North Dakota Law Review

Volume 43 | Number 4 Article 11

1967

School Tort Liability

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SCHOOL TORT LIABILITY

There exists today in the courts of this nation an increasingly more sympathetic attitude toward those who are injured at the hand of another Exemplary of this trend is the field of products liability Much progress has been made since *MacPherson v Buick Motor Co.*[1] Also thriving in these same courts is a rule of vague origin which is hostile to the interests of injured parties. This rule, which even denies recovery when gross and wanton negligence is present, is recognized as being anachronistic, unjustifiable, irrational and repugnant to basic principles of justice, its only salvation being the force of stare decisis.[2] The rule is embodied in the doctrine of sovereign immunity from tort liability. Although recognized as one of the most criticized rules of torts, it has withstood attack in the most sympathy evoking situations[3] and even in the face of statutes abrogating it.[4]

History of the Doctrine

Although the courts reviewing the history of the doctrine do not consider or explain the genesis of the doctrine in their particular jurisdiction—most merely accepting it as something that just happened and citing the long history of its existence in their case law[5]—some basic facts of its origin are recognized. Recognized as the primary origin of the doctrine is the concept "The King can do no wrong."[6] That this cannot be accepted is demonstrated

1. 217 N.Y. 382, 111 N.E. 1050 (1916). See 42 N.D.L. Rev. 53 (1965).
2. See, *e.g.*, Molitor v. Kaneland Community Unit Dist. No. 302, 18 Ill.2d 11, 163 N.E.2d 89 (1959), *cert. denied*, 362 U.S. 968 (1960) Hargrove v. Town of Cocoa Beach, 96 So.2d 130 (Fla. 1957), Muskopf v. Corning Hosp. Dist., 55 Cal.2d 211, 11 Cal. Rptr. 89, 359 P.2d 457 (1961).
3. See, Koehn v. Board of Educ., 193 Kan. 263, 392 P.2d 949 (1964) (child became paraplegic as a result of injury received on playground) Daszkiewicz v. Board of Educ., 301 Mich. 212, 3 N.W.2d 71 (1942) (death from fall down elevator shaft in school building).
4. *Compare* Graham v. Worthington, 146 N.W.2d 626 (Iowa 1966), *with* Boyer v. Iowa High School Athletic Ass'n., 256 Iowa 337, 127 N.W.2d 606 (1964) *and* Iowa Code Ann. § 25A (Supp. 1966).
5. Spanel v. Mounds View School Dist. No. 621, 264 Minn. 279, 118 N.W.2d 795 (1962) Holytz v. City of Milwaukee, 17 Wis.2d 26, 115 N.W.2d 618 (1962).
6. See Stone v. Arizona Highway Comm'n., 93 Ariz. 384, 381 P.2d 107 (1963), Muskopf v. Corning Hosp. Dist., *supra* note 2.

by the observation of one justice that this theory died in 1215 at Runnymede.[7] The progenitor of the doctrine is the early English case of *Russell v Men of Devon*,[8] the first application thereof in the United States coming in the 1812 Massachusetts case of *Mower v Leicester* [9]

Interestingly some surrounding facts indicate that *Russell* is poor authority for the doctrine, if it is authority at all. *Russell* concerned an action against all the men of an unincorporated entity, and has been cited in an American jurisdiction as authority for imposing liability on an incorporated county [10] *Russell* was decided in 1788, twelve years after our Declaration of Independence, hardly early enough to make it a part of our Common Law Finally, in 1890 the British courts overruled the *Russell* case and imposed tort liability on its schools,[11] a position maintained to the present day

THE GENERAL RULE

The overwhelmingly recognized general rule regarding school tort liability today is that the schools are quasi-corporations created as an agency of the state to execute the purely governmental function of providing a free and public education for the residents of the state. As such they are imbued with the state's immunity from tort liability in the absence of a clear statute imposing such liability [12]

This rule is variously stated in different states, depending on the structural organization of the state, with the school being referred to as the school board in some cases and being characterized at times merely as an agency of the state[13] or as a political subdivision of the state.[14]

It appears that the reason for giving the school a characterization different from that of municipalities or counties is to avoid the possibility of applying the spurious distinctons created to impose liability on the latter two types of subdivisions.

