#52 4/9/70

Memorandum 70-43

Subject: Study 52 - Sovereign Immunity (Liability of School Districts for Failure to Provide Reasonable Supervision of Pupils)

Attached as Exhibit I is a recent case decided by the Court of Appeal, Dailey v. Los Angeles Unified School Dist., 4 Cal. App.3d 105 (Feb. 5, 1970). This case recognizes the legislative intent to provide liability for failure of a school district to provide reasonable supervision on the school grounds, but the court holds that the statutes enacted and repealed upon recommendation of the Law Revision Commission in 1963 failed to effectuate that intent. The matter is fully discussed in the opinion of the court, attached as Exhibit I.

Exhibit II is a statute section and Comment designed to effectuate the legislative intent in 1963. An additional sentence might be added to the proposed section: "This section restates existing law and effectuates the legislative intent when Section 903 of the Education Code was repealed."

The staff suggests that this section be added to our comprehensive governmental liability bill at the current session. An alternative would be to amend Senate Bill 92 (our extra governmental liability bill that we will not need if Senate Bill 94 is approved) so that it merely adds the section set out in Exhibit II.

The staff believes that it is important that the proposed section or the Comment thereto or both, state that the section is intended to restate existing law rather than to change existing law.

Respectfully submitted,

John H. DeMoully
Executive Secretary

[Civ. No. 34321. Second Dist., Div. One. Feb. 5, 1970.]

WILLIAM WARREN DAILEY et al., Plaintiffs and Appellants, v. LOS ANGELES UNIFIED SCHOOL DISTRICT, etc., et al., Defendants and Respondents.

SUMMARY

The parents of a high school student brought an action for his wrongful death against two teachers and the public school district by which the teachers were employed. The boy had been killed during the lunch hour while slap boxing with other boys outside the gymnasium building. No hard blows had been struck and the boys had not appeared to be angry; but suddenly the boy fell backward when slapped and suffered a fractured skull that resulted in his death a few hours later. The trial court directed a verdict for defendants. (Superior Court of Los Angeles County, Goscoe O. Farley, Judge.)

On appeal, the judgment was affirmed. The court held that neither the principal nor any teacher had any duty to control the conduct of the decedent during the lunch hour in the circumstances, since there was no evidence that they knew of the slap boxing or of the propensity of the student to do it. Further, it was held that there was no statute applicable under the facts, making the school district liable for its own negligence; nor was it liable on the basis of the negligent conduct of some employee. (Opinion by Gustafson, J., with Lillie, Acting P. J., and Thompson, J., concurring.)

HEADNOTES

Classified to McKinney's Digest

(1) Trial § 269(4)—Direction of Verdict—Review—Evidence.—On appeal from a judgment entered on a directed verdict for plaintiffs, the court is required to consider only the evidence favorable to plaintiffs and every legitimate inference that may be drawn from the evidence in plaintiffs' favor.

(2) **State of California § 58—Liability—Torts of Officers and Agents.**—The practical effect of Gov. Code, § 815, is to eliminate any common law governmental liability for damages arising out of torts.

(3) **Schools § 66—Liability—Liability of Districts.**—Ed. Code, § 13557, concerning a teacher's duty to hold pupils to a strict account for their conduct on the way to and from schools, on the playgrounds, or during recess, applies to a teacher, and Cal. Admin. Code, tit. 5, § 18, concerning a principal's duty to provide for playground supervision, applies to a principal; but neither of these applies to a school district as such.

(4a, 4b) **Schools § 68(1)—Liability—Injuries to Pupils.**—In an action to recover for the wrongful death of a high school student killed while slap boxing during the noon hour outside the school gymnasium, a directed verdict for the school district was proper, there being no statute applicable under the facts to make the district liable for its own negligence and there being no negligent conduct of some employee that would make the employee liable.

[Tort liability of public schools, note, 86 A.L.R.2d 489.]

(5) **Schools § 66—Liability—Liability of Districts.**—The omission of a public employee contemplated by Gov. Code, § 815.2, imposing vicarious liability on a public entity, is one that would have given rise to a cause of action against the employee. The standard of care required of an officer or employee of a public school is that which a person of ordinary prudence, charged with his duties, would exercise under the same circumstances.

(6) **Schools § 73—Actions—Pleading and Proof.**—To provide a basis for a school district's vicarious liability under Gov. Code, § 815.2, for an injury proximately caused by an employee's omission, plaintiff need merely establish that some employee was responsible for an omission that would make him personally liable on any acceptable theory of liability; that employee need not be a defendant or be identified, but it must be shown that he was an employee acting within the scope of his employment.

