

Opinion No. 127.

States—Damages—Immunity—Parks
Morrison Cave.

Held: The State of Montana, the Montana State Park Commission, and the members thereof—acting in their official capacity—cannot be held liable if damages result from an accident involving a visitor to Morrison Cave. No opinion is expressed herein regarding possible liability of members of the commission as individuals if they act without the scope of their lawful authority or if they are guilty of misfeasance or actual negligence at any time.

February 20, 1946.

Honorable Sam C. Ford
Governor of State of Montana
State Capitol
Helena, Montana

Dear Governor Ford:

You have inquired "whether or not the state, the Park Commission or its members would be liable if damages resulted from an accident to one of

the visitors to" Morrison Cave, which is operated by the State Park Commission pursuant to authority contained in Chapter 48, Laws of 1939.

Suits for damages against the state have been considered by our court in two very recent cases: Heiser v. Severy, et al., (1945) 158 Pac. (2d) 501, and Coldwater, et al. v. State Highway Commission et al., (1945) 162 Pac. (2d) 772.

In the Heiser case the court said in part:

"It is elementary that a state cannot be sued in its own courts without its consent or be compelled against its will to discharge any obligation . . .

"The state's immunity from suit extends to the boards, commissions and agencies through which the state must act . . .

"In Johnson v. City of Billings, 101 Mont. 462, 54 P. 2d 579, 580, this court said that 'as the sovereign cannot be sued without its consent, its arms or branches are likewise immune, unless liability is specifically imposed upon them by statute.'

"The rule is well settled that the state, unless it has assumed such liability is not liable for injuries arising from the . . . tortious acts or conduct of any of its officers, agents, or servants, committed in the performance of their duties.' 49 Am. Jur. sec. 76, p. 288, citing Mills v. Stewart, 76 Mont. 429, 247 P. 332, 47 A. L. R. 424 . . ."

The Coldwater case reaffirmed the position taken in the Heiser case, and the court said, through Mr. Justice Cheadle:

"We think that, compelled as they are by physical necessity and statutory mandate to appoint subordinates to perform the actual work and supervise it, the members of the commission cannot, in the absence of misfeasance or actual negligence on their part, be held liable for the negligence of such subordinates, especially in the absence of actual notice. The doctrine of respondeat superior is not applicable . . .

"There is, perhaps, merit in appellant's contention that the rule of immunity of the sovereign from liability to the individual is out-moded, harsh and unjust. Nevertheless it is

firmly established under the common law and beyond the power of this court to repudiate. Should the people see fit they have the power, through the legislature, to consent that the state may be sued, and to determine under what circumstances the state and its agencies shall become answerable to the individual. If reform in this respect is desirable, it is a matter for the legislature, not for the courts."

It is therefore my opinion the State of Montana and the Montana State Park Commission and the members thereof, acting their official capacity, cannot be held liable if damages result from an accident involving a visitor to Morrison Cave. No opinion is expressed here regarding possible liability of members of the commission as individuals if they act without the scope of their lawful authority or if they are guilty of misfeasance or actual negligence at any time.

Sincerely yours,
R. V. BOTTOMLY,
Attorney General