

IMMUNITY FOR NEW MEXICO PUBLIC SCHOOL DISTRICTS
AND THE 1978 TORT CLAIMS ACT

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In a 3-year timeframe, nearly 800 student negligence suits were filed, and most involved some claim of personal injury. Despite heightened public attention of negligence lawsuits against school districts and their employees, an empirical study of court decisions revealed that the volume of litigation against school districts remained steady from 1990 to 2005, the majority of cases were ruled in favor of the school district employees, and government and official immunity were most often the basis for these rulings. Researchers have concluded that immunity laws are strong in the United States, although they vary by state in their application. However, a primary recommendation was that, because of the misconception of a lack of immunity for public school employees, a comprehensive study on governmental and official immunity is needed.

This dissertation employed legal research, analysis, and methodology to engage in a comprehensive investigation of teacher immunity in the four southern states of Texas, Oklahoma, Mississippi, and New Mexico. Of central concern to this dissertation was the Tort Claims Act of 1978 from the State of New Mexico. The Tort Claims Act is the vehicle by which immunity is granted to public school employees. Court findings over the last 35 years point to three primary domains under which cases pertaining to immunity fall: negligence (62.5%), evaluation and supervision (16.7%), and student discipline (8.3%). Immunity appears strong across all three domains; however, only future studies on cases by state will determine whether states in the southwest United States are the norm or an anomaly.

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CHAPTER 1

INTRODUCTION

Dunklee and Shoop (1986) found nearly 800 student negligence suits in a 3-year timeframe, most of which involved some claim of personal injury. The average damage award was just over \$1 million, with a reported high of over \$100 million. In terms of education litigation, the problem was not simply the volume of cases brought forth, but increase in the amounts awarded with each case. Dunklee and Shoop stated that, in the 5 years prior to their research, awards from tort litigation had increased 1,200%. They also pointed out that these figures included all types of litigation, not just those involving teachers. They contended that because lawsuits were being filed more frequently and awards were increasing, a need existed to increase teacher education in terms of negligence and potential liability.

Dunklee and Shoop (1986) referenced *Tinker v. Des Moines Independent School District* (1969) to enforce the point that society was becoming more litigious. Even though *Tinker v. Des Moines ISD* occurred in 1969, this landmark case illustrates the need for awareness among educators and district personnel of laws related to the educational workplace. Without this knowledge, these employees may be held liable for their actions. Dunklee and Shoop also asserted that school districts or their employees are often held to the same standards as are public entities in terms of litigation by injured parties (Dunklee & Shoop, 1986, p. 58). Sentiments such as this, along with the long-held belief that “The obligation of school is to provide proper instruction, proper supervision, and a safe place” (Dunklee & Shoop, 1986, p. 58) has led to negligence lawsuits that name not only school districts, but also specific public school employees. However, under tort law, educators and school districts are more likely to be immune from suit except under certain conditions. For example, in the state of Texas, educators

are immune from negligence lawsuits except when the negligent actions involve the use of a motor vehicle.

To be prepared in the face of increasing litigation, Dunklee and Shoop (1986) suggested the need for teachers to have a working knowledge of education law, and they placed this burden on the university programs in charge of teacher training. In their historical review of education litigation, they illustrated the need for education law courses to educate school leaders on ways to reduce their exposure to liability for personal injury caused by negligence. This research resulted in significant support for what became the Paul D. Coverdell Teacher Protection Act (2001), which provides qualified educators official immunity from litigation.

Despite heightened public attention about negligence lawsuits against school districts and their employees, Clark and Zirkel (2008) revealed that (1) the volume of litigation against New Mexico school districts remained relatively steady from 1990 to 2005, (2) a majority of cases were ruled in favor of school district employees, and (3) government and official immunity were most often the basis for these rulings. These findings show little increase in published lawsuits against school districts and educators in recent years, even though public commentators have often suggested otherwise. Maher et al. (2010) observed:

The media tends to sensationalize negligence liability in public schools by selectively covering exceptional cases and large verdicts. Other special interests also contribute to the confusion. For example, the school insurance industry has obvious self-interest in emphasizing the need for liability insurance, as do professional teacher associations and unions who tout their dues-funded professional liability insurance programs as important member benefits. (p. 248)
Some may feel that such liability insurance is necessary as public school employees can

be held liable. For example, in *Owens v. Leavitt's Freight Service Inc., Runyon, Loshbough, McKinley County School District, the State of New Mexico and Hoover*, the New Mexico Supreme Court found that partial liability rested with the school bus driver and remanded the

case back to the lower court for further proceedings. Maher et al. (2010) attested that special interest groups compete for dollars brought in by providing liability insurance. Therefore, this researcher aimed to investigate whether a real or merely perceived risk of liability exists for school districts and their employees as it relates to New Mexico school districts and the 1978 New Mexico Tort Claims Act (NMTCA).

Attorneys who represent school districts also have personal interest in reducing their exposure to litigation. Stressing the risk of lawsuits is one way to remind clients that they need the services of an attorney. Certainly, it makes sense for public educators to exercise heightened vigilance regarding the safety of students and adults on school campuses as monetary damages for personal injuries can be substantial. Nevertheless, as several scholars have pointed out, most notably Maher et al. (2010), the legal environment for public education and its employees has not become more perilous in recent years. Rather, school defendants have prevailed in most negligence lawsuits on the grounds of governmental immunity.

Justification

School administrators are often concerned that their school districts might be held liable for negligence related to personal injuries and that administrators might be held personally liable. However, research analyzed in dissertations pertaining to Texas (Carman), Oklahoma (Lacefield), and Mississippi (Kreisel-Hall) has shown that school districts and their employees enjoy substantial protection from liability under governmental immunity laws. Therefore, a better understanding of how governmental immunity operates across all states is crucial. School districts and their employees can use research findings about immunity specific to their state, or across a region of states, to form a realistic understanding of exposure to litigation and the legal protections available against liability.

Maher et al. (2010) underscored the need for studying education law, “Since it is unlikely that the mass media and special interests will do so, it is crucial that the education law literature and [graduate-school] coursework provide more balanced and accurate attention to governmental and official immunity” (p. 248). Moreover, these researchers pointed out that state law on governmental immunity is fluid and constantly changing.

Since Mayer et al.’s (2010) work, researchers have focused on the application of governmental immunity to school districts and their employees (Carman, 2009; Lacefield, 2010; Kriesel-Hall, 2013). However, to date, no comprehensive study has been conducted on the application of governmental immunity principles for school districts and their employees in New Mexico. The New Mexico Supreme Court adopted the concept of governmental immunity (also called sovereign immunity) as early as 1921. In *Evans v. Field* (1921), the court stated the concept of immunity, which is a universally acknowledged legal principle, “Is a fundamental doctrine at common law and everywhere in America that no sovereign state can be sued in its own courts or in any other without its consent and permission” (p. 3). Later, like courts in many other states, the New Mexico Supreme Court renounced the doctrine of governmental immunity as a judicial doctrine in *Hicks v. State* (1975). Citing the authority of courts in several jurisdictions, the New Mexico Supreme Court concluded, “The ancient doctrine of sovereign immunity has lost its underpinnings” (p. 5) by social and governmental changes, and it expressly overruled all prior holdings that protected the State of New Mexico from lawsuits.

The New Mexico Supreme Court’s *Hicks v. State* decision forced the state legislature to take action to define the basis by which the state and its subdivisions could be sued. In 1978, the legislature passed the New Mexico Tort Claims Act (referred to as NMTCA), which set forth the conditions under which the State of New Mexico and its subdivisions, including school districts,

could be sued. Since the passing of the NMTCA, 30 published New Mexico state court decisions have referenced the New Mexico Tort Claims Act; however, of those, only 24 cases directly interpreted the Act involving New Mexico school districts or their employees.

Research Question

The following research question guided this study: How have the New Mexico state courts interpreted the NMTCA in published litigation against New Mexico school districts and their employees?

Significance of Study

Maher et al. (2010) conducted a state-by-state survey of governmental immunity for school districts and their employees. They found substantial variations among states regarding the protection that school districts and school employees enjoy from being held liable in lawsuits. Carmen's (2010) study of governmental immunity in Texas, Lacefield's (2010) dissertation on governmental immunity in Oklahoma (2010), and Kriesel-Hall's (2013) analysis of governmental immunity in Mississippi all found that state laws operated to give public school defendants strong protection against being held liable in lawsuits including tort claims for personal injury. Nevertheless, among the three states Maher et al. examined, the statutory framework for governmental immunity varied significantly.

This study examined the NMTCA and the New Mexico state courts interpretation in lawsuits against New Mexico school districts and school employees. Just as public school leaders in Mississippi, Oklahoma, and Texas benefit from a clearer understanding of governmental immunity in their respective states, this study is significance in that it assists educators and administrators understand the way governmental immunity operates to protect school defendants in New Mexico.

The global significance of tort law goes beyond simple negligence of teacher performance and into the everyday operations of school districts. While not all operations contribute to abuse of minors, a case from Illinois illustrates how school districts, administrators, and teachers need to be ethical and mindful of their actions. *Doe v. McLean County Unit District* (2012) defined a *mobile molester* as an educator who knowingly abuses students in one school district, is terminated, and then finds employment in another school district. In some cases, a positive letter of recommendation is even written that allows these teachers to get another job with no hint of their potential wrongdoings.

The *Doe v. McLean* case illustrates how a district can become involved in a tort lawsuit. Specifically, the plaintiffs were two female elementary students (Jane Does) who attended Thomas Payne Elementary School in the Urbana School District. Their suit claimed that they were abused by John White, an elementary school teacher, while in school. Prior to working in Urbana, Mr. White worked for two years in McLean County Unit District No. 5 where it was known that he had sexually harassed or abused several elementary female students. Considering this situation, school districts must be mindful of their actions, whether made with good intentions or with the appearance of trying to hide something, as they can end up being litigated in a court of law.

Local and supreme courts sometimes dismiss tort claims, much like those brought against public school employees under the NMTCA. However, in *Doe v. McLean County*, the Illinois Supreme Court ruled that the two Jane Does could sue the local school district. The suit was based on allegations that school officials misrepresented the termination of Mr. White from the McLean County School District. In fact, McLean County school administration reportedly concealed the abuse, which allowed White to continue employment with the other school district.

These actions are in contradiction to Illinois state law in which school officials are legally required to report such cases. The sending school district stated that the teacher had worked an entire year with the district. However, it was later found that, in addition to two breaks in employment for disciplinary reasons, White left before the end of the school year.

Based on these actions, both Jane Does sued the directors of the McLean County School District, and argued that the district was liable for White. In fact, district personnel had acted knowingly when they passed White onto the Urbana School District. Initially, the McLean County defendants tried to dismiss the lawsuit because they had no direct contact or influence on the plaintiffs, and the trial court agreed. However, the Illinois Intermediate Court reinstated the lawsuit, and the Illinois Supreme Court agreed and ruled that the schoolchildren could proceed.

Webb and Fossey (2013) quoted Illinois law, which states, “Every person owes to all other persons a duty to exercise ordinary care to guard against injury which naturally flows at a reasonably probable and foreseeable consequence of his act” (para. 10). The duty of persons responsible for another does not extend to those accidents or events that are not foreseeable. As might be expected, the Supreme Court did not view the injuries suffered by the Jane Does as unforeseeable.

First, the Illinois Supreme Court ruled that the McLean School District falsely endorsed White and his employment by not disclosing that he left before the end of the school year. As such, the Urbana school district had no reason to believe there could be a foreseeable issue. A second point of the Supreme Court ruling was that the possibility of injury was likely. When someone is a known abuser of schoolchildren and is placed in another school setting, it is likely that a situation of abuse is a foreseeable issue. Third, the Illinois Supreme Court noted that it is not an unexpected duty to ensure that filling out employment forms occurs correctly for every

employee. In fact, the Supreme Court could not see that any negative consequences would have occurred had the employment reports been filled out correctly. At the time of this study, White was serving a 48-year prison sentence for abuse suffered by students in the Urbana School District. White had also pled guilty to abusing two other girls in the McLean County School District; the plaintiffs reported no record of these incidents in his personnel file.

In comparing this case with those studied through the lens of the NMTCA, the McLean School District argued that they were statutorily immune under Illinois tort immunity. The courts rejected this defense, as the accusers had not stated negligent misrepresentation. Rather, the suit stated that the actions were done willfully and wantonly. The global significance of tort claim law and its interpretation, when applied to school districts and their employees, will help ensure the proper responsibility of school districts in running daily operations as well as ensure the student safety. Table 1.1 offers definitions to easily understand the text.

Summary

Historically, negligent acts by public school employees have been highlighted to raise awareness of the possible areas of public education in danger of being held liable in a court of law. A seminal article by Dunklee and Shoop (1986) found nearly 800 student negligence suits in a 3-year timeframe, most of which involved some claim of personal injury. The researchers reported that the average damage award was just over \$1 million, with a reported high of over \$100 million. They contended that, because lawsuits were being filed more frequently and awards were increasing, a need existed to increase teacher education on negligence and potential liability.

Table 1.1

Definition Table Related to Case Law

| Term | Definition |
|-----------------------|---|
| A priori | Relating to or denoting reasoning or knowledge that proceeds from theoretical deduction rather than from observation or experience. |
| A posteriori | Inductively; from the particular to the general. |
| Breach of duty | Failing to exercise a standard of reasonable care. |
| De novo | A Latin expression meaning “from the beginning.” |
| False imprisonment | In education, false imprisonment refers to intentional confinement, including tying a child to a seat or locking a child in a closet. |
| Governmental immunity | Immunity specific to common law negligence liability for school districts. |
| Majority opinion | A judicial opinion agreed to by more than half of the members of a court. A majority opinion sets forth the decision of the court and an explanation of the rationale behind that decision. |
| Ministerial Acts | That which is done under the authority of a superior. |
| Official immunity | Immunity specific to school district employees. |
| Scope of duties | Performing duties that a public school employee is requested, required, or authorized to perform. |
| Summary Judgment | A quick decision based on documentation when facts are not disputed. |
| Tort action | A wrong that involves a breach of a civil duty owed to someone else. |
| Liability | Legal responsibility to another or to society, enforceable by civil remedy, or criminal punishment. |
| Claims | The assertion of an existing right; any right to payment or to an equitable remedy, even if contingent or provisional. |
| Certiorari | A Latin word meaning “to be informed of, or to be made certain in regard to;” also the given name to certain appellate proceedings for reexamination of the actions of a trial court. |

Source: Garner (2011)

In stark contrast to Dunklee and Shoop (1986), Clark and Zirkel (2008) revealed the following three points of interest:

- 1) The rate of cases against school districts remained steady over the 15-year period from 1990 to 2005.
- 2) Decisions in nearly all cases favored school districts and their employees.
- 3) Government, official, or sovereign immunity were the most often cited as the basis for the decisions.

Based on this contradictory evidence, this researcher aimed to investigate whether a real or merely perceived risk of liability exists for public school districts and their employees as it relates to the NMTCA.

School administrators are concerned about the real or perceived risks of liability that exist for their educators and administrators who might also be held personally liable. However, research in Texas, Oklahoma, and Mississippi has shown that school districts and their employees enjoy substantial protection from liability under state immunity laws. Thus, an investigation into this topic will allow public school personnel to use the findings about immunity specific to their states, or across a region of states, to form a realistic understanding of exposure to litigation and the legal protections available against liability.

Hicks v. State from the New Mexico Supreme Court forced the state legislature to take action in determining the boundaries of immunity by which the state and its subdivisions could be held. In 1978, the legislature passed the NMTCA that set forth the conditions under which the State of New Mexico and its subdivisions, including school districts, could be sued. Since the passing of the NMTCA, 24 published New Mexico state court decisions interpreted the act in cases involving school districts or their employees. The global significance of tort claim law and

its interpretation when applied to educators and school districts will increase responsibility of school districts in running daily operations and ensuring student safety.

CHAPTER 2

LITERATURE REVIEW

Dunklee and Shoop (1986) brought two research studies to the forefront that pointed to nearly 800 student negligence suits in a 3-year time frame across the United States; most involved some claim of personal injury. However, Clark and Zirkel (2008) conducted an empirical study of court decisions and found that the volume of tort litigation against school districts remained steady from 1990 to 2005, and the courts ruled the majority of cases in favor of school district employees, with government and official immunity the most common basis for these rulings. Maher et al. (2010) concluded that immunity laws are strong across the United States, even though variability exists in these laws from state-to-state. The previous findings and the call for additional research from Maher et al. led to the following research question: How have the New Mexico state courts interpreted the New Mexico Tort Claims Act (NMTCA) in published litigation against New Mexico school districts and their employees?

