THE PHYSICAL EDUCATION TEACHER AND TORT

by

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Chapter 1

INTRODUCTION

PURPOSE OF THE STUDY

The primary reason for this study is based upon a constant thought of what the responsibilities of a teacher really are for the protection of the students from injury in physical education classes and what the consequences might be if sued for negligence in duty and what legal defenses would be available in such a case.

Having taught for two years and now planning to resume teaching after fifteen years, one has an interest in knowing something about facing a suit for tort. This interest was sharpened by a discussion in a class of my major advisor, Professor Ray Wauthier. In conferring with him later it was suggested that a study be made of tort liability of teachers and attempt to center it on the area of physical education, as little has been done along this line. The suggestion served as the final step in the decision to learn something of vital importance to the writer who knew very little about the matter and as a teacher who might have a fundamental role to play in preventing hundreds of children from experiencing physical injury.

RESOURCE MATERIAL AND PROCEDURE

The main reliance for information has been on reports of court cases with chief emphasis upon courts of appellate jurisdiction since these decisions are usually of binding authority. The Kansas State University library is somewhat deficient in having some of the chief publications of case reports--for example, The American Digest System and The National Reporter System. The

latter is divided into nine geographical sections for publication. Kansas is included in the Pacific Reporter section but the library does not subscribe for this section but does have a complete file of the Southwestern Reporter, which includes Arkansas, Kentucky, Missouri, Tennessee, and Texas. It would be helpful to use this tool as the Reporter System includes all cases from all courts in all states and gives the actual opinion of the court in each case. Another deficiency of the Kansas State library is the Annotated Reports. Here one may read only the leading cases, which would have been helpful. The last series of Annotated Reports is published under the title of American Law Reports, abbreviated as A. L. R. The Riley County judge's office very kindly made appropriate volumes of A. L. R. available from the county court's library. One other library lack which would have helped in this report is American Jurisprudence. This publication is in encyclopedic form and contains only the leading cases. Each topic is well outlined and gives copious footnotes to cases dealing with each topic. Not having a law school at Kansas State is ample justification for the library not subscribing for most of these legal resources of information.

With these library limitations for work on the topic, the researcher relied on publications that are very helpful but required a considerable amount of time to trace cases and in the end has questions whether the last decision on the point in question has been found.

Although the library does not have the National Reporter System and the Annotated Reports, it does have Shepard's Citation of Cases for Kansas cases. This is a separate volume from the enlarged citation of Shepard's Citations which follows the National Reporter System and in this volume only the Kansas cases are cited.

The greatest amount of help has been received from Corpus Juris Secundum (abbreviated C. J. S.). This publication corresponds to American Jurisprudence but is more comprehensive and detailed and more time consuming to pursue the details to get to the leading cases. The Kansas Supreme Court Reports were used quite extensively and the United States Supreme Court Reports were resorted to when necessary.

The most valuable source of information about the laws of Kansas was Kansas Statutes Annotated published under the authority of the legislature by the reviser of statutes. If necessary, this material was supplemented by the Session Laws of Kansas. There is also a volume of school laws entitled 1968 School Laws of Kansas compiled by the attorney for the Department of Education. School laws since 1968 must be found in the Kansas Statutes Annotated or the Session Laws.

Secondary source materials were used to provide background material and to gain general information about the subject for a novice who went into the whole question with a minimum of knowledge about it. Secondary material was also used to provide leads for using the source materials and on the basis of both kinds of resource materials to weave the material together to compose this paper and to draw conclusions. Some of the books considered secondary material had briefs of court cases and summaries of laws to supplement the topics under discussion, so hence they were primary sources as well as secondary. The interlibrary loan department of the library was most useful and accommodating in providing useful books that were not available in the Kansas State library.

GENERAL OBSERVATIONS AND SCHEME OF ORGANIZATION

An acceptable and satisfactory definition of tort is difficult to find. The numerous attempts to define the term have succeeded only in achieving such a broad concept of meaning that it includes other matters than torts or are so narrow as to leave out some torts themselves. The word is derived from the Latin word "tortus" or "twisted." Hence, one may say that the word means twisted, or crooked, not straight. At one time tort was commonly used in the English language as meaning "wrong." It faded out of common usage but remained in the law, and acquired a technical meaning.

From a broad point of view, "today a tort is a civil wrong, other than a violation of contract, for which the court will provide a remedy in the form of an action for damages."[1] It is well to note that a tort is not a crime and is not necessarily concerned with property rights or problems of government. The law of tort, however, does pervade nearly every area of law, including the area of education in which the teacher plays such a vital role in his responsibilities for looking after the welfare of scores of students with whom he is associated.

The literature, state statutes, and court decisions on the question of teacher tort liability for student injury are of such a nature that the researcher is faced with considerable complexity because of the meaning of tort. There is such a difference of viewpoints on the part of authorities and the courts that the researcher is quite perplexed in her initial inquiry. As the study progresses, one absolute certainty emerges and that is <u>uncertainty</u> as to whether a teacher of physical education can be held responsible for a student's injury in any particular case that may come before the court. The basic reason for this uncertainty is that the plaintiff usually brings suit on

the grounds that the teacher has been negligent. Negligence is not defined by law but is decided on the basis of testimony presented in court and the jury and/or judge will make the decision as to whether the teacher may be held liable for damages. It is therefore possible that a similar kind of event resulting in student injury will be decided in one court that the teacher was negligent and in another court will be acquitted. It also seems possible that a given court might decide a case differently from what it did if the testimony had been heard at a different time.[2]

The states of the United States play a role in the matter of teacher tort liability because of long-time immunity from tort liability and also because school districts are controlled by the State and are legally considered governmental agencies.

From a study of the literature on the subject and from the research pursued, it appears that the most logical organization for a study of tort liability and the teacher is to begin with a study of school district immunity from tort. It is basic to the understanding of teacher tort liability to first consider in some detail the background, changes, and present situation today with respect to the traditional common-law doctrine of governmental immunity because the school district is a governmental agency and is the employer of the teacher. The district, therefore, has a vital role to play in protecting or not protecting the teacher from tort. In this role, the school district is controlled by the State legislature which can determine whether or not the teacher is to be liable for tort or protected in his employment from liability damages. The study of the question of school district immunity constitutes Chapter 2 of this paper.

This presentation is then followed in the next three chapters by a comprehensive investigation of the teacher and tort liability--grounds for being charged with tort, the teacher's defenses against tort, and his protections from tort, if made available. The sixth and last chapter closes with some conclusions drawn from this study.

Chapter 2

TORT IMMUNITY OF SCHOOL DISTRICTS

HISTORICAL DEVELOPMENT

A well-established principle of common law is that school districts and school boards in the exercise of their governmental functions are not liable in tort for injuries arising from the negligent acts of the board members or their employees. This principle of common law has its roots in the doctrines of governmental immunity from tort. A long list of court cases holding that a school district is an agency of the State and under common law is not therefore, in the absence of a statute imposing such liability, liable for torts committed by its members or employees. Based on the common law theory, a school board in its corporate capacity cannot commit a wrong or tort.

The general rule of nonliability relieves the board from a legal responsibility for injuries to students suffered in connection with their attendance in physical education or any other classes. These injuries may arise from the dangerous conditions, or improper construction of buildings, unsuitable or dangerous equipment, dangerous conditions of school grounds, unsafe transportation of students, and the negligent acts of officers, agents, or employees.

The common law doctrine of governmental immunity has its roots back in medieval times in the idea that "The King can do no wrong." This doctrine was incorporated into English common law and in the United States appears to stem from two basic cases. The original case was decided in England in the case of Russell and Others v. The Men Dwelling in the County of Devon, 100 Eng. Rep. 2 T. R. 667 (1788)[1] and the principle of the decision was adopted by

the courts in the United States, the first case being Ephraim Mower v. The Inhabitants of Leicester, Supreme Judicial Court of Massachusetts, 9 Mass. 237 (1812).[2] In the English case Russell tried to sue the male inhabitants of Devon for damages to his wagon when it went through a bridge being out of repair. The court, however, decided against him on the grounds that only the legislature could impose liability of this kind. In the Massachusetts case, Mower's horse was killed by stepping in a hole in the Leicester bridge and he sued for damages for the loss of his horse. The court held that the town had no notice of the defect and that quasi-corporations are not liable for such neglect under the common law.

Later in the nineteenth century, the Supreme Court of the United States extended the immunity to suits against the State by its own citizens. This completely abolished from federal court jurisdiction any actions against the states by their own citizens when the particular state had not consented to the suit.[3] Thus governmental immunity became thoroughly imbued in the code of laws at the federal and state levels. The progression of the immunity doctrine seeped down through the local governmental levels and agencies and in this respect each state had its own legal history of governmental immunity.[4]

In following the precedents of the English and Massachusetts cases, the doctrine of governmental tort immunity, and, therefore, of school districts, came to rest on the following bases:

1. Essentially the board of education is a State agency in that it performs a governmental function as a creature of the State legislature--that is, it has only those powers granted by the State legislature--and like the State itself is not liable in its corporate capacity unless made so specifically by statute.

2. Courts have also pointed out that school districts' money funds are trust funds and are not intended to be raised from tax sources to pay for damages for injuries. In other words, payment of claims for damages are illegal expenditures of public funds since the public receives no benefit.
3. Courts have pointed out that the relation of master and servant does not exist as to make the board of education liable for the negligence of its employees--that is, the doctrine of respondeat superior, where the master is liable for the acts of his servant does not apply.
4. Courts have also held that abolition of immunity would cause a large number of cases putting a financial burden on the school district.
5. Courts have also based their decisions on the fact that school board members in the performance of their duties exercise a public function and are an agency for the public welfare for which they receive no profit or corporate benefit.

