
The Trend toward Elimination of Governmental Immunity in Illinois

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COMMENTS

THE TREND TOWARD ELIMINATION OF GOVERNMENTAL IMMUNITY IN ILLINOIS

On May 22, 1959, a decision by the Illinois Supreme Court led many to believe that the almost sacred rule of law—governmental tort immunity—was dead. Mr. Justice Klingbiel, in giving the opinion of the Court, stated: "We conclude that the rule of school district tort immunity is unjust, unsupported by any valid reason, and has no rightful place in modern day society."¹

The case was *Molitor v. Kaneland Community Unit School District No. 302*.² It was hailed by many as the beginning of the end of the entire doctrine of sovereign immunity for governmental agencies.³ However, the celebration was short-lived. The Illinois General Assembly passed five bills which were signed by the Governor, thereby settling the question. The Chicago Park District,⁴ park districts organized under the Park District Code,⁵ counties⁶ and forest preserve districts⁷ were given full immunity in tort cases. A separate bill gave public school districts and private schools operated by religious, charitable or eleemosynary insti-

¹ *Molitor v. Kaneland Community Unit School District No. 302*, Docket 35249, Agenda 32, Illinois (1959).

² *Ibid.* Thomas Molitor, a minor, by his father as next friend, brought this action alleging negligence of defendant due to negligence of school bus driver in a bus accident. Plaintiff was a pupil in defendant school district. The complaint contained no allegation of insurance or other non-public funds out of which a judgment could be satisfied although the abstract of the record showed \$20,000-\$100,000 insurance carried by the defendant. The trial court sustained the defendant's motion to dismiss the complaint and judgment was entered. Plaintiff chose to stand on his complaint and attempted a direct appeal to the Illinois Supreme Court on constitutional issues, but appeal was denied and the case transferred to the Appellate Court, Second District. The Appellate court affirmed the trial court and the case again came before the supreme court on a certificate of importance. The supreme court reversed and remanded with instructions that school districts were no longer immune from suit in tort cases and explicitly overruled all prior decisions to the contrary. Two justices dissented without an opinion.

³ I. S. B. A., Trial Briefs, Civil Practice and Procedure, Vol. IV, No. 12 (June 1959); I.S.B.A., Newsletter, School Law, Vol. III, No. 3 (May 1959).

⁴ H.B. 1605, signed by Governor on July 22, 1959 which will become Ill. Rev. Stat. c. 105, § 333.2a.

⁵ S.B. 1005, 1006; signed by Governor on July 7, 1959.

⁶ H.B. 1638, signed by Governor on July 22, 1959 which will become Ill. Rev. Stat. c. 34, § 22.1.

⁷ H.B. 1640, signed by Governor on July 22, 1959 which will be Ill. Rev. Stat. c. 57½, § 3a.

tutions a tort recovery limitation on personal injuries or property damage in the amount of \$10,000, or insurance coverage, whichever is greater.⁸

It is interesting to note that the limitation on liability for schools did not extend to *death actions* and this leads to the conclusion that the schools are to be held liable under the *Kaneland* decision in these *death actions*.

THE PAST

Mr. Justice Klingbiel's opinion is a scholarly discourse pointing out the history of the concept; its illogical place in Illinois law; the great weight of writings criticizing the concept; and a rebuttal of the usual arguments for maintenance of the theory.⁹ It was pointed out that the theory seems to stem from the English case of *Russell v. Men of Devon*¹⁰ decided in 1788, which held that the action brought against the entire population of the county would not lie. Its theory was the lack of corporate funds out of which satisfaction could be obtained.

In *Hargrove v. Town of Cocoa Beach*,¹¹ the Florida Court, in 1957, abolished the theory of sovereign immunity of a municipality, pointing out that the *Devon* case did not involve a governmental agency or quasi-municipal corporation, but rather a suit against all the people of the county jointly. The Florida Court further weakened the force of the *Devon* case by directing attention to the fact that the case was decided several years after the Declaration of Independence and really has no place in our law. The *Devon* case and the entire theory of sovereign immunity stem from the medieval concept of "the King can do no wrong," or the "Divine Right of Kings." Both the Florida decision and the *Kaneland* case stressed the fact that this archaic theory seems to run directly contra to the entire system of republican government as epitomized by the constitutions of both states as well as the Federal Constitution. The Illinois Constitution guarantees to all those wronged an opportunity for a redress of grievances¹² and sovereign immunity materially restricts this constitutionally guaranteed right. Why did this anachronism creep into our Law? From whence did the anomaly spring?