This study analyzed the application of the New Mexico Tort Claims Act of 1978 by the state courts in tort claims involving public school districts and employees. This research follows the general outlines and methods of three previous dissertations completed at the University of North Texas. These dissertations examined tort policy in Mississippi (Kriesel-Hall, 2013), Oklahoma (Lacefield, 2010), and Texas (Carman, 2009). The literature review examines the foundation of sovereign immunity as it transitioned to common law and then to state statute. As a backdrop to negligence, which most cases in New Mexico reference, this chapter includes a discussion of negligence (from which most teachers and administrators are immune) versus gross negligence (from which most are not immune). In addition, this chapter includes a discussion of

the Paul D. Coverdell Teacher Protection Act enacted by Congress in 2001 to provide educators protection from tort claims.

The literature examined in this review is a composite of law, journals, and court decisions that pertain to the NMTCA. Combined with previous dissertations that focused on similar court case in Texas (Carman, 2009), Oklahoma (Lacefield, 2010), and Mississippi (Kriesel-Hall, 2012), this study extends the research to offer a comprehensive review of this issue in the southwestern United States as Maher et al. (2010) called for in the *Kansas Journal of Law and Public Policy*. Specifically, Maher et al.'s primary recommendations was that, because of the misconception of a lack of immunity for public school employees, a comprehensive study on governmental and official immunity was needed.

Carman (2009) examined over 40 cases on immunity of educators in Texas and reviewed Texas Education Code section 22.0511. While his focus was on defamation, he found negligence, discipline, and supervision and evaluation as emerging areas of legal concern (Carman & Fossey, 2009, p. 3). Lacefield's (2010) dissertation examined the interpretations of the governmental Tort Claims Act against school districts and their employees in Oklahoma courts, the limits of immunity protection for Oklahoma school districts and their employees, and the application of the statute of limitations as applied to Oklahoma educators in tort litigation. Finally, Kriesel-Hall (2012) determined how courts have interpreted the Mississippi Tort Claims Act in litigation against school districts and their employees.

I referenced these previous studies as a lens to analyze court cases in New Mexico to address the following research question: "How have the New Mexico courts interpreted the NMTCA of 1978 in litigation against New Mexico school districts and their employees?"

Historical Perspective

In almost every state, the concept of common law, often referred to as “The King can do no wrong,” has been in place from the day each state was founded. This concept indirectly gives school districts immunity from tort liability. Common law literally is law of the common people put in place to protect landowners from having their land taken by the government without due process. Over time, common law was cemented via thousands of court decisions. As the founding fathers established the 13 colonies, they recognized that common law was the basis for all lawmaking, or at least what connected areas that were not yet law. They believed that the “power of the people” would enable the government to remain strong (Fisher & Pond, 2010).

When traced to its initial form, common law is found to have originated over 2,000 years ago. The basic tenants of common law can be seen, among other places, in The 12 Tables, which was a system of law put forth by the Plebes in response to the Patricians of Rome in 449 B.C. In his writings on the subject, Mister Thorne (n.d.) noted that the basis of government brought forth the basic elements of common law that we see today and included the following: “(1) Everyone is equal before the law, (2) the accused are innocent until proven guilty, and (3) the accused have the right to defend themselves and to know their accuser” (para. 6). While these ideas are reflected in writings that are roughly 2,500 years old, they have stood the test of time in courts systems including that of the United States.

Therefore, where did the phrase “The King can do no wrong” originate? For over 1,000 years, the law in England was whatever the King said it was. Over time, common law was established as kings, such as Henry I set up courts throughout the country. Initially, judges (or clerics) were directed to be fair and reasonable and to use good sense in arriving at their judgments. During this time, the responsibility of developing laws where none existed was the

on the courts (Mister Thorne, n.d.). The decisions of these courts shaped the future of the laws in the country.

Historians, such as Kunal Parker, have noted the peculiarity in the United States embracing England's notion of common law during a time when it was trying to separate from England. It seems more reasonable that the founding fathers would have distanced themselves if they truly wanted to separate from the perceived oppression of England. However, in the early 1800s, James Kent wrote about common law in such a way that it captured the essence of how American lawyers viewed this concept. In his writings, Kent painted a picture that lawyers of the 1800s believed common law encompassed what statutory laws could not. In reality, common law itself was a thread that wove around all facets of life from the personal to the professional (Parker, 2012).

Two ideas illustrate how common law was not only sustained during early years of America's freedom, but how it expanded and grew as the country grew. The first idea is that common law is synonymous with a group's freedom from oppression by its government. This notion is at the very heart of the Anglo Saxon idea of freedom in the New World. The second reason that the United States embraced common law was that, in the 19th century, common law lawyers played a very large part in determining how laws were shaped. While those lawyers may not have had public education at the forefront of their thinking, common law ideas traditionally held some protection for educators.

Eventually, states such as New Mexico, and its 1978 Tort Claims Act, determined that common law was not sufficient to handle the burgeoning issues of the 20th century. Common law eventually transformed into the concept of sovereign immunity in every state much as it did in English law in the 13th century. As state governments became larger and more organized, a

greater need emerged to delineate which individuals or entities could be held liable and for what actions such liability could apply. The concept of sovereign immunity transformed in United States legislation, and eventually many states have waived immunity by enacting legislation that enables school districts to purchase liability insurance; however, districts are only held liable up to the amount of insurance coverage acquired. If coverage is not purchased, immunity remains in effect. The Supreme Court of Montana explained this idea as follows:

While a school district is granted immunity of various types, a school district is still granted authority to purchase insurance that may have the effect of a waiver of immunity to the extent of the insurance proceeds. We conclude that the Legislature has declared its intent to allow a school district to waive immunity to the extent of the insurance proceeds. (Alexander & Alexander, 2005, p. 734)

The Oklahoma and Virginia Supreme Courts both reached similar conclusions, and New Mexico, through legislation including the Tort Claims Act, reached those conclusions as well. Alexander and Alexander further noted, “Sovereign immunity has been in a state of considerable change. Some states have abrogated immunity only to have it reinstated by the legislatures” (p. 633)

Governmental Immunity in New Mexico

Government immunity had been in play in the courts for over 60 years when it became common law in 1912, the same year New Mexico became a state. While the concept of sovereign immunity was in effect in court decisions and legislative acts for many years, Justice Oman’s description from *Sangre de Cristo Development Corp. Inc. v. City of Santa Fe* summed up the era of immunity from 1912 until the mid-1970s as follows:

Regardless of what may be the law in other states, this Court has consistently held that the State of New Mexico may not be sued in its courts without its permission or consent. (citations omitted). Also in New Mexico, municipalities are clothed with this immunity from suit, insofar as their governmental functions are concerned. (Kovnats, 1976, 252)

As is found in the history of many other states, Justice Oman indicated that the State of New Mexico (and direct entities such as school districts) may not be sued while in pursuit of their

governmental functions (e.g., educating children). This idea continued until the early 1970s in New Mexico.

Prosser/Keeton on Torts

State courts have interpreted governmental immunity countless ways across the United States. However, the 1979 Restatement (Second) of Torts codified the components of common law and established those as such in section 895B:

1. A State and its government agencies are not subject to suit without consent of the state.
2. Except to the extent that a State declines to give consent to tort liability, it and its governmental agencies are subject to the liability.
3. Even when a State is subject to tort liability, it and its governmental agencies are immune to the liability for acts and omissions constituting
 - A) the exercise of a judicial or legislative function, or
 - B) the exercise of an administrative function involving the determination of fundamental government policy.
4. Consent to suit and repudiation of general tort immunity do not establish liability for an act or omission that is otherwise privileged or is not tortious.

Courts nationwide grew weary of governmental immunity as a judicial concept, and states began abolishing common law governmental immunity. Additionally, the courts directed state legislatures to define immunity and its limits for each state. Prosser and Keeton (1984) published a handbook that offers a comprehensive examination of tort law. In over 1,200 pages, the handbook covers tort law from wrongful death to nuisance. An accompanying handbook is also available that covers over 250 pages of definitions of various torts and immunities provided by law. In 1984, *Prosser and Keeton on Torts* was published. Keeton noted that states began establishing avenues upon which suits are brought against state agencies. Thus, limitations of governmental immunity were established to include the following four components:

1. The distinction between propriety acts (those that anyone can perform) and governmental acts (those restricted to government agencies) was established, which allowed governments to be sued when proprietary acts are involved.
2. The distinction between discretionary (those acted on by an individual) and ministerial acts (those done under the supervision of a superior) was established, which allowed governments to be sued when ministerial acts are involved.
3. A distinction between normal and gross negligence was established, which followed a common sense approach to allow suits involving gross negligence.
4. Waivers for immunity can be granted involving governmental agencies that have insurance up to the amount of that insurance.

These components are seen in varying degrees in the research on teacher immunity from different states. The ultimate idea is that suit can be brought against governmental agencies (with limitations) in some areas that were previously off limits under the “King can do no wrong” idea of sovereign immunity.

Differentiating Negligence versus Gross Negligence

A law-related study can turn on a point, and there is a difference between negligence and gross negligence that should be addressed before going forward.

The term *negligence* is defined as follows:

Failure to exercise the care toward others which a reasonable or prudent person would do in the circumstances or taking action which such a reasonable person would not. Negligence is accidental as distinguished from "intentional torts" (assault or trespass, for example) or from crimes, but a crime can also constitute negligence, such as reckless driving. Negligence can result in all types of accidents causing physical and/or property damage, but can also include business errors and miscalculations, such as a sloppy land survey. (*Legal Dictionary*, 2013, para. 1)

Additionally, *gross negligence* is defined as,

Carelessness, which is in reckless disregard for the safety or lives of others, and is so great, it appears to be a conscious violation of other people's rights to safety. It is more than simple inadvertence, but it is just shy of being intentionally evil. (Law.com, 2013, para. 1)

The distinction is important in how the courts interpret statutes such as the NMTCA. Further, this distinction is apparent in *Doe v. McLean County Union District No. 5*. In this case, the Illinois Supreme Court found that the school district had a duty to avoid fraudulently misrepresenting the circumstances involving the dismissal of an employee who abused children while under his care. If the district had used ordinary care to guard against injury to the children, it would not have been at fault, and any negligence involved would not have risen to the level of damages against the district. However, the district was accused of willful and wanton conduct and negligence rose to the level of gross negligence to which the district could not claim immunity. The result was a school district that was liable for its actions.

New Mexico Did Not Have the First Tort Claims Act

The Federal Tort Claims Act of 1946 was passed into law nearly 35 years before the NMTCA of 1978 and outlined the conditions under which a tort lawsuit can be brought. This federal act was the result of common law sovereign immunity whereby the United States cannot be sued without consent. Additionally, this act waives sovereign immunity for some tort lawsuits. Cohen and Burrows (2007) illustrated areas of liability with the Federal Tort Claims Act. Specifically, the U.S. government may be liable,

For injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment under circumstances where the United States if a private person would be liable to the claimant in accordance with the law of the place where the act or omission occurred. (p. 4)

Like the NMTCA of 1978, the following are exceptions to the Federal Tort Claims Act:

(1) the Feres doctrine, which prohibits suits brought by military personnel for injuries incurred related to their duties; (2) the discretionary function exception; and (3) the exception related to

intentional torts. The Feres doctrine centers on the unique characteristics of military duties and the lack of correlation of duties to those covered for similar non-military functions.

Intentional torts and the idea behind these exceptions arose from suits brought about by publicity given to a narcotics agent who acted illegally and unconstitutionally in order to fulfill his assignment (Cohen & Burrows, 2007). Some, such as Supreme Court Justice Kennedy, have questioned this exception and raised the issue of whether it could be used to cover virtually any tort lawsuit.

The discretionary function exception to the Federal Tort Claims Act is two-pronged. The first prong concerns the idea that the government employee used due care in implementing the statute or order in reference. Courts have struggled with the second prong as it deals with the discretionary function portion, as the Federal Tort Claims Act does not define what these functions entail. Finally, the intentional torts referenced above include, but are not limited to, false arrest, invasion of privacy, and trespassing.

While the Federal Tort Claims Act goes a long way in clearing up the inherent iniquities of sovereign immunity, challenges exist to its stability as a working doctrine. One area challenged over the last 60 years is the discretionary function exception. The seminal case in this area is *Dalehite v. United States*. In this case, the Supreme Court rationalized that no actionable offense existed when subordinates carried out duties in accordance with official directives. Initially, this rationale seemed to cover certain government employees and their actions unnecessarily. However, this rationale makes sense when viewed through the lens that the government employs millions of people, and employee duties (e.g., driving a government vehicle) could give rise to tort liability in the private sector. Hence, under fear of liability, employees could not carry out many duties that were critical to the workings of the U.S.

government. In order to ensure that the government is able to continue its mission, the employees are immune from those actions that are described as discretionary functions.

Coverdell Teacher Protection Act

At the national level, as part of No Child Left Behind (NCLB), Congress enacted the Paul D. Coverdell Teacher Protection Act of 2001. This legislation was included as part of the NCLB education bill and affected public schools nearly 13 years later. While not as broad in scope as the NMTCA, the stated purpose of the legislation is to, “Provide teachers, principals, and other school professionals the tools they need to undertake reasonable actions to maintain order, discipline, and an appropriate educational environment” (National School Boards Association [NSBA], 2004, para. 2). In other words, if school administrators followed their own stated rules and policies, their actions would not be subject to liability. This act covers not only teachers, but also all school employees and board members. While important legislation, the act is limited in its scope as it deals with issues that arise from discipline or maintaining order and covers less than one-fourth of suits brought to the courts in the State of New Mexico.

Within this scope, it is important to note that the coverage of actual people is broad in this context because a school district employee refers to any of the following types of people in the school setting: teacher, instructor, principal, administrator, another educational professional who works at the school; a professional (or non-professional) who works in a school and, as part of his or her job, must maintain discipline; and a member of the school board. It is interesting to note that, like the NMTCA, the Paul C. Coverdell Teacher Protection Act has a liability exception for harm involving motorized vehicles:

The harm was not caused by the teacher operating a motor vehicle, vessel, aircraft, or other vehicle for which the State requires the operator or owner of the vehicle, craft, or vessel to—(A) possess an operator’s license; or (B) maintain insurance. (p. 2)

In addition to this condition, four others are worth noting:

1. The employee is found to have been acting within the scope of his or her employment.
2. The employee's actions are within local, state, and federal laws.
3. The employee is licensed in the area under question.
4. The employee did not cause harm that included "willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the teacher" (Paul D. Coverdell Teacher Protection Act of 2001, para. 1)

In court cases in New Mexico, the subset on immunity relating to the Paul D. Coverdell Teacher Protection Act has not been actioned.

In *Morrone v. Prestonwood Christian Academy* (2007), the Texas court confirmed that the Teacher Protection Act applied to public and private schools (as was the case with Prestonwood Christian Academy). The case focused on the potentially abusive conduct directed at a particular student from the teacher. The court found that, because the teacher had not engaged in grossly negligent conduct, she was immune from liability (Hemenway, 2011).

Teacher advocacy groups, such as the National Education Association (NEA), were quick to point to such cases as proof that educators still needed to join the ranks of their membership to take advantage of liability insurance. The New Mexico branch of the NEA published a question and answer section on their website to inform current and potential members of the consequences of liability while performing their professional duties. Examples of lawsuits not covered by the Teacher Protection Act include situations in which the student is:

- Hurt in a playground accident
- Injured during a chemistry lab experiment
- Beaten up by other students

- Injured in shop class
- Assaulted on a field trip
- Sexually harassed by peers (Paul D. Coverdell Teacher Protection Act, 2001)

However, the NMTCA already provides immunity for educators in instances involving the above situations. Because teacher groups like the Association for Texas Professional Educators (ATPE) use liability coverage as a rationale for membership, teacher immunity education is needed in all 50 states.

Hicks v. State

In *Hicks v. State* (1975), the Supreme Court of New Mexico “abolished the common law rule that stated no sovereign state can be sued in its own courts without its consent and permission” (Kovnats, 1976, p. 251). The case centered on the death of the plaintiff’s wife and daughter in 1972 who were killed in a traffic accident when a cattle truck and school bus collided on a State Highway Department maintained bridge. The plaintiff claimed negligence on the part of the state. The court described sovereign immunity as archaic and refused to argue the contention any further, and attempted to stamp out the idea of sovereign immunity:

This and all other rationalizations that have been advanced to justify continued adherence to this doctrine are no longer valid in New Mexico. The argument has been presented that the elimination of sovereign immunity will result in an intolerable financial burden upon the State. We believe it is safe to say that adequate insurance can be secured to eliminate that possible burden in a satisfactory manner. It would appear that placing the financial burden upon the state, which is able to distribute its losses throughout the populace, is more just and equitable than is forcing the injured individual to bear the entire burden alone. There are presently in New Mexico no conditions or circumstances which could rationally support the doctrine of sovereign immunity. We have long recognized that the doctrine is not applicable to municipalities when engaged in a proprietary function *Barker v. City of Santa Fe*, 47 N.M. 85,136 P.2d 480 (1943). (*Hicks v. State*, 1975)

As a backdrop to immunity in New Mexico, in 2011 Matthew Bender offered the following rationale of the legislative declaration for the Tort Claims Act:

The legislature recognizes the inherently unfair and inequitable results, which occur in the strict application of the doctrine of sovereign immunity. On the other hand, the legislature recognizes that while a private party may readily be held liable for his torts within the chosen ambit of his activity, the arena within which the government has the power to act for the public good is almost without limit, and therefore government should not have the duty to do everything that might be done. Consequently, it is declared to be the public policy of New Mexico that governmental entities and public employees shall only be liable within the limitations of the Tort Claims Act and in accordance with the principles established in that act. (p. 1)

The NMTCA of 1978 effectively put sovereign immunity back in the hands of the court, allowing for certain exceptions to that immunity. As such, the New Mexico government would not have free reign without the threat of liability, but a detailed account of the limits of the government's immunity.