A case that is often cited to indicate the position of most courts on the tort liability of school districts is McGraw v. Rural High School District No. 1, 120 Kan. 413 (1926). A workman had been injured while constructing a school building and was seeking damages from the board of education. The plaintiff contended that the law of master and servant was applicable in his case. The court, however, denied this contention replying that the school district was performing a governmental function--"a sovereign function, to be exercised under immunity of the sovereign from tort liability." (Underlining the writer's.)

From the above bases for governmental immunity, it is clear that as a general rule a school district is not liable for injuries to students in the absence of a statute imposing liability. Two reasons were presented in the case of Chicago v. Chicago[5] when the court said: "There are two reasons for this rule: (1) that a school board acts nolens volens (with or without consent) as an agent of the State, performing a purely public or governmental duty imposed upon it by law, for the benefit of the public and for the performance of which it receives no profit or advantage; (2) since the property which it possesses is held in trust, the payment of judgments in tort would amount to a diversion, or, in some cases a destruction of that trust."[6] A third and older reason, which has been stated previously, is the traditional immunity from tort action.

The principle of governmental immunity when injured students and their parents have sued school districts for damages has been upheld by court decisions by the hundreds over the country. There is no redress at common law. No school district can accept liability voluntarily and waive its immunity. The State can do so for itself or for its subdivisions, but a school district is a subordinate unit without power to make itself liable. This is the general rule. Many instances of injuries to students and even death have occurred as presented in tort cases cited by Edwards[7] when school districts have been held immune from liability. Other writers on the subject agree and cite such cases. Some of these cases were: A flagpole erected on school grounds fell and injured a student; a student was injured by a jigsaw; a pupil was drowned in a swimming pool operated by the school; a pupil was injured as a result of the negligence of a bus driver; a student was injured by a motor truck negligently driven by an employee of the board of education.[8]

Examples of cases pertaining to physical education can also be found where a school district was held not liable for the negligence of its officers, agents, and employees. In other words, the school district will not be liable for the negligence of teachers, instructors, or other persons in charge of physical education.[9] Under the common law rule, school districts are exempt from liabilities for injuries arising in the performance of governmental functions and physical education is held to be a governmental function because it is a part of the school program of education; therefore, a student injured in the course of this nature cannot ordinarily recover damages from the school district.[10] A district may also be exonerated for noncontractual acts or omissions relating to any park, playground, fieldhouse, athletic apparatus, or appliance.[11]

MODIFICATIONS

The doctrine of nonliability for tort which is applicable to any agency of the State in its performance of governmental functions has been subject to increasing criticism in recent times. Several arguments are being directed against governmental immunity not only as it relates to all functions of government but also to the function of education as directed by school districts. Some people contend that it is a basic concept underlying the whole law of tort today that liability follows negligence and that individuals and corporations are responsible for the negligence of their agents and employees who are performing the duties of their employment. The doctrine of governmental immunity runs directly contrary to that basic concept.[12] Other people argue that the old doctrine is illogical and unjust.[13] A number of courts have expressed dissatisfaction with it on the grounds of modern social policy.[14]

It has been a long- and established-principle that if the doctrine of governmental immunity is to be changed the courts take the position that the legislature should do it. The Supreme Court of Kansas expressed the view

apparently entertained by most courts: "If the doctrine of State immunity in tort survives by virtue of antiquity alone, it is an historical anachronism . . . and works injustice to everybody concerned. . . . the legislature should abrogate. But the legislature must make the change in policy, not the courts."[15]

In the past several years, courts in some states have either abrogated the principle of governmental immunity or have modified it by judicial decree. It seems obvious that a court may abrogate a common-law principle, although many courts have continued to hold that it should be done by legislative enactment. Within the last few years, however, Supreme Courts in several states have abrogated the common-law principle of governmental immunity. One of these states is Illinois and the opinion of the Supreme Court of that state merits lengthy consideration as it expresses the viewpoints of laymen and jurists alike who are critical of traditional governmental immunity.[16] This decision stands as a watershed between the old common-law rule and the trend that apparently is going on at present. The decision of the Illinois court was upheld by the United States Supreme Court in 1959 and a brief of the case follows:

> In this case the plaintiff, Thomas Molitor, a minor, through his father, brought suit against the Kaneland Community Unit District School No. 302, for personal injuries incurred when the school bus in which he was riding left the road, allegedly as a result of the driver's negligence, hit a culvert, exploded, and burned. The school district sought a motion to dismiss the suit on the grounds a school district is immune from liability for tort and this motion was sustained by the trial court. The case was appealed to the appellate court. The plaintiff asked the court to abolish the rule of immunity in toto, or to find it inapplicable to a school district such as Kaneland which was organized through the voluntary acts of petition and election by the voters of the district, as contrasted with a school district created nolens volens by the State. The court held that no distinction can be drawn between a community type of school district and any other type. So the

court set itself to decide on the question of whether or not a school district, in light of modern developments, should be held immune from liability in a case like this. The court then reviewed the history of recent legislation by the State legislature in which it made the State and some of its agencies, including cities and villages, liable to damages in tort in some kinds of cases. The Illinois School Code authorized bus insurance so that a person injured may collect insurance if the school district carried such insurance but if it didn't could it be held immune from liability? The difficulty with this legislation is that it curtails the judicial doctrine in that it allows each school district to determine for itself whether, and to what extent, it will be financially responsible for the wrongs inflicted by it. Today individuals and corporations are responsible for the negligence of their agents and employees acting in the course of their employment. The doctrine of governmental immunity runs directly counter to this basic concept. The original basis of the immunity rule has been called a "survival of the medieval idea that the sovereign can do no wrong." The court held that the school district immunity cannot be justified on this theory.

The court referred to the other chief reason in support of the immunity rule in the more recent cases in the protection of public funds and public property. The court did not believe that in this present day and age, when public education constitutes one of the biggest businesses in the country, that school immunity can be justified on the protection-of-the-public-funds theory. So the court concluded that "the rule of school district tort immunity was unjust, unsupported by any valid reason, and had no rightful place in modern-day society."

The court then dealt with the contention of the defendant that if immunity was to be abolished it must be by legislative action. The court disagreed. The doctrine of school district immunity was created by the court and now having found the doctrine to be unsound and unjust under present conditions, it has not only the power, but the duty, to abolish that immunity.

The court also pointed out that the doctrine of stare decisis (upholding precedent) is not an inflexible rule requiring the court to blindly follow precedents and that when it appears that public and social needs require a departure from prior decisions, it is the court's duty as a court of last resort to overrule those decisions and establish a rule consonant with the present-day concept of right and justice.

The court then held that in this case the school district is liable in tort for the negligence of the employee.

The courts of New York have to some degree departed from the common law immunity from tort. In that state, the courts have been, in the absence of a statute providing for liability, repeatedly holding a school board liable in its corporate capacity for the negligent performance of duties imposed by law on the board itself. Recently the State of New York has by statute made boards of education in some classes of school districts liable for damages arising out of the negligence of their employees. Similarly, in California and Washington the common-law immunity from tort has been repealed by statute and in many cases boards of education have been held liable for injuries growing out of negligence of their agents and employees. Several cases may be cited here to indicate the change in the common-law rule: Weber v. State, 53 N. Y. S. 2d 598;[18] Charonnat v. San Francisco Unified School District, 56 Calif. App. 2d 840;[19] Eckerson v. Ford's Prairie School District No. 11, 3 Wash. 2d 475.[20]

CIRCUMVENTING IMMUNITY

Since courts have been reluctant to totally abrogate immunity, they have sought ways to avoid directly confronting the issue. One way is that some courts hold that school districts operate in a dual capacity--they perform functions which are strictly governmental in nature and also occasionally perform proprietary functions. The latter functions are those that schools are not statutorily required to perform, or they may be carried on by private enterprise, or they may be means of raising money. An example of a case in which the court held that the school district was liable on the basis of performing a proprietary function was Morris v. School District[21] in Pennsylvania. The school district conducted a summer recreation program open to the public

upon the payment of an admission fee. The program was not a part of the regular school curriculum. Constance Morris, a minor, was enrolled in the program and drowned while playing in the water of the swimming pool. The girl's parents claimed there had been lack of supervision and rough and disorderly play in the water. The defense used the time-honored doctrine of sovereign immunity but the court held the activity was not governmental but proprietary and held the school district liable for the negligence of its employees.

Another device used by the courts is to hold that a school board is liable for the maintenance of a nuisance. Suit was brought by some neighbors against the district school in Butler County, Kansas, because of playing softball on school property. The plaintiffs contended that the use of the public address system, working the playing field so as to cause dust to be blown on their premises, and the use of floodlights later than 10:00 o'clock p. m. constituted a nuisance. The court held that playing softball was not a nuisance per se but granted an injunction against those acts claimed by the plaintiffs to be a nuisance.[22]

Closely related to the maintenance of a nuisance is acts of trespass committed by a board of education. In Ferris v. Board of Education[23] the Supreme Court of Michigan held that the plaintiff had cause for receiving damages from the school board because the roof of the schoolhouse had no guards or projections to prevent ice and snow from falling on the house and lot occupied by the plaintiff.[24]

Courts have used these devices to modify the common-law principle of governmental immunity but, for the most part, declare that any abrogation of a common-law rule must be done by the legislature. Probably because of the modifications made by some State legislatures and of the growing popular

criticisms against immunity, some State legislatures began to modify the traditional common-law rule by statute. Some of the enactments have not been interpreted by the courts in such a way as to give judicial aid to injured students, because being in abrogation of common law, they are strictly construed.[25]

"Safe place" statutes have been enacted in a few states to cover building and grounds. Courts have been strict in applying these laws to school districts and there has been considerable inconsistency among them. Even with "safe place" laws improper construction of a school building or dangerous conditions on the school grounds, or any injury occasioned by the negligence of the school board or its employees do not necessarily make a school board liable for injuries. Remmlein states that there are hundreds of court cases which uphold the theory of immunity even under "safe place" statutes.[26] On the other hand, there does seem to be some theoretical trend toward the modification and even abolition of the theory of nonliability.

