

Opinion No. 41-3754

March 31, 1941

BY: EDWARD P. CHASE, Attorney General

TO: Mr. Gilbert Lopez Floor Leader of the House of Representatives Santa Fe, New Mexico

{*53} You recently inquired as to the constitutionality of legislative appropriations to pay individuals claiming damages against the state, in the aggregate sum of approximately \$ 76,000.00.

The question is whether or not such legislation conflicts with Section 14, Article IX, of the Constitution, prohibiting the pledging of the state's credit or the making of any donation "to or in aid of any person", and whether such appropriations are for a public purpose and not a private one.

The matter has never been determined in this state and is an open one here. In other jurisdictions, there is considerable conflict. After carefully studying the various decisions, I am of the belief that the weight of authority is to the effect that the legislature may make such appropriations in cases where the damages were incurred by an employee or officer of the state. Even with respect to such cases, some of the courts are quite emphatic that such a statute would be a donation to a private individual and not the satisfaction of a state obligation. For example, in California, in *Bourne vs. Hart*, 28 Pac. 1951, where an officer lost his arm and was given an appropriation therefor, the court said:

"In entering the service of the state, the petitioner assumed all the risks attending such employment, whether arising from its ordinary perils or resulting from the negligence or misfeasance of other servants of the state, and the appropriation made by this act is a mere gratuity, as the state was under no legal liability to compensate him for any loss which he may have sustained while thus in the discharge of his duties . . . The exemption of the state from paying damages for accidents of this nature does not depend upon its immunity from being sued without its consent, but rests upon grounds of public policy which deny its liability for such damages. It is argued, however, that the state has in this instance assumed and acknowledged its liability by the act under consideration. But this is precisely what the legislature is forbidden to do. A legislative appropriation made to an individual in payment of a claim for damages on account of personal injuries sustained by him while in its service, and for which the state is not responsible, either upon general principles of law or by reason of some previous statute creating such liability, is a gift within the meaning of the Constitution. The appropriation made to petitioner was a mere gratuitous assumption of an obligation from which the state was and is exempt, and is within the mischief which the framers of the Constitution intended to remedy by the sections before referred to. If the state desires to make itself

liable for such damages as may be sustained by those in its service, it must do so by a general law which shall embrace all cases which may come within its provisions."

On the other hand, the weight of authority seems to be that as to appropriations for damages caused to one not a state officer or employee, because of the negligence of some officer or employee of the state, or through some other unlawful or negligent act, are invalid, and that is my opinion from the authorities read.

If a man is damaged by an officer or by the state in the doing of a lawful act in a lawful manner, appropriation therefor would be valid; but not so if the injury is the result of the negligent, unlawful or unauthorized act of the {*54} employee. In the first case, the officer or employee causing the damage is acting on behalf of the state in the act done; in the latter, the officer is responsible, but assumption of the responsibility by the state would be a gratuity.

Though this seems to be the weight of opinion, there is at least one case in which an appropriation for damages caused by the negligence of the servants of the state in the operation of an elevator was sustained, *Mills vs. Stewart*, 76 Mont. 429, 249 Pac. 332.

Annotations on this subject are found at 47 A.L.R. 431, 22 A.L. R. 1445, 28 A.L.R. 1100.

By A. M. FERNANDEZ,

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