

1655.

SCHOOL BUS—LIABILITY OF DRIVER, DISCUSSED.

SYLLABUS:

A driver of a school wagon or motor van, used in the transportation of pupils to and from the public schools, is individually liable for injuries caused by the negligence of such driver in the operation of such wagon or motor van, even though such driver was at the time employed by a board of education and was engaged in the performance of a public duty required by law to be performed by such board of education. Such liability may be enforced in a civil action sounding in tort. In addition, under the holding of the Supreme Court of Ohio in the case of United States Fidelity and Guaranty Company vs. Samuels, 116 O. S. p. 586; 157 N. E. 325, a driver of a wagon or motor van, used in the transportation of pupils to and from the public schools, together with his sureties, are liable on the bond of the driver, required to be given by Section 7731-3, General Code, for the negligent operation of the school wagon or motor van by such driver, in the performance of the duties for which he was employed, and such liability may be enforced against the driver and his sureties in a proper action brought for that purpose.

COLUMBUS, OHIO, February 2, 1928.

HON. C. LUTHER SWAIN, *Prosecuting Attorney, Wilmington, Ohio.*

DEAR SIR:—This will acknowledge receipt of your request for my opinion, which reads as follows:

“The opinion of the Attorney General has been asked in regard to the carrying of liability insurance for school bus drivers.

I am aware of Opinion 875 by the Attorney General for 1923, 696, and also Opinion of the Attorney General of 1922, page 31.

The particular phase in this question is to the liability of a school bus driver who is not under direct employ of the Board of Education, but contracts with the Board for the hauling of the children for a year. In case of an accident, would this man be responsible or would he be regarded as carrying out a governmental duty?”

Since the decisions in the cases of *Aldrich vs. City of Youngstown*, 106 O. S. 342, and *Board of Education vs. McHenry*, 106 O. S. 367, it has been generally recognized that boards of education act in a governmental capacity in contra-distinction to a proprietary capacity when engaged in carrying out the provisions of law relating to the transportation of pupils and, therefore, are not liable in tort for injuries to third persons growing out of such transportation. This department so held in the opinion of 1923 to which you refer. The syllabus of said opinion, published in Opinions of the Attorney General for 1923, at page 696, reads as follows:

“In view of the recent decision of the Supreme Court of Ohio in the case of *Board of Education vs. McHenry, Jr.*, 106 O. S. 367, and in the case of *Aldrich vs. Youngstown*, 106 O. S. 342, a board of education would not be liable either to a pupil or other person for personal injury or property damage caused by the negligence of the driver of the school motor bus.”

The question arises whether or not the driver of a school wagon or motor van, while in the performance of his duties in carrying out, for his employer, what is held to be a governmental function, is himself relieved for that reason from responsibility on account of his own negligence.

It has been definitely stated by our Supreme Court that such immunity from liability does not exist in favor of the officer or employe of the city when carrying out the governmental functions of the city.

In the case of *United States Fidelity & Guaranty Co. vs. Samuels*, 116 O. S. page 586, the opinion in which was published in *The Ohio Law Bulletin and Reporter* in the issue of July 11, 1927, it was held:

"Where in the discharge of official duties a police officer fails to take that precaution or exercise that care which due regard for others requires, resulting in injury, his conduct constitutes misfeasance."

In this case suit was brought against the surety on a police officer's bond, seeking to subject the surety to the payment of a judgment which had been recovered against the police officer, on account of the negligence of the officer while in the performance of his duty as such police officer for the municipality. In the course of the opinion the court said:

"It does not follow that, because an action cannot be maintained against the city for the act of an official representing the city in the discharge of a governmental duty, there can be no recovery by a third person against the surety on the bond of such official. If there be a violation of the guaranty that the official will faithfully discharge his duties, there can be a recovery upon his bond by one injured by such failure, although there could be no recovery from the city."

From the principles stated in the opinion in the *Samuels* case, *supra*, it follows, in my opinion, that the driver of a school wagon or motor van, whether he be an employe of the board of education or an independent contractor, while in the transportation of pupils to and from the public schools, is responsible in tort for his failure to take that precaution or exercise that care which due regard for others requires. Under the holding of the Supreme Court of Ohio in the *Samuels* case, *supra*, action would also lie in contract against the driver and his sureties for breach of the guaranty in the bond of the driver, required by Section 7731-3, General Code, that the driver would faithfully discharge the duties of his employment.

This question was more exhaustively treated in Opinion No. 1632, rendered under date of January 30, 1928, to the Department of Education, a copy of which I am enclosing herewith.

Respectfully,
EDWARD C. TURNER,
Attorney General.