Another modification of the nonliability principle of the school district is that some State legislatures permit school districts to buy liability insurance for the protection of their employees and students. These statutes vary in that some states place no limitations on the nature and extent of the insurance. More states, however, require the board of education to establish the amount of money damage for the insurance company to pay. Several states permit districts to purchase liability insurance for certain areas of the educational program, such as bus transportation of students, shop practices, and others. Any type of insurance program must be authorized by legislative enactment; a school district does not have the authority as a subordinate agency of the State to buy a liability insurance program of its own.[27]

THE SITUATION TODAY

According to Knaak in his study School District Tort Liability in the 70's[28] the fifty states were grouped according to their status of tort immunity for school districts in 1969. In one group there were the states that still held to the traditional sovereign immunity doctrine: Alabama, Florida, Kansas, Mississippi, South Dakota, Tennessee, and Texas.

In another group were those states still holding to general immunity from liability for governmental functions--that is, functions imposed upon the school district as contrasted to proprietary functions. Naturally, teaching students is a governmental function, so the physical education teacher would be included here. These states were Alaska, Colorado, Delaware, Georgia, Kentucky, Louisiana, Maine, Maryland, Michigan, Missouri, Nebraska, New Hampshire, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Virginia, and West Virginia.

The third group of states were permitted to buy liability insurance with immunity abrogated up to the amount of the insurance. In those school districts which were permitted to buy insurance but did not purchase insurance, courts have held them to be immune from liability. Those that did purchase insurance were liable only up to the amount of the insurance. These states were Arkansas, Idaho, Indiana, Minnesota, Montana, New Mexico, North Carolina, North Dakota, Vermont, and Wyoming.

The fourth group of states were those which may be said to have abrogated immunity from tort liability. Abrogation does not necessarily mean complete freedom from tort liability, because in some instances there are dollar limits set on claims and in others there are time limits for filing claims. But as a group, these states are the most liable: Arizona, California, Hawaii,

Illinois, Iowa, Massachusetts, Nevada, New Jersey, New York, Oregon, Utah, Washington, and Wisconsin.

Since Knaak's study some states have shifted groups. Florida has moved from the first group to the last group of abrogated immunity and Nebraska from the second group of governmental immunity to abrogation.[29] The Minnesota legislature has also enacted a law, after the Supreme Court of the state abrogated by court decree the governmental immunity concept for the school districts,[30] providing that the doctrine of governmental immunity from liability is applicable to all school districts.[31] This action of Minnesota carries its status of tort liability from the third group of permitting the purchase of insurance to the fourth group of states providing for relative freedom from tort immunity.

THE STATUS OF KANSAS

The State of Kansas has held to a consistent position on governmental immunity until very recent years. The first case in Kansas recognizing the immunity rule appears to be Eikenberry v. Township of Bazaar, 22 Kan. 389 in 1879.[32] Since there is no constitutional provision or legislative statute accepting the doctrine, its origin in this state can be accurately described as judicial in nature. The legislature has recognized the doctrine and has legislated sporadically with respect to it, but the doctrine's existence is credited to the courts.

Since the original case in 1879, the line of judicial decisions has remained quite consistent.[33] Beginning in the 1950's, however, although upholding immunity, the courts have clearly showed disfavor for the doctrine. Many courts have indicated that justice required restricting rather than ex-

panding the rule of immunity. The courts began to make some distinction between governmental and proprietary functions but commonly held that such should be made by legislative enactment.

The Kansas courts' growing disfavor toward the doctrine of governmental immunity was a reflection of the attitude of the courts in other states which this paper has presented and for the same reasons. Government should administer justice against itself. Government is required to pay for private property deliberately taken for public purposes, so should government pay for injuries that result when it deliberately engages in public activities that might cause injuries. The government should accept the doctrine of respondeat superior (master-servant doctrine) as it has some rather dangerous functions to perform. Tanner[34] sums up the failure in Kansas to abrogate immunity not to rationally grounded policies but to (1) legislative and judicial inertia, (2) blind adherence to stare decisis, and (3) unwarranted fear of financial disaster.

The court's growing disfavor with governmental immunity was reflected to a limited extent in legislation. In 1953, the legislature provided[35] that any school district that furnished transportation for its students may purchase motor vehicle liability insurance, driver liability insurance, and passenger medical payments insurance for the protection and benefit of the district, drivers and passengers. In 1963, under Section 74-4707[36] it was made mandatory that any agency of the State purchase motor vehicle liability insurance and in Section 74-4708[37] the State agency securing such insurance waived its governmental immunity from liability for any damage by reason of death or injury to person or property caused by the negligent operation of any motor vehicle when acting within the course of its employment. Such immunity would

extend only to any person sustaining damages or in case of death, by his personal representative, may sue a State agency as provided in the act for the recovery of damages.[38]

In 1968 the State legislature enacted significant legislation related to school district immunity.[39] It was made mandatory for every school district or its contract carrier to purchase motor vehicle liability insurance and medical payments insurance for transportation of students. Most importantly for the teachers, the law provided that on or after January 1, 1970, the board of education of any school district is authorized to purchase public liability and property damage insurance for the protection and benefit of the school district and the officers, agents, teachers, and employees from liability. This insurance would cover any of their acts or omissions arising out of the scope of their services for the school district which shall result in damage or injury. Limits of insurance are set at the rate of $100,000 in case of death, bodily injury, or damage or destruction of property.

The board of education securing such insurance waives its governmental immunity from liability for any damage by reason of death or injury to persons or property proximately caused by the negligent acts of any officer, teacher, or employee of such school district when acting within the scope of his authority or within the course of his employment. Such immunity is to be waived only to the extent of the insurance so obtained. Any school district may incur liability pursuant to this act only with respect to a claim arising after the district has purchased liability insurance and only during the time when the insurance is in effect.

In March, 1970, the State legislature passed laws[40] to the effect that insurance was authorized to be purchased for the purpose of insuring the State

or any county or city, and their officers, employees, and agents against any liability for injuries or damages resulting from any tortious conduct of such officers, employees, or agents arising from the course of their employment. Upon procuring such insurance, the State, county, or city thereby waives its governmental immunity for injuries or damages resulting from the tortious conduct of its officers, employees, or agents during the course of their employment only to the extent of the insurance so obtained. Upon obtaining such insurance, the insurer or insurers thereby waive any defense based upon the governmental immunity of the State, county, or city or their officers, agents, or employees.

The legislative acts of the State of Kansas authorizing the purchase of insurance modified the State's traditional stand to the effect that immunity was abrogated only to the extent of the liability covered by insurance. Furthermore, the authority to purchase insurance was permissive not mandatory and it was up to the local school board or State authorities, or county or city governments to take advantage of this permissiveness if they so desired.

As mentioned above, the court had found the doctrine of governmental immunity in increasing disfavor and while the legislature was enacting legislation permitting the purchase of liability insurance, the court began to make some distinction between proprietary and governmental functions. It, however, still looked primarily to the legislature to make this distinction by statutory enactment.

In July, 1969, a case, Carroll v. Kittle[41] came before the court and here the court broke with the past and openly distinguished governmental functions from proprietary functions. Briefly, the facts of the case were that an oil-rig worker in 1964 caught his arm in a drilling rig severely in-

jurying it. The doctors replanted the partially severed arm. The patient's recovery was progressing satisfactorily until in the early morning of the eighth day when the night resident surgeon found him sitting on the bed with the splints and bandages ripped away. The effects of the medicine, drugs, and other treatment caused a change in the mental condition of the patient making him confused and irrational. The night resident surgeon rewrapped the arm and the incident was officially recorded and noted on the patient's hospital chart.

The patient's name was Wayne Carroll and the attending physician was Dr. Kittle. Mr. Carroll had a private room but was provided no extra care and approximately 48 hours later he was again found sitting in his bed with the bandages and splints torn away as well as part of the arm. Dr. Kittle consulted with a team of doctors at the University Medical Center, where the patient was being treated, and found it necessary to amputate the arm.

In time, Mr. Carroll sued Dr. Kittle and the Board of Regents alleging that the self-inflicted injury resulting in the loss of the plaintiff's arm was directly and proximately caused by the negligence and carelessness of the defendants, their agents, servants, and employees who all contributed to cause the loss of the arm.

The Board of Regents filed a motion claiming immunity from tort as an agency of the State. The trial court sustained the Board of Regents but the plaintiff appealed to the Supreme Court which heard the case in 1969. The issue before the court was whether the doctrine of immunity was applicable. The counsel for the plaintiff recognized that previous cases had been decided in favor of immunity but contended that these decisions had been wrong. The State by operating the Medical Center was carrying on a proprietary function in which millions of dollars yearly were involved. A majority of the court,

by a vote of 4 to 3, agreed that the decisions on the same premises had been made but were wrong and ruled that the State and all its agencies when engaged in proprietary as opposed to governmental activities were no longer immune to tort. Although this ruling did not abrogate the entire doctrine of immunity, it did eliminate one of the more glaring inconsistencies in prior Kansas law--that is, the county and state governments would now share the liability of the cities for tortious conduct while performing proprietary functions.[42]

The next session of the Kansas legislature reacted promptly to the Carroll v. Kittle decision. Kansas Senate Bill No. 465[43] was promptly passed overruling the Carrol decision and state agencies are once more completely immune from tortious acts regardless of the type of activity in which they are engaged. The law, however, does not affect prior Kansas law as it applies to local units and subdivisions of government. Relative to school districts and teachers, the legislation of 1969 is still in effect respecting liability insurance for the protection of teachers and school districts against torts.

Senate Bill 465 keeps Kansas as one of the few states still holding to the old common-law doctrine of governmental immunity with respect to the State government and its agencies.

