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Damages Under § 1983: The School Context

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DAMAGES UNDER § 1983: THE SCHOOL CONTEXT

In an attempt to curb abuses of the legal process in the South during reconstruction, Congress passed the Ku Klux Act in 1871. The one hundred year old statute presently represents a major tool of civil libertarians in the struggle to achieve equality of human rights. In its present form, § 1983 has become increasingly used in the school context to coerce officials who have failed or refused to recognize that constitutional guarantees extend to teachers and students. In effect, § 1983 has begun a process of judicialization of schools, extending concepts of due process and equal protection into an area where arbitrary action by officials has been historically accepted. This discussion will examine the scope and effectiveness of the § 1983 damage remedy, potentially the strongest weapon in this new form of reconstruction.

Desirability of the Damage Remedy

Damages under § 1983, where sought against individuals, represent a more effective remedy than injunctive relief alone. While conduct of a particular school official may be popular and even encouraged by the community, a violation of teachers' or students' civil rights may be involved. Many parents, for example, might favor the suppression by school officials of an underground newspaper which castigates the school's administration and extolls the virtues of oral sex. To enjoin the official ban of that publication as violative of the first and fourteenth amendments would not deter future violations of a similar nature. Neither community attitudes nor the prior injunction would encourage critical examination of school policies generally, or foster less arbitrary means of dealing with future provocative situations.

2. 42 U.S.C § 1983 (1970): Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
3. See note 6 infra.
5. See notes 6-8 infra and accompanying text.
Where damages are sought against school officials it is unlikely that they would so value community approval of their actions that they would risk personal financial loss. Even if ultimately unsuccessful, the fear arising from a complaint for damages against individuals may be far more effective in encouraging re-examination of school policies in light of constitutional standards than a host of injunctive actions. Accordingly, the damage remedy represents a coercive force that reaches beyond the immediate case.

It may be argued that officials must be permitted to freely exercise their discretion if school administration is to be innovative and creative, and hence the damage remedy will have a stifling effect on school administrators. This argument serves as a basic justification for common law immunity of government officials, a doctrine which has not been totally abrogated under the Civil Rights Acts. If damages are to

6. . . . [T]he advantage of seeking monetary as well as injunctive relief is that it faces school officials with the reality that their intransigent policies, so popular with the community, can expose them to personal loss. After all, hundreds of school systems that ignored the immorality of segregation and utilized every circumvention of Brown, finally initiated the desegregation process when Title VI of the 1964 Civil Rights Act jeopardized their federal financial aid. It is likely that board members will be no less protective of their personal finances than they are of the school board's money.


7. Id. at 282.

8. Id. See also Note, The Doctrine of Official Immunity Under the Civil Rights Acts, 68 Harv. L. Rev. 1229, 1236 (1955) [hereinafter cited as Doctrine].

9. In the words of Judge Hand:
   It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith.

Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949). Hand's analysis extended immunity to two U.S. Attorneys General, two Justice Department officials and a Director of Immigration.

10. Dispite the broad wording of the [A]cts, the large majority of complaints seeking damages against officials in recent years have been dismissed, usually after assertion of the defense of official immunity from suit. As in Tenney v. Brandhove, in which the Supreme Court held members of a legislative investigating committee immune with regard to their official duties, the courts have assumed that the Civil Rights Acts were not intended to abrogate totally the common-law immunities which attached to broad categories of legislative, judicial, and even administrative officials. Doctrine, supra note 8, at 1231.
be permitted against school officials, the argument places great responsibility on the judiciary and on legislators to clearly articulate the guidelines which are to be followed. For example, the meaning of “due process hearing” should be well defined if administrators are to be held accountable for their failure to fully provide such a forum.

Availability of the Damage Remedy in the School Context

The damage remedy against school officials has been most widely used where implementation of school integration plans has forced the closing of some schools within a district. Where Black teachers are dismissed in the process, claims arise that teaching credentials have not been objectively evaluated, and that dismissal was actually based upon the race of the teachers involved.11

Under the above fact situation, the Fourth Circuit Court of Appeals addressed itself to the damage issue in 1966.12 The school superintendent had based his decision in renewal of employment contracts “. . . upon his own ‘personal preference’.”13 Although some attempts were made to justify the Black dismissals on non-arbitrary grounds, the court rejected these arguments and placed the burden upon the school board to justify “. . . its conduct by clear and convincing evidence.”14 The reason for placing such a burden upon the school board was that an inference of discrimination arose from the long history of racial discrimination in the community and the past reluctance to comply with the mandate of Brown.15 The court went on to hold that the plaintiffs were entitled to an award for damages.16

