ROADS AND BRIDGES: County not liable for negligent operation of road and bridge machinery even though used in work optional with county.

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April 18, 1947

Honorable Allen Rolston
Prosecuting Attorney
Schuyler County
Lancaster, Missouri

Dear Sir:

This is in reply to your letter of April 12, 1947, requesting an official opinion from this department, which reads as follows:

> "Schuyler county owns quite a lot and variety of road machinery, including maintainers, graders and trucks. This machinery is used for general road work in this county. A large part of the work being work and maintenance required of the county by law, but quite often this machinery is used for road or bridge work that is optional with the county, that is work that is not expressly required, but also being work that is not prohibited.
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> "The question is whether or not the county would be liable for damages arising from the negligent operation of such machinery while it is being used in such optional work or work that is not required to be done by the county.
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> "I feel rather familiar with the rule that the state cannot be held liable for damages in the absence of a statute or provision of the constitution making it liable, and with the further rule that in most such instances the county, being a political subdivision, is only acting for

> and on behalf of the state, and that the county would not be liable for damages incurred while discharging its obligatory duties, but I can not make up my mind as to the liability of the county when it engages in work that it is not required to do, and would very much like to have the benefit of your views on this question.
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> "The case of Hannon v. The County of St. Louis, and also the case of Zoll v. St. Louis County, 124 S. W. (2d) 1168, touch on this question, but not enough to make it clear to me. The Hannon case is reported in 62 Mo. 313."

The specific question for consideration is whether or not a county is liable for damages arising from the negligent operation of road machinery while it is being used in road or bridge work which is not expressly required to be done by the county.

A public corporation or quasi corporation which performs governmental functions is not liable in a suit for negligence (Todd v. Curators of the University of Missouri, 147 S.W. (2d) 1063). This view is followed in the case of Reardon v. St. Louis County, 36 Mo. 555, l. c. 561, 562:

> "The State Legislature has given to the county court of St. Louis county certain powers and duties in respect to roads and highways in that county, and even if we admit that the acts of the Legislature do fully impose upon the county courts the duty to construct and repair and keep in good order the bridges, and that the same acts confer upon it the means of accomplishing that duty, by the levying of taxes upon the property of the people of the county, does it then follow as a legal sequence that the county is responsible for special damages arising out of neglect in keeping a road or bridge in proper condition? The duty is imposed not upon the county but upon the county court, nor has the county any power over districts and overseers.

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> "The counties, as such, have no control over the repair of roads; they choose the county court, and there their power ceases. The statute gives to the county court, in express terms, the care and superintendence of the highways and bridges of the county, and confers upon it all the powers requisite to the execution of the trust; and it derives all its authority, not through the county, but directly from the statute. The county has no authority to give any direction or instruction to the county court as to the proper performance of its duty.
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> "Upon a whole view, therefore, of the plain provisions of the statute, we are lead irresistibly to the conclusion that no such broad and onerous obligations rest upon the county."

If such quasi corporations are to be held liable for negligent injury, the right of action must be given expressly by statute. And a statutory provision providing that a public corporation "may sue and be sued" does not authorize a suit against it for negligent injury because the waiver of immunity for liability for torts of officers or agents of the state is quite different from the waiver by the state for itself or its agents of immunity from an action (Todd v. Curators of the University of Missouri, supra). In the present case we find no statutory provision authorizing an action for the negligent operation of road and bridge machinery.

Our attention is directed to the case of Hannon v. County of St. Louis, 62 Mo. 313, where the court said at pages 316, 317 and 319:

> "In the view we have taken of this case, it would be foreign, alike to our purpose and the facts admitted by the demurrer, to question the correctness of the proposition so generally concurred in elsewhere, asserted in Reardon vs. St. Louis County (36 Mo. 555) 'that <u>quasi</u> corporations, created by the legislature for the purposes of public policy, are not responsible for the neglect of duties <u>enjoined</u> <u>on</u> <u>them</u>,

> unless the action is given by the statute.' But * * * * * 'This rule of law, however, is of limited application. * *"
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> "* * * the county undertook the contract of its own volition, and not in the observance of a public duty imposed by general law, then there is no refuge from this result; that the county, in regard to the performance of that contract, must occupy the same attitude as if a mere private corporation, and the work thus contracted for should be deemed a private enterprise, undertaken for its own local benefit; and this is more especially the case as the work, at the time of the occurence which resulted in this action, was being done on its own property. * * *
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> "I am fully aware of the distinction so generally taken by the authorities between the liability of municipal corporations on the one hand, and the non-liability of quasi corporations under like circumstances on the other, though it has been very shrewdly observed in this connection, that 'the court have been much perplexed respecting the principle on which to rest the distinction' (Dill, Munc. Corp., Sec. 764): but I think it may with safety be asserted, that the admitted facts of this case disclose no sound reason why any such distinction should be taken here, nor why the county, in respect to its own property, should not be held answerable to the same rules, as would certainly prevail were a municipal or private corporation, or an individual, a party defendant. * * *"

Although the county in that case was held liable for the injury of the plaintiff, we cannot accept it as authority in the present situation as the facts are distinguishable. In the Hannon case the county was in the process of laying a water-

pipe to an insane asylum maintained by the county when the injury occurred. The court there held the county liable to the same extent and under the same conditions as a private corporation because it was exercising a private or proprietary function for the profit, benefit or advantage of the county, rather than the public at large. In the present case the court was not acting in a private or proprietary capacity but in a governmental function. And therefore the exception or limitation on the general rule set out in the Hannon case, is not applicable.