At the present time, the situation with respect to governmental immunity from tort seems as unclear as it was back in 1937. In that year the United States Supreme Court faced a question of whether the supplying of water to Greater New York for use by the city itself and its inhabitants as being a usual governmental function or an undertaking which cannot be efficiently or safely left to private enterprise. Justice Sutherland in the opinion of the Court said: "There probably is no topic of the law in respect to which decision of the State courts are in greater conflict and confusion than that which

deals with the differentiation between governmental and corporate powers . . . . . ."[44]

A dissenting judge's opinion in a court of original jurisdiction in a Kentucky case which was carried to the State Supreme Court in 1968 had a sense of history as expressed in his opinion. The case arose in a Louisville high school when a student, Geraldine Carr, a junior, was punished quite severely by one of her teachers, William L. Wright. She sued the board of education and the teacher for damages resulting from assault and battery alleged to have been committed against her by Wright while he was acting within the scope of his employment. Both defendants pleaded governmental immunity and each was awarded a summary judgment by the lower court. Miss Carr appealed and from the testimony at the trial, it was evident that Mr. Wright used some strong measures of punishment, and he virtually confessed intentional tort. The appellate court upheld the verdict on the basis that the school district supported the teacher and the higher court upheld the lower court on the basis of the school district being free from tort liability.

In writing a dissenting opinion in the lower court one of the judges included the following words from Abraham Lincoln's First Annual Message to Congress, December 3, 1861:[45]

> Nor is it an answer to say that when the public is ready to right the wrong it will do so through its representatives in the General Assembly. The average man in the street never heard of sovereign immunity and would scarcely believe it if he did. Indeed, it <u>is</u> unbelievable and it is in the name and for the sake of the average citizen that I record this protest against it.
>
> I rest my case on the proposition stated long ago by one of the greatest beings of all times: "It is as much the duty of government to render justice against itself in favor of citizens as it is to administer the same between private individuals."

Chapter 3

TORT LIABILITY OF THE TEACHER

The rule of immunity of school boards, school districts, or other agencies in charge of public schools ordinarily does not extend to school employees. The rule has been applied or recognized that teachers in a public school and other persons with the status of employees or independent contractors are personally liable for their negligence, unless of a statutory enactment providing otherwise.

Generally, most teachers are continually involved in situations which claims for personal liability may be brought against them because of injuries to students. This situation is due to the teacher's day-by-day contact with his students and his obligation to supervise them. It is therefore natural that every teacher sooner or later is confronted by a situation which could result in an alleged claim of being personally liable for injury to a student. In most instances, injuries to students do not result in court cases but the potentiality of liability always exists. A teacher at one time or another, because of various reasons, fails to provide constant supervision of his class. If this were to result in students misbehaving and a student injury would result, the teacher might be charged with negligence. Likewise, a student may be liable if he causes injury to the teacher or another student. As stated above, in most instances no legal action is taken but the potential is present and can be exercised, and the numerous court cases on record attest to the fact that hundreds of teachers have been charged with a tort.

GROUNDS FOR ACTION AGAINST THE TEACHER

Several grounds may be used for legal action against a teacher for committing a tort. The injured party may contend that the action was intentional. An intended act may be due to enmity, maliciousness, or by a good-natured, practical joke. The wrongdoer may be hostile and desire to do harm, or may not plan to injure another but acts intentionally in a way that invades the rights of another. Nevertheless, he commits an act of tort and may be held liable.

An assault is an intentional act. It may be committed even if no physical contact takes place but a threat to strike another if within striking distance is considered assault. For an assault to exist, there must be an overt act or an attempt at an overt act.[1]

Battery occurs when physical contact is made. "It is battery to strike a man while he is asleep, although he does not discover it until afterward; it is an assault to shoot at, frighten him and miss him."[2] Prosser goes on to say that in the ordinary case, both assault and battery are present and that the two terms are so closely associated in common usage that they are generally used together, or regarded as more or less synonymous.[3]

The tort of assault and/or battery has a close relationship with teachers administering corporal punishment to discipline students. The courts all agree that a teacher stands in <u>loco parentis</u> (in place of the parents) with respect to corporal punishment of students. By the act of sending a child to school, the parent delegates to the teachers authority to discipline the students for all offenses against the good order and effective conduct of the school. This is not to say, however, the teacher has the same general rights to punish for all offenses as does the parent. The teacher's right to admin-

ister corporal punishment is restricted to the limits of his jurisdiction and responsibility as a teacher. This right of a teacher, however, may extend to acts committed off the school grounds, as well as to those committed on school premises.[4] There are limits, however, beyond which a teacher may not legally go in inflicting corporal punishment. A teacher who transcends those limits may be held liable in either a civil or a criminal action.

It is difficult to draw a precise distinction between legal and illegal corporal punishment. The courts usually give teachers considerable leeway as to the reasonableness of their actions. Cases involving assault and battery usually result from a teacher's attempt to discipline a student. Courts usually presume the teacher is innocent, and has done his duty until proved otherwise. On the other hand, courts make it clear that a teacher may be guilty of assault and battery if the disciplinary measure was cruel, brutal, or if administered in anger or insolence.[5]

A case illustrating extreme conduct on the part of the teacher resulting in a charge of assault and battery took place in Louisiana in 1967. The pupil sustained a broken arm when a physical education teacher tried to remove him from a basketball court.[6] Punishment of a student may become assault and battery if the teacher does not administer the punishment reasonably--that is, use a proper and suitable weapon,[7] the manner and extent of chastisement,[8] the age of the pupil,[9] nature and gravity of the offense,[10] temper and deportment of the teacher,[11] history of student's previous conduct.[12] Other factors, of course, may enter into the testimony presented in any particular case.

A third type of intentional action is interference with peace of mind and involves the mental and emotional state of the plaintiff. The primary problem is proving mental suffering and resulting injury. This type of case

seldom arises with respect to suits of tort against teachers.

NEGLIGENCE

The above grounds (intentional) for suit at tort against a teacher constitute a very small proportion of all tort liability suits. In nearly all cases the charge is negligence. Negligence is generally defined as the failure to act as a reasonable, prudent, and careful person would act under the circumstances to avoid exposing others to unreasonable danger or risk of injury or harm. It may consist of the omission to act as well as to act affirmatively. This definition then indicates that it is conduct falling below an established standard which results in injury to another person. Negligent acts are neither expected nor intended while intentional tort may be both anticipated and intended.

An unavoidable accident--"pure accident"--which could not have been prevented by reasonable care does not constitute negligence. No liability exists for unavoidable accidents. A negligent act in one situation may not be negligence under a different set of circumstances. Negligence is not defined by law; hence, no specific legislative enactment as to what constitutes negligence can be applied in determining points of law in a law suit. Accordingly, any suit in tort liability in which the plaintiff charges the defendant with negligence must be determined by the jury and/or court based upon the testimony setting forth the action or lack of action of the parties to the case.

Almost every authority presents and almost every court renders verdicts on the basis of certain conditions which seem to have existed or did not exist at the time of the plaintiff incurring injury or harm. One, there must

have been a duty on the part of the defendant to protect his students against unreasonable risks--that is, did the teacher owe a duty of care toward the plaintiff? Two, there must have been a failure on the part of the defendant to exercise a standard of care--that is, was there a failure on the part of the defendant to observe such a duty? Three, the conduct of the defendant must have been the proximate cause of the injury--that is, was such a failure on the part of the defendant the direct and proximate cause of the injury. Four, the plaintiff must have suffered injury or damages--that is, did injury, actual loss or damage, result from the direct action of the defendant?[13]

If all of these four points can be answered in the affirmative, in the eyes of the law a case of personal liability is established. To escape suit of tort liability, a teacher has some definite responsibilities. If he fails to exercise the duty of care expected of a reasonably prudent person in the same or similar situations, that teacher is said to be negligent. If such negligence is the direct and proximate cause of injuries sustained by students to whom the teacher owes a duty of care, such teacher is personally responsible for damages.

Certain additional principles are also pertinent to the issue of negligence and liability on the part of the teacher. The degree of care expected of a teacher will also be measured in the light of the danger involved and the age and maturity of the student. Greater care would be expected of a teacher who supervises students who are exposed to dangerous machinery, chemicals, equipment or similar situations than a teacher of English, History, or teaching areas where hazards are not so immediate. In the former situation, the courts expect more constant and immediate supervision over the activities of the students. They also expect a greater degree of care by the teacher in foreseeing

the possibility of an injury. The courts also look for evidence that students had been adequately warned about and prepared for the hazards that they might be subject to, or adequately instructed in the proper use of the equipment, supplies, or nature of the activity in which the student will participate. This last factor is one which is of vital concern to the physical education teacher.

An important test in determining negligence is forseeability. When a reasonably prudent teacher could have foreseen that a student might be injured by some act of his own or another's, the teacher is liable if he disregards these foreseeable consequences. Many antecedent events may lead to an injury, each in its major or minor way was contributing to the cause of the injury. The one or more causes without which the injury would not have happened is or are the actual causes of the injury. Hence, among all of the antecedent events the legal cause is that which in the continuous sequence of events produced the injury. This is known as the principle of the proximate cause.

A case at law which brings out most of these elements involved in what constitutes negligence took place in Wisconsin.[14] This was a suit for damages against a teacher for injuries received by a student who, while scraping wax off a floor in a room in which certain chemicals were stored, knocked over a bottle of acid and was burned. The case was based upon the charge that the teacher was negligent in that there was no cork in the bottle and that he had not warned the student that the bottle contained acid. The jury rendered a verdict in favor of the student but the court rendered a judgment in favor of the defendant notwithstanding the jury verdict. Plaintiff appealed to a higher court. The appellate judges ruled in favor of the judgment for the teacher because the plaintiff failed to prove negligence on the part of the defendant.

