MINUTES OF THE SENATE COMMITTEE ON JUDICIARY

Held in Room 519 S, at the Statehouse at 11:00 a. m./p.m. on March 16, 19 78.

All members were present except: Senators Steineger, Everett, Gaar

The next meeting of the Committee will be held at 11:00 a. m./p.m. on March 17, 19 78.

~~The minutes of the meeting held on XXXXXXXXXXXXXXXXXX, 19XXX were considered, corrected and approved.~~

Elwaine F. Pomeroy
Chairman

The conferees appearing before the Committee were:
Frank A. Bien, Legal Counsel for League of Kansas Municipalities
E. A. Mosher - League of Kansas Municipalities
Leon B. Graves - City of Topeka
Representative Carlos M. Cooper
Jerry Palmer - Kansas Trial Lawyers
Robert Evans - Bonner Springs City Manager
Harry Felker - Topeka Park Commissioner
Mary Ellen Long - Virgil, Kansas, Mayor
Fred Devictor - Parks & Recreation Department, Lawrence
John Dekker - City of Wichita, Attorney
Fred Howard - Topeka Chief of Police
Firman Gladow - Lyons City Attorney
Kathleen Sebelius - Kansas Trial Lawyers

Staff present:
Art Griggs - Revisor of Statutes
Jerry Stephens - Legislative Research Department
Cynthia Burch - Legislative Research Department

House Bill 2888 - Crime of hypnotic exhibition. No conferees appeared in support of, or in opposition to the bill.

House Bill 2776 - Procedure for claims against cities. Ernie Mosher testified with regard to the bill. A copy of his prepared statement is attached hereto. He felt that the six months filing requirement should be retained. He pointed out the governor vetoed a similar bill last year. He distributed to the committee a copy of the veto message from the governor last year, a copy of which is attached hereto.

Mr. Leon Graves, the assistant city attorney of Topeka, said the city of Topeka is in basic agreement with the viewpoints expressed by Mr. Mosher.

Kathleen Sebelius appeared in support of the bill and introduced Jerry Palmer. He stated the Kansas Trial Lawyers Association was in favor of the bill. He stated that cities should be treated in the same way as a private corporation.

continued -

CONTINUATION SHEET

HB 2776

John Dekker testified that the six months notification is important, and provides the city with the opportunity to eliminate the defect. He stated that with street defects, a city is not able to correct all defects at the same time. If the city is not required to be notified for two years, there would be no opportunity to correct defects.

House Bill 2929 - Sub. for HB 2929; mob actions, liability of cities. Representative Cooper testified in support of the bill. He related briefly the difficulty experienced by the city of Bonner Springs. Although this bill would not help with that particular difficulty, it would help other cities in the future.

Mr. Mosher testified in support of the bill. A copy of his statement is attached hereto, along with a copy of the decision of the Court of Appeals in the Bonner Springs case, and a copy of the memo from Frank A. Bien.

Mr. Bien replied to questions propounded by members of the committee. He explained the factual situation of the Bonner Springs case. Considerable discussion with Mr. Mosher and Mr. Bien followed.

Bob Evans, the city manager of Bonner Springs, testified in support of the bill. A copy of his statement is attached hereto. He stated they don't know what to do about their summer program this coming year. They don't know how many officers they will need at the games next week. He stated they don't want to have to keep track of people. He has added three officers to his force.

Commissioner Felker appeared in support of the bill. He distributed copies of reports from the Kansas Recreation and Park Association; a copy is attached hereto. He stated that with this bill, cities could continue to grow in recreation programming. He pointed out that cities are liable for the actions of mobs, but counties are not. He stated that cities have to try to exclude the few troublemakers from the recreation program; committee discussion with him followed as to the difficulties involved in identifying troublemakers.

Mary Ellen Long testified in support of the bill. She stated she would have preferred the original version of the bill. She pointed out the difficulties that small cities have with regard to law enforcement.

Fred Devictor, from Lawrence, testified in support of the bill. He stated there are lots of sports activities and general recreation activities which would be jeopardized by the court decision. Under that decision, he feels that cities would be required to find out who are the troublemakers and follow them whenever they participate in any recreational activity. He pointed out the difficulty in knowing who the troublemakers might be among the spectators. He also pointed out that troublemakers have as much right to participate

CONTINUATION SHEET

Minutes of the Senate Committee on Judiciary March 16, 19 78.

HB 2929 continued -

as the non-troublemakers, and perhaps they need the services even more.

