

Note from the Attorney General's Office:

1927 Op. Att'y Gen. No. 27-0461 was overruled in part by 2012 Op. Att'y Gen. No. 2012-009.

461.

GUARD RAILS—NO LEGAL DUTY PLACED UPON DEPARTMENT OF HIGHWAYS AND PUBLIC WORKS TO ERECT SAME—WHEN IT IS THE DUTY OF COUNTY COMMISSIONERS TO ERECT AND MAINTAIN SAME.

SYLLABUS:

1. *There is no legal duty placed upon the Department of Highways and Public Works to erect and maintain guard rails at either fills, dangerous curves and other dangerous places on inter-county highways and main market roads, or at approaches to bridges.*

2. *Since guard rails in dangerous places are necessary to render the public roads and highways reasonably safe for travel and are an integral part of the roads and highways, the Department of Highways and Public Works may expend funds appropriated for the construction or maintenance and repair of state roads for the purpose of paying the whole or a part of the cost of erecting and maintaining guard rails at dangerous places. Such authority is necessarily to be implied from Section 1178 and related sections of the General Code.*

3. *The duty enjoined on county commissioners to erect and maintain guard rails at the places specified and in accordance with the provisions of Section 7563, General Code, was not removed by the passage of the State Highway law (105-106 v. 623—General Code, Section 1178 and related sections) or any later amendment thereto.*

4. *It is not the legal duty of county commissioners to erect and maintain guard rails at all fills, dangerous curves, and other points of danger on inter-county highways or at all approaches to bridges, but only at the places specified in Section 7563, General Code, not located in a municipality receiving a part of the bridge fund, viz., (1) at each end of a county bridge, viaduct or culvert more than five feet high, (2) at every approach to a county bridge, viaduct or culvert if the approach or embankment is more than six feet high, and (3) at wash banks more than eight feet in height, where such banks have an immediate connection with a public highway, or are adjacent thereto, in an unprotected condition.*

COLUMBUS, OHIO, May 7, 1927.

HON. GEORGE F. SCHLESINGER, *Director, Department of Highways and Public Works, Columbus, Ohio.*

DEAR SIR:—Receipt is acknowledged of your letter of recent date reading as follows:

“This department very frequently has claims for damages from motorists who run off the road on fills or curves on the highway. Their claims are based on the fact that this department has not erected guard rails along these dangerous places.

In view of these claims will you please advise me concerning the following questions:

1. Is it the duty of this department to erect guard rail on fills, dangerous curves or other dangerous places on an inter-county highway?
2. Is it the duty of this department to erect guard rail on approaches to bridges?
3. Is it the duty of the county commissioners to erect guard rail on fills, dangerous curves or other points of danger on inter-county highways?

4. Is it the duty of the county commissioners to erect guard rail on approaches to bridges?"

I am informed by you that it has been the practice of your department to make agreements with the county commissioners of the various counties whereby the county pays fifty per cent of the cost of erecting guard rails at dangerous places and fifty per cent is borne by the state.

I find no statute making it the duty of the Department of Highways and Public Works to erect guard rails either at fills, dangerous curves and other dangerous places on inter-county highways and main market roads, or at approaches to bridges. Nor is there any statute *expressly* authorizing such department to expend funds, appropriated for the construction or for the maintenance and repair of roads taken over by the state, for the purpose of paying in whole or in part the cost of erecting and maintaining guard rails.

However, in view of the demands of present day traffic and of the fact that, in order to obtain the fullest use and benefit of the public roads and highways, it is essential that they be reasonably safe for legitimate travel, I am of the opinion that guard rails in dangerous places are in reality an integral part of the highways and that from the grant of power to construct, improve, maintain and repair a state system of highways, conferred by Section 1178 and related sections of the General Code, the power to erect and maintain guard rails at such places as may be deemed necessary must be necessarily implied.

As to the duty of county commissioners to erect guard rails at the places specified in your letter, your attention is directed to Section 7563, General Code, which reads as follows:

"The board of county commissioners shall erect or cause to be erected and maintained where not already done, one or more guard rails on each end of a county bridge, viaduct or culvert more than five feet high. They shall also erect or cause to be erected, where not already done one or more guard rails on each side of every approach to a county bridge, viaduct or culvert if the approach or embankment is more than six feet high. They shall also protect, by suitable guard rails, all perpendicular wash banks, more than eight feet in height, where such banks have an immediate connection with a public highway, or are adjacent thereto, in an unprotected condition, but in such cities and villages as by law receive part of the bridge fund levied therein, such guard rails shall be erected by the municipality."

