose upon the school decision-maker the burden of mistakes made in good faith in the course of exercising his discretion within the scope of his official duties. School board members, among other duties, must judge whether there have been violations of school regulations and, if so, the appropriate sanctions for the violations. Denying any measure of immunity in these circumstances “would contribute not to principled and fearless decision-making but to intimidation.” . . . The imposition of monetary costs for mistakes which were not unreasonable in the light of all the circumstances would undoubtedly deter even the most conscientious school decision-maker from exercising his judgment independently, forcefully, and in a manner best serving the long- term interest of the school and the students. The most capable candidates for school board posi- tions might be deterred from seeking office if heavy burdens upon their private resources from monetary liability were a likely prospect during their tenure.

These considerations have undoubtedly played a prime role in the development by state

courts of a qualified immunity protecting school officials from liability for damages in lawsuits claiming improper suspensions or expulsions. But at the same time, the judgment implicit in this common-law development is that absolute immunity would not be justified since it would not sufficiently increase the ability of school of- ficials to exercise their discretion in a forthright manner to warrant the absence of a remedy for students subjected to intentional or otherwise in- excusable deprivations.

. . . We think there must be a degree of immu- nity if the work of the schools is to go forward; and, however worded, the immunity must be such that public school officials understand that action taken in the good-faith fulfillment of their responsibilities and within the bounds of reason under all the circumstances will not be punished and that they need not exercise their discretion with undue timidity. . . .

The disagreement between the Court of Ap- peals and the District Court over the immunity standard in this case has been put in terms of an “objective” versus a “subjective” test of good faith. As we see it, the appropriate standard necessarily contains elements of both. The offi- cial himself must be acting sincerely and with a belief that he is doing right, but an act violating a student’s constitutional rights can be no more justified by ignorance or disregard of settled, indisputable law on the part of one entrusted with supervision of students’ daily lives than by the presence of actual malice. To be entitled to a special exemption from the categorical reme- dial language of § 1983 in a case in which his ac- tion violated a student’s constitutional rights, a school board member, who has voluntarily un- dertaken the task of supervising the operation of the school and the activities of the students, must be held to a standard of conduct based not only on permissible intentions, but also on knowledge of the basic, unquestioned constitu- tional rights of his charges. Such a standard im- poses neither an unfair burden upon a person assuming a responsible public office requiring a high degree of intelligence and judgment for the proper fulfillment of its duties, nor an unwar- ranted burden in light of the value which civil rights have in our legal system. Any lesser stan- dard would deny much of the promise of § 1983.

Therefore, in the specific context of school disci- pline, we hold that a school board member is not immune from liability for damages under § 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitu- tional rights of the school affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other in- jury to the student. That is not to say that school board members are “charged with predicting the future course of constitutional law.” . . . A com- pensatory award will be appropriate only if the school board member has acted with such an im- permissible motivation or with such disregard of the student’s clearly established constitutional rights that his action cannot reasonably be char- acterized as being in good faith.

The Court of Appeals based upon its review of the facts but without the benefit of the tran- script of the testimony given at the four-day trial to the jury in the District Court, found that the board had made its decision to expel the girls on the basis of *no* evidence that the school regula- tion had been violated:

To justify the suspension, it was necessary for the Board to establish that the students possessed or used an “intoxicating” beverage at a school-sponsored activity. No evidence was presented at either meet- ing to establish the alcoholic content of the liquid brought to the campus. Moreover, the Board made no finding that the liquid was intoxicating. The only evidence as to the nature of the drink was that it was supplied by the girls, and it was clear that they did not know whether the beverage was intoxicat- ing or not. 485 F.2d at 190.

. . . In its statement of facts issued prior to the onset of this litigation, the school board ex- pressed its construction of the regulation by finding that the girls had brought an “alcoholic beverage” onto school premises. The girls them- selves admitted knowing at the time of the in- cident that they were doing something wrong which might be punished. In light of this evi- dence, the Court of Appeals was ill advised to supplant the interpretation of the regulation of those officers who adopted it and are entrusted with its enforcement. . . .

When the regulation is construed to prohibit the use and possession of beverages containing

alcohol, there was no absence of evidence be- fore the school board to prove the charge against respondents. The girls had admitted that they intended to “spike” the punch and that they had mixed malt liquor into the punch that was served. . . .

