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Illinois School Tort Immunity: 1959 to the Present

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ILLINOIS SCHOOL TORT IMMUNITY: 1959 TO THE PRESENT

I. INTRODUCTION

The present status of the Illinois law of tort immunity concerning schools and school districts is the product of five distinct elements: 1) the decision in *Molitor v. Kaneland Community Dist.*[1]; 2) the legislation of 1959 modifying *Molitor*[2]; 3) the judicial interpretation of *Molitor* and the 1959 "emergency" legislation;[3] 4) the 1965 Illinois Tort Immunity Act[4]; 5) the judicial interpretation from August 13, 1965[5] to the present. It is the purpose of this note to analyze the impact of these elements on the Illinois law of school tort immunity, and to make projections as to the possible future developments. Before such an analysis, however, it may be useful to survey the status of sovereign immunity in Illinois prior to the *Molitor* decision itself.

II. MOLITOR AND ITS PRESIDENTS

The doctrine of sovereign immunity first entered the common law in the English case of *Russell v. Men of Devon*,[6] decided in 1788. The case involved a suit brought against all of the inhabitants of a county to recover damages to a wagon caused by a faulty bridge. The court held for the defendants, and the case became the basis for the doctrine of sovereign immunity in American law.[7] *Russell* has been criticized, however; and it has been contended that it does not provide legitimate basis for the adoption and maintenance of the sovereign immunity principle, as it exists today.[8]

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1. 18 Ill. 2d 11, 163 N.E.2d 89 (1959) *cert denied*, 362 U.S. 968 (1960).
2. The date the second Molitor decision became final, effectuation its prospective holding.
3. The 1959 legislation was enacted on July 22, 1959, five months before the final Molitor decision, December 16, 1959. The legislation affecting school liability was enacted as ILL. REV. STAT. ch. 122 §§ 821-831 (1959) which, while not returning complete immunity to the schools, substantially limited the complete liability declared in the Molitor decision.
4. Local Governmental and Governmental Employees Tort Immunity Act ILL. REV. STAT. ch. 85 §§ 1-101 to 10-101 (1965), (hereinafter referred to as the Illinois Tort Immunity Act).
5. The effective date of the Illinois Tort Immunity Act.
6. 100 Eng. Rep. 359 (1788).
7. *See*, Mower v. Inhabitants of Liecester, 9 Mass. 247 (1812); and Waltham v. Kempter, 55 Ill. 346 (1870).
8. For a recent and detailed critique of *Russell* and its development as the basis

The decision did not say counties were immune from tort liability per se, but rather held that recovery was denied due to the unincorporated character of the defendant inhabitants.[9] The court also declared there were no funds for a judgment to be satisfied.[10] An inference to be drawn is that had the County of Devon been incorporated, the suit would have been successful.[11]

The *Russell* case was reversed in 1890.[12] In 1870, at the time England was beginning to have doubts about *Russell*, the Illinois Supreme Court chose to adopt it in *Town of Waltham v. Kemper*.[13] The Plaintiff, Kemper, sought damages for an illness he contracted while attempting to free his mired wagon from what he alleged was a negligently maintained road. His argument was that the municipality, in accepting its charter and the concomitant authority and power to act, incurred a liability to perform all the duties imposed on such a body. The court disagreed citing *Russell*:

> It has been held, . . . that towns as counties . . . existing as such only for the purposes of general political government of the state . . . are not liable at . . . common law . . . for neglect of duty [they] can only be made liable by statute.[14]

The first application of *Waltham* to schools and school districts in Illinois occurred in *Kinnare v. City of Chicago*,[15] decided in 1898. In refusing to award damages in a wrongful death suit, the *Kinnare* court pointed out that the school board was a quasi-corporation created for the purpose of aiding the local administration of government.[16] Citing *Waltham* the court said:

> [A] corporation created by the state is a mere agency for the more efficient exercise of governmental functions [and] is exempted from . . . [responding] . . . in damages . . . for negligent acts of its servants to the same extent as the state itself, unless such liability is expressly provided by the statute creating such agency.[17]

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for sovereign immunity *see*, Note, *Assault on the Citadel: De-immunizing Municipal Corporations*, 4 SUFFOLK U.L. REV. 832 (1970), *see also*, Professor Borchard's earlier but "classical" article, *Governmental Liability in Tort*, 34 YALE L.J. 1, 129, 229 (1924), 36 YALE L.J. 1, 757, 1039 (1926), 28 COLUM. L. REV. 577, 734 (1928).

9. 100 Eng. Rep., at 360.
10. *Id.* at 361.
11. Such was the position of Justice Gibes in his dissent, 100 Eng. Rep., at 362. Compare, Mayor and Burgesses of Lyme Regis v. Henley, 3 B. and A. 77, 100 Eng. Rep. 29 (K.B. 1832), (where the municipal corporation was found liable for failure to repair certain sea walls).
12. Crisp v. Thomas, 63 L.T. Rep. N.S. 756 (1890).
13. 55 Ill. 346 (1870).
14. *Id.* at 349.
15. *Id.* at 349.
16. *Id.* at 334.
17. *Id.* at 335. *See also*, Elmore v. Drainage Commissioners, 135 Ill. 269, 25

American writers, however, had begun to criticize this application of sovereign immunity as early as 1884.[18] Since that time there has been an increasing body of commentaries critical of the concept that municipalities should be immune from damages in tort.[19] Arguments in favor of sovereign immunity state that the operation of government is not a for-profit enterprise, that public services would be hindered, and that the public's interest would be ignored if funds were allowed to be diverted to pay private injuries.[20] The response to these arguments has been that, given the extension of government activity to benefit society, and the increased probability of harm caused by this expansion, the risk of loss ought to be spread among all the beneficiaries of the increased activity and not placed solely on the injured party.[71] Accordingly, by recognizing liability based on fault, it is argued that greater efficiency and economy can be encouraged in government as opposed to a situation where government activities can be performed without concern for the relative possibility of liability for personal injury or damage to property.[22]

Though a number of suggestions have been made regarding the conservation of public funds,[23] the general consensus of critics on the

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N.E. 1010 (1890); Symonds v. Clay County, 71 Ill. 355 (1874); Town of O'Dell v. Schroeder, 58 Ill. 353 (1871); Wilcox v. City of Chicago, 107 Ill. 334 (1883); Nagle v. Wakey, 161 Ill. 387, 43 N.E. 1079 (1896).

18. Young, Liability of Municipal Corporations for Negligence, 18 Am. L. Rev. 1008, 1018 (1884).

19. Some of the most frequently cited and "classical" articles are: Borchard, *supra* note 8; Ripko, *American Legal Commentary on the Doctrines of Municipal Tort Liability*, 9 LAW & CONTEMP. PROB. 214 (1942); Fuller and Casner, *Municipal Tort Liability in Action*, 54 HARV. L. REV. 437 (1941); James, *Tort Liability of Governments and Their Officers*, 22 U. CHI. L. REV. 610 (1955); Pugh, *Historical Approach to the Doctrine of Sovereign Immunity*, 13 LA. L. REV. 476 (1953).

20. *See* 2 HARPER & JAMES, LAW OF TORTS, § 29.4 (1956); Borchard, *Governmental Liability in Tort VI*, 36 YALE L.J. 1 (1926); Gardner, *An Inquiry into The Municipal Responsibility in General Assumpsit and Tort*, 8 VAND. L. REV. 753 (1955); Note, *Governmental Immunity*, 17 DEPAUL L. REV. 236 (1967). *Also see* Thomas v. Broadland Community Consolidated School Dist., 348 Ill. App. 567, 109 N.E.2d 636 (1952).

21. *See* Douglas, *Vicarious Liability and Administration of Risk II*, 38 YALE L.J. 720 (1929); Feezer, *Capacity to Bear Loss as a Factor in the Decision of Certain Types of Cases*, 78 U. PA. L. REV. 805 (1930); Blanchley and Oatman, *Approaches to Governmental Liability in Tort: A Comparative Survey*, 9 LAW & CONTEMP. PROB. 181 (1942); James, *Tort Liability of Governmental Units and Their Officers*, 22 U. CHI. L. REV. 610 (1955); 3 Davis, ADMINISTRATIVE LAW TREATIES, § 25.17 (1950).

22. *Cf.* U.S. v. Ure, 225 F.2d 709 (9th Cir. 1955). *See also*; Note, *The Discretionary Exception and Municipal Tort Liability: A Reappraisal*, 52 MINN. L. REV. 1047 (1968); 2 Harper and James, *supra* note 20, at § 12.1-4.