(7) **Schools § 68(2)—Liability—Failure to Exercise Supervision.**—A high school principal had a common-law duty to a student who was killed while "slap boxing" during the noon hour outside the gymnasium building, under the doctrine that one required by law to take custody of another under circumstances subjecting him to association with

persons likely to harm him has the duty to exercise reasonable care to control third persons to prevent their creating an unreasonable risk of harm, if the custodian knows or has reason to know that he has the ability to control the third persons and knows or should know of the need and opportunity to exercise such control; however, the principal's duty to supervise was no greater than that of the student's parents who could not be liable if they did not know of their son's propensity to slap box or of the occurrence of the slap boxing.

(8a, 8b) Schools § 68(2)—Liability—Injury to Pupils—Failure to Exercise Supervision.—In an action to recover for the wrongful death of a high school student who was killed while slap boxing during the noon hour outside the school's gymnasium, a directed verdict for the school's teachers was proper, where there was no evidence that the decedent had a specific propensity to slap box and thus, neither the principal nor any teacher had any duty to control the conduct of the student during the lunch hour as to that activity.

[Personal liability of public school officers or teachers for negligence, note, 32 A.L.R.2d 1163.]

(9) Schools § 68(2)—Liability—Injuries to Pupils—Failure to Exercise Supervision.—In an action to recover for the wrongful death of a high school student who was killed while slap boxing at the noon hour outside the gymnasium, Cal. Admin. Code, tit. 5, § 18, did not aid plaintiffs, since the regulation refers to conduct and play on the playground and the accident did not occur on any playground.

(10) Schools § 68(1)—Liability—Injury to Pupils.—Ed. Code, § 13557, requiring public school teachers to hold pupils to a strict account for their conduct on the way to and from school, on the playgrounds, or during recess, does not embrace the notion that every teacher is civilly liable in damages for personal injury or death caused by each and every student at the school.

COUNSEL

Jack I. Essersten and Walter D. Janoff for Plaintiffs and Appellants.

Veatch, Carlson, Dorsey & Quimby, Robert C. Carlson and Henry F. Walker for Defendants and Respondents.

OPINION

GUSTAFSON, J.—The parents of Michael Dailey brought this action for the wrongful death of Michael against two teachers (Maggard and Daligney) and the public school district by which the teachers were employed. After all parties rested, the trial judge directed the jury to return a verdict for all defendants. Plaintiffs appeal from the judgment entered upon that verdict.

(1) As we are required to do, we consider only the evidence favorable to the plaintiffs (disregarding conflicting evidence) and every legitimate inference which may be drawn from the evidence in plaintiff's favor. (*Taylor v. Centennial Bowl, Inc.* (1966) 65 Cal.2d 114 [52 Cal.Rptr. 561, 416 P.2d 793].)

On May 12, 1965, Michael, who was almost 17 years old, was a student at Gardena High School which is operated by defendant district. During the lunch hour Michael and three of his friends ate lunch outside at a fenced-in area designated for that purpose. Their next class was at 1:16 p.m. in the gymnasium building. After finishing lunch, the boys proceeded toward the gymnasium building. About 1 p.m. the boys stopped outside the north side of the gymnasium building where Michael and his friend Edward Downey engaged in "slap boxing" which is a form of boxing using open hands rather than clenched fists.

Michael and Edward Downey did not appear to be angry at each other and they seemed to be enjoying their activity. No hard blows were struck. Nevertheless, all of a sudden Michael fell backwards when slapped by Edward Downey and suffered a fractured skull which resulted in his death a few hours later.

Plaintiff's complaint alleged that defendants were negligent in "failing to supervise" students during the lunch hour. According to the plan which was in effect at the time of the accident, the principal, two vice-principals and two teachers were designated to supervise the lunch area during the lunch period following which they were to provide general grounds supervision. Students could eat lunch either in the inside cafeteria lunch area or the outside amphitheater lunch area. As long as they were not eating, students had free access during the lunch period to the entire 55-acre campus except for the parking lot area. According to the plan then in effect, the physical education department provided general supervision of the gymnasium area. Over 2,700 students were then enrolled in the school.