Despite the observation by the California Supreme Court, in discussing the doctrine, that "None of the reasons for its continuance can withstand analysis. No one defends total governmental

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7. Richards v. School Dist., 348 Mich. 490, 83 N.W.2d 643, 655 (1957) (dissent).
8. 2 T.R. 671, 100 Eng. Rep. 359 (1788). See also Hargrove v. Town of Cocoa Beach, *supra* note 2 Molitor v. Kaneland Community Unit School Dist. No. 302, *supra* note 2.
9. 9 Mass. 247 (1812) (cited in *Holytz, supra* note 5).
10. Shartle v. City of Minneapolis, 17 Minn. 284 (1871) (cited in *Spanel, supra* note 5).
11. Crisp v. Thomas, 63 L.T.N.S. 756 (1890) (cited in *Molitor, supra* note 2).
12. *E.g.*, School Dist. No. 48 v. Rivera, 93 Ariz. 384, 243 Pac. 609 (1926), *overruled*, Stone v. Arizona Highway Comm'n., *supra* note 6, Dahl v. Hughes, 347 P.2d 208 (Okla. 1959) Ford v. School Dist., 121 Pa. 543, 15 Atl. 812 (1888) Jensen v. Juul, 66 S.D. 1, 278 N.W 6 (1938), Bingham v. Board of Educ., 118 Utah 582, 223 P.2d 432 (1950).
13. Buck v. McLean, 115 So.2d 764 (Fla. Ct. App. 1959) Mire v. Lafourche Parish School Bd., 62 So.2d 541 (La. Ct. App. 1952).
14. Graham v. Worthington, *supra* note 4.

immunity"[15] There do exist many bases on which the doctrine is supported in protecting schools and continuing the existence of the doctrine.

Perhaps the most forceful and easiest to defend of all the rationales is that of stare decisis. Notwithstanding the repeated assertions that stare decisis is not a rigid standard which prevents courts from correcting their own errors,[16] "[t]he legal ghost of that doctrine"[17] still comes forth to prevent compensation of those injured by the state in one of its many forms.[18]

Another frequently cited basis for the rule is based on some conclusion founded in a statutory or constitutional provision. This takes many forms: the school is an agency of the state created to perform only a governmental function[19] (extant primarily where the governmental-proprietary distinction has been pleaded), the school funds cannot be used to satisfy judgments,[20] no authority exists to raise money for the purpose of paying judgments,[21] the school would go bankrupt if it had to pay such claims,[22] and other reasons based on the precarious fiscal status of the school,[23] school board has no authority to commit a tort,[24] and the school has authority to perform only those functions required by statute.[25] While it is immediately apparent that these arguments retain some of their validity today, it is submitted that they ignore the availability of liability insurance to cover such expenses.

Support has also been found in the concept that it is more reasonable that individuals bear the cost of their injury than that the school be imposed upon to respond for the injury it has caused by its negligence.[26] The absurdity of this position is best demonstrated by citing as examples some of the injuries which the individual has been forced to bear without recompense: a child injured in the eye by negligently maintained fence, resulting in total loss of sight;[27] a student severely injured as a result of a negligently