The Eighth Circuit Court of Appeals, in the same year, faced racially motivated non-renewal of teacher contracts where an integration plan was implemented.17 While the school board had followed past policies of absorbing into the remaining schools teachers whose positions were eliminated, many Blacks were left without jobs. Since only Black teachers had previously been assigned to the all Black schools, and

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11. See notes 12-19 infra and accompanying text. In all cases discussed therein, this set of facts was the basis for suit.
13. Id. at 191.
14. Id. at 192.
15. Id.
16. Id. at 193. For authority, the court cited its prior opinion in Franklin v. County School Board of Giles County, 360 F.2d 325 (4th Cir. 1966). However, the Giles decision had specifically refused to discuss the question of damages.
because the administrators must have known that integration was imminent, the court reasoned that the "absorbing" policy, though valid on its face, constituted racial discrimination. In fashioning its remedy, the court reasoned that "the passage of time, the intervening employment of new teachers, the necessity of already having made plans for the current year, and the paucity of evidence as to the employment status of those dismissed. . . ." made comparative evaluation orders inappropriate. The best remedy was held to be damages which should be awarded where established. Under this fact situation, teachers have continued their successful use of the damage remedy in the fourth and eighth circuits, and have also been successful in two other circuits.

A different situation arose in the seventh circuit where a teacher alleged wrongful discharge because of his association with a teachers' union. The district court's dismissal of the $100,000 damage suit was reversed, and a trial on the merits was ordered. In reversing the district court's holding that the plaintiffs had no constitutional right to form a union, the court of appeals reasoned that an unjustified interference with the teacher's associational freedom presented a claim under § 1983. However, a qualified immunity to damages was recognized; at trial the defendants would be permitted under the official immunity rationale of Pierson v. Ray, to defend upon a showing that their actions were taken in "good faith."

Where damages are incurred, students should be as successful as teachers in pressing their claims. Yet, unlike teachers who have lost their jobs, actual monetary losses may be less frequent among students. Moreover, the immediate concern of students may often be academic reinstatement or the prohibition of arbitrary hair and dress regulations. In these situations, injunctive relief is often the most appropriate remedy. Claims for damages by students would be advisable, however, where graduation dates are extended by virtue of expulsions, thus giving rise to a loss of earnings that would have been forthcoming upon earlier gradua-

18. Id. at 783. The Court gave no other reason for allowing damages.


22. 386 U.S. 547 (1967). Therein, the Court held that a police officer was not liable for damages upon showing that in good faith and with probable cause, he had enforced a statute which was later held unconstitutional.
tion. Furthermore, with increased empirical data, computation of actual damages may now be possible in situations concerning the effects of prolonged exposure to sub-standard segregated schools.23

The use of the damage action is also appropriate as a tool to force future compliance with constitutional standards,4 even where actual loss is slight, or where mental suffering is the primary injury. Attorney recognition of the coercive nature of the damage action was apparently present in the case of Scoville v. Board of Education of Joliet,25 where several high school students were expelled for their publication of an underground paper critical of school administrators. While actual monetary loss was probably slight, damages were prayed for in the complaint. The court of appeals found that the action of school authorities in expelling the students disclosed on its face an unjustified invasion of the students’ rights under the first and fourteenth amendments. Without further discussion, the court held that a claim for damages was stated.

Even in the absence of actual loss, there is a possibility that punitive damages may be recovered.26 In state courts, punitive damages are often not recoverable absent a showing that actual damages exist. There is some authority for the proposition that in federal courts actual damage is not a prerequisite for a punitive award.27 In Basista v. Weir28 for example, the court held that nominal damages may be presumed in civil rights violations and that punitive damages may be recovered with-

23 Bell, supra note 6, at 280. Therein, the author stated:
Educators and social scientists have prepared studies and testified in school desegregation litigation concerning the harm done to children attending segregated schools. These studies reveal that in addition to the adverse effects on the children's hearts and minds recognized by the Supreme Court in the Brown decision, there is more concrete deprivation. Exposure to an inferior, segregated school over a period of years can result in a child obtaining far lower scores on standardized achievement tests than if that same child had attended an integrated school.

Although Bell raises an interesting issue, he fails to discuss the difficult problem of causation which such evidence would raise if offered as proof at trial. There are undoubtedly many factors other than segregated schools which would lead a child to obtain a lower score on such achievement tests.

