Barriers to Justice, Limits to Deterrence: Tort Law Theory and Four Approaches to Shielding Districts and Teachers from Liability for Negligent Supervision

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Education Law Association Annual Conference, 2015
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One of the most complicated areas of education law is the law of tort, particularly as it relates to school liability for negligence. This area of law is a complex product of centuries-old common law doctrines, statutory and judicial reforms of those doctrines, and an exhaustive body of case law in which those doctrines and related statutes have been applied by judges. Perhaps because of this complexity, the issue of negligence has been underemphasized and, in some cases, mischaracterized by the authors of school law textbooks.¹ Unsurprisingly, research has shown that educators are poorly informed on the topic.² Yet negligence in the public school context represents an important issue from many perspectives, including those of school districts, administrators, and teachers, who may be vulnerable to claims based on negligence, and those of students and their parents.

Despite its importance, public school negligence remains relatively understudied. In 2008, Perry Zirkel and John Clark asserted that “school negligence is a staple [of education law] that merits more careful and complete study and training, tempered by the need for objective and specific knowledge customized to the particular state jurisdiction and school situation.”³ Although scholars have begun to respond to the need for more research regarding school negligence,⁴ the literature remains underdeveloped given the complexity and importance of this area.

The specific focus of this paper is district and employee liability for harm resulting from the negligent supervision of students. One premise of the paper is that understanding the legal landscape related to district and district employee liability for negligence requires a comprehensive state-by-state approach that considers: 1) how statutory and common law define and apply the traditional elements of negligence, including duty and foreseeability, in the context

of public schools; 2) how statutory and common law treat relevant immunity doctrines, particularly sovereign immunity and discretionary immunity; and 3) other relevant aspects of statutory law including damage limits and caps, heightened standards of evidentiary proof, and indemnification. In this paper, I present the results of a comprehensive analysis of the law of four states and examine the frameworks of those states from the perspective of tort law theory.

The paper has three parts. Part one discusses the two primary policy and legal bases for the tort of negligence: corrective justice and deterrence. Part two presents the legal frameworks that govern public school liability for negligent supervision in four states representing four different regions of the US: Arkansas, Colorado, Illinois, and Maine. These four states were chosen because they each illustrate different approaches taken to limiting the liability of states, school districts and district employees, including: the application of sovereign immunity; the application of discretionary immunity; the establishment of less demanding standards of care for districts and their employees; the application of more demanding evidentiary standards; potential liability for defendant legal fees; and damage caps. In the end, the legal frameworks of all four of these states lead to the same legal result: districts, administrators, and teachers are practically shielded from all or nearly all liability for harms resulting from the negligent supervision of students.

The final part of the paper examines the implications of these four frameworks from the perspective of the legal and policy justifications for negligence law presented in part one. Clearly the frameworks conflict with those justifications, undermining the goals of corrective justice and deterrence. Moreover, they thwart the intentions of judges and legislators who dismantled the common law doctrine of sovereign immunity that once shielded districts, administrators, and teachers from liability for negligent supervision. In the end, while only Arkansas retains sovereign immunity in more or less its previous form, the law in all four states represents a legal reality in which students injured because of district or employee negligence are in the same boat they were in before the rejection of sovereign immunity: lacking a meaningful remedy.
Corrective Justice and Deterrence: The Theoretical Bases for the Tort of Negligence

As Ernest Weinrib has stated, “Tort theory attempts to formulate a general conception of the justifications that underlie the norms of tort law.”5 Although tort law scholarship has been rife with debate about which of many theoretical conceptions of tort law best captures the goals and purposes of tort law, that scholarship generally coalesces into two perspectives: the corrective justice perspective and the deterrence perspective.6 The first perspective, corrective justice, “focuses on correcting the wrong a particular tortfeasor committed against a particular victim.”7 However, the method of correcting the wrong—the “remedy”—takes a particular form. Specifically, the remedy returns both parties to the status quo ante and, thus, correlates with or is connected to the wrong. In Weinrib’s words, “the remedy responds to the injustice [done by the defendant and suffered by the plaintiff] and endeavours, so far as possible, to undo it.”8 Undoing the injustice must involve both parties because the injustice encompasses the experience of two parties, the party who has committed the injustice and the party who has suffered from it. Under the guise of corrective justice, undoing that injustice calls for a remedy that impacts or involves both parties. Thus, the remedy must accomplish two things: in flowing to the plaintiff, it must “make the plaintiff whole,” and in flowing from the defendant, it must exact a price roughly equal to the suffering experienced by the plaintiff due to the injustice committed by the defendant.9

From the second theoretical perspective, that of deterrence, tort law serves as a tool for pursuing a particular social end: influencing behavior in ways that reduce the chances that members of society will be harmed. In this way, the deterrence perspective views tort law more through an instrumentalist lens, with an eye towards preventing harm, as opposed to the moral

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5 Deterrence and Corrective Justice, 50 UCLA L. Rev. 621, 626 (2002).
9 Of course, corrective justice is thwarted if the plaintiff is not compensated. Thus, if the defendant is unable to pay, principles of vicarious liability apply to hold other parties liable under particular circumstances. A harder question is raised by insurance: if having an insurance company pay leads to an avoidance of the harm on the part of the defendant, corrective justice is undermined. However, insurance is often the only way a plaintiff will recover large damage awards and insurance serves other social goals. In addition, defendants experience other harms when found liable for negligence: higher insurance rates; the payment of deductibles; public relations issues; and possible job security implications.
and fairness-infused perspective of corrective justice. The desire to deter people from committing certain behaviors is reflected in several aspects of tort law. Again, the fact that monetary awards flow from the person who committed the harm reflects this deterrent goal: if tortfeasors were not liable for the damages they cause, there would be no deterrent effect. Punitive damages provide another example. Under punitive damages, plaintiffs are awarded additional damages, damages that are beyond those to which they are otherwise entitled. Punitive damages do not reflect the goals of corrective justice—returning the parties to the status quo ante—for the award of punitive damages is beyond what is required to attain that goal. Rather, punitive damages serve as an additional incentive for the avoidance of risky behaviors.

