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Liability of Montana school districts and their employees for pupil injury

Stewart Hamilton Smith
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LIABILITY OF MONTANA SCHOOL DISTRICTS
AND THEIR EMPLOYEES FOR PUPIL INJURY

by

STEWART HAMILTON SMITH
B.A., Montana State University, 1949

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Chairman of the Board of Examiners

Dean of the Graduate School

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S. H. S.
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CHAPTER I

STATEMENT OF THE PROBLEM
AND ITS SIGNIFICANCE

Introduction to the Problem

This paper has not attempted to make any contribution to the legal profession; it is rather an attempt on the part of a layman to present in so far as is possible, without indulging in dangerous interpretation, a general background of the problem of school liability for injuries to pupils in the State of Montana.

If the law were a static and unchangeable institution there would perhaps be no need of lay people wading through much extraneous information in an attempt to evaluate their respective relationships in a legal situation, and the entire problem of tort liability in a particular state might be summed up comparatively briefly.

The law, however, is in a constant state of flux. New laws are passed by legislatures; new interpretations are rendered by the courts; and opinions by prominent jurists, lawyers, and attorney generals frequently influence legislators and other attorneys. Therefore, this paper will be limited to that information which may be of interest and
importance to school people, not with the view that they may, in the event of a lawsuit against them, be prompted to act as their own counsel, but rather with the thought in mind that with some background regarding their legal obligations they may be better prepared to avoid situations which may render them liable to a suit for damages.

In 1950, over twelve thousand cases, which were brought against schools, cost an aggregate sum of approximately seven million dollars\(^1\). This figure alone should be significant evidence to school board members, administrators and teachers that the problem is real, that it affects school finances, and as will be discussed later, it has its implications for school policy.

The problem is not only important to school people, but has presented situations troublesome to the courts and taxpayers alike. Perhaps the main issue involved can be classified as a moral one. For example, to what extent should boards of education be responsible for pupils, maimed, injured or killed? As the situation stands at the present time, it is frequently the only body capable financially of compensating parents or pupils for any loss. There is an old adage that you cannot squeeze blood from a stone. Is it then feasible to bring suit against a school teacher whose income makes the satisfaction of any judgment an impossibility? Certainly this has been true in the past. There is no

way of ascertaining how many potential suits against teachers for negligence have never reached the courts, because of the futility of suing someone who does not have the money. On the other hand, if for the sake of discussion, school boards were stripped of their immunity and held liable as a body for the negligence of teachers, and administrators, two questions are left to be answered. First of all, would there be an unduly large number of suits brought against the public schools merely because public funds would be available to satisfy a judgment? Secondly, would such an imposed liability affect the quality and caliber of men seeking positions as trustees? In most states, a local board member's job is an honorary one, and does not carry with it any financial compensation in the form of salary or expenses. Would it then be just to hold members of a community financially liable when engaged in a service to a community for which they receive no financial benefit? At the same time, who is to say that a child or its parents should not be compensated for the loss of sight of a child, a permanent injury, or even a medical bill for a temporary injury if that injury was in any way the result of unreasonable conduct on the part of schools or school personnel?

With the schools of our nation, and Montana no exception, being responsible for an increasing number of pupils, with new educational plants and policies underway, schools have in effect become "big business". As big business, they not only enjoy the responsibility, but must share the
obligations, not because of the financial magnitude of educational institutions alone but more so because of the increasing scope of educational activities.

Definitions of Legal Terms

To understand the problem and its implications, it is necessary and to a great extent appropriate to confine research to professional and legal sources. In doing so, the layman finds himself confronted with a vocabulary and terminology peculiar to the legal profession but needful of definition to those whose work in other fields rarely if ever brings them in contact with these terms.

First of all, what is meant by the term tort? A tort according to Prosser\(^1\) is:

> ... a term applied to a miscellaneous and more or less unconnected group of civil wrongs, other than breach of contract, for which a court of law will afford a remedy in the form of an action for damages. The law of torts is concerned with the compensation of losses suffered by private individuals in their legally protected interests through conduct of others which is regarded as socially unreasonable.

Many definitions of the term tort can be supplied, for example, a tort may be defined as:

> ... a legal wrong committed upon the person or property independent of contract.\(^2\) or


. . . . the infraction of some public duty, by which special damage accrues to the individual.\textsuperscript{1}

The same authority cited above has also defined a tort as:

. . . . the violation of some private obligation by which like damage accrues to the individual.\textsuperscript{2}

This study has been concerned with a particular kind of tort, that which involved an injury to the person, and might be properly classified as being a personal tort as distinguished from one involving damage to real or personal property.\textsuperscript{3}

If a tort then can be committed through the conduct of others, which is regarded as socially unreasonable, the next logical question would be what constitutes socially unreasonable conduct, how is it so defined in legal terms?

The most common form of conduct which courts and legislators have generally recognized and defined as being socially unreasonable is negligence. Negligence has been defined by the Montana courts, among many others as:

. . . . the want of care which an ordinary prudent and careful man would exercise under given circumstances.\textsuperscript{4}

According to Prosser\textsuperscript{5}, certain elements are necessary

\textsuperscript{1}Black, \textit{op. cit.}, I, 4.

\textsuperscript{2}Ibid., p. 4.

\textsuperscript{3}Ibid., p. 4.

\textsuperscript{4}Birsch v. Citizens Electric Col, 36 Mont. 574, 93 Pac. 940 (1903).

\textsuperscript{5}Prosser, \textit{op. cit.}, I, 4.
to render one liable on the basis of negligence. They are:

A. A legal duty to conform to a standard of conduct for the protection of others against unreasonable risks.

B. A failure to conform to the standard.

C. A reasonably close causal connection between the conduct and the resulting injury.

D. Actual loss or damage resulting to the interests of another.

Another term which is frequently encountered in lawsuits involving negligence is contributory negligence. Contributory negligence is conduct on the part of the person suffering damages which falls below the standard to which he is required to conform for his own protection. Such conduct will bar recovery only if it has exposed the damaged party to the particular risk from which he suffers harm.¹ Contributory negligence therefore, may prevent recovery against a negligent party.

Another bar to recovery is stated in legal terms as the assumption of risk, which is the implied or express consent on the part of the damaged party to relieve the defendant of an obligation of conduct toward him, and to take his chances of harm from a particular risk.²

Generally speaking, there are four classifications of damages which a court may award for the injury or death of minors due to negligence:

¹Prosser, op. cit., I, 4.
²Ibid., p. 4.
A. A court may award nominal damages. Nominal damages generally amount to a small sum where there is no substantial loss or injury, but the law recognizes there has been a technical invasion of the plaintiff's right or a breach of defendant's duty.  

B. Compensatory damages (this is probably the most frequently encountered of damages awarded in successful suits for personal injury due to negligence) are such as will reimburse the injured party for the injury only, and will simply make good or replace the loss caused by the wrong or injury.  

C. Exemplary damages are damages awarded over and above compensatory damages wherever the wrong or injury was committed under circumstances of violence, opposition, malice, fraud, or wanton and wicked conduct on the part of the defendant. These are frequently referred to as punitive or punitory damages.  

D. Prospective damages, are compensatory damages for that damage which is expected to follow from the act or negligence of the defendant. Things which must necessarily or most probably will result from the injury.  

Sources of Legal Authority

Before undertaking a study of cases in a particular legal field such as this, it may be well to review briefly the various sources of legal authority on the state level. First, the State Constitution supersedes all other State laws. The Supreme Court of the State interprets the State Constitution whenever the need arises in the form of

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1 Black, op. cit., I, 4.
2 Ibid., p. 4.
3 Ibid., p. 4.
4 Ibid., p. 5.
test cases, and therefore the Supreme Court has a definite influence in interpreting the meanings of the constitution in its relation to laws passed by the legislature.

The second source may be found in the statutes, or laws passed by the state legislature. These in turn and in theory supersede court decisions or the common law.

The next level of authority may be found in decisions of the various levels of courts in the various states. These proceedings when compiled and evaluated have established certain legal principles and precedents which constitute what is known as the common law. (The term common law may be correctly applied in reference to the English common law which has a very great influence on our own courts in the absence of American decisions pertinent to the subject.)

A decision in one state having similar statutory regulations does not necessarily have to be followed by the courts of another state, but it must be remembered that precedent has long been one of the most influential factors in legal decisions, and the decisions in one state therefore are frequently not without influence on the decisions of another. On the other hand, it is possible that a supreme court of a state may at a later date reverse its position or revise its interpretation of a legal situation. The dicta of cases of courts of record may often give clues as to the disposition of a particular court which may eventually attempt to remedy a situation by reversing a prior decision.

These dicta are not without their influence on legis-
lators who, in agreement with the courts reasoning, may instigate remedial legislation.

In the actual conduct of a trial itself, it becomes the duty of a judge to rule on matters of law while a jury weighs the evidence to determine questions of fact. It is therefore not the jury's duty to determine what negligence is, but rather upon instructions from the judge to determine from the evidence presented in court whether a situation or fact occurred or did not occur.

Summary of the Problem

In summary then, the problem is one of determining the areas of possible liability on the part of Montana school officials and employees for pupil injury. With an increasing number of lawsuits being brought against public schools, and with the public schools increasing in size of enrollments and in the scope of their activities, this becomes a problem of vital importance to school people, whether board members, administrators or teachers.

