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1. TOWNSHIP NOT LIABLE FOR NEGLIGENCE ARISING FROM OPERATION OF TOWNSHIP DRIVEWAYS, PARKING AREAS, GARAGES AND STORING AREAS—

2. DOCTRINE OF PROPRIETARY FUNCTIONS DOES NOT APPLY TO TOWNSHIPS—

3. BOARD OF PARK COMMISSIONERS NOT LIABLE FOR NEGLIGENCE IN MAINTENANCE OF PUBLIC PARK—

4. DIRECTORS OF TOWNSHIP CEMETERIES NOT LIABLE FOR NEGLIGENCE ARISING FROM MANAGEMENT OF TOWNSHIP CEMETERIES—

5. IF LIABILITY OF PUBLIC AGENCY FOR NEGLIGENCE IS IN DOUBT, THE DOUBT MUST BE RESOLVED IN FAVOR OF PUBLIC AND AGAINST EXPENDITURE OF PUBLIC MONEY TO PURCHASE IDEMNITY INSURANCE PROTECTION—§§511.18, 517.20, R.C., OPINION NO. 179, OAG FOR 1957, P. 41

SYLLABUS:

1. A township is not liable for negligence arising out of the operation and maintenance of township driveways, parking areas, garages and storage areas.

2. The doctrine of proprietary functions does not apply to townships (Opinion No. 179, Opinions of the Attorney General for 1957, page 41, approved and followed).

3. A board of park commissioners created pursuant to Section 511.18, Revised Code, is not liable in tort for negligence in the establishment and maintenance of a free public park.

4. The directors of township cemeteries appointed pursuant to Section 517.20, Revised Code, have the same immunity from liability for negligence with reference to the management of township cemeteries as township trustees have under the same circumstances.

5. If the liability of a public agency for negligence is in doubt, the doubt must be resolved in favor of the public and against the expenditure of public money to purchase indemnity insurance protection.

Columbus, Ohio, August 28, 1961

Hon. Robert Webb, Prosecuting Attorney
Ashtabula County, Jefferson, Ohio

Dear Sir:

Your request for my opinion poses the following questions:

"Excluding references to township roads over which express statutory liability exists, and for which liability indemnity may be provided, our office respectfully requests an opinion of the Attorney General to the following questions (we assume in our questions that where liability exists, indemnity protection may be purchased by the Board of Township Trustees or the Park and Cemetery Boards):

"1. Is a township liable for negligence arising out of the operation and maintenance of driveways, and Parking Areas on township property, especially that which is contiguous to the township Hall?

"2. Is the township liable for negligence arising out of the use of, operation or maintenance, of garages, storehouses and storage areas, wherein township equipment and machinery is maintained and stored?

"3. Is a township liable for negligence arising out of the conduct of a proprietary function?

"4. Is a township Park Board liable for negligence the same as a private corporation?

(a) If not liable as a corporation, is the Park Board liable for negligence arising out of proprietary functions carried on within a township park?

(b) If not liable as a private corporation, is the Township Park Board liable for negligence arising out of, and in connection with, the buildings and areas wherein concessions are conducted for private lessees from the lessor park board; also, does such liability attach for acts or omissions of such lessees, their agents and employees?

(c) If not liable as a private corporation, is a township park board liable for negligence arising out of the operation and maintenance of equipment and machinery used to maintain Park grounds, buildings, roads and sidewalks?

(d) If not liable as a private corporation, is a township park board liable for negligence arising out of the operation and maintenance of swimming pools, bath houses, boat launchings and docking areas, and similar functions?

"5. Is a Cemetery Board liable for negligence arising out of the operation and maintenance of machinery and equipment used to maintain cemetery grounds, roads, and sidewalks?

"6. Is a Cemetery Board liable for negligence arising out of the improvement and construction of cemetery grounds, vaults and other structures?

"I am aware of the general rule that townships are liable only in cases where liability is fixed by statute; however, it becomes increasingly apparent that the rule is not applied in many cases."

As indicated in your request, there is a general rule that townships are liable only in cases where liability is fixed by statute. This rule was recognized by one of my predecessors in Opinion No. 2498, Opinions of the Attorney General for 1950, page 730, in which paragraph one of the syllabus reads as follows:

"1. Liability insurance may be purchased by the township trustees only where there is a statutory liability to be insured against."

Since I have been unable to find any statute imposing liability in the situations mentioned in your request, I am constrained to follow the general rule and answer your questions in the negative. Because this general rule has been subject to sharp criticism in recent cases, however, I feel your questions merit a more detailed answer.