24. See notes 3-8 supra and accompanying text.

25. See note 4 supra. No discussion was devoted to the question of "good faith" of the officials involved, yet a claim for damages was found to be stated in the complaint. Since the seventh circuit requires a showing of bad faith if the immunity defense is to be defeated, (see note 21 supra and accompanying text) this case appears to demonstrate a lack of real content in the seventh circuit's "good faith" requirement. Alternatively, one could analyze Scoville as a demonstration of the fact that arbitrary denial of first amendments rights is per se bad faith.

26. See notes 27-30 infra.


28. 340 F.2d 74 (3rd Cir. 1965).
out a showing of actual loss. A similar result obtained in at least three
district court cases.\textsuperscript{29} Justice Brennan, though he did not write for the
majority, agreed with the Basista holding in his opinion in Adickes \textit{v.}
Kress.\textsuperscript{30}

Without a limiting doctrine, the language of the Act would permit
recovery in any § 1983 action where damages are incurred.\textsuperscript{31} The damage
remedy, however, cannot be considered a civil rights panacea as a result
of the case of \textit{Tenney v. Brandhove},\textsuperscript{32} which preserved the concept of
official immunity under the Civil Rights Acts. Faced with a plaintiff who
sought damages against members of the California Senate Committee on
Un-American Activities for violation of his constitutional rights, the
Supreme Court in \textit{Tenney} held that the traditional legislative immunity
doctrine was a valid defense and that the Civil Rights Acts were not
intended to abrogate common law immunities. Following \textit{Tenney}, dis-
trict attorneys, grand jurors and judges have been held as classes immune
to actions brought under the Civil Rights Acts.\textsuperscript{33} Consequently, since
school board members have traditionally enjoyed a limited immunity
under the common law, dependent upon a showing of "good faith",\textsuperscript{34}
\textit{Tenney} permits its continuation.\textsuperscript{35}

The use of the immunity doctrine is sporadic and often inconsistent.
There appears to be a holding on either side of every immunity issue
under the Civil Rights Acts.\textsuperscript{36} Moreover, courts generally have done
little to clarify the rationale behind their decisions. For example, the
Ninth Circuit Court of Appeals was faced with the question of damages,
where the plaintiff alleged a fourth amendment violation by police
officers.\textsuperscript{37} The defendants relied upon the court's prior holding in \textit{Hoff-}

\textsuperscript{29} Antelope \textit{v. George}, 211 F. Supp. 657 (N.D. Idaho 1962); Tracy \textit{v. Robbins},

\textsuperscript{30} 398 U.S. 233 (1970). Therein Justice Brennen concluded that a plaintiff should
be able to collect punitive damages under § 1983 irrespective of proof of actual damage,
if he could show knowledge on the part of the defendant that a civil rights violation was
occurring, or that the defendant acted with reckless disregard of whether he was violating
those rights.

\textsuperscript{31} \textit{See note} 2 supra. \textit{See also} \textit{Doctrine}, supra \textit{note} 8, at 1229.

\textsuperscript{32} 341 U.S. 367 (1951).

\textsuperscript{33} \textit{Note, Section 1983: A Civil Remedy for the Protection of Federal Rights, 39
N.Y.U L. Rev.} 839, 853-54. \textit{See also} \textit{Doctrine}, supra \textit{note} 8, at 1230.

\textsuperscript{34} \textit{See Doctrine, supra} \textit{note} 8, at 1235. \textit{See also}, note 21 \textit{supra} \textit{and accompanying
text.}

\textsuperscript{35} \textit{Id.} The doctrine is not always recognized however. For example, none of the
cases cited in notes 12-20 \textit{supra}, mentioned the question of official immunity.

\textsuperscript{36} Baylor, \textit{The Surety Industry's Involvement in the Civil Rights Movement, 34
Ins. C.J.} 37, 41. [Hereinafter cited as Baylor.] A brief reading of the annotations
to 42 U.S.C.A. § 1983 (1970) under the damage section will undoubtedly force the
reader to agree with Baylor's proposition.

\textsuperscript{37} Cohen \textit{v. Norris}, 300 F.2d 24 (9th Cir. 1962).
man v. Halden, wherein immunity was granted to government officials for discretionary acts performed within the scope of their authority. Although the cases were distinguishable, the court failed to discuss the logic of denying immunity to the defendants and stated that their prior holding was "not controlling in light of Monroe v. Pape." The confusion is further manifested in Francis v. Lyman, in which the First Circuit Court of Appeals stated:

We do not pretend that it is easy to explain why these two defendants are not liable in damages. Yet we are clear that the judgment of the district court ought to be affirmed in dismissing the complaint.