The vice-principal of Gardena High School whose duty it was to provide supervisory personnel for students testified in response to a question as to

who had the responsibility to supervise the gym area: "The assignment was made to the Gym Department. That's the way the assignment is made." Supervision, he said, was provided "for the very obvious reasons, youngsters smoke, youngsters climb over fences, youngsters fight, youngsters do all of these kinds of things." Mr. Maggard, who was chairman of the physical education department, testified that while his department had supervision duties in the area around the gymnasium building, he had never been told that it was his duty to make sure that some particular teacher was to supervise on a particular day. He was playing bridge during the lunch period because he saw that Mr. Daligney, a teacher of physical education, was in the "gym office." Mr. Daligney testified that a teacher supervises from the time he enters the school until the time he leaves and that there was no set procedure for supervising the students during the lunch period. He was in the office of the gymnasium building on the day of the accident but he did not see the accident because he could not see the area where the accident happened from the desk at which he was sitting. Mr. Daligney testified that when he observed slap boxing he would stop it because he feared it would lead to a fight.

The first question with respect to the school district is whether the school district has any liability for its torts. The court-made doctrine of governmental immunity from tort actions was abolished by the decision in *Muskopf* v. *Corning Hospital Dist.* (1961) 55 Cal.2d 211 [11 Cal.Rptr. 89, 359 P.2d 457]. Responding to this decision, the Legislature in 1963 enacted section 815 of the Government Code which reads in part as follows: "Except as otherwise provided by statute: (a) A public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person." (2) As the comments by the Senate Committee on Judiciary make clear, "the practical effect of this section is to eliminate any common law governmental liability for damages arising out of torts." (Senate Daily Journal, Apr. 24, 1963, p. 1886.)

There is, of course, governmental liability if a statute so provides. One statute which so provided was section 903 of the Education Code which said in part: "The governing board of any school district is liable as such in the name of the district for a judgment against the district on account of injury to person or property arising because of the negligence of the district. . . ." Not only was that action recognized in *Muskopf* as one of the "various statutes waiving substantive immunity in certain areas", but it was also said to have imposed upon a district "a primary duty to reasonably supervise the members of the student body while they were on the school grounds." (*Lehmuth* v. *Long Beach Unified School Dist.* (1960) 53 Cal.2d 544 [2 Cal.Rptr. 279, 348 P.2d 887].) That section (which had been derived from section 1007 of the Education Code) was repealed in

1963. (Stats. 1963, ch. 629, p. 1509, § 1; Stats. 1963, ch. 1681, p. 3285, § 5.)

The 1963 statutes to which we have referred were submitted to the Legislature by the California Law Revision Commission. The commission stated: "Public entities should be liable for the damages that result from *their* failure to exercise reasonable diligence to comply with applicable standards of safety and performance established by statute or regulation. . . . [W]hen minimum standards of safety and performance have been fixed by statute or regulation—as, for example, the duty to supervise pupils under Education Code Section 13557 and the rules of the State Board of Education. . . .—there should be no discretion to fail to comply with those minimum standards." (4 Reports, Recommendations and Studies, California Law Revision Commission, p. 816 (1963). Italics added.) Section 815.6 of the Government Code supposedly carried out that recommendation: "Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty".

While the legislation which the commission recommended met the problem which it stated (i.e., the failure of a *public entity* to comply with a duty imposed upon *it*), the examples used by the commission are not enactments imposing any duty upon "a public entity". (3) As will be shown later, section 13557 of the Education Code applies to a *teacher* and section 18 of Title 5 of the California Administrative Code applies to a *principal*. Neither applies to a *school district* as such.

(4a) We thus conclude that there is no statute applicable under the facts of this case making the district liable for its own negligence.

The second question with respect to the school district is whether it has any vicarious liability. Section 815.2 of the Government Code provides: "(a) A public entity is liable for injury proximately caused by an . . . omission of an employee of the public entity within the scope of his employment if the . . . omission would, apart from this section, have given rise to a cause of action against that employee. . . ."

Despite the repeal of section 903 of the Education Code, it is arguable that there is a common law duty of a school district to reasonably supervise the members of the student body while they are on the school grounds (notwithstanding that the district by statute is immune from direct liability for breach of that duty). Since the district can act only through its employees, failure to reasonably supervise students would therefore necessarily be an

omission of at least one employee. For this omission, goes the argument, the district is vicariously liable. Such a result would render meaningless the immunity given by statute to the district because in effect the district would be liable for its own negligence. The fallacy in the argument is that the omission of the employee, while always a violation of his duty to his employer, is not necessarily a violation of his duty to a student.