John Dekker testified in support of the bill. He pointed out that one difficulty that cities have is that schools can schedule events that may create disturbances, and then the city would be liable if any trouble arises at those events, even though the events are on the school grounds. Committee discussion with him followed.

Chief Howard of the Topeka Police Department testified in support of the bill. He said he is concerned about the manpower needed to patrol recreational activities; often times they are from 14 to 20 calls behind, and it is difficult to know where the priorities should be.

Firman Gladow testified that the mob statute places an undue burden upon the small cities. He pointed out the inconsistency in placing responsibility on the city, but not the county or the state. He stated a definition of a mob might be very helpful. Committee discussion with him followed.

The meeting adjourned.

These minutes were read and approved by the committee on 4-24-78.

3-16-78

GUESTS

SENATE JUDICIARY COMMITTEE

NAME	ADDRESS	ORGANIZATION
Mr + Mrs Charles Preston	1300 W 12th Emporia Ks.	Way College - Hypnotic Research
Mary Ellen Long Mayor	Virgil, Ks	Ks. Lg. of Muni
John W. Elder	Box 646, Winfield, Ks.	City of Winfield.
Harold Main	Ct House Topeka	Sh Co
Laurence V Sendlick	City Hall	City of Wm Keeney Mayor
Leon B. Draves	215 E 7th, Topeka	City of Topeka
Ron Ellsworth	Way College of Emporia	same
Kris Steadfeld	1300 W. 12th St. Emporia, KS.	Way College - Biblical Research
Frank Albin	117 W 7th	League of Kan Municipalities
Tony Fetter	City Hall	City of Topeka
Jerry Slaughter	KNS	Topeka
Fred DeCarter	City of Lawrence Parks + Recreation Dept.	Lawrence, Kansas
Neil Shortlidge	Topeka	League of Ks. Municipalities

3-16-78

112 WEST SEVENTH STREET
TOPEKA, KANSAS 66603
AREA 913 354-9565

League of Kansas Municipalities
Kansas Government Journal

To the Senate Committee on Judiciary
From E. A. Mosher, Executive Director, League of Kansas Municipalities
Re: HB 2776 -- Tort Claims Notice
March 16, 1978

By action of its State Legislative Committee, the League opposes enactment of HB 2776. We have no major objections to the bill, except for lines 20 and 21. Put bluntly, we strongly object to the removal of the present requirement that tort claims against cities be filed within six months of the time of a purported injury to persons or property.

Attached to this statement is a copy of the 1977 veto message of HB 2098, which also would have eliminated the six months notice requirement.

Our reasons for opposing this bill are substantially the same as those expressed by the governor. Incidentally, it may be noted that the two statutes cited by Governor Bennett continue to exist. K.S.A. 1977 Supp. 68-419 still has a 90-day time requirement for state highways; K.S.A. 68-301 still requires knowledge of the existence of a county or township road or bridge defect five days in advance of the incident, as a condition of liability. To our knowledge, there are no pending bills which would affect these two statutes.

Our concern with elimination of the six months notice is strengthened by the existence of many thousands of street pothole "defects" that exist in cities throughout the state. We have no idea how many lawsuits may result from these potholes. We are aware that a six months notice is not going to help too much in their discovery. However, the public treasury is going to be much better protected if notice is served within six months, rather than up to 23 months later. We assume, with the repeal of the six months notice requirement, that the only remaining time limitation on tort claims against cities would be the two-year statute of limitations found at K.S.A. 60-513.

To summarize, we think the six month filing requirement should be retained. Cities do have an obligation to remove conditions which may cause injury to persons or property, and to do so promptly. We don't think it is asking too much that cities be served notice within six months. Indeed, if the objective is to remove potential exposures to liability, to protect the general public, then the time limitation should be considerably shortened.

League of Kansas Municipalities

An Instrumentality of Its Member Cities

VETO MESSAGE FROM THE GOVERNOR

To the House of Representatives of the State of Kansas:

HB 2098 is returned pursuant to Article 2, Section 14, of the Kansas Constitution. HB 2098 as it was originally introduced would have improved the procedure relating to the filing of claims and institution of suit against municipalities.

As the bill passed through the legislative process, however, it was substantially amended and by the terms of this bill as submitted to me would repeal K. S. A. 12-105. The statute repealed provides a specific procedure for the filing of claims against municipalities on account of injury to person or property. Though the procedure could legitimately be improved, a total repeal of this statute at this time is in my view unwarranted.

