Opinion No. 43

School Districts—Board of Trustees —Tort Liability—Liability Insurance

Held: (1) Neither school districts nor Boards of Trustees are liable in tort for injuries arising

out of the governmental activities of the school in the absence of a specific statute.
(2) School district boards of trustees have no authority to expend school district funds to contract for liability insurance.

October 19, 1951.

Mr. Edward J. Ober, Jr.
County Attorney
Hill County
Havre, Montana

Dear Mr. Ober:

You have requested my opinion regarding the liability of a school district and the trustees for injury where a student sustained a broken ankle while engaged in a regularly scheduled tumbling class. This same question has arisen in several districts in connection with the authority of trustees to contract for liability insurance.

In Volume 6, Opinions of the Attorney General, page 427, it was held that the board of trustees had no authority in law for using any part of the school monies to pay doctor's bills for treatment of a student injured by an electric saw in the manual training department, despite the fact that the injury was due to defective machinery. Then Attorney General Poindexter stated:

> "A school district is not liable in tort and its officers have no jurisdiction to compromise or pay any claim such as you describe. It is my opinion the doctrine announced by our supreme court in Smith v. Zimmer, 45 Mont. 282, 48 Mont. 332, with respect to non-liability of counties for tort and individual liabilities of county officers for neglect, applies with equal force to school districts and the officers thereof."

In the many years since that opinion has been issued, it has not been reversed or questioned.

Our Supreme Court has directly passed upon school district liability on several occasions.

The general rule holds the school district immune from suit for injuries caused by negligence of its officers, agents or employees, unless liability is imposed by specific statute. Perkins v. Trask, et al., 95 Mont. 1. This rule was affirmed generally by the later case of Bartell v. School District 28, 114 Mont. 451, 137 Pac. (2d) 422.

The Bartell case involved an accident which occurred on a playing field, and the language of the court thereon is applicable to the instant situation. At page 457 of 114 Montana, the Court stated:

> "It is unquestioned that physical training is part of the educational duty entrusted to the public schools (McNair v. School District No. 1, 87 Mont. 423, 288 Pac. 188, 69 A. L. R. 866). We find no authority for the proposition that these educational duties are limited to members of voluntary athletic teams and can imagine no serious argument which could be made to that effect."

In the latest case concerning the liability of a school district, Rhoades v. School District No. 9, the argument of distinction between governmental and proprietary functions was strongly urged. The Rhoades case concerned an injury to a paying spectator at a basketball game conducted by the high school and resulting from a collapse of a stairway in the gym. The court found the allegations of negligence sufficient to state a cause of action "if the school district or its board of trustees is liable in negligence," and held that the school was acting in a governmental capacity in conducting the basketball game, and was therefore not liable.

The general rule has been little modified by the language of the later cases. So far as it applies to the instant situation, it is unchanged.

It is therefore my opinion that neither the school district nor the trustees are liable in tort for any injury arising out of the governmental activities of the school.

The stated distinction between governmental and proprietary functions which has developed in the later opinions of the Supreme Court has given rise to a correlative question concerning the authority of school districts to contract for liability insurance. In view of the long established rule of non-liability set forth, supra, there appears little practical basis for such an expenditure of school district funds.

Decisions based upon cases arising against municipalities are not good yardsticks by which to measure the liability of a school district. While both are corporate entities, the scope of activity allowed a municipal corporation leads to many activities proprietary in nature. The school districts operate within the more restricted area of statutory authority. It is not empowered to engage in non-educational activities and is therefore not subject to the same possibilities for liability as is a municipal corporation today. This distinction is set forth by our Supreme Court in the recent case of Felton v. Great Falls, 118 Mont. 586, 169 Pac. (2d) 229.

It is therefore my opinion that a board of trustees has no authority to expend school district funds upon liability insurance in the absence of specific statutory authority.

Very truly yours,
ARNOLD H. OLSEN,
Attorney General