1631.

APPROVAL, BONDS OF THE VILLAGE OF MEDINA, MEDINA COUNTY—$13,500.00.

COLUMBUS, OHIO, January 28, 1928.

Industrial Commission of Ohio, Columbus, Ohio.

1632.

SCHOOL BUS—DRIVER MUST FURNISH BOND—LIABILITY OF DRIVER DISCUSSED.

SYLLABUS:

1. *The driver of a school wagon or motor van used in the transportation to and from a public school is required to execute a bond conditioned upon the faithful discharge of his duties as such driver.*

2. *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 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, January 30, 1928.

HON. J. L. CLIFTON, *Director of Education, Columbus, Ohio.*

DEAR SIR:—This will acknowledge receipt of your inquiry as follows:

"In contracting with men who operate school vans the cost of this service depends in some measure on whether the owners and operators of these school vans, the service of which is contracted for by boards of education, are responsible in case of an accident and, hence, whether for their own protection they should carry liability insurance. We need, therefore, your opinion on whether the owner or operator of a vehicle employed by a board of education in the transportation of school children is responsible in case of accident in a possible suit to recover damage for injury."

In Article I, Section 16 of the Constitution of Ohio, it is provided:

> "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. * * * "

This is a mere restatement of the principles of common law which seek to secure inviolate the rights of personal safety and personal property. Any invasion of these rights entitles the person suffering injuries thereby to be compensated therefor by the only practical means of compensation, that is, money damages to be recovered from the person who by reason of what the law terms fault or negligence, has caused the damage. The constitution does not define injury or state what the remedy shall be, or how justice shall be administered, other than that it shall be by due course of law.

Not every injury is compensable. In fact, not even every injury from which flows damages is compensable. It has been determined by due course of law that when damage is suffered by one not himself at fault, on account of an injury proximately caused by the negligent act of another, the person suffering the damage may recover from the person who caused it. If, however, the injury be the result of an unavoidable accident, or of the concurrent negligent act of the person injured and another, or the act of a sovereign state or political subdivision thereof in the performance of a governmental duty, or an act of God, no remedy exists.

In due course another rule of law was developed to the effect that what may be done by a person may be done by him through his agent or servant, and thus the principal became liable for the acts of his servant or agent to the same extent as though the act had been done by himself. The negligent act of the servant or agent within the scope of his employment became the act of the principal to the same extent that it had been the act of the servant and burdened the principal with the same liability that befell the servant because of his negligent act.

This latter rule of law, however, known as the rule of respondeat superior, is held not to apply to sovereign states or subdivisions thereof, in the exercise of governmental functions in the public interest and for public purposes, as distinguished from the exercise of purely proprietary functions.

Since the pronouncement of this rule by the Supreme Court of Ohio in its decision 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 in carrying out the provisions of law relating to the transportation of pupils are engaged in the performance of a governmental duty in the public interests and for public purposes; and following the early case of *Finch* vs. *Board of Education*, 30 O. S. 37, such boards can not be held to respond in damages for injuries inflicted in the performance of this duty. This conclusion was reached in a former opinion of this department reported in Opinions of the Attorney General, 1923, page 696, wherein it was stated in the syllabus:

> "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."

This immunity from liability in the carrying out of a sovereign or governmental function is confined to the governmental agency so performing this duty, and does not extend to the servant or employe who may himself be guilty of actionable negligence. Such employe, although performing an act in furtherance of what for his employer is a governmental duty, nevertheless acts, so far as he himself is concerned, in a private and proprietary capacity and is responsible for his negligent acts to the same

extent as though he were acting for himself, or for an employer other than a governmental agency carrying out a governmental project.

Section 7731-3, General Code, reads as follows:

> "When transportation is furnished in city, rural or village school districts no one shall be employed as driver of a school wagon or motor van who has not given satisfactory and sufficient bond and who has not received a certificate from the county board of education of the county in which he is to be employed or in a city district, from the superintendent of schools certifying that such person is at least eighteen years of age and is of good moral character and is qualified for such position. Provided, however, that a county board of education may grant such certificate to a boy who is at least sixteen years of age and who is attending high school. Any certificate may be revoked by the authority granting same on proof that the holder thereof has been guilty of improper conduct or of neglect of duty and the said driver's contract shall be thereby terminated and rendered null and void."

It will be observed that the statute provides that the drivers of school wagons or motor vans used in the transportation of pupils must give a bond. This requirement applies, whether the school district owns the wagon or van and employs a driver, or whether the transportation of pupils is provided for by contract and the contractor employs the driver. In either case the driver of the wagon or van must give a bond as required by statute.

The statute does not provide what the condition of this bond shall be. The only reasonable construction that could be placed upon this provision is that the bond shall at least be security for the faithful performance of his duties as driver of the wagon or van. Any negligent act on the part of the driver, causing actionable injury to others would be the failure on the part of such a driver faithfully to perform his duties, and would not only impose liability on him, but would be a breach of his bond as well.

In a recent case decided by the Supreme Court of Ohio, *United States Fidelity & Guaranty Company* vs. *Samuels*, 116 O. S. 586, 157 N. E. 325, the opinion in which is published in the issue of July 11, 1927 of the Ohio Law Bulletin and Reporter, it was held as stated in the syllabus:

> "1. Where in the discharge of official duty 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.
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> 2. A surety on the bond of a motorcycle police officer, with a condition that he 'shall faithfully perform the duties of the office of policeman of said city,' is liable for the negligent operation of a motor vehicle by such officer in the performance of his official duties."

This was a suit instituted against the bondsmen of a police officer of the city of Youngstown, in which it was sought to subject said bond to the payment of a judgment which had been recovered against the police officer on account of his negligent operation of a motor vehicle while in the performance of his duties as such officer. In accordance with the case of *Aldrich* vs. *City of Youngstown*, supra, no liability could be imposed on the city for the negligent acts of its police officers in the performance of their duties for the reason that such duties were performed in the carrying out of a governmental function, and it was contended that this immunity from liability ex-

tended to the officer as well as the municipality. In the course of the opinion, Judge Matthias, speaking for the court, said:

> "Clearly, where in the discharge of an official duty an officer fails to take that precaution or exercise that care which due regard for others requires, resulting in injury, his conduct constitutes a misfeasance.
>
> 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. *Maryland Casualty Co.* vs. *McDiarmid*, 116 Ohio St., 576, 157 N. E., 321."

I am therefore of the opinion that the driver of a school wagon or motor van used in the transportation of pupils to and from the public schools, is required to give a bond conditioned upon the faithful performance of his duties as such driver, and such requirement applies to all drivers of such wagons or vans whether the school authorities own the wagon or van and employ a driver, or whether the transportation of pupils is provided for by contract and the contractor himself drives the van or employs some other person to drive it.

In view of the foregoing, I reach the following conclusions, the second of which specifically answers your question:

1. The driver of a school wagon or motor van used in the transportation to and from a public school is required to execute a bond conditioned upon the faithful discharge of his duties as such driver.

2. 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 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.

Respectfully,
EDWARD C. TURNER,
Attorney General.