Given the fact that there was evidence sup- porting the charge against respondents, the contrary judgment of the Court of Appeals is im- provident. It is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom and compassion. Public high school stu- dents do have substantive and procedural rights while at school. . . . But § 1983 does not extend the right to relitigate in federal court evidentiary questions arising in school disciplinary proceed- ings or the proper construction of school regu- lations. The system of public education that has evolved in this Nation relies necessarily upon the discretion and judgment of school adminis- trators and school board members, and § 1983 was not intended to be a vehicle for federal-court correction of errors in the exercise of that discre- tion which do not rise to the level of violations of specific constitutional guarantees. . . .

Respondents have argued here that there was a procedural due process violation which also supports the result reached by the Court of Appeals. . . . But because the District Court did not discuss it, and the Court of Appeals did not decide it, it would be preferable to have the Court of Appeals consider the issue in the first instance.

The judgment of the Court of Appeals is va- cated and the case remanded for further pro- ceedings consistent with this opinion.

So ordered.

###### CASE NOTES

1. *Absolute Immunity Under 1983.* The Supreme Court, in a series of cases, determined that absolute immunity from liability under § 1983 of the Civil Rights Act of 1871 is available as a defense for criminal prosecutors in initiating and presenting the state’s case, *Imbler v. Pacht- man,* 424 U.S. 409, 96 S. Ct. 984 (1976), and for state legislators, *Tenney v. Brandhove,* 341 U.S. 367, 71 S. Ct. 783 (1951).
2. *Qualified Immunity Under § 1983.* The defense of qualified immunity is available only to

an official sued in his individual or personal capacity, under § 1983, and not to an official sued in his official capacity. For example, as noted earlier in Chapter 9, a school official searching a student is entitled to qualified im- munity where “clearly established” law does not show that the search violated the Fourth Amendment. Where the law is clear, however,

§ 1983 damages may be invoked against the offending school administrator. *Safford v*. *Uni- fied School District No. 1 v. Redding,* 129 S. Ct. 2633, 174 L. Ed. 2d 354 (2009).

1. *Clearly Established.* Whether the qualified immunity of a school official can be extin- guished is dependent on whether the official transgresses “clearly established” U.S. consti- tutional law. In determining whether the law is “clearly established,” a court must decide whether the boundaries of the individual constitutional right at the time of the alleged violation were sufficiently clear, in light of preexisting law, that a reasonable person in the school official’s position would have un- derstood that his conduct violated the plain- tiff’s constitutional right. *Brown v. Hot, Sexy and Safer Productions, Inc*.*,* 68 F.3d 525 (1st Cir. 1995). *See also: Martinez v. Cui,* 608 F.3d 54 (1st Cir. (2010).

With regard to whether the boundaries or contours of the preexisting law is clear, it must be taken into consideration whether in matters of speech of a school employee, for example, the speech was ex- ercised as a matter of “public concern” (*Pickering*), was purely a “private concern” (*Connick*) or was made “pursuant to duty” (*Garcetti*). Not a simple proposition. The U.S. Court of Appeals, Third Cir- cuit, 2005, in addressing such a matter, held that school officials were not entitled to qualified im- munity for a school nurse’s retaliation claim based on the allegation that the school officials had given her an unsatisfactory employment rating for raising matters of public concern. According to the court, the law was clearly established that the nurse’s speech advocating on behalf of disabled students and objecting to pesticide spraying at school by an unqualified individual was undoubtedly protected speech, and the school officials were unable to enunciate a sufficient countervailing public school interest. *McGreevy v. Stroup*, 413 F.3d 359 (3rd Cir. 2005). *See also: Evans-Marshall v. Board of Education of Tipp City Exempted Village School District,* 428 F.3d 223 (6th Cir. 2005).

*Section 1983, a Claim for Denial of Substantive Due Process, Is Not a Remedy for Death of a Child on Band Field Trip—Due Process Clause Is Not a “Font of Tort Law”*



#### Lee v. Pine Bluff School District

*United States Court of Appeals, Eighth Circuit, 2007.*

*472 F.3d 1026.*

COLLOTON, Circuit Judge.

Sharon Lee appeals the decision of the district court dismissing her lawsuit against the Pine Bluff School District and Darrell McField, an em- ployee of the school district. We affirm.

This case involves the tragic death of Court- ney Fisher, Lee’s son and a former student in the Pine Bluff School District. According to Lee’s complaint, in January 2004, Courtney was an eighth-grade student at Jack Robey Junior High School in Pine Bluff, and a member of the school band. McField was the director of the band, and he supervised band activities and trips.