One method of resolving these conflicts is to examine the cause or proximate cause of the harm. For example, in Hoffman the plaintiff sought damages for deprivation of his civil rights, alleging wrongful incarceration in a state mental hospital. The court stated that the hospital acted under an apparently valid commitment order and therefore "the matter complained of could not have been the proximate cause of the injury." (Emphasis added.) The court's decision to grant immunity to the defendants was reasonable under the circumstances because the hospital officials could not be expected to know that the court order under which they operated was invalid. Under similar circumstances, the plain-

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8. 268 F.2d 280 (9th Cir. 1959).
9. 300 F.2d 24, 33. The court gave no clue as to its position if another Hoffman-type case were to arise again in this circuit. In Hoffman, the defendants had authority to hold the plaintiff in a state mental institution under an apparently valid commitment order, which was later held invalid. The Hoffman court was disturbed that an official might be prevented from defending his actions with: "I acted under the law—I did what the law required." 268 F.2d 280, 299. In formulating its decision, the Hoffman court stated: "The approach of granting immunity to government officials for discretionary acts done within the scope of their authority, seems a proper one." Id. at 300. Although the meaning of this phrase is not entirely clear when applied to specific cases, the decision is proper under a "causation analysis." See notes 42-48 infra and accompanying text. In Cohen, on the other hand, the plaintiff alleged that police had knowledge that they were exceeding their authority in the search and seizure. Had the Cohen court distinguished these cases on the grounds of alleged direct causation, Hoffman would have remained clearly viable after Cohen, and future courts would have been left with a clearer understanding of the immunity doctrine.

39. Id. at 586. In spite of this language, the court does develop a reasonable analysis. The court stated: [T]he defendants were not the legal cause of the continuous confinement of Francis pursuant to the original order of commitment. . . . The Parole Board had no function to go behind the commitment order . . . . Id. See note 42-48 infra, and accompanying text, for elaboration of this type of analysis.

40. 216 F.2d 583 (1st Cir. 1954).
41. Id. at 586. In spite of this language, the court does develop a reasonable analysis. The court stated: [T]he defendants were not the legal cause of the continuous confinement of Francis pursuant to the original order of commitment. . . . The Parole Board had no function to go behind the commitment order . . . . Id. See note 42-48 infra, and accompanying text, for elaboration of this type of analysis.

42. See Baylor, supra note 36, at 40.
43 See note 38 supra.
44. Id. at 301.
tiff in Jobson v. Henne alleged that he had been forced to work sixteen hours per day for only a few cents each hour, and was thereby deprived of his rights under the thirteenth amendment. In holding the institution's directors and psychiatrist not immune, the court stated that "in a real sense, they can be said to have caused the conditions under which the appellant labored." (Emphasis added.) The Fifth Circuit Court of Appeals recently held that a sheriff was not immune where he had negligently failed to release a prisoner after dismissal of the indictment because the sheriff's "failure to discover the dismissal of charges against [the prisoner] was the direct and sole cause of [the] unlawful detention." (Emphasis added.)

In each of these cases, the concept of "direct cause" is used, in effect, as a conclusion to categorize the conduct involved into degrees of reasonableness. Only in Hoffman was the conduct legal or proper under a "reasonable man" standard. A commitment order, valid on its face, enabled the defendants to carry out actions which were proper as to all validly committed patients. However, a reasonable man in the Jobson situation could not be expected to carry out slave-labor policies innocently and with a resolvable belief in their validity. In the fifth circuit case, the sheriff could be reasonably expected to know which prisoners were to be released since such knowledge was an essential part of his job. Consequently it appears that the reasonableness of the defendant's conduct is the key to the causation analysis.

Under this rationale, a school official might seek refuge under the immunity doctrine by arguing that he acted under the apparently valid orders of superiors. A school board directive to dismiss a teacher, where the superintendent is ignorant of the racial motivations behind the order, 

45. 355 F.2d 129 (2d Cir. 1965).
46. Id. at 134.
48. In discussing the "proximate cause" of an injury, one must go beyond a mere statement that the cause is direct, sole or proximate. These words are mere statements of the courts' conclusions, used at the end of their analysis. The problem with the use of these terms was best illustrated by Judge Andrews in his dissenting opinion in Palsgraf:

A boy throws a stone into a pond. The ripples spread. The water level rises. The history of the pond is altered to all eternity. It will be altered by other causes also. Yet it will be forever the resultant of all causes combined. . . . Each cause brings about future events. Without each the future would not be the same. Each is the proximate cause in the sense it is essential. But that is not what we mean by the word. Nor on the other hand do we mean sole cause. There is no such thing.


