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TOWNSHIP TRUSTEES—OFFICIALLY LIABLE FOR DAMAGES CAUSED BY NEGLIGENTLY OPERATED TOWNSHIP OWNED MACHINERY.

*SYLLABUS:*

*Township trustees are liable in their official capacity for damages resulting from the negligent operation of road repair machinery owned by the township.*

COLUMBUS, OHIO, May 10, 1933.

HON. ALVIN F. WEICHEL, *Prosecuting Attorney, Sandusky, Ohio.*

DEAR SIR:—Your request for my opinion reads as follows:

“With reference to the statute (G. C. 3298-17), would the township trustees in their official capacity, be liable, for a fire loss caused by a spark flying from the stack of a steam traction engine or roller while moving along a county road from one township road maintenance job to another township road maintenance job, said traction engine or roller being owned by the township trustees and operated by employes of the township trustees. The writer feels that the above statement of facts should come within the governmental function doctrine. However, in view of said statute, it is not clear as to whether the legislature intended that township trustees should be liable regardless of the fact whether the act was a governmental function or an administrative one.”

Section 3298-17, General Code, referred to in your letter, reads as follows:

“Each board of township trustees shall be liable, in its official capacity for damages received by any person, firm or corporation, by reason of the negligence or carelessness of said board of trustees in the discharge of its official duties.”

It is fundamental that in the absence of an express statute to the contrary, a board of township trustees, while acting in a governmental capacity as distinguished from a proprietary capacity, is not liable in damages to third persons. In the construction, repair and maintenance of roads, the township trustees are clearly acting in a governmental capacity. In this connection, I refer you to 38 Cyc. 640, where the following language appears:

“Towns and townships, being involuntarily quasi-municipal corporations, are not liable for injuries to private individuals through their failure to perform public or governmental functions; nor are they liable for default, negligence, or other torts of their officers in the performance of governmental functions, nor for the torts of officers acting beyond their authority, unless such liability is expressly imposed by statute.”

Section 3298-17, General Code, *supra*, is in derogation of the common law. This statute was passed in 1915 as part of an act entitled “An act to provide a system of highway laws for the State of Ohio, and to repeal all sections of the General Code, and acts inconsistent herewith.”

In an opinion reported in Opinions of the Attorney General for 1929, Vol. II, page 1013, it was held as disclosed by the second branch of the syllabus:

“By reason of the liability created by Section 3298-17 of the General Code in cases where boards of township trustees are negligent in the performance of their duties in connection with roads, such boards may lawfully protect themselves against damages by means of insurance.”

In Opinions of the Attorney General for 1931, Vol. I, page 303, it was held as disclosed by the syllabus:

“By reason of the liability created by Section 3298-17, General Code, boards of township trustees may lawfully protect themselves against liability for damages by procuring liability or property damage insurance upon township owned motor vehicles and road building machinery while such vehicles and machinery are being operated in furtherance of the official duties of said trustees.”

If it were not for the liability of the township trustees under section 3298-17, General Code, an expenditure of public funds for liability insurance would be unauthorized. The two opinions just cited are therefore relevant to your question.

In your letter you do not state that the township trustees or their employes were negligent in the operation of the traction engine in question. It is clear that section 3298-17, General Code, does not impose liability without fault upon the township. This section uses the words “by reason of the negligence or carelessness of said board of trustees.” Before liability may attach to the township, it must be shown that the township trustees or their employes were negligent in the operation of such traction engine. The fact that the engine was moving along a county road, from one maintenance job to another, does not alter the conclusion reached in this opinion. The engine was in charge of employes of the township trustees and was being used in the maintenance of township roads, and was actually being conveyed from one maintenance job to another.

I am of the opinion therefore that the trustees of a township are liable in their official capacity for damages resulting from the negligent operation of road repair machinery owned by the township.

Respectfully,

JOHN W. BRICKER,  
*Attorney General.*

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APPROVAL, NOTES OF RANDOLPH TOWNSHIP RURAL SCHOOL DISTRICT, MONTGOMERY COUNTY, OHIO—\$5,000.00.

COLUMBUS, OHIO, May 10, 1933.

*Retirement Board, State Teachers Retirement System, Columbus, Ohio.*