The complaint alleges that the band and its members were invited to participate in a com- petition in Atlanta, Georgia, on or about Janu- ary 16–20, 2004, and Lee permitted Courtney to make the trip to Atlanta. Lee completed a “medi- cal form,” which listed Courtney’s grandmother as an “emergency contact person,” and which also provided a name and telephone number for the family doctor, and a health insurance policy number. Lee checked a box stating that Courtney had no physical problems that would prohibit exercise, and then signed her name to a state- ment that “I give my consent to the band direc- tor to secure treatment at the best medical facility available if an injury does occur.” The complaint alleged that because parents and teachers were chaperones on the tour, Lee was confident that Courtney would be provided “reasonable care and supervision,” and that Courtney’s grand- mother would be contacted immediately “in the event an emergency occurred and Courtney be- came ill or injured.”

According to the complaint, Courtney be- came ill on Saturday, January 17, after arriving in Atlanta. McField held Courtney out of the band competition on that date due to the sever- ity of the symptoms, and “for the duration of the trip, Courtney was confined to a bed in his hotel room, making occasional trips to the bathroom to vomit.” The complaint asserts that Courtney could not eat, and that his only source of suste- nance was juice and water. Lee alleges that al- though the adults recognized that Courtney was extremely ill, and did not allow him to partici- pate in functions or sightseeing excursions, they failed to seek medical attention, and did not no- tify his family or physician of the illness.

The complaint alleges that when the band re- turned home in the early morning of January 20, Lee drove Courtney directly to a regional medi- cal center, where medical personnel determined that he should be transported to a children’s hospital in Little Rock. Courtney suffered car- diac arrest upon his admission to the hospital, and he died on January 21. The death was attrib- uted to undiagnosed diabetes. Lee’s complaint alleges that Courtney’s death could have been prevented if the chaperones, including McField, had sought medical care for Courtney.

Lee brought several state-law claims of neg- ligence against McField and the school district, and also included an allegation, read generously, that the Pine Bluff School District and McField are liable under 42 U.S.C. § 1983 for violating Courtney’s constitutional rights. The consti- tutional claim asserted that based on the con- sent form signed by Lee, McField and other representatives of the school district assumed “care, custody, and control” of Courtney, and had a corresponding duty to care for his medi- cal needs. The complaint asserts that these state officials were “deliberately indifferent” to Courtney’s medical needs, and “willfully and deliberately” failed to provide adequate care. Lee alleges that the inaction of these state actors would “shock the consc[ience]” of the court.

The district court dismissed the constitutional claim with prejudice, holding that “to assume federal jurisdiction over this case would re- quire the Court to disregard the admonition in *Dorothy J.* [*v. Little Rock Sch. Dist.,* 7 F.3d 729 (8th Cir. 1993)], that common law torts should not be converted into constitutional violations merely

because the actor was employed by a subdivi- sion of the state.”

The Due Process Clause of the Fourteenth Amendment is not a “font of tort law.” *Paul v. Davis,* 424 U.S. 693, 701, 96 S. Ct. 1155 (1976). The

Supreme Court has written that neither the text nor the history of the Clause supports the prop- osition that the State must “guarantee certain minimal levels of safety and security.” *DeShaney v. Winnebago County Dept. of Social Servs.,* 489 U.S. 189, 195–96, 109 S. Ct. 998, (1989). The Due

Process Clause is principally a restraint on the power of government to act, and it “generally confer[s] no affirmative right to government aid, even where such aid may be necessary to secure life, liberty, or property interests of which the gov- ernment itself may not deprive the individual.”

In “certain limited circumstances,” however, when the State restrains an individual’s liberty “through incarceration, institutionalization, or other similar restraint,” the Constitution does impose a corresponding duty on the State “to assume some responsibility for [the individual’s] safety and general well-being,” because the State has rendered the person unable to care for him- self. The substantive component of the Due Process Clause, for example, requires a State to provide involuntarily committed mental patients with such services as are necessary to ensure their “reasonable safety,” and to provide suspects in police custody with medical care required by injuries suffered during their apprehension.