23. To counter the complaint concerning depleting public funds a number of suggestions have been proposed. They include: Insurance, *see*, Thomas v. Broadlands Community Consolidated School District, 348 Ill. App. 567, 109 N.E.2d 636 (1952); 68 A.L.R.2d 1437) Bonds (*see*, 21 NAT. MUNIC. REV. 188 (1932); Note, *Municipal Corporations*, 14 CALIF. L. REV. 229 (1926) and Recovery Statutes (*see*, Fuller and Casner, *Municipal Tort Liability in Action*, 54 HARV. L. REV. 437 (1941).

subject is that municipal liability ought to exist.[24] A major issue, however, has always been who should eliminate this tort immunity, the courts or the legislature.[25] Legislatures, though they have been considered the best medium for change,[26] had been painfully slow to act on the issue of sovereign immunity.[27] In Illinois, for example, the Court of Claims was created in 1917[28], but no action was taken with regard to local government tort immunity, until 1959, after the court had assumed the initiative. When the courts in other states chose to act against this background of legislative inactivity, many of them abolished sovereign immunity by fiat.[29] These decisions though generally well received, were criticized by some because of the lack of "comprehensiveness" inherent in a court decision, and the difficulties which would occur if the decision was retroactive.[30] Mr. Justice Traynor formerly of the California Supreme Court, disagreeing with those who criticized the activity of the courts, argued in their defense saying:

> Were a court to undo well what it has done badly the law would

24. *See* Friedman, *Liability in Tort of Municipal Corporations in Missouri*, 3 Mo. L. REV. 275 (1938); Barrett, *The Foundations of the Distinction Between Public and Private Functions With Respect to the Common Law Tort Liability of Municipal Corporations*, 16 ORE. L. REV. 250 (1937); Tooke, *The Extension of Municipal Liability in Tort*, 19 VA. L. REV. 97 (1932); Feezer, *supra* note 24; Borchard, *supra* note 23; Harno, *Tort Immunity of Municipal Corporations*, 4 ILL. L.Q. 28 (1921); Rosenfield, *Government Immunity From Liability For Torts in School Accidents*, 5 LEGAL NOTES ON LOCAL GOVERNMENT 358 (1940).

25. In 1921 Professor Harno felt the courts would be the "vanguard" in abolishing the "anarchy" of sovereign immunity. Harno, *supra*, note 24 at 42. While others were convinced that the solution would have to be a legislative one, *See* Fordham and Pegues, *Local Government Responsibility in Louisiana*, 3 LA. L. REV. 720 (1941); Clark, *Municipal Responsibility in Tort in Maryland*, 3 MD. L. REV. 159 (1939).

26. *See* Van Alstyne, *Government Tort Liability: A Public Policy Prospectus*, 10 U.C.L.A. L. REV. 463 (1963); Hertler, *Judicial Legislation and the Doctrine of Sovereign Immunity*, 39 U. DET. L.J. 570 (1962).

27. Before the Molitor decision only 2 statutes had been passed in the United States abrogating sovereign immunity. One June 13, 1939, New York passed the first statute as The Court of Claims Act, LAWS OF N.Y., 1939 ch. 860. The second statute was the United States Federal Tort Claims Act of 1946, 28 U.S.C. §§ 2671-2680 (1949). *See* Note, *The Role of The Courts in Abolishing Governmental Immunity*, 1964 DUKE L.J. 888, 895 n.15 (1964).

28. ILL. REV. STAT. ch. 37 § 439 (1945).

29. Hargrove v. Town of Cocoa Beach, 96 So. 2d 130 (Fla. 1957) (Florida); Muskopf v. Corning Hospital District, 11 Cal. Rptr. 89, 389 P.2d 457 (1961) (California); Molitor v. Kaneland Community Unit School District, 18 Ill. 2d 11, 163 N.E.2d 89 (1959) (Illinois); Colorado Racing Commission v. Brush Racing Association, 136 Colo. 279, 316 P.2d 582 (1957) (Colorado); Stone v. Arizona Highway Commission, 93 Ariz. 384, 381 P.2d 107 (1963) (Arizona); Holytz v. City of Milwaukee, 17 Wis. 2d 26, 115 N.W.2d 618 (1962) (Wisconsin); McAndrew v. Mularchuk, 33 N.J. 172, 162 A.2d 820 (1960) (New Jersey, not complete immunity however); Williams v. City of Detroit, 364 Mich. 231, 11 N.W.2d 1 (1961) (Michigan); Spaniel v. Mounds School District No. 621, 264 Minn. 279, 118 N.W.2d 195 (1962) (Minnesota); Kamau and Cushnie v. Hawaii County, 41 Hawaii 527 (1957) (Hawaii).

30. *Cf.* Hickman, *Municipal Tort Liability in Illinois*, 1961 U. ILL. L.F. 475 (1961); Note, *The Role of the Courts in Abolishing Governmental Immunity*, 1964 DUKE L.J. 888 (1964).

> stand to gain much. At best, the legislature might then let well enough alone or advance constructively in the wake of judicial initiative. At worst, the legislature might repudiate the judicial turn for the better. In that event a court would at least have focused attention on a sore problem and could not in good conscience await developments as the legislature henceforth exercised the major responsibility it had pre-empted.[31]

In Illinois, the court acted first. The final decision of *Molitor v. Kaneland Community Unit District*[32] was rendered December 16, 1959.[33] Until that time, pursuant to the decision in *Kinnare*,[34] schools and school districts enjoyed complete immunity from tort liability in all cases except those where liability insurance had been purchased.[35]

The *Molitor* decision overruled *Kinnare*, and held that where a school district employee had been negligent in the operation of a school bus which resulted in injury to the plaintiff, the school district was liable in tort.[36] The court declared, "We conclude that the rule of school district immunity is unjust, unsupported by any valid reason, and has no rightful place in modern-day society."[37] The rationale of the decision was based on a reappraisal, in light of "modern-day society," of the sovereign immunity defenses that the "king can do no wrong," and that the payment of tort claims was an improper diversion of public education funds. This persistent view of funds being "diverted" by the recovery of damages in tort was rejected[38] because no determination had ever been made by a court as to what a proper school expenditure was. The relationship between the school's purpose and its financial responsibility for the negligent execution of that purpose had not been as clearly drawn as it had in business activities. "To predicate immunity upon the theory of a trust fund [for example] is merely to argue in a cricle, since it assumes an answer to the very question at issue, what is an educational purpose?"[39]

In repudiation of the "king can do no wrong" theory, the court said:

> It is almost incredible that in this modern age . . . the mideaval absolutism implicit in the maxim, "the king can do no wrong"

31. Traynor, *La Rude Vita, La Dolce Guistiza, or Hard Cases Can Make Good Law*, 29 U. CHI. L. REV. 223, 231 (1962).
32. *See* note 1, *supra.*
33. The first *Molitor* decision was handed down on May 21, 1959.
34. *See* note 15, *supra.*
35. Thomas v. Broadlands Community Consolidated School District, 348 Ill. App. 567, 109 N.E.2d 636 (1952).
36. 18 Ill. 2d 29.
37. *Id.* at 25.
38. *Id.* at 22.
39. *Id.*

> should exempt the various branches of government from liability for their torts, and that the entire burden of damage resulting from the wrongful acts of the government should be imposed upon the single individual who suffers the injury, rather, than distributed among the entire community . . .[40]

In rebuttal to the charge such liability would "bankrupt" schools and school districts and impede education, the court declared that:

> We do not believe, in this 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-public-funds theory[41]. . . . Private concerns have rarely been greatly embarrassed, and in no instance, even where immunity is not recognized, has a municipality been seriously handicapped by tort liability.[42]

Citing Dean Green[43] the court said:

> The public's willingness to . . . pay the cost of its enterprises . . . through municipal corporations is no less than its insistence that individuals and groups pay the cost of their enterprises.[44]

The court claimed the ability to make so sweeping a decision in the face of legislative inactivity because:

> The doctrine of school tort immunity was created by this court alone. Having found that doctrine to be unsound and unjust under present conditions, we consider that we have not only the power, but the duty to abolish that immunity.[45]

Although the final *Molitor* decision made a clean break with the past, and eliminated sovereign immunity from tort, the legislature acted to modify the effects of the decision.[46]

III. The 1959 School Tort Liability Act

Prior to *Molitor*, a proprietary-governmental distinction had been drawn with respect to the sovereign immunity of municipal corporations. When the court in *Molitor* abolished the sovereign immunity of

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40. *Id.*
41. *Id.*
42. *Id.* at 22.
43. Green, *Freedom of Litigation*, 38 Ill. L. Rev. 355, 378 (1944).
44. 18 Ill. 2d 22.
45. *Id.* at 25. *But see*, Justice Davis' dissent where it is argued that changes such as these, affecting the status of state created entities and the use of public funds, are solely legislative functions. *Also see* Hickman, *supra* note 30.
46. In June 1959, four statutes were passed granting total immunity to: park districts generally, Ill. Rev. Stat. ch. 105 §§ 12.1-1 and 491 (1959); the Chicago Park District, Ill. Rev. Stat. ch. 105 § 333.2a (1959); forest preserve districts, Ill. Rev. Stat. ch. 57½ § 3a (1959); counties, Ill. Rev. Stat. ch. 34 § 301.1 (1959). A statute which limited the liability of school districts to $10,000 in each separate cause of action was also passed. Ill. Rev. Stat. ch. 122 § 829 (1959).

any political subdivision of the state it rendered this distinction moot.[47] In reaction to *Molitor*, the legislature enacted the 1959 School Tort Liability Act.[48] It applied the proprietary--governmental distinction to schools and school districts,[49] making them totally immune from tort liability for their governmental functions and limited their tort liability for proprietary functions to a maximum of $10,000.[50]

In Section 821 of the Act, the legislature clearly stated its reasons for enacting the statute.

> The General Assembly finds and hereby enacts as . . . public policy . . . that public schools in the exercise of purely governmental functions should be protected from excessive diversion of their funds . . . and that non-profit private schools conducted by bona fide eleemosynary or religious institutions should be protected from excessive diversion of their funds for purposes not directly connected with their educational functions.