Thus, it is necessary to move beyond the conclusions in the language of the courts, examine the similarities and differences in the cases, and attempt to determine a common thread running throughout.
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is an example of a situation where the argument might be successfully used.

A recent seventh circuit case, *McLaughlin v. Tilendis*,\(^4\) suggests that school administrators may seek protection from damages by consulting the school board, and requesting directives where there is some question of propriety. In adopting the language of *Pierson v. Ray*,\(^5\) the court held that a showing of good faith was required if the official was to maintain a successful immunity defense. In *Pierson*, the Supreme Court had held that a police officer was immune where he acted with probable cause and in good faith to enforce a statute which was later held unconstitutional. Although the administrators had not sought directives in the seventh circuit case, by adopting *Pierson* language, the court implied that school officials, like police, will be immune if they act as directed by superior authority. At least where the administrator is not on notice that his actions will result in constitutional violations, his obedience to the orders of superiors is reasonable under the circumstances, and the immunity doctrine should apply. Conversely, since an administrator acts with only limited discretion under the supervision of the school board, a unilateral act which violates another’s civil rights is likely to be held outside the scope of his discretionary power and therefore unreasonable. Like the police in *Pierson*, illegal conduct must be justified by the existence of a requirement to act if it is to be considered reasonable under the circumstances.

The immunity of the school board members is another matter. They are given statutory power to manage the school system and are vested with the ultimate decision making authority. They can turn only to statutes and court decisions to justify improper or otherwise unreasonable conduct.\(^6\) Where a question arises concerning the propriety of future conduct, they may often turn to the courts. In the *Scoville* case for example,\(^7\) administrators could have sought an injunction to ban future distribution of the unpopular newspaper, and included a prayer for declaratory relief. Similar actions would be available with respect to hair and dress regulations. Where prior court determination of an issue is available, school board members are in the same position as the lower administrative officials who seek advice from the board. Where such advice is sought and given, immunity should exist, but where unilateral action is taken and a constitutional right is violated, the conduct should

\(^4\) See note 21 supra.
\(^5\) See note 22 supra.
\(^6\) See text accompanying note 63 infra.
\(^7\) See note 4 supra.
not be considered reasonable, and therefore, immunity should be denied.

There are situations in which injunctive or declaratory actions are
not appropriate. If courts have clearly articulated the standard of conduct
which is required of school officials, they must be deemed to be on notice,
and actions not conforming to the standard held unreasonable. If
standards of conduct have not been made clear, reasonable men could
differ on the limits of acceptable actions. In a recent Virginia district
court case, for example, the University of Virginia was held to have
violated the plaintiffs' constitutional rights to equal education by denying
them admission on the basis of sex. The school had traditionally been
an all male institution. In granting immunity from damages, the court
stated that the officials had acted "in unquestioned good faith and in
perfect accord with long standing legal principle, only to find their
discretionary conduct declared illegitimate under a later constitutional
interpretation."54

School officials cannot be certain of the extent to which the courts
will apply the immunity doctrine as the use of the damage remedy
increases. The doctrine may be viewed as a tool, used by the courts to
avoid taking action where administrative decision making is involved.
To preclude widespread intervention into school administration, it may
be attractive for courts to award damages, thus encouraging all ad-
ministrators to evaluate their policies and to internally develop a range
of acceptable standards.55 To the extent that damage actions encourage
a re-ordering of school policies beyond the immediate case, the frequent
use of the damage remedy would help to insure that fewer constitutional
violations occur in the future. Thus, by refusing to apply the immunity
doctrine, the courts would be called upon less often to intervene in school
administrative decision making. Accordingly, the immunity doctrine is
not likely to be a serious bar to damage actions in the school context.56

Does Indemnification Reduce the Coercive Nature of the Remedy?

It is possible for school officials to be reimbursed for losses incurred
in civil rights litigation through direct school district indemnification.

53. Kirsteine v. Rector & Visitors of the University of Virginia, 309 F. Supp. 184
54. Id. at 189.
55. See text accompanying notes 6-8 supra.
56. Indiana Superintendents and School Boards have been told:
   Governmental immunity for school board members [is a] thing of the past
   under the Civil Rights Act of 1871... [G]ood faith means 'being right' [under
   McLaughlin v. Tildenis.]

