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Schools and School Districts - Particular Torts in General - Legislative or Judicial Abrogation of School District's Immunity in Tort

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RECENT CASES

SCHOOLS AND SCHOOL DISTRICTS—PARTICULAR TORTS IN GENERAL—LEGISLATIVE OR JUDICIAL ABROGATION OF SCHOOL DISTRICT'S IMMUNITY IN TORT—An action was brought in behalf of the minor plaintiff against the school district and four of its employees for injuries sustained in a fall down the steps of a high school while attending classes. The plaintiffs alleged that the fall was due to the negligence of the school district in maintaining the steps and that it was liable under the doctrine of *respondeat superior* On plaintiffs' appeal from dismissal of the complaint as to the school district the Supreme Court of Pennsylvania, with two dissents, *held* that a school district was immune from tort liability in the performance of its governmental functions. *Dillon v York City School District,* 422 Pa. 103, 220 A.2d 896 (1966)

The court's majority opinion recognized that the doctrine of governmental immunity needed reform, but refused to abrogate the rule because the issue was too complex for piecemeal judicial reform and because the legislature normally determined public policy A concurring opinion stated that the school district was immune because it was an agency of the state and thus covered by the same sovereign immunity that protected the state. However, the dissent of Roberts, J stated that the case was decided not upon its merits, but upon the issue of whether the doctrine "should be abrogated by judicial action or retained as a matter more properly to be dealt with by the Legislature."[1] He asserted that legislative review was unlikely due to the opposition of interest groups, and that since the doctrine was estblished by judicial action, it could be abrogated in the same manner The legislature would still be free to act after the court withdrew from the area. Musmanno, J., in dissent, added that the court had no right to presume that the legislature would assume a responsibility which resided in the court and that postponing such responsibility only would perpetuate the injustice. Thus the issue raised in this case is whether the judiciary may abrogate the doctrine.

The instant case continues the line of precedent recognizing the school districts' immunity, followed since it was established in

1. Dillon v. York City School Dist., 422 Pa. 103, 220 A.2d 896, 899 (1966).

Pennsylvania.[2] In recent years the court has reaffirmed the rule,[3] although drawing the distinction between governmental and proprietary functions[4] in the attempt to limit immunity However, this distinction has lead to another, holding that liability insurance did not waive a school district's immunity to the extent of its coverage since it received protection in proprietary functions.[5] Although dissatisfied with the rule, the court still applies it to municipal corporations.[6] Members of the court have invited the legislature to review the whole area of governmental immunities,[7] but the legislature has failed to respond.[8] In an analogous situation because of the legislature's inaction, the court in 1965 overruled the immunity of charitable organizations.[9] In light of such action and the necessity for a more equitable resolution of the problem, the court may in the future overrule the instant case despite the fact that at present it considers the problem too complex.

Like Pennsylvania, the majority of jurisdictions have held that a school district in the performance of its governmental functions is not liable in tort in the absence of statute imposing such liability [10] It has been recognized that many different exceptions to the rule have created varying and confusing applications in many jurisdictions.[11] Nevertheless, there is a trend toward the limitation and abrogation of governmental immunity in general: witnessed by statute in the imposition of liability upon the federal government,[12] and since 1957, by judicial abrogation as to the state[13] and political subdivisions.[14]

This tort immunity of political subdivisions originated in England in *Russell v Men of Devon*,[15] and was established in this country[16] through judicial action. *Russell* was based upon the ra-

