

Opinion No. 39-3201

July 1, 1939

BY: FILO M. SEDILLO, Attorney General

TO: Dr. John W. Myers, New Mexico State Hospital, Las Vegas, New Mexico.

{*76} I have your letter of June 23 stating:

"The enclosed copies of correspondence will indicate that the State Hospital has been asked to settle a claim brought against the Hospital by Mr. Genaro Garcia. Mr. Garcia claims that he was inconvenienced, put to unnecessary expense and mental anguish, brought on through a mistake by the former Superintendent of this Hospital. The Board feels that they would be willing to settle for the stated sum should this meet with the approval of the Attorney General."

Shortly after this claim was first advanced, I had occasion to look into this matter somewhat, and was of the opinion:

(1) That although a mistake had occurred by reason of close identity in the names of the patients in question, there was no culpable actionable negligence.

(2) That no damages were allowable for mental anguish unaccompanied by any physical injury.

(3) That the hospital was not liable for torts committed by it as such (See opinion to Miners Hospital dated June 30, 1939), and

(4) That the doctrine of respondent superior, {*77} whereby the employer is made responsible for the acts of its employees, was not applicable to the state hospital.

However, the amount for which settlement has been offered is small, and the man no doubt was out some expense in making the trip from Albuquerque to Las Vegas, and, if the Board is satisfied that this is just, with or without taking mental anguish into consideration, I see no reason why such a settlement cannot be properly made.

I say this for the reason that although my opinion was as above indicated, it would probably take a law suit to determine all four of those points. The Supreme Court of this state, so far as I can find out, has not had occasion to determine either the question of mental anguish without physical injury as an element of damage or the responsibility of this corporate state agency for tort on the part of the hospital or its employees.

The question is not settled one way or the other by the cases of Smith vs. Director of Insane Asylum, 19 N.M. 137, Locke vs. Trustees of the Reform School, 23 N.M. 487, State vs. Locke, 29 N.M. 148, and Dougherty vs. Vidal, 37 N.M. 256, where the agency

involved is one made a body corporate and authorized to be sued. In fact, the broad language used by the Supreme Court in the last two cases gives one cause to hesitate before positively declaring an opinion as to the liability of these corporate state agencies for torts.

Therefore, the Board being satisfied with the amount stated in the last offer of the claimant, settlement for that amount on the part of the Board, has the approval of this office. The Board is given control of the disbursements and expenditures of all funds, and this I believe carries with it wide discretionary powers in that respect. Section 130-302, 1929 Compilation.

By: A. M. FERNANDEZ,

Asst. Atty. Gen.