In this paper, I, like many but not all tort law scholars, adopt a pluralistic understanding of the goals/purposes of tort law. From a jurisprudential perspective, this pluralistic approach best reflects how the goals and purposes of tort law, including negligence, are understood by lawyers and judges. That tort law encompasses both normative functions and instrumentalist functions is reflected in both the two different goals of tort law—making the victim whole and deterring future harm—and the specific details of particular principles related to negligence. One such principle is that of foreseeability. While the principles of corrective justice support awarding damages to plaintiffs harmed by the conduct of others, those same principles also support restricting the awarding of damages in cases where the negligent party is thought to be less morally culpable for the harms. Under negligence law, a negligent actor is not responsible for any and all harms caused by his wrongdoing; only those harms that are foreseeable and, thus, should have led the actor to refrain from behaving in a less than careful way. My decision to behave unreasonably is only a moral transgression towards another person to the extent that that decision exposes that person to risks of which I should have been aware. Likewise, the requirement of foreseeability also may be understood from the perspective of deterrence: if a particular result is not foreseeable, we should not expect anyone to take actions to prevent it from happening. Thus, punishing someone for the unforeseeable consequences of their conduct will not lead others to refrain from such conduct because they will not be able to determine that such consequences could result.

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10 Schwartz, supra, and Shmueli, supra.
The rules regarding the awarding of punitive damages also reflect the pluralistic perspective. Although punitive damages primarily reflect the goal of deterrence, punitive damages are typically awarded only in cases where the tortfeasor’s culpability exceeds the minimum standard of care applied in negligence, requiring, for example, a finding of gross negligence or recklessness. This shows how tort law’s instrumental, deterrent goals may be tempered by the normative aspects of tort law, which would be violated if people were punished simply for failing to act in a way deemed “reasonable.” Failing to act that way is enough culpability for holding you responsible for the damages you caused. But punishing you beyond that requires a more serious moral transgression. Likewise, under the perspective of corrective justice, more serious moral transgressions call for more serious consequences.

**Negligent Supervision and Four States’ Approaches to Shielding Districts and Teachers from Liability**

Understanding the legal frameworks that govern negligent supervision claims is a mammoth task. Those frameworks encompass several complex issues including the traditional elements of the tort of negligence (duty, breach, causation/foreseeability, and injury) as well as other tort law principles that present particular issues in the context of schools. These issues include the vicarious liability of school districts for employee conduct and the viability of doctrines like contributory negligence and assumption of the risk when the person harmed is a child. The complexity of this legal framework is further exacerbated by principles and doctrines specifically related to state, district, and district employee liability, particularly the issue of immunity. All of this is compounded by the fact that every state defines and applies the elements of negligence, state liability and immunity, and related doctrines in its own way. This paper focuses primarily on issues particular to the question of public school district and district employee liability. In other words, this paper does not include a detailed discussion of the traditional elements of the tort of negligence or the traditional defenses to liability for negligence. Rather, this paper considers how state law acts to shield public school districts and district employees from liability for negligence in cases where private actors typically would be liable.

The civil liability of public schools, like all entities of state government, is governed by various state statutes and court decisions related to tort law and the doctrine of sovereign
immunity. According to the traditional doctrine of sovereign immunity, the King—or subsequently, in the United States, state and federal government—was immune from liability. Under the US common law, the doctrine of sovereign immunity originally was interpreted as shielding public school districts and teachers from tort liability. For example, in Illinois, the state supreme court explicitly applied the doctrine of sovereign immunity to public schools in 1898 in *Kinnare v. City of Chicago.* However, beginning in the 1920s, the doctrine of sovereign immunity was criticized for requiring injured persons “to bear almost all the risks of a defective, negligent, perverse or erroneous administration of the State’s functions.” In response to such criticisms and perceived injustices, state courts and legislatures began altering or rejecting the doctrine of sovereign immunity. Looking at Illinois again as an example, that state followed this trend away from school district immunity when the Illinois Supreme Court declared in 1959 that “the rule of school district tort immunity is unjust, unsupported by any valid reason, and has no rightful place in modern day society.”

In response to the shift away from absolute sovereign immunity, states passed laws that restricted state and local governmental liability for negligence. Under these laws, school districts and teachers no longer enjoyed absolute immunity from tort liability. However, the extent to which districts and teachers could be held liable varied—and continues to vary—considerably: in some states, immunity was eliminated completely; in others it merely was weakened. For example, in Illinois, in response to the elimination of sovereign immunity by the *Molitor* decision in 1959, the legislature passed the Local Governmental and Governmental Employees Tort Immunity Act (“Tort Immunity Act”) and section 24-24 of the School Code in 1965. These two laws acknowledged the elimination of absolute state immunity under common law but nonetheless provided Illinois school districts and teachers with a significant degree of protection against tort law liability. Many states took a similar approach and preserved much of the immunity recognized under the doctrine of sovereign immunity, showing that, despite the

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12 171 Ill. 332.
14 *Molitor v. Kaneland Community Unit Dist.,* 18 Ill. 2d 22, 25.
15 Alexander and Alexander, *supra,* at 727.
assertion by some scholars and commentators that sovereign immunity is “moribund,” the doctrine has remained “alive and well.”