In Illinois, the courts first adopted the *Devon* ruling and expanded it

⁸ H.B. 1615, signed by the Governor on July 22, 1959.

⁹ The main arguments for sovereign immunity appear to be: First, lack of funds earmarked for payment of judgments, *Love v. Glencoe Park Dist.*, 270 Ill. App. 117 (1933); and second, the agency theory of immunity of the state as a sovereign devolving on the quasi-municipal corporation as a government agency. *Lake County v. Cuneo*, 344 Ill. App. 242, 100 N.E.2d 521 (1951).

¹⁰ 100 Eng. Rep. 359 (1788).

¹¹ 96 So. 2d 130 (Fla., 1957).

¹² Ill. Const. (1870) Art. II, §§ 13, 17, 19.

to sovereign immunity in the 1870 case of *Town of Waltham v. Kemper*¹³ and applied it to schools in *Kinnare v. City of Chicago*¹⁴ in 1898. These cases were decided squarely on the sovereignty of a state extending to its agencies. Further application of sovereign immunity along with other, more cogent reasons for the concept appeared in *Leviton v. Board of Education*¹⁵ and *Thomas v. Broadlands Community Consolidated School District*.¹⁶ It is interesting to note that in England as early as 1890, the concept was discarded.¹⁷ Illinois and the other states, though, slavishly followed this doctrine.¹⁸ Some states found that the concept was not only unjust but unwise and began whittling down by legislation that which the courts refused to abolish by reason.¹⁹ New York has long held that school districts are liable for torts generally and for their own negligence.²⁰ However, the general rule remained that a school district or similar governmental agency was immune from tort liability unless such liability was specifically imposed by statute and the immunity extended to acts committed by agents of the governmental agency.²¹

¹³ 55 Ill. 346 (1870).

¹⁴ 171 Ill. 332, 49 N.E. 536 (1898).

¹⁵ 374 Ill. 594, 30 N.E.2d 497 (1940); lack of funds out of which judgments could be satisfied.

¹⁶ 348 Ill. App. 567, 109 N.E.2d 636 (1952).

¹⁷ *Crisp v. Thomas*, 63 L. T. Rep., N. S. 756 (1890).

¹⁸ *Baker & Co. v. Lagaly*, 144 F.2d 344 (C.A. 10th, 1944); *Bingham v. Bd. of Education of Ogden City*, 118 Utah 582, 223 P.2d 432 (1950); *Reed v. Rhea County*, 189 Tenn. 247, 225 S.W.2d 49 (1949); *Briscoe v. School Dist. No. 123*, 32 Wash.2d 353, 201 P.2d 697 (1949); *Farmer v. Poultry School Dist.*, 113 Vt. 147, 30 A.2d 89 (1943); *Wallace v. Laurel County Bd. of Education*, 287 Ky. 454, 153 S.W.2d 915 (1941); *Shirkey v. Keokuk County*, 225 Iowa 1159, 281 N.W. 837 (1938); *School Dist. No. 28 v. Denver Pressed Brick*, 91 Colo. 288, 14 P.2d 487 (1932); *Benton v. Bd. of Education of Cumberland County*, 201 N.C. 653, 161 S.E. 96 (1931).

¹⁹ *Heiden v. Milwaukee*, 226 Wis. 92, 275 N.W. 922 (1937); *Huff v. Compton City Grammar School Dist.*, 92 Cal. App. 44, 267 Pac. 918 (1928); *Redfield v. School Dist. No. 3*, 48 Wash. 85, 92 Pac. 770 (1907).

²⁰ *Lessin v. Bd. Education of City of N.Y.*, 247 N.Y. 503, 161 N.E. 160 (1928); *Herman v. Bd. of Education of Union School Dist. No. 8*, 234 N.Y. 196, 137 N.E. 24 (1922); *Titusville Iron Co. v. City of New York*, 20 N.Y. 203, 100 N.E. 806 (1912); *Wahrman v. Bd. of Education*, 187 N.Y. 331, 80 N.E. 192 (1907).