The district court dismissed Lee’s constitu- tional claim against the Pine Bluff School District without delving into these principles, because the complaint alleged no policy or custom of the district that caused an alleged constitutional vio- lation. We agree with this conclusion. It is well settled that a municipality may not be found liable under § 1983 “unless action pursuant to official municipal policy of some nature caused a constitutional tort.” A school district cannot be held liable under § 1983 on a *respondeat superior* theory, *i.e.,* simply because it employs a tortfea- sor. Lee’s complaint alleged no unconstitutional policy of the Pine Bluff School District, and it as- serted no widespread unconstitutional practices that might constitute a “custom or usage with the force of law.” Accordingly, the district court properly dismissed Lee’s constitutional claim against the school district.

Whether McField, the band director, may be liable under § 1983 does require consideration of whether the complaint identifies one of the “lim- ited circumstances” in which a state official may have a constitutional duty to attend to the medi- cal needs of a citizen. As noted, *DeShaney* defined those circumstances as situations in which the State restrains an individual’s liberty “through incarceration, institutionalization, or other simi- lar restraint.” We conclude that the scenario alleged here does not meet the stringent require- ments for substantive due process liability.

We previously have considered whether com- pulsory attendance at public schools places a stu- dent within the limited category of individuals to whom the State owes a special duty of care. In *Dorothy J.,* we joined three other circuits in hold- ing that “state-mandated school attendance does not entail so restrictive a custodial relationship as to impose upon the State the same duty to protect it owes to prison inmates, or to the invol- untarily institutionalized.” In *Dorothy J.,* there- fore, we held that school officials did not have a constitutional duty to protect a mentally retarded student from violent acts of another student. . . . Not long after *Dorothy J.,* the Supreme Court indicated agreement with our holding, saying “we do not, of course, suggest that public schools as a general matter have such a degree of control over children as to give rise to a ‘duty to protect.’ ” *Vernonia School District v. Acton.* . . .

Given that even mandatory school attendance generally does not give rise to a constitutional duty of care that could trigger liability based on substantive due process, it is not surprising that the weight of authority also holds that school officials have no such duty with respect to stu- dents participating in *voluntary* school-related activities that are *not* required by state law. For if a citizen voluntarily exercises his liberty to enter into the custody of a state official or to partici- pate in a state-sponsored activity, it is difficult to conclude that *the State* has deprived the citizen of liberty. *. . .*

Applying the principles articulated in *DeShaney* and *Dorothy J.,* we hold that Courtney likewise was not within the limited class of persons to whom the State owes a constitutional duty to provide some degree of medical care. The complaint makes no allegation that the band trip was compulsory and, indeed, acknowledges that Courtney’s mother

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voluntarily consented to the student’s partici- pation. There is no assertion that Courtney was prohibited from leaving the band activity at any time if, for example, his mother or grandmother arranged for him to be picked up in Atlanta. Lee does not allege that McField or any chaperone denied Courtney an opportunity to contact his mother or grandmother by telephone, or that any-

indifference leading to the death of a student on a school-sponsored trip. The parties have dis- puted whether a cause of action against school officials is available under Arkansas law on the facts of this case, and that claim remains avail- able for Lee to pursue in the Arkansas courts.

For the foregoing reasons, the judgment of the district court is affirmed.

one prevented Courtney’s family from communi-

cating with him at the hotel during the four-day excursion. There is no claim that Courtney’s vol- untary participation evolved into an involuntary commitment during the course of the trip.

We acknowledge Lee’s allegations that she was confident, based on her completion of the medical form and the presence of adult chaperones, that the school district would provide Courtney with reasonable care and supervision, and that McField was well aware that Courtney became ill during the stay in Atlanta. In a common-law tort action, these factors might well support Lee’s claim that McField was negligent. *DeShaney* makes clear, however, that the State’s *constitutional* duty to protect or care for an individual “arises *not* from the State’s knowledge of the individual’s predica- ment or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf.” As with compulsory public school attendance in *Dorothy J.,* we cannot say that voluntary participation in an out-of-town extracurricular activity is analogous to confinement in a prison or mental institution, such that the Constitution imposes on state offi- cials an affirmative duty to care for individuals who are participating in the event.