To understand the problem, certain terms have been defined which are frequently encountered in the law on this subject, the understanding of which is a necessary legal background to the problem. In addition to this terminology may be added the three larger classifications of legal authority within this State, constitutional, statutory, and the common law as it is revealed by court decisions. Other
legal terms have been used in the body of this work in addition to those defined here; whenever they have been used and it was thought that a definition was needed, it has been supplied.
CHAPTER II

SOURCES OF INFORMATION

In preparing this paper it became apparent that five main sources of information were available:

A. Work already done in this field or in related fields in other Universities in the forms of doctoral dissertations, masters' theses or published books;

B. Specific legal references such as statutory provisions of the United States, court decisions, and legal dictionaries, texts and annotated reference books;

C. The opinions of lawyers and school administrators;

D. Facts gathered from parents and pupils involved in situations involving injuries connected with the school system;

E. Hearsay evidence, regarding cases which were never brought to court, or if brought to court never reached a court of record.

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Doctoral Dissertations

As to the first category, a listing of doctoral dissertations\textsuperscript{1} from the year 1937 to the present time was examined.

In 1941, it was found that three such studies were made on the doctoral level. The first one was a doctoral dissertation by John Cavicchia at Rutgers entitled \textit{The Law of Tort as Applied to Public Schools}\textsuperscript{2}. At the same time at New York University, Charles Francis Xavier O'Brien wrote on \textit{The Legal Status of Corporal Punishment in Public School Systems of the United States}\textsuperscript{3}. (Due to the fact that this was only a related problem to the study at hand, and that statutory provisions in the State of Montana are rather explicit as to corporal punishment, O'Brien's work was not examined.)

Also, in 1941, Arthur C. Poe at Columbia University had published his doctoral dissertation on \textit{School Liability for Injuries to Pupils}\textsuperscript{4}. This work takes the form of a hand-

\textsuperscript{1}Association of Research Libraries, \textit{Doctoral Dissertations Accepted by American Universities} (H. W. Wilson Co., 1941/42-1950/51).

\textsuperscript{2}John Cavicchia, "The Law of Tort as Applied to Public Schools" (unpublished Ph.D. dissertation, Rutgers, 1941).


book for school administrators, dealing largely with explanations of the legal principles involved. While Poe points out distinctions between states, the information is not directed toward school people in any one particular jurisdiction. His bibliography and listing of cases, while by no means exhaustive, makes interesting and informative reading.

In 1940, Harry Nathan Rosenfield published, in cooperation with New York University School of Law, a doctoral dissertation on the Liability for School Accidents\(^1\). Rosenfield's work is enhanced, no doubt, by his most appropriate background to undertake a writing in this field. He was Secretary to the Commissioner, Board of Education, New York City, New York, and also an Instructor in School Law, School of Education, New York University, and a member of the New York Bar.

Rosenfield's work is somewhat longer than Poe's but more limited in its definition of legal terms. The organization of his work becomes extremely valuable to school administrators by virtue of the fact that he has classified injuries to pupils as to their physical location. For example, one chapter deals with accidents on the playground, another with school safety patrols, another with accidents involved in the transportation of students. His work also includes an index of cases by states.

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In 1943, Marie Marguerite Schwartz at the University of Wisconsin wrote on *The Law and the Teacher*.¹

In 1943, two more studies on a doctoral level were made, one by Herman P. Mantell at New York University, concerning *The Liability of Teachers and School Officers in New York State*.² About the same time, at George Peabody College for Teachers, Robert Ward Johnston wrote on *The Legal Aspects of Insuring Public School Property*.³

Between 1943 and 1948, there is no evidence of any work on the doctoral level being done on this particular problem. However, in 1949, at Chicago, Fred E. Brooks did some work on *The Legal Status of the Pupil in the American Public Schools*.⁴ At the same time, at Temple University, Ted J. Satterfield wrote on *The Legal Aspects of a Tort Liability in School Districts as Indicated by Recent Court Decisions*.⁵ Satterfield has done subsequent work published

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in the *Phi Delta Kappan*¹, in which he strongly advocates doing away with the immunity as regards school districts. At the present time, Satterfield is Professor of Education, State Teachers College, Bloomsburg, Pennsylvania.

At Harvard University in 1950, Ernest E. Fuller wrote on *Tort Liability of School Districts in the United States*². Another work done in 1950, exclusive of Satterfield's, was by Freeburg at Indiana³.

Probably the most interesting work being currently undertaken is a series of pamphlets published by Dean Hamilton of the University of Wyoming College of Law. These pamphlets⁴ deal with a great many aspects of school law, and are written in a style which is understandable to the layman, and particularly interesting because of Hamilton's willingness to interpret the implications of case holdings to school administrators.

**Legal Sources**

The specific legal references used included as back-

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ground reading pertinent sections of Ruling Case Law\(^1\), Corpus Juris\(^2\), Corpus Juris Secondum\(^3\), American Law Reports\(^4\), American Jurisprudence\(^5\), Black's Law Dictionary\(^6\), and Prosser on Torts\(^7\).

In addition to these, state constitutions, and in particular the State Constitution of the State of Montana, and the Revised Codes of the State of Montana, 1947\(^8\) were consulted before engaging in the subsequent search for specific cases.

The case references cited in this work were largely derived from Pacific and Montana Digest\(^9\), Montana Reports\(^10\), and the Fifth Decennial\(^11\). Naturally, there are citations of cases of other jurisdictions than those of the Northwest

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\(^1\)Ruling Case Law (Lawyers Cooperative Publishing Co., 1914).

\(^2\)Corpus Juris (American Lawbook Company 1928).

\(^3\)Corpus Juris Secondum (American Lawbook Co., 1941).

\(^4\)American Law Reports (Lawyers Cooperative Publishing Co., n.d.).


\(^6\)Black, op. cit., I, 4.

\(^7\)Prosser, op. cit., I, 4.


\(^9\)Pacific and Montana Digest (West Publishing Co., 1941).

\(^10\)Montana Reports (State Publishing Co., pub. yrly.).

states cited. Wherever the secondary source of authority was a reputable one, the abstract was taken from the secondary source verbatim, and both secondary and primary sources have been cited wherever possible.

Other Sources

The third general source of information, that of opinions of lawyers and school administrators, has been of assistance in directing the course of research and guiding the delimitation of the problem, but has not been used directly as reference material or cited as such in this paper.

The fourth category, facts gathered from parents and pupils, has not been considered as a reliable one, mainly because of two factors. The passage of time of course frequently clouds an issue, particularly as to the actual facts or sequence of events. Another objection would be the rather obvious conclusion that people involved, either as parents of injured pupils, or pupils themselves, could not reasonably be expected to view their own injury objectively.

The last category, that of hearsay evidence, obviously has no place in research of any kind. It is merely mentioned because such information is frequently offered by wellwishers and can "if taken to heart" color the conclusions drawn from actual research.

In summary then, it can be said that the last three categories of sources were observed, at times appreciated,
but seldom if ever used to constitute evidence of the status of school liability in Montana or in any other jurisdiction.
CHAPTER III

GENERAL BACKGROUND OF SCHOOL LIABILITY

How the Common Law is Applied

The common law, that great mass of court holdings and legal principles handed down by courts and judges both in England and the United States, has set up certain principles of law which are followed by courts in this country, in the absence of any statute changing the law.

If a cases arises concerning the tort liability of a school district, the court of any state would first examine the state laws (statutes) to find out if there was any particular law on the tort liability of school districts. If, upon examination, no statutory provisions are found pertinent to the case at hand, the court then examines the cases on the same subject which have arisen within the state. The legal reasoning, the opinions and the decisions set forth by these cases, establish a precedent for any conclusion the court draws, assuming the same points of law are involved. Suppose, however, the court finds no statutory provisions and no cases within its own state on which to rely? The court then examines cases from other states having similar laws and uses these cases as precedent. There is no law which
says any court must follow precedent, but tradition makes such practice so common that it is taken to be a probability.

When attempting to determine the common law background or "case law background" in regards to tort liability of school districts for pupil injury in Montana, it is necessary to refer to cases from other states. Frequently, in matters of law, the Montana courts have looked to California decisions because of the similarity between California Codes and Montana Codes. This similarity, however, does not apply to tort liability of school districts since California has a law\(^1\) which specifically has changed the common law position, while Montana has no such law.

The court of any state then looks first to its own statutes, next to its own cases, then to the cases of other states having similar laws, or no laws superseding the common law doctrine.

Common Law Doctrines Pertaining to School Districts

In an effort to determine what the common law is in respect to school districts, it is first necessary to ascertain the relationship existing between the school district and the state. Some states have referred to school districts

\(^{1}\)California School Code, Section 2, pp. 801-802.
as quasi municipal corporations, and public corporations or involuntary corporations. Regardless of wording, American courts are usually agreed with the sentiments of the Indiana court when it defined a school district in the following language: "A school district under our system of government is merely an agency of the state". The courts then are agreed that a school district is an agent of the state government, and as an agent of that government, while acting within the bounds of its authority, enjoys certain privileges and immunities along with the state, which have their roots deep in the history of common law.