I veto HB 2098 for the following reasons:

1. HB 2098 removes the requirement that notice be served on a municipality for any claim for damages within six months after the date of injury. A repeal of this requirement will deprive cities of the opportunity to make early investigation of the alleged claim as well as to clear deficient conditions or offending practices in order to avoid subsequent loss.

2. With the passage of this proposal it becomes more difficult for municipalities to actually budget for potential and in many instances unknown liabilities.

3. There is every indication that should this bill become law our Kansas cities may be required to pay higher liability insurance premiums, assuming they can obtain adequate insurance protection at all.

4. The Supreme Court of the United States in the case of *Hughes, et al. vs. The Board of Public Utilities* acknowledged that a more restrictive limitation was appropriate and constitutional where claims were filed against governments and their governmental instrumentalities.

5. It is my understanding that those who favor the amended version of this bill have done so claiming that it will place government tort feasors on an equal footing with private tort feasors. As nearly as I can tell, while the bill might move in that direction, it does not accomplish that result. For instance, under the provisions of K. S. A. 1976 Supp. 68-419 written notice of claim and demand for damages resulting from defects in state highways and bridges must be made within 90 days. Likewise, under the provisions of K. S. A. 68-301 there is a requirement that counties and townships have at least five days prior notice as a condition precedent to recovering damages for defective bridges, culverts or highways. If the state is going to modify the procedure in these areas then, in my view, the modification should be uniform or the variances should be fully justified.

6. While it may well be that changes should be made in the concepts and procedures relating to governmental immunities and liability, it is inappropriate to make those charges on a piecemeal basis without full knowledge of the consequences of the change and the inter-relationship of the modification with other provisions of Kansas law.

ROBERT F. BENNETT, *Governor.*

Session of 1978

Substitute for HOUSE BILL No. 2929

By Committee on Judiciary

2-24

AN ACT relating to mob action; amending K.S.A. 12-203 and repealing the existing section.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 12-203 is hereby amended to read as follows: 12-203. A city shall be liable in damages for injuries to persons or property caused by the action of a mob within the corporate limits of the city if the city police or other proper authorities of the city have *knowledge of the existence of the mob and have* not exercised reasonable care or diligence in the ~~prevention or~~ suppression of such a mob. The city shall have all of the defenses in such action that are available to parties in tort actions.

Sec. 2. K.S.A. 12-203 is hereby repealed.

Sec. 3. This act shall take effect and be in force from and after its publication in the statute book.

3-16-78

112 WEST SEVENTH STREET
TOPEKA, KANSAS 66603
AREA 913 354-9565

League of Kansas Municipalities
Kansas Government Journal

To the Senate Committee on Judiciary
From E. A. Mosher, Executive Director, League of Kansas Municipalities

Re: Sub. HB 2929 -- City Mob Liability Statute

March 16, 1978

The League urges this committee to favorably recommend the passage of Substitute for House Bill 2929.

Frankly, we would prefer the original bill, which would have repealed K.S.A. 12-203 and 12-204, to completely eliminate the city mob liability statute. However, the house committee felt its repeal was too drastic a step at this time, and therefore proposed the substitute which would require that the city had knowledge of the existence of the mob and failed to exercise reasonable care or diligence in its suppression as a condition precedent to a finding of liability.

As some members of this committee will recall, the original mob liability statute, which had been on the books since the civil war and territorial days, was modified in 1967, at the request of the League and others, both to change the definition of who constitutes a mob, from five to ten persons, and to introduce the negligence concept. During the past ten years, we were not aware of any particular problems with implementation of the new statute, until the December 16, 1977 Bonner Springs court decision.

We are very anxious about the potential impact of this court of appeals decision, a copy of which is attached to these remarks. Also attached is a brief memo on this subject by Frank Bien, Legal Counsel of the League, who filed a brief amicus curiae on behalf of our 503 member cities.

In our judgment, the decision tends towards substituting the concept of absolute liability to replace the negligence test which we think was the intent of the 1967 Legislature. If the Bonner Springs decision is the precedent for future decisions, we think cities are in very serious trouble. Their vulnerability to lawsuits will be so extensive that it will seriously affect such activities as the sponsorship of recreational programs. Even a tavern brawl in a small city with a part-time marshall is a potential lawsuit. Police resources will need to be assigned primarily to protect the city from liability, not to protect the public safety. Strangely, counties and townships are not liable for mob action -- only cities.