*DeShaney* recognized that in tragic cases like this one, “judges and lawyers, like other hu- mans,” are moved by natural sympathy to try to compensate a mother for her loss, but that the Fourteenth Amendment was not designed to provide relief in all cases where the State’s functionaries fail to take action that might have averted a serious harm. The constitutional duties derived from substantive due process analysis are carefully circumscribed, and the events al- leged here do not implicate the limited circum- stances in which the Constitution obligates a State to care for an individual’s medical needs. The State of Arkansas, of course, may fashion a system of tort liability that would hold school officials accountable for negligence or deliberate

###### CASE NOTES

1. The U.S. Court of Appeals, Sixth Circuit, has explained that in order to recover damages under § 1983 for violation of a substantive due process constitutional right, as explained previously, under the “state-created danger” theory, three important requirements must be met: First, an affirmative act must have transpired that created or increased the risk of harm; second, a special danger must have been created for the victim that is greater and distinguishable from the public at large; and, third, there must exist a requisite degree of school district (state) culpability. Where a first-grade boy brought a gun to school and shot and killed a girl classmate when the teacher had departed the room, but was about 27 feet away, the federal court ruled that there was no school district or teacher liability under § 1983. The fact that the teacher had left the room unsupervised was not an “affirma- tive act” that created or increased the risk. The teacher was not “deliberately indifferent,” and there was no demonstration of the requi- site degree of “culpability” to incur liability. *McQueen v. Beecher Community Schools,* 433 F.3d 460 (6th Cir. 2006).
2. A school district is not liable for a constitu- tional violation, “a constitutional tort,” unless it can be shown that the school district had an official policy or custom that was the “mov- ing force” leading to harm of the student. *Rivera v. Houston Independent School District,* 349 F.3d 244 (5th Cir. 2003).

### Eleventh Amendment Immunity and Local School Districts

Does Eleventh Amendment immunity extend to local school districts? As observed earlier in this text (Chapter 4), local school districts are actually

state agencies; local school board members are legally state officials; and locally derived funds are, in fact, state funds. Because this is gener- ally true, it would seem logical that Eleventh Amendment immunity (see Chapter 3) should extend to local school districts as agencies of the state. However, this conclusion has run afoul of the practical problems that would ensue if all ed- ucation treasuries, state and local, were declared immune from suits by private citizens. The Supreme Court has therefore apparently con- cluded that the Eleventh Amendment requires a different test as to immunity for the state versus local school districts.

The U.S. Supreme Court held, in *Mt. Healthy,* that the Eleventh Amendment does not nec- essarily apply to “counties and municipal corporations.”109 The Court has, however, con- cluded that the Eleventh Amendment bars suit against county officials if the resulting judgment would effectively constitute a judgment against the state’s treasury itself.110

The question as to the local nature of school districts, however, is far from being clearly de- cided. The Supreme Court set a precedent in *Mt. Healthy* that has caused considerable con- fusion and is not likely to be resolved soon. In *Mt. Healthy,* the Court took the position that local school boards in Ohio are more like a “county or city” than they are like “an arm of the state.” This conclusion is, of course, contrary to the prevailing view of state and federal prec- edents on the subject.

In maintaining that local school districts are not state agencies in Ohio, the Supreme Court perused the Ohio statutes and concluded that the “state” does not include “political subdivi- sions” and that local school districts fall within the category of “political subdivisions.” The Court further noted that local school boards can levy taxes and issue bonds and are thereby local instead of state agencies. In so surmising, the Supreme Court ignored the Ohio Constitu- tion, which clearly places the responsibility for the provision of education in its entirety on the state legislature, not the locality.111 Regardless, the Supreme Court held in *Mt. Healthy* that a school board in Ohio is a local agency, distinct from a state agency, and is thereby not entitled to Eleventh Amendment immunity. This de- marcation of immunity between state and local

agencies is consistent with the Supreme Court’s rulings in *Monell*112 and *Pugh,*113 which did not distinguish public schools from other local gov- ernmental agencies.

These precedents have left the lower courts with little guidance in attempting to determine whether school districts are state or local agen- cies for Eleventh Amendment purposes. In ap- plying the *Mt. Healthy* rationale to Louisiana, the

U.S. Court of Appeals for the Fifth Circuit con- cluded that school parish boards in Louisiana are “local independent agents not shielded” by Eleventh Amendment immunity. The U.S. Court of Appeals for the Tenth Circuit has held that local school boards in New Mexico are not arms of the state and therefore enjoy Eleventh Amend- ment immunity.114