Speaker Outline, Institute on School Law, Indiana Continuing Legal Education Forum
and Indiana School Board Association, December, 1970, at 5.
Express indemnification powers exist in several state statutes. Indiana§7 and New Jersey§8 have “save harmless” statutes which provide for indemnification in civil rights litigation. In Indiana, the officials’ recovery depends upon a finding of “good faith”, and he will not be indemnified where a judgment against him is based on “malfeasance in office.” New Jersey does not expressly so limit the recovery. The New York§9 and Connecticut§10 “save harmless” statutes cover only personal

57. “Save harmless” statutes give school districts power to indemnify their agents for various types of losses. Indiana school boards are authorized, inter alia:

To defend any members of the governing body or any employee of the school corporation in any suit arising out of the performance of his duties for, or employment with, the school corporation, provided the governing body, by resolution determined that such action was taken in good faith; and to save any such member or employee harmless from any liability, cost or damage in connection therewith, including, but not limited to the payment of any legal fees, except where such liability, cost or damage is predicated on, or arises out of the bad faith of such member or employee, or is a claim or judgment based on his malfeasance in office or employment.

IND. ANN. STAT., § 28-1710 (Burns Repl. 1970). It is unclear whether a civil rights violation is per se malfeasance in office. Probably not, at least where mere negligence is involved.

58. The New Jersey “save harmless” statute provides:

Whenever any civil action has been or shall be brought against any person holding any office, position or employment under the jurisdiction of any board of education, including any student teacher, for any act or omission arising out of and in the course of the performance of the duties of such office, position, employment or student teaching, the board shall defray all costs of defending such action, including reasonable counsel fees and expenses, together with the costs of appeal, if any, and shall save harmless and protect such person from any financial loss resulting therefrom; and said board may arrange for and maintain appropriate insurance to cover all such damages, losses and expenses.

18 N.J.S.A., 16-6, Education (1968). Although no “good faith” finding is required under this language, “in the course of the performance of the duties of such office” could be read by a court to mean “within the scope of authority.” The “no inherent authority” doctrine, see note 63 infra was undoubtedly developed in part to protect the taxpayers from wasteful expenditures of public funds. If a finding of intentional harm was made, it seems unlikely that either a school board or a court would be anxious to allow the spending of public funds to satisfy a judgment rendered against the wrongdoer. Under these circumstances, it is likely that the “duties of such office” would be held not to include the harm involved, and that no authority existed to indemnify the official.

59. The New York statute dealing with cities over one million in population provides, inter alia:

... the board of education ... shall be liable for, and shall assume liability to the extent that it shall save harmless any duly appointed member of the teaching or supervising staff, officer or employee of such board for damages arising out of the negligence of any such appointed member, officer or employee, resulting in personal injury or property damage...


60. The Connecticut statute provides, inter alia:

Each board of education shall protect and save harmless any member of such board or any teacher or other employee thereof or any member of its supervisory or administrative staff ... from financial loss and expense, including legal fees and costs, if any, arising out of any claim, demand, suit or judgment by reason of alleged negligence or other act resulting in accidental bodily
injury and property damage liability. Thus, in the latter two states, most civil rights litigation involving school administrators would fall outside the express terms of the statute.

Where "save harmless" statutes are limited by "good faith" and "malfeasance" provisions, an official's confidence in receiving reimbursement will vary directly with the degree to which he believes the courts will find him within the terms of that language. The lack of clarity in the meaning of those terms will probably reduce his confidence proportionally. Where officials act without benefit of directives from a superior authority, the likelihood of a finding of impropriety is substantially increased. Even where no good faith limitations are imposed by statute, a court finding reprehensible conduct on the part of an official might impose such standards as a matter of public policy. Moreover, remonstrating taxpayers might effectively persuade state budget review authorities that indemnification was improper in a particular case. Thus, even where express authority exists, a high degree of confidence that indemnification will occur would be unwarranted.

Most states have school power clauses permitting the exercise of "general supervision and control of the district's schools." Whether such a clause would be held to necessarily imply a power of indemnification by a school district would depend upon precedent in the particular jurisdiction. In determining whether indemnification is proper under a

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61. See note 67 infra, and accompanying text.
63. For example, in dealing with the power of a school district to settle damage claims, the Kansas Attorney General said:

... we direct your attention to the general rule that school districts have only such powers as are conferred upon them by statute, specifically or by clear implication, and any reasonable doubt as to the existence of such powers should be resolved against its existence.

We are ... unaware of any statute authorizing a board of education to expend public funds in settlement of a claim against a school district. Such authority would be implied where immunity is waived by statute. In the absence of such a statute, we are of the opinion that the expenditure of school funds in settlement of a claim against a school district would be unauthorized.