15. Muskopf v. Corning Hosp. Dist., 55 Cal.2d 211, 11 Cal. Rptr. 89, 359 P.2d 457, 460 (1961).
16. Stone v. Arizona Highway Comm'n., *supra* note 6 Hargrove v. Town of Cocoa Beach, 96 So.2d 130 (Fla. 1957), Williams v. City of Detroit, 364 Mich. 231, 111 N.W.2d 1 (1961) (opinion for reversal).
17. Richards v. School Dist., *supra* note 7.
18. *E.g.*, Perkins v. Trask, 23 P.2d 982 (Mont. 1933), Dahl v. Hughes, *supra* note 12 Conway v. Humbert, 145 N.W.2d 524 (S.D. 1966).
19. School Dist. No. 48 v. Rivera, *supra* note 12.
20. Spanel v. Mounds View School Dist. No. 621, 264 Minn. 279, 118 N.W.2d 795 (1962).
21. Hummer v. School City, 124 Ind. App. 30, 112 N.E.2d 891 (1953).
22. Spanel v. Mounds View School Dist. No. 621, *supra* note 20.
23. Hummer v. School City, *supra* note 21 Rhoades v. School Dist. No. 9, 115 Mont. 352, 142 P.2d 890 (1943).
24. School Dist. No. 48 v. Rivera, 30 Ariz. 1, 243 Pac. 609 (1926), *overruled,* Stone v. Arizona Highway Comm'n. 93 Ariz. 384, 381 P.2d 107 (1963).
25. See, Ford v. School Dist., 121 Pa. 543, 15 Atl. 812 (1888), Bingham v. Board of Educ., 118 Utah 582, 223 P.2d 432 (1950).
26. See, Thacker v. Pike County Bd. of Educ., 301 Ky. 781, 193 S.W.2d 409 (Ct. App. 1946), Ford v. School Dist., *supra* note 25 Anderson v. Board of Educ., 49 N.D. 181, 190 N.W 807 (1922).
27. Shields v. School Dist., 408 Pa. 388, 184 A.2d 240 (1962).

operated athletic program, becoming ultimately a paraplegic;[28] deaths from drowning and other causes;[29] and loss of limbs.[30]

Finally, recovery has been denied on the theory that the doctrine of respondeat superior does not apply to schools,[31] consequently, the agent of the school had no authority to bind the school by acting tortiously and his acts could not bind the school. By refusing to apply vicarious liability to the schools, the courts disregard completely that the school can act only through the use of agents, and places them in the enviable position of being able to avoid the undesireable consequences of the conduct of those given authority to act on behalf of the school.

EXCEPTIONS

As must ultimately result when a doctrine as unjust as the governmental immunity doctrine is imposed upon the courts, exceptions have been developed to thwart, to some extent, the harshness of the doctrine. Notwithstanding that some courts have held the school to be absolutely immune,[32] even to the extent that they cannot waive their own immunity,[33] the exceptions have been applied to schools. Although the usual course followed in creating an exception is the recognition of two types of conduct, one of which will result in the imposition of liability, there are some means of circumventing the doctrine not dependent upon such a cumbersome process. One of these is that recognized by the general rule—passage of a special act waiving immunity in a particular case.[34] This process is obviously slow and cumbersome because of the necessity of waiting until the legislature convenes and depending upon the legislative process to approve the act. An additional deterrent to this means of relief is that it depends upon some circumstance of sufficient compulsion to arouse the sympathy of the legislature.

Another means created by the courts to avoid the harshness of the rule is characterizing the conduct as a nuisance.[35] This gambit is infrequently applied and is held not applicable to schools.[36] Other ways utilized by courts are the imposition of liability if reasonable

28. Koehn v. Board of Educ., 193 Kan. 263, 392 P.2d 949 (1964), Vendrell v. School Dist. No. 26C, 226 Ore. 263, 360 P.2d 282 (1960).
29. Fetzer v. Minot Park Dist., 138 N.W.2d 601 (N.D. 1965) Anderson v. Board of Educ., *supra* note 26, Jensen v. Juul, 66 S.D. 1, 278 N.W 6 (1938).
30. Bragg v. Board of Pub. Instruction, 160 Fla. 590, 36 So.2d 222 (1948).
31. Rhoades v. School Dist. No. 9, *supra* note 23.
32. Koehn v. Board of Educ., *supra* note 28 Hummer v. School City, 124 Ind. App. 30, 112 N.E.2d 891 (1953) Richards v. School Dist., 348 Mich. 490, 83 N.W.2d 643 (1947).
33. Kellam v. School Bd., 202 Va. 252, 117 S.E.2d 96 (1960), Utz v. Board of Educ., 30 S.E.2d 342 (W. Va. 1944).
34. *E.g.*, Daniel's Adm'r v. Hoofnel, 287 Ky. 834, 155 S.W.2d 469 ,Ct. App. 1941), Steer v. Orleans Parish School Bd., 92 So.2d 128 (La. Ct. App. 1957) Whitfield v. East Baton Rouge Parish School Bd., 43 So.2d 47 (La. Ct. App. 1949).
35. See Anderson v. Board of Educ., *supra* note 26.
36. Bingham v. Board of Educ., 118 Utah 582, 223 P.2d 432 (1950) Kellam v. School Bd., *supra* note 33.