We think a modification of the act, in recognition of the court of appeals decision, is essential, and we urge your support.

League of Kansas Municipalities

An Instrumentality of Its Member Cities

The following is an analysis of the matter prepared by Frank A. Bien, Legal Counsel of the League, who filed the brief noted above.

"In 1967 the legislature repealed K. S. A. 12-201 and 12-202 which imposed absolute liability on cities for mob damage, and enacted in its place K. S. A. 12-203 and 12-204 which imposes liability for mob action only if a city fails to exercise "reasonable care or diligence" in the prevention or suppression of a mob.

"In a very recent case involving the new mob statute a jury determined that the city of Bonner Springs was negligent in failing to prevent mob action at a basketball game which was part of a city sponsored recreational program. (Jenkins v. City of Bonner Springs, 1 Kan. Court of Appeals 2d 727, decided 12-16-77). The facts of this case are such as to cause concern to cities in regard to their potential liability for mob action. The city had no direct notice that any mob action was threatened at the game. Trouble at the game began when a spectator, who was displeased with the rough play of one of the players shouted an obscenity at the player. Immediately after the game ended the player, McGee, went into the stands and challenged the spectator to a fight. Lynn Johnson, who was apparently trying to calm things down, came up behind McGee and tapped him on the shoulder whereupon McGee hit Johnson who landed on the basketball court. Spectators then converged on Johnson and attacked him. Plaintiff was injured when he attempted to rescue Johnson. To establish notice of probable mob action the district court permitted introduction of evidence that some of the basketball players were trouble-makers and had had previous difficulty with the police and that there had been fights and disturbances at other athletic events in the city, including little league baseball games. On the basis of this evidence, the jury was allowed to determine whether the city was negligent. Apparently the jury decided that because of the character of some of the players at the game the city should have known that mob action might occur and was therefore negligent in failing to take action to prevent such mob action. By permitting the case to go to the jury, the district court in effect held that a city is under a legal duty to provide police protection at an athletic event if any of the participants or spectators are what might be termed "trouble-makers" or "police characters." Cities are concerned about this decision because of the effect it will have on use of limited police resources and their operation of recreational programs. It places an impossible burden on cities because it will require cities to define who is a "trouble-maker" or "police character" and then monitor the attendance of such persons at all athletic events, or even church picnics held in their city, on the ground that such persons may incite mob action. It must be also noted that because of this case many cities may decide to limit or abandon city sponsored recreational programs such as basketball or baseball leagues.

"The scope of the legal duty which has been imposed by the court on cities to prevent mob action under the new mob law is so broad as to place an unwarranted and socially undesirable burden on cities and for that reason the law should be repealed."

We think the apparent obligation placed on cities by the existing statute as applied by the court is unreasonable. We should also point out that if cities are to be held liable, why shouldn't counties or townships also be held liable for mob action? We urge the committee to favorably report HB 2929.

3-16-78

TESTIMONY ON BEHALF OF THE CITY OF BONNER SPRINGS, KANSAS

BEFORE THE SENATE JUDICIARY COMMITTEE

IN SUPPORT OF BILL NO. 2929

MARCH 16, 1978

#6

OFFICE: DREXEL 1-1590 RES: DREXEL 1-8564

D. H. CORSON, JR.
LAWYER
434 BROTHERHOOD BUILDING
KANSAS CITY, KANSAS 66101

'78 FEB 16 A8:19

BONNER SPRINGS

February 14, 1978

Mr. Robert Evans
City Manager
City Hall
Bonner Springs, Kansas 66012

RE: MOB STATUTE

Dear Bob:

You asked that I prepare a letter relating to the Mob Statute, the factual situation that Bonner Springs was confronted with and the problems that we can foresee based on our experience with the two mob lawsuits that we just concluded.

I am attaching as Exhibit "A" a copy of our brief to the Supreme Court petitioning for Review -- which petition was denied.

With respect to the facts of what did occur in Bonner Springs, prior to the mob, it's important to keep a few things in mind: (1) the basketball players who seemed to spark or trigger the mob were not themsleves (as nearly as we can determine, nor from the evidence was it so disclosed) a part of the mob. The mob was solely composed of people in the stands who were watching the basketball games; (2) While there was evidence and testimony to the effect that over the years the games were getting a lot"rougher" there was no evidence of prior disturbances from people in the stands; (3) There was no evidence of any mob ever occurring in Bonner Springs, Kansas. There was some limited evidence with relation to a racial type disturbance at a girls' softball game in a City park and there was some evidence of fights and disturbances (but not mobs) at high school games; (4) While the referree or timekeeper testified that he "knew something was going to happen sometime" he also indicated that he had not relayed that information to the Police Department or City Manager.