Letter dated May 8, 1958, and signed by John Anderson Jr., Attorney General, reprinted at 7 KAN. L. REV. 102, at 103-04 (1958). See also Paterson v. Board of Trustees of Montecito Union School District, 157 Cal. App.2d 811, 321 P.2d 825 (1958), where a construction company which had received the low bid on a school construction contract through its own clerical error, sued for reformation of the contract. The court found that statutory authority limited the school board to accepting low bids and that their prior promise to reform the contract could not be held binding upon them since they had no power to so act under the circumstances.
general power clause, courts might examine policies in other areas of the law. A strict agency approach, for example, would require indemnification of an agent who suffered litigation expenses resulting from his tortious conduct where he did not believe that the conduct was tortious. However, where the agent knowingly commits a tortious act he cannot require the principal to indemnify him.

Because agency doctrines were not designed to protect the interests of the taxpayer community which must support the school system, courts may turn to other areas of the law for guidance in interpreting a broad school power clause. Corporation law, to the extent it reflects the protection of the stockholding public, is analogous to the school setting. Corporation acts generally permit a corporation to indemnify its officers or directors where they have suffered expenses resulting from litigation. Commentators suggest, however, that it is a "snare and a delusion" to believe that public policy would be defined by the courts so as to permit reimbursement of directors where their conduct was wrongful to the corporation. It is possible that indemnification would be allowed only where the officer is successful on the merits or where his conduct was

There is extensive authority for the proposition that school districts, in absence of express statutory provisions, or necessary implications arising therefrom, have no power to act in any respect. See, e.g. Board of Directors of Independent School District of Waterloo v. Green, 147 N.W.2d 854, 259 Ia. 1260 (1967); Board of Directors of Miami Trace Local School District v. Marting, 217 N.E.2d 712, 7 Ohio Misc. 64 (1966); Chartiers Valley Joint Schools v. County Board of School Directors of Allegheny County, 211 A.2d 487, 418 Pa. 520 (1965). See also 78 C.J.S., Schools and School Districts, § 119 et. seq. (1952).

In the Marting case, for example, the school attempted to sue the defendant for malicious prosecution. Finding no statutory authority expressly allowing schools to bring tort actions in Ohio, the court said: "The board has only such powers as are clearly and expressly granted." 7 Ohio Misc. 64, 217 N.E.2d 712, 717 (Emphasis added).

64. See Restatement (Second) of Agency § 439 (1958). The comment to clause (c) provides inter alia:

If . . . the agent, at the direction of the principal, commits an act which constitutes a tort but which the agent believes not to be tortious, he is entitled to indemnity to the amount which he is required to pay as damages. This is true both where the principal contemplates the likelihood that the directed act will constitute a tort and where he has no reason to anticipate that it will be tortious.

Id. at 332.

65. The comment to clause (c) adds: "An agent knowingly committing an illegal act ordinarily has no right to indemnity from the principal, although the principal directed him to commit it. . . ." Id. See also, Seavey, LAW OF AGENCY, § 168 (1964).

66 The [corporate indemnification] statutes fall into two basic categories, although they present a rich and bewildering variety of detail. The commoner variety, of which the Delaware provision is the prototype, simply empowers the corporation to indemnify, or sometimes to include in its articles or by-laws a provision for indemnification. The other type confers upon insiders a more or less qualified right to be indemnified.
determined by an impartial agency to be either not harmful to the corporation or in "good faith." Present S.E.C. policy appears to coincide with this type of analysis.8

If taxpayer protection is to be considered in determining the breadth of the general school power clause, courts may be hesitant to sanction indemnification unless the official was successful on the merits, or unless a determination of good faith was made in advance. In summary, under a broad school power clause officials cannot reasonably rely on direct indemnification from the school district should an attempted indemnification be challenged in court. If the school district refuses reimbursement, an official cannot expect to easily obtain a court order for indemnification.

Insurance policies represent an alternative means of indemnification for school officials. Although some underwriters may be willing to create specific policy coverage for individuals or local groups of school administrators, general insurance coverage expressly designed for civil rights violations does not appear to be readily available. In absence of sound actuarial statistics concerning civil rights liability, such policies will either be relatively unavailable, or very expensive. In light of the discussion to follow, the enforceability of such policies is in doubt.