(5) The omission contemplated by the statute imposing vicarious liability is one which would "have given rise to a cause of action against that employee". "The standard of care required of an officer or employee of a public school is that which a person of ordinary prudence, charged with his duties, would exercise under the same circumstances." (*Pirkle* v. *Oakdale Union Grammar School Dist.* (1953) 40 Cal.2d 207 [253 P.2d 1].) (6) "To provide a basis of entity liability, the plaintiff need merely establish that *some* employee . . . was responsible for an omission that would make him personally liable on any acceptable theory of liability". (Van Alstyne, California Government Tort Liability (Cont. Ed. Bar) p. 144.) That employee need not be a defendant nor need he be identified (Senate Daily Journal, April 24, 1963, p. 1887), but it must be shown that he was an employee within the scope of his employment. Thus the question is whether there was any substantial evidence from which the jury could have concluded that *some* employee would have been liable for Michael's death.

(7) It must be conceded that the principal of Gardena High School had a common law duty to Michael under the doctrine set forth in Restatement, Second, Torts § 320: "One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal power of self-protection or to subject him to association with persons likely to harm him, is under a duty to exercise reasonable care so to control the conduct of third persons as to prevent them from intentionally harming the other or so conducting themselves as to create an unreasonable risk of harm to him, if the actor

"(a) knows or has reason to know that he has the ability to control the conduct of the third persons, and

"(b) knows or should know of the necessity and opportunity for exercising such control."

As we view it, however, the principal's duty to supervise Edward Downey was no greater than was that of Downey's parents. Restatement, Second, Torts, § 316 states a parent's duty in these terms: "A parent is under a duty to exercise reasonable care so to control his minor child as to prevent

it from intentionally harming others or from so conducting itself as to create an unreasonable risk of bodily harm to them, if the parent

"(a) knows or has reason to know that he has the ability to control his child, and

"(b) knows or should know of the necessity and opportunity for exercising such control."

The Reporter's Notes (Rest., 2nd Torts, App. § 316) emphasizes that "[t]here must, however, be some specific propensity of the child, of which the parent has notice".

There was no evidence of a "specific propensity" of Edward Downey to intentionally harm anyone else or to engage in conduct creating an unreasonable risk of harm to anyone else. We cannot see how a parent of Edward Downey, had the parent been unaware that Edward Downey ever slap boxed with anyone, could have been liable for Michael's death if the slap boxing had occurred without the actual knowledge of the parent in the backyard of the parents' home. Without knowledge of any "specific propensity" of Edward Downey to slap box (and this assumes that slap boxing could be found to create an unreasonable risk of harm to the participants) and without knowledge that the slap boxing was occurring, it cannot be said that the parent "should know of the necessity . . . for exercising such control." (See, e.g., *Singer* v. *Marx* (1956) 144 Cal.App.2d 637 [301 P.2d 440] and cases discussed therein.)

(8a) Had any teacher seen and failed to stop the slap boxing between Michael and Edward, a jury could well have found the teacher liable under the common law principles which have been discussed. Similarly, if the principal knew or should have known of the necessity of exercising control over Edward Downey because of his propensity to slap box, a jury could well have found the principal liable. But there was no evidence that Edward had a specific propensity to slap box. Thus neither the principal nor any teacher had any duty "to control the conduct of" Edward during the lunch hour on the facts before us.

We next turn to the question of whether any statute or regulation created some duty where none existed under the common law.

(9) "Where playground supervision is not otherwise provided, the principal of each school shall provide for the supervision, by teachers, of the conduct and direction of the play of the pupils of the school or on the school grounds during recesses and other intermissions and before and after school." (Cal. Admin. Code, tit. 5, § 18.) We do not think that this regulation aids the plaintiffs. It obviously refers to conduct and play on the "play-

ground".[1] The accident here involved did not occur on any playground. Moreover, there is nothing in the record to show that playground supervision was not otherwise provided at Gardena High School.

(10) "Every teacher in the public schools shall hold pupils to a strict account for their conduct on the way to and from school, on the playgrounds, or during recess." (Ed. Code, § 13557 as it existed on the date of the accident.) While this section purports to impose a duty upon each teacher, we are not prepared to say on the record before us that it is the basis of liability of any teacher for Michael's death. If the slap boxing had occurred a mile from the school while the two students were going home, obviously no particular teacher would be liable for Michael's death. Yet the section says that every teacher "shall hold pupils to a strict account for their conduct on the way to and from school". We do not know what holding "pupils to a strict account" means, but we are satisfied that it does not embrace the notion that each and every teacher is civilly liable in damages for personal injury or death caused by each and every student at the school.