men would not permit the continuance of the "palpably and manifestly dangerous condition,"[37] and finding the action to be based on contract and not tort.[38] One other exception, limited to the application of the immunity when the officer is deemed to be acting in his discretionary capacity, is to impose liability when the officer is deemed to be motivated by malice.[39]

The most frequently recognized distinction applied to impose liability is that of governmental-proprietary.[40] The court will impose liability if the function involved is deemed to be proprietary in nature.[41] The test to determine whether the function is proprietary has been stated to be whether the act is for the common good of all without the element of special corporate benefit or pecuniary profit,[42] an affirmative answer resulting in a determination that the function is governmental. Conversely it has been stated that the criteria for a proprietary function are that the conduct is not required by statute, or if it may be carried on by private enterprise or if it is used as a means of raising money.[43] It is of little wonder that this distinction has produced "a quagmire that has long plagued the law"[44] and has resulted in contradictory results in dealing with the same subject matter in different jurisdictions.[45] As one court observed, this distinction is generally "applied to escape difficulties, in order that injustice may not result from the recognition of technical defenses."[46]

Other distinctions occasionally recognized and seldom applied are acts of omission-commission[47] and exercise of ministerial-judicial authority,[48] liability being imposed when an act of commission or an exercise of ministerial authority is negligently executed. It is not wholly unexpected that the latter two distinctions have met with less acceptance than the governmental-proprietary dichotomy when problems of definition are noted and considered. Few positions, if any, have the absolute absence of discretion

37. Davis v. City of Henryetta, 402 P.2d 902 (Okla. 1965).
38. Buttes v. County of Dade, 178 So.2d 592 (Fla. Dist. Ct. App. 1965).
39. Eliason v. Funk, 233 Md. 351, 196 A.2d 887 (Ct. App. 1964). *But see,* Parker v. City of Hutchinson, 196 Kan. 148, 410 P.2d 347 (1966) (Comment, 43 N.D.L. REV. 118 (1966) applying immunity even though the conduct was grossly and wantonly negligent).
40. See, *e.g.,* Sawaya v. Tucson High School Dist. No. 1, 78 Ariz. 389, 281 P.2d 105 (1955) Boyer v. Iowa High School Athletic Ass'n., 256 Iowa 337, 127 N.W.2d 606 (1964) Dahl v. Hughes, 347 P.2d 208 (Okla. 1959) Morris v. School Dist., 393 Pa. 633, 144 A.2d 737 (1958). *Contra,* Ludwig v. Board of Educ. 35 Ill. App.2d 401, 183 N.E.2d 32 (1962) (governmental-proprietary distinction not applicable to schools).
41. Morris v. School Dist., *supra* note 40.
42. Daszkiewics v. Board of Educ., 301 Mich. 212, 3 N.W.2d 71 (1942).
43. Morris v. School Dist., *supra* note 40.
44. Indian Towing Co. v. United States, 350 U.S. 61, 65 (1955).
45. *Compare* Sawaya v. Tucson High School Dist. No. 1, *supra* note 40, *with* Kellam v. School Bd., *supra* note 33.
46. Bucholz v. City of Sioux Falls, 91 N.W.2d 606, 609 (S.D. 1958).
47. See Hoy v. Capelli, 48 N.J. 81, 222 A.2d 649 (1966) McAndrew v. Mularchuk, 33 N.J. 172, 162 A.2d 820 (1960) Holtz v. City of Milwaukee, 17 Wis.2d 26, 115 N.W.2d 618 (1962).
48. Clark v. Ruidoso-Hondo Valley Hosp., 72 N.M. 9, 380 P.2d 168 (1963).

requisite to a determination that a ministerial duty was exercised. It is also difficult to find that inaction was not actually a form of action. It is evident that none of these exceptions is imbued with such certainty that it should be a basis for denying recovery to an individual who has suffered at the hands of the state and will be forced to suffer his pain without the compensation permitted when the same activity is performed by a private person. One other distinction recognized in a 1963 Minnesota case, probably resulting from the prospective abrogation of the doctrine by the state's court in 1962, was that a statute which required the conduct which was not performed and caused the death was sui generis and, therefore, justified an exception to the immunity rule.[49]

ABROGATION

The criticism of the rule has not gone unheeded for the governmental immunity doctrine has been revoked in many states by the courts and the legislatures. What was recognized at the beginning of this decade as a trend,[50] based largely on four cases, has increased in tempo to the point that it appears quite likely that state liability may be the general rule before the end of this decade.