As a result of such legislative and court-mandated limitations on the doctrine of sovereign immunity, what was once a cut-and-dried rule—public schools and teachers are immune from civil liability, applicable in nearly all states, was replaced by a patchwork of policies that varied from state to state. This paper takes a deep look at the patchwork found in the law of four states: Arkansas, Illinois, Colorado, and Maine.

**Approach 1: Reinstate the Common Law Approach to Sovereign Immunity (Arkansas)**

The approach in Arkansas is refreshingly straightforward, albeit problematic from the perspective of justice, deterrence and the rights of injured plaintiffs. First, like some other states, Arkansas preserves absolute sovereign immunity for the state itself. The foundation of the Arkansas framework is the immunity granted to the state under Article 5, § 20 of the Arkansas constitution: “The State of Arkansas shall never be made defendant in any of her courts.” The situation is somewhat more complicated when we consider the liability of school districts and their employees. The extension of absolute sovereign immunity to municipalities and other political subdivisions of the state, including school districts, was abrogated by the Arkansas Supreme Court in 1968.

The Arkansas legislature then reinstated that immunity. Arkansas statutory law, specifically § 21-9-301 (a) of the annotated state code, extends tort immunity to charter schools and school districts, at least to the extent that such schools and districts are not insured:

> It is declared to be the public policy of the State of Arkansas that all counties, municipal corporations, school districts, public charter schools, special improvement districts, and all other political subdivisions of the state and any of their boards, commissions, agencies, authorities, or other governing bodies

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16 Maher et al., *supra*, at 234.

17 This decision maintained limited immunity for discretionary acts: “We would make plain that this decision imposes liability on municipalities only for the imperfect, negligent, unskillful execution of a thing ordained to be done. No tort action will lie against them for those acts involving judgment and discretion; which are judicial and legislative or quasi-judicial and quasi-legislative in nature. The exercise of discretion necessarily carries with it the right to be wrong. It is only for ordinary torts committed in the execution of the activities decided upon that a tort action will lie; not for the decision itself.” *Parish v. Pitts*, 244 Ark. 1239, 1254.
shall be immune from liability and from suit for damages except to the extent that they may be covered by liability insurance.

Section b of the same statute extends that immunity to cover claims based on respondeat superior: “No tort action shall lie against any such political subdivision because of the acts of its agents and employees.” Another provision requires that all political subdivision acquire motor vehicle insurance, thus indirectly creating an exception to the blanket immunity enjoyed by school districts. However, that insurance need only meet the minimum requirements for drivers in the state, potentially limiting the liability under this exception to $25,000 for one person or $50,000 for two or more persons. 18

Thus, Arkansas plaintiffs seeking restitution for harms caused by negligent supervision must look to state employees—namely school teachers and administrators—for relief if the district or charter school responsible for the harm is not insured. However, even these relatively shallow pockets are shielded under a line of court cases stretching back to 1983. Specifically, in 1983, the Arkansas Supreme Court held that the immunity created by § 21-9-301 extends to the employees of any state actor covered by the law when such employees commit “acts of negligence in carrying out their official duties.” 19 The immunity applies whether the employee is sued in her official or individual capacity. As summarized by the US District Court for the Western Division of Arkansas in Braden v. Mount Home School District:

Officials and employees of governmental entities named in §21-9-301 are also immune from suit for negligence in their official capacities. Matthews v. Martin, 280 Ark. 345, 658 S.W.2d 374 (Ark. 1983). School officials are specifically immune from suit in their individual capacities, as well. Davis v. Fulton County, Arkansas, 90 F.3d 1346, 1353 (8th Cir. 1996). 20

These constitutional, statutory, and judicial protections against state, district, and public employee liability have been applied in numerous cases in which children attending Arkansas public schools have been harmed at or while travelling to and from school. These cases have included, inter alia,

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• *Doe v. Baum*, in which a female third-grader was allegedly raped by an eighth-grader while traveling to home on the school bus;\(^{21}\)

• *Brown v. Fountain Hill School District*, in which a high school shop teacher allegedly removed the safety guard from a table saw, leading a male student to amputate the fingers on his right hand;\(^{22}\)

• *Young v. Blytheville School District*, in which a thirteen-year-old female student was raped inside the men’s bathroom at her school by a “minor male”;\(^{23}\) and

• *R.P. v. Springdale School District*, in which a seventeen-year-old special needs student was, according to the plaintiffs, abused by non-disabled classmates who confined him in a dog cage, forced him to eat dog feces, and sexually exposed him to a group of other students.\(^{24}\)

In cases such as these, courts in Arkansas will grant defendants’ motions to dismiss or motions for summary judgment absent a showing that districts or their employees acted with intent.\(^{25}\) In other words, for students harmed due to negligent supervision in Arkansas public schools, there appears to be no path to recovery unless a district has acquired insurance against such claims.

**Approach 2, Illinois: Alter the Common Law Rules of Negligence by Applying a More Forgiving Standard of Care**

In comparison with Arkansas, Illinois responded to the abrogation of sovereign immunity in a way that provides districts and district employees with less protection from liability for negligent supervision. However, the protection in Illinois is nonetheless robust. The linchpin of this protective framework is the statutory definition of the standard of care schools and school employees owe to the students they are supervising. In a nutshell, under Illinois law, neither a school district nor a teacher is liable for injuries incurred by a student unless the injuries were the result of “willful and wanton conduct” on the part of the district or teacher in supervising that

\(^{21}\) 348 Ark. 259 (2002).


