

1950

# Marilyn Bingham and Jack T. Bingham v. Board of Education of Ogden City : Brief of Appellant

Utah Supreme Court

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CASE NO 7468

# In the Supreme Court of the State of Utah

MARILYN BINGHAM, an infant, by JACK T.  
BINGHAM, her guardian ad litem, and JACK T.  
BINGHAM, in his own right,

Plaintiffs and Appellants,

vs.

BOARD OF EDUCATION OF OGDEN CITY,  
a public corporation,

Defendant and Respondent.

## Appellant's Brief

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ATTORNEYS FOR PLAINTIFFS  
AND APPELLANTS.

Clerk, Supreme Court, Utah

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## STATEMENT

Plaintiff, by his amended complaint, (Paragraphs 2 and 3 of which were amended by written stipulation of counsel to correct a patent error which is not material to this appeal), seeks to recover judgment against the Board of Education of Ogden City upon two causes of action growing out of the alleged maintenance of a nuisance upon the open and unprotected public school grounds where children played at the Central Junior High School, located at 781 - 25th Street, Ogden, Utah, wherein the plaintiff's little daughter, less than three years of age, was severely burned by reason of her falling into hot ashes, embers, cans, and other burning and hot substances which were allowed to be scattered around an open, unguarded incinerator placed upon said school grounds and used by the janitor as a garbage disposal.

The first cause of action sought recovery for the benefit of the child as the result of her injuries. The second cause of action sought a recovery by plaintiff himself by way of reimbursement for moneys paid out by him and bills and obligations contracted for doctor and hospital bills incurred in the treatment of said child.

Defendant has made no point as to the propriety of joining these two causes of action, so that we believe no further mention of the same is necessary.

Defendant filed a general demurrer to each cause of action upon the ground that neither stated facts sufficient to constitute a cause of action. The trial Court sustained said demurrer. Plaintiff elected to stand upon said amended complaint, whereupon the Court entered a judgment of dismissal as to each cause of action. Plaintiff appeals from the judgment of dismissal.

Two points only are presented for consideration of this appeal:

1. Is a Board of Education liable in damages for injuries sustained by a child of tender years who is injured by and through the maintenance of a nuisance upon its school grounds?

2 Does plaintiff's amended complaint allege sufficient facts from which a jury might find that the conditions of which plaintiff complains constituted a nuisance?

## STATEMENT OF ERRORS

Appellant relies upon the following errors committed by the trial Court for a reversal of the judgment of dismissal:

1. THE COURT ERRED IN SUSTAINING DEFENDANT'S GENERAL DEMURRER TO PLAINTIFF'S AMENDED COMPLAINT AND IN ENTERING ITS JUDGMENT DISMISSING EACH OF SAID CAUSES OF ACTION.

## ARGUMENT

POINT 1. A BOARD OF EDUCATION IS LIABLE FOR DAMAGES SUSTAINED BY AN INFANT CHILD WHILE PLAYING UPON ITS SCHOOL GROUNDS SET APART AS PLAYGROUNDS WHERE SUCH INJURIES WERE CAUSED BY OR THROUGH THE MAINTENANCE OF A NUISANCE.

It is the contention of the defendant and the theory of the lower Court that a board of education, being an agent of sovereignty, is immune from such liability. The question of sovereign immunity has been a subject of much litigation and on no other subject, perhaps, is there more confusion among the decisions of the various courts.

It has been well stated that:

“The rule of governmental immunity is subject to a great number of exceptions, many of which are purely arbitrary and without any relation to grounds upon which the Courts please to base the general rules. *The whole doctrine of governmental immunity from liability for torts rests upon a rotten foundation.* It is almost incredible that in this modern age of comparative sociological enlightenment, and in a republic, the medieval absolutism supposed to be implicit in the maxim ‘The King can do no wrong’ should exempt the various branches of government from



liability for their torts and that the entire burden of damages resulting from the wrongful acts of the government should be imposed upon a single individual who suffers the injury rather than distributed among the entire community constituting the government, where it could be borne without hardship upon any individual and where it justly belongs.”