New Mexico Tort Claims Act of 1978

The New Mexico Tort Claims Act of 1978 reinstated governmental immunity based on the idea that equal protection clauses for the United States and New Mexico were based on the same standards. This legislative move was in response to the Hick's case during the previous year. However, the state also had to balance the rights of the people with possible liability from tort actions. As with many legislative decisions, when looked at in light of past, current, and future litigation, eight exceptions to immunity regarding government activities emerged:

1. Operating motor vehicles
2. Operating or maintaining buildings or property
3. Operating airports
4. Negligence in operating public utilities
5. Operating some specific medical facilities

6. Health care
7. Highway maintenance
8. Some unlawful acts of law enforcement officers (*State v. Garcia*, 1980)

As this is a discussion on the New Mexico Tort Claims Act, these exceptions require further exploration. The courts have interpreted operating motor vehicles narrowly to mean that a vehicle is performing work; therefore, activities such as faulty planning of bus stops are immune even in cases where a school bus accident occurs. Operating and maintaining buildings or properties include accidents on government property; however, does not include situations in which negligent acts cause such accidents. Operating airports refers to those areas not handled by public entities.

Negligence in the operation of public utilities includes operation of the following utilities: gas, electricity, water, waste collection or disposal, heating, and ground transportation. However, immunity is not granted in instances where there is a failure to provide such resources. Negligence in the operation of medical facilities refers to those that are state run and provide people directly. Negligent health care has not been tested; therefore, the immunity applied herein must be taken in light of the immunity for negligent operation of medical facilities.

Negligent maintenance is interpreted more broadly than are other exceptions. Here, immunity is waived regarding negligent maintenance of any “bridge, culvert, highway, roadway, street, alley, sidewalk, or parking area” (McAlister, 1991, p. 25). The final exemption falls under negligent law enforcement in which an officer and the government entity he or she is employed under may have a suit brought against them. The exemption category encompasses any person whose primary responsibility is to keep persons in custody.

In the ensuing 35 years, 24 published court cases have been filed under the NMTCA involving school districts and their employees. As illustrated in the definitions table, negligence refers to the failure to use reasonable care in avoiding causing an individual harm. Walsh, Kemerer, and Maniotis (2010) pointed out that this form of tort, referred to as a state tort, is most common. The analysis of the cases and articles involving the Tort Claims Act in New Mexico and school district employees references negligence across the board.

Initial Discussion of Cases

Garcia v. Albuquerque Public Schools Board of Education appeared before the New Mexico Court of Appeals on June 10, 1980. The District Court of Bernalillo County heard this case on appeal based on the plaintiff's contention that the NMTCA violated the New Mexico and the United States Constitutions. The suit contended that a 12-year-old child suffered personal injuries after teacher struck him. The court dismissed the suit on immunity provided by the NMTCA. The plaintiffs argued, "The Act denied injured parties equal protection of the law since only those parties may have recovered damages who were injured by negligence of state and public employees performing their duties" (*Garcia v. Albuquerque Public Schools Board of Education*, 1980, p. 1). The court affirmed the action to dismiss the complaint, as the Equal Protection Clause for both the New Mexico and the United States Constitutions were "rationally related to a legitimate state interest" (*Garcia v. Albuquerque Public Schools Board of Education*, 1980, p. 1).

Judge Lopez's opinion emphasized the following exceptions provided by the Tort Claims Act that reinstated government immunity:

- 1) the operation or maintenance of motor vehicles, aircraft, and watercraft;
- 2) the operation or maintenance of any building, public park, machinery, equipment, or furnishings;
- 3) the operation of airports;
- 4) the operation of certain public utilities and services;
- 5) the operation of certain medial facilities;
- 6) health care services;
- 7) the

maintenance and existence of highways, streets, and certain appurtenances; 8) certain unlawful acts of law enforcement officers.” (*Garcia v. Albuquerque Public Schools Board of Education*, 1980, pp. 2-3)

As such, the court dismissed the suit against the Albuquerque Public Schools Board of Education. In a dissent, Judge Walters argued that immunity may not be necessary for public employees “to take actions which are necessary for the good of the general public” (*Garcia v. Albuquerque Public Schools Board of Education*, 1980, p. 7) and those actions are not subject to judicial review.

The New Mexico Court of Appeals heard *Trembath v. Riggs and The Truth or Consequences Municipal Schools* from the District Court of Sierra County on December 27, 1983. Frank Trembath, a teacher for Truth or Consequences, brought suit against the Riggs family and the school district after he was injured while on his way to lunch. He filed a negligence tort case against the defendants after he was hit by a pipe sticking out of a truck that passed by the school.

Initially, the court stated that the Workmen’s Compensation Act barred the action of the plaintiff based on the student being a “special employee” (*Trembath v. Riggs and the Truth or Consequences Municipal Schools*, 1983, p. 1). However, the appeals court found that the student did not meet the qualifications of an employee; therefore, the Workmen’s Compensation Act was not the appropriate vehicle to deny the claim. The court stated that the plaintiff could proceed with the tort remedy action; however, ruled that the school district was not negligent (or at fault). Once it was determined that the student was not an employee (special or otherwise) of Truth or Consequences, the plaintiff moved to dismiss the count against the school. While the defense objected in hopes of immunity being granted, the dismissal of this count effectively dismissed

the Tort Claims Act against Truth or Consequences. Simply put, the school district could not be sued because it was not an employee that caused the injuries.

On February 9, 1984, the New Mexico Court of Appeals heard *Sena School Bus Company and David Sena v. Board of Education of the Santa Fe Public Schools* from the District Court of Santa Fe County. In this case, the plaintiffs appealed the ruling dismissing the case based on the statute of limitations. The case cited as a “willful and malicious breach of contract and deprivation of constitutional rights” (*Sena School Bus Co. v. Board of Education*, 1984, p. 1) between the Board of Education of the Santa Fe Public Schools and the Sena Bus Company, which was owned by David Sena.

As in *Garcia v. Albuquerque Public Schools Board of Education* (1980), the plaintiffs in *Sena School Bus Co. v. Board of Education* (1984) argued that the NMTCA and the statute in New Mexico that limited governmental contract liability were both unconstitutional. The court disagreed and pointed out that the number of contracts a government deals with requires time limits, and those time limits “overcame” the Sena Bus Company’s claim (*Sena School Bus Co. v. Board of Education*, 1984, p. 1). In their suit, the plaintiffs argued five issues relating to unconstitutionality and statutes of limitations. For the purpose of this research, only the fifth claim related to the NMTCA, “Plaintiff’s action under 42 U.S.C. 1983 is not governed by the New Mexico Tort Claims Act limitations period (Section 41-4-15)” (*Sena School Bus Co. v. Board of Education*, 1984, p. 3).

The court agreed that the Tort Claims Act did not govern the United States Constitution. While not overtly stated by the plaintiffs, the court noted that the constitutionality of the Tort Claims Act was in question; however, because no action was brought under the NMTCA, if the court had addressed the constitutionality of it, “any pronouncement of the constitutionality and

scope of 41-4-15 would be advisory. We do not give advisory opinions” (p. 4). As such, the Tort Claims Act did not play into the plaintiff’s claims. The court also agreed that the government did indeed breach “both written and oral” contracts, but the statute of limitations still applied. Therefore, the court affirmed the decision of the lower court.

The New Mexico Court of Appeals heard *Pemberton v. Cordova and the Moriarty Municipal Schools Board of Education* from the District Court of Torrance County on February 5, 1987. The District Court of Torrance County dismissed the Moriarty Schools Board of Education’s motion to dismiss the personal injury action in light of the NMTCA. That court held that New Mexico Statute 22-10-5(D) “superseded” (*Pemberton v. Cordova*, 1987, p. 1) the NMTCA.

Of importance in this case was that Pemberton and Cordova had fought while on school property; Pemberton was hurt and had filed suit. The suit further claimed that the exception provided in the Tort Claims Act pertained to negligent operation of a building. The court noted that the injuries sustained by the student were not because of a physical defect of the building; therefore, could not be used as the basis of a claim under the Tort Claims Act.

In *Pemberton v. Cordova* (1978), the court also considered whether a suit could be brought against a teacher under the claim of negligent supervision. The court found that it could not and noted, “If no specific waiver of immunity can be found in the Tort Claims Act, plaintiff’s complaint must be dismissed as to the governmental defendant” (*Pemberton v. Cordova*, 1987,p.

3). The court also stated,

The right to sue governmental entities and public employees is limited to the rights and procedures outlined within the Tort Claims Act...Since Section 41-4-6 (of the Tort Claims Act) does not allow an injured student to sue on the theory of negligent supervision, sovereign immunity has not been waived. (*Pemberton v. Cordova*, 1987,p. 3)

In this case, the lower court was in error, and the Moriarty Public Schools Board of Education was dismissed from the action.

Owens v. Leavitt's Freight Service Inc., Runyon, Loshbough, McKinley County School District, the State of New Mexico and Hoover was appealed out of the District Court of Santa Fe County into the New Mexico Court of Appeals on March 3, 1987. The District Court of Santa Fe had granted summary judgment in favor of the defendants in the action that Owens' parents brought about when their child sustained injuries while crossing the highway to get on the school bus. In this case, the student had to cross a road to catch the school bus. The parents included the school board and superintendent in the suit because they reasoned those entities had not enforced their own regulations in terms of public school transportation.

In their action, the parents argued, "The state defendants failed in their duty to adopt and enforce procedures for the safe pick up and transportation of school children" (*Owens v. Leavitt's Freight Service Inc.*, 1978, p. 4). The court countered that the government is not responsible to do everything that could have been done, rather is only liable within the limits of the Tort Claims Act. As such, the "design, planning, and enforcement of safety rules for school bus transportation do not fall within the meaning of 'operation' of a motor vehicle" (*Owens v. Leavitt's Freight Service Inc.*, 1978, p. 4). The court concluded that it was not up to them to read into the meaning of the Tort Claims Act beyond what it states, and the state defendants were dismissed per the ruling of the lower court.

However, in the case of the bus driver and school district, they could be held liable, pending the decision of the jury as to whether the bus driver had negligently operated a motor vehicle. This point of the case was explained extensively and examples were given that other courts have determined "operation of a motor vehicle" specifically to those actions that propel

the vehicle. However, relevant in this case, is that the court noted other cases have involved students being injured while waiting for the bus. In those cases, the buses were not at the stop when the accidents occurred, thus, the idea of a safe bus stop remained in question.

Material to this action was whether Hoover, the bus driver, was negligent by pulling off the road at the bus stop. The court also noted there could be some negligence by the steward of the child who let him out of a car to run across the roadway to catch the bus. However, the court said that the jury would determine negligence on the part of the bus driver in the “operation of a motor vehicle,” which triggered the exception provided by the Tort Claims Act.

Rubio v. Carlsbad Municipal School District (1987) was heard on appeal from the District Court of Eddy County. In this case, the parents brought suit because a teacher supplied their children with marijuana. The parents claimed negligence in hiring and retaining the aforementioned teacher, and “educational malpractice” (*Rubio v. Carlsbad Municipal School District*, 1978, p. 1), which the court did not recognize. The court noted that even if they did recognize educational malpractice, it was not one of the exceptions provided by the Tort Claims Act. Finally, the family filed claims pursuant to SS1983 claiming family sanctioned marijuana use “either by custom or policy” (*Rubio v. Carlsbad Municipal School District*, 1978, p. 1). Ultimately, the court awarded attorney’s fees to the school district, citing that the family had not conducted even minimal research that would have determined their claim invalid.

The New Mexico Court of Appeals affirmed the ruling of the District Court, and dismissed all claims by the Rubio family. The court used the logic presented in *Pemberton v. Cordova*, whereby Section 41-4-21 does not waive immunity; therefore, no basis existed to bring suit against the defendant. Rather, Section 41-4-21 stipulates that the Tort Claims Act does not hold sway over “Personnel acts, rules or regulations, or other provisions of law governing the

employer-employee relationship” (*Rubio v. Carlsbad Municipal School District*, 1978, p. 4).

While the court stated that the family could not pursue action under the Tort Claims Act, it did state in closing that the court was not expressing an opinion as to whether the plaintiff’s family “may have a cause of action against the teacher” (p. 6).

Allen v. Board of Education of the City of Albuquerque was brought to the New Mexico Court of Appeals on December 22, 1987 on an appeal from the District Court of Bernalillo County. The lower court did not hear this case, but the defendant, Board of Education of the City of Albuquerque, motioned for dismissal and summary judgment. Of the four counts brought by the plaintiff, the trial court dismissed two. The immediate appeal by the school board was problematic because the trial was not over, “Thus, the order did not fully determine a claim that was separable from, collateral to, or independent of the course itself, but rather required a determination of the very ingredients of the cause of action themselves” (*Allen v. Board of Education*, 1987, p. 1). Simply put, this was not an appeal that the appellate court could hear because it was incomplete; the court dismissed the appeal.

The New Mexico Court of Appeals heard *Schleft v. the Board of Education of the Los Alamos Public Schools* on October 19, 1989. The trial court had ruled that the school board was granted immunity under the NMTCA, and that the board had no duty for the maintenance of the electrical facility. The facts pointed to a 15-year-old who was injured on the property of Mountain Elementary School. School was not in session, and the facility in question held three transformers, 20 feet in the air on a platform. The boy and his friend climbed the platform, and the plaintiff’s head touched an uninsulated copper wire, which sent an electrical shock of 7,620 volts through his body. The boy sustained injuries including brain damage and fourth-degree burns.

The trial court initially granted immunity by the NMTCA Sections 41-4-1 to 29. On appeal, the New Mexico Court of Appeals reversed this decision and concluded that “1) Immunity was waived under the Act and 2) the Board has a duty to the plaintiffs, as a matter of law” (*Schleft v. the Board of Education*, 1989, p. 3). The clause granting exception to immunity caused by public employees “while acting within the scope of their duties in the operation or maintenance of any building, public park, machinery, equipment or furnishings” (*Schleft v. the Board of Education*, 1989, p. 3). The court also stated that the term “maintenance” included more than repairs, but also keeping the structure safe. They used as an example of the state keeping a highway safe (which is a duty of the government), the school yard must be in likewise safe condition. In its findings, the court stated that whether negligence in its duties was reached in this instance would require a finding of fact during the trial. In addition, the reasonableness of the conduct involved must be determined; therefore, the court awarded the plaintiffs their cost on the appeal.

The Supreme Court of New Mexico heard *Saiz v. Belen School District* on February 21, 1992, which debated whether a school district could be held jointly and severally liable for an independent contractor’s negligence. As a legal matter, liability is jointly and severally under the following conditions:

1) to any person or persons who acted with the intention of inflicting injury or damage; 2) to any persons whose relationship to each other would make one person vicariously liable for the acts of the other, but only to that portion of the total liability attributed to those persons; 3) to any persons strictly liable for the manufacture and sale of a defective product, but only to that portion of the total liability attributed to those persons, or 4) to situations not covered by any of the foregoing and having a sound basis in public policy.” (*Saiz v. Belen School District*, 1992, pp. 1-2)

The court ruled that the school district was immune from acts of the contractors in this case.

However, as matters of facts go in this case, the story originally began in 1964 when contracts

were signed to design and construct a lighting system for the Belen School District football stadium. In 1973, a metal fence was built around the field in front of the bleachers to keep spectators off the field. In 1988, 24 years after the project began, Jerry Saiz was at a football game when he touched a pole with an electrical conduit running along the metal fence. The student was electrocuted and died minutes later.

Lorenzo Saiz brought suit in the name of Jerry Saiz, but was unable to sue the architect, engineer, or electrical contractor because of a New Mexico statute (NMSA 1978, Section 37-1-27) that precluded such actions after 10 years have passed since the completion of a project. However, he was able to bring suit against the Belen School District under the Tort Claims Act because of the immunity that is waived under negligence due to installation and maintenance of the electrical system and lighting. The school district argued unsuccessfully as to the negligence lying with other parties because they did not design or build the system. In this case, the jury assigned fault “To the electrical contractor, sixty percent; to the architect, twenty-five percent; to the school district, fifteen percent; to the design engineer and deceased, zero percent” (*Saiz v. Belen School District*, 1992, p. 4). With \$1,250,000.00 in total damages awarded, the Belen School District was assigned their portion of \$169,902.73 (*Saiz v. Belen School District*, 1992, p. 4). The Supreme Court of New Mexico upheld this portion of the appeal. Additionally, Saiz filed a suit and amended it to include the district as jointly and severally liable. However, after examining the circumstances necessary to impose the judgment, the court denied the claim.

