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INSURANCE—TYPE OF INSURANCE AUTHORIZED BY SECTION 7731-5 FOR LIABILITY OR CASUALTY INSURANCE COVERING TRANSPORTATION OF SCHOOL CHILDREN.

*SYLLABUS:*

*The class of insurance which a board of education is authorized to effect by the terms of Section 7731-5, General Code, is what is popularly known as liability or casualty insurance covering the legal liability for personal injury or property damage growing out of the operation of conveyances used in the transportation of school children to and from school or school events under the jurisdiction of the assured, providing the actual use of the vehicle is at the time with the permission of the assured board of education, and providing further that the insurance effected by the proposed policy covers not only liability or casualty insurance as above described, but as well compensation for injury or death to any school pupil caused by any accident arising out of or in connection with the operation of the conveyance covered by the policy while used in the transportation of such school pupils.*

COLUMBUS, OHIO, December 22, 1936.

*Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.*

GENTLEMEN: You have submitted for my consideration a specimen policy of insurance which one of the reputable insurance companies of Ohio has proposed as meeting the conditions and limitations of Section 7731-5, of the General Code of Ohio, and you inquire as to the power of district boards of education within the state to enter into such contracts of insurance as are provided for by the proposed policy, and to pay the premiums therefor from public funds, in pursuance of this statute.

The proposed policy recites in part:

“The \_\_\_\_\_ Insurance Company (Hereinafter Called the Company), In Consideration of the payment of the premium and subject to the terms, conditions and limitations contained herein, does hereby insure the owner of this policy, herein called the Insured, for a term of one year from date hereof, against loss caused by bodily injuries as hereinafter provided and in the sums hereinafter specified.

Following this introductory clause is “SECTION A—Indemnity for Death, Dismemberment or Loss of Sight—Payments in One Sum”.

Under this indemnity heading are listed specified sums to be paid for loss of life, for loss of both eyes, or both hands, or both feet, and for loss of one hand, one foot, one eye, one hand and one foot, one hand and loss of sight of one eye, and for loss of one foot and sight of one eye. Payments of indemnity are not to be paid for more than one loss enumerated under indemnities headed "Payments in One Sum."

Indemnities listed as such are to be paid only in case loss results within thirty days from date of the accident, from accidental bodily injury solely and independently of all other causes and only if such injuries are sustained as follows:

"While riding in a School Bus, or any conveyance approved by the Board of Education used to transport school pupils or students, going to or returning from School; or, while going to or returning from School athletic games or other School functions which have been authorized by proper School authorities, and while said Bus or conveyance is being driven by the regularly authorized driver; or, while getting on or off said School Bus or said conveyance; or, while crossing the public highway approaching or leaving said School Bus or said conveyance; or, while acting under the instruction of the driver of said School Bus or said conveyance for the purpose of directing traffic while said School Bus or said conveyance is stopped to take on or discharge school pupils or students; or, while said School Bus or said conveyance is stopped at railroad crossings; or, for any other necessary purpose incidental to its use as a School Bus or such conveyance; provided, that at the time of injury the Insured is regularly enrolled as a pupil or student at some Public School."

Under "SECTION B." of the proposed policy the following appears:

#### "PAYMENT FOR EXPENSE OF

Treatment by a Physician or Surgeon, Nurses and Hospital Fees.

If the Insured shall suffer, under any of the conditions described in Section A, any injury which shall result in a disability for which no indemnity is herein provided, but which shall require immediate treatment by a Physician or Surgeon, hospital confinement, or the employment of a Trained Nurse, the Company will pay, in addition to any other indemnity to which the Insured may be entitled, the actual expense of such treatment, hospital charges and Nurses' fees up to an amount not exceeding ONE HUNDRED DOLLARS (\$100.00); provided that notice

of claim as required by Standard Provision Four., shall be given the Company within 20 days after the date of injury and that receipted bills for the actual expense of such treatment, hospital charges and Nurses' fees shall be filed with the Company within 60 days after the date of the injury."

Both "Section A" and Section B" of the proposed policy are subject to certain enumerated "Standard Provisions" and "General Provisions", among which is the following:

"No. 21—The total sums payable in claims under this policy and other policies covering in a similar manner, shall be limited to \$100,000.00 for any one accident in connection with the operation of any single school bus or conveyance."