The other things I think you should keep in mind, which do not necessarily relate to the facts, are as follows: (1) for a number of years under the old mob statute (which was amended in 1967) the city was an absolute insuror, by that I mean it did not make any difference whether the city had notice there was going to be a mob or not, it made no difference as to the liability of the city what attempts the city took to suppress or prevent a mob if there was a mob. If someone was injured the city was liable. The

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attempts to suppress and/or prevent mobs were merely matters in mitigation of the amount of the damages. (2) That there apparently was some thought by the Legislature when they made the 1967 changes that cities should not be absolute insurors or at least their degree of liability should be lessened. We believe their intent was that the duty of the city should be reduced to one of ordinary care. Undoubtedly this change was aparked by the nationwide racial disturbances of the 1967 era. (3) That the lawyers and judges who are attempting to interpret the new law may understandably still be laboring under the impression that cities are absolute insurors but they might get off the hook if they did try to prevent or suppress a mob. The tendency here being to very closely and strictly construe the legislative change with a tendency still toward absolute liability (perhaps an extension of the theory that you can't teach an old dog new tricks--at least very easily).

At the time of the trial and at the time of the argument on the Appeal to the Court of Appeals the city repeatedly asked that it be given guidelines for the benefit of not only our city but of all cities as to just what the liability and responsibility of cities was so that we might know how to properly conduct ourselves in the future. It is interesting to note that the trial court found that the city had no notice that a mob was going to occur, that even had a police officer been there at the time the mob erupted he would not have been able to stop it and further that once we did know that a mob was in existence we acted properly and did all we could to suppress it. The Court of Appeals asked plaintiff's counsel's opinion as to whether or not, if a police officer had been present, it would have made any difference.

The only element of guidance which the Court of Appeals provided in its opinion, as we view it, is that this is a negligence type action. This adds to our quandary.

PROXIMATE CAUSE. The statute provides that the City shall have all the defenses in such action that are available to the parties in tort actions. Proximate cause, of course, is one of the required elements in an action based on negligence. Proximate cause, however, was left out of the trial court's instructions, so that the thrust of the instructions to the jury was aimed more along the lines of the old absolute liability than along the lines of ordinary care.

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NOTICE. Nowhere in the evidence and/or instructions was the problem of notice to the city adequately addressed. If a city has a defense that it did exercise reasonable care and diligence, in order to exercise that care we must at some point in time be put on notice that there was a mob which would be in existence and/or probably be in existence; notice of the type that a reasonable person would be required to act upon. There was no evidence that the city had any notice except testimony by the referree (of a city league) that these games were getting rougher and rougher and he just knew something was going to happen sooner or later. He also testified, of course, that he had made no report to the Police Department.

One of the problems, therefore, is a definition of what kind of notice and/or notice the city should have; is proof the city did have notice required by the plaintiff to sustain his case; and whether or not proximate cause (which is an indispensable element of a regular action for negligence) is an element in an action under the mob statute.

OTHER PROPER AUTHORITIES. The statute provides that the city is liable "if the city police or other proper authorities of the city have not exercised reasonable care or diligence..." Who are other proper authorities? The tendency of the trial court, and, by inference, the Court of Appeals was that a referree of a city recreation league was within the definition of "other proper authorities". Obviously this is a question of agency, but, of course, you could conceivably, under this theory, argue that a common laborer, street sweeper and/or trash picker, being an employee of the city, would impute such agency. It would seem to us that the "other proper authorities of the city" should be more properly confined to those authorities charged by the statutes with law enforcement responsibilities (in our case, the Mayor and Council, the City Manager, and, of course, all the members of the Police Department).