The New Mexico Court of Appeals heard *Johnson v. School Board of Albuquerque Public School System* on November 25, 1992 on appeal from the District Court of Bernalillo County. In this case, a student was at school serving detention after school hours with a friend. After being dismissed from detention, the two students walked home. Per the Albuquerque

Public School case, the student fell, skipped, or hopped off the sidewalk into oncoming traffic and was struck by a passing vehicle and was injured. Neither signal at either end of the crosswalk was flashing at the time of the accident. The lights were set to flash from 2:30 pm-2:50 pm during school days, and students were released from detention at 3:30 pm. In this case, the students had remained on campus until approximately 3:50 pm; the plaintiff agreed to the timeline of events. However, the parent sued using the street maintenance exception of the NMTCA. The lower courts ruled in favor of the Albuquerque Public School District, and stated that the waiver granted for street maintenance was not applicable as school districts were not responsible for maintaining roads.

In Judge Bivins' opinion, the focus of the suit stemmed from the parents' claim that immunity under the Tort Claims Act was waived by the road maintenance exception. However, the question remained as to whether the school district is responsible for road maintenance, specifically the crosswalk that was not in working condition. The court found it was not responsible and stated, "Duty or responsibility is not provided in the Tort Claims Act; it must be found outside the Act either at common law or by statute. We hold APS has no such responsibility" (*Johnson v. School Board*, 1992, p. 3).

Judge Bivins also stated that the facts of the case were not in dispute inasmuch as they pertained to liability in this case. The plaintiff relied on the *Schleft v. Board of Education* (1989) decision and stressed that the responsibility of the school was beyond simply the walls of the school. The court distinguished the two cases in that the transformer in *Schleft* was on school grounds, whereby the crosswalk was not in this case. In fact, the court noted that the conditions, signs, and signals were "Clearly outside the school grounds" (*Johnson v. School Board*, 1992, p. 5). Hence, the court affirmed summary judgment in favor of Albuquerque Public Schools

granted by the trial court in this case where the student was injured near the crosswalk while walking home from school.

The New Mexico Court of Appeals heard *Rider v. Albuquerque Public Schools* on May 20, 1996 on appeal from the District Court of Bernalillo County. Joelle Rider was a six-year-old at Jackson Elementary School in Albuquerque, New Mexico when she fell from the monkey bars in 1992. Later that day, her grandmother called the school to inform her teacher of the fall and her current condition. As was policy, the teacher reported the injury to the principal the following day and, subsequently, Joelle missed some school over the following several weeks.

Over a year and a half later, Joelle Rider's grandfather contacted a lawyer to pursue a claim under the NMTCA. The notice was served to the Albuquerque Public Schools in March 1994. Immediately Albuquerque Public Schools filed a motion for summary judgment stating they had not been notified within 90 days of the injury as required by section 41-4-16(B) of the Tort Claims Act. In addition, the school district claimed it did not receive official notice of the injury on the night that Joelle's grandmother called the school in 1992. The district court ruled in favor of the school district on both points.

However, the New Mexico Court of Appeals reversed the decision and stated, "The district court incorrectly applied the ninety day notice requirement of Section 41-4-16(A) to a minor of Joelle's tender years, and accordingly we reverse and remand" (*Rider v. Albuquerque Public Schools*, 1996, p. 3). The court went on to discuss what it felt it was the "heart of the problem" (*Rider v. Albuquerque Public Schools*, 1996, p. 3) was that a clear direction by the legislature was absent. The court questioned whether it was up to parents, relatives, spokespeople, etc., to provide notice for a minor in a timely manner. The court also questioned whether one could hold it against a minor child if a timely notice is not met. The court stated

emphatically, “We know of no New Mexico case imposing such a duty on parents without legislative mandate, and APS (Albuquerque Public Schools) has not directed our attention to one” (*Rider v. Albuquerque Public Schools*, 1996, p. 3).

The court did note that Albuquerque Public Schools had a compelling argument in that the legislature must have intended for parents to act for their child within the 90-day notice framework absent any other directions intended at issues pertaining to minor children. As such, minors are only able to act through their parents, and the 90-day limit should be enforced. The court concluded as to this point: “It is not the only interpretation (of the law), nor the most compelling, particularly in light of *Tafoya*.” (*Rider v. Albuquerque Public Schools*, 1996, p. 4) (*Tafoya* involved injury of a newborn infant). *Rider v. Albuquerque Public Schools* was remanded for further proceedings and the plaintiff was awarded costs on appeal. The school district then filed a petition for Writ of Certiorari, which was ultimately denied on September 5, 1996.

Gallegos v. School District of West Las Vegas, New Mexico arrived on appeal from the District Court of Santa Fe County in the New Mexico Court of Appeals on July 12, 1993. The parents of a child struck by a vehicle while crossing the road to be picked up by a school bus filed the suit under the Tort Claims Act 41-4-1 to 41-4-27 on the principle of the waiver of immunity under negligent maintenance and operations. The District Court of Santa Fe County granted summary judgment for the defendant school district, which brought about the appeal by the parents. The appeal included the bus driver and the individual responsible for planning the route. The plaintiffs contended that negligence existed in the maintenance of the highway and operation of a school bus. The facts of the case were divided into five main areas:

1. The normal operation of the school bus was to drive down the entire State Road 3 without picking up any children.

2. At Sena, the driver would turn around and pick up all children on the return trip down the road.
3. The driver expected children to be waiting when the bus arrived at their stops, and at no time did the driver insist the children wait for his arrival before crossing the road.
4. Another defendant, Mr. Martinez, was responsible for providing the bus driver with route instructions, bus stop locations, and any pertinent procedures.
5. The child was crossing State Road 3 and was struck by the vehicle before the bus arrived at the assigned stop.

The court was forced to examine the negligent maintenance of highways and negligent operation of the school bus in determining the outcome of this appeal. The plaintiffs argued negligent maintenance of highways because the bus stop was located on the side of the road opposite from where the student came. The defendants argued that the design of the road determined the location of the stop, and design was not a trigger to waive immunity under the Tort Claims Act. The court stated that no immunity could be granted without evidence that the design of the road included bus stops. Placement of school bus stops involves “Elements of traffic control” (*Gallegos v. School District*, 1993, p. 3) much like the placement of stoplights and, as such, constituted maintenance of the road under the NMTCA. The court referenced cases such as *Grano v. Roadrunner Trucking, Inc.* (1983) and *Miller v. New Mexico Dep’t of Transportation* (1987) to illustrate its reasoning in not granting immunity.

The plaintiffs claimed the following two points contributed to negligent operation of a school bus:

First, they maintain that his day-to-day practice of refusing to pick up Martha on her side of the road, thus forcing her to cross the road to wait for his return trip, was negligent operation of the vehicle. Second, they claim that Driver’s failure to instruct Martha to wait until the school bus arrived at the stop and had its lights flashing to cross the road was negligent operation of the bus. (*Gallegos v. School District*, 1993, p. 3)

While the defendants claimed that, because the bus was not at the scene when the accident occurred, there could be no negligence; the court disagreed. The defendants also claimed that the driver's decision to have students not waiting for the bus before crossing the roadway was not an operation of the school bus. However, the court referred *Owens v. Leavitt's Freight Service* (1987) to state that the driver's decision did constitute operation of a school bus. As such, the court reversed the summary judgment and remanded the case to the district court. The parties settled out of court.

Gallegos v. State of New Mexico Board of Education and School Transportation Division of the State of New Mexico Department of Education came out of the previous Gallegos case described in this chapter. While the school district and other parties settled, or the plaintiff had certain parties dismissed (i.e., New Mexico State Police), the appeal moved forward against the State Transportation Division of the State of New Mexico Board of Education (the Division). In the appeal, the defendant (the Division) argued against the verdict for liability in part for the injuries suffered by Martha Gallegos when she crossed State Road 3 to catch the bus and was struck by a car. The parents also cross-appealed the cap limits imposed by the Tort Claims Act as being unconstitutional. The cross appeal was dismissed, and the court stated that unless *Trujillo v. City of Albuquerque* (1990) found the Act unconstitutional in its proceedings, the cross appeal would be denied. If Trujillo found that the cap limits imposed by the NMTCA were unconstitutional, the Gallegos cross-appeal would be re-opened.

In its discussion of the appeal, the court went to great lengths to discuss the idea of reviewing parts of a summary judgment and whether such a review could be done. While the court noted some neighboring states did not allow for such review, based on certain items as being factual and others being matters of law, the court felt the review was allowed. Hence, the

plaintiff's claim against the Division could move forward, even if settlements had been reached between the plaintiff and other defendants previously named.

The section of the Act in question is 41-4-17(B) states, "The settlement of judgment in an action under the Tort Claims Act shall constitute a complete bar to any action by the claimant, by reason of the same occurrence against a governmental entity or the public employee whose negligence gave rise to the claim" (NMTCA, 1978, p. 6). The court stated that this passage precluded the plaintiff from further action against those it already settled with; however, it did not preclude them from others already named (i.e., the Division). If the opposite idea (as hoped for by the defense) were true, the language could have read, "Instead of using language such as 'against a governmental entity,' the Legislature could have stated, 'against any governmental entity'" (para. 16). In plain reading, the legislature chose not to do so. In addition, the court pointed out that if the wording were as the defense argued, it would discourage settlement of cases, which was also not the legislative intent of the Tort Claims Act. The outcome of this appeal was a judgment in favor of the injured student and her parent against the State Transportation Division of the State of New Mexico Board of Education. The cross-appeal was dismissed pending further litigation.

Seal v. Carlsbad Independent School District was appealed out of the District Court of Eddy County into the Supreme Court of New Mexico on September 7, 1993. The case involved a wrongful death suit against the Carlsbad Independent School District and its employees. The District Court of Eddy Count (New Mexico) granted summary judgment for the defendants, and the representative of the deceased appealed the decision. The basis of the summary judgment was "The operation of a swimming pool was an inherently dangerous activity giving rise to strict

liability, from which the school district and its employees enjoyed statutory sovereign immunity under Section 41-4-4 of the Tort Claim Act” (*Seal v. Carlsbad*, 1993, p. 1).

As a matter of law in New Mexico, certain criteria must be met to be considered an inherently dangerous activity. These three criteria are as follows: “the owner or occupier of the premises must investigate or tolerate the activity; an injury must be a relatively certain consequence of the activity unless reasonable precautions are taken; and the absence of the necessary precaution must cause injury” (*Seal v. Carlsbad*, 1993, p. 2). The Supreme Court of New Mexico did not feel this case met those standards. This case is similar to the *Saiz v. Belen School District* (1992) case discussed that also involved inherently dangerous activities.

Of significance in *Seal v. Carlsbad* (1993) was that a student Kevin Seal was a disabled member of the Boy Scout troop and he could not swim. Seal drowned while on a scouting trip to the Carlsbad Natatorium with the Scouts. At question was the availability of lifeguards. The court determined that an agreement was reached that the Boy Scout troop, not Carlsbad, was responsible for providing the lifeguards, which it did not do.

At issue in the court decision were two points raised by Seal. The first point was that the school district states that swimming is an inherently dangerous activity. However, the court ruled that swimming did not meet the standard of inherently dangerous as the Saiz case illustrated. Specifically, going swimming did not have the same expectation of injury as did touching an uninsulated high voltage power line.

The second point in contention was that if swimming was not an inherently dangerous activity and the Scouts accepted the responsibility of providing lifeguards, did some amount of negligence on the part of Carlsbad ISD exist? The Supreme Court ruled that the lower court did not adequately cover this question, and it remanded for further proceedings on this point. The

Supreme Court felt that the second question hinged on whether the Scouts should have been treated like any other user of its resources that the school district owed “a duty of reasonable care” (*Seal v. Carlsbad*, 1993, p. 4). If this were case, then the school district could be found liable via the waiver of immunity in the Tort Claims Act due to negligence of a public employee causing unsafe conditions on government-owned property. However, the Court affirmed the judgment for the school district employees as individuals.

Luboyeski v. Kermit Hill, Steve Dilg, Elanor Ortiz, and the Santa Fe Public School System was appealed out of the District Court of Santa Fe County into the Supreme Court of New Mexico on March 21, 1994. The plaintiff, Luboyeski, was discharged from her position after she complained to the Human Rights Division of the New Mexico Department of Labor about the sexual advances allegedly brought upon her by another teacher (Hill). She argued that, not only did Kermit Hill make uninvited sexual advances and physical contact with her, but the Principal (Dilg) and Assistant Principal (Ortiz) were aware of the activities and did nothing about them. Luboyeski filed a grievance but nothing was done and the two teachers were assigned to the same team. Ultimately, the division found a lack of probable cause. In her initial case, the plaintiff only addressed the school district; however, on appeal to the trial court, the plaintiff included the individuals as well.

For its part, the Santa Fe Public School System argued that the individuals could not be added on appeal because they were not part of the initial suit. As support, a law in New Mexico supports the position that “parties who have not been to an administrative proceeding should not be added on appellate review of that proceeding” (*Luboyeski v. Kermit Hill*, 1994, p. 3). The court documents cited *Wylie Bros. Contracting Co. v. Albuquerque-Bernalillo County Air Quality Control* (1969) to illustrate this point. The court also noted that the plaintiff did not

exhaust her remedies within the school system as to her grievance against the individual; therefore, the court did not have jurisdiction over that portion of the proceedings.

The school system in *Luboyeski v. Kermit Hill* (1994) argued that the Tort Claims Act overrode the Human Rights Act, and the case should be dismissed. The Supreme Court agreed that the additional defendants brought up in the appeal could not be added, and it affirmed the ruling of the lower court. The court also agreed that the Tort Claims Act did not override the Human Rights Act. Specifically, “Sovereign immunity is waived by the Human Rights Act to the extent needed to permit recovery under the Act against the state and its political subdivisions” (*Luboyeski v. Kermit Hill*, 1994, p. 2). The court noted that a portion of the Human Rights Act was amended in 1983 to include the phrase “the state shall be liable the same as a private person” (as cited in *Luboyeski v. Kermit Hill*, 1994, p. 5). As such, the suit could not be dismissed from the perspective of the school district. In summary, the ruling was affirmed as to the individuals and ultimately reversed regarding the school district. The Supreme Court of New Mexico then remanded the case back to the lower court for further proceedings.

Daddow v. Carlsbad Municipal School District and the Carlsbad Municipal School Board of Education is a New Mexico Supreme Court case heard on May 2, 1995 on appeal from the District Court of Eddy County. In this case, an employee sued for wrongful termination under 42 U.S.C.S. § 1983. The district court found that the local school boards were “persons” as defined in 1983, and had autonomy for their actions (like the termination), and that those actions were not prevented by any laws or statutes in New Mexico. The court noted that, while the plaintiff could sue the district under §1983, her case would not prevail because her due process was afforded to her by the district. As such, the district was awarded damages in defending the lawsuit. The Supreme Court affirmed most of the findings of the trial court with

the exception that the district could be awarded monetary damages based on the plaintiff's behaviors.

Daddow v. Carlsbad (1995) is included in this discussion as background to the litigation in New Mexico. However, it is instrumental in the overall idea behind the legal research involved, which will be discussed in detail in Chapter 5. In brief, as immunity for school district employees is affirmed by legislation, such as the Tort Claims Act, a study of those actions taken at the national level in hopes of circumventing state tort law is needed.

Williams v. Central Consolidated School District and Annelle Darby, Chambers, Campbell & Partners Architects, Ike J. Monty was an appeal from the District Court of San Juan County to the Court of Appeals of New Mexico on November 12, 1997. In this case, the plaintiff brought suit against the school district for negligence "in failing to use shatterproof glass or guards around a school window through which the student fell" (*Williams v. Central Consolidated School District*, 1997, p. 1). The student was injured during a fight when his arm went through glass that was in the hallway where the fight took place.

The District Court of San Juan County affirmed the right of the student to sue based on the idea that the district owed a duty to exercise care of its buildings. It also looked at the case as summary judgment, as information outside of what was originally presented was considered. Four ideas related to the law that bears importance to these proceedings. First, according to the court, "When evidence outside the pleadings has been considered, a motion to dismiss is analyzed as a motion for summary judgment" (*Williams v. Central Consolidated School District*, 1997, p. 2). The court chose to analyze evidence outside the initial trial, thus, the motion to dismiss was viewed as a summary judgment. Second, section 41-4-6 of the Tort Claims Act "waives governmental immunity of injury caused by the negligence of public employees in the

operation or maintenance of a building” (*Williams v. Central Consolidated School District*, 1997, p. 2). In this case, the window was originally part of an exterior wall; however, after remodeling, it became an interior wall. As such, the district should have maintained the building in way as to limit the possibility of damage with the placement of the glass. Third, the Tort Claims Act, specifically in section 41-4-6, states, “No exception to premises liability for defects originating in design,” and it provides a “Blanket waiver of immunity for operation or maintenance of a public building without exception for negligence in design” (*Williams v. Central Consolidated School District*, 1997, p. 2). Fourth, in light of the facts of the case, it is important to note that 41-4-6 of the NMTCA “places upon the state a duty to exercise reasonable care to prevent or correct dangerous conditions on public property” (*Williams v. Central Consolidated School District*, 1997, p. 2).