Comments of Annotator,  
75 A.L.R. 1196.

It has been further said:

“Law writers and editors generally have criticized and disapproved the doctrine of governmental immunity as illogical and unjust.”

Comments of Annotators,  
160 A.L.R. 23

22 Virginia Law Review 910  
54 Harvard Law Review 437

See also annotations in

120 A.L.R. 1376.

By reason of its harshness and the illogical basis upon which the doctrine rests, Courts quite generally have restricted rather than extended the doctrine, so that there are now many recognized exceptions or limitations adopted by many courts. They may be summarized in the language of the annotator as follows:

“Although the authorities are far from uniform in this matter, various exceptions or limitations have been recognized or adopted by some courts in connection with the rule of tort non liability as applied to certain agencies or authorities in

charge of public schools or public institutions of higher learning, providing, of course, that the particular agency or authority is amenable to suit and that it is the proper party defendant. These exceptions may be summarized as permitting recovery:

1. For a tort arising out of or committed in the performance of a proprietary as distinguished from a governmental function or activity,

2. For damage or injury to private real property or property rights in respect thereto or consequential injuries thereon resulting from a trespass or the creation or maintenance of a nuisance,

3. For the taking or damaging of private property for public use without compensation,

4. For personal injury or death caused by the creation or maintenance of a nuisance,

5. For injury or death caused by an active or positive wrong or a wilful or intentional act,

6. Where recovery may be predicated upon breach of contract rather than tort, and

7. The view has been adopted by some Courts, notably those of New York, that a school district or a school board may be liable for its own acts or omissions as distinguished from those of its officers, agents or employees.”

Comments of Annotator,  
160 A.L.R. 21.

The annotator further comments:

“Although there is authority to the contrary, several Courts have ruled that municipal corporations in charge of public schools, as well as school districts and state universities, which

are amenable to suit, are liable for the creation or maintenance of a nuisances on school premises resulting in damage to or consequential injuries on private real property, even though committed in the performance of governmental functions.”

Many cases and text writers are cited by the annotator in support of the above statements. They are all found in the elaborate notes in the above annotations.

Although there is authority to the contrary, the general rule of law is that counties, municipal governments, and other governmental agencies created solely by statute as subdivisions of the government are not liable for the negligence of its officers or employees unless expressly provided for by statute.

However, in nearly every jurisdiction, the courts have held that such an agency, even though acting in a governmental capacity, loses its immunity from liability for damages when its acts or conduct or the acts or conduct of its employees creates a nuisance and injuries or damage results from said nuisance.

McQuillan on Municipal Corporation,  
Section 2641

states the rule that a municipal corporation when acting in a governmental capacity is liable for injuries caused by the maintenance of a nuisance.

See also

The Law of Nuisances by Joyce,  
Section 346,

which also deals with this problem and sets forth the rule that a school district is liable in damages for

injuries sustained when said injuries arise out of the maintenance of a nuisance by such an agency.

See also

Hoffman v. City of Bristol,  
155 Atl. 499,

wherein the Supreme Court of Connecticut held that although the operation of maintaining a swimming pool in a park open to the public in general was a governmental function of the City, the City was liable for the injuries received by the plaintiff, when, through the conduct of the City by its employees, a diving board was maintained over shallow water which rendered the use of the diving board inherently dangerous.

On Page 500 of 155 Atl. the Court used the following language:

“Where a municipal corporation creates and maintains a nuisance, it is liable for damages to any person suffering special injury therefrom, irrespective of whether the misfeasance or non-feasance causing the nuisances also constituted negligence. The liability cannot be avoided on the ground that the municipality was exercising governmental functions or powers, even in jurisdictions where, as here, immunity is afforded from liability for negligence in the performance of such functions.”