In general the remainder of the statute,[51] regarding injuries occurring both before and after the act, provided that notice of injury be filed in the office of the school's attorney or the school clerk.[52] Failure to give six months notice was a ground for dismissal of the complaint and a bar to future suits on the cause of action.[53] A one-year statute of limitations was provided,[54] and any recovery obtainable by the plaintiff was limited to $10,000.[55] Finally the act was not to be construed as creating a new cause of action or as authorizing judgment.[56]

In re-establishing the governmental-proprietary distinction and having it apply to schools and school districts, the legislature imposed this distinction on entities which are quasi-municipal and which, before *Molitor*, had only governmental functions and therefore were immune from liability in tort.[57] This re-designation raised three questions

47. *See* 18 Ill. 2d at 20 and 29.
48. ILL. REV. STAT. ch. 122 §§ 821-831 (1959).
49. ILL. REV. STAT. ch. 122 §§ 821-831 (1959).
50. ILL. REV. STAT. ch. 122 § 825. Generally, it has been held by Illinois courts that legislatures may create instances of immunity from tort where the classification is a reasonable one. See Mills v. Winnebago County, 104 Ill. App. 2d 366, 244 N.E.2d 65 (1969).
51. ILL. REV. STAT. ch. 122 §§ 826-829. These sections contain provisions identical to §§ 822-825 of the chapter except that they relate to injuries which occurred prior to the effective date of the act.
52. ILL. REV. STAT. ch. 122 § 823.
53. *Id.* at § 824.
54. *Id.* at § 822.
55. *Id.* at § 825.
56. Garrison v. Community Consolidated School Dist., 34 Ill. App. 2d 322, 181 N.E.2d 360 (1962). (Interpreting § 830 of the School Tort Liability Act).
57. The *Garrison* case, *supra* note 56, explained: The governmental-proprietary distinction ". . . has not been applied to school districts or other quasi-municipal corporations which are mere political divisions of the state government." 34 Ill. App.

concerning the effect that the new distinctions would have on school liability: (1) what is the governmental-proprietary distinction; (2) should municipal and quasi-municipal corporations be treated differently for purposes of the application of sovereign immunity; and (3) given the fact the functions of quasi-municipal corporations were historically considered wholely governmental, on what criteria can a proprietary distinction now be made?

The governmental-proprietary distinction made its first appearance in American case law in 1802.[58] It has been suggested that the purpose of the decision was an attempt at "benevolent immunity."[59] However, the attempt to create meaningful tests to identify the two functions have been not only difficult to apply,[60] but vary from jurisdiction to jurisdiction with "glaring inconsistencies."[61] This difficulty in establishing a uniform, meaningful test has been given as the reason for abandoning the distinction in several recent cases.[62]

Municipal corporations have been described as "legal institution[s] . . . established . . . primarily to regulate the local or internal affairs of the territory . . . , and secondly to share in the civil government of the state in the particular locality.[63]" They had always been considered liable in tort[64] until the 1842 *Bailey* decision[65] changed the American law by bifurcating the identity of the municipal corporation. In American case law, quasi-corporations have been distinguished from

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2d 326. *See also*: Lincke v. Moline, 245 Ill. App. 459 (1927); Lindstrom v. City of Chicago, 331 Ill. 144, 162 N.E. 128 (1928); Chicago City Bank and Trust Co. v. Board of Education, 386 Ill. 508, 54 N.E.2d 498 (1944); Lake County v. Cuneo, 344 Ill. App. 242, 100 N.E.2d 521 (1951).

58. Hooe v. Alexandria, 12 Fed. Cas. 461 (C.C.D.C. 1802). From Hooe, the first case in America finding a municipal corporation liable in tort until Bailey v. City of New York, 3 Hill 531, 38 Am. Dec. 669 (N.Y. 1842), no distinction was made between the tort liability of public and private corporations. One writer has commented on Bailey saying "the distinction was absolutely reactionary and extremely unfortunate . . ." Barrett, *supra* note 24 at 681.

59. 2 HARPER & JAMES, *supra* note 20, at § 29.6.

60. PROSSER, LAW OF TORTS, § 125 at 1009 (1964). "There is little that can be said about such distinctions except that they exist, that they are highly artificial, and that they make no great amount of sense." *But see* Hickman, *Municipal Tort Liability in Illinois* 1961, U. ILL. L.F. 475 (1961).

61. Davis, *Tort Liability of Governmental Units*, 40 MINN. L. REV. 751 at 773 (1956). *See also* 6 MCQUILLIAN, MUNICIPAL CORPORATION, § 2792 at 1040; Indian Towing Company v. U.S., 350 U.S. 61 at 65 (1955). Brush v. Commissioner, 300 U.S. 352 at 362 (1937).

62. Molitor v. Kaneland Community Unit School District, *supra* note 1; Hargrove v. Town of Cocoa Beach, 96 So. 2d 130 (*Fla. 1957*); Holytz v. City of Milwaukee, 17 Wis. 2d 26, 115 N.W.2d 618 (1962).

63. 1 MCQUILLAN, MUNICIPAL CORPORATIONS, § 126 at 365 (2d ed. 1937).

64. Russell v. Men of Devon, *supra* note 6; Varick v. New York, 4 Johns ch. 53 (N.Y. 1819); People v. Albany, 11 Wend. 539 (N.Y. 1834).

65. *See* note 61 *supra*.

normal municipal corporations as early as 1810[66] and were held to be not liable in tort.

The basis for this immunity of quasi-municipal corporations arose from the status they historically enjoyed in England as *ad hoc* bodies, as opposed to substantive corporations. These quasi-corporate entities were created *sub modo* for the performance of specific, specialized functions.[67] These functions were termed governmental in that the entities were created by the state. In the performance of their missions, they held funds in trust for the taxpayer. The duties of quasi-municipal corporations could be expanded only with the legislative authority.[68] School districts have been classified as quasi-municipal corporations or *governmental agencies* as distinguished from municipal corporations.[69]

Section 821 of the School Tort Liability Act implies that school districts may have proprietary functions. A method for determining these functions is necessary. The most reasonable way to distinguish those functions which are proprietary is by use of the rationales of existing authorities interpreting the governmental-proprietary distinction as applied to a municipal corporation.[70] It appears that the distinction must be determined by whether the school or school district's activities are for its own profit or special advantage, or for the general purpose of education.[71] Essentially, the distinction seems to be whether the edu-

66. Riddle v. The Proprietors of the Locks and Canals on Merrimack River, 7 Mass. 169, 5 A. Dec. 35 (1910); *See also,* Mower v. Leicester, 9 Mass. 247, 6 A. Dec. 63 (1812).

67. Barrett, *supra* note 24 at 263. *See also* Moore, *Misfeasance and Non-feasance in the Liability of Public Authorities,* 30 L.Q. REV. 415, 416 (1914); (Russell v. Men of Devon, 100 Eng. Rep. 359 (1788), was decided as it was chiefly because the county had a quasi-corporate identity.)

68. Elmore v. Drainage Commissioners, 135 Ill. 269, 25 N.E. 1010, (1890); Thomas v. Broadlands Community Consolidated School District, 348 Ill. App. 567, 109 N.E.2d 606 (1952). With regard to the argument that governmental functions are immune because the municipal corporation represents the state, one authority has written; "While the reasoning is a logical enough deduction from the premises assumed, yet . . . as indicated, the whole matter of sovereign immunity is so questionable from the points of view of history, comparative law, and policy that any application of the notion which extends rather than cuts down immunity may be and has been questioned." *See* 2 HARPER & JAMES, *supra* note 20 at 1619.

69. *See* Lane County v. Cuneo, 344 Ill. App. 242, 100 N.E.2d 521 (1951); LePitre v. Chicago Park District, 374 Ill. 184, 29 N.E.2d 81 (1940); Backer v. West Chicago Park Commission, 66 Ill. App. 507 (1896). *See also,* Note, *Trend Toward Elimination of Governmental Immunity in Illinois,* 9 DEPAUL L. REV. 39 (1959); For discussion of education as a governmental function, *see* 160 A.L.R. 7 (1946); *Municipal Corporations,* § 571; 47 Am. Jur. schools § 56; 4 DILLON, LAW OF MUNICIPAL CORPORATIONS, 1658 (5th ed. 1911); RHYNE, MUNICIPAL LAW, §§ 30-20.

70. *See* note 48, *supra.*

71. *Cf.* 2 HARPER & JAMES, *supra* note 20, at § 29.6 where the test is phrased in terms of a municipality and involves distinctions between self-benefiting acts and historical governmental acts.

cational service to the student is direct or indirect.[72] For example, a Pennsylvania court explained that for determining the proprietary functions of schools and school districts the criteria were as follows: Was the activity regulated by statute, was a fee charged, and was the activity of a type regularly conducted by private enterprise.[73]

IV. INTERIM 1959-1965

In the period between the final decision of *Molitor*,[74] and the effective date of the 1965 Local Governmental and Governmental Tort Immunity Act,[75] the law regarding school sovereign immunity was affected by a number of decisions.

Generally, the cases lend themselves to three categories: (1) cases in which the cause of action arose before the final *Molitor* decision; (2) cases having a cause of action arising after the *Molitor* decision and applying to the School Tort Liability Act; and (3) the *Harvey v. Clyde Park District* decision[76] declaring the 1959 Park District Act unconstitutional.