²¹ *Jensen v. Juul*, 66 S.D. 1, 278 N.W. 6 (1938); *Perkins v. Trask*, 95 Mont. 1, 23 P.2d 982 (1933); *Boice v. Bd. of Education*, 111 W.Va. 95, 160 S.E. 566 (1931); *Turk v. County Bd. of Education*, 222 Ala. 177, 131 So. 436 (1930); *Antin v. Union Dist.*, 130 Ore. 461, 280 Pac. 664 (1929); *Consolidated School Dist. No. 1 v. Wright*, 128 Okla. 193, 261 Pac. 953 (1927); *McVey v. Houston*, 273 S.W. 313 (Tex. Civ., 1925); *Dick v. Bd. of Education*, 209 Mo. App. 63, 238 S.W. 1073 (1922); *Gold v. Baltimore*, 137 Md. 335, 112 Atl. 588 (1921); *Juul v. School Dist.*, 168 Wis. 111, 169 N.W. 309 (1918); *Daniels v. Bd. of Education*, 191 Mich. 339, 158 N.W. 23 (1916); *Ernst v. West Covington*, 116 Ky. 850, 76 S.W. 1089 (1903); *Howard v. Worcester*, 153 Mass. 426, 27 N.E. 11 (1891); *Ford v. School Dist. of Kendall Borough*, 121 Pa. 543, 15 Atl. 812 (1888).

School districts have been classified as quasi-municipal corporations or governmental agencies as distinguished from pure municipal corporations. Immunity is extended to the quasi-municipal corporation almost in toto²² while the municipal corporation's functions were classified either governmental or proprietary.²³ Liability was imposed upon the municipal corporations when the tort arose from a proprietary function.²⁴

THE PRESENT

In the *Kaneland* case, the Court stated that the question of school district immunity had not been questioned thoroughly in almost fifty years and therefore the decision is a very fresh and long needed reconciling of modern needs to modern law. The Florida decision²⁵ was preceded by two very vigorous dissents in cases handed down a few years earlier.²⁶ Florida took the approach that it had departed soon after its entrance into the Union from the correct law and was now merely aligning itself with what was, in reality, a true exposition of the law.

Perhaps the best reason for the abolition of the sovereign immunity doctrine was voiced by Dean Harno who said:

A Municipal corporation today is an active and virile creature capable of inflicting much harm. Its civil responsibility should be co-extensive. The municipal corporation looms up definitely and emphatically in our law, and what is more, it can and does commit wrongs. This being so, it must assume the responsibilities of the position it occupies in society.²⁷

The *Kaneland* case is up for rehearing before the Illinois Supreme Court and a reaffirmation of the decision will serve as an indication of the determination of the court to stand fast in the face of the legislative indication that it favors immunity.²⁸ With such cogent reasons for the

²² *Lake County v. Cuneo*, 344 Ill. App. 242, 100 N.E.2d 521 (1951); *Le Pitre v. Chicago Park Dist.*, 374 Ill. 184, 29 N.E.2d 81 (1940); *Backer v. West Chicago Park Comm.*, 66 Ill. App. 507 (1896).

²³ *Roumbos v. City of Chicago*, 332 Ill. 70, 163 N.E. 361 (1928).

²⁴ *Ibid.*, at 77, 364 where the court said: "If the tort is one for which the municipality is expressly made liable by statute, that fact, of course, concludes the liability of the corporation. If such is not the case then the tort must consist (in the case of public corporations other than public quasi corporations) of the violation of a private duty imposed for private corporate advantage, and not of a public or governmental duty imposed for the benefit of the public at large. In the case of public quasi corporations the general rule is that they are liable only for those torts for which the statute expressly prescribes that they shall be liable."

²⁵ *Hargrove v. Cocoa Beach*, 96 So.2d 130 (Fla., 1957).

²⁶ *Williams v. Green Cove Springs*, 65 So.2d 56 (Fla., 1953); *Miami v. Bethel*, 65 So.2d 34 (Fla., 1953).

²⁷ 4 Ill. L. Q. 28, 42 (1921).

²⁸ Auth. cited footnotes 4, 5, 6, 7, 8, *supra*.

abolition of the doctrine, a reaffirmation seems to be the most sound and logical approach.