In total, these ideals point to the school district not having immunity, and the District Court of San Juan County viewed it as such when they reversed the ruling of the trial court. The Court of Appeals of New Mexico substituted its opinion for that of the lower court after the motion for rehearing was denied. As part of its opinion, the Supreme Court, as noted by Judge Bosson, observed, “On several occasions our Supreme Court has rejected a narrow view of ‘operation or maintenance’ with respect to public buildings, in favor of a broad interpretation” (*Williams v. Central Consolidated School District*, 1997, p. 5). Simply put, the district had a duty to correct the defect (an exterior window not unprotected on an interior wall) that could lead to injury. The Supreme Court referenced *Saiz v. Belen School District* (1992) and added that the state could not be held to strict liability; however, “the state is responsible for Acts of negligence of its own ‘public employees’ which cause or permit a dangerous condition on the premises” (*Williams v. Central Consolidated School District*, 1997, p. 5).

Much of the discussion of this case centered on whether or not the district could be held responsible for the acts of the contractors who completed the renovation. The court strongly stated that the district should not be “vicariously liable” (*Williams v. Central Consolidated School District*, 1997, p. 7) for the actions of the independent contractor (architect). However, the district would be held liable for the actions of negligence of its own employees who allowed the conditions to exist. Ultimately, the Supreme Court reversed the dismissal of the district court, and remanded for further proceedings.

Kennedy and Ford v. Dexter Consolidated Schools, Donald Warren, Kent Perry, Sue Rodriguez, and James Derrick was a Constitutional case more so than a Tort case; however, it bears description in this section as it illustrates the spirit of the court in which it is easy to see that the court was offended by the way the school district acted. In this case, heard in December of 2000, the two plaintiffs were strip searched while school administrators looked for a ring reported missing by another student. The Supreme Court ultimately ruled and held to the following five ideas:

- 1) The strip search of Randy Ford clearly violated his rights in 1992, and the district officials were not entitled to immunity for their search.
- 2) Qualified immunity determination is not tied to the specific involvement of each defendant.
- 3) Even though the instructions given to the jury on the pre-search detention were improper, they were not severe enough to constitute a “reversible error”.
- 4) Punitive damages were supported by evidence provided at trial.
- 5) Under 42 U.S.C. § 1988, there cannot be attorney’s fees without evidence of hours worked. (*Kennedy and Ford v. Dexter Consolidated Schools*, 2000, p. 4)

In effect, the Supreme Court concluded that the judgments of the trial court were appropriate with the exception of the award of attorney’s fees. However, that portion was

remanded for further proceedings. As with *Daddow v. Carlsbad* (1983), this case shed light into teacher immunity claims in New Mexico and other states where claims have taken a Constitutional route rather than argue under state law. Further research into immunity granted constitutionally and via legislation, such as the Coverdell Teacher Protection Act, would provide insight into this issue.

Lucero v. Richardson & Richardson, Inc; Wright & Hammer Architects, Albuquerque Public Schools, and John Does appeared in the Court of Appeals of New Mexico on December 13, 2001 on appeal from the District Court of Bernalillo County. In this case, the mother of a student sued the school district after tripping on the premises of the elementary school where she was watching her son's baseball game. The plaintiffs claimed that the school district waived its liability under the Tort Claims Act when it allowed the construction workers to "leave the school grounds in a dangerous condition" (*Lucero v. Richardson & Richardson, Inc.*, 2001, p. 2). They looked to Section 41-4-6, "operation and maintenance of public buildings and grounds" (*Lucero v. Richardson & Richardson, Inc.*, 2001, p. 2) to which the New Mexico Court of Appeals found to be an appropriate argument.

While the plaintiff argued that the school district waived its immunity from negligence via the Tort Claims Act, the school district argued that immunity was granted through the Recreational use Statute. The District Court of Bernalillo County ruled in favor of the school district based on the Recreational Use Statute. However, the appellate court stated that the Recreational use Statute was written for non-organized, non-team activities, and it was not meant for activities that took place under scheduled times, locations, and by extensive rules. The court also noted that the Recreational Use Statute was located within the Game and Fish Acts, which supported the idea that it was not written with the intent to include organized team activities.

While not germane to the discussion of teacher immunity in New Mexico, the court discussed whether the Recreational use Statute was meant to apply to state land. On a broad reading of the statute, the court said that if the statute it were meant to include immunity for state-owned land, it would include any public park that people use free of charge. This finding was in direct contrast to the Tort Claims Act, which waives immunity for public parks. The court concluded by saying that would include the discussion of the Recreational use Statute as a signal to the legislature that there may be a gap in its statutes. Ultimately, the court reversed the summary judgment in favor of the school district.

Gutierrez v West Las Vegas School District is a case that was brought before the Court of Appeals of New Mexico on May 3, 2002 on appeal from the District Court of San Miguel County. The case centered on a student who was injured while at an event that showcased the mariachi music of multiple schools. The plaintiff filed suit that the teacher was negligent and thus was not immune under the NMTCA because she left the students unsupervised. The West Las Vegas School District filed a motion to dismiss, and the San Miguel County District Court granted the motion.

The parent of the injured student contended that her son was injured because of the teacher's negligence under the Tort Claims Act 41-4-6 waiver of immunity. The importance of this case was that it tested the limits of governmental immunity when conduct occurs on public property. The University of New Mexico sponsored the event, and multiple schools were involved; the event occurred at the Albuquerque High School under the direction of the University of New Mexico. The plaintiff argued that the event was a jointly run affair between the University and the West Las Vegas School District, and as such, the district should be held liable.

At no time did the plaintiff provide evidence to demonstrate joint powers for the event. In addition, the lack of evidence on the part of the school district having any operational control over the event contributed to the court ruling that the school district could not be held liable. The Supreme Court affirmed the ruling of the lower court, and stated “We affirm the trial court’s dismissal of the action under Rule 1-012(B)(6) for failure to state a claim on which relief may be granted,” thus, affirming the ruling of the District Court of San Miguel County (*Gutierrez v. West Las Vegas School District*, 2002, p. 6).

The Supreme Court of New Mexico heard *Sam v. Benny Sam, Jr. and Arizona School Risk Retention Trust, Inc.* April 24, 2006 on appeal from the Court of Appeals of New Mexico. This case does not involve a school district, but is instrumental in the discussion of cases involving the NMTCA because of the statute of limitations. The wrongful death suit involved a mother filing suit against the father of her son after the he killed his son while moving a truck that belonged to the company where father was employed.

The company the father worked for was located in Arizona, and the truck involved in the accident was also registered in Arizona. However, at the time of the accident, business was being conducted in New Mexico. In either state, immunity would have been waived by the state’s respective Tort Claims Acts. However, a key point in the case was that Arizona and New Mexico both adopted statute of limitations in their tort reforms. The statute of limitations in New Mexico is two years and one year in Arizona. Because of these limitations, the Supreme Court of New Mexico stated that the NMTCA governed the suit in the State of New Mexico, and the 2 year statute of limitations had passed, thus barring suit against the estate of the father (who was deceased) and the company he was working for at the time of the accident.

In its discussion of the case, the Supreme Court noted that in cases like this one, in which the New Mexico court system is party to suits involving other states, “In the interest of comity, New Mexico should extend the NMTCA statute of limitations to states with similar tort claims acts when they are sued in New Mexico district courts” (*Sam v. Benny Sam, Jr.*, 2006, p. 2). The discussion also defined the idea of comity as “The spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states” (*Sam v. Benny Sam, Jr.*, 2006, p. 3). In other words, New Mexico should honor the laws of the other states involved in the litigation as long as those laws do not violate the laws of the State of New Mexico. In this case, while the NMTCA, in the spirit of comity, was only one year, the Supreme Court ruled that had the suit been brought to court within the two-year limit imposed in Arizona’s statute of limitations, the suit could have been brought before the court. However, the two-year statute had run its course and the ruling of the lower court was affirmed, even though the reasoning was different between the Court of Appeals and the Supreme Court of New Mexico.

Upton v. Clovis Municipal School District appeared before the Supreme Court of New Mexico on June 12, 2006 on appeal out of the New Mexico Court of Appeals. Before being considered by the Supreme Court of New Mexico, the Court of Appeals affirmed the ruling of the lower court and granted summary judgment in favor of the Clovis Municipal School District, which stemmed from a wrongful death claim by the parents of a student who died at school after the onset of an asthma attack. The parents appealed.

In the discussion of the ruling, the Supreme Court, mentioned the conditions under which the waiver of immunity could be applied under the Tort Claims Act: “For the waiver to apply, the negligent operation or maintenance must create a dangerous condition that threatens the

general public or a class of users of the building” (*Upton v. Clovis Municipal School District*, 2006, p. 2). The parents believed this was the case in this suit in that there was negligence in the operation of the building, which led to their daughter’s death. The court explained that the Tort Claims Act has been interpreted broadly to protect citizens. As such, the Act has been interpreted to include not only the maintenance and operation of the buildings themselves, but also the policies and practices that affect running the building. However, the court reported that the Tort Claims Act section 41-4-6 did not waive immunity for single actions affecting single individuals, rather those actions or policies that contributed to dangerous conditions overall.

In this case, the Upton’s daughter died from an asthma attack that occurred after a series of events unfolded, from a substitute teacher requiring her to run more than she should to the school not complying with the Individual Education Plan that called for the school to contact medical personnel in the event of a severe asthma attack. After becoming red in the face during class and having difficulty breathing, the student used her inhaler and went on to her next class. In that class she collapsed onto her desk, and the office was contacted while the teacher tried unsuccessfully to get the student to use her inhaler. First, the school secretary came into the room, followed by another teacher. They checked her vital signs and asked the office to call 911. Ultimately, CPR or other emergency procedures were never administered. The girl died later that afternoon, even though medical personnel arrived at the school shortly after her collapse.

The Upton’s argued that the Tort Claims Act section 41-4-6 waived immunity based on “negligence of public employees while acting within the scope of their duties in the operation or maintenance of a building” (*Upton v. Clovis Municipal School District*, 2006, p. 3). As is common in the district court and Court of Appeals, the ruling was made in favor of the school district at both levels. While the Supreme Court of New Mexico did not dispute the facts in

question, they granted review of this case to determine the scope of whether “the operation of maintenance of any building” (*Upton v. Clovis Municipal School District*, 2006, p. 3) applied in this context. The Supreme Court ruled in favor of the Upton’s, and remanded the case for further proceedings based on the idea that they had adequately argued negligent operation of a building within the definition of the Tort Claims Act. In this case, the plaintiffs were able to convince the court that operation and maintenance of a building included the policies and procedures that dictate how the school is operated. This interpretation of the New Mexico Tort Claims Act waivers for immunity stretched the law in favor the plaintiff.

In line with the thinking that this case stretched the law in favor of the plaintiffs, Justice Minzner provided a dissenting opinion. He argued with the logic that went into this decision, along with that of other cases, such as *Espinoza v. Town of Taos* (1995). He discussed interpreting the general public concept of the Tort Claims Act waiver of immunity and questioned how those in the majority opinion could expand case law without being consented to do so, or those who lack authority on case law. He also stated that the Supreme Court needed to return to the intent of the original language of the law and rule in favor of the school district.

Henning v. Rounds, Cooper, McBee, West, and the Board of Education of Hobbs Municipal Schools involved evaluation and supervision, and came out of the District Court of Appeals of New Mexico on August 29, 2007. In this case, Anne Henning filed a claim against the school district superintendent, two assistant superintendents, her principal, and the board of education that an “abuse of power” (*Henning v. Rounds*, 2007, p. 2) led to her losing her teaching position. The lower court ruled that the teacher’s claims were barred under the Tort Claims Act, section 41-4-1 through 41-4-27. The Supreme Court of New Mexico affirmed the

ruling of the District Court of Lea County, but also brought up two important points related to evaluation and supervision:

- 1) The fact that the defendants may have had a wrongful motive was simply irrelevant, as long as there was a connection between their actions at the time of the incident and the duties they were requested, required, or authorized to perform.
- 2) While the teacher's allegations, if true, potentially raised concerns about the evaluative process and procedures in her school district, the teacher's claim of a breach of the covenant of good faith and fair dealing failed as a matter of law (*Henning v. Rounds*, 2007, p. 1)

Considering these points, the court returned to the matter of law that liability for public employees (e.g., principals in their duties of supervision and evaluation), when acting within their scope of duties, are granted immunity under the Tort Claims Act. Therefore, immunity is granted if someone acts within his or her scope of duties is a matter of law, and the Supreme Court identifies that person as one who is "performing any duties that a public employee is requested, required, or authorized to perform by the governmental entity, regardless of the time and place of performance" (*Henning v. Rounds*, 2007, p. 2). In addition, and the point made regarding this case, is that even when there may be a suspect motive, if the school district employee is acting within the scope of his or her duties, immunity is still granted by the Tort Claims Act.

In his dissenting opinion, Judge Bustamante agreed, for the most part, with the ruling of the Supreme Court. Specifically, he agreed that the plaintiff did not have a valid tort claim and her case against the school district was thin, at best; and "it is not appropriate to allow the courts to become a referee for every case of disputed employment evaluation" (*Henning v. Rounds*, 2007, p. 7). However, he also pointed out that there appeared to be "a sufficiently egregious set of circumstances over a long enough period of time to meet the requirements of (the covenant of good faith and dealing)" (*Henning v. Rounds*, 2007, p. 7). With the importance of their

personnel file and evaluations at such a premium for educators, Judge Bustamante felt that the plaintiff should be given the opportunity to prove her case.

As with the other dissertations on the subject of immunity for school districts and their employees, it is noted that the courts address tort lawsuits from two angles: Tort Law and Constitutional Law. This work only examines tort cases under the New Mexico Tort Claims Act of 1978.

Chapter 2 Summary

This study analyzed the application of the NMTCA of 1978 by the state courts in tort claims involving public school districts and employees. To gain a better understanding of the overall outlook of immunity for public education at the state and regional levels, this dissertation followed the general outlines and methods of three previous dissertations completed at the University of North Texas; specifically, tort policy in Mississippi (Kressel-Hall, 2013), Oklahoma (Lacefield, 2010), and Texas (Carman, 2009), and applied those methods to the State of New Mexico.

The literature review examined the foundation of sovereign immunity as it transitioned to common law and then to state statute in the form of the NMTCA. As most cases in New Mexico, this chapter included a discussion of negligence, which most teachers and administrators are immune, versus gross negligence, which most are not immune. This chapter also included a discussion of the Paul D. Coverdell Teacher Protection Act enacted by Congress in 2001 to provide educators protection from tort claims that deal with student discipline and the daily operation of schools.

This study followed the research question, “How have the New Mexico courts interpreted the NMTCA of 1978 in litigation against New Mexico school districts and their employees?”

The question then followed concerning the source of the idea of immunity for public educators. While not specific to educator immunity, immunity in general for government employees came about from the idea of common law. In nearly every state, the concept of common law is referred to as “The King can do no wrong” and has been in place from the day each state was founded. This concept gives school districts immunity from tort liability indirectly. Common law literally is law of the common people that was put in place to protect landowners from the government taking land without due process. Over time, common law was formalized by statute after legislators determined that court decisions could not be the sole basis for formalizing immunity.

During the initial years of the State of New Mexico, the concept of sovereign immunity was in effect in court decisions and legislative acts. Justice Oman’s description from *Sangre de Cristo Development Corp. Inc. v. City of Santa Fe* summed up the era of immunity from 1912 until the mid-1970s as follows:

Regardless of what may be the law in other states, this Court has consistently held that the State of New Mexico may not be sued in its courts without its permission or consent. (citations omitted). Also in New Mexico, municipalities are clothed with this immunity from suit, insofar as their governmental functions are concerned. (Kovnats, 1976)

Prosser and Keeton are known as the preeminent authorities on tort law. Their resources have been published since 1941, and have been regularly updated for over 40 years. In 1984, In *Prosser and Keeton on Torts* (1984), Keeton noted that states began establishing avenues upon which suits are brought against state agencies and establishing limitations of governmental immunity to include the following four components:

1. Governments may be sued when proprietary acts are involved.
2. Governments may be sued when ministerial acts are involved.

3. There is the fostering of a common sense approach to allow suits involving gross negligence.
4. Waivers for immunity can be granted involving governmental agencies that have insurance up to the amount of that insurance.