In *Duke v. Grady Municipal Schools,*115 the U.S. Court of Appeals, Tenth Circuit, relied heavily on *Daddow v. Carlsbad Municipal School District,*116 wherein the New Mexico Supreme Court held that a school district and a board of education and its members are not absolutely immune from suit under § 1983. Significantly, this court found that a local school board is not an “arm of the state” entitled to Eleventh Amendment immunity and can be sued under § 1983. The court reasoned that local boards do not ben- efit from state Eleventh Amendment immunity based on the facts that (a) local school boards are statutorily defined as local public bodies, (b) local school boards have significant political and fi- nancial autonomy, and (c) local school boards operate like other local political subdivisions of the state. The court further concluded in its “arm of the state” analysis, for purposes of § 1983 ac- tions, that local board members are elected by popular vote from counties and precincts and that school boards acquire and dispose of prop- erty and have capacity to sue and be sued. All of these aspects lead to the conclusion that local school boards are local and not state entities. The

U.S. Court of Appeals in *Duke* found the reason- ing of the New Mexico Supreme Court in *Daddow* to be compelling in its decision to hold that local school districts are not “arms of the state” and are not entitled to Eleventh Amendment immu- nity. The New Mexico Supreme Court in *Daddow* further explained the § 1983 liability of localities and, in so doing, provided what is probably the best guide to the status of local school district

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liability in view of the Eleventh Amendment re- strictions. This court was unequivocal in holding that local school districts are not immune from liability under the Eleventh Amendment and may be held liable for damages under § 1983.

Several conclusions can be drawn from this line of precedents. The foremost is that the Eleventh Amendment is a viable constitutional restraint on the judiciary, preserving immune status for state government unless Congress spe- cifically and unequivocally abrogates it through the enforcement provision, § 5, of the Fourteenth Amendment. Where relief is granted, it cannot be in the form of retroactive monetary damages taken from the state treasury.

Whether the treasuries of local school boards are similarly immune is a matter of application of the Supreme Court’s criteria to determine im- munity status. The *Mt. Healthy* criteria117 are:

* whether state statutes and case law characterize the local school district as an arm of the state;
* the source of funds to operate the schools;
* the degree of autonomy enjoyed by the school district;
* whether the school district is concerned pri- marily with local, rather than statewide, problems;
* whether the school district has authority to sue and be sued in its own name; and
* whether the school district has the right to hold and use property.118

These criteria will, of necessity, be applied by the courts in each case where Eleventh Amendment immunity is raised as a defense by local school districts.

### Summation of Case Law

*Sovereign and Governmental Immunity*

1. Sovereign immunity is a common-law con- cept recognized as an inherent attribute of the state.
2. “Governmental immunity” is public policy derived from the traditional doctrine of sov- ereign immunity that limits imposition of tort liability on a government agency. The prem- ise is that courts should not be called upon to pass judgment on policy decisions made by members of coordinate branches of govern- ment in the context of tort actions because

such actions furnish an inadequate crucible for testing the merits of social, political, or economic policy.

1. A state agency is entitled to immunity from tort liability to the extent that it is per- forming a governmental—as opposed to a proprietary—function.
2. Factors to be considered when deciding if a public employee is entitled to benefits of sovereign immunity include: (1) nature of function employee performs; (2) extent of the governmental entity’s interest in involvement in function; (3) degree of control and direction exercised by the governmental entity over employee; and (4) whether the alleged wrong- ful act involved the exercise of judgment and discretion.

*Official Immunity*

1. “Official immunity” is immunity from tort lia- bility afforded to public officers and employees for acts performed in the exercise of their dis- cretionary functions. It rests not on the status or title of the officer or employee, but on the function performed.
2. When an officer or employee of a govern- mental agency is sued in his representative capacity, the officer’s or employee’s actions are afforded the same immunity, if any, to which the agency, itself, would be entitled.
3. Qualified official immunity applies to the negligent performance by a public officer or employee for (1) discretionary acts or func- tions involving the exercise of discretion, judgment, or personal deliberation and de- cision; (2) decisions made in good faith; and

(3) decisions made within the scope of the officer’s or employee’s authority.

1. A public officer or employee is afforded no immunity from tort liability for the negligent performance of a ministerial act. A ministerial act is one that requires only obedience to the orders of others; with such, the officer’s duty is absolute, certain, and imperative.
2. In the context of qualified immunity, bad faith can be predicated on a violation of constitu- tional, statutory, or other clearly established rights which a person in the public employ- ee’s position presumptively would have known was afforded to a person in the plain- tiff’s position.