For purposes of this paper, the importance of this case is the manner in which the Supreme Court of Wisconsin spoke authoritatively on the question of tort liability of teachers. The court said that the elements of negligence alleged were the placing of an unlabeled, uncorked bottle of acid on the shelf and failing to warn the plaintiff of said hazards. The burden of proof was, of course, on the plaintiff to establish the alleged claim of negligence. The testimony brought out that the defendant was not negligent in warning the plaintiff that the bottle contained acid. It presented from creditable evidence that the defendant did warn the plaintiff. The defendant stated positively that there was a cork in the bottle at the time he placed it upon the shelf. There was evidence that the bottle became uncorked immediately after the accident. Positive evidence was shown that the defendant did not place an open bottle on the shelf, or that he knew or should have known that the cork had been removed. There was no such testimony. Evidence showed that the accident resulted from a scuffle and that said scuffling was an intervening cause of the accident. The plaintiff failed to establish the allegations of his complaint and the suit must be dismissed as the trial court had directed.

Applying the conditions which must have existed at the time of the accident, the testimony in this case brought out that the teacher did observe a duty of care, that he did exercise a proper standard of care (warning about the chemical), that his action was not a proximate cause of the accident, and that there was an injury. The evidence also brought out that the teacher did foresee the possibility of an injury by placing a corked bottle of acid high on a shelf.

CASES INVOLVING PHYSICAL EDUCATION TEACHERS

There are scores of cases on record with judgments holding the physical education teacher innocent of tort liability and likewise scores with verdicts holding him guilty. As mentioned previously, the highest degree of care is expected of teachers in the more hazardous activities such as "shop" teacher, bus driver, and classes where dangers and possibilities for injury are more immediate than in an ordinary classroom. One of the highest risk activities in the educational program is physical education. William C. Knaak found that in 85,000 school jurisdictions accidents, physical education classes had a higher rate of accidents than any other part of the school program. He classifies accidents as those requiring doctor's attention or causing one-half days absence or more. Professor Knaak's data indicate that there were 4.3 accidents involving male students for 100,000 days in physical education (in classes only, not including intramurals and playground activities), while there were only 2.3 in interscholastic sports, .76 in shops and labs, and 2.3 in unorganized activities on playgrounds. For girls, the data were 2.59 in physical education classes, .04 in interscholastic sports, .14 in shops and labs, and 1.25 in unorganized activities on school grounds.[15]

The nature of the varied physical activities help to account for the relatively high incidence of injuries in physical education classes and the teacher has a greater responsibility for the care of his students than in most other classes. Furthermore, most physical education teachers use a considerable amount of equipment and apparatus which they must constantly inspect to see that it is not defective and thereby contribute to the possibilities of injury. Some court cases will be presented revealing the many possibilities of injury and the reasons why there is so much litigation about tort and the

physical education teacher. First, some cases will be presented in which the teacher was found negligent; then some in which he was found not to have committed a tort.

In many physical education classes students of different ages and sizes compete with one another in physical activities. Courts seem to frown upon this sort of thing as was shown in the case of Brooks v. Board of Education of City of New York.[16] A student was kicked by a larger boy in a physical education class in which pairs of students were arranged regardless of size or age and were assigned to compete in kicking a single ball. The court held this to be negligence on the part of the teacher and the school board because of improper teaching techniques and not a reasonable and prudent standard of care and supervision.

Somewhat similar is that school districts in states which have abrogated immunity are held negligent for injuries to students on the grounds of the district's failure to perform its statutory duty to select suitable teachers.[17]

Cases have been reported of student injuries in which the teacher was held responsible because the students in class were not skilled sufficiently or not instructed adequately about the dangers involved in the activity. In a school in Albany, New York, a student who was not exceptionally skilled to perform an acrobatic feat beyond his ability and which was not recommended in the regents' manual, and with the knowledge that several boys had been injured while performing such a feat, this boy was required by the teacher to do the feat as part of the physical education course. The boy was injured and in court the teacher was held in tort liability because he had not observed some of the conditions for a proper standard of care a prudent man would have

done.[18]

Another case in which the teacher was held liable was when students in a physical education class were boxing as a part of the class program. Some students were untrained while others had had some experience in boxing. The result was that some students were injured during their bouts while the teacher was watching them. The teacher was found negligent for lack of proper care and supervision of the students of his class.[19]

A few court cases have heard testimony as to whether or not the physical education activity and curriculum have been appropriate or reasonable. Out of these cases comes a principle of law that the teacher should be careful not to prescribe activities which are beyond the students' capacity to perform. A suit was heard in San Francisco involving a particular tumbling exercise as suitable for girls. This exercise is called a "roll over two" in which the student takes a short run diving over two students who are on their hands and knees, alights on her hands, does a forward roll and ends in a standing position. A girl was injured when performing this activity. The jury in the case heard the testimony as to whether the exercise was inherently dangerous and also whether the student should have been allowed to take the instruction in tumbling. The court held that the particular tumbling exercise was not suitable for high school girls and held the teacher responsible in prescribing this kind of activity as being beyond the capacities of the high school girls.[20]

The cases presented thus far have been those in which the teacher had been alleged negligent and was held for tort liability. Probably there are as many or more suits in which the courts have held that the teacher was not negligent and hence not held liable for committing a tort.

Purely accidental injuries may occur as was evidenced by a teacher committing an inadvertent physical error when he was directing a rope-skipping exercise and while turning the rope, the wooden handle was jerked from his hand and injured a student. The teacher was sued for negligence but the court held that the teacher in conducting the exercise and turning the rope could not reasonably have foreseen that the wooden handle might be jerked from his hand and injured the student. He was not held to be negligent as the plaintiff had contended.[21]

In New Jersey, a physical education teacher was demonstrating to his class the proper method of jumping over a gymnasium horse. He set out the mats around the horse, supervised the jumps, warned students that it was dangerous and that if they did not think they could do it, they should not attempt the jump. A boy was injured in making a jump and the teacher was sued for negligence and insufficient supervision. The court decided that the instructor had observed most of the elements of conditions for observing good standards of care and acquitted him of the charges.[22]

A physical education teacher was charged with negligence when a student sustained a back injury while playing touch football in the gymnasium of a Washington school. The plaintiff alleged that the teacher had not supervised the game responsibly because it was held indoors on a hard, rough floor. The court held that the teacher was not negligent, that the playing was not the proximate cause of the injury, and that the injury could have occurred had the game been played outdoors.[23]

In California a physical education class was engaged in playing basketball and a boy was shoved by another player into a basketball upright. He lost both front teeth. The teacher was charged with negligent supervision,

but the court held that the cause of the injury was an intervening classmate, and not lack of supervision on the part of the teacher. The teacher was not present on the gymnasium floor because he had stayed behind to lock the classroom door, in observance of a school rule to that effect.[24]

Chapter 4

THE TEACHER'S DEFENSES AGAINST TORT

There are several defenses the teacher has at his disposal to defend himself legally against tort. The two most common defenses are contributory negligence and assumption of risk.

CONTRIBUTORY NEGLIGENCE

Contributory negligence is conduct on the part of the plaintiff, contributing as a legal cause to the injury he has suffered, and which falls below the standard to which he is required to perform for his own protection. It is perhaps unfortunate that contributory negligence is called "negligence" at all. "Contributory fault" might be a more appropriate and descriptive term. Negligence connotes conduct by a person or persons which is harmful to another, while contributory fault is conduct that brings harm to oneself.[1] Nolte and Linn give the impression that the defense of contributory negligence is based on the idea that even though the teacher was negligent, there was a lack of ordinary care on the part of the injured person. This lack of care contributed to the injury, and constituted an element of negligence without which the injury would not have occurred. They go on to say, however, that contributing negligence in such cases must be shown to be a proximate cause of the injury.[2]

In determining whether a student may be charged with contributory negligence, the courts have said that the degree of care required may differ between adults and minors. A child eleven years old can only be charged with that degree of care which children of the same age and maturity, and experience of ordinary care and prudence are accustomed to exercise under the same or

similar circumstances. A child of very tender age, in the absence that he knows better and understands the danger that confronts him, cannot very well be chargeable with negligence.

A couple of cases will illustrate how contributory negligence on the part of students served as legal defense for a school employee and a teacher when charged with negligence.

Contrary to school rules, a janitor unlocked the door of the chemistry supply room and two students entered the room, helped themselves to some supplies, and gave some to a third student who was subsequently injured. The court held that unlocking the door was not the direct cause of the injury. It was the independent acts of the students stealing the chemicals and giving them to the plaintiff, and the latter's act in experimenting with them contributed to his own injury and therefore contributory negligence was the proximate cause of the injury.[3]

A fifteen-year old high school student injured himself while using a chinning bar prior to the commencement of a regular physical education class in the high school gymnasium. The teacher was sued for negligence in not placing a mat under the bar and for lack of adequate supervision. The court held that there was no causal relationship between the accident and alleged lack of supervision in the alleged failure to place a mat under the chinning bar. The legal cause of the accident was the contributory negligence of the student to provide for his own protection as his activity was not a part of the regular class activity.[4]

ASSUMPTION OF RISK

As stated previously, assumption of risk is another common defense against tort. In certain school activities, such as athletic events, there are inherent and obvious risks. The student is assumed to know the risks involved, and thus the assumption of risk falls upon the student when he enters the activity. This is the same as saying that some school activities are more dangerous than others, and that the teacher should not assume all of the risks in activities of more than ordinary danger.