THE FUTURE

What about the constitutionality of the legislation again giving full or partial immunity to schools, counties, park districts and forest preserves?²⁹ Does this legislation meet the tests of the Illinois Constitution which guarantees redress of grievances?³⁰ Other constitutional guaranties have been jealously guarded by the courts, notably the right to be secure against assaults on reputation.³¹ Should not this very basic right, one upon which our entire judicial system is based, be as militantly upheld?

Assuming for a minute that the court will some time in the future hold the recent legislation unconstitutional, what would result? A rash of suits? Bankruptcy of small governmental agencies similar to school districts? The court in the *Kaneland* case succinctly discredits the question of bankruptcy by pointing out that schools are big business and, further, municipalities and private corporations have not gone out of business as a result of satisfying judgments rendered against them. Another author has pointed out several ways to deal with the suits which would result from an abolition of tort immunity and safeguard the public interest at the same time. It was suggested that claims be excluded from jury determination; that maximum recovery limits, similar to workmen's compensation claims, be established; that claims be administered by a separate state agency instead of placing the load of such newly sanctioned claims on the already overcrowded courts; and that special procedures be introduced to permit the funding of the resulting liabilities or their payment over a period of years.³²

Still another solution pointed out by many authors is the use of tort liability insurance as a basis for a more liberal compensation for injuries.³³ Of course, Illinois has followed the theory that the procurement of liability insurance acts as a type of waiver of immunity; but the *Kaneland* case points up the rule that hitherto the fact of insurance had to be alleged by the plaintiff before the waiver would be operative.³⁴

²⁹ *Ibid.*

³⁰ Ill. Const. (1870) Art. II, §§ 13, 17.

³¹ Ill. Const. (1870) Art. II, § 19.

³² David, *Tort Liability of Local Government—Alternatives to Immunity from Liability or Suit*, 6 U.C.L.A. L. Rev. 1 (January 1959).

³³ Phillips, *Tort Liability of Quasi Corporations in Pennsylvania*, 32 Temp. L. Q. 1 (Fall 1958).

³⁴ *Molitor v. Kaneland Community Unit School District No. 32*, Docket 25249, Agenda 32, Illinois (1959).

CONCLUSION

The entire question of immunity may be relegated to a position of no significance if upon rehearing the court decides to withdraw or change its prior decision. The purpose of this paper is solely to point up the overwhelming opinion of scholars and the trend of the states to do away with the old theory. If the reader's curiosity is kindled, a reading of the *Kane-land* case will lead him to innumerable authorities whose discussion of the problem is too copious and lengthy for this paper.

MOVIE CENSORSHIP STANDARDS UNDER THE FIRST AMENDMENT

With the advent of a multitude of moving pictures with prurient overtones heralded by a spicy variety of come-hither advertising, there is much concern as to what type of censorship is acceptable to the Supreme Court of the United States. Quite unlike the poem by Stoddard King, the movies do not arrive equipped with an asterisk.¹

To the present day the Supreme Court has struck down such standards as "best interests," "immoral," "tend to corrupt morals," "harmful," and "alluringly portrays adultery as proper behavior." The problem of censorship then is twofold. First, a standard acceptable to the United States Supreme Court must be determined and second, an attempt must be made to define the extent of allowable censorship, if any exists.

The first case to be considered in a review of censorship case law is *Mutual Film Corp. v. Ohio*,² decided in 1915 wherein the Supreme Court of the United States for the first time ruled on movie censorship. This decision was to remain the law of the land until 1952. The statute involved in this case stated: "Only such films as are in the judgment and discretion of the board of censors of a moral, educational or amusing and harmless character shall be passed and approved by such board."³ The most important contention of the plaintiffs so far as this discussion is concerned was that the censorship violated the constitutional guarantees of Freedom of Speech in both the United States and Ohio Constitutions. The Court in upholding the statute under the Ohio Constitution, said:

¹ "A writer owned an Asterisk, and kept it in his den,
Where he wrote tales (which had large sales) Of Frail and erring men,
And always, when he reached the point where carping censors lurk,
He called upon the Asterisk to do his dirty work."

"The Writer and the Asterisk," *The Desk Drawer Anthology*, compiled by Alice Roosevelt Longworth and Theodore Roosevelt, Doubleday, Doran & Co., pp. 416 (1931).

² 236 U.S. 230 (1915).

³ *Ibid.*, at 240.