*Immunity for Discretionary Acts*

1. A public body that owes a particular duty of care has wide policy discretion in choosing the means by which to carry out that duty; however, the range of permissible choices does not include the choice of not exercising care.
2. Normally, choice within a permissible range, in order to qualify for statutory discretionary immunity, is one that has been made by a su- pervisor of a policy-making body. However, the choice to follow or not to follow a prede- termined policy in the face of a particular set of facts involving safety of a particular indi- vidual normally is not a “discretionary policy choice” entitled to statutory immunity.
3. A two-step test exists for determining whether a challenged action falls within “discretion- ary” function: (1) whether the challenged conduct involves an element of choice or discretion; and (2) if discretionary judgment is involved, whether the decision or course of action is driven by public policy concerns grounded on social, economic or political considerations.

*Liability Insurance*

1. If liability insurance coverage is obtained by a government entity, then the government en- tity waives its sovereign immunity to the ex- tent of such insurance coverage.
2. Where the plain terms of a government en- tity’s insurance policy provide that there is no coverage for a particular claim, the policy does not create a waiver of sovereign immu- nity as to that claim.

*Invitees and Licensees*

1. A holder of a complimentary pass to a high school football game is an invitee on school premises, but not a licensee. As an invitee the person is owed the duty of reasonable care by the school district.
2. Where one enters a part of premises reserved for the use of the occupant and its employees, and to which there was no express or implied invitation to go, there can be no recovery for resulting injury, even though the person who enters is an invitee to other parts of the premises.

*Constitutional Torts Damages Under § 1983*

1. Public school officials must have qualified immunity from damage suits under the Civil Rights Act if the work of the schools is to go forward. However worded, the immunity must be such that school officials understand that an action taken in the good faith fulfill- ment of their responsibilities and within the bounds of reason will not be punished and that they need not exercise their discretion with undue timidity.
2. Even though on the basis of common-law tradition and public policy school officials are entitled to a qualified good faith immu- nity from liability for damages under § 1983 of the Civil Rights Act, they are not immune from such liability if they knew or reasonably should have known that the action they took within their sphere of official responsibility would violate the constitutional rights of the person affected. A compensatory award is ap- propriate only if the school officials acted with such an impermissible motivation or with such disregard of a student’s clearly estab- lished constitutional rights that the officials’ actions could not reasonably be characterized as taken in good faith.

*Constitutional Torts: State-Created Danger*

1. A governmental actor may violate the Due Process Clause by allowing a third party to harm a person in government custody, or by creating a particular danger to the victim.
2. Liability under the “state-created danger” theory of due process under § 1983 is predi- cated upon affirmative acts by the state which either create or increase the risk that an indi- vidual will be exposed to by third party acts of violence.
3. Liability of supervisors under § 1983 cannot be based solely on the right to control em- ployees or on simple awareness of employ- ees’ misconduct.
4. Under the “state-created danger” doctrine, bad decisions by the government are not due process violations unless they are arbitrary, meaning that they are taken for no legitimate reason.
5. A supervisory official’s failure to supervise, control, or train an offending individual is

not grounds for supervisory liability under

§ 1983 unless the supervisor either encouraged the specific incident of misconduct or in some other way directly participated in it. At a min- imum, a plaintiff must show that the supervi- sor at least implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending person or persons.

1. Under the “state-created danger” doctrine, where a substantive due process claim arises out of a governmental actor’s attempt to dis- charge duties which are required by law or public necessity, generally the government’s action is not arbitrary, in violation of the Due Process Clause, even if the actor was impru- dent in choosing one legitimate goal over another.
2. Under the “state-created danger” doctrine, which is a viable substantive due process claim, a governmental actor can be held re- sponsible for an injury committed by a private person if: (1) an affirmative act by the govern- mental actor either created or increased the risk that the plaintiff would be exposed to by the injurious conduct of the private person,

(2) the governmental actor did especially en- danger the plaintiff, and (3) the governmental actor had the requisite degree of culpability.

*Eleventh Amendment Immunity*

1. Eleventh Amendment immunity extends only to states and governmental entities that are arms of the state.
2. The determination that an agency is an arm of the state and enjoys Eleventh Amendment immunity from suit in federal court requires consideration of state statutes and case law that characterize state agency and involves several attendant considerations: (1) the source of funds of the agency, (2) the degree of local autonomy enjoyed by the agency, (3) the scope of problems concerning agency, (4) the authority of the agency to sue and be sued in its own name, and (5) the right of the agency to hold and use property.
3. Whether a local entity is an arm of the state under the Eleventh Amendment is a question of federal law, although that federal question can be answered only after considering pro- visions of state law that define the agency’s character.

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### Research Aids

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