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2. Ford v. School Dist., 121 Pa. 543, 15 Atl. 812 (1888).
3. Shields v. School Dist., 408 Pa. 388, 184 A.2d 240 (1962) Michael v. School Dist., 391 Pa. 209, 137 A.2d 456 (1958).
4. Morris v. School Dist., 393 Pa. 633, 144 A.2d 737 (1958).
5. Supler v. School Dist., 407 Pa. 657, 182 A.2d 535 (1962).
6. Graysneck v. Heard, 422 Pa. 111, 220 A.2d 893 (1966).
7. Stouffer v. Morrison, 400 Pa. 497, 162 A.2d 378, 381 (1960) (concurring opinion).
8. Graysneck v. Heard, *supra* note 6, at 894 n. 3.
9. Flagiello v. Pennsylvania Hisp., 417 Pa. 486, 208 A.2d 193 (1965).
10. *E.g.*, Tesone v. School Dist. No. RE-2, 152 Colo. 596, 384 P.2d 82 (1963) Boyer v. Iowa High School Athletic Ass'n., 256 Iowa 337, 127 N.W.2d 606 (1964) Weisner v. Bd. of Educ., 237 Md. 391, 206 A.2d 560 (1965) Russell v. Edgewood Independent School Dist., 406 S.W.2d 249 (Tex. Civ. App. 1966), Campbell v. Pack, 15 Utah 2d 161, 389 P.2d 464 (1964).
11. *E.g.*, Haney v. City of Lexington, 386 S.W.2d 738 (Ky. 1964).
12. 28 U.S.C.A. §§ 1346, 2674, 2680.
13. Stone v. Arizona Highway Comm'n., 93 Ariz. 384, 381 P.2d 107 (1963). In Colorado Racing Comm'n. v. Brush Racing Ass'n., 136 Colo. 279, 316 P.2d 582 (1957) the Supreme Court of Colorado made broad statements abolishing all governmental immunity which it later retracted over strong dissent in cases like Faber v. State, 143 Colo. 240, 353 P.2d 609 (1960).
14. *E.g.*, Muskopf v. Corning Hosp. Dist., 55 Cal. App.2d 211, 11 Cal. Rptr. 89, 359 P.2d 457 (1961) Hargrove v. Town of Cocoa Beach, 96 So.2d 130 (Fla. 1957) Haney v. City of Lexington, *supra* note 11 Walsh v. Clark County School Dist., 419 P.2d 774 (Nev. 1966) Holytz v. City of Milwaukee, 17 Wis.2d 26, 115 N.W.2d 618 (1962).
15. 2 T.R. 667, 100 Eng. Rep. 359 (1788).
16. Mower v. Inhabitants of Leicester, 9 Mass. 247 (1812).

tionale that "it is better that an individual should sustain an injury than that the public should suffer an inconvenience,"[17] and the fear that there would be an infinity of actions with no fund out of which to pay such judgments.[18] The courts also have reasoned that the school district was merely an agent of the state in the administration of the great public charity of education and thus it would be unfair to impose liability which would severely curtail an agency serving the public without profit.[19] From this developed the protection of public funds theory which today is without justification since a governmental unit like a school district is financially capable of carrying such liability[20] or of buying liability insurance. Although liability or the payment of premiums for insurance means additional expense, this factor should be accepted and borne as the cost of administration.[21]

Many jurisdictions now base the continuation of the rule upon *stare decisis* and the theory that the legislature and not the court normally determines public policy [22] In spite of the realization that the burden on the individual is too great in an area where the government s expanding and that education is a big business, the courts feel bound because as one justice complained: "We are not writing on a clean slate; we are dealing with the law as established and developed after years of growth."[23] Indeed, the slate may be filled with assorted statutes, constitutional problems, and distinctions of the court itself.

The vocal minority, however, has acknowledged that liability is the rule and immunity is the exception, and that where policy and justice for such immunity does not exist it should be abolished.[24] An example of such judicial action is found in *Spanel v Mounds View School District No.* 621.[25] In that case the Supreme Court of Minnesota held the school district immune for its tort, but stated, although necessarily dicta, its intention to overrule the immunity of all political subdivisions after the next legislature adjourned.[26]

This prospective overruling had the effect of maintaining the

17. Russell v. Men of Devon, *supra* note 15 at 673, 100 Eng. Rep. at 362 (Ashhurst, J.).
18. *Id.* at 673, 100 Eng. Rep. at 362 (Lord Kenyon, Ch. J.).
19. Ford v. School Dist. 121 Pa. 543, 15 Atl. 812 (1888).
20. *See generally* Muskopf v. Corning Hosp. Dist., *supra* note 14.
21. Molitor v. Kaneland Community Unit Dist. No. 302, 18 Ill.2d 11, 163 N.E.2d 89 (1959), *cert. denied* 362 U.S. 968.
22. *E.g.*, Weisner v. Bd. of Educ., 237 Md. 391, 206 A.2d 560 (1965).
23. Molitor v. Kaneland Community Unit Dist., *supra* note 21, at 102.
24. Stone v. Arizona Highway Comm'n., 93 Ariz. 384, 381 P.2d 107 (1963) Holytz v. City of Milwaukee, *supra* note 14, at 623-25.
25. 264 Minn. 279, 118 N.W.2d 795 (1962).
26. *Id.* at 803. The exact statement is. "[T]he court is unanimous in expressing its intention to overrule the doctrine of sovereign tort immunity as a defense with respect to tort claims against school districts, municipal corporations, and other subdivisions of government on whom immunity has been conferred by judicial decision arising after the next Minnesota Legislature adjourns, subject to any statutes which now or hereafter limit or regulate the prosecution of such claims." The court further qualified the statement to the effect that it would not apply to discretionary, legislative or judicial functions of such units.

