

Opinion No. 64**Intoxicating Liquors—Liquor Control Board—Public Liability Risk—
Sovereign Immunity—"Proprietary" and "Governmental"
Functions**

- Held:** 1. In the absence of legislative consent to be sued, the doctrine of "sovereign immunity" is applicable to the Montana Liquor Control Board in connection with the conduct of the state liquor monopoly, since the Board is thereby engaged in a governmental function as an administrative agency of the State of Montana.
2. There is no public liability risk against which the Montana Liquor Control Board can purchase insurance protection.

July 9, 1958

Mr. J. E. Manning
 Administrator
 Montana Liquor Control Board
 Helena, Montana

Dear Mr. Manning:

You request my opinion whether the Liquor Control Board should insure against public liability risk arising from the occupancy of warehouses and retail store buildings in connection with the conduct of the state liquor monopoly.

The Liquor Control Board is an administrative agency of the state. (*McFatrige vs. District Court*, 113 Mont. 81, 88, 122 Pac. (2d) 834; *McCarten vs. Corwin*, 119 Mont. 520, 529, 117 Pac. (2d) 189.) In every instance in which the question of tort liability is raised in connection with an agency or political subdivision of the state we are confronted by the ancient doctrine of "sovereign immunity." This long continued injustice is based upon the obsolete if not erroneous theory of law that the "king can do no wrong," and, unless the sovereign has consented to be sued in any of its agencies, the state is not liable for damages resulting from the negligence of its employees or agents while in the performance of their governmental duties. Although I have long opposed this theory I am constrained to apply it as the established law of this state. (*Heiser vs. Severy*, 117 Mont. 105, 111, 158 Pac. (2d) 501; *Coldwater vs. Highway Commission*, 118 Mont. 65, 75, 162 Pac. (2d) 772; *Johnson vs. City of Billings*, 101 Mont. 462, 270, 54 Pac. (2d) 579.)

An examination of the statutes relating to the Liquor Control Board (Sec. 4-101, RCM, 1947, et seq.) reveals that the legislature has not given the "sovereign" consent to be sued by injured third parties with the result that if the Liquor Control Board, through its officers and agents, functions in a governmental as opposed to proprietary capacity then the board is not liable for damages which may result from the occupancy of warehouses and retail store buildings in con-

nection with the conduct of the state liquor monopoly. (Jacoby vs. Chouteau County, 112 Mont. 70, 74, 112 Pac. (2d) 1068; Johnson vs. City of Billings, supra. See also, 26 Opinions of the Attorney General 98; 23 Opinions of the Attorney General 100.)

In order to characterize the function of an agency of the state as either "proprietary" or "governmental" it is necessary that we examine the particular agency and the activity it conducts. (23 Opinions of the Attorney General 100, Weed Control District; 24 Opinions of the Attorney General 43, School District; 26 Opinions of the Attorney General, 98, County.) In this connection it is well established that under the Liquor Control Act (Section 4-101, RCM, 1947, et seq.) the Liquor Control Board is engaged in the enforcement of the police power of the state, a governmental function. (State v. Andre, 101 Mont. 366, 371, 54 Pac. (2d) 566; McFatrige v. District Court, 113 Mont. 81, 88, 122 Pac. (2d) 834.) The fact that each year the state derives considerable profit from the operation of the liquor monopoly is only incidental to the main purpose of the Liquor Control Act, and I do not believe that from this factor alone we can attribute a "proprietary" characteristic to the function of the board. (State v. Driscoll, 101 Mont. 348, 365, 54 Pac. (2d) 571.)

There is almost unanimous agreement in the courts of other states that when the state engages in the regulation and control of intoxicating liquor it is exercising a governmental function, and that the agency is clothed with the same immunity from suit as is the state in the exercise of other purely governmental functions. (Harrison v. Wyoming Liquor Commission, 63 Wyo. 13, 177 Pac. (2d) 397; See cases annotated in 9 A.L.R. (2d) 1292.)

It is my opinion, therefore, that in the absence of legislative consent to be sued, the doctrine of "sovereign immunity" is applicable to the Montana Liquor Control Board in connection with the conduct of the state liquor monopoly, since the Board is thereby engaged in a governmental function as an administrative agency of the State of Montana. Upon this basis it is my opinion that there is no public liability risk against which the Board can insure.

Very truly yours,
FORREST H. ANDERSON
Attorney General