Opinion No. 98

Counties — Tort Liability — Proprietary Functions — Governmental Functions — Sovereign Immunity

HELD: 1. That the creation of a gravel pit and the operation thereof is not expressly directed by law, but is an activity that grew out of or was assumed by reason of the proprietary capacity of the county and, therefore, under the factual situation in this case, the county would be liable for damages for the negligent acts of its officers or servants.

2. That the defense of sovereign immunity from tort liability is not applicable when a county is engaged in a proprietary function as distinguished from a governmental function.

December 6, 1956

Mr. N. A. Rotering
County Attorney
Silver Bow County
Butte, Montana

Dear Mr. Rotering:

This acknowledges your letter of November 23, 1956, wherein you requested an opinion as to the tort liability of Silver Bow County in a case where the claimant was injured as a result of the County's creation of a gravel pit.

The Board of County Commissioners of Silver Bow County set forth the following facts in their letter to you dated November 1, 1956, which you enclosed with your request for an opinion as to the County liability in the instant case:

> "On or about September 15th, 1956, Sharon Powers was injured on Amherst Avenue, at a point approximately one block Easterly from the intersection of Amherst and what is known as the Upper Nine Mile Road in Silver Bow County, Montana. Briefly the accident occurred in the following manner: On the aforesaid date in the evening about 11:00 O'clock P.M., Miss Powers was a guest in

an automobile which was driven by her escort to the Crest Theatre which they attended that evening. As they left the Crest Theatre in an effort to avoid the congestion of traffic, the driver proceeded up Amherst Avenue in an Easterly direction as aforesaid and as he reached a point approximately one block above the intersection of Amherst and the Upper Nine Mile Road he ran into an excavation and open pit which had been created by the County of Silver Bow at the said point. The excavation removed what remained of Amherst Avenue running in the Easterly direction. There was no guard rail or sign to indicate that the excavation existed or that the street so ended in such an open pit. The excavating was done, we might explain, to provide sand and gravel for the surfacing and sanding of other highways in Silver Bow County, Montana. There is an obvious road leading up to the said excavation since Amherst Avenue does not continue right into the area excavated by Silver Bow County, Montana, as aforesaid.

"Miss Powers received severe injuries to her person including bursitis of the right knee, shock, contusion, sprains and bruises, which resulted when the automobile was catapulted forward into the excavation as they drove through the darkness of the area. It may be added that Amherst Avenue has a slight incline upwards toward the mountains and consequently the headlights were so directed that it was impossible to see the excavation."

Under the above set of facts, the pertinent questions raised are as follows:

1. Is a county liable for damages due to the negligence of its officers or servants?

2. Is the defense of sovereign immunity applicable under the above factual situation?

In answer to the first question, it must be stated that the general rule in Montana is that a county is liable for damages for the negligence of its officers or servants while in the performance of proprietary, as distinguished from governmental, functions. (See Johnson v. City of Billings, 101 Mont. 462, 54 Pac. (2d) 579; Jacoby v. Chouteau County, 112 Mont. 70, 112 Pac. (2d) 1068).

An examination of the cases shows the futility, not to say absurdity, of any such distinction between governmental or public and corporate or private functions for the purpose of predicting tort liability. Building a draw bridge (Daly v. City and Town of New Haven, 38 Atl. 397); maintaining a health department (Howard v. City of Philadelphia, 95 Atl. 388; Tollefson v. City of Ottawa, 81 N.E. 823); confining and punishing criminals (Jackson v. City of Owingsville, 121 S.W. 672); assaults by policemen (Lamont v. Stavanaugh, 152 N.W. 720); sweeping and cleaning streets (Savannah v. Jordan, 83 S.E. 109) have been held governmental acts. Sweeping and cleaning streets (City and County of Denver v. Mauer, 106 Pac. 875); street lighting (Dickinson v. City of Boston, 75 N.E. 68); operating water works (Stubbs v. City of Rochester, 124 N.E. 37); maintaining prisons (Edwards v. Town of Pocahontas, 47 Fed. 268) have been held private functions. In Opacensky v. City of South Omahan, 163 N.W. 325 (Neb. 1917), the plaintiff was injured by a collision with a fire engine on a practice run. In allowing a recovery, the court restricted the governmental function of operating a fire department to the answering of emergency calls.