POLICE CHARACTERS. It was interesting to note that the trial court permitted testimony to the effect that the members of the "Ghetto Gang" basketball team (who were all black) were "known police characters". Testimony indicated they had been ticketed for traffic violations, that they had been involved in some fights and other disturbances (not mob actions), that they had been involved in some racial disturbances, and that they didn't get along with the policemen, when a policeman might stop them for some reason. There was no testimony concerning conviction of felonies (except in the one case of Rhodney McGee, who pled guilty to a charge of inciting to riot as a result of this particular incident.) This case seems to say to cities that a city is on notice that wherever these "known police characters" might be there might be a mob situation. This, of course, is ridiculously extended to churches,

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bowling alleys, movie picture theaters, parks, playgrounds and convention halls; anywhere, as a matter of fact, that there may be 10 or more people present. If one of these known police characters should be at or participate in one of these functions a reasonable extension of the trial court and the Court of Appeals theory is that we are liable if a mob occurs and someone is hurt. Even assuming that's not true and assuming that a city has had fights, disturbances of major proportions, perhaps not mob actions, but at least major fights at various and sundry recreational activities, such as basketball games, parks, playgrounds, etc., the problem, then, seems to be that if a city is put on notice as indicated above, the city must protect itself by having policemen there to deal with the situation. If this is the case, then how many policemen do you have? If you anticipate 100 people are you required to have one policeman, or two, or eight? If you anticipate 100 and there are 200, how many more do you add, or do you call out the National Guard? The question here, of course, is in the area of reasonable care and diligence of preventing or suppressing a mob but, of course, no one knows the answer nor do we have any guidelines. There are no cases to refer to which would answer that question. In one New Jersey case the court found that the Mayor of the town that did not have a separate police force should have organized a vigilante force to suppress the mob. How far do you go?

It appears that it was the obvious intent of the legislature to reduce the absolute liability down to one of ordinary care. Why not say so? Why should not the degree of liability be more explicitly stated in the statute?

At so-called private or privately organized functions, or profit making functions (such as churches, bowling alleys, etc. or even family reunions at a park) why is the city liable for mob actions or should the city be immune from mob liability for these types of functions and the responsibility placed upon the private or profit making organization to secure its own security forces to handle problems that they might reasonably expect to occur.

Manhattan raised the question last year why a city should be liable where there was a separate governmental entity responsible for police protection. That makes a lot of sense to me because if you are going to be liable then it should be liability for failure to carry out a responsibility or duty and/or failure to carry it out in a proper manner. The law of negligence speaks of a duty which in some fashion is violated, but if you have a county-wide law enforcement agency then what is the duty that the cities within that county have?

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The effect of the two lawsuits against Bonner Springs, as you know, was to immediately discontinue all of the Adult League Basketball games and probably other recreational activites. The monetary effect, of course, was tremendous, with the discovery cost of an estimated $3,000 to $5,000, one lawsuit praying for $25,000 in damages and another praying for $500,000. The city, in one instance, had a judgment rendered against it for $2,500, and in the other was able to settle out for $44,500. We are going to have to issue General Obligation Bonds for $51,000,just to pay the judgments, interest and the costs (not including the discovery costs mentioned above). I haven't set out the attorneys' fees because no specific fees were charged nor records kept involving the time required to take the several depositions, prepare for trial and to carry the matter forward on appeal to the Court of Appeals and to petition the Supreme Court to review the matter. (The petition was summarily denied).

The Council, not long ago, asked the question as to where we are now and what we should do to protect ourselves in the future. Of course, without proper guidelines my answer had to be "I don't know". If any of the functions I mentioned above occur the only advice that I could render would be that you flood the place with policemen. A city of our size, of course, is severely limited by the number of policemen that we have, and, of course, by a severe budget limitation. I recall a few years ago that an association of people who were interested in vans held a meeting of two or three days duration at the Cutty Camp Grounds in the City. We expected 300 or 400 people to be present but we were not quite sure how many people would actually be there. On that occasion, where we did have reason to believe there might be trouble we did coordinate law enforcement efforts with the County Sheriff's Department, with the City of Kansas City, Kansas, with the City of Edwardsville and with the Kansas Highway Patrol. As you know, nothing happened but the ever present question of "what do we do now" was answered in that instance simply by doing everything that we could think of short of calling out the National Guard. The inference remaining after the mob lawsuits, trials and appeals, is that, in order to be fully protected, we must take these elaborate precautions for a great variety of "every day" type events.

I don't believe this was the intent of the legislature. This "cure" is almost as bad as the "disease".

There remains the question of what changes might be made in our present statute. It's difficult to forecast the numerous factual occurrences which might occur and the different ways they might occur so that you are in a position to consider all the "facts". The probabilities of some problems likely to occur in Bonner Springs might be mere "possibilities" in Wichita, and vice versa.