6 McQuillin on Municipal Corporations,  
815 et seq.; 43 Corpus Juris, p. 956.

“If the natural tendency of the act complained of is to create danger and inflict injury upon the person or property be found a unisance as a matter of fact; but, if the act in its inherent

nature is so hazardous as to make the danger extreme and serious injury so probable as to be almost a certainty, it should be held a nuisance as a matter of law.”

Melker vs. New York, 190 N. Y.  
481, 83 N. E. 565, 16 L. R. A.  
(N. S.) 621, 13 Ann Cas. 544.

While, as we have seen, Connecticut has so far aligned with those states which do not hold a municipality liable for negligence in the performance of governmental functions and duties, we have definitely and repeatedly recognized that a similar immunity does not attach to nuisance created by it.”

In an early Indiana Case,

Haag vs. Board of Commissioners  
of Vanderburg County,  
60 Indiana 515,

the same question was presented to the Supreme Court of Indiana. In that instance the plaintiff had charged the County with maintaining a nuisance, to wit: a pest house, to her detriment and resulting in injuries to her property and also had charged that the maintenance of such a nuisance caused the death of three of her children through infectious disease. The Supreme Court of Indiana on Page 515 of the decision used the following language:

“A municipal corporation has no more right to maintain a nuisance than an individual would have, and for a nuisance maintained upon its property, the same liability attaches against a city, as to an individual.”

We regard the rule thus laid down as correct in principle and as equally applicable to a county.

Upon a careful review of the authorities, we are led to the conclusion, that the several paragraphs of the complaint are sufficient upon demurrer, and that the court erred in holding them otherwise.

In the case of

Pearce et al vs. Gibson County  
et al, 64 SW 33,

the Supreme Court of Tennessee enjoined the defendant, Gibson County, from creating a nuisance which would be detrimental to the plaintiffs. The Court in its ruling used the following language:

“But it is well settled that a municipality or county, in in the construction of a public work, is not privileged to commit a nuisance to the special injury of the citizens, and for such act is liable as a private individual in damages, or it may be restrained by the writ of injunction.”

In

56 Corpus Juris, page 530,  
Section 621,

the general law is set forth as follows:

“The district is . . . however liable where its acts and ommissions result in the creation of a nuisance . . . to persons suffering special damage therefrom.”

In a rather recent case, the Idaho Supreme Court has held that an action would lie against a school district to enjoin a nuisance.



Hansen vs Independent School  
District, 98 P.2d 959

The subject is treated in

39 Am. Jur. 837, Section 41.

In view of the fact, however, that our own Court has on frequent occasions discussed this matter, we feel that further citations are unnecessary.

Section 75-9-8, Utah Code  
Annotated, 1943,

expressly authorizes suits to be brought against the Board of Education. This Court has repeatedly adopted the more humanitarian trend of limiting rather than extending sovereign immunity. It has adopted the so-called liability for negligence committed in a proprietary as distinguished from governmental pursuit. It has also adopted the theory of liability for damaging property without compensation, as distinguished from the taking of property without compensation.

In the case of

Croft vs. Millard County Drainage  
District, 59 Utah 121,  
202 Pac. 539,

Mr. Justice Thurman, speaking for the Court, uses the following language:

“It is difficult to understand upon what principle such a corporation (a drainage district) can claim the right to enter upon the land of another and perpetrate wrongs thereon resulting in a substantial injury and when confronted in a court of justice with a claim for damages undertake to defend itself upon some technical appli-

cation of the antiquated idea that 'The King can do no wrong' or, if he does, the wrong is simply *damnum absque injuria*. In the darkest ages of medieval history when despotic rule flourished among the semi-barbarous nations of the old world, it was even then considered barely tolerable to assert in behalf of kingly rule the doctrine that 'The King can do no wrong.' Upon what principle, then, in the twentieth century of the Christian era, in the most enlightened age of the world, in a free American commonwealth, should a voluntary corporation, created solely for private benefit, be permitted to invoke the same doctrine in order to escape the consequences of wrongs either deliberately or carelessly perpetrated against the property rights of another? Even the state itself, when acting within the scope of its sovereign powers, cannot take or damage private property for public use without making just and adequate compensation to the person to whom the property belongs."