A. By Decision

The first case in which the doctrine was abrogated by the courts was a 1957 decision in Florida.[51] In that case the Florida Supreme Court recognized that the doctrine was anachronistic, that it violated the traditional concept that a personn injured should have redress, and that the traditional justifications for the rule were indefensible. A subsequent Florida case, however, limited the application of the abrogation to municipalities.[52]

The courts of Colorado,[53] Michigan,[54] and Wisconsin[55] reversed their precedents on the doctrine shortly after the Florida decision but each of these has also met with some limitation. The Colorado decision was subsequently held to apply only to obligations arising out of contract,[56] notwithstanding the statement in the decision abrogating the doctrine that "In Colorado 'sovereign immunity' may be a proper subject for discussion by students of mythology but

49. McCorkell v. City of Northfield, 266 Minn. 267, 123 N.W.2d 367 (1963).
50. Williams v. City of Detroit, 364 Mich. 231, 111 N.W.2d 1 (1961) (opinion for reversal).
51. Hargrove v. Town of Cocoa Beach, 96 So.2d 130 (Fla. 1957).
52. Buck v. McLean, 115 So.2d 764 (Fla. Ct. App. 1959).
53. Colorado Racing Comm'n v. Brush Racing Ass'n., 136 Colo. 279, 316 P.2d 582 (1957).
54. Williams v. City of Detroit, *supra* note 50.
55. Holytz v. City of Milwaukee, *supra* note 47.
56. City & County of Denver v. Madison, 142 Colo. 1, 351 P.2d 826 (1960).

finds no haven or refuge in this Court." [57] Also, in the Michigan decision the court stated unequivocally that the defense of governmental immunity would no longer exist in that state, but laer decisions limited the abrogation to cities. [58] The Wisconsin court placed its own limitation on the operation of its decision by holding that, while they were removing the state's nonliability for torts, they were not affecting its sovereign right not to be sued. In all of these cases the court recognized that the courts had created the immunity and that they had the power to extinguish it.

The courts of Arizona,[59] California,[60] Illinois,[61] Minnesota,[62] and Nevada[63] also judicially abolished the doctrine, but without subsequent cases limiting the effect. Arizona is the only one of these, however, which was not affected by legislative action. The operation of the California decision was suspended by statute for two years,[64] subsequently being embodied in a section of a comprehensive statutory scheme of tort liability [65] The Minnesota decision was suspended by the opinion itself until after the 1963 session of the legislature, and the Illinois decision was altered by legislative action the same year [66] Although the Nevada court held that school districts did not enjoy the same immunity as the state, it is notable that the decision involved an injury incurred only four months before the Nevada statute abrogating immunity was to become effective and was decided after the operational date.

B. By Statute

Comprehensive tort liability statutes now exist in Alaska,[67] California,[68] Hawaii,[69] Illinois,[70] Iowa,[71] Minnesota,[72] Nevada,[73] New

57. Colorado Racing Comm'n. v. Brush Racing Ass'n., *supra* note 53, at 316 P.2d 585.

58. McDowell v. Mackie, 365 Mich. 268, 112 N.W.2d 491 (1961).

59. Stone v. Arizona Highway Comm'n., 93 Ariz. 384, 381 P.2d 107 (1963).

60. Muskopf v. Corning Hosp. Dist., 55 Cal.2d 211, 11 Cal. Rptr. 89, 359 P.2d 457 (1961).

61. Molitor v. Kaneland Community Unit Dist. No. 302, 18 Ill.2d 11, 163 N.E.2d 89 (1959).

62. Spanel v. Mounds View School Dist. No. 621, 264 Minn. 279, 118 N.W.2d 795 (1962).

63. Walsh v. Clark County School Dist., 419 P.2d 774 (Nev. 1966) (refers only to school districts).

64. Cal. Stat. 1961, ch. 1404, p. 3206 (expired 1963 by its own force). See Corning Hosp. Dist. v. Superior Court, 57 Cal.2d 488, 20 Cal. Rptr. 621, 370 P.2d 325 (1962), determining the effect of the statute.

