

SHERIFFS:           Liabile personally on official bond for negligence  
                          in performing duty.

PEADE OFFICERS:

March 9, 1936

3-10



Honorable E. L. Redman  
Prosecuting Attorney  
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Dear Sir:

This department wishes to acknowledge your request for an opinion under date of February 27th, wherein you state as follows:

"Several months ago the sheriff of our county was conveying by automobile to the reformatory, two boys, whom the Court had sentenced to four years at Boonville, under the juvenile code, with a delinquent charge of burglary, and on the way down, his car skidded and struck an abutment on a railroad bridge, shaking up the occupants in the car and breaking a leg of one of the boy prisoners.

"Query: Is a sheriff, and or his bondsmen, liable for ordinary acts of negligence which result in injury to a prisoner while the sheriff is executing a process issued by the Court to convey a prisoner to a state institution for confinement, or is liability, if there is liability, limited to cases where negligence is gross and wanton, and amounting to culpability?"

I.

Sheriff is liable for acts of negligence  
while engaged in performance of duty.

We wish to point out in the beginning that we are not passing on the question of whether, under the facts as set out in your letter, the sheriff was guilty of negligence, but are confining our opinion strictly to the question asked.

We have searched the authorities carefully and have been unable to find any Missouri cases on the question propounded. However, we are of the opinion that our court would be inclined to follow the following decisions.

In the case of Florio v. Mayor and Aldermen of Jersey City, 129 Atl. 470, l. c. 471, 472, 473, the court said:

"We now approach the consideration of the question whether Schmolze, he being a servant of the city in the discharge of a public duty, can be properly held liable for the consequences of his negligent act in the performance of such public duty.

"In Oliver Nowell & Wife v. Wright, 3 Allen (Mass.) 166, 80 Am. Dec. 62, Dewey, J., at page 167, very aptly remarks:

"It may be a delicate if not a difficult task, to mark with precision the line of discrimination between the various classes of public officers or agents created by statute and whose duties are defined by statute, who may be held responsible to individuals in an action on the case, for injuries resulting from the improper execution of their official duties. That many such officers and agents have been so held responsible, the adjudged cases abundantly show."

\* \* \* \* \*

"Schmolze, the defendant below, was a servant of the city of Jersey City charged with the performance of a certain public duty or

service which was to drive a fire truck through the public streets to go to fires for the protection of property and oftentimes of life. This duty is concededly a highly important and grave function to perform. But it would be a travesty upon both law and justice to hold, that, because of the gravity and importance of the duties cast upon him, he has become clothed with the privilege, while in the act of performing such duties, to thrust aside all ordinary prudence in driving along the public streets to the great hazard of life and limb of men, women, and children of all classes and conditions, who may be upon the public highway. He must answer for his negligence, though in the performance of a public duty, in the same manner as if he were an individual in private life and had committed a wrong to the injury of another. The servant of the municipality is required to perform his duty in a proper and careful manner, and when he negligently fails to do so, and in the performance of his duty negligently injures another, his official cloak cannot properly be permitted to shield him against answering for his wrongful act to him who has suffered injury thereby.

\* \* \* \* \*

"We think that a sound public policy requires that public officers and employees shall be held accountable for their negligent acts in the performance of their official duties, to those who suffer injury by reason of their misconduct. Public office or employment should not be made a shield to protect careless public officials from the consequences of their misfeasances in the performance of their public duties."

And to the same effect is the case of *Falasco v. Hulén*, decided April 17, 1935, and reported in 44 Pac. (2d) 469, 1. c. 477, wherein the court said:

"Public officers, which includes, of course, sheriffs and constables, are not relieved from liability for acts of negligence. Perkins v. Blauth, 163 Cal. 782, 127 P. 50, dealing with officers of reclamation districts; Proper v. Sutter Drainage District, 53 Cal. App. 576, 200 P. 664, dealing with the same class of officers; Filarski v. Covey, 75 Cal. App. 353, 242 P. 874, dealing with sheriffs and deputy sheriffs; Wolfson v. Wheeler, 130 Cal. App. 475, 19 P. (2d) 1004, dealing with officers whose duties were to exterminate rodents and other pests; notes in 1. A. L. R. beginning on page 236, treating of duties of sheriffs and deputy sheriffs; Manwaring v. Geisler, 191 Ky. 532, 230 S. W. 918, 18 A. L. R. 192. We quote from the syllabus: 'A police officer is not exonerated from liability for an injury to another while in the discharge of official duties on the ground of public necessity, if he failed to exercise reasonable care to protect those whom he knew, or by exercise of reasonable judgment should have expected, to be at the place of the injury.' See, also, notes to the same case, 18 A. L. R. beginning on page 197, under the caption, 'A peace officer is generally held to be personally liable for negligent or wrongful acts causing personal injury or death.'

To the same effect is the case of Florio v. Mayor and Aldermen of Jersey City, 101 N. J. Law. 535, 129 A. 470, 40 A. L. R. 1353, and notes beginning on page 1358."