The idea that a state may not be sued without its consent is a "hand-me-down" from the ancient medieval maxim of "the king can do no wrong", meaning the state of course. When this definition of a school district and this common law doctrine of immunity of suit are joined, the result generally is that a school district may not be held liable for the torts of its agent, in the absence of an express statute to the contrary. Notice that there are several qualifications to this rule of immunity from suit. In the United States, this doctrine has not been applied to school districts in cases involving contract law, and has been further qualified by many courts so that it pertains to immunity in cases of negligence but not in cases involving active misconduct. An inconsistency seems apparent when one

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1Freel v. Crawfordsville, 41 N.E. 312, 142 Ind. 27.
considers this line of reasoning. First of all, if the courts have held that this immunity from suit does not apply in cases involving the law of contracts, but that it does apply to cases involving negligence, one might well pose the question, "Why does the law afford protection to a mature individual having a contract with a school board or school system for services or goods delivered, in which the only probable loss would be of property or money, while the same law holds that a small child or his parents may not be afforded that protection if they suffer physical injury or even death?"

In England, where our "common law" originated, school boards are at present liable for their torts\(^1\), but American courts generally uphold the traditional viewpoint, albeit with an increasing number of dissenting opinions and rumblings of dissatisfaction\(^2\).

There are other grounds upon which the courts base this non-liability of school districts for the negligence of their employees. The Montana court has outlined in Perkins v. Trask\(^3\):

> Even the school board itself cannot render the district liable in tort, for when it commits a wrong or tort, it does not in that respect represent the district. Various reasons are assigned why a school district should not be

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\(^2\)Hamilton, *op. cit.*, II, 15.

\(^3\)Perkins v. Trask, 95 Mont. 1, 23 P. (2d) 982 (1933).
liable in tort. Some authorities place it on the ground that the relation of master and servant does not exist; others take the ground that the law provides no funds to meet such claim. Still other authorities hold that school districts in performing the duties required of them exercise merely a public function and agency for the public good, for which they receive no private or corporate benefit. Many authorities do not base their holding on any single ground, but rely on two or more of them at the same time.

This decision has been borne out by subsequent cases.¹

In the above quotation, the Montana court makes reference in its mention of a "public function", one of the important distinctions made by many courts in determining liability of school districts. If in the course of their activities, a school board, in its corporate capacity performs what the courts consider a governmental function, the general rule of immunity applies.

Physical training has been held by the Montana Courts as being a governmental function². Other activities which courts have declared to be governmental are the maintenance or employment of transportation for pupils to and from school³, and the charging of the lay public to see an athletic event⁴.


³Poe, op. cit., II, 12.

If on the other hand, the court finds a school district or school board, acting in its corporate capacity, has been negligent, in the performance of a proprietary or "private" function, the rule of immunity does not apply to the school district, and it may be liable as any other corporation. The theory is that when such a group as a school board engages in a private function not authorized by the state, it has exceeded the authority vested in it by the state, and in doing so has put itself beyond the protection of the state.

The following cases are representative of the decisions rendered in those states which rely on the common law doctrine of immunity, on one ground or another, and have no statutory provisions altering it.

In Alabama, the county board of education was held not liable for injuries caused to a child by a negligent bus driver on the school grounds.¹

In Colorado, a case against the school district was dismissed on the grounds of district immunity wherein a pupil was injured by a heavy radiator which was standing on a sidewalk adjoining the school. Apparently, the pupil, in the course of play, pulled the radiator over on himself and as a result his leg was broken.²

¹Turk v. County Board of Education of Monroe County, 131 So. 436, 222 Ala. 177, (1930).

²School district 1 in City and County of Denver et al v. Kenney, 236 Pac. 1012, 77 Colo. 429, (1925).
A long list of cases could be compiled demonstrating the immunity of school districts, but since this paper is concerned with the Montana law, and since the general rule is so well established, the noting of a large number of cases in detail seems hardly necessary, particularly since the Montana cases cited later in this work in detail bear out the general rule without exception.

A rather interesting exception has appeared in a few jurisdictions relying on the common law in regards to a particular type of negligence known as *nuisance*. According to Rosenfield\(^1\), "A nuisance consists in the existence or creation of a situation which by its very nature is likely to cause injury, harm, or inconvenience to another". A hypothetical example might be a situation in which a school district maintained a large open well on the playground, where the physical position of the well and the nature of its construction was obviously dangerous to children, and yet by virtue of its position children were exposed to it. This nuisance doctrine, according to Rosenfield\(^2\), was first stated by the Michigan court in 1899\(^3\), and again in 1937 by the Connecticut court\(^4\).

\(^{1}\)Rosenfield, *op. cit.*, II, 13, p. 31.
\(^{2}\)Ibid., p. 25.
\(^{4}\)Bush v. City of Norwalk, 122 Conn. 426, 189 At. 608, (1937).
Even more recently, in 1951, the Kansas Court\(^1\) has stated it in the following terms:

A school district, being a quasi public corporation, has no more right to create and maintain a situation that is a nuisance to private individuals than does a municipal corporation.

Rosenfield concluded in 1940 that the states were divided on the issue of school district liability under the nuisance doctrine. Not only were they divided, but, in his opinion, inconsistent frequently within their own jurisdictions as to what was negligence and what was a nuisance.\(^2\) Some of the most understandable statements clarifying the distinction between negligence and nuisance were rendered by Justice Cordozo in McFarlane v. Niagara Falls\(^3\). Cordozo states, "Narrow is the line between nuisance and negligence". In the course of the decision, he points out that the word nuisance is a "catchall" term, and that some nuisances are based on negligence while others are not. An example of a nuisance not based on negligence, according to Cordozo, would be the case of the individual whose factory emits noxious fumes even though he has taken every precaution to prevent it. As an example of a nuisance which has its basis in negligence, he cites the situation where a coal hole was

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\(^2\) Rosenfield, op. cit., II, 12.


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built under proper license but the individual building the coal hole was negligent in not having it properly covered, hence the situation becomes a nuisance based on negligence. Cordozo also points out in this case that: "Whenever a nuisance has its origin in negligence one may not avoid the consequences of his own contributory negligence by affixing to the wrongdoer the label of a nuisance".

The latter example is probably of more importance to school officials, since most situations arising around school grounds which would be of a dangerous nature would probably tend to fall into the category of cases where the nuisance is based upon negligence. This decision is not necessarily the law in Montana, but it is significant in that it represents the legal opinion of a prominent American jurist, whose legal reasoning is respected and not infrequently followed by the courts throughout the United States.

**Liability of School Board Members as Individuals**

As has been pointed out, the law has clothed school districts and school boards, while acting in their official capacity, with immunity for their own negligence or for the negligence of their employees. However, if a school board member, functioning as an individual and not as a part of that board, is guilty of conduct which the courts deem negligent, he is then liable as any other individual. For example,
if a school board member were to take some students to a football game in his car, and in the course of the trip drove his car in a negligent manner which resulted in an accident, and some pupils were injured, he would be liable for negligence as would any other individual.

The Indiana courts held the members of a school board individually liable wherein the plaintiff, not a pupil, was injured by the collapse of poorly constructed bleachers during a field day exhibition conducted by the school board. The courts held that when the board undertook the construction of the bleachers the function was not a "governmental" one in which the board members were engaged but a "ministerial" one. This Indiana case is confusing because of its inference that a governmental function is opposed to the concept of a ministerial function. Usually, the terms ministerial or discretionary functions are associated with the law concerning municipal corporations, and are applicable to school board members as individuals acting as individuals, while the terms governmental and proprietary are usually associated with the school board as a corporate body. There have been no cases as yet in Montana in which a school official has been charged with negligence in the performance of a ministerial duty, probably because it is difficult to conceive of any ministerial duty which a school board member is required to perform that could lead to pupil injury. A ministerial duty has been defined as a specific and positive duty.

required by law.

Some legal authorities hold that a public official regardless of whether his duties are ministerial or discretionary should be liable if he acts in bad faith. Although this may be the better view, Montana courts have stated it differently.

In 1912, the Montana court made the following statements regarding the tort liability of public officials.

If the official duty is public no private redress is available . . . .

If the act of the official involved discretion or is quasi judicial no civil liability attaches as long as it is within the scope of the official's authority . . . .

Only when official acts are purely ministerial is the official liable to individuals for misfeasance or non-feasance in the exercise of his office . . . .

Poe mentions, that many states have statutes which specifically exempt members of the board, as individuals, from personal liability in cases involving personal injury to pupils in public schools. This is no doubt provided by some states as a matter of public policy so that responsible citizens would not be reluctant to accept a position as a board member, for fear of subjecting themselves to a series of lawsuits.

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It might be pointed out, that the California statute, which admits of liability of school board members, qualifies itself to the extent that a school board member shall be liable if the negligence on the part of the said member is the proximate cause of such injury or death. The court then has said, that if a board member's act is the direct cause of the injury, liability exists.

Now the question arises as to the liability of board members, as individuals, for the negligence of their employees, which would include administrators, teachers, janitors, and all other employees under contract with the school board. There is another doctrine in common law known as respondeat superior. This doctrine hinges around the conception of a master servant relationship, and that the master should pay for the negligent acts of his servant. Most courts have held that the doctrine of respondeat superior does not apply to school board member-employee relationships, on the ground that administrators, teachers and other employees are not the personal employees of the board member. Generally speaking then, in most jurisdictions, where there is no statute to the contrary, school board members are not liable for the negligent acts of their employees, and this is true in the State of Montana.