We believe that the case of

Husband vs. Salt Lake City,  
92, Utah 449,  
69 P. 2d 491

is decisive of the question in this jurisdiction.

In that case each of the five judges then sitting wrote separate opinions, and while the members of the Court differed sharply on whether the complaint in fact alleged a nuisance, yet all five members of the Court, including Mr. Justice Wolfe, seemed without question to accept the doctrine that sovereign immunity does not apply where the sovereign maintains or permits a nuisance upon its premises. The only difference is that the Husband case relates to a municipal corporation



rather than a board of education, but, as we have pointed out supra, numerous Courts and text writers draw no distinction between a board of education and any other kind of agency of sovereignty.

We desire to call attention particularly to the language of Mr. Justice Wolfe in his separate, concurring opinion:

“But I am willing to hold the city liable on the theory of respondeat superior for the negligence of the driver of this sprinkling wagon. I think the decisions have gone to ridiculous lengths in giving municipalities immunity from the negligence of their employees on the ground that the work in which such employees were engaged was in pursuance of governmental purpose. In the case of *Lehi City vs. Meiling*, 87 Utah 237, 48 P. 2d 530, I had something to say about the continual growth in the extent and kind of municipal functions and the obscurity of the line between governmental and proprietary functions.”

Again:

“I am in favor of restricting municipal immunity for the negligence of its employees while engaged in the city's business to that committed in the pursuit of actual protection of persons and property or preserving the peace of the community or some other police duty which it exercises as an agency of the state.”

In other words, Mr. Justice Wolfe, while holding that the complaint in question did not allege a nuisance, yet he believed that the complaint stated a cause of action.

It is submitted, therefore, that in view of the previous pronouncements of this Court, that it will now

adhere to the enlightened and humanitarian doctrine that any agency of government is not immune from suit for damages or injury to person or property caused by the maintenance of a nuisance.

POINT. 2. PLAINTIFF'S AMENDED COMPLAINT STATES FACTS SUFFICIENT TO SUPPORT A FINDING OF A JURY THAT THE CONDITION OF WHICH PLAINTIFF COMPLAINS WAS IN FACT A NUISANCE.

In the event this Court accepts our contention as to Point 1, then it becomes necessary to determine whether or not plaintiff's amended complaint states a cause of action. That is, whether or not sufficient facts are alleged in the complaint, all of which are admitted by the general demurrer, from which a jury could find that the defendant did in fact maintain a nuisance upon its school grounds.

Our statute,

Section 103-41-1, Utah  
Code Annotated, 1943,

provides as follows:

“Whatever is dangerous to human life or health, and whatever renders soil, air, water or food impure or unwholesome, are declared to be nuisances and to be illegal, and every person, whether owner, agent or occupant, having aided in creating or contributing to the same or who may support, continue, or retain any of them, is guilty of a misdemeanor.”

Reverting to the Husband case, cited supra, the members of this Court, as then constituted, divided sharply on the question of whether or not the complaint

in that case alleged facts sufficient to constitute the operation of the sprinkling wagon a nuisance. Mr. Justice Hansen was of the opinion that a jury might well find from the facts alleged in the complaint that the same constituted a nuisance. The other members of the Court disagreed with Mr. Justice Hansen on this question.

Mr. Justice Hansen in his dissenting opinion quotes extensively from various cases in an attempt to define the term "nuisance." He says:

"The term 'nuisance' has been said to be incapable of definition so as to fit all cases because the controlling facts are seldom alike and each case stands on its own footing."

He quotes with approval from the case of

Dahl vs. Utah Oil Refining Company,  
71 Utah 1, 262 Pac. 269,

which held that in determining whether a business as conducted constituted a nuisance, the question was one of degree and must be determined by the facts and circumstances involved, *being a question of fact*. He then quotes from

46 C. J. 654

as follows:

"The question as to what constitutes a nuisance depends upon the nature and result of the acts of which complaint is made and not upon the means by which produced or the particular description applied to them. Whether a nuisance exists is a question to be determined, not merely by an abstract consideration of the thing itself,

but in reference to its circumstances. For instance, the reasonableness of the use, the locality, the extent of the injury, the nature and effect of the matters complained of, are matters that must be considered. No particular fact is conclusive. All the attending circumstances must be taken into consideration.”