New Mexico did not have the first Act relating to tort claims. While not the first, the Federal Tort Claims Act goes a long way to clearing up the iniquities that are inherent in sovereign immunity. Unfortunately, at the level of individual cases are challenges to its stability as a working doctrine. To that end, the discretionary function exception has been challenged. The Supreme Court case, *Dalehite v. United States* (1953), illustrates the discretionary function debate. In this case, the Supreme Court rationalized that no actionable offense existed when subordinates carried out duties in accordance with official directives. This rationale seemed to cover certain government employees and their actions unnecessarily. After review, this rationale makes sense in that the government employs millions of people and employee duties (e.g., driving a government vehicle) could give rise to tort liability in the private sector. In fear of liability, employees could not carry out many duties that are critical to the workings of the U.S. government without some form of tort liability protection.

In addition to the Federal Tort Claims Act, the Coverdell Teacher Protection Act of 2001 provides protection at the state level. This Act is one section of NCLB that still affects public schools nearly 13 years later. While not as broad in scope as the NMTCA, the purpose of the legislation is to, “Provide teachers, principals, and other school professionals the tools they need to undertake reasonable actions to maintain order, discipline, and an appropriate educational environment” (National School Boards Association [NSBA], 2004, para. 2). In other words, if school administrators followed their own stated rules and policies, their actions would not be subject to liability. While important, the Act is limited as it deals with issues that arise from

discipline or maintaining order. These types of claims cover less than one-third of suits brought to the State of New Mexico courts.

The case *Hicks v. State* in 1975 is the seminal case in what became the NMTCA. In this case, the Supreme Court of New Mexico ruled that the idea of sovereign immunity needed to be legislatively formalized. As with tort legislation in other states, eight exceptions to immunity regarding government activities exist:

1. Operating motor vehicles
2. Operating or maintaining buildings or property
3. Operating airports
4. Negligence in operating public utilities
5. Operating some specific medical facilities
6. Health care
7. Highway maintenance
8. Some unlawful acts of law enforcement officers (*New Mexico v. Garcia*, 1980)

In the State of New Mexico, from *Garcia v. Albuquerque Public Schools Board of Education* in 1980 to *Henning v. Rounds, Cooper, McBee, West and the Board of Education of Hobbs Municipal Schools* in 2007, most cases have looked for waivers of immunity based on operating or maintaining buildings or property, or have argued a point of fact that was not available as a waiver of immunity according to the NMTCA (see Figure 2.1). The table below illustrates this fact in graphic form to give the reader a sense of waivers that were attempted, regardless if they were a waiver recognized by the courts of New Mexico.

While the waivers above are specific to the state of New Mexico, there are similarities among the four states that are being compared overall in this text. In Oklahoma, the Government

Tort Claims Act governs immunity for school districts and their employees. Over its history, there were 15 published cases, with themes that are mainly broken down into the two major themes of negligent supervision and corporal punishment. Of note in Oklahoma is that their Statute of Limitations also gives considerable protection for school districts and their employees by its very nature.

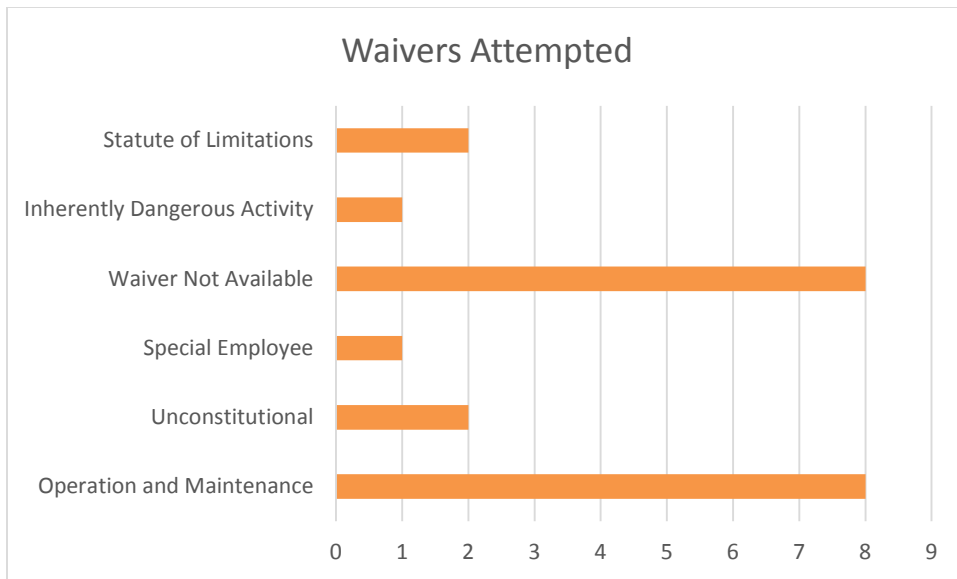


Figure 2.1. Waivers attempted.

Texas, with the Texas Education Code, offers its own immunity considerations for school districts and their employees. Texas leads the four states in number of published cases that were studied across this group, with 32 total cases. Of the three themes that encompass the published court cases in Texas, excessive force in corporal punishment is the one that is similar to Oklahoma, and in addition, Texas also cases have dealt extensively with Defamation and their Motor Vehicle exception. It is this exception that persuades Texas public school employees to not use their personal vehicles for school business like transporting students. A strong factor in determining liability, when it comes to Texas school districts and their employees, is if the actions that brought about the suit are within the scope of employment of the employee. If they are, there is a strong chance that immunity will be granted.

Mississippi, with 17 published court cases relating to immunity and the Mississippi Tort Claims Act, shares a major theme with New Mexico (Negligence), but unlike any of the other states, also has a theme of Notice of Claims. Notice, as discussed in this dissertation, relates to when an injured party states its claim.

New Mexico, the focus of this dissertation, employs the New Mexico Tort Claims Act in determining the immunity protection for its school districts and employees. New Mexico shares a theme of Negligence with Mississippi and Oklahoma, while also has published court cases referencing Evaluation and Supervision, Discipline, and the Statute of Limitations. As is the case with all four states, evidence of immunity is strong across these states.

CHAPTER 3

METHODOLOGY

As discussed previously, Dunklee and Shoop (1986) brought two research studies to the forefront that referenced almost 800 student negligence suits in a 3-year timeframe; most involved some claim of personal injury. However, an empirical study of court decisions revealed that the volume of litigation against school districts remained steady from 1990 to 2005. In addition, the majority of cases were ruled in favor of school district employees with government and official immunity most often the basis for these rulings. Maher et al. (2010) concluded that immunity laws are strong across the United States, even with variability from state to state. The call to research the variability in tort laws from state to state brought about by the Maher et al. article led to the research question, “How have the New Mexico state courts interpreted the New Mexico Tort Claims Act in published litigation against New Mexico School Districts and their employees?”

This dissertation employed a traditional legal research, analysis, and methodology as discussed in Permuth and Mawdsley (2006) to answer the research question. Unlike more traditional dissertations, there is not a Theoretical Framework section in this chapter. Rather, the point of this dissertation is to discuss the limits of tort liability as constructed on the basis of case law. The methodology used in studying law as it relates to education “can be described as a form of historical-legal research that is neither qualitative nor quantitative” (Permuth & Mawdsley, 2006, p. 6). As such, the New Mexico Tort Claims Act (NMTCA) of 1978 analyzed, and then the identified cases were determined in which decisions were based on the Act in some part.

To complete this portion of the research, I included primary and secondary sources, and research and findings tools. Primary sources included statutes, regulations, and case law. Secondary sources were not law, but rather they were writings on the law, and were used as another piece of legal research. Periodicals such as West's *Education Law Reporter*, Brown's *Legal Dictionar*, and law journals were consulted during the research. Finally, the research and findings tools included Lexis/Nexis, Westlaw, and Google.

Methodology 1

To obtain a historical perspective; case law, statutes, and documents were researched using an emergent themes approach. With this approach, combined with my experience in the public school setting, I analyzed each case from the New Mexico court system to determine the central theme of the arguments. For instance, upon an initial reading, I might categorize the central theme of a case as having to do with student discipline when, in reality, the argument was framed and fought in light of negligence. I then noted the theme of the case in a notebook before moving on to the next one. I followed this process for all 24 cases studied.

After I reviewed the 24 cases, I used an a priori method to determine the three central themes that comprised the cases discussed in light of the NMTCA. For the purposes of this dissertation, a priori was defined by the knowledge or central themes that emerged from the study of cases from 1978 to the present as they related to the NMTCA. This knowledge and central themes were a direct result of the deductive reasoning that occurred when each case was examined in light of the Act. I determined the three central themes of the tort cases as follows:

1. Student Discipline
2. Negligence
3. Other Cases

I also consulted the following three dissertations:

1. *A Legal Analysis of Litigation against Mississippi Educators and School Systems under the Mississippi Tort Claims Act* (Kriesel-Hall, 2013).
2. *A Legal Analysis of Litigation against Oklahoma Educators and School Districts under the Oklahoma Governmental Tort* (Lacefield, 2010).
3. *Analysis of Qualified Immunity for Texas Public School Professional Employees as Interpreted by the Texas Courts* (Carmen, 2009).

The research methods in these studies were similar in scope and provided a comprehensive examination of teacher immunity in the four southern states of New Mexico, Texas, Oklahoma, and Mississippi.

The legal research entailed a detailed document analysis of law review articles, textbooks, and published court decisions. I analyzed sources by scholars, as well as those involved in court systems to determine how state law pertained to the legal questions under consideration. Methodology in the area of law research is not exact, rather, it is based on the requirements of the questions being considered. As such, the methodology employed in this study mirrored that of Kriesel-Hall, Lacefield, and Carmen.

The focus of this dissertation was on how the courts have applied the NMTCA in cases against school district employees in New Mexico from 1978 to the present. Detailed in the literature review, the New Mexico legislature passed the NMTCA in response to *Hicks v. State* (1975). The legislature recognized that sovereign immunity needed a statutory structure to replace the concept that had been developed and then abandoned by the New Mexico courts. Similar to Oklahoma and Mississippi, in New Mexico, governmental immunity was born statutorily by the state legislature.

Scholarly legal research began with a broad overview of the topic as I examined how New Mexico tort law has been applied over the last 37 years to school districts and their

employees. This dissertation followed, in part, from Maher et al. (2010) who provided a comprehensive overview of governmental immunity laws that pertained to public education (including school district employees and entire districts).

The doctrine of sovereign immunity, also called governmental immunity, developed similarly across the United States. The concept of sovereign immunity began in 13th century English common law and later came to the United States as individual states shaped their common laws after declaring independence from England. To gain a proper understanding of the evolution of common law to statute, I studied numerous texts including *State Sovereign Immunity: A Reference Guide to the United States Constitution* (Durch, 2002), *In Defense of Our Law of Sovereign Immunity* (Hill, 2001), *Restatement of the Law, second, torts* (American Law Institute, 1977), and *The Educator's Guide to Texas School Law* (Walsh et al., 2010).

The work from the American Law Institute (1977) described, in detail, how statutory immunity works and highlighted that laws differ from state to state in practice, and was a valuable resource in analyzing the New Mexico court decisions. Kreisel-Hall (2013) noted that Mississippi, like New Mexico, did not have a comprehensive study on the application of governmental immunity to state decisions regarding teacher immunity. Unlike the other dissertations on the subject of sovereign immunity, this analysis focused on the State of New Mexico; therefore, I focused my search on law review articles that pertained to sovereign or governmental immunity as it evolved in New Mexico. Additionally, I conducted Boolean searches using the database LEXIS/NEXIS to find additional cases that pertained to the topic. Boolean searches “allow you to combine words and phrases using the words AND, OR, NOT and NEAR (otherwise known as Boolean operators) to limit, widen, or define your search”

(Boswell, 2013, para. 1). During the LEXIS/NEXIS search, I limited law review articles to their discussions of the development from common law to the NMTCA.

The law analysis continued with a search of the LEXIS/NEXIS database to identify published court cases in New Mexico that pertained to teacher immunity. Court cases were limited to the late 20th and early 21st Centuries. To find published court decisions, additional Boolean searches were conducted using the following terms: name(school!) and “tort claim!”. To gain perspective, I also examined court cases that involved sovereign immunity prior to the passage of the NMTCA. In addition to these searches, the LEXIS/NEXIS database contained all pertinent statutes adopted by the New Mexico Legislature including the entire text of the NMTCA.

After identifying relevant cases, the findings were analyzed in light of the NMTCA of 1978. While most cases involving the Act centered on negligence, a limited number of cases focused on human resources decisions and student discipline.

Methodology 2

Peer review was used as a secondary methodology for my research. Peer review is often used within a given profession to determine the likelihood of publication. This dissertation has gone through peer review by professionals in Texas public school professional positions; however, they did not have specific connections to education law. Because of the nature of a dissertation involving matters of statutes and laws, peer review was used to determine the readability of the dissertation. Simply put, readability is “The quality of written language that makes it easy to read and understand” (WordNet Search, n.d., para. 1). A review of law cases does not read the same as narrative text; therefore, ensuring readability is key to understanding the topic of teacher immunity.

The peer review panel consisted of four non-law related individuals whose highest levels of education varied from bachelor's to doctorate degrees. The panel received the dissertation draft at the following phases:

1. The submittal of the dissertation proposal
2. The submittal of dissertation final draft
3. The dissertation defense

Once received, each member had 2 weeks to review the draft and return it with questions, concerns, or comments. As the researcher, I decided whether to consider these comments or to incorporate, add, or dismiss the ideas brought forth. While this process increased the understanding of the concept of teacher and governmental immunity for those not related to the law, peer review has the following limitations:

- Objectivity can be hard to maintain depending on the reviewer's level of education and experience
- This process is not expedient
- Peer-review can have a tendency to not weed out faulty research
- Criticism, or lack of, can depend on the reviewer's point of view. (Hale, 2011, p. 1)

With these concerns in mind, peer review was not the primary method of this work, rather this method served to strengthen the quality of the research project. Responses from the four peer review participants fell into the following two categories:

1. Significance: Participants felt that the first draft did not illustrate the importance of the topic concisely; however, readability increased from beginning to end. This background knowledge was key to comprehension. The significance of the study was embedded in the format, and clarity was provided in the Abstract to help the reader understand the bigger picture of the dissertation.
2. Vocabulary: All four participants felt, at various points in the process, that the vocabulary used could be a stumbling block toward readability. This feedback led to

additional definitions added at the beginning and descriptions added throughout the body of the dissertation.

Chapter 3 Summary

Chapter 3 refocused on the question at hand: How have the New Mexico state courts interpreted the NMTCA in published litigation against New Mexico school districts and their employees? Stemming from the history of legal research on the topic of teacher immunity, I used a traditional legal research, analysis, and methodology as discussed in Permuth and Mawdsley (2006). The researchers stated that studying law as it relates to education “can be described as a form of historical-legal research that is neither qualitative nor quantitative” (p. 6).

I interpreted the NMTCA of 1978 and identified those cases in which decisions were based on the Act in some part. I included primary and secondary sources and research and findings tools such as Lexis/Nexis to research this topic comprehensively. Statutes, regulations, and case law were the main primary sources. Secondary sources were not law, rather were writings on the law and were used as another piece of legal research. Periodicals including *West’s Education Law Reporter*, *Brown’s Legal Dictionary* and other books were consulted during the research. Finally, the research and findings tools used included Lexis/Nexis, Westlaw, and Google.

An emergent themes approach was the main methodology used to study teacher immunity in light of the NMTCA. Cases from the New Mexico court system were studied to determine the central theme. For example, an initial reading of a case may point to the central theme being student discipline, while, in reality, the argument may have been fought in light of negligence. I followed this procedure for the 24 cases related to the NMTCA. Additionally, for the four cases that returned to court, I followed the same process with the appeal to determine whether the initial findings were congruent with the follow-up.

An a priori method was then used to determine central themes that comprised cases discussed in light of the NMTCA. I determined the four central themes of the tort cases to be as follows (any number of cases being less than two were not discussed as a central them):

1. Negligence (15)
2. Employment and supervision (4)
3. Student discipline (2)
1. Statute of limitations (2)
2. Breach of contract (1)

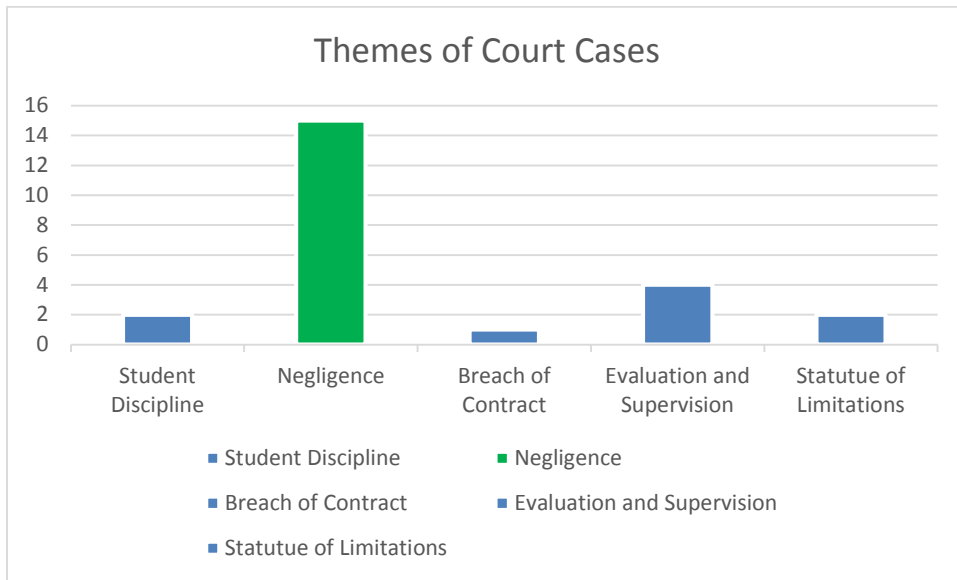


Figure 3.1. Themes of court cases.