65. CAL. GOVT. CODE §§ 815-825.6 (West Supp. 1966).

66. ILL. ANN. STAT. ch. 34 § 301.1 (Smith-Hurd 1960) ch. 122 §§ 821, 825 & 830 (Smith-Hurd 1962), ch. 85 § 2-109 and ch. 105, § 12.1 (Smith-Hurd Supp. 1966). Ill. Laws 1959, ch. 57½, 3a, ch. 105, §§ 333.2a & 491.

67. ALASKA STAT. § 09.50.250 (Supp. 1962).

68. *Supra* note 65.

69. HAWAII REV. LAWS ch. 245A (Supp. 1963).

70. ILL. ANN. STAT. *supra* note 66.

71. IOWA CODE ANN. ch. 25A (Supp. 1966).

72. MINN. STAT. ANN. ch. 466 (1963). Note that section 466.12 (Supp. 1966) excepts school districts from operations of the statute but provides that the section will expire in 1970.

73. NEV. REV. STAT. §§ 41.031 to 41.038 (1965).

York,[74] Utah[75] and Washington.[76] With the exception of New York, which has had a tort claims provision since 1920, these statutes are all products of this decade. Their provisions generally provide for liability, tortious and otherwise, with exceptions in some circumstances, e.g., execution of statutes, exercise of discretionary authority, etc. North Carolina has chosen not to eliminate their immunity but instead created a commission to hear cases involving claims against the state and award payments therefore to be paid out of the state treasury [77] South Dakota has also created a board for the purpose of hearing claims against the state but the board is advisory only and reports its findings to the legislature.[78] Other states have chosen merely to permit schools to purchase liability insurance,[79] but in the absence of a provision in the statute waiving immunity to the extent of the insurance, the purchase of insurance has not always been effective to permit recoveries against the insurer.[80]

NORTH DAKOTA

In 1922 the North Dakota Supreme Court recognized the doctrine as a "well settled common law rule"[81] and applied it to protect a school from liability In 1965 the court again considered the doctrine,[82] noting the cases in other jurisdictions abrogating the rule, but felt constrained by the North Dakota Constitution[83] to uphold the doctrine. In the 1967 session of the legislature a bill which would have abrogated the doctrine was indefinitely postponed.[84] The legislature did provide some relief, however, in adopting a bill which will permit the purchase of liability insurance and waives immunity to the extent of such insurance.[85] Notably, the question of total abrogation of the doctrine was referred to the Legislative Research Committtee for study [86]

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74. N.Y. CT. CL. ACT § 8 (1963).
75. UTAH CODE ANN. title 63-30 (Supp. 1965).
76. WASH. REV. CODE ANN. § 4.92.090 Supp. 1966). Note that section 28.58.030 creates an exception for school districts when "athletic apparatus" is involved but this has not been a large restriction. See Tardiff v. Shoreline School Dist., 66 Wash.2d 146, 411 P.2d 889 (1966), Rodriguez v. Seattle Dist. No. 1, 66 Wash.2d 51, 401 P.2d 326 (1965).
77. N.C. GEN. STAT. §§ 143-291 to 300.1 (Supp. 1965).
78. S.D. CODE § 33.43 (Supp. 1960).
79. *E.g.*, KY. REV. STAT. § 160.310 (1962) W. VA. CODE ANN. 18-5-13 (1961); WYO. STAT. ANN. §§ 21-154 to 159 (1957).
80. See Stevens v. City of St. Clair Shores, 366 Mich. 341, 115 N.W.2d 69 (1962) (action against insured school dismissed) Maffei v. Incorporated Town of Kemmerer, 80 Wyo. 33, 338 P.2d 808 (1959). *Compare* Christie v. Board of Regents, 364 Mich. 202, 111 N.W.2d 30 (1961) (to find insurance not waiver would give insurance company premiums without liability), *with* Sayers v. School Dist. No. 1, 366 Mich. 217, 114 N.W.2d 191 (1962) (insurance not a waiver).
81. Anderson v. Board of Educ., 49 N.D. 181, 190, 190 N.W. 807, 811 (1922) (concurring opinion).
82. Fetzer v. Minot Park Dist., 138 N.W.2d 601 (N.D. 1965).
83. N.D. CONST. §§ 22 & 130.
84. S. 256, 40th Legis. Sess. (1967).
85. S. 384, 40th Legis. Sess. (1967) (a bill to amend Code sections 39-01-08 & 40-43-07).
86. S. Con. Res. EEE, 40th Legis. Sess. (1967).