Regarding the first question, your attention is directed to Opinion No. 412, Opinions of the Attorney General for 1949, page 152, the syllabus of which reads as follows:

> "Township trustees have no authority to pay premiums on a liability insurance policy covering a town hall and surrounding property."

The basis of Opinion No. 412, *supra,* is the non-liability of township trustees for negligence in connection with the ownership of a town hall and surrounding property.

In regard to your second question, Opinion No. 412, *supra,* was followed by Opinion No. 2498, *supra,* in which the then Attorney General held that township trustees are not liable in tort for negligence in connection with the ownership of other township property.

Question No. 3 is specifically answered in Opinion No. 179, Opinions of the Attorney General for 1957, page 41, wherein it is stated, at page 46, as follows:

> "In sum, municipal and private corporations were at a very early time held not liable for any of their acts done within their corporate powers. Then, beginning with the Goodloe case they were held liable for all their torts. The doctrine of governmental and proprietary functions recognized that with regard to some functions municipal corporations act as agents of the sovereign state, and when they do they partake of sovereignty and sovereign immunity. The purpose of the doctrine is to distinguish those functions where the municipal corporation does partake of sovereignty from those where it does not. But counties and townships have never been regarded otherwise than as agents of the state. There has never been any confusion between their governmental and corporate functions, for they are not corporations and are regarded as having governmental functions only. Therefore the doctrine of governmental and proprietary functions does not apply to them."

On page 48 of the same opinion, however, is found the following language:

> "If, however, the building were used in whole or in part by a private business for profit a different question would arise. The law of such a case is not settled, but I call your attention to the case of Dean v. Trustees, 65 Ohio App., 362, which suggests that liability might attach. Since your building apparently is not being used for private profit-making purposes of the sort or to the extent involved in the Dean case it is not necessary here to consider that aspect of the question."

The Dean case, *supra,* was decided by the Court of Appeals for Licking County in 1940. In a similar case, *Partlow & Gates v. Monroe Township,* 44 Ohio App., 447, decided by the Court of Appeals for Miami County in 1932, a different conclusion was reached. Since neither case was appealed, it is uncertain which, if either, position the Supreme Court will take in the future. A question arises, therefore, whether a board of township trustees may expend public money to purchase liability insurance where there is only probable cause to believe some liability may exist. In this regard, paragraph three of the syllabus in *The State ex rel., The A. Bentley & Sons Co. v. Pierce,* 96 Ohio St., 44 (1917) provides as follows:

> "In case of doubt as to the right of any administrative board to expend public moneys under a legislative grant, such doubt must be resolved in favor of the public and against the grant of power."

I must conclude, therefore, that where it is uncertain whether liability may exist, the doubt must be resolved in favor of the public and against the expenditure of public money to purchase indemnity insurance protection.

Regarding question four, Section 511.18, Revised Code, provides as follows:

> "When any number of electors in a township, including the electors of all municipal corporations therein, equal to or exceeding one tenth of the total vote cast in such township at the general election next preceding, files a petition with the board of township trustees for proceedings to organize a park district and to establish a free public park within such township, the board shall certify such fact to the court of common pleas of the county, which court, or a judge thereof, shall appoint a board of park commissioners for the township."

Section 511.23, Revised Code, provides that a board of park commissioners "shall be a body politic and corporate." In *Dunn v. Agricultural Society,* 46 Ohio St., 93 (1888), the court stated on pages 96-97 as follows:

> "There is a class of public corporations, sometimes called civil corporations, and sometimes *quasi* corporations, that, by the well settled and generally accepted adjudications of the courts, are not liable to a private action in damages, for negligence in the performance of their public duties, except when made so by legislative enactment.
>
> "Of this class, are counties, townships, school districts and the like. The reason for such exemption from liability, is that organizations of the kind referred to, are mere territorial and

political divisions of the state, established exclusively for public purposes, connected with the administration of local government. They are involuntary corporations, because created by the state, without the solicitation, or even consent, of the people within their boundaries, and made depositaries of limited political and governmental functions, to be exercised for the public good, in behalf of the state, and not for themselves. They are no less than public agencies of the state, invested by it, of its non sovereign will, with their particular powers, to assist in the conduct of local administration, and execute its general policy, with no power to decline the functions devolved upon them, or withhold the performance of them in the mode prescribed, and hence, are clothed with the same immunity from liability as the state itself.
"* * * * * * * * *

"This rule of exemption, however, extends no further than its reason, and therefore has no application to corporations called into being by the voluntary action of individuals forming them, for their own advantage, convenience or pleasure. Corporations of this class, which are but aggregations of natural persons associated together by their free consent, for the better accomplishment of their purposes, are bound to the same care, in the use of their property, and conduct of their affairs, to avoid injury to others, as natural persons; and, a disregard or neglect of that duty, involves a like liability."

