

Damages, County Not Liable In. Counties, Liability For Tort. Theatre, Moving Picture Not. Show, Moving Picture Not. Moving Picture Show, Not Prohibited on Sunday.

A county is not liable for damages resulting from defective highway or bridge.

A county is not generally liable in tort unless made so by statute.

A moving picture show does not come within the provision of the statute making it unlawful to open or carry on a theatre on Sunday.

December 13, 1910.

S. P. Wilson, Esq.,
County Attorney,
Deer Lodge, Montana.

Dear Sir:

I am in receipt of your letter of December 10th, 1910, wherein you submit for my official opinion the following questions:

1. Is the county liable for damages for injuries received by a person passing over a public county bridge by reason of the dangerous and defective condition of such bridge; assuming that the officers or agents of the county, charged with the duty of keeping such bridge in repair knew, or should have known of its dangerous and defective condition, and assuming also that the injured person was not guilty of contributory negligence in attempting to pass over such bridge. The bridge being outside the limits of any city or town and upon a public highway maintained by the county.

3. Is a moving picture show within the contemplation of Section 8369, which makes it a misdemeanor for any person to keep open or maintain any theatre, or play-house on Sunday, or the first day of the week?

In reply to your first question concerning the liability of a county in a civil suit for the recovery of damages on account of personal injuries received by traveler, you are advised as follows:

According to the prevailing rule counties are under no liability in respect to torts except as imposed by statutory expression or by necessary implication therefrom. Section 2781, Revised Codes, defines a county as being the largest political division of the state having corporate powers. The nature of this political division is very similar to that of organized townships, school districts, and road districts, and like all of these possesses certain corporate capacity with power to levy taxes and raise money for their respective public purposes. This sort of political division of the state is generally considered not to be liable in civil action for neglect of public duties, unless such liability be created by statute. These general principles are announced in Judge Dillon's municipal corporations, and in support of the text, which is found in Section 963, that author cites many cases

from various jurisdictions, the leading case seems to be that of *Hollenbeck vs. Winnebago county*, 95 Ill. 148. The author in various other chapters of the same work draws distinction between the liability of incorporated cities for neglect to keep in repair highways and bridges; and the liability of counties and of New England towns where the duty is private or corporate, as distinguished from public, and in this connection I call your attention to the language of the court in *Snook vs. City of Anaconda*, 26 Mont. at the bottom of page 134, where Justice Pigottfi uses this language:

“We had supposed that the liability of a municipal corporation proper, as distinguished from quasi corporations, such as counties and New England towns for failure to keep in repair its streets, was no longer an open question in this state; nor do we see that it is.”

This language of Judge Pigott seems to indicate that the court draws exactly the same distinction between the liability of counties and New England towns as distinguished from incorporated cities as is drawn by Judge Dillon in the chapter above referred to. I think we can therefore safely assume that counties are not liable in action for recovery of damage caused by personal injuries received through defective roads or highways, even though the officers of the county had or should have had knowledge of the defect and that no contributory negligence is shown on the part of the person injured.

I believe that the statutes in this state do not either expressly or by necessary implication impose any liability for tort upon the counties of this state, in fact, Section 1372 of the Revised Codes, provides for the removal of obstructions from public highways and for a method of repairing bridges that are defective or dangerous. I do not at this time express any opinion as to whether or not certain officers, whose duty it is to keep bridges in safe condition, might not under circumstances of neglect after notice be personally liable, but the great weight of authority seems to relieve the county as such of this liability.

In reply to your second question, you are advised that a moving picture show is not a theatre or play-house within the provisions of Section 8369 making it a misdemeanor for any person to keep open or maintain a theatre or play-house on Sunday. We have a very recent expression of opinion by the supreme court on this identical question in the case of *State of Montana vs. T. C. Penny*. The opinion is not yet printed but you will probably find it in No. 4, *Advance Sheets*, Vol. III, *Pac. Reporter*, when you receive the same. However, through the courtesy of the stenographer of the supreme court, I am able to send you a copy of this opinion, which is herewith enclosed.

Yours very truly,

ALBERT J. GALEN,

Attorney General.