Peer review for readability is a secondary methodology in place for my research. The most common purpose of peer review is to determine the likelihood of publication. While publication is a minor issue at this point, an additional reason for peer review was to determine the readability of the text. Because the most likely reader of this type of dissertation is that of public school administrators and educators, peer review was completed by professionals in Texas public schools. These professionals were a cross section from attendance personnel to an assistant superintendent.

Responses from the four peer review participants yielded two consistent themes, which were addressed at various points in the drafting process. The two themes were that the importance of the topic was not understood easily upon the initial reading and the vocabulary used in the writing was such that a greater number of definitions should be included rather than assuming the reader knows law-related terms used in this work.

CHAPTER 4

ANALYSIS OF NEW MEXICO TORT CLAIM CASES

Dunklee and Shoop (1986) brought two research studies to the forefront that pointed to nearly 800 student negligence suits in a 3-year timeframe; most involved some claim of personal injury. However, an empirical study of court decisions revealed that the volume of litigation against school districts remained steady from 1990 to 2005, and the majority of cases were ruled in favor of the school district employees with government and official immunity the most common basis for these rulings. This researcher analyzed court cases involving teacher immunity in New Mexico since the 1978 passage of the Tort Claims Act (NMTCA), which was a direct result of the intent of the legislature to do away with official sovereign immunity that came out of *Hicks v. State* in 1975.

The research on the law trends in New Mexico pointed to the cases that not only involve personal injury and negligence, but also those that involved evaluation and supervision, student discipline, statute of limitations, and breach of contract. Maher et al. (2010) concluded that immunity laws are strong across the United States, even with the variability in those laws from state to state. The following research question aimed to determine not only how the courts interpret the NMTCA, but also what types of cases are most prevalent in the New Mexico system: “How have the New Mexico state courts interpreted the NMTCA in published litigation against New Mexico School Districts and their employees?”

An analysis of the 24 cases that directly referenced the NMTCA revealed five themes. One theme was not considered major because there were fewer than two instances found in the court system. The first theme is that of negligence. Negligence is the reasonable care that one

would take in a given situation. Fifteen cases dealt with negligence in light of the NMTCA. Next, with nearly one-fourth of the cases were on the theme of evaluation and supervision—the responsibility of administrators to evaluate their staff members. Two other themes studied related to student discipline and the statute of limitations, with only two cases recorded for each theme. The final theme found in analyzing tort lawsuits in New Mexico related to the breach of contract.

Negligence

In *Trembath v. Riggs and the Truth or Consequences Municipal Schools* (1983), a teacher filed suit after allegedly being injured while on his way to lunch when a pipe in the back of a truck hit him as he waited to cross the street. Trembath initially filed for remedy via workmen's compensation; however, benefits were denied because he was not "in the course of employment" (p. 3) while going to lunch. Rather than file his suit via workmen's compensation, he filed suit against the family who owned the truck and the Truth or Consequences School. The court dismissed the NMTCA portion against the school, but stated that the suit could move forward in the lower courts to determine the level of negligence of Don Riggs, Earl Riggs, Jr., and Truth or Consequences School. Since the portion attributed to the New Mexico Tort Claims Act was dismissed, it is not discussed here.

Negligence in hiring was one aspect of *Rubio v. Carlsbad Municipal School District* in 1987. The plaintiffs also sued under §1983 in its claim in which a public school teacher obtained marijuana for minor students. The suit was dismissed and, on appeal, the court ruled that no waiver of sovereign immunity was provided under N.M. Stat. Ann. SS 41-4-5 through 12. All of the parents' claims were dismissed.

Owens v. McKinley County School District (1987) involved a school bus-related accident in which a student was struck by a semi-truck as he crossed a road to get on the school bus. The Court of Appeals of New Mexico found that the school board and superintendent were immune under NMTCA. However, the issue of negligence against the bus driver (as the operator of the motor vehicle) was to be decided by the court and was remanded to the lower court to be reinstated on the trial docket.

Pemberton v. Cordova and Moriarty Municipal Schools Board of Education (1987) involved a fight between two students. The action was filed because of damages incurred by JoElla Lynn Pemberton at the hands of Theresa Cordova. The trial court denied the initial motion of the school board to dismiss under the NMTCA. On appeal, the Court of Appeals for New Mexico ruled that,

The right to sue governmental entities and public employees is limited to the rights and procedures outlined within the Tort Claims Act. § 41-4-2; § 41-4-4; *Methola*. Since Section 41-4-6 does not allow an injured student to sue on the theory of negligent supervision, sovereign immunity has not been waived. (*Pemberton v. Cordova*, 1987, p. 2)

The *Pemberton* case was one that established precedent in New Mexico that teacher supervision is not an area granted exceptions to immunity for purposes of the New Mexico Tort Claims Act.

Allen v. Board of Education of the City of Albuquerque came before the New Mexico Court of Appeals on December 22, 1987. In this court decision, the court of appeals chose not to hear the case because “the circumstances did not meet the requirements for appellate review” (*Allen v. Board of Education*, 1987, p. 1). While the facts of the case included an injury to a child because of an accident, the court dismissed the appeal.

Schleft v. the Board of Education of the Los Alamos Public Schools (1989) was brought to court when a child was injured after being exposed to an un-insulated copper wire on school district property. The plaintiff and a friend climbed a transformer located on the grounds of Mountain Elementary School during summer break. Upon noticing they were walking on loose boards, they decided to climb down. The friend was able to get down safely; however, before making it down, the plaintiff accidentally touched the un-insulated copper wire. He received an electrical shock of 7,620 volts and became unconscious; the student was revived via CPR. Because of the loss of oxygen to the brain, he suffered permanent brain damage, motor and speech impairments, and fourth-degree burns. The appellants were awarded costs on appeal.

Saiz v. Belen School District (1992) applied to the issue of negligence immunity in New Mexico since it involved action against a contractor employed by a school district. In this case, the Belen school district hired an electrical contractor to install lighting at the football stadium. A student was electrocuted after touching a metal electrical conduit that was not installed according to code. The parent sued, and the jury found judgment in part against the school district and the contractor.

Initially, the appellate court ruled that the district could not be held liable for the student's death. The representative for the deceased child appealed, and the court upheld the appeal. Upon review, the contractor was found to be immune from liability because of a statute of repose in New Mexico (§ 37-1-27). In general, a statute of repose determines more strictly the timeline for lawsuits to be filed, as its sequence is initiated by the completion of an act (such as work being finished on a school playground) versus when an injury may have occurred. In addition, the district was found to be immune under the NMTCA. The Supreme

Court of New Mexico (1992) conferred that the original ruling was correct. The opinion of this case stated,

Liability for acts or omissions under the Tort Claims Act shall be based upon the traditional tort concepts of duty and the reasonably prudent person's standard of care in the performance of that duty. The Tort Claims Act in no way imposes a strict liability for injuries upon governmental entities or public employees. (*Saiz v. Belen School District*, 1992, p. 13)

To date, this is the only case studied in which the plaintiff sued a contractor in connection with school district duty.

Johnson v. Board of Albuquerque Public School System (1992) involved a student who was hit by a car while in a school zone leaving school. The suit was brought under the NMTCA section 41-4-11(A) (street maintenance waiver). At the time of the accident, neither set of school zone signs were flashing. The court ruled (and held on appeal) that school boards are not liable to maintain school zone roadways or signage; therefore, the NMTCA did not apply.

In *Seale v. Carlsbad ISD* (1993), the plaintiff sued the school district for negligence after her son died while swimming in a pool at a Boy Scout camp; the child was handicapped, could not swim, and was prone to seizures. The pool was located at a natatorium owned and run by the school district. The swimmer died and went unnoticed initially by the scouting staff. The plaintiff argued that the district failed to have a lifeguard on duty, and it did not take the proper safety precautions in the operation of the pool.

The mother of the deceased, representing his estate, appealed the lower court's decision that the school district was not liable. The Court of Appeals found that a key part of the NMTCA was not met. This case demonstrates the specificity of this Act. The immunity granted by the Act pertains to "inherently dangerous activities" as run by a school district. The appeals court found that operating a swimming pool was not "inherently dangerous" and allowed

damages to be pursued. Somewhat in contrast, the case was allowed to move forward against the district. On a separate point, the ruling in favor of the individuals being dismissed was not reversed (they included the Superintendent of the district and two employees of the natatorium).

In 1993, Palmyra Gallegos filed suit against the State of New Mexico Board of Education and School Transportation Division of the State of New Mexico Department of Education. In this case, Gallegos' daughter was severely injured when she attempted to cross a state road to catch a school bus. As part of the 1997 appeal, the court referenced the NMTCA in the discussion of the case. Specifically, the NMTCA states,

The settlement or judgment in an action under the Tort Claims Act shall constitute a complete bar to any action by the claimant, by reason of the same occurrence against a governmental entity or the public employee whose negligence gave rise to the claim. (as cited in *Gallegos v. State of New Mexico Board of Education*, 1993, p. 6)

The discussion of this case centered on the fact that there was a settlement at some level before filing the suit. In such cases, no settlement occurs under the NMTCA; therefore, the Act does not come into play. Ultimately, the court affirmed the judgment of the district court in favor of the plaintiff.

In *Williams v. Central Consolidated School District* (1997), the father of a student brought suit against the school district after his son's arm went through a window in the school hallway. It did not matter to the court that this occurred because of a fight the student was in at the time of the accident. The action brought stated that the school should have installed a guard around the window or used shatterproof glass. Initially, the trial court dismissed the action; however, the court of appeals reversed the decision of the lower court.

Even though there is a history of broad interpretation of "operation or maintaining a school building," the court noted this rationale alone was not reason enough to grant the school district immunity. Rather, the school had a duty to repair, replace, or redo unsafe

conditions that began as design defects. This particular window had originally been an exterior window and, after an extensive remodeling six years earlier, it became an interior hallway window near extensive student traffic. Even though the architect designed the remodel, the school district was responsible for ensuring the work was done correctly; therefore, blame could not simply be laid at the feet of the contractor.

In the *Lucero v. Richardson & Richardson, Inc.; Wright & Hammer Architects; Albuquerque Public Schools; and John Doe* (2001), a mother was injured when she tripped and fell on school district property. While the family sued and stated that the district had waived its immunity under the NMTCA, the school district countered that it was immune under the Recreational use Statute. In their suit, the family argued that the school district allowed construction workers to leave the school grounds in dangerous conditions.

Therefore, the NMTCA waived immunity for the “operation and maintenance of public buildings and their grounds” (*Lucero v. Richardson & Richardson, Inc.*, 2001, p. 3). The district court granted summary judgment for the school district, and the family appealed. Upon appeal, the court affirmed that the Recreational Use Statute did not cover organized events such as a little league game. The court also stated that the statute was in place for events that were meant for individuals or groups to pursue, but not organized activities. The court ruled that the case was to be remanded to the lower court to determine liability.

Gutierrez v. West Las Vegas (2002) pertains to the study of immunity for public school educators when the school district is not the only system in place at the time of an accident. In this case, a child was injured while at a mariachi band function that involved multiple schools. The child’s guardian sued, and stated that negligence by the teacher caused the injury when

she left her students unsupervised. The school district asked the trial court to dismiss her case based on immunity under the NMTCA; the court granted the request of the school district.

The mother filed in the Court of Appeals of New Mexico, and claimed that because the school district jointly operated the mariachi function with other districts on school district property, the immunity granted by the NMTCA should be waived in accordance with New Mexico statute Ann. §41-4-6. The court disagreed and stated that the mother provided no documentation that the school district solely operated the property and, thus, immunity was held. If she had been able to prove that a joint-powers agreement was in place, she may have been able to move forward against the school district, but not against the teacher. The court was firm in their finding that the teacher was working under the scope of her duties; therefore, would be granted immunity by the NMTCA.

In *Sam v. Estate of Sam* (2004), a father accidentally killed his son while operating a motor vehicle that belonged to the father's company. Three years later, after the father died, the child's mother sued his estate in a wrongful death action. The state Supreme Court ruled that the suit should not have been brought forward to begin with, as the NMTCA has a 2-year statute of limitations. The Supreme Court barred her suit and highlighted that the time frame was the issue, rather than the facts of the case.

The 2006 case of *Sam v. Estate of Benny Sam Jr. and the Arizona School Risk Retention Trust, Inc.* followed from *Sam v. Estate of Sam* (2004), and involved the wrongful death case of a pedestrian by a truck driver from Arizona. The truck driver was a public employee of a state government entity, and the accident occurred in New Mexico. The court ruled that the NMTCA only covered government employees from the State of New Mexico who operated in the state. As such, the NMTCA did not apply in this case. However, at

issue was the fact that the statute of limitations of the NMTCA is two years, and on appeal, the Supreme Court noted that the case should be dismissed and suit barred because the statute of limitations ran its course almost a year before the suit was brought to the courts.

Upton v. Clovis Municipal School District (2005) addressed the NMTCA regarding negligence that caused the death of a child. The parents claimed that the school district could be sued for negligence under the NMTCA, statute 41-4-6, which permits plaintiffs to sue school districts for negligence while operating or maintaining a public school building. In the discussion of the case, the court pointed out that the NMTCA was enacted to “resolve the tension” (p. 2) between the right of the government to exercise power versus encouraging the government to act responsibly. The court interpreted the intent of the New Mexico legislature on NMTCA and held that the government is immune from negligent supervision.

In this case, the student was forced to exercise more than she was permitted. The “foreseeable risk” was determined by examining her asthmatic condition in conjunction with the strenuous exercise. The school failed to follow its own procedures in cases such as this, and ignored information given to them by the student’s parent. The court ruled that this action led to the endangerment of more than one child, and the risk was far worse than should be expected. The key to this provision being enacted was that the actions of the school placed the “general public or class” at risk.

Of the fifteen actions brought about because of accusations of negligence, only one resulted in immunity being waived for the public school employee. The Court of Appeals of New Mexico determined *Owens v. McKinley County School District* (1987) as such that the board and superintendent were immune under the NMTCA. The bus driver, unlike the other public school employees involved, was ruled to have his level of negligence determined by

the lower court as he was the operator of a motor vehicle. In contrast to the one case that found negligence with the public school employee, are eight instances of school districts being held liable, or at the very least, the cases were remanded back to a trial court to determine an amount of liability.

Evaluation and Supervision

Evaluation and supervision is a key component of public education. The lives and livelihoods of educators can rest on their evaluation data, which takes the form of walk-through observations, formal observations, growth plans, etc. These records and the policies and practices behind them, are annually worked through with public school employees. If and when negative information enters those records, it can effectively end a teacher's career if due process is afforded to the teacher. Fortunately, processes exist to mediate conflicts that may arise when one person and his or her bias affects the evaluation of the performance of another based on a relatively small amount of time in the classroom.

The case of *Catherine Daddow v. Carlsbad Municipal School District* (1983) is similar in that the plaintiff had sued for wrongful termination. The court found that her action was not barred by any form of governmental immunity in New Mexico (such as the NMTCA). The court also found that the district was able to show that the plaintiff received due process. In light of this finding, the district recovered the cost of defending the suit, but no other damages were awarded.

Carrillo v. Rostro, Jones, Lucero, and Marquez (1992) involved the non-renewal of Carrillo's principal contract. She claimed that her contract was not renewed because of her criticism of the school board. The school board argued they were protected by qualified immunity from the lawsuit. Carrillo argued on the First and Fourteenth Amendment claims, not

the NMTCA directly. However, the court decided that the NMTCA granted immunity from liability, while in other cases involving the Act had waivers of immunity from suit.

Luboyeski v. Kermit Hill, Steve Dilg, Eleanor Ortiz, and the Santa Fe Public School System (1994) is applicable in a study of the NMTCA as it pertains to employment litigation and the issue of immunity for public school employees. This case brought to light statute §28-1-13 of the Human Rights Act, and was the first case studied that sought to differentiate the Human Rights Act and the NMTCA. The teacher (Luboyeski) in this case asserted that she was terminated because she rejected the sexual advances of another teacher. Initially, Luboyeski filed a complaint with the Human Rights Division in New Mexico against the school system regarding her termination. In the initial filing, the individuals involved were not listed as defendants, and her claim was found to be without merit. However, after her appeal, the lawsuit listed the individuals involved.

