Opinion No. 100

Counties, Tort Liability—Weed Control, Damages—Board Members Liability.

Held: The activity of Weed Control District is governmental in nature and thus there is immunity from liability for crop damage resulting from regular spraying of weeds along roads.
In the absence of facts showing that Weed Control Board members acted beyond the scope of their authority, or directed or encouraged negligence which resulted in damage, the members of the Board are not personally liable for crop damage.

March 21st, 1950.

Mr. John D. French
County Attorney
Lake County
Polson, Montana

Dear Mr. French:

You have requested my opinion as to the liability of a County for damage to crops resulting from the spraying of weeds along roads. You have further requested my opinion as to the individual liability of the Weed Board.

The general rule is stated in 14 American Jurisprudence, Counties, Section 48, as follows:

> "It is well settled that since counties are organized for public purposes and charged with the performance of duties as arms or branches of the state government, they are never to be held liable in a private action for neglect to perform such duties, for acts done while they are engaged in the performance of such duties, or because they are not performed in a manner most conductive to the safety of employees or the public, unless such liability is expressly fixed by statute."

Historically, this rule has been applied on the ground that a county can exercise only governmental functions and has attached to it the immunity of the sovereign.

In some jurisdictions, there have been developed exceptions to the general rule of non-liability of counties. The general rule and exceptions thereto are annotated in 101 A.L.R. 1166-1171. The rule is stated as follows:

> "It is well settled that when a duty is imposed upon a city or town by statute, to be performed by officers whose duties are prescribed by law, it is not responsible for their acts. Even when a function is voluntarily assumed by a city or town, if it is a public or governmental one, it is not responsible for the negligence of its officers. But when a function is undertaken by a municipality in its private or proprietary capacity, for the profit, benefit or advantage of the corporation or of the people who compose it, rather than that of the public at large, it is liable for the negligence of its employees to the same extent and under the same conditions as a private corporation."

The case of Johnson v. City of Billings, (1935) 101 Mont. 469, 54 Pac. (2d) 579, contains a long dissertation on the tort liability of counties. The language is clearly to the effect that counties should be liable for tort. This, however, is obiter dictum. The case held that a county and a city stood in the same situation concerning injuries resulting from some act of an agent acting in a proprietry, as distinguished from a governmental capacity.

That Montana has recognized an exception to the general rule of non-liability is further evidenced in the holding of the Supreme Court in Witter v. Phillips County, (1940) 111 Mont. 352, 109 Pac. (2d) 56. The court in the Witter case stated that when the Board of County Commissioners chose to create a special improvement district, the County placed itself in the same position as a city which creates such a district. Stating the general exception to the rule of non-liability, the court said:

> "Also a County is liable for its torts when it is performing special duties imposed upon it with its consent or voluntarily assumed by it."

However, the Witter case involved the claim of a holder of warrants for damages resulting from the payment of warrants out of the order of their registration. The overwhelming weight of opinion has long been to hold that recovery may be had in such circumstances and the court based its decision on the dual ground of an assumed duty by the County, and a general liability resulting from unlawful or unauthorized use of funds.

In the case of Jacoby v. Choteau County, (1941) 112 Mont. 70, 112 Pac. (2d) 1068, the Supreme Court was asked to overrule the Johnson case (supra). The court stated the general rule of non-liability as follows:

> "The general rule is that counties, which are organized for public purposes and charged with the performance of duties as arms or branches of the State government, are not liable for neglect acts or omissions unless liability is fixed by statute."

The court went on to point out that in Montana there has been recognized an "exception" to the general rule, and held the County liable for injury due to negligence in the exercise of a proprietary function. It was held that the County acted in a proprietary capacity in the operation of a ferry since such operation was in a "private" rather than a "public" capacity.

The latest case on the subject is Rhoades v. School District No. 9, (1945) 115 Mont. 352, 142 Pac. (2d) 890. In the Rhoades case the court reviewed the general rule and the recognized exception. At page 359 it stated:

> "In none of these cases, or in any of the others to which the court's attention has been called, is there any modification of the rule that no liability attaches where the instrumentality such as a County, city, or a school district is acting solely in a governmental capacity. A careful analysis of the allegations of the complaint here compels the conclusion that the defendants were acting in this instance in that capacity that is, in a governmental capacity."