\(^{23}\) 425 S.W.3d 865, 868 (2013).


\(^{25}\) The one bright spot in Arkansas immunity law from the perspective of plaintiffs came in 1989, when the Arkansas Supreme Court held that the immunity from liability for employees under § 21-9-301 did not extend to intentional torts. *Battle v. Harris*, 298 Ark. 241.
student.\textsuperscript{26} This standard is reflected in both judicial interpretation of the Illinois School Code and the language of several sections of the Illinois Local Governmental and Governmental Employees Tort Immunity Act ("Illinois Tort Immunity Act").

For cases involving the negligent supervision of public school students, the Illinois Tort Immunity Act provides the most straightforward language establishing the willful and wanton standard.

Except as otherwise provided in this Act, neither a local public entity nor a public employee who undertakes to supervise an activity on or the use of any public property is liable for an injury unless the local public entity or public employee is guilty of willful and wanton conduct in its supervision proximately causing such injury.\textsuperscript{27}

Other sections of the Act also confer immunity absent a showing of willful and wanton conduct. For example, section 2-202 holds that, “A public employee is not liable for his act or omission in the execution or enforcement of any law unless such act or omission constitutes willful and wanton conduct.”\textsuperscript{28} Section 1-206 defines local public entity to include a “school district, school board, educational service region, regional board of school trustees, trustees of schools of townships, treasurers of schools of townships.”\textsuperscript{29}

In addition to the protections afforded school districts and employees under the Illinois Tort Immunity Act, the Illinois School Code has been interpreted to apply the willful and wanton standard to claims based on negligent supervision of school students. The Illinois School Code applies the principle of in loco parentis to the relationship between educators and students.

In all matters relating to the discipline in and conduct of the schools and the school children, [teachers, other certificated educational employees, and any other person, whether or not a certificated employee, providing a related service for or with respect to a student] stand in the relation of parents and guardians to the pupils. This relationship shall extend to all activities

\textsuperscript{26} Other states, including Colorado, Connecticut, Florida, Indiana, and West Virginia, also apply the willful and wanton standard.
\textsuperscript{27} §745 ILCS 10/3-108 (a) (2015).
\textsuperscript{28} §745 ILCS 10/2-202 (2015).
\textsuperscript{29} §745 ILCS 10/1-206 (2015).
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connected with the school program, including all athletic and extracurricular programs, and may be exercised at any time for the safety and supervision of the pupils in the absence of their parents or guardians.\(^{30}\)

As interpreted by the Illinois courts, this language of the Illinois School Code “specifically confers upon educators the status of parent or guardian to the students and since a parent is not liable for injuries to his child absent wilful and wanton misconduct, it therefore follows that the same standard applies as between educator and student.”\(^{31}\)

Thus, under both the Illinois Tort Immunity Act and the Illinois School Code, the willful and wanton standard defines the standard of care teachers, administrators, and districts owe to students under their supervision. As defined under the Illinois Tort Immunity Act, “willful and wanton conduct” is “a course of action which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an *utter indifference* to or *conscious disregard* for the safety of others.”\(^{32}\) Within the context of the Illinois School Code, as interpreted by Illinois courts, “Willful and wanton conduct is conduct which is either ‘intentional or done with a conscious disregard or indifference for the consequences when the known safety of other persons is involved.’”\(^{33}\)

This forgiving standard of care has provided the basis for the dismissal of many negligent supervision claims in Illinois courts, including:

- *Doe v. Lawrence Hall Youth Services*, in which a high school student at a residential school for at-risk youth was given drugs and alcohol by his teacher, who then engage in sexual acts with the student.\(^{34}\)
- *Braun v. Board of Education*, in which an epileptic student told by coach to use ladder rather than school-provided scaffold to reach scoreboard and had seizure and was injured when he fell: not willful and wanton because coach thought seizures were controlled by medicine.\(^{35}\)

\(^{31}\) *Doe v. Lawrence Hall Youth Services*, 966 N.E.2d 52, 58 (2012).
\(^{32}\) 745 ILCS 10/1-210 (West 2015); emphasis added.
\(^{34}\) 966 NE 2d 52 (2012).
• *Henrich v. Libertyville High School*, in which a 17-year-old student who had undergone spinal fusion surgery was injured after being required to participate in a water basketball game during PE.\(^{36}\)

• *Brooks v. McLean County Unit District No. 5*, in which a junior high school student collapsed and died after he and a group of junior high school students, played a “game” called “Body Shots”, which involved voluntarily punching each other with closed fists as hard as they could in the abdomen, chest, and ribs.\(^{37}\)

• *Repede v. Community Unit School District No. 300*, in which a freshman cheerleader fell while practicing a pyramid routine, breaking her arm, and alleged that the squad was insufficiently trained and that the coaches failed to provide “spotters.”\(^{38}\)

**Approach 3, Colorado: Couple a Forgiving Duty of Care with a More Demanding Evidentiary Standard and the Threat of Plaintiff Liability for Defendant’s Attorney’s Fees**