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Certainly the mob law statute should specifically declare the "duty" of the city to be one of ordinary care; should specifically label the action as an ordinary "negligence" action; should place the burden of proof as to notice and acting reasonably on the plaintiff; should require proximate cause to be shown, i.e., that the injuries suffered by the plaintiff were the direct and proximate result of the violation of some duty owed by the city; and should define"other proper authorities" as now used in the statute.

Consideration might be given to limit the liability to city functions or to grant immunity from private or private profit making functions.

The best answer as far as the City is concerned is to repeal the statute and thus grant the cities complete immunity. While I would have no hesitation to recommend this in view of Bonner's fine Police Department, other less conscientious departments could become sloppy (perhaps more so than some are now) and place the citizens in danger.

I realize there is a nationwide tendency to reduce or limit governmental immunity; and to recognize that running a city is not a great deal different from running any other "big business" (thus requiring it to be well run or suffer the consequences). I am not altogether satisfied, in my own mind, that this is not a good "tendency" overall. We should recognize, however, that cities, large or small, are looked upon as prime targets for lawsuits since they have the power to tax and the burden may be spread over a larger base (the "deep pocket" doctrine). Thus care should be taken to define the terms of liability and not to place cities in any greater or worse position than any other big business.

Finally, I must conclude, that the overall effect of the instructions in our case, as they were given by the Trial Court, and from the failure of the Court of Appeals to determine the issues we feel were squarely presented, was to place the city in the "old" position of an absolute insuror, the same place we would have been under the "old" law, K.S.A.12-201 and K.S.A.12-202.

If you have any questions please let me know.

Sincerely,

D. H. Corson, Jr.

DHCjr:mc
encl.
cc-Frank Bien
Ernie Moser
Kansas League of Municipalities
w/encl.

No. 48,995

ROBERT E. JENKINS, *Appellee*, v. CITY OF BONNER SPRINGS, KANSAS, a Municipal Corporation, *Appellant*.

SYLLABUS BY THE COURT

1. CITIES AND MUNICIPALITIES—*Mob Action—Liability of City for Negligence in Preventing or Suppressing Mob.* Recovery under K.S.A. 12-203 requires that three things be established: (a) The injury to persons or property must have been caused by the action of a mob; (b) the injury must have occurred within the corporate limits of the city; and (c) the city police, or other authorities of the city, did not exercise reasonable care and diligence in the prevention or suppression of such a mob.
2. SAME—*Mob Action—Liability for Negligence.* Under K.S.A. 12-203, cities are liable for negligence, which necessarily encompasses the issue of foreseeability or notice.
3. SAME—*Mob Action—Reasonable Care in Suppressing Mob.* In an action against a city for damages for injuries caused by a mob, it is *held:* (a) The trial court properly submitted to the jury the issue as to whether the defendant exercised reasonable care and diligence in preventing or suppressing a mob; (b) the court did not err in admitting testimony of specific acts of prior conduct; and (c) taken as a whole the instructions to the jury were adequate and proper.

Appeal from Wyandotte district court, division No. 2; WILLIAM M. COOK, judge. Opinion filed December 16, 1977. Affirmed.

Donald H. Corson, Jr., and *Thomas E. Osborn*, of Kansas City, for the appellant.

D. Gary Hunter, of Williamson, Cubbison, Hardy & Hunter, of Kansas City, for the appellee.

Frank Bien, of Topeka, was on the brief *amicus curiae*, for the League of Kansas Municipalities.

Before ABBOTT, P.J., SPENCER and PARKS, JJ.

PARKS, J.: This is an action for damages resulting from personal injuries caused by a mob. The jury awarded a $2,500 judgment in favor of the plaintiff, Robert E. Jenkins. The city appeals.

Plaintiff, in the company of his teammates (the Barristers) and their scorekeeper, Murray Rhodes, were seated in the bleachers of the Bonner Springs Junior High School watching a basketball game between the Ghetto Gang and the Five. When one of the players on the Ghetto Gang threw an opposing player into the wall, Rhodes shouted, "Get that son of a bitch off the court." A few minutes later the game was over and the offending player, Rodney McGee, and another player went over to Rhodes, threatened him and challenged him to a fight. Lynn Johnson, a Barrister player, attempted to calm things down. However, when he tapped McGee on the shoulder, McGee either pushed or hit Johnson

causing him to land on the basketball court. A number of persons in the bleachers left their seats, converged upon the floor and attacked Johnson. Robert Jenkins went to Johnson's rescue and the crowd turned on him. Jenkins was knocked down and 25 to 35 persons began hitting him, kicking him and tearing his clothes. By the time a Bonner Springs police officer, two Edwardsville reserve officers and two sheriff's patrol cars arrived, the fracas was over. Jenkins was taken to a hospital where he was X-rayed and six to eight stitches were taken to repair a cut in his mouth. Other injuries included body bruises, damaged teeth and an apparent concussion or loss of consciousness.