Liability of Administrators, Teachers, and Other Employees

With only one exception\(^1\), no doctrine of immunity from suit has ever been applied to teachers, administrators or employees of school districts. They stand, in the eyes of the law, as any other individual, and the only possible immunity which they may enjoy may be by virtue of statutory provisions relating to corporal punishment. Most states have specifically stated in their laws the privileges and limitations to which a teacher or school administrator is subject regarding disciplinary measures and corporal punishment.

The Montana statute regarding corporal punishment is typical, and is quoted here in its entirety\(^2\):

\begin{verbatim}
1031. Corporal punishment. Whenever it shall be deemed necessary to inflict corporal punishment on any student in the public schools, such punishment shall be inflicted without undue anger and only in the presence of teacher and principal if there be one, and then only after notice to the parent or guardian; except that in cases of open and flagrant defiance of the teacher or the authority of the school, corporal punishment may be inflicted by the teacher or principal without such notice.
\end{verbatim}

While the above law does, in a sense, allow teachers

\(^1\) Poe, op. cit., II, 12, p. 67.

to commit a technical assault, it is further limited by the following section:

1084. Undue punishment of pupils. Any teacher who shall maltreat or abuse any pupil by administering any undue or severe punishment shall be deemed guilty of a misdemeanor, and upon conviction thereof before any court of competent jurisdiction, shall be fined in any sum not exceeding one hundred dollars.

Returning to the general rule, the following cases may be of interest to school teachers or principals who are under any illusions as to whether the doctrine of district immunity attaches itself to them.

In California, a teacher who permitted pupils to use a dilapidated truck which belonged to the school, without warning or instruction as to its operation, was held liable for negligence when the truck went off the road on a curve and injured one of the pupils.

Another California case, in 1935, involved a high school chemistry experiment. During the experiment, students were engaged in making explosives. There was an explosion, and one of the students was injured. The court held the teacher liable, on the ground that such an experiment should have been carried on under the strictest attention of the instructor.

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1 Ibid., Chap. 101, Sec. 1084.
In New York, a teacher was held liable for failure to properly supervise the playground during noon hour, when a pupil was injured on a fire escape. Noon hour supervision was her delegated job. The facts of the case disclosed that she watched the playground through a window which afforded no view of the fire escape.

Another New York case, which should be of interest to the physical education instructors, occurred in 1947. In this case, a physical education instructor was held liable by the courts for letting two boys box, without training in self defense or warning of the danger involved. One of the boys suffered a hemorrhage as a result of a blow.

The courts of Iowa at one time provided an exception in their interpretation of the common law to the generally established principle of non-immunity from suit of teachers. Rosenfield points out, that this attempt on the part of the Iowa court to extend the immunity of school districts to their employees was shortlived, and subsequently changed by later opinions of the same court.

2 LaValley v. Stanford, 70 NYS (2d) 460, (1947).
3 Poe, op. cit., II, 12, p. 67.
The general rule of liability then regarding teachers, administrators and employees of school districts is that they must conduct themselves in a reasonably prudent manner, or answer for the consequences of their negligent acts.

Summary

It has been stated that the common law, as evidenced by the opinions of judges and case decisions, has created certain broad principles of law which have a profound influence on cases which might arise in the future. In determining what the law is, the court looks first to the statutes of its own state, next to the decisions of its own courts, and then to the decisions of the courts of other states having similar laws. These common law doctrines were first discussed as they pertained to school districts as a corporate body. The general rule of common law being that a school district, as an agent of the state, is immune from suits for its own negligence or the negligence of its employees. Certain exceptions to this were pointed out. The distinction, which is probably of primary importance to Montana, being that of immunity of the district in the performance of a governmental or "public" function, and non-immunity if the activity under consideration is of a proprietary or "private" nature.

It has been pointed out, that school board members, acting as individuals, in any state not having a statutory provision abrogating the common law, are liable for their
negligent acts. This includes the State of Montana.

The law of tort in regards to teachers, (which term generally includes administrators and principals) and janitors, is much the same as it is for any private citizen or individual.
CHAPTER IV

THE MONTANA POSITION REGARDING PUPIL INJURY

Key Montana Cases

In the last twenty six years, the Montana Supreme Court has had occasion to render four decisions pertaining to the tort liability of school districts. The four cases are cited at length in this chapter because they represent the only cases decided by the Montana Courts regarding the tort liability of schools.

The first case was Mills v. Stewart. The facts of the case stated briefly as follows, taken from the opinion of Mr. Justice Holloway who delivered the opinion for the Montana Court, are:

. . . George A. Rietz, a resident of Lewis and Clark county, was injured while a student at the state university at Missoula. He contends that on the day he registered (September 25, 1923), he was assigned a room on the second floor of the "South Hall" dormitory building; that he was not familiar with the surroundings; that on the same floor and near his room were two doors about two feet apart, one of which led into the bathroom and the other into the

\footnote{Mills v. Stewart, 76 Mont. 429, 247 Pac. 332, (1926).}
elevator shaft; that neither door was locked, and neither one was marked or labeled, and there was not anything to indicate which door led into the bathroom or which one led into the elevator shaft; that the hall was dimly lighted, and when he undertook to go to the bathroom, through mistake he opened the door leading into the elevator shaft, and, the shaft being unguarded and the elevator above that floor at the time, he fell down the shaft to the bottom of the pit and sustained serious, permanent injuries, on account of which he incurred large expenses, only a part of which has been repaid to him; a part of such expenses was paid by the university.

These matters having been brought to the attention of the members of the Nineteenth Legislative Assembly, an Act was passed and approved (House Bill 398, Laws of 1925, p. 416), which in a preamble sets forth the substance of Rietz' contention. The Act then provides that if Rietz presents a claim to the state board of examiners within three months after the approval of the Act, the board shall hear and determine the claim, and if it shall find that the injuries were sustained as contended by Rietz, damages therefor in such amount, not exceeding $7,500, as the board shall determine to be just and equitable, "shall constitute a legal and valid claim against the state of Montana." The Act then makes an appropriation of $7,500, or so much thereof as may be necessary to pay the claim, if it is allowed by the board.

Rietz made due presentation of his claim, and the board appointed a time for hearing; but before final action was had this suit was instituted by a resident taxpayer to secure an injunction restraining the board from proceeding further with the matter. From an order granting the injunction the board appealed.

The complaint in the action proceeds upon the theory that House Bill 398 is unconstitutional, and in consequence thereof any action taken by the board must be void. This theory was adopted by the trial court, and the correctness of it is the sole question presented by the appeal.

... The dormitory building is the property of the state, and the state is charged with its...
management and control, and, while it does not have any moral right to commit a tortious act, it has the same capacity to do so as any other corporation. (1 Cooley on Torts, p. 208; Bishop on Noncontract Law, sec. 749.) The maxim of the English law "The King can do no wrong," does not find a place in the jurisprudence of this country. (Langford v. United States, 101 U. S. 341, 25 L. Ed. 1010.) The state, like any other corporation, can act only through agents, and if the state of Montana were a private corporation, it would be responsible to Rietz in an action at law for the damages resulting proximately from the negligence of its agent in charge of the dormitory building. But the state is a public corporation, and out of considerations of public policy the doctrine of respondeat superior does not apply to it unless assumed voluntarily. In other words, the state is not liable for the negligent acts of its agents unless through the legislative department of government it assumes such liability.

The main problem in this case then was not of determining the liability of school districts or of the negligence of the state or its agents, but of specifically determining the constitutionality of a private bill passed by the Montana State Legislature to reimburse the plaintiff.

The case is interesting because of the method used to obtain reimbursement for injuries to a pupil, which was through the legislature rather than through courts of law. This "private bill" method has been employed at various times in other states with some success. While the legislature of the State of Montana is not bound by tradition and precedent to the extent that courts are, they have certainly imposed upon themselves a moral obligation to provide reimbursement to pupils injured in the public schools. This contention is based upon Justice Holloway's reasoning in
declaring that this bill was constitutional because the money
expended or appropriated for the plaintiff was deemed to be
for a "public purpose". The public purpose was education in
this instance. More of Justice Holloway's opinion follows:

... It is elementary that a state cannot
be sued without its consent or be compelled
against its will to discharge any obligation.
... If the term "legal claim" as applied to
a state has any meaning it must refer to a claim
which is recognized or authorized by the law of
the state, or one which might be enforced in an
action at law if the state were a private corpo­
ration, and this is in the sense in which the
term was employed in State ex rel. Mills v. Dixon,
and apparently it was used in the same sense in
Conlin v. Board.

The question then arises: Was it within the
power of the legislature to give recognition to
the Rietz claim by assuming a limited liability
for the negligence, if any, of the state's agent?

Our legislative assembly acts in virtue of
inherent authority and not through authority
delegated to it ..., and since it is not
prohibited by the state Constitution or by the
supreme law of the land to assume liability for
the torts of the state's agents, it may do so.
In 26 R. C. C. 66, it is said: "The power of the
legislature to make the state or one of its sub­
divisions liable for injuries inflicted by it
upon an individual is unquestioned even if there
was no liability at common law."