"Assumption of risk" and "contributory negligence" are not synonymous terms. Assumption of risk, as inferred above, is a matter of knowledge of the danger and intelligent acquiescence to it. Before a person can be charged with assumption of risk as a matter of law, it must be shown that the person accepted a danger he clearly understood, and that he had a foresight of the consequences and the readiness to accept them. Somewhat similar to contributory negligence in reference to the assumption of risk by a child, the facts must establish that the child was old enough or had sufficient maturity to understand the danger involved. Courts also take the position that he was aware of the danger involved in the intended action on his part, and that he willingly accepted the consequences of what might happen.[5]

Several court cases, particularly relating to sports, that are on record hold that the participant or spectator assumed the risk of active or passive participation. In an intramural basketball game, a player suffered an injury when he collided with a doorjamb in a brick wall while playing voluntarily in the school gymnasium, a place he had played in previously several times. Suit was brought against the school and the instructor charging that a dangerous situation existed and that the teacher did not provide a proper standard

of care, The court's judgment was that the boy knew the position of the door, the basket, and the wall, and was well aware of the risk that he was taking.[6]

In another case injuries were sustained by a student who fell from a monkey bar in a gymnasium when even general superintendence would not have avoided the accident and the requirement of specific supervision would have been unreasonable. The apparatus was in a good state of repair, and risk of falling from the apparatus was assumed by those who made use of the bar. The court held that the student assumed the risk in his using of the apparatus.[7]

COMPARATIVE NEGLIGENCE

A third defense against tort is comparative negligence. A few states have adopted this doctrine of comparative negligence in which the teacher's and student's negligence are ruled to be mutually contributory to the injury. The damages in such cases are pro-rated on the basis of whether the negligence of each party was slight, ordinary, or gross. Thus a teacher might be held to be only slightly negligent, in which the injured party would be required to carry the major portion of the burden of the injury.[8]

This defense has a somewhat interesting history in that there had been for many years an increasing dissatisfaction with the absolute defense of contributory negligence. Courts appear to becoming more reluctant to rule that the plaintiff's conduct is negligent as a matter of law, and juries are more and more inclined to agree that there is no such thing as absolute negligence, or to make some more or less haphazard reduction in the plaintiff's damages in proportion to his fault. This dissatisfaction has led to a number of attempts to find some substitute method of dealing with cases where there is negligence on the part of both parties.

The makeshift doctrine of the "last clear chance" has been adopted to some extent in all jurisdictions. The early explanation of this doctrine was that if the defendant has the last clear opportunity to avoid the harm, the plaintiff's negligence was not a proximate cause of the result. Later courts have held that the later negligence of the defendant also involves a degree of fault and that this is a rule of comparative negligence which is being applied. The real explanation for the evolving doctrine of comparative negligence has been the dislike for the situations which arise when it seems that the last wrongdoer is the one who is guilty and must be held liable, even though this may work a great hardship on him. From the evidence of authorities on this subject, it is literally true that there are as many variations and applications of this doctrine as there are courts to apply it. This condition is probably due to the efforts of the courts to mete out justice on the basis of evidence and not rely so much on the rule of law.[9] The last clear chance doctrine is not available to the defendant in about ten states while it is probably used by the defendant in twelve states and in the United States courts. The remainder of the states appear to cope with it according to the circumstances of the case.[10]

Apportionment of damages has come to be more and more the procedure that courts follow as cases are decided. Civil law jurisdiction has experienced no particular difficulties in the administration of judgments of comparative negligence, perhaps because the jury has no part in the apportionment of damages. Some states in recent times have enacted comparative negligence laws in which there is no question about the division of damage--for example, Nebraska and some other states provide that if the plaintiff's fault is found to be twice as much as the defendant's, the latter will recover two-thirds of the damages, and himself bear the remainder of the loss.[11]

The principles of civil law respecting comparative negligence are being applied to school districts and teachers in some states as they are in civil jurisdictions. Pro-rating of the damages are assessed against both the plaintiff and the teacher according to the findings and judgment of the court.[12]

UNAVOIDABLE ACCIDENT

An obvious defense against tort is unavoidable accident. Sometimes accidents happen even when the utmost care is taken by the teacher. In such instances, the teacher may use the defense that the accident was unavoidable, and nothing that the teacher could have done would have prevented it. In such connecton, however, the liability of the teacher for accidental injuries may turn on whether the teacher in the exercise of prudent behavior should have anticipated the danger of an accident, not necessarily the specific accident itself. If in the exercise of due care on his part, the teacher should have warned the student of the danger, or taken proper care to prevent the accident.[13]

One may assume that an accident which is unavoidable and could not have been prevented by reasonable care does not constitute negligence. Certainly no liability exists for an unavoidable accident. There are, however, suits brought to court wherein the plaintiff charges insufficient care and negligence. In Wisconsin, damages were sought against the owner of a property adjacent to the school grounds when his horse leaned across the fence and bit a boy on the ear. The boy's parents brought suit against both the owner of the horse and the school board because the fence was not high enough to restrain the horse as required by law. The fence, however, had been installed by the board of education and had met statutory requirements. The court held that

since the horse was properly contained in the owner's pasture, it would have made no difference who owned the fence. It was pure accident the boy was bitten. Some words of the court were to the effect that "the horse would have thrust his head over the fence no matter who owned it."[14]

ACT OF GOD

Another obvious defense against charges of negligence is Act of God. Such an act is the direct, immediate, and exclusive operation of the forces of nature, uncontrolled and uninfluenced by the powers of man, and without human intervention. No amount of foresight could have prevented the occurrence, and in a suit at law certainly the defendant would be innocent of casualty.[15]

Chapter 5

LEGISLATIVE PROTECTION OF THE TEACHER AGAINST TORT

Although strictly speaking legislation by some States to protect teachers from liable suits and permit the school districts to purchase liability insurance do not constitute defenses against tort in the same sense as those presented above, for the teacher they do serve the same purpose.

"SAVE HARMLESS" LAWS

Those State laws which require or permit boards of education to come to the aid of teachers who are found liable for damages in pupil injury cases are called "save harmless" laws. Some States require boards of education to protect and save harmless financially the teacher who has been required to respond to damages for his negligence in the line of duty. Other States permit boards of education to protect the teacher financially if the board so chooses. If the board of education does not save harmless its teachers, they are personally liable if judgment is rendered against them in a damage suit.

Until recently only a few States, notably California, New York, and Washington, had enacted statutes making the school districts answerable in damages for the torts of their officers, agents, and employees. In Washington the law was not comprehensive as it provided that the immunity rule would still apply to certain types of torts--for example, those growing out of use of shop equipment and athletics but recently these restrictions have been removed and the immunity rule now is nonexistent. In some other States, legislatures have made the districts liable for certain types of injuries only--generally those growing out of transportation of students. In these cases,

the legislature commonly limits the amount of damages that can be recovered from the district.[1]

As far as can be determined at present, States having "save harmless" laws are New York, New Jersey, Connecticut, California, Washington, Illinois, Iowa, Minnesota, and Wyoming.[2] The New York law was one of the earliest and other States apparently have patterned their laws on this one. A part of the New York Education Law, Sec. 3023, states:

> Notwithstanding any inconsistent provision of law, general, special or local, or the limitation contained in the provision of any city charter, it shall be the duty of each board of education, trustee or trustees, in any school district having a population of less than one million, and each board of cooperative educational services established pursuant to section nineteen hundred fifty-eight of this chapter, to save harmless and protect all teachers and members of the supervisory and administrative staff or employees from financial loss arising out of any claim, demand, suit or judgment by reason of alleged negligence or other act resulting in accidental bodily injury to any person within or without the school building, provided such teacher or member of the supervisory or administrative staff or employee at the time of the accident or injury was acting in the discharge of his duties within the scope of his employment and/or under the direction of said board of education, trustee, trustees, or board of cooperative educational services. . .[3]

Although these laws do not make school districts liable in damages for torts, they do provide that if judgment is rendered against an employee because of injuries or harm growing out of his negligence, the district must reimburse the employee in the amount of the judgment. Such laws, it is generally held, do not authorize an injured party to bring suit against the school district or school board. In Connecticut, however, it was recently held that, under a "save harmless" statute, the board may be made a party to an action in tort.[4] Connecticut is one of the States in which it is mandatory that school boards "save harmless" teachers who are liable for damages. In interpreting the intent of the law one court of the State said: "Obviously, the General Assembly

felt that a school teacher should be held harmless from the burden of paying damages for certain acts of civil misconduct on his part and that his burden should be transferred to the taxpayers."[5] Surely all teachers will agree with the sentiment expressed by the court; probably not all taxpayers will concur.

LIABILITY INSURANCE

The purchase of liability insurance by school districts is limited by statutory requirements. In States where a school board is immune from liability because of the operation of the common-law doctrine and no statute makes it liable or permits it to buy insurance to protect itself against loss or to protect persons against the negligence of its employees, it has no responsibility to answer to tort. When a school district purchases liability insurance without statutory authority to do so its act is ultra vires (the legal term used when a corporation, school board, and so forth, is said to act when it exceeds its authority given by its charter or constitution). Even so the insurance company will, as a rule, be held to its contract because the doctrine of ultra vires is intended to protect taxpayers and the public from unauthorized acts of public officials.[6]

In those States where statutes have been enacted permitting school boards to purchase and carry insurance, it has been held that such a statute does not abrogate the common-law rule of immunity. For the most part, liability insurance purchased by States has been of specific areas of the educational program. For example, the laws of Oklahoma cover school bus transportation and the laws of Nevada cover both bus transportation and athletics. These are the two kinds of liability which are most commonly covered by insurance purchased by school districts.