The provisions contained in the "Standard Provisions" and "General Provisions" of the proposed policy are, I believe, reasonable and proper, and similar to such provisions as are usually contained in policies of insurance, and do not affect the liability under this policy in such a manner as to require consideration for our present purpose. The question before us is whether or not the proposed policy of insurance affords protection contemplated by Section 7731-5, General Code. If it does, it clearly follows that boards of education may lawfully pay the premium from public funds to effectuate the insurance.

I do not have before me the charter authority of the particular insurance company which has proposed the issuance of this policy, but I assume, for the purposes of this opinion, that any company assuming to effect insurance such as is contemplated by the specimen policy here under consideration, is authorized under the laws relating to insurance, to do so, and that the schedule of premiums accompanying the policy meets actuarial requirements. Section 7731-5 of the General Code reads:

"The board of education of each school district may procure liability and property damage insurance covering each school wagon or motor van and all pupils transported under the authority of such board of education. This insurance shall be procured from a recognized insurance company authorized to do business of this character in the state of Ohio, and shall include compensation for injury or death to any pupil caused by any accident arising out of or in connection with the operation of such school wagon, motor van or other vehicle used in the transportation of school children. The amount of liability insurance carried on account of any school wagon or motor van shall not exceed one hundred thousand dollars."

It will be observed that the first sentence of the above statute authorizes boards of education to procure "liability" insurance. The term "liability insurance", as it is generally understood, is insurance against a liability which may be incurred, and no such policies of insurance are written without the proviso in substance at least, that the insurance company will not be liable directly to a claimant until such time as the claimant has recovered a judgment against the insured or at least unless circumstances are such that a judgment could be obtained against the insured. In other words, unless the insured is liable, the insurance company cannot be held; nor does the word "liability", as it is generally used in connection with tort liability or damage liability for injuries exist unless the damage or loss is occasioned by negligence either of the insured himself, or of his servant or agents. The word "liability" is defined by Bouvier, as:

"Responsibility; the state of one who is bound in law and justice to do something which may be enforced by action."

See:

McElfroth v. Kirkendale, 36 Iowa, 226; Wood v. Currey, 57 Calif., 209; Joslin v. Car Spring Co., 36 N. J. L., 145.

The Supreme Court of Massachusetts, in the case of Employers' Liability Assurance Company v. Maryland, 155 Mass., 404, held that the term "liability insurance" as it is ordinarily used, covering personal injuries is understood to mean insurance covering accidents to others than the insured, provided the insured stands in such relation to the person accidentally killed or injured as to be legally liable for the result of the accident, as distinguished from accident insurance or strict indemnity insurance against loss or damage to the person injured.

It has been the settled law of this state, as well as most other states, for many years, that boards of education are not liable in their corporate capacity for injuries or loss to third persons arising out of their negligence or that of their servants or agents for the reason that boards of education are governmental agencies performing a governmental function.

Finch v. Board of Education, 30 O. S., 37;  
Board of Education v. McHenry, Jr., 106 O. S., 357;  
Conrad v. Board of Education, 29 O. A., 317.

This rule has been applied directly by the courts of other states to accidents growing out of the transportation of school pupils and no

doubt would be applied by the courts of this state should the occasion arise.

Harris v. Salem School District, 72 N. H., 424;  
Allen v. School District, 216 N. W., 533 (Minn.)

Of course, this rule of non-liability could be changed by statute, but I do not think the legislature, by the enactment of Section 7731-5, General Code, meant to change the rule with respect thereto, which has been followed by the courts of Ohio for many years. We must assume that the legislature, in enacting this statute knew of this rule, and therefore used the term "liability" in a sense different than simply limiting it to the liability of a board of education itself.

Moreover, the legislature must have known that in the transportation of school pupils, the board of education itself does not operate the school conveyance. Those conveyances are always operated by servants or agents of the board. These servants or agents of the board who operate school conveyances are liable to third parties for the consequences growing out of their own acts of negligence. The question of the power of boards of education to pay from public funds premiums to effectuate insurance to protect the drivers of these vehicles has been frequently raised. It has always been the consensus of opinion, at least prior to the enactment of Section 7731-5, General Code, that it would require some further legislation than then existed to empower boards of education to effect such insurance and pay the premiums thereon from public funds. It is reasonable to conclude that the legislature in enacting this statute meant to provide for this kind of insurance. In fact, the terms "liability insurance" or "property damage insurance" as the terms are now popularly used, are understood to include protection for others than the insured himself, who may use the vehicles covered by the insurance if said use is with the consent of the insured. I have before me at this writing such a policy. It is an ordinary liability or casualty policy issued by one of the leading casualty companies, covering personal injury liability ("COVERAGE A") and property damage liability ("COVERAGE B") suffered by the named "assured" growing out of the operation of a certain motor vehicle definitely described in the policy. This policy contains the following clause:

"The unqualified word 'Assured' wherever used in Coverage A and B and in other parts of this Policy when applicable to these Coverages, includes not only the named Assured but also any person while using the automobile and any person or organization legally responsible for the use thereof, provided the disclosed and actual use of the automobile is 'Pleasure and Business'

or 'Commercial' each as defined herein, and provided further that the actual use is with the permission of the named Assured."

It is concluded therefore that the kind of insurance which is contemplated by Section 7731-5, General Code, wherein liability and property damage insurance are spoken of, is insurance covering liability of each and every driver of a school conveyance legally and lawfully authorized to drive the conveyance with the consent and knowledge of the assured board of education while such vehicle is being used in the transportation of school children to or from school or school events under the jurisdiction of the assured board of education. By the plain terms of the statute, however, the insurance effected by authority of said statute must, to be such insurance as is authorized by the statute, include in the same policy Compensation for injury or death to any pupil caused by any accident arising out of or in connection with the operation of the vehicle when the vehicle is being used in the transportation of school pupils.

Without pursuing this subject further, your attention is directed to an opinion of this office which will be found in the reported Opinions of the Attorney General for 1933, page 1310, where it is held:

"Section 7731-5, General Code, does not create any liability upon the part of boards of education for accidents resulting from the negligence of such boards in the transportation of school children under their authority.

Said section contemplates what is commonly known as accident insurance as well as liability insurance."

Another Opinion along the same line, will be found in the reported Opinions of the Attorney General for 1934, page 1806, where it is held:

"Unless a contract of insurance entered into by a board of education provides for compensation for injury or death to any school pupil caused by any accident arising out of or in connection with the operation of a school bus or other vehicle used in the transportation of school children it is not such a contract as a board of education is authorized to enter into by favor of Section 7731-5, General Code."

The proposed policy here under consideration, does probably provide compensation for injuries to any pupil growing out of any accident arising out of or in connection with the operation of a school bus or conveyance used in the transportation of school pupils. It does not, however, provide any sort of liability insurance, and it is therefore my opinion that

a policy of insurance such as the specimen policy here under consideration, is not such a policy as is authorized by the statute, and that boards of education are not authorized by this statute to effect this insurance and pay the premium thereon from public funds.

In conclusion, I am of the opinion that the class of insurance which a board of education is authorized to effect by the terms of Section 7731-5, General Code, is what is popularly known as liability or casualty insurance covering the legal liability for personal injury or property damage growing out of the operation of conveyances used in the transportation of school children to and from school or school events, under the jurisdiction of the assured, providing the actual use of the vehicle is at the time with the permission of the assured board of education, and providing further, that the insurance effected by the proposed policy covers not only liability or casualty insurance as above described, but as well compensation for injury or death to any school pupil caused by any accident arising out of or in connection with the operation of the conveyance covered by the policy while used in the transportation of such school pupils.

Respectfully,

JOHN W. BRICKER,  
*Attorney General.*

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APPROVAL—AGREEMENT COVERING SEPARATION OF  
GRADE OF TRACK IN TUSCARAWAS COUNTY, OHIO—  
WHEELING AND LAKE ERIE CO.

COLUMBUS, OHIO, December 22, 1936.

HON. JOHN JASTER, JR., *Director of Highways, Columbus, Ohio.*

DEAR SIR: You have submitted for my consideration a proposed agreement by and between the Director of Highways, The Wheeling and Lake Erie Railway Company and the Board of Commissioners of Tuscarawas County, covering the separation of the grade of the track of the said company and County Road No. 396-b, east of Valley Junction in Tuscarawas County, Ohio.

After examination, it is my opinion that said proposed agreement is in proper legal form and when the same is properly executed it will constitute a valid and binding contract.

Said proposed contract is being returned herewith.

Respectfully,

JOHN W. BRICKER,  
*Attorney General.*