certainty of the law and the reliance upon it. Its abrogation as to all subdivisions enabled the court to avoid the complexities and uncertainties of piecemeal abrogation. Its prospective date would give the legislature the opportunity to implicitly approve of the change, and in the event the legislature decided to act, the court indicated areas to which the legislature might address itself.

Within six months the legislature acted to define the tort liability of political subdivisions.[27] Although continuing the school districts' immunity to a future date,[28] the legislature provided for voluntary liability insurance.[29] Thus the court's creative action worked as a catalyst to bring about a partial change of the rule.[30] In other states the courts have followed a number of approaches,[31] although in many aspects similar to that of Minnesota. This creative role has been approved by a number of authorities and urged upon other courts.[32]

The law of North Dakota is in accord with the instant case. Early in the state's history the court applied the common law rule to municipal corporations[33] finding that the people, attempting to establish homes and communities in this State, would be overburdened by such liability, and therefore the rights of the individual must give way to the greater right. The governing case as to school districts[34] also reasoned that the public interest must come before individual rights in order to insure the proper continuation of the schools. However, since these cases were decided, there have been great changes in the economic and social conditions of our society; the reason for the rule is no longer valid. Recently, in an analogous situation, the North Dakota Supreme Court in reviewing the doctrine of charitable immunity found that it was never established in the state and that there was no valid reason for giving such immunity to a charity now.[35]

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27. MINN. STAT. ANN. ch. 466 (1963). This chapter with certain exceptions made municipal corporations liable and set up special methods of procedure, including maximum liability limits.

28. MINN. SESS. LAWS 1963 ch. 798, § 12. This provision would have terminated in 1965, but the date was extended to 1970; MINN. STAT. ANN. § 466.12(4) (Supp. 1965).

29. MINN. STAT. ANN. § 466.12(3) (1963).

30. 48 MINN. L. REV. 198 (1963), Peck, *The Role of the Courts and Legislatures in the Reform of Tort Law*, *infra* note 32.

31. Molitor v. Kaneland Community Unit Dist. No. 302, *supra* note 21 (The court's overruling was board and prospective, allowing recovery in the case before them) Muskopf v. Corning Hosp. Dist., 55 Cal. App.2d 211, 11 Cal. Rptr. 89, 359 P.2d 457 (1961) (Although school districts were liable prior to the decision, this is an example of board abrogation and retrospective application as to areas that the legislature has not defined) Holytz v. City of Milwaukee, 17 Wis.2d 26, 115 N.W.2d 618 (1962) (The court allowed recovery in this case, but made its broad application effective with reference to a future date), Stone v. Arizona Highway Comm'n., *supra* note 24 (Following the example of California, the court abolished governmental immunity to the state as well as to subdivisions and applied it retrospectively).

32. Green, *Freedom of Litigation* pts. 1 & 3, 38 ILL. L. REV. 117, 355 (1943-44) Peck, *The Role of the Courts and Legislatures in the Reform of Tort Law*, 48 MINN. L. REV. 265 (1963).

33. Vail v. Town of Amenia, 4 N.D. 239, 59 N.W 1092 (1894).

34. Anderson v. Bd. of Educ., 49 N.D. 181, 190 N.W 807 (1922).

35. Granger v. Deaconess Hosp., 138 N.W.2d 443 (N.D. 1965).

Although reform is needed in North Dakota, any judicial action on the subject seems to be severely limited by a constitutional provision which states that:

> All courts shall be open, and every man for any injury done him in his lands, goods, person or reputation shall have remedy by due process of law, and right and justice administered without sale, denial or delay Suits may be brought against the state in such manner, in such courts, and in such cases, as the legislative assembly may, by law, direct.[36]

The North Dakota Supreme Court has determined that the second sentence of the provision is controlling and that the legislature alone has the right to decide the question of governmental immunity [37] In so doing, the court has found legislative intent for the continuation of the rule in individual statutes[38] and in particular a recent enactment authorizing the purchase of liability insurance by subdivisions.[39] Thus, in the absence of an express statute providing for a cause of action the court has held that a municipal corporation[40] or a park district[41] in the performance of its governmental function was immune in tort. Likewise, it can be argued that a school district as a political subdivision is immune in tort under this interpretation.

