

Opinion No. 59-39

April 21, 1959

BY: FRANK B. ZINN, Attorney General

TO: Mr. Raymond E. Keithly District Attorney Seventh Judicial District Truth or Consequences, N. M.

A county would not be liable for damages resulting from possible injuries incurred by a person in the use of a foot bridge if the county constructed such a bridge.

OPINION

{*60} Your predecessor in office, Mr. E. M. Barber, has asked whether if a county constructed a foot bridge across a creek and provided adequate side and floor boards would the county be liable for the damages resulting from possible injuries incurred by a person in using the bridge.

In my opinion, there would be no liability on the part of the county should it construct the bridge if some one thereafter was injured while using the bridge.

Your inquiry basically raises the question as to whether a county may be liable for damages resulting from an injury sustained by a person using a public works. As a general rule, apart from statute and considerations of nuisance, a county is not liable for tort in connection with the construction or maintenance of public improvements or works where such construction or maintenance is the {*61} performance of a governmental function. 20 C.J.S., Counties, Sec. 218, page 1070.

At the outset, it should be noticed that I have found neither general or special legislation providing for suits against counties for injuries arising from dereliction of duty in maintaining public roads, bridges or other public improvements, or for torts committed by any of its officers, servants or agents in the management or operation of improvements of this type. The case of *Vigil v. Penitentiary of New Mexico*, 52 N.M. 224, points out that such general or special legislation must be enacted and must exist before such actions are instituted, and in *Vigil v. State*, 56 N.M. 411, special legislation was declared unconstitutional. Thus, unless the county will be maintaining the foot bridge in a private or proprietary or voluntary capacity, a person using the bridge cannot bring suit against the county.

It is my view that the construction and maintenance of the foot bridge in this instance would be the tender of a "governmental function". As pointed out in *Barker v. City of Santa Fe*, 47 N.M. 85, page 89, when a municipality or other governmental subdivision acts for the public benefit generally, as distinguished from acting for its immediate benefit or private good, it is acting in a governmental capacity.

In the case of *Murray v. County Commissioners*, 28 N.M. 309, it was pointed out that the exemption of counties from liability for torts in the performance of their governmental functions is based upon the proposition that a county is an involuntary subdivision of the state and exercises by direction and command of the state a portion of the governmental function thereof. Grant County, therefore, was held not liable for injuries received by a person by reason of a defective highway. This holding in the *Murray* case, *supra*, was recently upheld by the New Mexico Supreme Court in *Elliott v. Lea County*, 58 N.M. 147.

In this instance it has been pointed out that the foot bridge will be constructed across the Percha Creek at Hillsboro, New Mexico, to be used principally by children at such times when water prevents crossing by pedestrians. The erection of this bridge, I believe, will insure the safety of children who must cross the creek when it contains water, and if the county supplies this public works, it will do so as a governmental function rather than as a private, proprietary or voluntary undertaking.

One last question remains as to whether the bridge could possibly be constituted a nuisance, thus subjecting the county to liability. It has been held that a bridge constructed under due authority of law in a manner authorized by law is not a nuisance. 66 C.J.S., Nuisance, Sec. 28, P. 790. Inasmuch as it is my opinion that the construction and maintenance of the bridge is a necessary works and one constructed under due authority of law, I do believe the bridge could be held to be a nuisance, thus invoking possible liability on the part of the county should one be injured in the use of the bridge following construction.

Fred M. Calkins, Jr.