You will observe that by the terms of this section it is the duty of the county commissioners *to erect or cause to be erected and maintained* guard rails (1) at each end of a county bridge, viaduct or culvert more than five feet high, (2) at each side of every approach to a county bridge, viaduct or culvert if the approach or embankment is more than six feet high and (3) at all perpendicular wash banks more than eight feet in height, where such banks have an immediate connection with a public highway, or are adjacent thereto, in an unprotected condition; the section further providing that where by law a city or village receives a part of the bridge fund, such guard rails shall be erected by the municipality.

Section 7565, General Code, provides as follows:

"Failure to comply with the provisions of the next two preceding sections shall render the county liable for all accidents or damages as a result of such failure."

The Supreme Court of Ohio has not passed upon the question as to whether or

not the creating of a Department of Highways and Public Works and the sections of law defining the duties of such department and conferring thereon the supervision and control of all inter-county highways and main market roads, has entirely taken away the duty of county commissioners as provided in Section 7563 of the General Code. However, this question was presented in the case of *Harrigan, Administrator, vs. Board of County Commissioners*, 31 O. C. A. 449, decided June 25, 1919, by the Court of Appeals for Lawrence county, in which case the court held:

"The principal purpose of requiring guard rails to be erected at the ends of certain county bridges and on each side of the approaches thereto, as required by Section 7563, is to warn drivers of the location of danger.

The duty enjoined on county commissioners by the provisions of such sections was not relieved by the passage of the state highway law (105-106 O. L., p. 623-666) or any later amendment thereof."

In that case the facts, as stated in the opinion, were as follows:

"April 16, 1917, plaintiff's decedent lost her life by the falling of an automobile, in which she was riding, from a county bridge over Lick Creek, about five miles above Ironton, near the Ohio river. The negligence complained of was the failure of the county commissioners to erect guard rails along the approach to and at the end of the bridge.

There were no guard rails erected on the approach to the bridge where the accident happened. * * * There was evidence tending to show that state aid was used in the improvement of the road from the floor of the bridge for a distance toward Ironton, and that it was at the date of the accident a state road and under state control, being an inter-county highway and main market road."

The trial court directed a verdict in favor of the defendant at the close of all the evidence.

One of the defenses of the county commissioners was that "as the State Highway Department has control and the duty to repair and maintain the road the defendant, the board of county commissioners," was not liable.

In its opinion by Judge Middleton, the court quoted the provisions of Section 7563, supra, and 7564, General Code, and referred to Section 7565, above quoted.

The court then said as follows:

"It is contended that since the road has come under the control of the State Highway Department the county commissioners were relieved of their duty to comply with Sections 7563 and 7564. However, these sections have not been expressly repealed and if they are now superseded by the state highway law it is because they are inconsistent with such law. The following is the last section of the act of June 5, 1915 (105-106 O. L., p. 666):

'This act shall supersede all acts and parts of acts not herein expressly repealed, which are inconsistent herewith * * *'

Section 7464 provides that inter-county highways and main market roads constructed by the state, or taken over by it, shall be maintained by the State Highway Department.

Section 7465 provides that under certain conditions county and township roads may become state roads.

Section 1178 provides:

'There shall be a State Highway Department for the purpose of affording

instruction, assistance and cooperation in the construction, improvement, maintenance and repair of the public roads and bridges of the state * * *.'

These sections, and others, show that the legislature intended to create a State Highway Department and give it control over certain highways for the construction, improvement, maintenance and repair of the same. But our attention has not been called to any provision, nor have we found any, which makes it the duty of the State Highway Department to erect guard rails. If by the state highway law the duty to erect guard rails had been placed on the Highway Department then there would have been an inconsistency between its provisions and the provisions of Sections 7563 and 7564, and the former would supersede the latter. But we can see no inconsistency between a law which confers authority upon the officers of a department to construct, improve, maintain and repair certain roads and a law which directs other officers to erect guard rails on the approaches and ends of bridges. The legislature may have concluded that since it was the duty of county commissioners to erect guard rails, where required, at all other bridges in the county it might remain their duty to place guard rails, where required, at bridges on roads under state control.

