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1. HOSPITAL, JOINT TOWNSHIP — ORGANIZED UNDER SECTION 3414-1 ET SEQ., G.C.—OPERATION—GOVERNMENTAL. NOT A PROPRIETARY FUNCTION.

2. BOARD OF GOVERNORS OF HOSPITAL—NOT LIABLE IN DAMAGES DUE TO INJURIES SUSTAINED THROUGH NEGLIGENCE OR FAULT OF ANY EMPLOYES OR TO ANY ACT OR OMISSION ON PART OF BOARD.

3. BOARD WITHOUT POWER TO EXPEND ANY PUBLIC MONEY TO PROCURE INSURANCE AGAINST POSSIBLE LIABILITY GROWING OUT OF OPERATION OF HOSPITAL.

SYLLABUS:

1. The operation of a joint township hospital organized under the provisions of Section 3414-1 et seq., of the General Code, is a governmental and not a proprietary function.

2. In the operation of such hospital, the board of governors thereof is not liable in damages by reason of injuries sustained, due to the negligence or fault of any employes of said board, or to any act or omission on the part of such board.

3. The board of governors of such hospital is without power to expend any public money in procuring insurance against possible liability growing out of the operation of such hospital.

Columbus, Ohio, April 24, 1952

Hon. Gibson L. Fenton, Prosecuting Attorney
Williams County, Bryan, Ohio

Dear Sir:

I have before me your request for my opinion, reading as follows:

"The Williams County Joint Township Hospital District in a political subdivision in Williams County organized under G. C. 3414-1 et seq. It is, of course, organized for the purpose of operating a hospital and expects to be operating a hospital within the next few weeks.

"Your opinion on the following questions will be appreciated:

"1. Is a joint township hospital district organized under G. C. 3414-1 et seq., liable in tort to one injured in the operation of its hospital?

"2. Is the operation of a hospital by such board a proprietary or governmental function?

"3. May such board insure itself, and spend money for premiums therefor, against loss by reason of liability for malpractice or other tort in the operation of its hospital?"

Your first and second questions seem to call for consideration together. The organization and operation of a hospital by a joint hospital district are governed by the provisions of Sections 3414-1 to 3414-8, inclusive, of the General Code. Section 3414-1 authorizes the trustees of two or more contiguous townships in any county to form themselves into a joint township hospital district for the purpose of constructing and maintaining a joint township hospital. All the members of the boards of township trustees of the townships participating shall comprise the joint hospital board. Section 3414-2, General Code, contemplates the issuance by such board of bonds for the construction of such hospital. The same section makes provision for the operating expenses of such hospital, in the following words:

"ALL necessary expenses for the operation of such general hospital may be paid out of any moneys derived from the special levy approved for such purposes by the voters of said joint township hospital district, voting as a subdivision, or out of any other moneys received from *hospital income or services rendered*, or from any unencumbered funds from any other source. The board

> of trustees of the several townships participating in said hospital district are hereby authorized to appropriate and pay over to said joint township hospital board any unencumbered funds that they may have, for maintenance of said hospital." (Emphasis added.)

Section 3414-6, General Code, provides for the appointment by said joint township district hospital board and the judge of the court of common pleas of the county, of a board of three members, known as the board of hospital governors, to whom is committed the management and control of the operation of such hospital.

Since the decision of the Supreme Court in the case of Commissioners of Hamilton County v. Mighels, 7 Ohio St., 109, it appears to have been well settled, as stated in the syllabus of that case:

> "The board of commissioners of a county are not liable, in their quasi corporate capacity, either by statute or at common law, to an action for damages for injury resulting to a private party by their negligence in the discharge of their official functions."

The court in the opinion cites many cases in support of the proposition that a county, being a body created by the legislature, is but an arm of the state, and at common law could incur no liability by reason of any act or omission of its offices unless such liability is created by statute. That decision was approved and followed in Board v. Storage Company, 75 Ohio St., 244. The same principle was applied in an action against a county agricultural society, where plaintiff was injured by the collapse of defective bleachers, Dunn v. Agricultural Society, 46 Ohio St., 93; also in an action against a board of education, Finch v. Board of Education, 30 Ohio St. 37.

In the case of Lloyd v. Toledo, 42 Ohio App., 36, damages were sought by the plaintiff against the City of Toledo, for injuries claimed to have been sustained by her through the negligence of servants and employes of the defendant in the course of a treatment given her while she was a patient in the municipal hospital. The syllabus of the case is as follows:

> "1. If performing governmental function in operating hospital, city was not liable to patient for alleged negligent treatment.
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> "2. Operation with municipal funds of hospital for public charitable treatment of sick and injured being 'governmental

function,' notwithstanding some patients pay for services, city held not liable to patient for torts of hospital employees."