Kansas has statutory provisions making it mandatory for school districts to purchase motor vehicle liability insurance and also medical payments insurance for drivers and passengers of school busses. In addition, a law was enacted in 1969 making it permissive for school districts to buy liability insurance for protection of the school district and teachers against tort. The law reads as follows:

> On and after January 1, 1970, the board of education of any school district is authorized and permitted to purchase public liability and property damage insurance for the protection and benefit of said school district and the officers, agents, teachers and employees from liability as a result of their act or omissions arising out of and in the scope of their services for the school district which will result in damage or injury: Provided, however, the public liability and property damage insurance policy so purchased shall provide coverage to a limit . . . of not less than $100,000 because of death, bodily injury, and/or damage or destruction of property in any one occurrence.
>
> The board of education of any school district of this State securing insurance as hereinbefore authorized waives its governmental immunity from liability for any damage by reason of death or injury to persons or property caused by the negligent acts of any officer, teacher or employee of such school district when acting within the scope of his authority or with the course of his employment. Such immunity shall be waived only to the extent of the insurance so obtained.[7]

This Kansas law places the State in the same category as the other States which have provided for liability insurance but have not abrogated the common-law doctrine of immunity except as covered by insurance. California has gone farther than any other State in saving harmless its teachers. It has virtually abrogated governmental immunity for injured students and allows direct suit against the school board and requires the board to pay damages out of school funds. The law states: "The governing board of any school district is liable as such in the name of the district for any judgment against the district on account of injury to person or property arising because of the negligence of the district, or its officers, or employees."[8]

According to the situation existing in most States today, it would seem wise for a physical education teacher to provide himself with a generous amount of liability insurance, unless he teaches in a state that has a "save harmless" law or one that has used its statutory authority to purchase liability insurance for its teachers. In some states insurance protection is provided by group action of the teachers unsupported by public funds, while a few districts contribute from public funds to pay up to half of the premium cost and the teachers pay the balance. Many teachers still have no insurance protection or any other kind of protection from the risk of being sued for tort.

Chapter 6

RETROSPECTION AND CONCLUSION

"Teachers are personally liable to pupils for injuries growing out of their own negligence. To avoid liability, all that is required of a teacher is that he exercise, in the management of his pupils, the care that a reasonably prudent person would have exercised in the same or similar situation."[1]

After having made this study and written this paper to this point and now faced with a profound statement as that above, one may very well be of the opinion that the author might just as well have said, "Do everything right, don't sin, and you'll go to Heaven." From what has been learned from this study, and it has been a most valuable study, the physical education teacher to escape tort liability must play an important role in the selection and designation of instructional materials. A large enough play area must be provided to take care of a class safely in the type of activity at hand. A check must be made of the equipment regularly to see that it is the proper kind and not defective. There must be adequate supervision of a large number of students engaging in physical activity (and maybe some in extracurricular activity).

Alexander and Alexander[2] have done well by drawing upon Liebee's[3] set of practices by which a reasonable physical education teacher will keep busy and do her work well, and very likely escape a suit at tort:

1. Be aware of the health conditions of your students.
2. Require a health permit of students to take part in activities following serious injury or illness.
3. Inspect all necessary equipment at regular intervals.

4. Do not use defective equipment.

5. Use a safe area to carry on class activity.

6. Re-examine periodically teaching methods for the safety of the students.

7. Always use qualified personnel to conduct and supervise an activity.

8. Require a student to participate within his physical ability. This will require conferences with him about his capabilities.

9. Instruct and explain adequately before the class actually performs.

10. Provide adequate protective equipment.

11. Keep accurate records of accidents and actions.

Having reflected on the all encompassing duties and possible liability of a physical education teacher, one cannot help but extend a hand of appreciation to the judge of a Court of Appeals, Fourth District, California, when a case involving a teacher and school district was appealed to him.[4] In California, where the school district is made liable by statute for injuries resulting from the negligence of its employees, this action was brought against the district and a teacher by the parents of a kindergarten pupil who in climbing a playground gate had a finger severed when the gate was pushed by another boy. Plaintiff contended that the teacher was negligent in not providing adequate supervision. The lower court ruled in favor of the teacher and district and then the plaintiff appealed. The higher court, in sustaining the action of the lower court, commented on the lack of evidence to support the charge of negligence. The judge giving the opinion commented on the fact that there was no evidence to show when the accident occurred; no evidence to show that the gate was used for ingress or egress; no evidence to show that there were more than two boys there at the time of the accident; no evidence to show

where the teacher was at the time; no evidence that would justify the inference that this teacher should reasonably expect not only that the boy would climb the gate but that his hand would slip at the very moment another boy was moving the gate. There was no evidence to show that this injury was proximately caused by any negligence on the part of the district or its employees.

From the many cases read in the preparation of this paper, how often the phrase, "no evidence", was expressed in the verdict of the court when a physical education teacher had been accused of negligence!

Some conclusions may be drawn from this study. More school accidents and liability tort claims are a result of injuries sustained in physical education areas than in other areas. In view of this fact, the possibilities of a suit against the teacher and the need to protect students from injury, might well cause each physical education department to formulate and distribute written policies to teachers and students alike warning against hazards and harms in the program. A number of studies have been undertaken to investigate liability problems in physical education and these may well be used in developing written accident promotion and safety policies. The most important areas of concern should be adequate supervision and preparation, area and apparatus inspection, emergency care, and accident reports. Furthermore, each physical education teacher would do well to carry sufficient liability insurance.

FOOTNOTES

Chapter 1

1. William L. Prosser, Law of Torts, 3rd, ed., (St. Paul, Minnesota, West Publishing Co., 1964), p. 2

2. P. J. Bird, "Tort Liability," Journal of Health, Physical Education, and Recreation, Vol. 40, (January, 1970), p. 40.

Chapter 2

1. An abbreviated portion of the decision in this case is found in Kern Alexander, Ray Corns, and Walter McCann, Public School Law, Cases and Material, (St. Paul, Minnesota, West Publishing Co., 1969), pp. 336-339.

2. Ibid., pp. 339-340

3. Hans v. Louisiana, 134 U. S. 1 (1890)

4. William C. Knaak, School District Tort Liability in the '70's, (St. Paul, Minnesota, Warric Publishing Co., 1969), p. 8.

5. 243 Ill. App. 327 (1927)

6. Madaline Kinter Remmlein, School Law, 2nd. ed., (Danville, Illinois, Interstate Printers, 1962), p. 279.

7. Newton Edwards, The Courts and the Public Schools: The Legal Basis of School Organization and Administration, 3rd. ed., (Chicago, Illinois, Chicago University Press, 1971), pp. 396-397.

8. Remmlein, School Law, op. cit., pp. 279-280; Robert L. Drury and Kenneth Ray, Principles of School Law With Cases, (New York, Appleton-Century-Crofts, 1965), pp. 256-269; Mervin Chester Nolte, Guide To School Law, (West Nyack, New York, Parker Publishers, 1969), pp. 104-105; Prosser, Law of Torts, op. cit., pp. 1001-1005; Edwards, Courts and Public Schools, op. cit. pp. 393-399.

9. Perkins v. Trask, 95 Mont. 1. Cited in Corpus Juris Secundum, Vol. 78 p. 1329. Hereafter cited such as 78 C. J. S. 1329.

10. Bartell v. School District No. 28, 141 Mont. 45. Hoffman v. Scranton School District, 67 District & Co., 301. Both cases cited in 78 C. J. S. 1329

11. Snowden v. Kittitas County School District No. 401, 38 Wash. 2d. 691. Yarnell v. Marshall School District No. 243, 17 Wash. 2d. 284. Both cases cited in 78 C. J. S. 1330

12. Ruth Alexander and Kern Alexander, Teachers and Torts: Liability For Pupil Injury, (Middletown, Kentucky, Maxwell Publishing Co., 1969) pp. 36-37.

13. Edwards, op. cit., p. 41.

14. David Martin, "Trends in Tort Liability of School Districts as Revised by Court Decisions," Legal Issues in Education. E. C. Bolmeier, ed., Duke Doctoral Dissertations, (Charlottesville, Va., The Michie Co., 1970) pp. 176-177.

15. McGraw v. Rural School District No. 1, 120 Kan. 413 (1926).

16. Molitor v. Kaneland Community Unit District No. 32, 18 Ill. 2d 11.

17. 362 U. S. 968.

18. Edwards, op. cit., p. 412.

19. National Commission on Safety Education, "Who Is Liable For Public School Injuries?" National Education Association, (Washington, D. C. 1963), p. 46.

20. Ibid., 44.

21. 393 Pa. 633 (1958)

22. Neiman v. Common School District No. 95, 171 Kan. 237.

23. 122 Mich. 313.

24. 78 C. J. S. 1322

25. Remmlein, op. cit., 280.

26. Ibid., p. 281.

27. Alexander and Alexander, op. cit., p. 53; Remmlein, op. cit., p. 280; Drury and Ray, op. cit., pp. 263-264.

28. Knaak, op. cit., pp. 16-42.

29. Alexander and Alexander, op. cit., p. 43.

30. Spanel v. Mounds View School District, 264 Minn. 279. Cited in Kern Alexander, Corns, and McCann, op. cit., p. 340.

31. Martin, op. cit., p. 177.

32. William P. Tanner, III "Governmental Immunity in Kansas: Prospects For Enlightened Change," University of Kansas Law Review, Vol. 19, (Winter, 1971), p. 215.

33. Kansas Reports: 59 Lumber Co. v. Elliott 42 (1898); 171 Nieman v. Common School District No. 96 Butler County 237 (1951); 176 Jones v. City of Kansas City 406 (1954); 193 Koehn v. Board of Education, City of Newton, 263 (1964); 184 Rose v. Board of Education of Abilene, Kansas, 486 (1956); 204 Smith v. Board of Education of Caney School District 580 (1969).

34. Tanner, op. cit., p. 214.

35. Kansas Statutes Annotated, Sec. 72-615. Hereafter cited as K. S. A.

36. K. S. A. 74-4707.

37. K. S. A., 74-4708.

38. Ibid.

39. K. S. A. 1971 Supp. 72-8404, 72-8407, 72-8408, 72-8410, 72-8411.

40. K. S. A. 1971 Supp. 74-4715, 74-4716.

41. 203 Kan. 841.

42. Tanner, op. cit., p. 217.

43. K. S. A. 1971 Supp. 46-901, 46-902.

44. Brush v. Commission of Internal Revenue, 300 U. S. 352 (1937).

45. Carr v. Wright, 423 S. W. 2d 521 (Ky. 1968).

Chapter 3

1. State v. Hampton, 63 N. C. 13 (1968).

2. Prosser, op. cit., p. 41.

3. Ibid.

4. Balding v. State, 23 Tex. App. 4 S. W. 579.

5. Boyd v. State, 88 Ala. 169; Cooper v. McJunkin, 4 Ind. 290. Both cases cited in 78 C. J. S. 1330.

6. Frank v. Orleans Parish School Board, 195 So. 2d 541 (La. 1967). Cited in Nolte, Guide To School Law, op. cit., p. 109.