Rietz has a valid claim against the agent
through whose negligence he was injured, and if,
in advance of the injury the state had, by general
law, assumed liability for the negligence of its
agents in charge of the university buildings
there would not be any dissent in the authorities
from the conclusion that an appropriation to dis­
charge such liability would be for a public purpose.

We do not discover any provision of our
Constitution which forbids the legislature to
assume liability for injury resulting from the
negligence of the state's agent, whether the
liability is assumed before or after the injury
occurs, and to say that the state may assume such
liability but may not discharge it is simply to make the law ridiculous.

The Montana court then, in this case, has stated the general rule of immunity from suit of the state. The court has held that the legislature of the state may assume that liability either by enacting a statute making them liable, or by private bill reimbursing a particular individual.

The next Montana case which upholds the general rule is that of Perkins v. Trask. This case is quoted in its entirety except for case citations made by the court in its opinion.

... This is an action for damages for the death of James Penkake, plaintiff's minor son. The complaint seeks recovery against school district No. 1, of Powell county and against the named defendants as trustees and individually, and is grounded upon negligence. The trial court sustained a general demurrer to the complaint, and, deeming the complaint one that could not be amended to state a cause of action against any of the defendants, entered judgment that plaintiff take nothing by her action. The appeal is from the judgment.

The sole question presented is whether the complaint states facts sufficient to constitute a cause of action against the defendants, or any of them. Plaintiff in her complaint, after alleging that she is the mother of James H. Penkake, charges defendants with negligence resulting in his death. The particular negligence relied upon is set out in detail, and may be summarized as follows: That the defendants maintained and operated a swimming pool in school district No. 1 for the general use of the pupils; that, owing to certain facts specifically alleged, the pool was a dangerous place in which to permit children to play and swim; that they were permitted and directed so to do without having any one in charge to guard them; and that in consequence,

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1Perkins v. Trask et al, 23 P. (2d) 982 (1933).
while James H. Penkake, then a pupil, was playing in the pool, and by reason of the negligence of the defendants, he lost his life by drowning.

It is sufficient to say that the allegations of negligence are ample to state a cause of action if a school district or its trustees, either as trustees or individually, may be compelled to respond in damages for negligence; hence the question is directly presented as to whether a school district or its officers are liable for negligence.

The general rule, sustained by the overwhelming weight of authority, is that school districts are not liable in damages for injuries caused by the negligence of their officers, agents, or employees, unless the liability is imposed by statute. The courts are not generally in accord as to the reason for such nonliability. Some base it upon one reason, and some upon another. The general rule is stated in 24 R. C. L. p. 604, as follows: "The courts very generally hold that school districts are not liable in damages for injuries caused by the negligence of their officers, agents or employees, nor for any torts whatsoever, unless such liability is imposed by statute, either in express terms as is the case in some jurisdictions, or by implication, as where the district is given authority to levy taxes to meet such claims. But of course this general rule of law is limited to the district itself, and does not extend to independent agencies doing work for the district on school property. Even the school board itself cannot render the district liable in tort, for when it commits a wrong or tort, it does not in that respect represent the district. Various reasons are assigned why a school district should not be liable in tort. Some authorities place it on the ground that the relation of master and servant does not exist; others take the ground that the law provides no funds to meet such claims. Still other authorities hold that school districts in performing the duties required of them, exercise merely a public function and agency for the public good, for which they receive no private or corporate benefit. Many authorities do not base their holdings on any single ground, but rely on two or more of them at the same time.

... Plaintiff's counsel contend that this
case is not controlled by the rule announced by the great weight of authority for several reasons:

First. It is argued that, because of section 1022, Revised Codes of 1921, which provides that "every school district constituted and formed as provided in this title shall be and is hereby declared to be a body corporate, and under its own proper name or number as such corporate body may sue and be sued, contract and be contracted with, and may acquire, purchase, and hold and use personal or real property for school purposes mentioned in this title, and sell and dispose of the same," there is legislative authority to sue a school district in tort. The adjudicated cases hold that such a statute does not have this effect.

Second. Plaintiff's counsel contend that under the laws of this state defendants had no authority to construct or maintain a swimming pool, and hence cannot defend on the ground that they were but performing governmental functions.

Our Constitution imposes the duty upon the Legislative Assembly "to establish and maintain a general, uniform and thorough system of public, free, common schools." Section 1, art. 11. This the Legislature has done by the enactment of our school laws. The courses of study are prescribed by section 1054, Revised Codes of 1921, with power in the boards of trustees "to determine what branches, if any, in addition to those required by law, shall be taught in any school in the district." Chapter 122, Laws 1923, and chapter 122, Laws 1931. Also by chapter 147, Laws 1927, the trustees are given authority to issue bonds for the purpose of constructing or acquiring a gymnasium and for "furnishing and equipping the same." (Section 1.) Under the broad rules announced in McNair v. School District. 87 Mont. 423, 238 P. 188, 69 A.L.R. 366, the trustees have authority to construct and maintain a swimming pool for the use of the pupils.

It is also contended by plaintiff that, if there be authority to maintain a swimming pool, the authority does not extend to the right to maintain a dangerous instrumentality, such as the one is alleged to be in this case, and that in consequence there is no immunity from liability on the ground that its maintenance constituted a part
of the governmental functions of the school district. This contention overlooks the fact that in all cases holding that there is no liability on the part of the district or its officers for negligence there is no statutory authority for the maintenance of the offending agency in a negligent manner.

It is also contended that, if the board has the right to maintain a swimming pool, its right is optional and not mandatory, and hence the rule of immunity does not apply. This fact does not alter the legal principle applicable. Krueger v. Board of Education, supra.

Other contentions made by counsel for plaintiff as to the liability of the school district and the trustees, as such, have been considered by us, and we see no reason for departing from the rule sustained by the overwhelming weight of authority.

The only remaining question is: Are the individual defendants personally liable? . . . . But in most of the cited cases the injury or damage was caused by the failure to perform a statutory duty. Here there is no statute directing how a swimming pool shall be maintained. The complaint does not charge a failure to perform a statutory duty. The other cases deal with ministerial, as distinguished from governmental, duties, and hence are not controlling here.

Perkins v. Trask then has summed up the various grounds upon which the general rule of immunity applies. It has also declared that the existence of a statute in Montana stating that a school district may sue and be sued does not alter the common law position as regards to tort liability. The court pointed out the distinction between government and proprietary functions and relies heavily on this line of reasoning as the basis for school board immunity. It also infers that school board members might be liable for negligent performance of a ministerial duty, and that they would
be liable for negligent conduct if engaged in a proprietary function.

The next case is Bartell v. School District No. 23, Lake County. The facts of the case and the opinion as stated in the words of the court are as follows:

... The complaint is for damages for negligence. It alleged in part that plaintiff was a pupil and defendant Bronson the principal of the school mentioned; that Bronson, within the scope of his employment as such and while coaching and instructing several older boys of the school in the field event of shot putting, directed plaintiff to stand near where the heavy iron shot would fall and to mark the place; that Bronson, without warning to plaintiff, cast the shot, striking plaintiff on the head and inflicting serious injuries of a permanent nature.

... In accordance with the well established rule, it has been held by this court in Perkins v. Trask, 95 Mont. 1, 23 P. 2d 982, that school districts are not in general liable for injuries caused by negligence of their officers, agents or employees unless liability is imposed by statute, even though the activity with which the negligence is connected is optional with the school district.

Plaintiff's contention is set forth as follows in his brief: "We do concede that the general rule is that a school district is not liable in tort, but this case falls within the list or line of exceptions. The rule is that a school district, town or city as well as a county, is not liable for tort when the tort is committed while acting in a governmental capacity. * * *"

"The rule laid down in the case of Perkins v. Trask * * * has no application and is not controlling in the case at bar, nor do the many citations mentioned therein throw any light on this case. The facts and conditions are materially different. In the Trask case there was inaction while performing a governmental function in the absence of

1Bartell v. School District No. 28, Lake County, 137 P. (2d) 422, (1943).
specific statutory instruction. Here there is positive action, in fact an overt act, placing a child in a dangerous place while he was not a part of the athletic team, when by force of rule and authority he had to obey, failing to advise him of the accompanying danger, and failure to warn him when the professor threw the ball, and, we claim, in violation of a statute which requires a cautious lookout for the welfare of a child, and in the presence of statutes giving the school board power to levy taxes for athletic purposes. And no one can, with any degree of credence, say these acts as above listed are governmental functions.

"If this boy had been part of the athletic team and chose to perform the duties he did perform of his own volition or even by request and then was injured, we concede there would be no liability and, under those circumstances, the rule of the Trask case would apply."

While plaintiff states that there are various exceptions to the rule of non-liability, the exceptions upon which he relies here are shown by the distinction he draws between the circumstances of the Trask case and the instance one. The contention seems to be that because plaintiff was not voluntarily receiving instructions as a member of the athletic team (1) the defendant school district was not acting in a governmental function and (2) the injury resulted from plaintiff's being put into a dangerous place by "positive action, in fact an overt act" rather than by mere negligence or non-action. That these are the only grounds upon which he relies is shown by his final admission quoted above. He speaks also in this reference to "a statute which requires a cautious lookout for the welfare of a child" and "statutes giving the school board power to levy taxes for athletic purposes." Whatever the school district's duties and powers may be in those respects are not shown to be any different under the circumstances of this case from what they were in the Trask case, in which the accident occurred in connection with a swimming pool instead of an athletic field.