It appeared that while the hospital was open to all persons who applied for its benefits, yet rooms were at times rented and services rendered for compensation to those who were willing and able to pay therefor. The court in the course of the opinion said:

> "In our judgment, the facts recited above, which are conceded by the pleadings, show that the hospital is a municipal institution maintained and operated at the expense of the city in the interest of and for the preservation of the public health, and that the municipality in conducting the institution is performing a governmental function. The situation in this respect is not altered by the mere fact that there were some patients who paid for the accommodation and service. The rule is well settled that a municipal corporation is not liable for the torts of its officers and employees engaged in the operation of a municipal hospital, mainly at the public expense, to promote the public health."

In an earlier case, Crawford v. Commissioners, 1 Ohio App., 54, it was held:

> "1. Where a county or a district maintains a children's home under the provisions of Section 3077 et seq. and Section 3109 et seq., General Code, the county commissioners in their capacity as the board of managers thereof are liable in their official capacity for negligence in maintaining such institution, independent of the provisions of Section 2408, General Code.
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> "2. Where an employe of such institution is injured by the negligence of a superior servant under such circumstances as would ordinarily create a liability between employer and employe such employe may maintain an action against the county commissioners in their official capacity for damages arising therefrom."

The court in the course of its opinion referred to the rule laid down in the case of Commissioners v. Mighels, supra, but undertook to avoid the rule of that case by arguing that the organization of a children's home, while permitted by the statutes, was not compulsory, and therefore that having assumed such enterprise, the commissioners would bring upon themselves a liability for negligence of their employes that might not exist in case they were performing a duty enjoined upon them by law. Reliance was had upon several cases outside the State of Ohio. The Supreme Court in 90 Ohio St., 433, reversed the above decision by a unanimous vote on

authority of Commissioners v. Mighels, and Board v. Storage Company, supra, but without report.

In 26 American Jurisprudence, p. 594, the following broad rules are laid down as to publicly owned hospitals:

> "The general rule, in the absence of any statutory provision to the contrary, is that strictly public institutions created, owned, and controlled by the state or its subdivisions, such as state asylums for the insane, municipal and county hospitals, reformatories, etc. are not liable for the negligence of their agents. The doctrine of respondeat superior does not apply. They are held to be governmental agencies brought into being to aid in the performance of the public duty of protecting society from the individual unfortunate or incompetent in mind, body or morals, and the rules applicable to municipal corporations and public officers generally are applied. This seems to be the rule whether the action is against the state, a county, a municipal corporation, or a hospital corporation, created by the state to act as its agent in the case of those physically or mentally unwell. There seems to be no dissent from the rule wherever applied to a case in which an injury to the person is considered, whether the injured person is a stranger, a patient, an employee or servant, or an invitee on the hospital premises."

In the light of the foregoing, it appears that a joint township district hospital operated by its board of governors, is acting in a governmental and not a proprietary capacity. It also appears clear that in the absence of any statute imposing liability, such board of governors is immune from liability for injuries caused by the negligence or fault of its employes, or by any act or omission of the board.

Coming to your third question, relative to the right of the board of governors of such hospital to purchase liability insurance, it seems obvious that where there is no liability, it would be a waste of public money and an illegal expenditure to purchase insurance against liability. This subject has been covered by many opinions of this office. In opinion No. 787, Opinions of the Attorney General for 1937, page 1451, it was said at page 1455:

> "As to property damage and public liability insurance, suffice it to say that this office has consistently held that a political subdivision cannot legally enter into a contract and expend public moneys for the payment of premium on public liability or property damage insurance covering damages to property and injury to persons unless there is a liability created against the political

subdivision by statute. Opinions of the Attorney General for 1934, Vol. II, page 1120."

These and other opinions were reviewed in my opinion No. 803, issued on October 5, 1951.

In specific answer to the questions submitted, it is my opinion and you are advised:

1. The operation of a joint township hospital organized under the provisions of Section 3414-1 et seq., of the General Code, is a governmental and not a proprietary function.

2. In the operation of such hospital, the board of governors thereof is not liable in damages by reason of injuries sustained, due to the negligence or fault of any employes of said board, or to any act or omission on the part of such board.

3. The board of governors of such hospital is without power to expend any public money in procuring insurance against possible liability growing out of the operation of such hospital.

Respectfully,

C. WILLIAM O'NEILL
Attorney General