In March 1960, *Peters v. Bellinger*[77] was decided. This was the first of cases where the complaint had arisen before *Molitor*, was decided, and proved dispositive of all later cases having a similar pre-*Molitor* cause of action.[78] In this personal injury case, the plaintiff claimed that in July, 1956, he was beaten by police officers. His complaint was that the officers had been negligently hired. The court dis-

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72. For example the construction of education facilities, or the conduction of fund raising activities could be construed as propriety while the assignment of an instructor to a class or the need for field trips could be construed as governmental i.e. primarily educational, *cf.* Johnson v. City of Chicago, 258 Ill. 494, 101 N.E. 960 (1913), where "The test of 'governmental' is . . . whether the activity is for the common good of all the people of the state and for the benefit of the public at large."

73. Morris v. School District, 393 Pa. 633, 144 A.2d 737 (1958); *See also* 33 A.L.R.3d 734, § 8 (1970). However, the vagueness of the application of the governmental proprietary distinction is once again made clear when we see that school facilities to be used for other than strictly school purposes were held to be immune from tort in that they were exercising "governmental" functions. Lincke v. Moline Board of Education, 45 Ill. App. 457 (1927).

74. December 16, 1959.

75. ILL. REV. STAT. ch. 85 §§ 31-101 to 10-101 (1965). August 13, 1965 (hereinafter referred to as the Tort Immunity Act).

76. *See* note 85, *infra*, and accompanying text.

77. 19 Ill. 2d 367, 166 N.E.2d 581 (1960).

78. *See* List v. O'Connor, 19 Ill. 2d 337, 167 N.E.2d 188 (1960) (a wrongful death action brought against a park district); *See also* Terry v. Mt. Zion Community Unit School District, 30 Ill. App. 2d 307, 174 N.E.2d 701 (1961); Lynwood v. Decatur Park District, 26 Ill. App. 2d 431, 168 N.E. 185 (1960) (damages were awarded on other grounds, however); Ludwig v. Board of Education, 35 Ill. App. 401, 183 N.E.2d 32 (1962); Garrison v. Community Consolidated School District, 34 Ill. App. 2d 322, 181 N.E.2d 360 (1962); Bergman v. Board of Education, 30 Ill. App. 2d 65, 173 N.E.2d 565 (1961).

missed, saying *Molitor* did not apply in that it was a prospective decision effective only after December 16, 1969.[79] In *List v. O'Connor*,[80] a case similar to *Peters*, which involved a park district, a wrongful death action was brought based on the negligence of the park district and its employees in conducting a motorcycle race on a frozen pond. The court in *List* dismissed the plaintiff's cause of action for the same reasons that were given in the *Peters* case. The importance of *Peters* and *List*, however, was the implication that *Molitor* applied to governmental entities other than school districts.

In the cases with causes of action arising after the final *Molitor* decision, it was held that recoveries in excess of the $10,000 stipulated in the School Tort Liability Act[81] could not be obtained.[82] It was also held that but for the 1959 legislation,[83] the final *Molitor* decision *would* apply prospectively to abolish the tort immunity of all municipal or quasi-municipal entities, and not merely schools or school districts.[84]

Harvey v. Clyde Park District, decided in 1965,[85] was the first case to overrule a part of the 1959 legislative package. The case consisted of a negligence action on behalf of a minor for injuries received on a faulty playground slide. A motion to dismiss was entered by the defendant park district alleging that it was totally immune from liability under the park district code.[86] The court upheld the plaintiff's claim that the statute was invalid because it constituted special legislation prohibited by the Illinois Constitution,[87] the court declared the act unconstitutional. The issue was whether the statutory classification in the Park District Act was rational as required by Article IV of the Constitution. The court held that many of the activities which frequently give rise to tort liability are common to all governmental units, and there is no apparent rational reason to make any of those activities immune

79. *See* Schaefer, *The Control of "Sunbursts" Techniques of Prospective Overruling*, 42 N.Y.U. L. REV. 631 (1967); and, Note, *The Role of the Courts in Abolishing Governmental Immunity*, 1964 DUKE L.J. 888 (1964).
80. *See* note 78, *supra*.
81. *See* note 48, *supra* at § 825.
82. Griffin v. Board of Education of City of Chicago, 38 Ill. App. 2d 79, 186 N.E.2d 367 (1962).
83. *See* note 46, *supra*.
84. Walker v. Forest Preserve District of Cook County, 27 Ill. App. 2d 538, 190 N.E.2d 296 (1963).
85. 32 Ill. 2d 60, 203 N.E.2d 573 (1964) (opinion modified on denial of rehearing, Jan. 19, 1965). See discussions: Recent Decisions, 53 I.B.J. 728 (1965).
86. ILL. REV. STAT. ch. 105 § 12, 1-1 (1963).
87. Ill. Const. art. IV, § 22 (1870). "The general assembly shall not pass local or special laws in any of the following enumerated cases . . . granting to any corporation, association or individual any special or exclusive privilege immunity or franchise whatever."

for one governmental unit and not another.[88] "[T]o the extent recovery is permitted or denied on an arbitrary basis, a special privilege is granted in violation of section 22 of Article IV."[89] Here, these had been no "rational" distinction between playground facilities maintained by the park district and those maintained by the state or a school, where, at least, limited recovery would be available. The effect of *Harvey* was to shake the foundations of the General Assembly's pattern of immunity. The courts, by holding that non-uniform provisions regarding immunity were unconstitutional, placed the entire 1959 legislative scheme in jeopardy.

However, in striking down the Park District Tort Immunity Act, the *Harvey* court did offer suggestions for a re-classification to achieve the purpose of municipal tort immunity.[90] Rather than classification by governmental entity, the court offered classification by function, discretionary acts, or the use of insurance.[91] As models for classifications giving immunity to discretionary acts, the court suggested the Federal Tort Claims Act and the California Tort Liability Statutes.[92]

In summary of the period from 1959 to 1965, *Molitor* had abolished governmental immunity and all governmental and proprietary distinctions, thereby rendering schools and school districts, and quasi-municipal corporations completely liable in tort. The 1959 School Tort Liability Act partially reinstated the prior immunity with regard to schools and school districts by limiting judgments to $10,000, and permitting liability at all only for proprietary functions thereby repudiating *Molitor* to this extent. Although the effect of the 1959 Act was to limit school liability, it was still theoretically possible to gain full recovery for torts occurring under governmental or proprietary functions where liability insurance existed and was alleged by the plaintiff.[93] Finally the decision in *Harvey* cast serious doubt on the constitutionality of the entire 1959 legislative package because of the inconsistencies in treatment of the tort immunity of the various governmental entities.

V. The Local Governmental and Governmental Employees Tort Community Act

In response to *Harvey*,[94] the Illinois General Assembly acted to re-

88. 32 Ill. 2d at 66.
89. *Id.*
90. *Id.* at 67.
91. *Id.*
92. 28 U.S.C. § 2680 (1949); California Government Code §§ 810-895.8 (1965).
93. Lynwood v. Decatur Park District, 26 Ill. App. 2d 431, 168 N.E.2d 188 (1960).
94. Note 85, *supra.*

assert the immunities jeopardized by that decision by passing the Local Governmental and Governmental Emmployees Tort Immunity Act.[95] The act attempted to make uniform what *Harvey* had declared to be special legislation. Thus, it responded to the *Harvey* suggestion that immunity ought to be attached to certain functions and uniformly applied rather than immunizing the activities of certain agencies. It also exempted from liability the discretionary acts of public entities.[96]

Artcle I of the act relates to the construction and application of the act. It provides in part, that all public employees under the act include members of school boards,[97] and that "local public entity" under the act includes school districts and school boards.[98]

Article II of the act sets forth the general immunities applicable to public entities and public employees. The article is divided into three parts: (1) immunity for local public entities; (2) immunity of public employees; and (3) the indemnification of employees. Under Part I, public entities are immune from punitive or exemplary damages[99] or damages arising from either a failure to adopt or enforce a law,[100] a failure to inspect or negligent inspection,[101] a negligent or intentional oral promise or misrepresentation,[102] or an injury resulting from an act or omission of its employee where the employee is not personally liable.[103] This last provision has the greatest importance because under it only through *respondeat superior* may a public entity be liable. Therefore, the basis for public entity liability must arise from the fault of the employee. As has been observed by the legal writers, it thereby extends to governmental units the "discretionary act" immunity provided public employees.[104]

Part II of Article II provides for the immunity of public employees in various circumstances. Among the provisions of greatest importance are: Immunity from liability for discretionary acts or policy determina-

95. ILL. REV. STAT. ch. 85 § 1-101 to 10-101 (1965).
96. For discussions concerning discretionary immunity see, Note, *Discretionary Exception and Municipal Tort Liability: A Reappraisal*, 52 MINN. L. REV. 1047 (1968); Davis, *Administration Officers Tort Liability*, 55 MICH. L. REV. 201 (1956); Note, *California Tort Dams Act: Discretionary Immunity*, 39 So. CAL. L. REV. 470 (1966).
97. *See* Illinois Tort Immunity Act, § 1-202.
98. *Id.* at § 1-206.
99. *Id.* at § 2-102.
100. *Id.* at § 2-103.
101. *Id.* at § 2-105.
102. *Id.* at § 2-106.
103. *Id.* at § 2-109.
104. Baum, *Tort Immunity of Local Governments and Their Employees: An Introduction to the Illinois Immunity Act*, 1966, ILL. L. REV. 981, 988 (1966); Kionka and Norton, *Tort Liability of Local Governments and Their Employees in Illinois* 58 I.B.J. 620, 629 (1970).