In comparison with Illinois law, Colorado law presents even further barriers to plaintiffs seeking recovery for damages resulting from negligent supervision. However, like Illinois, Colorado law relies on a patchwork of policies as opposed to the more sweeping approach taken in Arkansas. First, Colorado follows Illinois in restricting negligent supervision liability for district employees unless the harm resulted from willful and wanton misconduct. However, unlike Illinois but like Arkansas, Colorado grants absolute immunity to school districts. The standard of care that applies to negligent supervision claims against employees and districts in Colorado is governed by two statutes, the Teacher and School Administrator Protection Act, C.R.S. 22-12, and the Colorado Governmental Immunity Act, C.R.S. 24-10. These two statutes, read in conjunction, grant robust immunity to school districts and their employees in negligent supervision cases. First, under the Colorado Governmental Immunity Act, school districts, like all public entities, are absolutely immune from liability except under a limited set of

\(^{36}\) 712 NE 2d 298 (1998).
\(^{37}\) 8 NE 3d 1203 (2014).
\(^{38}\) 335 Ill. App. 3d 140 (2002).
circumstances, most of which would not be relevant in negligent supervision cases. Second, under the Teacher and School Administrator Protection Act,

An educational entity and its employees are immune from suit for taking an action regarding the supervision, grading, suspension, expulsion, or discipline of a student while the student is on the property of the educational entity or under the supervision of the educational entity or its employees; except that immunity shall not apply if the action is committed willfully and wantonly and violates a statute, rule, or regulation or a clearly articulated policy of the educational entity.

While the Teacher and School Administrator Protection Act would appear to restrict the absolute immunity districts enjoy under the Colorado Governmental Immunity Act, Article 12 of the Teacher and School Administrator Protection Act requires that, if a provision of that act conflicts with a provision of the Governmental Immunity Act, “the provision that grants the greatest immunity and protection to an educational entity and its employees shall prevail.” Thus, while the Teacher and School Administrator Protection Act allows for recovery against employees under the willful and wanton standard, the more sweeping immunity for school districts found in the Governmental Immunity Act would apply to claims made against districts.

While the willful and wanton standard is not defined within either the Colorado Teacher and School Administrator Protection Act or the Colorado Governmental Immunity Act, it has been defined by the Colorado courts and the Colorado legislature in other statutes. As noted in a recent decision by the Jefferson County Court:

An early decision defined the term as follows: The demarcation between ordinary negligence, and willful and wanton disregard, is that in the latter the actor was fully aware of the danger and should have realized its probable consequences, yet deliberately avoided all precaution to prevent disaster. A failure to act in prevention of accident is but simple negligence; a mentally active restraint from such action is willful. Omitting to weigh consequences

39 “A public entity shall be immune from liability in all claims for injury which lie in tort or could lie in tort regardless of whether that may be the type of action or the form of relief chosen by the claimant except as provided otherwise in this section.” (C.R.S. 24-10-106.)
40 C.R.S. 22-12-102, subsection 3.
is simple negligence; refusing to weigh them is willful. Pettingell v. Moede, 271 P.2d 1038, 1042 (Colo. 1954).\(^{41}\)

The Jefferson County Court went on to note that the Colorado punitive damages statute, sec. 13-21-102(1)(b), C.R.S., defines “willful and wanton conduct” as conduct “purposely committed which the actor must have realized as dangerous, done heedlessly and recklessly, without regard to consequences, or of the rights and safety of others.”\(^{42}\)

In 2015, Colorado law regarding negligent supervision became further complicated when the legislature passed the “Claire Davis School Safety Act.”\(^{43}\) This act, passed in response to the 2013 murder of Claire Davis at her high school in Arapahoe, Colorado, recognizes a very narrow exception to the grant of absolute immunity to districts found in the Colorado Governmental Immunity Act. At first blush, the Claire Davis School Safety Act seems to drastically alter the standard of care applicable in negligent supervision cases. Specifically, subsection 3 of the Act declares that “All school districts and charter schools and their employees in this state have a duty to exercise reasonable care to protect all students, faculty, and staff from harm from acts committed by another person when the harm is reasonably foreseeable, while such students, faculty, and staff are within the school facilities or are participating in school-sponsored activities,” suggesting that the reasonable care standard applies to claims made against districts and district employees for negligent supervision. However, much of what the Act gives plaintiffs in subsection three is taken away elsewhere in the Act.

First, subsection four of the Act reasserts districts’ absolute immunity for tort liability, albeit while also recognizing the possibility of exceptions.

Notwithstanding any other provision of this article, a public school district or charter school is immune from liability in all claims for injury that lie in tort or could lie in tort regardless of whether that may be the type of action or the form of relief chosen by the claimant except as otherwise provided in this section or in this article.

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\(^{41}\) ORDER re: claims concerning willful and wanton conduct of individual defending parties, In re the Lower North Fork Fire litigation, Case No.: 12 CV 2550 (Filed Feb. 18, 2014), at 3.

\(^{42}\) Id.

\(^{43}\) C.R.S. 24-10-106.3 (2015).
Subsection four goes on to formulate the precise exception to absolute district liability the Claire Davis School Safety Act creates. Specifically, immunity is not to apply “for a claim of a breach of the duty of care established in subsection (3) of this section by the school district, a charter school, or an employee of the school district or charter school arising from an incident of school violence on or after the effective date of this section.” In other words, in cases in which harms arise from an incident of school violence, the reasonable care standard applies. However, the reasonable care standard only applies to claims asserted against districts, be it for their direct or vicariously liability. In the words of subsection four, “An employee of a public school, school district, or a charter school is not subject to suit under this section in his or her individual capacity unless the employee's actions or omissions are willful and wanton.”