Clark v. Adair County, 79 Mo. 536, involved a situation similar to the one in the present case, as there the plaintiff was injured when a county bridge gave way allegedly because of defective construction and improper maintenance. The court said there, at page 537:

> "Under the law of this State, as laid down in the cases of Reardon v. St. Louis County, 36 Mo. 555, and Swineford v. Franklin County, 73 Mo. 279, the judgment in this case will have to be affirmed. Counties are territorial subdivisions of the State, and are only quasi corporations created by the legislature for certain public purposes. As such they are not responsible for neglect of duties enjoined on them or their officers unless the right of action for such neglect is given by statute. Such has always been the law of this State. The plaintiff's case does not fall within the distinction approved in the case of Hannon v. St. Louis County, 62 Mo. 313. In this latter case the county was held liable for injuries suffered by the employe of a contractor, while a trench was being dug through the grounds of the county insane asylum under the superintendence and control of the county. It was held that in respect to county property of which the county was owner and proprietor, it must be held responsible for negligence in improving and managing it like any other proprietor of realty. The correctness of the doctrine settled in Reardon v. St. Louis County, was not questioned, but on the contrary was alluded to in terms of approval."

Also, in Pundman v. St. Charles Co., 110 Mo. 594, another similar case, the court said, l. c. 596, 597:

> "* * * It has long been settled law in this state that counties, being merely political subdivisions of the state and only quasi corporations created by the legislature for purposes of public policy, are not responsible for neglect of public duties enjoined upon its officers, unless the action is given by statute; and no statutory action is given in cases such as this. Reardon v. St. Louis Co., 36 Mo. 555; Hannon v. St. Louis Co., 62 Mo. 313; Swineford v. Franklin Co., 73 Mo. 279; Clark v. Adair Co., 79 Mo. 536. * * *"

The case of Hill-Behan Lbr. Co. v. State Highway Comm., 347 Mo. 671, 148 S. W. (2d) 499, decided in 1941, restates the rule and approves the cases cited above, saying at pages 679-680 (Mo.):

> "'The opening, construction and maintenance of public highways is purely a governmental function, whether done by the State directly or by one of its municipalities.' (13 R.C.L., p. 79, sec. 70) Under the governmental function rule, not always specifically referred to, and absent an authorizing statute, relief has been denied where damages resulted by falling from an unguarded bridge (Reardon v. St. Louis County, 36 Mo. 555); from filling up a millrace to prevent injury to a public road (Swineford et al. v. Franklin County, 73 Mo. 279); from a defective bridge in a public road (Pundeman v. St. Charles County, 110 Mo. 594, 19 S. W. 733; Clark v. Adair County, 79 Mo. 536); from driving an automobile, in the nighttime, into a creek where a bridge had been removed and the place left unguarded (Moxley v. Pike County, 276 Mo. 449, 208 S. W. 246). Also, and in spite of Sec. 21, Art. 2 of the Constitution, and under the rule of governmental function, relief has been denied, because of the absence of an authorizing statute, where lands,

> outside of a drainage district, have been damaged from overflow due to the improvements of the district. (Anderson et al. v. Inter-River Drainage Dist., 309 Mo. 189, 274 S. W. 448; Sigler et al. v. Inter-River Drainage Dist., 311 Mo. 175, 279 S. W. 50; Max v. Barnard-Bolckow Drainage Dist., 326 Mo. 723, 32 S. W. (2d) 583.) See also, Todd v. The Curators of the University of Missouri, 347 Mo. 460, 147 S. W. (2d) 1063, concurrently handed down, and where it is held that the State University is not liable for failure to exercise ordinary care to furnish a reasonably safe place to work."

Even when a function is voluntarily assumed by a quasi corporation, if it is a public or governmental one the corporation is not responsible for the neglicence of its officers or agents. The construction and maintenance of roads and bridges by a county is a governmental function, and, in absence of statute expressly granting the right of action for negligent injury, no such action can be maintained even though said construction and maintenance is optional with the county.

Conclusion

Therefore, in view of the foregoing authorities, it is the opinion of this department that a county is not liable, in the absence of statute, for damages resulting from the negligent operation of county road and bridge machinery, and further, that a county is not liable for said damages even though such machinery is used in road and bridge work which is optional with the county.

Respectfully submitted,

DAVID DONNELLY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

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