Although the move toward state liability appears to be gaining momentum, there are still those who would defend the need for immunity They express concern that our already over-burdened courts will become more so. The answer to this is that, although this has not been the case in jurisdictions which have removed the defense,[87] the need for change would be more apparent. There can be less justification for a rule which creates a hardship for so many people than one which is relatively innocuous. It may also be contended that the state will be forced to pay for every injury The courts and the statutes do not, however, impose such liability; the state merely becomes liable the same as any individual.[88] All the defenses available to those who employ agents in the performance of their business—nonliability for the acts of its agents, contributory negligence, assumption of risk, etc.—are also available to the state.

The provision adopted by the North Dakota Legislature, a laudable advancement, is not the ultimate solution and is, in fact, little better than the recognized exceptions. With the purchase of insurance optional, theoretically, and very probably, situations will arise in which one injured by negligence in a school conscientious enough to purchase insurance, will be permitted redress, whereas one injured in the same manner but in a school without insurance will be denied relief. A comprehensive provision imposing liability will avoid this problem, with care being taken to avoid the result which was reached in Iowa. In 1966 the Iowa Legislature accepted the responsibility handed it by its high court and abrogated the immunity,[89] using language in a 1964 case to describe those subdivisions upon which liability would be imposed.[90] Later that year the Supreme Court of Iowa held that a school district was not included within the language of the statute,[91] notwithstanding that the terms were used by that court to describe a school district. There can be no doubt but that the court is acting to undo that which it placed upon the legislature.

Hopefully consideration will be given to the recognition that

> If there is anything more than a sham to our constitutional guarantee that the courts shall always be open to redress wrongs and to our sense of justice that there shall be a

87. The Washington Statute, *supra* note 76, was first enacted in 1961 but it was apparently not applied until 1965 in Evangelical United Bretheren Church v. State, 407 P.2d 440 (Wash. 1965).

88. Muskopf v. Corning Hosp. Dist., 55 Cal.2d 211, 11 Cal. Rptr. 89, 359 P.2d 457 (1961).

89. *Supra* note 71.

90. Boyer v. Iowa High School Athletic Ass'n., 256 Iowa 337, 127 N.W.2d 606 (1964) (school created as agency of state).

91. Graham v. Worthington, 146 N.W.2d 626 (Iowa 1966) (school held not state agency).

> remedy for every wrong committed, then certainly the rule cannot be supported.[92]

Since the North Dakota Constitution contains a similar provision the reasoning should be equally applicable. Similarly the Illinois court could have been speaking of the situation in North Dakota when they stated

> We do not believe that in this present day and age, when public education constitutes one of the biggest businesses in the country, that school immunity can be justified. [93]

A realistic evaluation of the extent to which the state, in all of is multifarious forms, pervades the lives of its citizens, and a recognition of the plethora of possibilities for injury to one of those citizens through the negligence of one of the state's agents, will glaringly illustrate the profound need for imposing liability when injuries do occur It cannot be ignored that attendance at schools is compelled by statute in North Dakota to the age of sixteen,[94] and by society at least to some degree of education beyond high school, a factor which indicates a more pressing need for change regarding schools than in other areas where the state can be avoided.

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92. Hargrove v. Town of Cocoa Beach, 96 So.2d 130, 132 (Fla. 1957).
93. Molitor v. Kaneland Community Unit Dist. No. 302, 18 Ill.2d 11, 163 N.E.2d 89, 94 (1959), *cert. denied*, 362 U.S. 968 (1960).
94. N.D. CENT. CODE § 15-34-01 (1960).