On top of the tangled statutory web related to district and district employee immunity, Colorado law has two other provisions that directly and indirectly enhance that immunity. Per the Claire Davis School Safety Act, since these two provisions appear in article 12 of the Colorado Teacher and School Administrator Protection Act, they do not apply to claims “arising from an incident of school violence.” However, they do apply to any other claims based on negligent supervision. First, subsection 1 of section 104 of article 12, the same provision that establishes the willful and wanton standard to negligent supervision claims, also establishes a heightened evidentiary standard for the establishment of liability for such claims:

…[I]mmunity [under the Act] shall not apply if the action is committed willfully and wantonly and violates a statute, rule, or regulation or a clearly articulated policy of the educational entity. The burden of proving the violation shall rest with the plaintiff and must be established by clear and convincing evidence to the court as part of a summary proceeding. If at the

44 An incident of school violence is defined as “an occurrence at a public school or public school-sponsored activity in which a person: (I) Engaged in a crime of violence; and (II) The actions described in subparagraph (I) of this paragraph (c) by that person caused serious bodily injury or death to any other person.” Under the statute, “‘Crime of violence’ means that the person committed, conspired to commit, or attempted to commit one of the following crimes: (I) Murder; (II) First degree assault; or (III) A felony sexual assault, as defined in section 18-3-402, C.R.S.” C.R.S. 24-10-106.3 (2015).
45 Although article 12 of the Colorado Teacher and School Administrator Protection Act requires courts to apply whichever Act—be it the Colorado Teacher and School Administrator Protection Act or the Governmental Immunity Act—provides the most protection to districts, subsection four of the Claire Davis School Safety Act adds that, with respect to claims arising out of incidents of school violence, “the provisions of article 12…do not apply to school districts and charter schools.”
summary proceeding the court finds a violation exists, the educational entity and its employee may raise immunity at trial under the provisions of this article and the “Colorado Governmental Immunity Act.”

In other words, before a negligent supervision claim may proceed to trial, the plaintiff first must establish by clear and convincing evidence that the district or its employees willfully and wantonly committed a violation of a statute, rule, regulation, or a clearly articulated district policy. In contrast, in Colorado civil actions generally, the plaintiff will prevail upon meeting the less demanding “preponderance of the evidence” standard.⁴⁶

As if these provisions were not enough to discourage plaintiffs from filing claims for negligent supervision, Colorado adds one more provision that should give plaintiffs and their lawyers pause:

(1) In a civil action or proceeding against an educational entity or its employee in which the court finds the educational entity or its employee is immune from suit or from liability pursuant to the provisions of section 22-12-104, the court shall award costs and reasonable attorney fees to the defendant or defendants. The court in its discretion may determine whether such fees and costs are to be borne by the plaintiff’s attorney, the plaintiff, or both.

(2) Expert witness fees may be included as part of the costs awarded under this section. C.R.S. 22-12-106 (2015)

In other words, if the plaintiff loses on the basis of immunity—if, at the end of the trial, it is determined that either the district was immune, perhaps because the action did not arise out of an incident of school violence, or the employee was immune, because he or she did not act willfully and wantonly, the plaintiff and/or the plaintiff’s lawyer could be required to pay the attorney and expert witness fees for the district and/or the employee. Although the heading for this provision reads, “Frivolous actions - attorney fees – costs,” nothing in the actual wording of the statute requires that the claim be “frivolous.” Rather, the plaintiff simply must not prevail. This is in contravention of the traditional rule under which parties to a civil action are responsible for their

own attorneys’ fees absent a determination that the action was based on a groundless claim or designed to harass the defendant.

The protections against liability recognized under Colorado law have provided the basis for dismissing claims against districts and district employees in many cases, including:

- **Young v. Brighton School District 27J**, in which “a minor child, slipped and fell in a puddle of water that had accumulated on a concrete walkway at his public elementary school. This walkway was located at the bottom of a set of outdoor steps, a short distance away from the elementary school’s exterior cafeteria doors.”

- **Robinson v. Ignacio School District, 11JT**, in which, while riding on the school bus, “two older students, including the bus driver's son… grabbed [a seven-year-old student’s] neck and began to jerk his head back and forth, causing a severe cervical strain and a concussion.”

- **Padilla v. School District No. 1**, in which “a ten-year-old developmentally disabled child, suffered from serious medical conditions for which she had frequently been subject to hospitalization, blood draws, and invasive medical procedures. Due to such procedures, she associated physical restraint with pain and became frightened and agitated when restrained, pulled, or grabbed. Her mother informed personnel of the Denver Public Schools (DPS) that Padilla should not be pulled or restrained. She provided a stroller for transporting Padilla to avoid pulling or dragging her. On February 12, 1997, Padilla refused to eat her lunch, and became agitated when DPS employees tried to get her to eat. DPS employees placed Padilla in her stroller and propped the stroller out of their line of sight against an open door of a closet adjoining the classroom. Padilla became agitated, the stroller fell backward, and Padilla struck her head against the floor, fracturing her skull.”

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47 2014 CO 32; 325 P.3d 571 (2014).
Approach 4, Maine: sovereign immunity for districts; discretionary immunity for employees; plus liability and damages caps

The law in Maine, the final state included in this paper’s analysis, illustrates two other powerful means of limiting district and district employee liability: discretionary immunity and damage caps. Maine law, like the law in many other states, starts with a blanket grant of immunity for school districts: “Except as otherwise expressly provided by statute, all governmental entities shall be immune from suit on any and all tort claims seeking recovery of damages.”\(^{50}\) The exceptions to this blanket immunity that are most relevant to school districts include the use and maintenance of motor vehicles and the operation and maintenance of public buildings.\(^{51}\) In most situations in which an exception to district immunity applies, there are some exceptions to the exception, including for discretionary acts.\(^{52}\) In addition, in cases in which an exception to districts’ blanket immunity applies, Maine law also imposes a damage award limit of $400,000 for any and all claims arising out of a single occurrence.\(^{53}\)

In terms of district employees, Maine law does not provide this sort of blanket grant of immunity coupled with exceptions. Rather, 14 M.R.S. § 8111 (2015) carves out specific areas of immunity, including:

- The performance of discretionary functions;
- Any intentional act or omission within the course and scope of employment; provided that such immunity does not exist in any case in which an employee’s actions are found to have been in bad faith;
- The use of reasonable force by teachers against students who create a disturbance.