In Griffith v. City of Butte et al., 72 Mont. 552, 234 Pac. 829, the plaintiff was injured when run over by a city street sprinkler. The defendant municipality's contention was that it was not responsible for such a tort because the sprinkling of streets is a governmental function. In holding against this argument and affirming the decision of the lower court which had rendered a judgment in favor of the plaintiff, our court said on page 556:

"It is a matter of no little difficulty to define what are and what are not purely governmental du-

ties of a city. To a very large extent these questions can only be settled by the facts of each particular case, so variant are the conditions under which this question arises. **The public or governmental duties of a city are those given by the state to the city as a part of the state's sovereignty, to be exercised by the city for the benefit of the whole public,** living both in and out of the corporate limits. All else is private or corporate duty, and for any negligence on the part of the agents or employees of the municipality in the discharge of any of the private duties of the city the city is liable for all damages just as an individual would be." (Emphasis Supplied.)

The Court continued on page 563:

"The duty of the city in connection with the maintenance of its streets is ministerial and corporate, and for its negligence in that connection, it is liable. (Sullivan v. City of Helena, 10 Mont. 134, 25 Pac. 94; Snooks v. City of Anaconda, 26 Mont. 128, 66 Pac. 756; Ford v. City of Great Falls, 46 Mont. 292, 127 Pac. 1004.)"

This decision would seem to become particularly important in view of the court's statement in the case of Johnson v. City of Billings, 101 Mont. 462, 478, 54 Pac. (2d) 579 wherein it was said:

"Being unembarrassed by any former opinion of this court on the question directly before us for determination, we discard precedent and refuse to perpetuate the error of other courts throughout the Union; rather, **we hold that, under the statutes of this state, with respect to the care of highways and liability for injury thereon, counties and cities stand in the same relation to the traveling public in so far, at least, as injury results from some act of an agent of either while in the prosecution of an enterprise engaged in by either in its proprietary, as distinguished from its governmental capacity, which is as far as we need to go in this opinion. Supporting this conclusion, see the following cases:** (Citing cases)" (Emphasis Supplied.)

Here in the instant case the county removed a portion of Amherst street and created a gravel pit. As was stated by the County Commissioners, " . . . The excavating was done, we might explain, to provide sand and gravel for the surfacing and sanding of other highways in Silver Bow County, Montana . . ."

Clearly, such activity as stated by the County Commissioners was one of a proprietary nature and thus the county would be liable in damages for their negligence. In Johnson v. City of Billings, supra, at page 478 wherein the court decided that the ditch in question was a proprietary rather than a governmental activity it was stated:

" . . . the work being done on the road at the time of the accident was in progress, **not under the mandate of the statute** requiring counties to keep roads in repair, but as a necessary and proper part of the drain project thus jointly being completed. Clearly, in so repairing the road, the city and county were each acting in the proprietary, and not in the governmental capacity." (Emphasis Supplied.)

The operation of a gravel pit by the county is certainly not an operation that is fixed by statute but rather an operation that is voluntarily assumed by the county in its proprietary capacity. Thus, the rule laid down in Jacoby v. Chouteau County, 112 Mont. 70, 112 Pac. (2d) 1068, as stated in the syllabus is most apropos. Therein it is stated:

"While counties, organized for public purposes and charged with the performance of duties as arms or branches of the state government, are not liable for negligent acts or omissions of its officers or agents unless liability is fixed by statutes, where they voluntarily assume duties and obligations in their proprietary, as distinguished from their governmental, capacity, they are held to the same degree of liability for tort

as private corporations. (Johnson v. City of Billings, 101 Mont. 462, 54 Pac. (2d) 579, reaffirmed)."

This opinion does no violence to the Weed Control Opinion, 23 Reports and Official Opinions of the Attorney General 266, No. 100, and should not be construed to do so. In that opinion, it was held that weed control, being an activity directed by the legislature, is a governmental function, as distinguished from a proprietary, private or assumed activity.

It is therefore my opinion that the creation of a gravel pit and the operation thereof is not expressly directed by law, but is an activity that grew out of or was assumed by reason of the proprietary capacity of the county and, therefore, under the factual situation in this case, the county would be liable for damages for the negligent acts of its officers or servants.

It is further my opinion that the defense of sovereign immunity from tort liability is not applicable when a county is engaged in a proprietary function as distinguished from a governmental function.

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