The court then went on to state on page 99 as follows:

"* * * These agricultural societies are formed of the free choice of the constituent members, and by their active procurement; for, it is only when they organize themselves into a society, adopt the necessary constitution, and elect the proper officers, that they become a body corporate. The state neither compels their incorporation, nor controls their conduct afterward. They may act under the organization, or at any time dissolve, or abandon it."

An examination of the statutes relative to a board of park commissioners clearly shows that such a board is not an aggregation of natural persons associated together by their free consent for the better accomplishment of their own purposes, but, rather, such a board is a creature of statute established exclusively for a public purpose. A board of park commissioners, therefore, is not liable for negligence as is a private corporation.

It is not necessary to decide whether a board of park commissioners would be liable for negligence arising out of proprietary functions, because

such board has no authority to engage in proprietary functions. The authority of such a board is simply to "locate, establish, improve, and maintain a free public park." Section 511.23, *supra*. In *Selden v. City of Cuyahoga Falls,* 132 Ohio St., 223 (1937), the Supreme Court held in paragraphs 1 and 2 of the syllabus as follows:

> "1. In the construction and maintenance of a park and swimming pool for the use and benefit of the general public, a municipality acts in a governmental rather than a proprietary capacity.
>
> "2. While acting in such governmental capacity a municipality incurs no liability in tort for common-law negligence."

Although some courts outside of Ohio are now taking a more liberal view toward the liability of public agencies for negligence (see 142 A.L.R. 1340; 55 A.L.R. 2d 1434), our Supreme Court has consistently held to the more conservative view as evidenced by the comment of Zimmerman, J. in *Broughton v. Cleveland,* 167 Ohio St., 29 (1957) as follows:

> "* * * Perhaps we are behind the times, but, in the absence of legislation by the General Assembly, this court is not yet ready to abandon the position adopted and retained for so many years."

The most recent case in this field is *Wolf v. Ohio State University Hospital,* 170 Ohio St., 49 (1959) in which Weygandt, C. J. said:

> "* * * If the law of Ohio is to be changed to authorize tort actions against the state, this important question of legislative policy must be determined by the General Assembly acting under the thus far unused constitutional legislative power vested in it by the people approximately half a century ago."

Regarding questions 5 and 6, Section 517.20, Revised Code, provides as follows:

> "The board of township trustees may appoint three directors to take charge of any cemetery in the township, the control of which is vested in such board. The first appointments shall be for one, two, and three years respectively. The order appointing a director shall designate, by name, the cemeteries over which he shall have supervision. Each year one director shall be appointed to serve for three years from the second Monday of May succeeding his appointment. When appointed, such directors shall be governed, in the discharge of their duties, by sections 517.01 to 517.32, inclusive, of the Revised Code, so far as applicable."

in Opinion No. 791, Opinions of the Attorney General for 1929, page 1210, the then Attorney General commented on the statute, which is now Section 517.20, *supra,* as follows:

> "* * * Under Section 3464 authority is given to township trustees to appoint three directors to take charge of any cemeteries in the township under their control. When and if such directors are appointed, it would seem they perform the same duty with reference to management of cemeteries as are required of township trustees."

What I have already said with regard to the liability of township trustees for negligence would be applicable, therefore, to the cemetery directors appointed pursuant to Section 517.20, *supra.*

It is my opinion, therefore, and you are accordingly advised:

1. A township is not liable for negligence arising out of the operation and maintenance of township driveways, parking areas, garages and storage areas.

2. The doctrine of proprietary functions does not apply to townships (Opinion No. 179, Opinions of the Attorney General for 1957, page 41, approved and followed).

3. A board of park commissioners created pursuant to Section 511.18, Revised Code, is not liable in tort for negligence in the establishment and maintenance of a free public park.

4. The directors of township cemeteries appointed pursuant to Section 517.20, Revised Code, have the same immunity from liability for negligence with reference to the management of township cemeteries as township trustees have under the same circumstances.

5. If the liability of a public agency for negligence is in doubt, the doubt must be resolved in favor of the public and against the expenditure of public money to purchase indemnity insurance protection.

Respectfully,
MARK MCELROY
Attorney General