In cases in which no specific immunity applies to employees, Maine law provides a back-stop: a personal liability cap of $10,000.\(^{54}\)

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\(^{50}\) 14 M.R.S. § 8103 (2015).


\(^{52}\) Except for cases involving the operation of a motor vehicle, a governmental entity is not liable for any claim which results from “Performing or failing to perform a discretionary function or duty, whether or not the discretion is abused and whether or not any statute, charter, ordinance, order, resolution or policy under which the discretionary function or duty is performed is valid or invalid.” 14 M.R.S. § 8104-B (2015).


\(^{54}\) 14 M.R.S. § 8114-D (2014).
Maine’s use of discretionary immunity reflects a common approach to limiting liability of districts and district employees. While discretionary immunity is defined differently in different states, Maine’s definition, like that of some other states, largely encompasses the supervision of public school students by teachers and districts. As explained by the Maine Supreme Court,

An act qualifies as a discretionary function if the act is essential to the realization or accomplishment of a basic governmental policy program or objective, Doucette v. City of Lewiston, 1997 ME 157, P6, 697 A.2d 1292, 1294 (citing Rippett v. Bemis, 672 A.2d 82, 88 (Me. 1996)), and "requires the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental employee involved." Carroll, 1999 ME 131 at P7, 736 A.2d at 282-83. This definition has been applied to teacher supervision of students by lower courts.

In the rare instances where immunity is not available to a district or its employees, the caps on district and employee liability kick in. While the extent to which districts and employees are immune may be more important from a jurisprudential perspective, the caps on liability and damages may be more important from the perspective of plaintiffs. Specifically, when damage caps apply, lawyers may be reluctant to take a case on a contingency basis. The net effect, some research suggests, is diminished access to the civil justice system, particularly for low-income plaintiffs.

In the case of teacher liability, the affect is obvious: a $10,000 award would not allow for the recover of any significant contingency fee. While this may be less of a concern in cases where districts are not immune, given the higher cap that would apply, the legal framework in Maine means that such cases are few and far between.

The impact of Maine’s legal framework related to negligent supervision is illustrated by the dismissal of several cases, including:

55 E.g., Alaska, Connecticut, and Delaware. The consequences of interpreting discretionary immunity so as to cover acts related to the supervision of public school students vary by state. In Maine, districts and their employees are absolutely immune for liability for most discretionary acts. In contrast, in Connecticut, discretionary immunity applies unless damages result from wanton, reckless or malicious conduct.
56 SELBY v. CUMBERLAND COUNTY et al., 2002 ME 80; 796 A.2d 678; 2002 Me. LEXIS 84 (2002).
59 Trying to circumvent the cap on employee damages via the assertion of vicarious liability is unlikely to be successful. See Richards v. Town of Eliot, 780 A.2d 281 (2001).
• *Peterson v. Bangor*, in which a kindergartener was injured after falling off of the school playground monkey bars.60

• *Lightfoot v. Sch. Admin. Dist. No. 35*, in which a school allowed its wrestling team to use the high school hallways for timed relay races, leading a student to smash his arm through a glass window.61

• *S.B. v. South Portland*, in which a 15-year-old ninth grader with cerebral palsy slipped and fell on a patch of ice on the sidewalk, suffering severe injuries leading to multiple surgeries, including a hip fusion.62

**Returning to Corrective Justice and Deterrence**

Overall, these legal frameworks clearly violate the purposes of the law of tort and negligence as understood by tort law theory. To some extent, this violation is self-explanatory: denying a plaintiff the ability to recover damages under legitimate negligence claims is unjust and removes some of the incentive for providing high levels of care. However, the impact of these frameworks on both the goals of corrective justice and the goal of deterrence is complicated by the workings of the legal system and the particular approaches to limiting liability that are reflected in the frameworks.

First, the cases mentioned in the previous sections do not, in themselves, directly show that public school students have been denied recovery for damages to which they were otherwise entitled. After all, when a case is dismissed on the basis of defendant immunity, the merits of the plaintiff’s claims are not examined; thus, it is impossible to know if the plaintiffs would have prevailed had these cases not been decided on the basis of immunity and related doctrines. However, these sorts of cases show that, in these states and others with similar provisions, many public school students asserting claims on the basis of negligent supervision are treated unjustly by the civil justice system. For those plaintiffs whose cases make it to the pretrial phase and beyond, the likelihood of a final rejection of their claims is substantially higher than it would be if the alleged tortfeasor were a private party. Such a situation raises two issues related to just treatment: the denial of recovery for legitimate claims and the unequal treatment of plaintiffs.

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Barriers to Justice, Limits to Deterrence

Obviously, some legitimate claims will be rejected by courts in these states. What’s more, some of these rejections will come in cases where, had the defendant been a private actor, the plaintiff would have prevailed.

