Opinion No. 370.

Schools—School Districts, Liability in Tort—Trustees, Individual Liability in Tort.

HELD: 1. A school district, or its directing board, as such, is not liable to persons injured by its nonfeasance, nor is it liable for injuries or loss resulting from its negligence, as for a failure properly to construct a school building or to keep it in repair, or to maintain the school premises or equipment in a proper and safe condition, except where liability is imposed by statute.

2. Members of the board of trustees of a school district are not personally liable for the negligence of the board as such, but they are personally liable for their own negligence or tort in the performance of duties to be performed by themselves, or for that of an agent or employee of the district when acting directly under their supervision or by their direction.

November 19, 1936.

Mr. Chris W. Demel
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You have requested my opinion on the following questions which are submitted to you by the clerk of a school district:

"Are the trustees of a school district liable individually for damages sustained by either students of any of the schools in attendance at such

schools, or by others not in attendance, such as adults? Is the school district, itself, liable?"

Your questions are general and hypothetical. Our answers must necessarily be general.

Attorney General Rankin, in 1923, held that the trustees of a school district are not individually liable for injuries to pupils enroute to school in a school bus, unless the board, while convened as such, had notice of a defect in the mode of conveyance, which should have been remedied in the exercise of reasonable care and diligence (10 Opinions of Attorney General, 83). Attorney General Foot, in 1928, held that school districts are not liable for injuries resulting to school children while being transported in school busses (12 Opinions of Attorney General, 236). In 1929, Attorney General Foot affirmed both opinions without expressly referring to or citing them (13 Opinions of Attorney General, 168).

A school district, or its directing board, as such, is not liable to persons injured by its nonfeasance, nor is it liable for injuries or loss resulting from its negligence as for failure properly to construct a school building or to keep it in repair, or to maintain the school premises or equipment in a proper and safe condition, except where liability is imposed by statute. (56 C. J. 528; 24 R. C. L. 604; Perkins v. Trask et al, 95 Mont. 1, 23 Pac. (2d) 982.) There is no such statutory liability in Montana. Section 1022, R. C. M. 1935, which provides that a school district may sue and be sued, does not have the effect of imposing liability in tort. (Perkins v. Trask et al., supra; 56 C. J. 530.)

Members of the board of trustees of a school district are not personally liable for the negligence of the board as such (56 C. J. 348; 24 R. C. L. 606; Perkins v. Trask et al., supra), but they are personally liable for their own negligence or tort in the performance of duties to be performed by themselves, or for that of an agent or employee of the district, when acting directly under their supervision or by their direction. (56 C. J. 348; 24 R. C. L. 606.)

Some doubt, apparently, is cast upon the rules stated above by the case of Johnson v. City of Billings, et al. (101 Mont. 462, 54 Pac. (2d) 579.) That case, however, is readily distinguished from the authorities above cited. Suit was brought by the plaintiff for damages occasioned by a collision with a gravel truck on the highway. The highway was being repaired as part of a drainage ditch project being carried on by the county and city jointly. Negligence was not disputed. The court held the city and county liable with the truck driver over the objection that cities and counties are not liable in tort. The court expressly held (and it went no further) that the repair of the highway was a part of the construction and completion of the drain ditch and that the city and county were acting in their private, proprietary capacity as distinguished from public or governmental capacity (p. 479, 480).

A school district is merely a political subdivision of the state, created for the convenient dispatch of public business (State ex rel. Redman v. Meyers, 65 Mont. 124, at 127). The education of the children of a state is a function of the state and a school district has as its purpose the aiding in the exercise of that function; all its functions are of a public nature. (56 C. J. 177, 169, 193; Perkins v. Trask et al., 95 Mont. 1; Section 1, Article XI, Montana Constitution.)

It is assumed that the questions propounded by you relate to activities of the board of trustees as such, and to the use of the school properties for legitimate school purposes. That being true, it is clear that any liability on the part of the district or on the part of the trustees individually must be based upon nonfeasance or negligence in the performance of public or governmental functions. The decision in the Johnson case, relating as it does to liability based upon proprietary functions, has no persuasive weight here.

Mr. Justice Matthews, speaking for the court in the Johnson case, vigorously criticized the rule that counties are not liable in tort when acting in their governmental capacity, but reserved the question since it was not before the court (p. 472). Since the

court expressly reserved the question as it relates to counties, and since the court did not consider, and did not have under consideration, the rule announced in the case of Perkins v. Trask, supra, we are bound by the decision in Perkins v. Trask, and must apply the rules stated above. Those rules were approved by former attorneys general in the opinions cited, and are the rules in the overwhelming majority of jurisdictions.

It cannot, however, be too forcefully impressed upon school trustees that they owe a great moral and public duty to use every effort to remove or improve any existing conditions which might cause damage or injury to pupils and teachers and to other persons legitimately using school properties. They owe this duty to the state, which is vitally concerned with the education and welfare of its youth, they owe it to the teachers and pupils who must use the school properties, they owe it to the parents of the pupils, and, for a more selfish reason, they owe it to themselves because, as was pointed out above, they are not exempt from individual, personal liability where they are charged with a duty, either personally or through an agent or employee responsible to them. The existence of the latter liability can be determined only under the facts of each particular case.