Coverage for civil rights violations may be obtained, to a limited extent under specific clauses in present liability policies. Standard policy forms are generally used for liability insurance.9 For example, the

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68. Id. at 202.
69. 17 C.F.R. § 230.460, Note (1970), provides, inter alia:
Insofar as indemnification for liabilities arising under the Securities Act of 1933 may be permitted to directors, officers and controlling persons of the registrant pursuant to the foregoing provisions, or otherwise, the registrant has been advised that in the opinion of the Securities and Exchange Commission such indemnification is against public policy and is, therefore, unenforceable. In the even [sic] that a claim for indemnification against such liabilities (other than the payment by the registrant of expenses incurred or paid by a director, officer or controlling person of the registrant in the successful defense of any action, suit, or proceeding) is asserted by such director, officer, or controlling person in connection with the securities being registered, the registrant will, unless in the opinion of its counsel the matter has been settled by controlling precedent, submit to a court of appropriate jurisdiction the question whether such indemnification by it is against public policy as expressed in the act and will be governed by the final adjudication of such issue. (Emphasis added.)

This policy applies, even where corporate statutes expressly allow indemnification. It would appear that where school power acts do not expressly allow indemnification, this type of policy analysis would preclude a court from finding that the power to indemnify is necessarily implied from the language of the statute. To the extent that taxpayers and stockholders are analogous, it would seem that this type of policy analysis is essential in the school setting.

Standard Comprehensive General Liability Insurance Policy is used for coverage of bodily injury and property damage caused by accidents. Since bodily injury and property damage would seldom be involved in school civil rights litigation, this coverage would be of little significance to school officials. Where the subject matter of the litigation falls under the policy, only "accidents" would be covered, thus ruling out coverage for intentional harm.

A standard endorsement to this policy increases coverage to false arrest or detention, libel, slander or utterances made in violation of an individual's right of privacy, and wrongful entry or other invasion of the right to private occupancy. In some states, racial discrimination is added as a scheduled risk. The standard endorsement could increase a school official's insurance coverage in the civil rights area to a limited extent. For example, the wrongful entry provision might cover damages arising from an illegal locker search. The other provisions do not appear applicable to the school context, except in those states where racial discrimination provisions have been added.

Negligent conduct is covered under the standard endorsement and, unlike the basic policy, the endorsement also purports to cover intentionally caused harms. Insurance coverage for intended wrongs is novel, and, under present authority, such contracts may be held unenforceable as against public policy. Whether the present rule of unenforceability will find continued acceptance as the use of this type of coverage becomes more widespread remains unclear. At present, however, coverage for intentional wrongs remains relatively unimportant in the school civil rights context since the scheduled torts would cover few types of conduct in which a school official would be involved. To the extent that the subject matter of the litigation may fall within the scope of the policy, the question of enforceability may render officials unwilling to rely upon the coverage in planning future actions.

72. Id.
73. See Farbstine and Stillman, note 70 supra, at 1239.
74. Id. at 1238 n.85.
75. Id. at 1239.
76. Id. at 1240. See also Patterson, Essentials of Insurance 107 (1935), dealing specifically with the violation of criminal laws; Bishop, New Cure for an Old Ailment: Insurance Against Directors' and Officers' Liability, 22 Bus. L. 92, 107-08 (1966), dealing with the issue in the securities area; MacGillivary and Browne, MacGillivary on Insurance Law § 570 (4th ed. 1953), presenting the general argument that the assured cannot deliberately cause the event insured against.
77. The willful violation of a penal statute is expressly excluded from coverage under the standard endorsement. See Baylor, note 71 supra, at 164. Although § 1983 is
Coverage under the standard endorsement also purported to permit recovery for punitive damages. However, such coverage is generally held unenforceable. The leading case in the area is *Northwestern National Casualty Company v. McNulty*, wherein the court justified the unenforceability of punitive damage clauses upon the following reasoning:

[Punitive] damages do not compensate the plaintiff for his injuries, since compensatory damages already have made the plaintiff whole. And there is no point in punishing the insurance company; it has done no wrong. [T]he burden would ultimately come to rest not on the insurance companies but on the public, since the liability to the insurance companies would be passed along to the premium payers. Society would then be punishing itself for the wrong committed by the insured.

Accordingly, it would appear imprudent for a school official to rely on insurance coverage for punitive damages that might be assessed under § 1983.

Given the varying degrees of uncertainty which underlie all forms of indemnification, a great deal of reliance will probably not arise on the part of school officials with respect to reimbursement for damages assessed in § 1983 actions. In order to recover losses, either from the school district or under a personal liability insurance contract, a finding of mere negligence or "good faith" will be a prerequisite in most cases. If an official wishes to justifiably rely on any form of indemnification it is essential that he sincerely attempt to follow legislative and judicial
guidelines, or show that he acted under apparently valid directives of superiors. Under these circumstances, the deterence effect which § 1983 damages provide is not diminished by the presence of indemnification schemes.

RANDALL J. WEDDLE