He further states:

“It frequently happens that the same act or omission may constitute negligence and at the same time give rise to a nuisance, and the existence of a nuisance frequently may presuppose negligence, the two torts being co-existing and incapable of separation. (Citing cases) Whether a given situation, therefore, gives rise to an action based solely upon negligence or solely upon the creation or existence of a nuisance may become a most difficult question to decide, but the mere difficulty involved cannot alter the necessity to make a decision whenever the facts and circumstances create that necessity. The law has long recognized the two types of tort and has established principles and remedies to govern each. It is the Court’s duty to apply such principles and remedies. The inability to precisely delineate, by a satisfactory formula, the division between negligence and nuisance, must of necessity leave the Court and triers of the fact more or less free to say whether negligence or a nuisance is involved in any particular case. But as a guide the following principles have been enunciated. To find a nuisance the dangerous condition must have been consciously created. That is, during the performance of its acts the defendant must have known or it must have been obvious and practically certain to a reasonably prudent person that what it was doing was creating or

was helping to create a dangerous condition. The condition brought about by its acts must have been a conscious objective of the defendant or its acts must have been so reckless and unwarranted as to conclusively imply such intention. The acts which give rise to the condition may be negligent acts but if the condition itself which these acts produced was an objective of the defendant and was dangerous, or if the defendant, as a reasonably prudent person obviously and certainly must have known that the condition which it was creating was or would be dangerous, then, even though it did not intend danger or the unfortunate results, it was under obligation to refrain from performing the acts creating such condition. It then becomes no longer a question of exercising care in the performance of such acts. It becomes an absolute duty not to perform the creative acts at all. The wrongfulness thus has shifted to the doing of the acts as distinguished from the mere failure to exercise care in their performance. A nuisance arises from the violation of an absolute duty not to do and is thus distinguished from negligence which involves the requisite care in the doing.”

We have quoted somewhat liberally from Mr. Justice Hansen’s opinion for the reason that, as we understand it, the other members of the Court found no fault with Mr. Justice Hansen’s dissertation on the law of nuisance, but rather concluded that the facts and circumstances involved did not measure up to the requirements of a nuisance.

The subject of what constitutes a nuisance is discussed in

39 Am. Jur. 380, Section 2.



In the case of

Hall vs. Putneys, 10 NE 2d 204,

the following definition was used by the court:

“The term ‘nuisance’ extends to everything that endangers life or health, gives offense to the sense, violates the law of decency, or obstructs the reasonable and comfortable use of property.”

In

39 Am. Jur. 282, Section 4,  
the author distinguishes between “nuisance” and “negligence.”

In the case of

Hoffman vs. City of Bristol, supra,

a rather complete discussion of what constituted nuisance according to the facts therein involved was entered into by the Court and the Court on page 501 of 155 Atl. reached the following conclusion:

“In the Hewison Case the weight overhanging the street, in the Dyer case the dead tree within the street limits, in the Riccio Case the tree protruding over the highway, in the Rogers Case the catch-basin cover, if constituting a nuisance, was such that the only duty of the city was to remove or abate it. If it was not a structure or condition created by the city, certainly not by acts which were wrongful in nature or in intent actual or implied; the fault, if any, consisted in the failure to use requisite care in remedying a condition otherwise created or occurring. Therein lies the distinction between nuisance to which governmental immunity does not attach, and mere negligence as to which it is available. Herman v. Buffalo, 214 N.Y. 316, 108 N.E. 451.”

There are many other cases which could be cited but we doubt that it would be helpful to the Court. Many of them are cited in Mr. Justice Hansen's opinion in the Husband case.

It seems to us, therefore, that the real question presented is whether or not the allegations of the amended complaint do in fact allege a condition which was so obviously dangerous to life, and particularly to the lives of small children, that a jury might find, as a question of fact, that the same would in fact constitute a nuisance. With that thought in mind, let us look to the allegations of the amended complaint on this subject.

It is alleged in Paragraph 5 (a) that the defendant, by and through its agents, operated and maintained a certain incinerator consisting of a cylindrical body of steel or similar construction 43 inches in diameter and 52 inches in height; that was provided with an opening at or near the bottom, approximately 15 inches in diameter, with another opening at or near the center approximating 15 x 11 inches, into which was deposited, from day to day, various and sundry books, magazines, papers debris and other combustible materials. That there was also deposited therein empty cans and other trash, and that at regular periods the same was ignited and burned, and that the hot ashes, embers, cans and other hot and burning substances were either permitted to be discharged through said opening or were removed from said incinerator and allowed to accumulate while still hot and burning over several feet distance from said incinerator, and that the same was allowed to remain in an open and unguarded place upon the open school grounds

adjacent to an area reserved for children of all ages to play thereon and in that immediate vicinity.

While of course a view of this incinerator and the way it was operated is not available to the members of this Court, it will be available to a jury if the case is tried. But we submit that this description of the large incinerator, of the materials which were burned therein, and of the way the hot residue was removed therefrom and allowed to accumulate for some distance therefrom, certainly created a condition that was dangerous to life and limb. Then, too, it must be remembered and it is so alleged that this area was open playground where children of all ages assembled for recreational activities.

It is further alleged that this condition existed for a long time prior to the 14th day of October, 1948, with the knowledge of the defendant.

It is further alleged that it was further known to the defendant that small children of pre-school age residing in the neighborhood customarily played upon these school grounds with the knowledge and acquiescence of the defendant, and that the defendant knew or should have known that the natural tendency of allowing this condition to exist did create a dangerous and hazardous condition and that it might inflict injury upon children of tender years who resorted to said schoolgrounds for play.

All of these facts are admitted by the demurrer.

We cannot conceive of a more dangerous situation. It is difficult to understand how a school board would permit an incinerator to be placed upon a playground



where children of tender years resorted for play, and it is beyond understanding why it would permit the hot, burning substances to be removed therefrom and scattered, while still hot and burning, around the incinerator, without any protection to small children. Certainly it ought to be obvious to anyone that children run and play and that a child of tender years might conceivably trip or fall into the hot, burning embers. We say that if the defendant permitted a condition like that to exist over a period of time, that it constituted more than mere negligence, that it was a nuisance as defined by our own statute. Or at any rate we say that a jury might very well find from such a condition that a nuisance in fact existed.

As we view it, the other allegations of the complaint are immaterial to the question raised upon this appeal. It is, however, alleged that on the 14th day of October, 1948, this little child, two years of age, daughter of the plaintiff, who lived near the school grounds, was riding a tricycle on the playgrounds and that while passing near this incinerator she either tripped or was otherwise thrown or fell from the tricycle into these hot ashes and burning embers, cans and other debris, which was scattered about the incinerator, and that she was severely burned. The extent of her injuries is alleged as well as the terrific cost to the father for hospital and doctor bills. This little girl, notwithstanding extensive plastic surgery, is permanently disfigured and maimed for life.

It certainly presents a case where, in the language of writers, it seems humanitarian that this loss should

be borne by the members of Ogden City's school district than to be heaped upon this little girl and her father.

## CONCLUSION

Appellants urge with all the sincerity they possess that this Court should adopt the modern, humanitarian view that a board of education should not be immune from maintaining or permitting a nuisance to be maintained upon its public school grounds, and furthermore that the allegations of this amended complaint, all of which are admitted by the demurrer, state facts sufficient to permit a jury, if believed, to find that the condition therein described was in fact a nuisance and that the order of the lower Court sustaining the demurrer and dismissing the action should be reversed.

Respectfully submitted,

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