tions,[105] acts or omissions in the execution of any law unless they constitute wilful and wanton negligence,[106] injuries caused by the acts or missions of a third party,[107] the adoption of or the failure to adopt or enforce a law,[108] the failure to inspect or negligent inspection of property other than the public entity's[109] and injury arising from organizing or maintaining a school safety patrol.[110] The immunity from liability for the discretionary or policy making acts of public entity employees is based on a concern for avoiding the hindrance of a public official's best judgment in making determinations of law and fact,[111] and the possible deterrent effect extensive personal liability would have on those who enter public life.[112] A restrictive effect on public administration might result from the over-caution of public officials in the exercise of their authority.[113]

Part III, relating to the indemnification of employees, declares that nothing relieves a local public entity from indemnifying or insuring its employees where required by law.[114] It further provides that the entity may appear and defend any claim made against an employee, indemnify him for any court costs, pay or indemnify for any judgment on the claim, or pay or indemnify him for a compromise settlement.[115]

Article III deals with immunity from liability of local public entities with regard to the operations and management of real or personal property owned or leased by them. Generally the duty of the entity is to exercise ordinary care in the maintenance of the property. There will be no liability unless the public entity had prior or constructive notice of the condition which caused the injury, and then failed to take appropriate corrective measures.[116]

No public entity nor public employee is liable for injuries due to the condition of a park, playground or recreational area unless the entity or employee is liable of willful and wanton negligence proximately causing the injury.[117] In addition, except as otherwise provided, nei-

105. Illinois Tort Immunity Act § 2-201.
106. *Id.* at § 2-202.
107. *Id.* at § 2-204.
108. *Id.* at § 2-205.
109. *Id.* at § 2-207.
110. *Id.* at § 2-211.
111. McCormack v. Burt, 95 Ill. 263 (1880).
112. *See* Nagle v. Wakey, 161 Ill. 387 at 392 (1896).
113. *See* PROSSER, TORTS § 126 (3rd ed. 1964).
114. Illinois Tort Immunity Act, § 2-301. (ILL. REV. STAT. ch. 122 §§ 10-20.20, 34-18.1 are the statutes which require the indemnification of school employees).
115. Illinois Tort Immunity Act, § 2-302.
116. *Id.* at § 3-102.
117. *Id.* at § 3-106.

ther a local or public employee is liable for an injury caused by a failure to supervise activity on, or the use of any public property, except where swimmming facilities are provided.[118]

Articles IV, V, VI, and VII deal with police, fire protection, medical, hospital, and public health activities and liabilities and will not be discussed here.[119]

Article VIII provides for a one year statute of limitations,[120] and notice in actions against local entities and public employees. Notice must be served in the office of the secretary or clerk of the entity within six months from the date of injury or cause of action.[121] Failure to give notice will permit dismissal of the action, and will preclude any further suit on the cause of action.[122]

Article IX provides for the payment of claims.[123] Under its provisions a local public entity may contract for insurance against any loss or liability which may be imposed upon it under the act. The expenditure of funds for the purchase of such insurance is proper for the entity. It is also required that every policy issued to a local public entity shall be issued or endorsed to provide that the issuing company waive any immunity which may exist on the part of the entity by virtue of the provisions of the act.

VI. 1965 TO THE PRESENT

Following the passage of the Tort Immunity Act, it remained for the courts to reconcile through the two judicial periods, and two legislative sessions that dealt with governmental tort immunity. In addition to the problems existing before the act, there now existed new discretionary immunities, new notice provisions, new limitations on actions, and new recovery provisions to be interpreted. The governmental tort cases which arose from 1965 to the present form two categories: (1) those which concern actions arising under the 1959 School Tort Liability Act; and (2) those arising under the 1965 Tort Immunity Act.[124]

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118. *Id.* at § 3-108.
119. Articles IV, V, VI and VII deal with police, fire protection, medical, hospital and public health activities and liabilities. They will not be discussed in this note.
120. Illinois Tort Immunity Act, § 8-101.
121. *Id.* at § 8-102.
122. *Id.* at § 8-103.
123. *Id.* at § 8-103.
124. The Tort Immunity Act did not attempt to repeal any earlier legislation regarding tort immunity, however, at the time the act was passed there was considerable doubt as to the constitutionality of many provisions of the 1959 legislative scheme following the Harvey decision, 32 Ill. 2d 60, 203 N.E.2d 573 (1964).

Cases arising under the School Tort Liability Act during this period rendered the bulk of that statute unconstitutional. In 1966, shortly after the passage of the Tort Immunity Act, it was held in *Haymes v. Catholic Bishop of Chicago*, that the notice provisions of the School Tort Liability Act[125] had no application to the plaintiff, a minor, who had been injured on school premises.[126]

In 1966, the Supreme Court in *Lorton v. Brown County Community Unit School District*[127] affirmed the denial of a motion to dismiss the complaint by a teacher who had fallen on a negligently maintained school floor, explaining that under the *Harvey* decision,[128] the notice provisions of the School Tort Liability Act[129] were unconstitutional under Article IV, section 22 of the Illinois Constitution.[130] Other cases based on the *Harvey* decision found unreasonable classifications concerning the $10,000 limitation on recoveries[131] as it related to public school districts,[132] and private schools.[133]

Following these decisions, all that remained of the 1959 School Tort Liability Act was the statement of public policy contained in Section 821 and those sections governing cases with causes of action arising before the effective date of the act,[134] all of which, except section 821, have little or no application today.

Actions arising under the 1965 Tort Immunity Act[135] have generally centered on five issues: (1) the constitutionality and applicability of the act's notice provisions; (2) the liability of a public entity for failure to supervise properly; (3) the extent of discretionary immunity; (4) the applicability of the statute in federal causes of action; and (5) questions concerning construction.

Cases arising under the notice provision of the Tort Immunity Act have held that failure to personally serve the notice regarding an injury presents a basis for dismissal[136] even where notice has been timely

125. ILL. REV. STAT. ch. 122, §§ 823, 824 (1965).
126. Haymes v. Catholic Bishop of Chicago, 52 Ill. App. 2d 140, 201 N.E.2d 675 (aff'd 33 Ill. 2d 425, 211 N.E.2d 690 (1965).
127. Lorton v. Brown County Community Unit School District, 35 Ill. 2d 362, 220 N.E.2d 161 (1966).
128. *See* note 85, *supra.*
129. *See* note 125, *supra.*
130. ILL. CONST. art. IV, 22 (1870).
131. ILL. REV. STAT. ch. 122, § 825(a), (b) (1959).
132. Treece v. Shawnee Unit Community School District, 39 Ill. 136, 233 N.E.2d 549 (1968).
133. Haymes v. Catholic Bishop, 41 Ill. 2d 336, 243 N.E.2d 203 (1969).
134. ILL. REV. STAT. ch. 122, §§ 826-829 (1959).
135. Illinois Tort Immunity Act, § 8-102.
136. Ritsena-Millgard Inc. v. McDermott, 295 F. Supp. 181 (1969).

served by certified mail.[137] It was also held that minors were not required to comply with the notice provision of the act.[138] The notice provision in this act is distinguishable from the notice provision in the School Tort Lability Act in that this provison has been unformly applied to all governmental entitites.

On the question of liability incurred by negligent supervision, the Appellate Court held that acts or omissions in the maintenance of discipline or supervision by teachers are not actionable in tort. In two of the cases decided on this issue,[139] the rationale for the decisions rested on an interpretation of the Tort Immunity Act to the effect that schools and public employees have no liability for failure to supervise the activity of students in their care in the essence of wilful and wanton negligence.[140]

With regard to the discretionary acts immune under the Tort Immunity Act,[141] two cases arose based on libel and slander. In *McLaughlin v. Tilendis,* it was held that even where, slanderous a communication between officials in the conduct of their duties was privileged.[142] In *Meyers v. Board of Education,* where a similar utterance was made publicly, it was granted immunity on the basis of the discretionary act provision.[143] An attempt by the plaintiff to have this provision of the Tort Immunity Act ruled unconstitutional was unsuccessful as a result of failure to raise the issue at the trial level. However, in an action charging conspiracy to revoke a taxicab company's license, which was defended chiefly on the basis of the immunity for discretionary acts, it was held that the Tort Immunicy Act extended to good faith errors but not malicious acts.[144] Inasmuch as the acts complained of by the taxi-

137. Fannon v. City of Aurora, 106 Ill. App. 2d 408, 245 N.E.2d 286 (1969). The court interpreting the "personal service" language of the Illinois Tort Immunity Act, § 8-102 (1965) to require service in person or by an agent.

138. Wills v. Metz, 89 Ill. App. 2d 334, 231 N.E.2d 629 (1967), citing Haymes v. Catholic Bishop of Chicago, 41 Ill. 2d 336, 243 N.E.2d 203. *See* note 132, *supra* and accompanying text.

139. Woodman v. Litchfield Community School District, 102 Ill. App. 2d 331, 242 N.E.2d 780 (1968); Fustin v. Board of Education, 101 Ill. App. 2d 113, 242 N.E.2d 308 (1968).

140. Illinois Tort Immunity Act, § 3-108(a).

141. *Id.* § 2-201.

142. McLaughlin v. Tilendis, 115 Ill. App. 2d 148, 253 N.E.2d 85 (1969). In the federal court, however, it was held that state discretionary immunity had no effect on a federal civil rights cause of action, and that the question of privilege rested solely on whether or not the utterance of the defendant was a good faith statement. 398 F.2d 287 (C.C.N.D. Ill. 1968). *See also* Donner v. Francis, 225 Ill. App. 409 (1930) cited by the Illinois Appellate Court regarding the Illinois law of privileged communications.