Besides, the legislature may have considered, in enacting the state highway law, that to put the duty of erecting guard rails on the State Highway Department would be virtually eliminating a right of action for injuries where one should exist, and left the duty and liability remain."

In construing the term "wash bank" as used in Section 7563, *supra*, the Court of Appeals for Jefferson county held in the case of *Kerr, Admr., vs. Hougher, et al., Board of County Commissioners*, 16 O. A. 434, that:

"1. The words 'wash bank' in Section 7563, General Code, mean a bank composed of such substance that it is liable to be washed away by the action of the water thereon, so as to become unsafe to travelers on such highway.

2. The county commissioners are not required under Section 7563, General Code, to protect by guard rails banks immediately connected with or adjacent to a public highway unless they have a perpendicular drop of more than eight feet from the surface of the highway and are composed of such substance that they may be washed away by the action of water thereon so as to be unsafe for travel on such highway."

Your attention is also directed to the case of *Riley vs. McNicol, et al., Board of County Commissioners*, 109 O. S. 29, decided by the Supreme Court of Ohio on December 4, 1923. The syllabus in the case reads:

"A board of county commissioners constructed a highway 24 feet in width, with a 14-foot paved brick road in the center. At the bottom of the embankment it inserted a 12-inch corrugated pipe, 44 feet in length; this pipe was 13 feet below the surface level of the traveled highway and the ends thereof 10 feet distant therefrom. Held, such a pipe was not a 'culvert' within the meaning of Section 7563, General Code, and the board is not liable for failure to erect and maintain guard rails at a point on the highway above such pipe, or on the side of an approach thereto."

In so far as the question decided by the Court of Appeals in the Harrigan case, *supra*, (31 O. C. A. 449) is concerned, the Supreme Court at page 35 of the opinion in this case of *Riley vs. McNicol, et al.*, said as follows:

"In the trial court one of the defenses of the board was that at the time of the accident that part of the highway was an inter-county highway, and under the control of the State Highway Department. In the Court of Appeals and in this court counsel for the board complain that that feature of the cause was not submitted to the jury under the evidence offered. However, it is unnecessary to dispose of that feature, in view of our decision upon the other branch of the case."

Since the decision in the *Harrigan* case, *supra*, I do not find that Sections 7563 to 7565, *supra*, have been amended by the legislature, or that the state highway law has been so changed as to make inapplicable the conclusions and reasoning of the opinion in that case.

In answer to your first and second questions it is, therefore, my opinion that there is no legal duty placed upon the Department of Highways and Public Works to erect and maintain guard rails at either fills, dangerous curves and other dangerous places on inter-county highways and main market roads, or at approaches to bridges. However, since guard rails in dangerous places are necessary to render the public roads and highways reasonably safe for travel and are an integral part of the roads and highways, the Department of Highways and Public Works may expend funds appropriated for the construction or maintenance and repair of state roads for the purpose of paying the whole or a part of the cost of erecting and maintaining guard rails at dangerous places. Such authority is necessarily to be implied from Section 1178 and related sections of the General Code. I am further of the opinion that in view of the holding in the case of *Harrigan, Administrator, vs. Commissioners*, *supra*, the duty enjoined on county commissioners to erect and maintain guard rails at the places specified and in accordance with the provisions of Section 7563, General Code, was not removed by the passage of the state highway law (105-106 v. 623,—General Code, Section 1178 and related sections) or any later amendment thereto.

Answering your third and fourth questions, I am of the opinion that it is not the legal duty of county commissioners to erect and maintain guard rails at all fills, dangerous curves, and other points of danger on inter-county highways or at all approaches to bridges, but only at the places specified in Section 7563, General Code, not located in a municipality receiving a part of the bridge fund, *viz.*, (1) at each end of a county bridge, viaduct or culvert more than five feet high, (2) at every approach to a county bridge, viaduct or culvert if the approach or embankment is more than six feet high, and (3) at wash banks more than eight feet in height, where such banks have an immediate connection with a public highway, or are adjacent thereto, in an unprotected condition.

Respectfully,
EDWARD C. TURNER.
Attorney General.

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APPROVAL, TRANSFER OF LEASE TO BUCKEYE LAKE LAND KNOWN AS "ROWND ISLAND."

COLUMBUS, OHIO, May 7, 1927.

HON. GEORGE F. SCHLESINGER, *Director of Highways and Public Works, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your communication of recent date which reads as follows: