

OPINION NO. 67-001

Syllabus:

The Board of Trustees of The Ohio State University may not purchase insurance to cover liability other than that growing out of the use of motor vehicles, including auxiliary equipment, and self-propelling equipment, or trailers.

To: Novice G. Fawcett, President, The Ohio State University, Columbus, Ohio
By: William B. Saxbe, Attorney General, January 6, 1967

Your request for an Attorney General's opinion reads in pertinent part as follows:

"Is it permissible for the Board of Trustees to purchase insurance to cover liability which might run: (1) to the University, or (2) directly to the Board of Trustees as a result of litigation based on the theory that the University or a University employee negligently performed a proprietary rather than a governmental function:

"May the University purchase or make available liability insurance which would defend and insure its employees and other representatives against personal liability arising from their activities performed in the scope of University employment or University sponsored activity?"

In regard to your first question it is expedient to begin with an explanation of the nature and function of a state university and its board of trustees. This is well stated in Robert E. Neil v. The Board of Trustees of The Ohio Agricultural and Mechanical College, 31 Ohio St. 15, at page 21, reading as follows:

"The act is entitled 'an act to establish and maintain an Agricultural and Mechanical College in Ohio'. [The defendant is the predecessor of The Ohio State University]. It creates a board of trustees to be appointed by the Governor, by and with the advice and consent of the senate, and commits to such board the government, control and general management of the affairs of the institution, and while the statute authorizes the board to make contracts for the benefit of the college, and to maintain actions, if necessary, to enforce them and to exercise other powers similar to those conferred on bodies corporate, it does not assume to, nor does it in fact, create or constitute such board of trustees a corporation; * * *. The college is a state institution, designed and well calculated to promote public educational interests, established for the people of the whole state, to be managed and controlled by such agencies as the legislature in its wisdom may provide." (Emphasis added)

Thus the University is described as a "public" or "quasi" corporation, which, as an agency of the state, performs only state or governmental functions. Therefore the doctrine of governmental and proprietary functions does not apply to a State University.

Section 16, Article I, of the Ohio Constitution, provides in pertinent part as follows:

"* * *Suits may be brought against the state, in such courts and in such manner, as may be provided by law."

Herein rests the basis for the doctrine of sovereign immunity which prevails in Ohio. The doctrine, in brief, provided that the state is not subject to suit in its own courts without its express consent. In Palmer v. State, 96 Ohio St. 513, the Supreme Court of Ohio held that Section 16 was not self-executing; that in the absence of enabling legislation suit may not be brought against the state. The Court in Wolf v. Ohio State University Hospital, 170 Ohio St. 49, further found that the authority granted by Section 16, Article I, Constitution, has not been exercised by the general assembly so as to provide for tort actions against the state, its agencies, or officers.

In Wolf v. The Ohio State University Hospital, *supra*, the specific question to be determined is stated by the Court at page 50 as follows:

"The sole question of law here presented is whether these defendants, the Ohio State University Hospital and the board of trustees of the University, are suable in tort."

The answer stated in the opinion is an unqualified "no".

It is self-evident that where there is immunity from suit, the question of tort liability cannot arise, for the question of liability only arises when the state has consented to be sued. Thus, since the board of trustees and the University are not subject to tort liability, there is nothing in this respect for the board to insure against. The payment of a premium on account of such insurance, if procured by the board, would be tantamount to a gift of public funds to the insurance company.

Your second question, which refers to liability running directly to employees of the University, may be answered as follows: The board of trustees, with one exception hereinafter pointed out, may not purchase liability insurance to protect its employees against liability for their own negligence. The reasoning hereinabove set forth is applicable. For although the employee may be personally liable for his own negligence, the University and the Board of Trustees do not partake of this liability. Hence any subscription by the board of trustees for liability insurance to underwrite the private responsibility of individual employees, would constitute a diversion of public monies for private purposes. This expenditure would clearly come within the prohibition of Section 4, Article VIII, Constitution of Ohio, which specifically prohibits the diversion of public funds for private purposes.

However, as alluded to above, there exists one exception to this rule. The exception is found in Sections 9.82 and 9.83, Revised Code, as follows:

Section 9.82, Revised Code, reads as follows:

"As used in sections 9.82 and 9.83 of the Revised Code:

"(A) 'State' means the state of Ohio or any department, division, commission, board, educational or other institution of the state of Ohio.

"(B) 'Political subdivision'

means county, city, village, township, park district, or school district."

Section 9.83, Revised Code, reads as follows:

"The state and any political subdivision may procure a policy or policies of insurance insuring its officers and employees against liability on account of damage or injury to persons and property, including liability on account of death or accident by wrongful act, occasioned by the operation of a motor vehicle, motor vehicle with auxiliary equipment, or all self-propelling equipment or trailers owned or operated by the state or a political subdivision, while said vehicle is being used or operated in the course of the business of the state or the political subdivision."

In a recent Informal Opinion I had occasion to consider Sections 9.82 and 9.83, Revised Code, and held in pertinent part as follows:

Opinion No. 168, Opinions of the Attorney General for 1966:

"* * *Following the constitutional injunction that no bill shall contain more than one subject, which shall be clearly expressed in its title, it is of interest to note that the title to the act, and the act itself, that were considered and passed by the legislature, and eventually became law, contain the title in the following language: 'State and subdivisions may insure officers and employees against motor vehicle accidents liability.' From this title and the law, it is clear that liability insurance is not considered in any other form except to protect those who may operate vehicles on behalf of the state and its subdivisions. The statute is silent as to liability insurance on other kinds or class of property.

"* * *Section 9.83, Revised Code, does not provide that a political subdivision /or state/ may purchase insurance to cover liability other than that growing out of the use of motor vehicles. * * *"

It is therefore my opinion and you are advised that the Board of Trustees of The Ohio State University may not purchase insurance to cover liability other than that growing out of the use of motor vehicles, including auxiliary equipment, and self-propelling equipment, or trailers.