Nevertheless, there may be another interpretation of this constitutional provision. The absolute language of the first sentence indicates that liability is the rule and that there is no presumption of immunity The second sentence gives the legislature the power to grant immunity to those state agencies it chooses to protect and to provide special procedures in which the cause of action may be brought and determined. Thus it can be argued that where the legislature has not granted by express statute immunity to a political subdivision liability exists. Other courts have interpreted similar provisions in their constitutions as not applicable in overruling the school districts' immunity [42] If the court does decide to change its interpretation of this provision, a school district may become liable through judicial action in the absence of legislative prohibition. Of couse such judicial action is not preferable to the legislative process

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36. N.D. CONST. § 22 (1889).
37. Spellman v. State of North Dakota, 91 N.W.2d 627 (N.D. 1958).
38. N.D. CENT. CODE §§ 40-42-01 to 40-42-03, 40-42-05 (1960).
39. N.D. CENT. CODE § 40-43-07 (Supp. 1965). "This section shall not deprive any political subdivision of the state of its right to claim governmental immunity "
40. Kaczor v. City of Minot, 138 N.W.2d 784, (N.D. 1965).
41. Fetzer v. Minot Park Dist., 138 N.W.2d 601 (N.D. 1965).
42. Muskopf v. Corning Hosp. Dist., 55 Cal. App.2d 211, 11 Cal. Rptr. 89, 359 P.2d 457, 460-61 (1961) Holytz v. City of Milwaukee, 17 Wis.2d 26, 115 N.W.2d 618, 624 (1962). In Illinois, the court in overruling a school district's immunity did not find that ILL. CONST. art. IV, § 26, which states that "[t]he state of Illinois shall never be made defendant in any court of law or equity," applied. Molitor v. Kaneland Community Unit Dist. No. 302, 18 Ill.2d 11, 163 N.E.2d 89 (1959).

which is more flexible and which can with ease resolve the problem. However, with the continuing and growing necessity for a more equitable solution to the problem in the absence of legislative action, the court, may eliminate the presumption of immunity which it has established thus following the Minnesota example.

THEODORE ABE

UNREASONABLE SEARCHES AND SEIZURES—EXECUTION OF WARRANTS—LIMITATIONS ON OFFICERS EXECUTING A WARRANT—The defendant was suspected of bookmaking. Two county detectives in plain clothes, armed with two search warrants and one arrest warrant, approached his home, knocked once on the door, waited about a minute and, after receiving no response from within, began to apply a crowbar to the door The defendant opened the door before they proceeded any further, and they were allowed a peaceable entry Subsequently the detectives identified themselves and read the warrants. Upon searching the premises they found and confiscated several blank sheets of paper and two newspapers containing horseracing forms. During this time they answered phone calls for the defendant in which the callers wished to place bets on horses. The Supreme Court of Pennsylvania, with two judges dissenting,[1] affirmed a conviction for setting up a gambling establishment and for bookmaking, while denying the defendant's contention that the evidence obtained in the search was inadmissible due to the detectives' failure to announce their purpose and authority prior to forcible entry The court said that the defendant opened the door voluntarily and entry was therefore gained peaceably Thus the ensuing search was lawful and the evidence obtained therefrom was admissible. *Commonwealth v Ametrane*, 422 Pa. 83, 221 A.2d 296 (1966)

The present case raises a question as to the extent that law enforcement officers may go and yet remain within established boundaries of lawful searches and seizures carried out under a warrant. With regard to the instant case it has been held that the execution of a warrant is lawful if entry is peaceful and there is no breaking of parts of the house.[2] The defendant here did allow the officers to enter peacefully, although the results of the ensuing

1. Eagen and Musmanno, J. Musmanno dissented strongly, stating that never before has he felt it more necessary to write a dissenting opinion. He said that entry under such condition was illegal, "as if without encountering resistance the officers had reduced the door to splinters." He went on to say that the evidence should have been suppressed not only because of illegal entry, but because the search warrants were not issued upon probable cause.

2. United States v. Bowman, 137 F.Supp. 385 (D.D.C, 1956).