It does not appear how, in the athletic activity in question here, the district was acting in any less a governmental function than in the Trask case. It is unquestioned that physical training is part of the educational duty entrusted to the public schools. McNaughton v. School Board
District No. 1, 87 Mont. 423, 288 P. 183, 69 A.L.R. 866. We find no authority for the proposition that these educational duties are limited to the members of voluntary athletic teams, and can imagine no serious argument which could be made to that effect. Plaintiff's reference to that phase of the matter in the final sentence quoted above from his brief must therefore have been intended to relate to the proposition that he was there by positive order of the principal rather than by his own volition and that the proximate cause of the accident was therefore the principal's affirmative action rather than his mere negligence. It will not be necessary to consider whether the order placing him in that position was the proximate cause of the injury.

For the proposition that the district is liable if the injury is caused by an affirmative action rather than by mere negligence of its employees, plaintiff relies only upon the following statement from 24 R.C.L. 605, Sec. 60: "The authorities generally recognize that this rule of exemption from responsibility, as broadly stated, does not extend to positive mischief produced by active misconduct, or direct acts in the nature of a trespass which invade the premises of another to his injury."

Obviously there is great difference between the "affirmative act" of the principal in asking plaintiff to mark the place where the shot was to fall and the "active misconduct" referred to in the textbook statement. The only case cited by Ruling Case Law is Daniels v. Board of Education, 191 Mich. 339, 158 N.W. 23, L.R.A.1916D, 468, from which the statement was quoted; but that case merely held that under its facts there was no liability, so that it can hardly be considered a precedent for either of the propositions stated. The court cited as an authority only an earlier Michigan case relating to the second proposition, that of trespass upon another's premises, and not to the first proposition of "active misconduct." The rule further more, in so far as it may be good, apparently relates to action by the district authorities and not to the unauthorized actions of its mere employees or agents.

Thus the rules are stated (56 C.J. 530, Section 622) that a district is not liable for the negligence of its officers, agents or employees except where
made so by statute, and (56 C.J. 528, Section 621) that the district is not liable for its own negligence in the absence of statute, except under some circumstances "for a trespass upon private property committed in the improper exercise of its lawful functions." It will be noted that no such exception is stated in connection with the question of a district's liability for negligence of its officers, agents or employees as distinct from its own negligence.

It is our conclusion that the present case is not within any exception to the general rule. Whether that rule should be changed, as has been done with reference to certain circumstances by the legislatures of California, Washington, Oregon and other states, is a matter for the legislature rather than the courts.

Again the Montana Court has made the distinction of governmental versus proprietary function, and defined physical training as constituting a governmental function of the school district. It has pointed out that there may be some exception to the general rule for trespass committed in improper exercise of lawful functions, but the opinion rendered in the Trask case was upheld.

The next case, that of Rhoades v. School District No. 9, is important for again the governmental - proprietary distinction is relied on, but more important perhaps because of the dissenting opinion of Mr. Justice Erickson. The majority opinion of the court was delivered by the Honorable Frank P. Leiper, which is as follows:

... Plaintiff seeks damages for injuries alleged to have been suffered by her as a result of an accident which occurred in the school gymnasium at Poplar, Montana. The defendants.

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appeared by general demurrers which were sustained. Plaintiff was granted time in which to file an amended complaint. Having failed to plead further, plaintiff's default was entered and judgment of dismissal followed. This appeal is from that judgment.

The sole question presented is — Does the complaint state facts sufficient to constitute a cause of action against the school district or against the other defendants as trustees or against them as individuals or against any of them? All of the allegations of the complaint, which are well pleaded, stand admitted. We therefore have these admitted facts:

That the defendant district is one of the duly constituted school districts of Roosevelt County, Montana. The other defendants are the duly elected, qualified, and acting trustees of that district.

The building in which the accident occurred is a school gymnasium. It was constructed and is maintained by this school district and is upon school grounds.

At the time alleged in the complaint there was a basketball game or contest between the neighboring school teams of Brockton and Poplar. The general public in that vicinity were advised of the time and place of this game through advertisements. Plaintiff attended that contest. She paid admission.

Within the gymnasium is a floor space suitable for playing the game of basketball and other games. Within the gymnasium and above the space provided for playing basketball is a gallery for the accommodation of spectators. Leading to that gallery is a stairway. As the plaintiff approached the gallery by way of this stairway one of the stairs collapsed or gave way and she received the injuries complained of. She alleges the construction was faulty and that the stairway was not properly maintained.

So far as material, these are the essential admitted facts.

It must be conceded that the allegations of negligence contained in the complaint are sufficient to constitute a cause of action if
the school district or its board of trustees, either as such or individually, are liable in damages for negligence.

This court has heretofore passed upon this precise question in the case of Perkins v. Trask, 95 Mont. 1, 23 Pac. (2d) 952, 953, and there used the following language:

"The general rule, sustained by the overwhelming weight of authority, is . . . ."

. . . . Counsel for plaintiff concede that the foregoing is the general rule but contend that this court, as well as other courts, have modified the rule in that a distinction has been drawn between a governmental instrumentality such as a county, city or school district when acting in a governmental capacity as distinguished from a proprietary capacity; and that, in the instant case, the school district and its officers were acting in the latter capacity; that is, in a proprietary as distinguished from a governmental capacity. In support of that contention counsel cite a number of adjudicated cases, among which are . . . .

In none of these cases, or in any of the others to which the court's attention has been called, is there any modification of the rule that no liability attaches where the instrumentality such as a county, city, or a school district is acting solely in a governmental capacity. A careful analysis of the allegations of the complaint here compels the conclusion that the defendants were acting in this instance in that capacity—that is, in a governmental capacity.

A public school system is provided for in our Constitution (section 1, Article XI). The trustees of a school district may issue bonds for the purpose of constructing a gymnasium (Chapter 147, Laws of 1927, sec. 1224.1, Rev. Codes of 1935).

The evolution of our common school system is most interesting and that system has contributed no little to the development and stability of this nation. We have come to regard education— not as a development of a part of the faculties, but of all of them—the intellectual, the moral, as well as the physical. (Mt. Herman Boys' School v. Gill, 145 Mass. 139, 146, 13 N.E. 354, 357). In order to make effective our conclusions in that
respect we have authorized the proper officers of a school district to expend our money in the construction of a gymnasium. A part of that physical training consists in the playing of games—basket ball among others. Because some are better able to coordinate the action of the different members of the body, they are more adept at playing games than are others; but with basket ball, as in all other games, practice makes perfect.

It is a matter of common knowledge that, in these schools, teams are selected to play against another team or teams of the same school; and that out of all of these are selected those who have acquired the greatest proficiency, and these compose the team which represents the school in contests with teams from other schools in the same general vicinity. In striving to make the first team there is a great rivalry. A spirit of emulation is developed—all of which results in a more complete development of the physical powers. Undoubtedly, one of the elements which stimulate the contestants is that they will be afforded an opportunity of exhibiting their skill in games against their fellows of the same school or against teams of a different school. This, we think, is true, not alone as it pertains to physical sports, but the same may be said of debating teams, or of band concerts, or of exhibitions of the art department of a school. The fact that a band concert is held, or an exhibition of the work of those in the art department of the school had, brings better results in each of these departments. Therefore, we conclude that the basket ball game in question was merely a part of the program of physical education of the school; and consequently, the defendants were exercising governmental functions in connection therewith.

Counsel for plaintiff emphasize the fact that an admission fee was charged and assert that because such charge was made, the activity is removed from the field of governmental functions. With that we cannot agree. Little if any difference does it make whether the admission fee thus collected went into the school fund, or whether the expense of conducting this game of basket ball was paid from general taxation. The result is the same. It advances the purpose of physical education. That is a part of the governmental functions of the school district and of its trustees. . . . .
We reaffirm the rule announced in the case of Perkins v. Trask, supra.

Neither are the members of the board individually liable; this for the reasons set forth in the Perkins case.

The dissenting opinion on the above case of Justice Erickson is important to Montana, because it represents the first dissent on the Supreme Court as to what constitutes a governmental or proprietary function, and may well be indicative of some future decision. It will be noticed, that the case does not involve injury to a pupil. It is quoted here because of its obvious importance to school people. Following is the dissenting opinion of Justice Erickson:

... I dissent. As is indicated in the quotation from Perkins v. Trask, 95 Mont. 1, 23 Pac. (2d) 932, found in the majority opinion, the reason for the rule exempting school districts from tort liability is not generally agreed upon by the authorities. The rule arose, of course, from the old idea that the king could do no wrong, and suit would not lie against the sovereign. The courts of this land have never agreed on any single basis why, in the absence of statute, recovery against the school district cannot be had by reason of its tort. One state (California) has entirely discarded the old rule. (See, also, Kelly v. Board of Education, 191 App. Div. 251, 180 N. Y. Supp. 796.) Most of the states, in attempting to decrease the severity of the rule, have adopted the governmental-proprietary test. This test is an arbitrary one, but the general trend of the decisions is to declare more and more functions proprietary rather than governmental so as to allow recovery. It is now generally agreed that neither logic nor justice supports the general rule which in this case denies recovery to the person injured where she goes for entertainment to a basket ball game sponsored by a school district, while on the other hand for exactly the same injury under the same conditions she could recover if she had gone to a theatre and had been there injured. For a general discussion of the governmental-proprietary test as applied to municipal corporations
in the light of recent decisions, see the article in The Virginia Law Review, 910, and also the article in Harvard Law Review, 437.