143. Meyers v. Board of Education of City of Chicago, 121 Ill. App. 2d 187, 257 N.E.2d 183 (1970).

144. Young v. Hansen, 118 Ill. App. 2d 7, 249 N.E.2d 301 (1969).

cab company in the case were found to be malicious, section 2-201 was determined not to apply.

In Illinois there has been no clear definition of the term "discretionary act", however, a mosaic of decisions and authorities has developed to reveal a rationale for immunity. The attempts that have been made to define "discretionary acts" with more certainty, have been termed by one author "like the rule of immunity itself . . . vague."[145] Indeed it has been held that some level of discretion is involved in every human act no matter how menial or mechanical.[146] Because of the difficulty in applying the rule, it ought to be strictly construed in favor of the innocent plaintiff.[147]

In cases litigated in federal courts on a federal cause of action under the Civil Rights Act,[148] the defenses of failure to give notice, and the statute of limitations were denied on the ground that the purpose of a civil rights act is to protect federal rights, and that to give immunity on the basis of state law would be to frustrate the purpose of the act.[149]

In terms of general construction, the Tort Immunity Act has been held constitutional in the face of a complaint that the act was special legislation in that counties but not the state were subject to suit.[150] The rationale for the court's holding of constitutionality was the existence of the Illinois Court of Claims Act,[151] which permits suit against the state.

VII. Prospective Analysis

Since the Molitor decision, three competing approaches to the law of sovereign immunity for schools and school districts have developed. In reaction to the injustice that was borne by innocent victims of torts committed by agents of governmental entities, the *Molitor* decision abolished governmental immunity and declared that all who benefit from the activities of a governmental entity must also share in the liability for negligence incurred by the entity while providing the benefit.

145. *See* Baum, *supra*, note 104 at 997.
146. Ham v. County of Los Angeles, 46 Cal. App. 148, 189 Pac. 462 (1920).
147. Generally in the past in Illinois, this immunity has been extended only to high level officials. See Baum, *supra* note 104 at 997 and cases cited therein. But it has also been held in Illinois that the negligent operation of a police car by police officers in pursuit of criminals is a discretionary function (Taylor v. City of Berwyn, 372 Ill. 124, 22 N.E.2d 930 (1939)). The operation of a snow plow was discretionary too. (Mower v. Williams, 402 Ill. 486, 84 N.E.2d 435 (1949).
148. 48 U.S.C. § 1983 (1964).
149. Huey v. Barloga, 277 F. Supp. 864 (1967); McLaughlin v. Tilendis, 115 Ill. App. 2d 148; Skrapis v. Skala, 314 F. Supp. 511 (1970).
150. Edelen v. Hogsett, 44 Ill. 2d 215, 254 N.E.2d 435 (1969).
151. *See* note 28, *supra* and accompanying text.

In 1959, legislative activity attempted to move in the other direction. The School Tort Liability Act stood for the General Assembly's declaration that some governmental entities, on the basis of their financial vulnerability, shall be immune from tort liability, and where, as with schools, liability was permitted, it was permitted subject to strict limitations.[152] Between these two positions, that of permitting liability, and that of limiting it, the *Harvey* decision[153] attempted to strike a balance by requiring, for the benefit of those injured by governmental entity torts, that any limitation on liability be in conformity with the federal and state constitutions. In an attempt to resolve these competitive factors, the legislature in 1965 sought to create a comprehensive and effective tort immunity act.

Any statute other than a blanket grant of immunity to governmental entities recognizes, to some degree, the social desirability and fundamental fairness of a "spread the loss philosophy".[154] To the extent a statute limits liability, however, it manifests the proposition that governmental agencies may be hindered in the effectiveness of the performance of their statutory duty if subjected to the payment of tort claims.

It is clear that legislatures may grant immunities based on compelling state interests;[155] however, any such grant must meet two criteria: (1) the requirements of constitutionality, and (2) the requirement that the statute applies in a manner which protects the rights that the legislature did not intend to limit. It is in the light of these criteria that the 1965 Tort Immunity Act must be evaluated. As to the question of constitutionality, the primary ground on which elements of the Tort Immunity Act may be challenged is the denial of equal protection of the laws.

It has been the unrepudiated position of the legislature that the purpose of limiting or eliminating tort liability is the protection of public funds as weighed against the possible burden placed on an innocent victim of a tort arising from the activity of a governmental entity.[156] With this philosophy in mind, the Tort Immunity Act was passed. It must be noted, however, that private schools are not covered by the Tort Immunity Act,[157] nor are other private entities which maintain functions

152. *See* generally, Illinois School Tort Liability Act.
153. *See* note 85, *supra* and accompanying text.
154. *See* note 22, *supra* and accompanying text.
155. *see* note 50, *supra.*
156. *See* ILL. REV. STAT. ch. 122, § 821 (1965).
157. *See* Gubb v. Catholic Diocese of Rockford, 122 Ill. App. 2d 77, 257 N.E.2d 239 (1970).

similar to those found in schools, such as children's play facilities. These entities with a much smaller economic base than most public entities, have been required, nevertheless, to meet the "threat" of liability for damages in tort. This has been accomplished largely through commercial insurance, or where necessary, through self-insurance. It is evident that this responsibility has not had significant effect on either the number or the effectiveness of private entities performing such functions.[158]

The fact that insurance is available to protect an extreme deprivation of public funds, presents an argument in itself against the reasonableness of a classification based on an alleged compelling or substantial state interest such as the protection of public funds. However, it may be said that even this argument does not adequately treat a further objection that *any* governmental funds spent on tort liability, as for example, insurance premiums, is an interference with the statutory purpose of the entity, such as education. The question then becomes, to what extent is the allocation of funds for the payment of tort claims a "diversion" of funds? It is clear that if education is the primary purpose of an entity, it must be organized to accomplish that end. A consequence of organization is to provide facilities and procedures which in the day to day operations of the entity achieve the statutory purpose specified.

It is hornbook law that the idea of risk necessarily involves a recognizable danger, based upon some knowledge of the existing facts, and some reasonable belief that harm may follow.[159] This concept of foreseeability encompasses the activities of a school or school district, where it is reasonable to assume that, among other things, to bus students, or to sponsor an athletic event, or to build a playground is to create a climate where injuries may occur and where injuries have occurred in similar situations. To say that these contingencies should not be anticipated and prepared for, is to advocate, in essence, the abrogation of the duty of government for the welfare of its citizens. To say that any benefit administered by government should not be weighed and effectuated with concern for its concomitant risks is to say, in effect, the king can do no wrong, while in fact wrong has indeed been done, and will continue to be done.

It follows that whatever reasonable expenses are incurred by a governmental unit in anticipating its tort liability, on the basis of foreseeable

158. *See* Molitor v. Kaneland Community Unit District, 18 Ill. 2d at 24; Darling v. Charleston Community Memorial Hospital, 33 Ill. 2d 326, 337, 211 N.E.2d 253 (1965).
159. PROSSER, LAW OF TORTS, § 31 (3d ed. 1964).

risks of harm, are proper expenses. This may be revealed by any comprehensive analysis of the many aspects and implications of the entities' activities. It may be said that as to foreseeable risks of harm, there is a duty[160] on the part of a governmental entity to compensate for injuries caused in the normal conduct of its affairs. This view is warranted in that to declare by legislative enactment, or otherwise, that a governmental entity need not take into account reasonable risks of harm created by it, is to create an unreasonable classification in comparison to other similar activities; a classification which is not adequately counterbalanced by the mere fact society benefits from the governmental activity.

If it is claimed that the existence of a governmental entity may be threatened by being held accountable for its torts, it may reasonably indicate that the activity is either extremely dangerous and should not be undertaken for the community's benefit without additional financing, in reasonable anticipation of the risks, or the activity may be operated in such a manner as to present a greater hazard than a benefit to the community. It would then require, as a consequence, strong measures to reduce the risks of harm. In either case foreseeability appears to be an appropriate standard for balancing an appraisal of the worth to society of the governmental activity undertaken against the potential danger to society of the activity. Also the claim that a reasonable classification has been created to protect public funds would appear invalid, as a denial of equal protection, in that private entities conducting similar activities, without immunity, have successfully protected both their funds and their existence by various methods, such as insurance. This would seem to invalidate the claim of a compelling state interest.

In acting to limit governmental tort liability, it has been the main purpose of the legislature to protect public funds. In Section 821 of the Tort Liability Act, which has been neither abrogated nor repealed, the legislature declared this purpose, but also recognized that the public, through schools and school districts, should to some degree bear the burden of tort liability.[161]

> [T]here should be a reasonable distribution among the members of a public at large of the burden of individual loss from injuries incurred as a result of negligence in the conduct of school district affairs.

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160. U.S. CONST. amend. XIV.
161. ILL. REV. STAT. ch. 122, § 821 (1959).