7. Lander v. Seaver, 32 Vt. 114. Cited in Alexander, Corn, McCann, op. cit., p. 628.

8. Berry v. Arnold School District, 199 Ark. 118, 137 S. W. 2d 256 (1940).

9. Sheehan v. Sturgess, 58 Conn. 481, 2 A 841. Cited in Prosser, op. cit., p. 139.

10. State v. Mizner, 50 Iowa 145. Cited in 79 C. J. S. 448.

11. Marla v. Bill, 181 Tenn. 100, 178 S. W. 2d 634 (1944).

12. Whitley v. State, 33 Tex. Cr. 172. 25 S. W. 1072 (1894)

13. Alexander and Alexander, op. cit., p. 39; Prosser, op. cit., Chapter 6; Drury and Ray, op. cit., p. 70; Bird, op. cit., p. 39.

14. Grosso v. Wittenan, 226 Wis. 17 (1954), 62 N. W. 2d 386 (1964).

15. Knaak, op. cit., pp. 208-209.

16. 205 N. Y. S. 2d 777 (1960). Cited in National Commission on Safety, op. cit., p. 49.

17. Garber v. Central School District No. 1 of Town of Sharon, 295 N. Y. S. 850 (1937). Cited in Alexander, Corn, and McCann, op. cit., p. 371. Kalar v. Union Free School District No. 9, Town of Lennox, 8 N. Y. S. 2d 255. Cited in 78 C. J. S. 1330.

18. Govel v. Board of Education of the City of Albany, 28 N. Y. 2d 299. Cited in American Law Reports Annotated, 2nd Series, Vol. 32, (Rochester, New York, Lawyers Co-operative Publishing Co., 1953), pp. 1188-1189. Hereafter cited such as 32 A. L. R. 2d 1188-1189.

19. LaValley v. Stanford, 70 N. Y. S. 2d 461. Cited in 32 A. L. R. 2d 1189.

20. Bellman v. San Francisco School District, 11 Cal. 2d. 576, 81 P 2d 274 (1938). Cited in Alexander and Alexander, op. cit., p. 76.

21. 270 Minn. 390. Cited in 78 C. J. S. Pocket Part, 1971, p. 164.

22. Sayers v. Ranger, 16 N. J. 22. Cited in 32 A. L. R. 2d, 1186.

23. Read v. School District No. 11 of Lewis County, 7 Wash. 2d 502. Cited in 78 C. J. S. 1330.

24. Woodsmall v. Mt. Diablo Unified School District, 10 Cal. Reptr. 47 (1967). Cited in National Commission Safety, op. cit., p. 45.

Chapter 4

1. Prosser, op. cit., pp. 426-430.

2. Chester M. Nolte and John Phillip Linn, School Law For Teachers, (Danville, Illinois, The Interstate Printers and Publishers, 1963), pp. 252-253.

3. Frace v. Long Beach City School District, 137 P 2d 60 (Calif. 1943).

4. Fein v. Board of Education of City of New York, 104 N. Y. S. 2d 996. Cited in National Commission on Safety, op. cit., p. 50.

5. Prosser, op. cit., p. 303; Drury and Ray, op. cit., pp. 73-74.

6. Maltz v. Board of Education of New York City, 114 N. Y. S. 2d 856. Cited in Herbert A. Appenzeller, "Legal Liability For Injuries Sustained in a Public School Program of Physical Education, "Legal Issues in Education, E. C. Bolmeier, ed., (Charlottesville, Va., The Michie Co., 1970) p. 190.

7. Miller v. Board of Education Union Free School District No. 1, Town of Oyster Bay, 291 N. Y. S. 633, 249 App. Div. 738. Cited in 78 C. J. S. 1330.

8. Nolte, op. cit., p. 121; Drury and Ray, op. cit., p. 73.

9. Prosser, op. cit. pp. 437-441.

10. 32 A. L. R. 2d pp. 548-552.

11. Prosser, op. cit., p. 447.

12. Nolte, op. cit., p. 121.

13. Nolte and Linn, op. cit., p. 252.

14. Leipske v. Guenther, 96 N. W. 2d 821 (Wis. 1960). Cited in Nolte, op. cit. p. 124.

15. The writer is of the opinion that it is rather strange that this defense even be mentioned in the literature but there are scattered references to it by some of the writers, such as Prosser, op. cit., 127, 132; Nolte and Linn, op. cit., p. 253; Nolte, op. cit., pp. 124-125. She was unable to find any court cases relating to schools in which An Act of God was involved.

Chapter 5

1. Edwards, op. cit., pp. 618-619

2. Nolte and Linn, op. cit. 266-267; Edwards, op. cit., 618-619.

3. Quoted from Remmlein, School Law, op. cit., p. 281.

4. Pastor v. City of Bridgeport, 229 A 2d 43 Conn. Cited in Edwards, op. cit., p. 620.

5. Swainbank v. Coombs, 19 Conn. Supp. 391 (1957). Cited in Nolte and Linn, op. cit. p. 267.

6. Edwards, op. cit., pp. 562-653.

7. Kansas Statutes Annotated, Supplement 1971, 72-8407, 72-8408.

8. Deering's California Education Code, Sec. 903. Quoted from Remmlein, op. cit., p. 282.

Chapter 6

1. Newton Edwards and Leo A. Garber, The Law Governing Teaching Personnel, (Danville, Illinois, Interstate Printers, 1962), p. 6.

2. Alexander and Alexander, op. cit., p. 82.

3. Howard C. Liebee, Tort Liability For Injuries To Pupils, (Ann Arbor, Michigan, University of Michigan Press, 1965), p. 76.

4. Luna v. Needles Elementary School District, 154 Cal. App. 803, 316 P 2d 773 (1957). Cited in Edwards and Garber, op. cit., 75-76.

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THE PHYSICAL EDUCATION TEACHER AND TORT

by

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AN ABSTRACT OF A MASTER'S THESIS

submitted in partial fulfillment of the

requirements for the degree

MASTER OF SCIENCE

Department of Physical Education

KANSAS STATE UNIVERSITY
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The purpose of this study is to discover the responsibilities and risks of the physical education teacher in the area of tort liability in order to protect students from injury and to avoid judicial suit at tort.

The question of the teacher and tort is an increasingly important one and a study of it deals to a large extent with suits at law, which entails using material of a judicial nature or secondary material based upon court charges, defenses and verdicts.

At the very start of this study, one runs into the vital relationship of the school district and the teacher and tort. Being a governmental agency, the school district is entirely subordinate to the State and has been endowed with the common-law doctrine of governmental immunity from tort handed down from medieval times and cannot be sued without its own consent. Much dissatisfaction has arisen by the courts and the general public because of this immunity, not only for the school district but also for the State and its agencies. Until very recently, courts have taken the position that only the State legislature could abrogate immunity. More recently, some State Supreme Courts have determined that change can be made by judicial decree. Popular demand and court decree apparently have caused many State legislatures to act. Some states have virtually abrogated immunity, others have modified their positions, while a few cling to the traditional doctrine. Kansas still holds to immunity, except that it permits school districts and some State agencies to purchase liability insurance to cover tort damages.

At the same time that school districts were immune from tort, the teachers were not and had to face charges if they were brought into court. Several grounds may be used against a teacher who allegedly commits a tort. Some of these are assault and battery, which arise when he uses corporal pun-

ishment in discipling a student, but the most common charge is negligence. Since negligence is not defined by law, the verdict on a charge of negligence rests entirely on the testimony presented at the trial. Courts ordinarily define negligence as the failure to act as a reasonably, prudent, and careful person would act under the circumstances to avoid exposing others to unreasonable risk or harm. It may also consist of omission to act as well as to act affirmatively. There are certain standards which courts use in evaluating testimony when an alleged charge of negligence against a teacher is before them: (1) there must be a duty to protect his student against unreasonable risk, (2) there must have been a failure to exercise a standard of care, (3) his negligence must have been the proximate cause of the injury, and (4) the student must have suffered injury or damage. The court also stresses the element of foreseeability. When a reasonably prudent teacher could have foreseen that an injury might occur by reason of his act or another's, he is liable if he disregards the foreseeable consequences. Throughout this paper court cases have been presented to illustrate the above points as well as other material in the study.

Studies have been made showing that there are more injuries in physical education classes than in other areas of the educational program. The physical education teacher should then be aware of the legal defenses available if he should be charged with tort. The most common legal defenses are: (1) contributory negligence--the student was really at fault and contributed to the injury, (2) assumption of risk--the student was aware of the risks involved and voluntarily assumed the danger, (3) comparative negligence--both teacher and student were negligent and the court decides the proportion of blame for each party to the suit, (4) unavoidable accident--the teacher is

usually not convicted in a suit of this nature, and (5) Act of God--natural forces caused the injury and it is difficult to prove liability in a case of this nature.

Some states have come to the protection of the teacher when he is charged with tort. A few states have enacted what are termed "save harmless" laws. If a teacher is convicted of a tort, the school district is required to pay the financial damages assessed against him. Another means of help by the State is to purchase liability insurance to cover the damages which may arise from a tort case.

Conclusions drawn from this study may be summarized as follows:

1. Physical Education Departments may well prepare written statements of safety policies and distribute them to teachers and students alike.
2. Constant studies should be made to improve the safety program of the Department.
3. There should be adequate preparation and supervision on the part of the teachers.
4. Regular inspection of apparatus and equipment should be made.
5. Emergency care and accident reports should be essential.
6. Each physical education teacher would do well to carry sufficient liability insurance.