This court has in its recent decisions followed the trend of the majority of the courts of this country by applying the governmental-proprietary test liberally so as to permit recovery. The gist of the majority's opinion in this case is that the activity here in question was so closely connected with the historically recognized governmental function of the school district that it partook of the same nature. It seems to me that in the Jacoby case cited in the majority opinion, (Jacoby v. Chouteau County, 112 Mont. 70, 112 Pac. (2d) 1068), and certainly in the Johnson v. City of Billings case, 101 Mont. 462, 54 Pac. (2d) 579, the activity out of which the tort arose was as closely identified with the governmental function, if not more so, than the holding of the public contest which we have in this case. I cannot reconcile the decision in this case with the decisions of those two cases, particularly the more recent one of Jacoby v. Chouteau County, supra.

Rehearing denied November 26, 1943.

Implications to School Districts

The Montana cases cited in this chapter have borne out the general rule that school districts, in their corporate capacity, are not liable for their own negligence or for the negligence of their employees. They have inferred, however, that while this general rule of immunity will apply to cases involving a governmental function, it will not apply if the school district, or the school board, engages in a proprietary function. Justice Erickson's dissenting opinion, quoted above, shows an increasing willingness on the part of the court to consider more functions as being
proprietary in nature.

These cases have also inferred that a school board, or a school board member, may be liable for negligent performance of a ministerial duty. The implications of these cases should demonstrate to school board members in this state that while the general rule of immunity is upheld in Montana, and has been upheld in every one of these cases, the opinions are in many instances not favored by the courts as being entirely just, and that the doctrine of immunity generally rests upon the court's willingness to follow precedent in an effort to let the legislature assume responsibility for enacting remedial legislation.

There has been no legislative action forthcoming on this subject. However, the trend in legislation in some other states has been to allow suits against the district to a limited extent; these statutory exceptions are discussed in more detail in Chapter V. One may well wonder what the effect might be if injured parties, instead of seeking recovery through the courts, were to attempt in any great number to bring their influence to bear upon the legislature in the form of requests for private bills. Certainly the legislature is morally obligated to pass these bills, and the court, if it were to follow precedent, would be obligated to declare these bills constitutional because of the decision in *Mills v. Stewart*.
Implications for Teachers, Administrators and Employees

The absence of any litigation involving teachers for pupil injury in this state is probably explainable on the ground that due to the average school teacher's income satisfaction of any judgment might be difficult. Montana Courts, however, have stated rather clearly in Mills v. Stewart, 76 Mont. 429, 247 Pac. 332, if the plaintiff's injuries were the result of negligence on the part of the person responsible for the care and management of the dormitory building, the plaintiff would have a valid legal claim which he might enforce in an action at law.

This line of reasoning would seem to be quite applicable to any case which might arise involving the negligence of a school administrator, or teacher in charge of a dormitory, or a janitor in charge of school buildings.

In view of the fact that teachers' salaries, and school employees' salaries in general have been increasing, and in view of the fact that the Montana court to date has not allowed satisfaction against the district, (unless remedial legislation is passed by the state legislature) school people might reasonably expect to be sued more frequently in the future than in the past. The question arises as to what is expected of a teacher or administrator by way of
supervision. The *Perkins v. Trask* case was not against a board, so the question was never clearly decided as to whether failure to supervise a swimming pool constituted negligence on the part of a teacher, however, the wording of the court infers that it did. The Montana court would undoubtedly have to look to other jurisdictions.

It is obvious, however, that a duty exists to provide some sort of supervision over pupils in school or on the playground.¹

The most frequently occurring type of case concerns accidents which have happened in the course of physical training activities.

A football coach, for example, is protected to some extent from injuries that might happen to one of his players in the course of a game by virtue of the fact that there is an assumption of risk there, also by virtue of the fact that it is customary in this state for schools to require pupils engaged in competitive athletics to take out insurance on their own behalf. The implications of the common law, however are quite clear that this assumption of risk does not apply to activities engaged in in a regular physical education class or "gym period".

The case of the New York teacher who allowed the boys to box, without warning or instruction, stands as a warning to physical education instructors. As a general rule an

instructor in physical education may be liable if he requires
the performance of any activity on the part of a pupil which
results in an injury to that pupil, if the injury was a for-
seeable result of the activity. In brief, he has no right
to require the performance of a task which is beyond the ob-
vvious physical capacity of the pupil.

As to the liability of administrators for physical
education facilities, it may be generally stated that many
states hold them responsible for the inspection of such fa-
cilities, to the extent that no obviously dangerous condi-
tions exist. Rosenfield\(^1\) cites a case which may be of par-
ticular interest to over-zealous football coaches. The case
concerned a football coach who knowingly sent an injured
player back into the game. He was declared negligent for
doing so and held liable, and moreover, the court declared,
that if he did not know of the injury, he was negligent be-
cause of his ignorance of it.

The next area in which there appears to be a con-
siderable amount of litigation concerning pupil injury is
that of transportation. School bus drivers in the State of
Montana are required by law to be bonded, if they are under
an individual contract with the school district. Districts
operating their own busses are required to carry personal
liability insurance on the driver of between ten and fifteen
thousand dollars\(^2\).

\(^1\)Rosenfield, \textit{op. cit.}, II, 13, p. 64.
\(^2\)\textit{School Laws of Montana}, Chapt. 152, Sec. 6.
There have been a number of cases in other jurisdictions brought against school bus drivers. The general conclusions drawn from these cases are that a bus driver's duty of care towards the children on his bus does not end when the student steps away from the bus, particularly if the students have to cross a highway in front of the bus or behind the bus. Failure on the part of the bus driver to warn small children of the danger, has been held to be sufficient cause to hold a bus driver liable for negligence.

Another type of activity which is worth considering, particularly since the activity type of curriculum is gaining in popularity, is that of the duty and liability imposed upon teachers and administrators in the course of undertaking field trips or excursions with students.

Madaline Remmlein\(^1\) points out in her article that in the course of visiting industrial plants, students have been declared to be mere licensees, and must accept the premises as they find them. There appears to be no duty on the part of the owner to make the plant or premises safe. She also points out that while no cases have been brought against teachers to date (1941), the courts have said it was the teacher's responsibility for taking pupils to a dangerous place.

\(^1\)Rosenfield, op. cit., II, 13, p. 77.

\(^2\)Madaline Remmlein, "Excursions are Often Hazardous", Nation's Schools, XXVII (May, 1941), 55.
Another situation which frequently arises in the public schools, is that instance in which a teacher finds himself or herself in the predicament of having to render first aid, and is under an obligation to do so. This does not mean that a teacher has the authority to exercise medical judgment in the treatment of injuries or disease, except in the case of emergency. It is somewhat alarming to note also, that if in the case of an emergency the teacher fails to do anything, she may be liable criminally as well as civilly.

An example of the limitations on first aid treatment are illustrated by the case of the teacher who was held liable when she put a boy's infected hand in a pan of scalding water for ten minutes, the results of which should be obvious.¹

Summary

In summary, it is found that the Montana courts have adopted the traditional common law conception of school immunity, and that they are more and more inclined to rest this doctrine upon the grounds of governmental versus proprietary functions. They conclude, with one dissenting opinion in the latest case, that a school district is not liable for its own negligence or the negligence of its employees.

¹"Accidents to Pupils, National Education Association Research Bulletin, XXV (1948), 32."
Although there have been no cases brought against board members as individuals in this state, the general weight of authority is that they may be liable as individuals the same as any teacher or administrator, but that the occasion for a board member to be acting in such a capacity in respect to pupils would be rare.

Teachers, administrators and other employees of school districts are regarded in the same general category as other individuals, but may enjoy certain limited privileges in respect to disciplinary measures. It may be added, that the courts, as a matter of public policy, are sometimes reluctant to declare a teacher negligent because of the very nature of educational work, which entails a heavy obligation to expose oneself to situations fraught with possibilities for injuries to small children.

There is nothing in the dicta of the Montana cases, however, to reassure teachers that the Montana court would view a teacher's negligence or an administrator's negligence in failing to provide inspection or supervision as being unique or an exception to the general rules of tort liability.
CHAPTER V

COMPARISON OF THE MONTANA POSITION REGARDING LIABILITY WITH OTHER STATES

It has already been stated that the majority of the states of the union have followed the common law rule in regards to tort immunity. Only seven states have enacted any form of legislation to change the common law regarding tort immunity. These states are: California, Washington, Oregon, Minnesota, New York, New Jersey and Connecticut.

The California law expressly permits suits against the district for the negligence of the officers or employees.

In the State of Washington, immunity from suit has been voided by a law. The permission is limited, however, in that the statute expressly forbids suits based on injuries connected with parks, playgrounds, field houses, athletic apparatus or appliances, or manual training equipment.