The case involved a claim for injuries suffered by a spectator at a school basketball game, which injuries were alleged to have been caused by a faultily constructed and improperly maintained stairway.

From the above it appears that the Montana court has definitely accepted the proprietary activity exception to the general rule of non-liability.

It follows from the above that the primary question to be examined is whether or not any particular activity is to be classed as proprieary or public.

In the Jacoby case the court appears to base its determination on the distinction between a "private" and a "public" obligation, and

upon the fact that by Montana statute the operation of ferries may be leased to individuals or corporations.

In the Rhoades case, supra, the court followed an earlier decision, Perkins v. Trash, 95 Mont. 1, 23 Pac. (2d) 982, to hold the school district not liable and refused to concede that the conduct of public basketball exhibitions was a proprietary function, despite the fact that no law compels them to be held, and admissions were charged.

Weed Control Boards and Weed Control Districts do not come within the special improvement District law. Weed Control is provided for by Chapter 17, title 16, Revised Codes of Montana, 1947, (Chapter 195, Laws of 1939, as amended). The procedure for establishment of a Weed Control District calls for petition by 25% of the freeholders of a proposed district (Section 16-1709, Revised Codes of Montana, 1947, Section 5, Chapter 195, Session Laws of 1939), notice and hearing, and consents signed by owners of 51% of the agricultural land in the district. (Section 16-1711, Revised Codes of Montana, 1947, Section 7, Chapter 195, Session Laws of 1939, as amended by Section 1, Chapter 228, Session Laws of 1947).

Bearing in mind the pre-requisites to the establishment of Weed Control Districts, it is indeed difficult to find ground for holding the authorized activity of such districts to be either private, proprietary, or assumed.

I agree with you that the courts have in the past indicated a definite broadening of the recognized exceptions to non-liability of counties. (See further, dissenting opinion in Rhoades v. School District No. 9, 115 Mont. 352, at 361, et seq). The Legislature, too, in its recent session approved House Bill 154, which would have eliminated the State's immunity from tort liability. The bill, however, did not become law due to the Governor's veto and failure to override.

However, despite the expressed tendency of our Supreme Court and Legislature, in the absence of a clear cut court determination that such an activity as Weed Control is not governmental, I am constrained to hold that such activity is not of a sufficiently private or proprietary nature to bring it within the recognized exception to the rule of non-liability. The question is close, but my opinion is fortified by the further consideration that we, as attorneys for the State and County, should not advance beyond the Court and Legislature in the process of extension of the scope of the exception. For that reason, as well as because the question is not clearly resolved by the decisions, I would deny liability. The law is not sufficiently clear, however, that a weed control district should feel confident that it would escape liability were suit to be brought. I call this to your attention since your fact situation indicates that the weed district could perform its duties by methods which would be less likely to cause crop damage. Certainly the least hazardous methods practicable should be utilized regardless of liability.

It is therefore my opinion that the activity of a weed control district is governmental and thus there is immunity from liability for damages resulting to crops from the spraying of weeds along the roads.

Your inquiry as to the liability of the members of the Weed Control Board for crop damage resulting from the spraying of roadways presents a somewhat different consideration in part. The case of Heiser v. Severy, 117 Mont. 105, 158 Pac. (2d) 501 (1945), considered this question. The court held that the state was not liable, in the absence of an assumption of liability, for injuries arising from the tortious acts of its officers, agents, or employees committed in the performance of their duties. On the point of liability of the officer individually, the court on rehearing stated:

> "Public officers when acting in good faith within the scope of their authority, are not liable in private actions. When a public officer goes outside the scope of his duty, he is not entitled to protection on account of his office, but is liable for his acts like any private individual."

Justice Cardozo considered a similar proposition in Dowler v. Johnson 225 N. Y. 39, 121 N.E. 487 (1918), which is annotated in 3 A.L.R. 149. In his opinion Justice Cardozo stated:

> "We do not doubt the rule invoked by counsel for the defendant, and sustained by superabundant citations, that public officers are not liable for the negligence of their subordinates unless they cooperate in the act complained of, or direct or encourage it."

From the above, and in the absence of any facts showing that the Weed Control Board members acted beyond the scope of their authority, or directed or encouraged negligence which resulted in damage, it is my opinion that the Weed Control Board is not personally liable for crop damage.

Very truly yours,
ARNOLD H. OLSEN,
Attorney General.