(8b) We think the directed verdict was proper with respect to the two employees of the district. **(4b)** We are unable to find negligent conduct of some employee which would make the employee liable to Michael's parents.[2] Therefore the directed verdict in favor of the district was also proper.

The judgment is affirmed.

Lillie, Acting P.J., and Thompson, J., concurred.

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[1]It is to be noted that the regulation was of much broader scope when *Reithardt* v. *Board of Education of Yuba County* (1941) 43 Cal.App.2d 629 [111 P.2d 440] and cases cited therein were decided.

[2]Professor Arvo Van Alstyne, whose study formed the basis of the recommendations of the California Law Revision Commission recognized that a plaintiff may well be able to prove an entity negligent, but may be unable to prove any employee thereof negligent. "For one thing, the injured plaintiff often may not be able to identify (or perhaps more accurately put, may not be able to prove the identification of) the particular officer or employee whose tortious act or omission caused his injury yet it may be possible, nonetheless, to prove a cause of action in tort against the employing entity. Cases arising under the Public Liability Act of 1923, for example, document the fact that persons injured as a result of defective public property often are in a position to prove a basis for statutory liability of the city, county or school district defendant, even though administrative responsibility for the maintenance of the particular source of the injury may be so diffused that it is extremely difficult to pinpoint the negligent public employee. Similarly, a patient injured as a result of negligence on the part of medical or nursing personnel in a public hospital may not have been conscious at the time of injury, and hence may be required to prove his claim within the ambit of the *res ipsa loquitur* doctrine, a task which may be easier when the entity is the defendant (since it may not be difficult under that doctrine to establish that at least *one* of its employes was negligent) than when suing the individual defendants." (5 Reports, Recommendations and Studies, California Law Revision Commission, p. 312 (1963).)

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EXHIBIT II

Sec. . Section 1012 is added to the Education Code, to read:

1012. A school district shall provide for reasonable supervision of children on the school grounds and is liable for the injury or death of any child resulting from an accident that could have been avoided if reasonable supervision had been provided.

Comment. Section 1012 is added to the Education Code to make clear that a school district is liable for its failure to provide reasonable supervision of children on the school grounds. Liability can be imposed under Section 1012 only for "school ground" accidents. However, the section in no way limits liability under other applicable statutes. A public entity, including a school district, is generally speaking vicariously liable for the torts of its employees. See Govt. Code § 815.2(a). Accordingly, liability for an accident off of school grounds may be imposed, for example, where a teacher in charge of a group of children on a field trip negligently fails to provide them with reasonable supervision.

Section 1012 makes clear the legislative intent when the governmental tort liability act (Government Code Sections 810 et seq.) was enacted in 1963. Prior to 1963, school districts were liable under Education Code Section 903 for accidents resulting from failure to provide reasonable supervision for children while they were on the school grounds. E.g., Beck v. San Francisco Unified School Dist., 225 Cal. App.2d 503, 37 Cal. Rptr. 471 (1964). Education Code Section 903 was

repealed in 1963 and Section 815.2 of the Government Code was enacted to continue this liability for negligent failure to provide reasonable supervision. See Recommendation Relating to Sovereign Immunity: Number 1--Tort Liability of Public Entities and Public Employees, 4 Cal. L. Revision Comm'n Reports 801, 816 (1963):

"5. Public entities should be liable for the damages that result from their failure to exercise reasonable diligence to comply with applicable standards of safety and performance established by statute or regulation. Although decisions relating to the facilities, personnel or equipment to be provided in various public services involve discretion and public policy to a high degree, nonetheless, when minimum standards of safety and performance have been fixed by statute or regulation--as, for example, the duty to supervise pupils under Education Code Section 13557 and the rules of the State Board of Education, . . .--there should be no discretion to fail to comply with those minimum standards."

Section 1012 makes clear the legislative intent that a school district is liable for its failure to provide reasonable supervision of children on the school grounds. Compare Dailey v. Los Angeles Unified School Dist., 4 Cal. App.3d 105 (1970), holding that Government Code Section 815.2 (imposing liability for failure to comply with mandatory duty) and Education Code Section 13557 do not make a school district liable for its failure to provide reasonable supervision.