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3 Redfield v. School District, 92 Pac. 770 (1907).

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Minnesota passed a law in 1873 which was supposed to allow suits against school districts for the negligence of their employees; however, a subsequent decision of a Minnesota court held that the statute applied only to damages to property caused by a breach of duty by school officers, and did not change the rule of immunity\(^1\).

Oregon has had a similar experience to that of Minnesota, in having the teeth taken out of the law by judicial interpretation\(^2\).

The next interesting type of statute which has been effective in reducing the harshness of the governmental immunity rule has been the so called **save harmless** statutes found in Connecticut, New York and New Jersey\(^3\).

In this type of statutory provision, the law states that school funds may and will be used to reimburse teachers who are sued because of their negligence in the course of their duties. New York has qualified its statute to the extent that it "saves harmless" from liability teachers and administrators only in districts of less than one million population, and in larger districts it apparently protects all employees.

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\(^1\) Bank v. Brainer School District 51, 51 \(\ldots\) 814 (1892).

\(^2\) Antin vs. Union High School District No. 2, 280 Pac. 664, (1929).

\(^3\) Cumulative Supplement to Connecticut Statutes, 234h-2361.

New York Education Law, Sec. 569a.
New Jersey Statutes Annotated, Sec. 13:5-50.2.
Frequently in the school laws of various states are found provisions that require the drivers of school busses to carry liability insurance, or if the bus is under contract, liability insurance must be carried by the district. Montana has such a provision in its school laws.

Another method frequently employed by socially minded school districts throughout the United States has been the taking out of liability insurance to protect the district in case of pupil injury. The legality of this insurance has been questioned in many states, and has been rejected by the courts of West Virginia and North Carolina. The Montana Attorney General, Arnold H. Olsen, rendered an opinion in 1951 on this subject to the effect that: "School district boards of trustees have no authority to expend school district funds to contract for liability insurance".

There is some valid criticism of this method for, if the common law doctrine of immunity were applied, it would be very easy for an insurance company to claim that there is no need for it to pay since no liability exists in the eyes of the law.

Many insurance policies of this nature have had the

1School Laws of Montana, 1949, Chap. 152, Sec. 6.
2Rosenfield, op. cit., p. 124.
3Montana Attorney General's Opinions, XXIV (October 19, 1951), Opinion No. 43.
specific clause written in them that the insurance company will not raise governmental immunity as a defense.

The overall picture of school district liability may be summed up by saying that the only states which have at present conceded, by legislation or judicial interpretation, the changing of the common law doctrine, have been California and Washington. In the remaining forty-six states, the common law doctrine still applies, but the severity of it has been lessened in Connecticut, New York and New Jersey. Minnesota and Oregon have attempted by legislation to change this rule, but subsequent judicial interpretations have practically nullified the effect of their laws. As it stands at the present time, California is the only state where governmental immunity has been removed to the extent that a pupil or his parents may recover from the school district with the same ease they could recover from a private corporation.

New York has accomplished this by the "save harmless" statute, but has not actually declared that the common law rule does not exist.

One thing may be noted with respect to the Montana judicial decisions concerning this subject, Montana decisions have been consistent, and they have relied, along with the majority of states, on the common law rule. They have declared that the statute to sue and be sued does not affect a school district, and would probably decide that the provision in the school law requiring bus drivers for school districts to carry liability insurance would not in any way be admissible
of liability on the part of Montana school districts.

The general trend throughout the United States has been to lessen the severity of the common law rule. This has been done by a variety of methods, most of which have been discussed in this chapter. One of the methods has been the use of specific statutory provisions that school districts are liable. Another method discussed, has been the so called save harmless statutes. Another method not discussed here, because of its use in the State of Washington, has been practically nullified by subsequent decisions of the Washington court, are the safe place statutes. Along with this general trend, it should be noted that the Federal Government itself has now consented by statute to allow itself to be sued in tort.1

With reference to teachers and employees, the situation is universally similar, the only exception being the brief Iowa experiment.2

It should be added, that Washington, New York and California, during the last ten years, have all had an exceedingly large amount of litigation concerning injuries to pupils. In view of the fact that these are heavily populated states, it is difficult to make inferences from the number of cases found; however, one might conjecture that it is possible these states, in their effort to provide a just remedy to the public, have subjected themselves to a

1Federal Tort Claims Act, 1943.
2Supra, p. 30.
tremendous expense in having to provide funds to satisfy judgments and damage suits, or reimburse teachers who are sued.
CHAPTER VI

SUMMARY AND CONCLUSION

The problem has been defined as that of ascertaining the status of liability on the part of Montana school districts and employees for the injury of pupils. It can be said that Montana is a typical state in its legal decisions on this matter. For many years, the courts of various states have voiced their disapproval of the common law doctrine of district immunity. Regardless of wording, however, few courts have ever taken it upon themselves to change the common law by judicial interpretation.

Some judges have reasoned that since the common law "grew up" in the courts, and was evolved by the judicial branch, it is not only the perogative but the obligation of the courts to change the law.

Regardless of the dicta of cases, however, the courts in general have steadfastly adhered to the doctrine of immunity.

In two states, they went so far with their decisions as to practically nullify the effect of a statute which was probably intended to abrogate the old common law rule.

The problem of school district immunity has been discussed at great length in comparison to the time devoted to
employee liability, because the ability to reimburse an injured pupil or his parents must generally come from a larger bank account than is possessed by most public school employees.

Strong legal and moral arguments may be presented for upholding this doctrine of immunity from suit. First of all, as a matter of sound public policy, it might be considered better to hold those liable whose negligence was personally the cause of an injury. Secondly, is it a justifiable expenditure of public funds or taxpayers' money to reimburse one particular member of that public? Thirdly, would the abrogation of this rule bring a multitude of so-called "smart money" suits against the public treasury?

The arguments against holding the district immune from suit for the torts of its agents are both academic and practical. On the academic side, it may be said that any line of legal reasoning which has as its basis a phraseology (the king can do no wrong) reminiscent of the divine right of kings, has no place in a republican form of government which has dedicated itself to democratic philosophies. It could be further argued, that if the federal government now allows itself to be sued, by what moral or logical reason does the state government continue to hide behind its immunity.

The law has drawn a fine distinction between those obligations arising out of the law of contracts and those arising from injury to the person or property. It is difficult to understand or appreciate the social worth of a
reasoning process which says in effect that the rights of businessmen shall be held sacred, but the rights of a small child, if he is injured in the course of attending a public school, (which the government insists he attend for the better part of his childhood) are held to be subject and limited by a rule which evolved long before the funds of a state were ever considered public funds.

It has been pointed out that a great many cases have been brought against school districts, teachers, administrators, and school employees in the last few years. In those states where the school district is liable for its own torts and the torts of its agents, it has caused, without a doubt, a sizeable expenditure of public funds.

There are several aspects of the situation which cannot be measured in financial terms. Of primary consideration, is the matter of public relations. A lawsuit brought against the district or a teacher is probably one of the most detrimental occurrences which can befall a school system or an individual associating with that system. If the school district hides behind its immunity, it leaves the teacher to pay, if the teacher cannot pay and no judgment can be obtained, hard feelings arise on the part of the injured party or his parents. On the other hand, if either the school district or one of its teachers are found negligent by a court and held liable for negligence, such publicity may be used by those in any community, who wish to see a change in school administration or the board, as an affidavit testifying to the "poor
job" the school is supposedly doing.

When these two factors, financial cost and detrimental publicity, are coupled with the moral issue, that of the right of a young child or its parents to be reimbursed for injuries suffered due to the negligence of someone else, the primary consideration as it pertains to school people should be, "How can we best avoid those situations which could lead not to liability necessarily, but injury or harm to the pupil?"

Progressive educators are advocating more and more the "experience curriculum". If this philosophy of educational method continues or grows in popularity, by its very nature, it will expose students of all ages to out-of-class activities, activities which by their very nature would expose a person to a greater risk of harm than the heretofore prosaic life associated with the traditional classroom.

This work has not attempted to list specific situations in which a school board member or employee is or is not liable for negligence. No two situations are probably exactly alike, and it is frequently a matter for the jury, rather than the law to decide whether a person or a corporation acted in a negligent manner. It has attempted to render a general background in the field as to the reasoning engaged in by courts of law in applying the law of torts to school districts and their employees.

A school board member in Montana should be aware that while he is generally immune from suit, as a member of
that body, for the negligence of the administrator or teacher, it is extremely bad politics to have a suit brought against a board. Secondly, that this immunity applies only if the activity engaged in by the school board is of a governmental nature. It does not apply if the activity being engaged in is of a proprietary nature, or one in which the board itself would realize a profit or gain. One further word of caution should be noted, in that this rule of immunity does not, nor has it ever, applied to a member of a school board acting as an individual and not as a corporate member of that board.

To administrators, the problem has its political connotations similar to those of a board member. In addition to this, courts and juries have consistently supported the view that a duty to supervise and correct known dangerous conditions is an obligation inherent to the position.

To teachers, a study of this type should indicate that regardless of phrases such as "district immunity", no such immunity applies to them, and that to avoid situations in which they may become liable, they must utilize, in the course of their daily work, a great deal of common sense tempered by the knowledge that the law and the public expect prudent behavior commensurate with their position.
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