39 A. L. R. 1306, in its annotation on the "Personal liability of peace officer or his bond for negligence causing personal injury or death," declares that:

"The present annotation on personal liability of a peace officer or his bond for negligence causing personal injury or death is supplemental to an earlier annotation on the same topic in 18 A. L. R. 197.

"The recent cases affirm the rule stated in the earlier note, to the effect that a peace officer may be held personally liable for negligent or wrongful acts causing personal injury or death."

Section 11518, R. S. Mo. 1929, provides, among other things, that the sheriff shall

"\* \* \* execute all process directed to him by legal authority \* \* \* ."

Hence, the sheriff in conveying the prisoners to the reformatory was discharging an official duty.

From the foregoing, we are of the opinion that the sheriff is personally liable for ordinary acts of negligence which result in an injury to a prisoner while he is executing a process issued by the court, and such liability is not limited to cases where negligence is gross and wanton and amounting to culpability.

## II.

Surety is liable on official bond for sheriff's acts of negligence while engaged in performance of duty.

In 24 R. C. L., page 965, Sec. 59, in speaking of the test of liability of a surety on a sheriff's bond, it is said:

"The test should be: Would he have acted in the particular instance if he were not clothed with his official character, or would he have so acted if he were not an officer? If he assumed to act as an officer--whether under valid or void process, or under no process whatever--the bondsmen should be held, as he is held, for they are the sponsors of his integrity as an officer while acting as such. They should not be absolved from liability for reasons which if carried to their logical extreme would make them responsible only

for legal or authorized acts (where of course there is no liability) and excuse them from liability where acts are in excess of or apart from his authority-- the very acts which they are supposed to assure against and which constitute the only logical contingency for entering upon their obligation as sureties. Under such a test as this, it is clear that the distinctions drawn out at interminable length in the authorities as between acts *virtute officii* and acts *colore officii* would be deemed of little if any use in practice inasmuch as, from their very nature, they are mere argumentations in a circle."

39 A. L. R. 1306, in discussing the liability of a peace officer on his bond, which includes that of a sheriff, declares that:

"Whether the surety on the bond of a peace officer is liable for personal injury or death due to the wrongful or negligent manner in which the officer performs his duties depends on the provision of the bond and whether the act is in the performance of duty. See *Rice v. Lavin* (Ky.); *Fidelity & C. Co. v. Boehnlein* (Ky.); *Dean v. Brannon* (Miss.); *Jackson v. Harries* (Utah); and *State ex rel. Sonner v. Dean* (W.Va.) *supra*. And see *Geros v. Harries* (reported herewith).

"It was said in *Jackson v. Harries* (Utah) *supra*, that sureties on the official bond of a peace officer may be held liable in cases where the officer committed a wrong, only while he is acting in his official capacity.

"Also, in *Fidelity & C. Co. v. Boehnlein* (Ky.) *supra*, it was held that the surety upon a policeman's bond was liable, where the officer, acting in the capacity of a motorcycle policeman, negligently ran into

and injured the plaintiff. It appeared that the official bond covenanted to stand bond in the sum of \$1,000 that the policeman should well and faithfully discharge the duties of his office as policeman. The court said: 'When the bond was executed, the board of public safety had plenary power in assigning a policeman for duty to any department of the police service; and he is still a policeman, whether serving as a traffic officer, walking or riding a beat, or performing any of the many duties a policeman can be required as such to do. Appellant executed the bond with full knowledge of these facts, and to hold that for every change in a policeman's duties his bondsmen were released, or not bound, unless notified of the change, would render the execution of such bonds a farce. . . . By all the authorities, an official bond for the faithful performance of official duties covers misfeasance, malfeasance, and nonfeasance, as counsel for appellant concedes, but their argument assumes negligence in the operation of a motorcycle by a policeman is none of these. Such an assumption has neither authority nor reason to support it. . . . In driving the motorcycle he was doing precisely what his duties require him to do, and what he had no right to do except in the discharge of his official duty. He had neither the right to patrol the beat nor drive the motorcycle except as a policeman, and there is no intimation in either the pleadings or the proof that anything he did (except his negligence) was not done in the discharge of his official duty. He was therefore driving the motorcycle by authority of his office, and it was only because of his negligent performance of his official duty that he struck and injured plaintiff. It necessarily follows that the surety upon his official bond is liable for such negligence upon its covenant that he would well and faithfully discharge his duties as a policeman.' "

Section 11507, R. S. Mo. 1929, provides that the sheriff shall give bond

" \* \* \* conditioned for the faithful discharge of his duties."

The above language is similar to the condition in the bond required of the bondsmen in the Boehnlein case, supra, wherein the surety was held liable.

From the foregoing, we are of the opinion that a surety is liable upon his official bond for ordinary acts of negligence by a sheriff which result in an injury to a prisoner while such sheriff is discharging an official duty, and that such liability is not limited to cases where negligence is gross and wanton and amounting to culpability.

Respectfully submitted,

Wm. ORR SAWYERS  
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APPROVED:

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