The school district argued that the NMTCA overrode the Human Rights Act. The court ruled that, because the original case did not include the individuals, they were correctly dismissed from the appeal. Adding to the decision, the court ruled that the Human Rights Act waived immunity as expressed by the NMTCA, and it allowed the case to move forward with the possibility of Luboyeski recovering damages. The court also stated that, because the individual defendants were not named in the original suit, they were immune from action on appeal. Because the court maintained that the school system could be held liable, the case was remanded for further proceedings.

In 2007, the NMTCA was used in reference to a staff evaluation (*Henning v. Rounds*). The teacher felt that her evaluation was not conducted in good faith and fair dealing, and the resulting evaluation should be a matter of law. The court(s) ruled and affirmed that the teacher's

claims were forbidden by the NMTCA. While the court stated that the teacher's allegations, at the very least, pointed to serious flaws in the appraisal system, the dealings were not a matter of law and the ruling that her actions were barred by the NMTCA was upheld. She could not present any facts to support that the defendants did not act within the scope of their duties. In addition, Henning could not provide any case that illustrated liability for school personnel evaluating staff members in bad faith. However, as Carman and Fossey (2009) noted, supervision and evaluation of school employees falls under the scope of employment and is protected.

Of the four cases involving evaluation and supervision, *Luboyeski v. Kermit Hill*, (1994) was the only that ruled that the school district could be held liable, even if the individual defendants would not be held liable. Again, this is a small sample, even with 25% of the cases being decided against the school system. This small sample size limits New Mexico from being viewed as a state that is "friendly" to plaintiffs, even if they should be able to argue that immunity has been waived by the NMTCA.

Student Discipline

If a room full of school administrators were asked one thing that they deal with on a daily basis, there is a great chance that they would mention dealing with student discipline. From kindergarten through 12th grade, discipline in one form or another, is an everyday part of the life of a school administrator. Increasingly, teachers handle lower levels of infractions, while the principal or assistant principal deals with larger infractions. It is no surprise then that student discipline has been addressed in terms of immunity granted by the NMTCA.

Kennedy v. Dexter Consolidated Schools (2000) involved a lawsuit initiated by students after a strip-search was conducted on their campus. This case is unique in that it started in

federal court and was remanded to the state courts. While school district officials claimed immunity under the NMTCA, the Supreme Court of New Mexico disagreed with the lower courts that had found in favor of the defendants. The Supreme Court found that the searches were reckless, unfounded, and without individualized suspicion. The court also found that the searches were excessive in scope and intentionally did damage to the students. The court ultimately ruled for punitive damages including attorney fees. However, a separate detention phase of the consequence existed in which the court ruled that, while improper, this action was harmless and without merit. Ultimately, the superintendent, counselor, and principal were found in error, and the court ruled that they were to be assessed punitive damages in this case. The New Mexico Supreme Court upheld the judgment of personal liability against the principal, and reversed the decision that gave immunity to the counselor and superintendent.

Statute of Limitations

Simply put, a statute of limitations is a part of the legal system that states how long after an action has taken place that an entity can bring a suit based upon that action. There is no standard statute of limitations (for instance one or two years); however, this fact can be ameliorated when states such as New Mexico honor their own statute of limitations (two years according to the NMTCA) when it involves another state (e.g., Arizona's one year statute of limitations) to the benefit of the plaintiff. A statute of limitations case was *Sena School Bus Company v. Board of Education of the Santa Fe Public Schools* (1984). Unlike *Rider v. Albuquerque Public Schools*, which involved a minor, the court ruled initially (and upon appeal) that the dismissal of these claims was based on a two-year statute of limitations. The plaintiff argued that the N.M. Stat. Ann. 41-4-16 statute of limitations was unconstitutional (both at the state and national levels), and the suit should be allowed. The court noted that, while it could be

assumed that the defendant breached the contract with the bus company, through its findings in case law at the state and national levels, the statute of limitations still applied and would be upheld.

The question of age of plaintiff in regards to the statute of limitations came into play in the 1996 case of *Rider v. Albuquerque Public Schools*. A 6-year-old child was injured while playing on playground equipment. The student's grandfather filed a lawsuit 17 months later under "negligence in the maintenance and operation of the school playground" (*Rider v. Albuquerque Public Schools*, 1996, p. 1). The court initially dismissed the case because the claim was not filed within the 90-day requirement set forth in N.M. Stat. Ann. 41-4-16(A), (B). In order for notice to be given, when it involved a school district, the Superintendent of Schools must be notified, in writing, of the time, place, and circumstances involved in the injury. The law that gave rise to the notice requirement is the Tort Claims Notice (TCN). However, the court of appeals ruled that if the legislature intended to include infants who could not protect themselves, it would be the same as excluding children as a whole from the NMTCA. Because the child could not act on her own behalf, the court ruled that the 90-day requirement for filing did not apply to this claim. The court reversed the summary judgment of the lower court in favor of the school district, and awarded the plaintiff costs.

The *Rider v. Albuquerque Public Schools* (1996) case is clearly pro-plaintiff, and similar to the court history in Oklahoma torts. When it comes to statute of limitations cases, the State of New Mexico will be as lenient to the plaintiff as possible, and consider the facts of the case, such as age of the person who was injured and whether the individual is old

enough to be held to the statute of limitations. The court will also extend the time allowed to two full years when another state statute of limitations may be shorter.

Breach of Contract

A common reason for bringing a lawsuit is a breach of contract in which the party bringing the action states that the other party did not complete its end of the contract, which could take the form of not finishing a project on time, to using materials or specifications that are different from those agreed on in the original contract. One such case involving breach of contract involving NMTCA is *Sena School Bus Company and David Sena v. Board of Education of the Santa Fe Public Schools*, which was heard in the New Mexico Court of Appeals in February of 1984.

In this case, the plaintiffs appealed the ruling that dismisses their case based on the statute of limitations. The plaintiffs argued unsuccessfully that the statute of limitations was unconstitutional at the national and state levels. The plaintiff also cited “willful and malicious breach of contract and deprivation of constitutional rights” (p. 1) between the Board of Education of the Santa Fe Public Schools and the Sena Bus Company, owned by David Sena. The Court of Appeals stated the facts of the case were a breach of oral and written contracts. Regardless, the statute of limitations still applied, and the court affirmed the decision of the lower court.

Chapter 4 Summary

A review of the cases involving the NNTC of 1978 yielded similar results to those of Maher et al. (2010). From 1978 to 2008, 24 published cases reached as high as the New Mexico Supreme Court that dealt with the NMTCA. Table 4.1 details the breakdown of the central themes of these cases. Table 4.2 details the breakdown of the liability of the total

number of cases in that theme at the school district level. Table 4.3 details the breakdown of liability of the total number of cases in that theme for school-level administrators or educators.

Table 4.1

Central Themes of Cases Examined

| Theme | Percent of Cases |
|--------------------------|------------------|
| Negligence | 62.5% |
| Evaluation & Supervision | 16.7% |
| Student Discipline | 8.3% |
| Statute of Limitations | 8.3% |
| Breach of Contract | 4.2% |

Table 4.2

Percentage of Cases for Liability at the School District Level

| Theme | Percent of Cases |
|--------------------------|------------------|
| Negligence | 53% |
| Evaluation & Supervision | 25% |
| Student Discipline | 0% |
| Statute of Limitations | 50% |
| Breach of Contract | 0% |

Table 4.3

Percentage of Cases for Liability or School-Level Administrators or Educators

| Theme | Percent of Cases |
|--------------------------|------------------|
| Negligence | 6.7% |
| Evaluation & Supervision | 0% |
| Student Discipline | 50% |
| Statute of Limitations | 0% |
| Breach of Contract | 0% |

Overall, the State of New Mexico appears to be more likely to entertain the plaintiff's arguments when those arguments are directed at the district level. Much like Texas, the New Mexico courts are not plaintiff-friendly at the individual educator or administrator level. The research in New Mexico appears consistent with Maher et al. (2010) who concluded that immunity laws for educators are strong across the United States.

CHAPTER 5

FINDINGS AND CONCLUSIONS

In summary, popular opinion, including the professional literature, has led people in the education community to believe that school district employees are under increasing threat of litigation and damage awards. Companies that sell litigation insurance, authors that try to sell textbooks and curriculum, and news media that highlight stories about lawsuits against school districts have promulgated these popular opinions. However, Clark and Zirkel (2008) found that the frequency of these types of cases was relatively flat from 1990 to 2005, outcomes favored school district employees, and immunity was the most often mentioned reason for those decisions. Since 1978 when the New Mexico Tort Claims Act (NMTCA) was passed, cases involving immunity have fallen into the categories of negligence, evaluation and supervision, student discipline, statute of limitations, and breach of contract (see Figure 5.1). New Mexico is like many states in which a balance exists between absolute immunity and absolute liability, which means that there is room for the courts to determine if and where liability rests between parties.

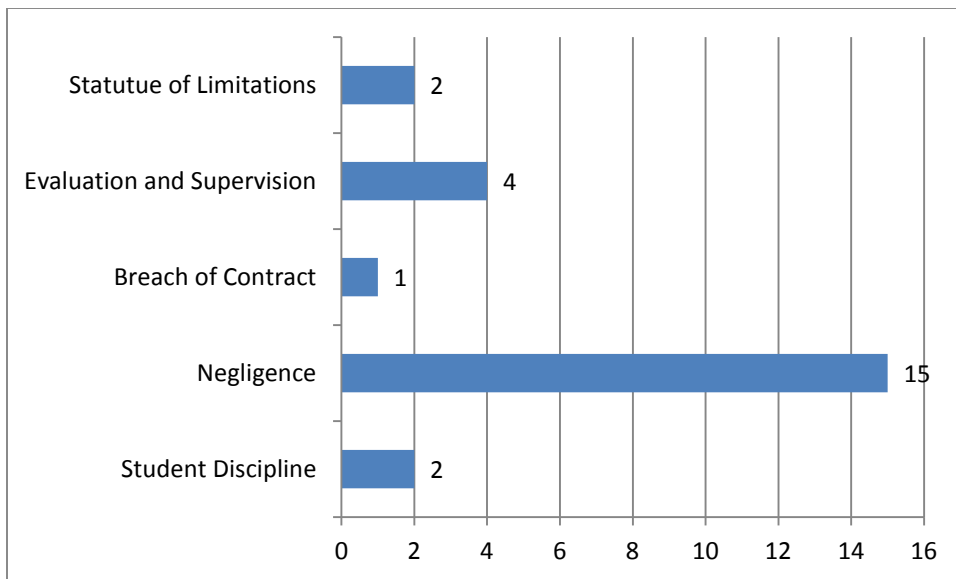


Figure 5.1. Themes of litigation under NMTCA.

The majority of the cases in the study of New Mexico involve negligence, a fact that the literature supports. In the initial study of the cases in New Mexico, the research alluded to student discipline playing a larger role in the litigation; however, examining the research in depth did not hold the same conclusion. A possible reason that there are significantly fewer student discipline and evaluation and supervision cases could be the mechanisms school districts have in place to grieve those situations, and the parties can reach a resolution before taking the cause to court. Figure 5.1 denotes the number of times the school district was found liable, or the case was remanded for further proceedings to determine liability of the school district.

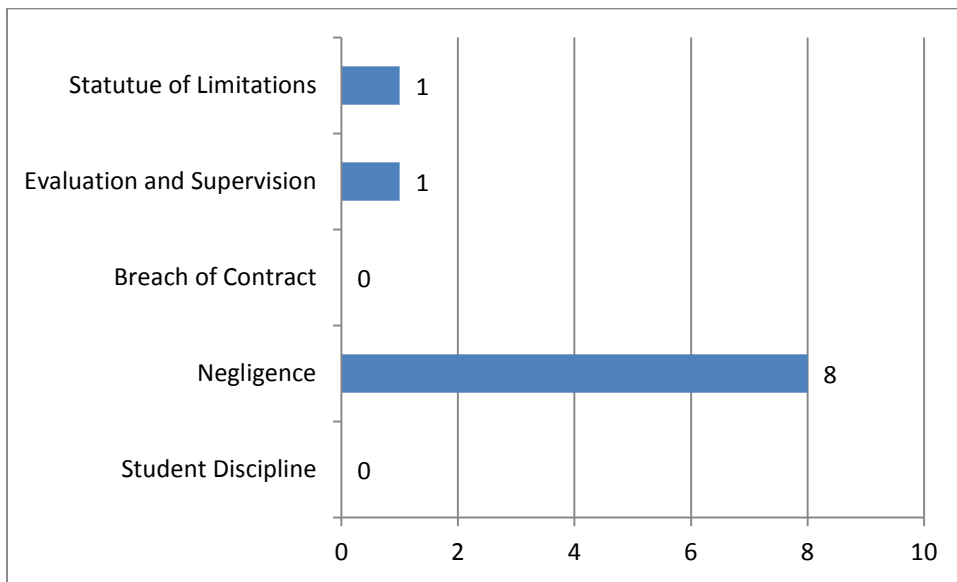


Figure 5.2. Liability of school districts/remanded to determine liability.

The literature tends to show that immunity appears relatively strong across the board in the State of New Mexico, with less than half of the suits being brought to court pointing to outright liability or the need for a court to determine liability at the school district level. This level of immunity grows even stronger when viewed in terms of the liability of school administrators, educators, and other personnel. Figure 5.2 denotes the number of times school

administrators, educators, or other personnel were found liable or had the case remanded for further proceedings to determine liability.

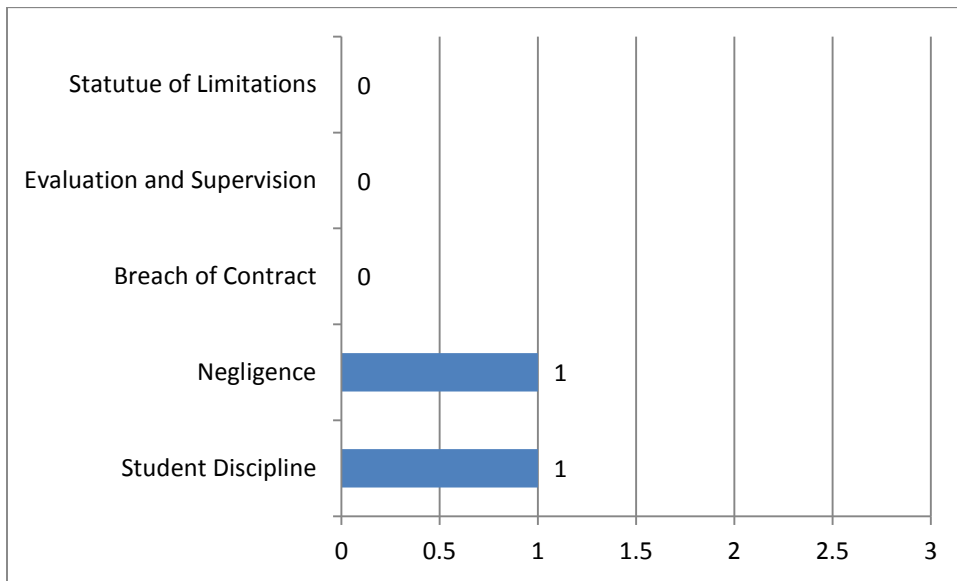


Figure 5.3. Liability of administrators, educators, other personnel/remanded to determine liability.

Maher et al. (2010) found that immunity laws are strong across the United States. Specifically, immunity was waived and liability bestowed upon a school administrator, educator, or other school personnel only 8.3% of the time. As of this writing, researchers have investigated immunity legislation and court cases in only three states (Texas, Oklahoma, and Mississippi). Even with the addition of New Mexico as part of this work, the research is not complete. All 50 states should be examined to determine judicial trends regarding immunity. Ideally, such investigation will lead to unbiased reporting of the results, and an increased reliability of the school law literature. While studies have focused on simple liability, an analysis of other forms of tort liability is also needed to determine their roles in running public schools.

In conclusion, tort liability, in relation to public school employees, has been overemphasized and under researched (Clark & Zirkel, 2008). The public perception that

liability awards and cases against public school educators is increasing is incorrect; however, the underlying laws and court cases as to why this is the case have not been studied systematically. Regarding the NMTCA, New Mexico joins Texas, Oklahoma, and Mississippi in gathering a robust defense of immunity for public school educators. This immunity appears to spread across negligence-, supervision-, and discipline-related cases. Immunity also appears to play a role in statute of limitations and breach of contract cases; however, the numbers are small and further study is needed to determine whether those areas hold true. Only future study on a state-by-state basis will determine whether states in the southwestern United States are the norm or the anomaly. Initial research indicates these states are quite simply the norm.

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