

**OPINION**  
**64-48**

May 15, 1964            (OPINION)

CITIES

RE:   Governmental Immunity - Proprietary or Governmental Capacity

This is in reply to your letter of May 9, 1964, relative to the following matter:

At the last city council meeting one of the local insurance men approached the city in regards to selling them a comprehensive and liability insurance policy to cover all their vehicles and also the swimming pool. The city council delayed taking any action on this matter and requested that I write for an opinion from the attorney general as to whether they would need such insurance and also whether other cities that you might know of have such insurance.

I wish you would be so kind as to write an opinion as to whether the city should carry such an insurance to protect themselves or whether they are immune to most actions and therefore making it unnecessary to have insurance. I might add that they are particularly concerned about the swimming pool and their liability. Also, they are interested to know whether any other cities do have insurance of this nature."

As you are aware the doctrine of governmental immunity applies to certain actions of municipalities. Generally speaking, those acts of a municipality which are held to be governmental in nature are the acts to which governmental immunity applies. Governmental immunity does not apply to those acts which are proprietary in nature. Of course, the doctrine of governmental immunity and the question of liability cannot, in any event, arise unless the municipality or their agents or employees have been negligent and such negligence is the cause of any damages which might be incurred.

The question of which acts of the municipality are governmental in nature and which acts are proprietary in nature depend on factual situations which this office cannot determine. The courts of this state have decided few cases involving this question and the other jurisdictions certainly do not have unanimity of opinion on the question. Generally speaking, it appears that trend of the courts is to limit the doctrine of governmental immunity and permit the plaintiff to recover damages from a municipality. In view of such trend we have rather serious doubts that the operation of a swimming pool by a municipality would be considered a governmental act which would entitle the municipality to immunity for its negligent acts. In South Dakota it has been held that a city, in operating a swimming pool and its related facilities, was acting in a proprietary rather than a governmental capacity and the city was not immune from liability for injuries sustained by a patron which injuries were due to the negligence of the municipality in its operation. See Orrison

v. City of Rapid City, 76 S.D. 145, 74 N.W.2d. 489 (1956).

The North Dakota Legislature, in 1955, enacted section 40-43-07 of the North Dakota Century Code which provides:

POLITICAL SUBDIVISIONS AUTHORIZED TO CARRY LIABILITY INSURANCE  
- DEFENSE OF GOVERNMENTAL IMMUNITY NOT AVAILABLE TO INSURERS.  
Any political subdivision of the state may insure against claims of loss, damage, or injury against such political subdivision or any department, agency, or function, or officer, agent, or employee, of such subdivision. This section shall not deprive any political subdivision of the state of its right to claim governmental immunity but such immunity shall not be available to the insurance carrier furnishing such insurance and all policies providing for such insurance shall contain a waiver of such defense."

This office cannot determine whether a given municipality should or should not carry liability insurance. The decision in such matter rests within the discretion of the city government. The above-quoted statute authorizes a municipality to carry liability insurance. It does not require the municipality to carry such insurance. The status of the law in North Dakota is such that it would be conjecture on our part to venture whether, in any given circumstances, the courts of this state would hold a municipality to be acting in a governmental or proprietary manner. In determining whether the city should purchase liability insurance we presume the governing body would want to weigh the cost of such insurance against the possibility of suit for damages in addition to the other factors which they might consider.

Insofar as other cities of this state are concerned, we believe some of them do carry liability insurance although we have no specific records relative to this matter. We would suggest you contact the North Dakota League of Municipalities, 418 East Rosser Avenue, Bismarck, North Dakota, for information on this subject.

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Attorney General