The reason in support of a "reasonable distribution" of individual tort losses was discussed in *Molitor* before the legislative pronouncement. There it was said that:

> It is a basic concept underlying the whole law of torts today that liability follows negligence, and that individuals and corporations are responsible for the negligence of their agents and employees acting in the course of their employment. The doctrine of sovereign immunity runs directly counter to that basic concept.[162]
>
> It is almost incredible that . . . the wrongful acts of government should be imposed upon the single individual who suffers the injury, rather than distributed among the entire community constituting the government, where it could be borne without hardship upon any individual, and where it justly belongs.[163]
>
> * * *
>
> This reasoning seems to follow the line that it is better for the individual to suffer than the public to be inconvenienced.[164]

In light of this apparent concern for the welfare of the injured individual, the Illinois Tort Immunity Act had been passed avoiding the blanket reassertion of governmental immunity. This was in accord with the California Law Revision Commission which observed:

> [T]he basic problem is to determine how far it is desirable to permit the loss distribution function of tort law to apply to public entities without unduly frustrating or interfering with the desirable purposes for which such entities exist.[165]

Worth noting, is that the recommendations of the California Law Revision Commission[166] were highly influential in the formulation of the Illinois Tort Immunity Act.[167] Also by its silence, the legislature chose to retain the general *Molitor* rule of liability[168] in all areas other than those in which it legislated. It would seem reasonable and consistent with legislative intent, therefore, to liberally apply whatever immunities and restrictions on governmental liability may be enacted, resolving issues which are uncertain on behalf of the innocent claimants.

In *Fustin v. Board of Education*,[169] a case involving supervision and the exercise of discretion, the appellate court chose to decide in the

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162. 18 Ill. 2d at 20.
163. *Id.* at 21.
164. *Id.* at 22.
165. 4 CALIFORNIA LAW REVISION COMMISSION REPORTS, RECOMMENDATIONS AND STUDIES 801-810 (1963).
166. *Id.*
167. Latturner, *Local Governmental Tort Immunity in Illinois*, 55 I.B.J. 23, 31 (1966).
168. *Id.*
169. 101 Ill. App. 2d 113, 242 N.E.2d 308 (1968).

opposite direction. The plaintiff complained that the defendant had failed to control or supervise a basketball player of known violent propensities; and as a result, the plaintiff had been injured without provocation. The defendant moved to dismiss citing the Tort Immunity Act. Section 3-108(a) of that Act provided that local public entities shall not be liable for a failure to supervise an activity on, or the use of any public property. The Act also provided that an employee is not liable for injury resulting from an act or omission made in the exercise of disrection even though an abuse is shown. As has already been discussed, a local entity is not liable in tort, where the employee is not liable.

The *Fustin* court distinguished its case from the *Molitor* decision on the ground that the exercise of discretion by professional school personnel, relating to the participation of a particular student wasn't involved[170] in the *Molitor* decision. The court also cited an article by Dean Harno,[171] referred to as authority by the *Molitor* court, for the proposition that the municipality should not be held responsible for errors of judgment of its officers.[172]

Citing the previous decision in *Woodman v. Litchfield Community School District*,[173] the *Fustin* court also indicated that the exstence of the *in loco parentis* doctrine of the Illinois School Code[174] protects a teacher from liability for mere neglience in supervision. For the above reasons, and others regarding insurance to be discussed later in the article, the defendant's motion to dismiss was granted.

It would seem the result in *Fustin* goes beyond the legislation intent of permitting loss distribution while attempting to protect the financial integrity of local entities.[175] The construction given the statute by the *Fustin* court has the effect of eliminating the first of the legislature's objectives. The declaration that schools, under section 3-108(a), have no duty to supervise an activity on, or the use of any public property, is wholly repugnant if applied, as in *Fustin*, to instances where supervision had been provided for, and was improperly and negligently carried out.[176] Professor Baum, in his comprehensive study of the Illinois

170. *Id.* at 120.
171. *See* Harno, *supra* note 24.
172. Dean Harno also wrote: "A municipal corporation today is an active and virile creature capable of inflicting much harm. . . . This being so, it must assume the responsibilities of the position it occupies in society." Molitor v. Kaneland, 18 Ill. 2d at 24.
173. 102 Ill. App. 2d 330, 242 N.E.2d 780 (1968).
174. ILL. REV. STAT. ch. 122 § 24-24 (1965).
175. *See* generally, E.J. Kionka and J.E. Norton, *supra* note 104; Baum, *supra* note 104 at 1017.
176. Woodman v. Litchfield Community School District, *supra* note 172, was de-

Tort Immunity Act, had observed Section 3-108(a) "should not and probably will not be extended to cases where a public entity has undertaken to provide some supervision, but the amount of supervision is inadequate or the supervision is negligently carried on."[177]

Such an interpretation is highly probable after a careful reading of Section 3-108(a). The Act provides there will be no liability for an injury caused by a failure to supervise an activity. It is reasonable to construe this language as referring to nonliability for *absence* of supervision, rather than negligent supervision, as suggested by the *Fustin* court.

The policy determining that the supervision of an activity is unnecessary or beyond available resources, would seem to be proper under the provisions of section 2-201, granting immunity for discretionary acts. Furthermore, this interpretation would seem more consistent with a legislative intent to distribute the loss, than the allowance of immunity for negligent supervision once supervision has been decided upon. This allowance would place immunity for discretionary acts in the hands of anyone, however, low in the school hierarchy, which is inconsistent with the general purpose of such immunity.[178] It is also incompatible with the expectations of parents, who, encouraged by the presence of supervisors, have placed their children in the care of these ostensibly competent personnel.

In *McNamara v. United States*,[179] the District Court commenting on the discretionary immunity provision of the Federal Tort Claims Act, after which the Illinois provision was patterned, said: "It is inconceivable that if the government undertakes to perform a discretionary function, and does it negligently, thereby injuring somebody, such an act

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cided by the court shortly before the Fustin decision and involved a case of negligent supervision identical to that mentioned above. *See* the comment on Woodman in Fustin v. Board of Education, *supra* note 169 at 116 (Ill.).

177. Baum, *supra* note 104 at 1018.

178. Latturner in his article, *supra* note 167, observed "That the Federal Tort Claims Act refers only to a 'discretionary function' while the Tort Immunity Act links the discretionary act with 'determining policy.' In this respect § 2-201 has codified the judicial decisions regarding the federal law." Citing Sullivan v. U.S., 129 F. Supp. 713 (N.D. Ill. 1955), the author observed there is a distinction "between activity performed in accordance with official programs, plans, specifications or schedules of operations and activities which, although performed at the command of a superior, is not exercised pursuant to any plan, specification or program." The first is a discretionary function under the Federal Tort Claims Act while the latter is not. The distinction is phrased in terms of "planning and operational" activities. Only acts involving planning are deemed essential enough to warrant total immunity. *See* Dalehite v. U.S., 346 U.S. 15, 35 (1953); Note, *Illinois Tort Claims Immunity Act: A New Approach to Municipal Tort Immunity in Illinois*, 61 N.W. L. REV. 266, 282 (1966).

179. 199 F. Supp. 879 (D.D.C. 1961).

should be excepted from the Federal Tort Claims Act." It was then held the discretionary act exception did not apply. Contrary to the interpretation of Section 2-201, relied on in *Fustin*, the better rule act would seem to be the limitation of immunity for discretionary strictly essential planning functions.

> The discretionary function provision of the . . . act should only be allowed to exclude from liability those employees engaged in the performance of an *essential* function of government, who are involved in the decision-making or planning level of that function.[180]

In applying Section 2-109 under which the school is not liable if the employee is not liable, the *Fustin* court relied on Section 24-24 of the Illinois School Code to absolve the instructor of liability. The act provides that:

> Teachers shall maintain discipline in the schools. In all matters relating to the discipline in, and conduct of the schools and school children, they stand in the relation of parents and guardians to the pupils. This relationship shall extend to all activities connected with the school program and may be exercised at anytime for the safety and supervision of the pupils in the absence of their parents or guardians.[181]

The court claimed this imposition of a relationship *in loco parentis* to the student precluded liability on the part of the employee unless his conduct was wilful or wanton. However, speaking with reference to an organization, which stood *in loco parentis*, it was pointed out in *Reid v. Y.M.C.A. of Peoria*,[182] that "such an organization (or employee) is not an insurer of the safety of the children involved. On the other hand, such an organization may not avoid liability for injuries from its failure to exercise reasonable care." It would seem this holding is the better rule in that liability follows fault as advocated by *Molitor*, while the harm sought to be avoided by the legislature would be minimal in that most schools and school employees should be required to carry on their activities with reasonable care.

In *Thomas v. Broadlands School District*,[183] it was established in Illinois law that possession of liability insurance by a governmental entity acted as a waiver of immunity from suit for an injury arising from

180. See note 188, *infra* at 284.
181. ILL. REV. STAT. ch. 122, § 24-24 (1965). "The duties and responsibilities of an organization to which the care or control of children is entrusted are sometimes said to be akin to the duties and responsibilities of parents." Lawes v. Bd. of Education of City of New York, 16 N.Y.2d 302, 266 N.Y.S.2d 364, 213 N.E.2d 667 (1965).
182. 107 Ill. App. 2d 170, 175, 246 N.E.2d 20, 23 (1969).
183. 348 Ill. App. 567, 109 N.E.d 636 (1952).

the risk insured against.[184] Since the *Thomas* decision, Illinois courts have generally adopted its holding as the rule of law in Illinois.[185] Beginning in 1965, however, confusion was created with the passage of Section 9-103 of the Tort Immunity Act,[186] the subsequent interpretation of it by the courts in light of *Molitor*, and the apparent legislative intent behind the Act.[187]

The provisions of Section 9-103 are:

> (a) A local public entity may contract for insurance against any loss or liability which may be imposed on it under this Act. Such insurance shall be carried with a company authorized by the Department of Insurance to write such coverage in Illinois. The expenditure of funds of the local public entity to purchase such insurance is proper for any public entity.
>
> (b) Every policy for insurance coverage issued to a local public entity shall provide or be endorsed to provide that the company issuing such policy waives any right to refuse payment or to deny liability thereto within the limits of said policy by reason of the non-liability of the insured public entity for the wrongful or negligent acts of itself or its employees and its immunity from suit by reason of the defenses and immunities provided in this Act.