Second, these two violations of justice, both the denial of recovery and the unequal treatment, are magnified when we consider how these legal frameworks undermine plaintiffs’ pursuit of justice prior to the adjudication of their claims. One issue is the likelihood of a pretrial settlement. Defendants have many incentives to settle a case but the two primary incentives are avoiding a substantial damages award and avoiding the large costs associated with defending a suit. Of course, knowing that you are likely to prevail in a case makes you less likely to settle because the risk of an unfavorable outcome in the form of a large damages award is small. However, the particular approaches these states and others take to limiting district and district employee liability have a much larger impact on a plaintiff’s chances of receiving any monetary award through settlement. When caps and restrictions on punitive damages apply, the defendant knows that the worst case scenario—losing after a trial—in addition to not being all that likely, also is not all that bad. The costs of defending against a negligent supervision claim also are likely to be limited since many of the bases for such a defense are resolved via pretrial motions, prior to any substantial costs of litigation.

In addition to making the likelihood of an out-of-court settlement low, these legal frameworks also make it less likely than negligent supervision claims ever even see the light of day. Since the likelihood of a plaintiff recovering is so small and the amount of damages plaintiffs may recover is often capped, plaintiffs may find it difficult to even begin that process, especially if they lack the financial resources to pay a lawyer other than through contingency. The barriers to a judgment of liability may discourage lawyers from taking the case on a contingency basis. While such barriers might be less significant in cases involving more egregious behavior, the potential reward for prevailing in such cases is limited when damages are capped and punitive damages largely are off the table. Although only applicable in Colorado, the potential liability for defendants’ legal costs likely serves as an additional significant disincentive for plaintiffs and their lawyers contemplating a negligence supervision claim.

From the perspective of corrective justice, the denial of recovery for harms related to negligent supervision arguably raise more concerns than would the denial of recovery for other
forms of negligence. The tort of negligent supervision rests on the notion that those with physical custody of children are obligated to protect those children from harm. This obligation is particularly weighty in the context of mandatory schooling: children and their parents have no choice; attendance at school is required. By forcing children to attend school, the state becomes particularly responsible for any harms children experience at school.

In addition to undermining the goals of corrective justice, the instrumentalist goals associated with deterrence are also thwarted by these sorts of restrictions on district and district employee liability. Although the impact on the goal of deterrence may be less significant than the impact on the goals of corrective justice, the impact on deterrence may be significant. The possibility of legal liability spurs individual and institutional action designed to limit the exposure to that potential liability. Large damage awards receive media coverage and make individuals consider their own vulnerability and what they may do to limit that vulnerability. Likewise, institutions have the incentive to invest in training, personnel, and equipment designed to decrease the risk that children will be harmed due to negligent supervision. The removal or limitation of potential liability removes one incentive for taking such action.

Conclusion

Of course, there are policy justifications for restricting the potential for district and district employee liability for negligent supervision: protecting public employees from liability that might discourage some from pursuing public employment; encouraging public officials to make decisions based on public policy goals not the avoidance of litigation; avoiding liability awards that drain important resources from the public purse, resources that otherwise support instruction. However, it is important to consider the costs of such restrictions as well. The extent to which the law in Arkansas, Illinois, Colorado, and Maine shields a particular class of tortfeasors—namely, state actors, from liability suggests that neither the values of corrective justice nor the goals of deterrence are served by the frameworks presented here. From the

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63 My point here is that while corrective justice likely is completed denied when a legitimate negligence claim is thwarted, deterrence may only be weakened. One reason is that winning today doesn’t guarantee winning tomorrow. Another reason is that the possibility of being sued, regardless of whether you would prevail at trial or not, is an incentive to avoid negligent behavior. I am not suggesting that fears of being sued are the only or even the primary motivator behind districts and teachers concern for children’s well-being. Rather, the prospect of litigation and liability is one of many reasons that educators are mindful of taking proper care of children in their custody. Other possible sources of this concern include compassion, job security, and public/community relations. The existence of these other incentives further weaken the impact that limiting liability has on the goal of deterrence.
perspective of corrective justice, clearly rules that prevent plaintiffs from being made whole fall short. The unjust nature of this denial of recovery is amplified by the fact that these frameworks deny recovery to only some plaintiffs, those harmed by the negligence of state, as opposed to private, actors. Finally, if we accept the notion that one goal of negligence law is the deterrence of behavior that exposes others to unreasonable risks, these frameworks fail from that perspective as well.

What, then, should be done? Obviously, one answer is to treat districts and their employees the same way that private actors are treated under state law. If one accepts the view of the Illinois Supreme Court back in 1959—that “school district tort immunity is unjust, unsupported by any valid reason, and has no rightful place in modern day society”64—that answer makes sense. What’s more, such a solution, coupled with other public policies, need not prevent the state from pursuing some of the goals reflected in restricting district and district employee liability. If the goal is the protection of public employees, indemnification should meet that goal.65 If the goal is the protection of sound policy judgment, narrowly-defined discretionary immunity should meet most of that goal, especially in terms of officials charged with policy decision. If the public purse is the concern, insurance is available and reasonable limitations on punitive damages awards, limitations that do not discourage contingency representation in cases involving egregious behavior, could be retained. While not perfect, frameworks reflecting these approaches would strike a better balance between the goals of collective justice and deterrence and the policy goals reflected in restrictions on liability for districts and their employees.

64 Molitor v. Kaneland Community Unit Dist., 163 NE 2d 89, p. 25).
65 I also would argue that indemnification policies that require individuals to contribute to the cost of any damage awards better serve the goals of collective justice and deterrence, as would insurance policies with deductibles covered by responsible parties.