It has been suggested by one writer,[188] in a commentary on the Act, that under the ruling in *Harvey v. Clyde Park District*,[189] Section 9-103 may be unconstitutional as a violation of Article IV, Section 22 of the Illinois Constitution,[190] and the Equal Protection Clause of the Fourteenth Amendment.[191] The basis of the claim is that Section 9-103(b), through its requirement of waiver by the insurance carrier, provides that, though otherwise immune, a public entity would be subject to suit and liable in judgment to the extent of its insurance coverage. This ability of the public entity to insure or not insure, therefore, creates a situation where recovery is based on the "fortuitious" circumstances of whether or not the defendant entity is insured. The question is whether

184. The Illinois Supreme Court, citing Thomas v. Broadland, acknowledged that ". . . the immunity granted to school districts is not an absolute one and can be waived." 348 Ill. App. at 574.

185. Lynwood v. Decatur Park District, 26 Ill. App. 2d 431, 168 N.E.2d 185 (1960). (The fact that the defendant was covered by liability insurance made the defense of immunity unavailable to the park district); Garrison v. Community School District, 34 Ill. App. 2d 47, 208 N.E.2d 894 (1965). Johnson v. Girvin, 61 Ill. App. 2d 47, 208 N.E.2d 894 (1965).

186. *See* note 1, *supra.*

187. *See* discussion on legislative intent in preceding treatment of liability for supervision and discretionary immunity, note 167, *supra* and accompanying text.

188. Note, Illinois Tort Claims Immunity Act: A New Approach to Municipal Tort Immunity in Illinois, 61 N.W. L. Rev. 266 (1966).

189. *See* note 85, *supra.*

190. ILL. CONST. art. IV § 22 (1870).

191. U.S. CONST. amend. XIV.

Section 9-103 is a general law, or is rather a special law in violation of Article IV, Section 22 of the illinois Constitution, and whether it violates the Fourteenth Amendment, in that it subjugates the plaintiff's ability to recover to fortuitous circumstances, which lie in the whim of the public entity.

In response to this argument, it can be contended that no exclusive privilege is granted by Section 9-103 in that it applies to all public entities in all circumstances where, at the discretion of the responsible public officials, insurance is necessary or desirable.[192] It is equally clear that no discrimination or exclusive privilege exists under Section 9-103, vis-a-vis private entities covered by liability insurance, in that Section 9-103 imposes equality by requiring that the insurance companies' handling of public entity contracts be under the same circumstances as their handling of private entity's insurance conracts. It cannot be said that Section 9-103 is a psecial law where a general law can be made applicable, because both Section 9-103 and the Tort Immunity Act, of which it is a part, are specifically aimed at *all* public entities, and all public employees within the state.

In *Keene v. Village of Park Forest*,[193] a comprehensive opinion on the issue of school tort immunity, it was said:

> The legislature has the power to change, modify, amend or limit previously existing common law remedies so long as no vested right is violated. Under Section 9-103(b), the legislature has made changes amounting to an increase of remedies available to claimants and plaintiff provided the public body and the insurer cary out certain acts.
>
> Does this kind of change amount to capricious absurd 'discrimination'? There is no principle of law that all plaintiffs are entitled to absolutely the same principle of liability regardless of voluntary action by tortfeasor and his insurer, tending to increase the area of liability to the claimants or plaintiffs involved with this tortfeasor.

Thus, while there may be an element of fortuitousness to a given situation, it is not because of this characteristic alone that it is invalid under the doctrine of *Harvey v. Clyde Park District* and Article IV, Section 22 of the Illinois Constitution.

The first decision to interpret Section 9-103 was *Fustin v. Board of*

192. *See* ILL. REV. STAT. ch. 122, § 10-20.20 (1967) and ILL. REV. STAT. ch. 122, § 34-18.1 (1963) where school boards and school districts are required to indemnify school board members and school employees.

193. Circuit Court of Cook County No. 66L 18802 (Opinion by Hon. Abraham W. Brussel, J. dated April 1, 1969).

Education.[194] In that case the court refused to recognize Section 9-103 as constituting a waiver of immunity be cause the "plaintiff has not alleged liability under the Tort Immunity Act . . ." And it was not "Alleged that the insurance contracted for was contracted for pursuant to the authority of Section 9-103(a)."

The court in *Fustin* appears to indicate that Section 9-103(b)[195] requires insurance company payments only to the extent of liabilities created under the Tort Immunity Act. However, it is arguable that the waiver requirement of Section 9-103(b) refers to any liability imposed on the defendant governmental entity by general law and that the waiver eliminates the immunities of the Tort Immunity Act.[196]

The real error of the *Fustin* court, however, and of more importance than the above argument is the court's requirement that the plaintiff must allege that the insurance contracted for was contracted pursuant to Section 9-103(a). The basis for this requirement was the *Fustin* court's observation that other provisions for insurance in the indemnity statutes under the Illinois School Code did not require a waiver of immunity, and did not limit insurance against liability arising under any statutory provision or particular act as Section 9-103 which "is limited to insurance against liability imposed by the Tort Immunity Act."[197]

As to the court's first observation, that other insurance provisions of the Illinois School Code do not require waivers, two authors in a recent article[198] pointed out:

> Section 9-103 of the Tort Immunity Act provides that 'every policy for insurance coverage issued to a local public entity *shall*' contain a waiver of the defenses and immunities provided *in the Act.* Since Section 9-103 was enacted *after* the insurance provision of the School Code, and since school districts do not have any 'defenses and immunities' *other* than those contained in the Tort Immunity Act, Section 9-103 has reinstated the waiver of immunity requirement omitted in the school insurance statutes. This means that *all* insurance purchased by public entities *must* contain a waiver of immunity clause, and that virtually all of the statutory immunities are waived.

As to the second observation of the *Fustin* court that Section 9-103 is limited to liability imposed under the Tort Immunity Act, the court in

194. *See* note 169, *supra.*
195. *See* the excellent discussion on the meanings of § 9-103(a)(b) in Keene v. Village of Park Forest, *supra* note 193.
196. *See* note 193, *supra* at 37.
197. *See* note 169, *supra* at 119.
198. Kionka and Norton, *supra* note 175 at 633.

Kenne v. Village of Park Forest[199] commented:

> [T]he Appellate Court has misconceived the language of Section 9-103(a). The legislature said, 'liability which may be imposed *under* this Act . . .' The legislature did not use the word 'by'. If this language is followed, public bodies have been and will be paying premiums for insuring against nonexistent liabilities, i.e. liabilities, 'created' by an Immunity Act . . . a non-liability creating enactment.

The second appellate decision to interpret Section 9-103 was Schear v. City of Highland Park. The opinion, by way of dicta sought to clarify what was meant by the language "non-liability of insured public entity," and "its immunity from suit by reason of the defenses provided in this Act" in the waiver provisions of Section 9-103(b). In other words, the court clarified what type of defenses were waived by the provisions of Section 9-103(b). The plaintiff argued that the one year statute of limitations and the six months' notice provisions had been waived by the insurance carrier, under the meaning of the above language. The court rejected this contention and cited as examples of defenses that were waived Sections 2-102, 2-103 of the Act, which provided, respectively, immunity from punitive damages, and immunity from injury caused by adopting or failure to adopt "an enactment." It declared them to be the kind of non-liability and "defenses and immunities" referred to in Section 9-103(b).

> If the defense of limitations were contemplated by this language, this would mean that the insurance company could not raise the statute even if the suit were to be brought some 20 years after the alleged injury. Clearly, it is unreasonable to suppose that such a result was intended by the legislature.[200]

Building on the language of the decision in *Schear*, the court in *Keene v. Village of Park Forest*, on a motion to strike an amended complaint alleging insurance, and a claim for compensatory and exemplary damages, held that insurance waived the immunity provisions of Section 2-102 with regard to punitive and exemplary damages under the provisions of Section 9-103.

> This immunity insulated the village from liability to pay exemplary or punitive damages; that liability otherwise existed prior to adoption of Section 2-201. In other words, the insurance policies 'covered' by the Tort Immunity Act. The liability imposed 'under', i.e. in conformity with the Act in the sense that under the Act immunity was waived and thus restored the liability.[201]

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199. *See* note 193, *supra* at 41.
200. 104 Ill. App. 2d 285, 244 N.E.2d 72 (1968).
201. *See* note 193, *supra* at 42.

The opinions in *Schear* and *Keene* represent the better interpretation of the Tort Immunity Act. Both reflect a consistency with the doctrine espoused in *Molitor v. Kaneland Community Unit District*,[202] that liability should follow fault, and the apparent legislative intent, that there should be a spreading of the loss where a public entity or a public employee may be held liable in tort, and public funds have been adequately protected.

CONCLUSION

In the brief but intensive history of Illinois school tort immunity, from 1959 to the present, the law, through judicial and legislative interaction has moved inexorably toward the modern and enlightened position of governmental liability for tortious conduct.

In an age where government has vastly expanded its influence on the lives of every citizen, it is equitable and reasonable in the expectation of the citizen affected, that the activities and services offered on his behalf be planned and administered with consideration of their possible harmful consequences.

MICHAEL A. COTTELEER

202. *Id.*