Whether there was a mob as contemplated by K.S.A. 12-204 is not at issue before this court.

K.S.A. 12-203, which governs this case, reads:

"A city shall be liable in damages for injuries to persons or property caused by the action of a mob within the corporate limits of the city if the city police or other proper authorities of the city have not exercised reasonable care or diligence in the prevention or suppression of such a mob. The city shall have all of the defenses in such action that are available to parties in tort actions."

Recovery under K.S.A. 12-203 requires that three things be established. First, the injury to persons or property must have been caused by the action of a mob. Second, the injury must have occurred within the corporate limits of the city. Third, it must be established that the city police, or other proper authorities of the city, did not exercise reasonable care and diligence in the prevention or suppression of such a mob. These three factors were sufficiently shown by the evidence.

The trial court was correct in identifying the controlling question as being whether the action or lack of action on the part of the city of Bonner Springs was reasonable. Defendant's counsel agree but question whether the plaintiff sustained the burden of showing that the city did not act reasonably.

Relevant evidence is evidence having any tendency in reason to prove any material fact [K.S.A. 60-401(*b*)]. In the instant case, the relevant evidence included evidence which would prove or disprove the reasonableness of the city's actions under the circumstances. The plaintiff presented testimony regarding previous conduct of the Ghetto Gang team members to establish that the city was aware of their behavior and habit of creating disturbances. Such testimony was properly admitted and goes to the

question of whether the city used reasonable care and diligence under the circumstances.

The controlling statute clearly imposes liability upon the city for negligence, which necessarily encompasses the issue of foreseeability or prior notice. We hold it was proper to submit to the jury the factual issues as to whether the city exercised reasonable care and diligence in preventing or suppressing a mob. Here, the jury in its province resolved that question in favor of the plaintiff.

Another issue presented concerns the instructions to the jury. Defendant alleges that the trial court erroneously instructed the jury as to the applicable law and refused to give several of defendant's requested instructions. Read as a whole, as well as individually, the trial court properly instructed the jury as to the applicable law.

Essentially, the city has argued the issue of foreseeability in three different aspects: sufficiency of evidence, admissibility of evidence, and propriety of instructions. We conclude that under the facts and circumstances of this case, no error which would warrant disturbing the judgment has been shown.

Judgment is affirmed.

THE STATUS OF CITY MOB LIABILITY IN KANSAS

By Frank A. Bien, Legal Counsel, League of Kansas Municipalities

February 16, 1978

In 1967, the legislature repealed K.S.A. 12-201 and 12-202 which imposed absolute liability on cities for mob damage, and enacted in its place K.S.A. 12-203 and 12-204 which imposes liability for mob action only if a city fails to exercise "reasonable care or diligence" in the prevention or suppression of a mob.

In a very recent case involving the present mob statute, a jury determined that the city of Bonner Springs was negligent in failing to prevent mob action at a basketball game which was part of a city-sponsored recreational program (Jenkins v. City of Bonner Springs, 1 Kan. Court of Appeals 2d 727, decided 12-16-77). The facts of this case are such as to cause concern to cities in regard to their potential liability for mob action. The city had no direct notice that any mob action was threatened at the game. Trouble at the game began when a spectator, who was displeased with the rough play of one of the players shouted an obscenity at the player. Immediately after the game ended, the player, McGee, went into the stands and challenged the spectator to a fight. Lynn Johnson, who was apparently trying to calm things down, came up behind McGee and tapped him on the shoulder whereupon McGee hit Johnson who landed on the basketball court. Spectators then converged on Johnson and attacked him. Plaintiff was injured when he attempted to rescue Johnson.

To establish notice of probable mob action, the district court permitted introduction of evidence that some of the basketball players were trouble-makers and had had previous difficulty with the police and that there had been fights and disturbances at other athletic events in the city, including little league baseball games. On the basis of this evidence, the jury was allowed to determine whether the city was negligent. Apparently the jury decided that because of the character of some of the players at the game the city should have known that mob action might occur and was therefore negligent in failing to take action to prevent such mob action. By permitting the case to go to the jury, the district court in effect held that a city is under a legal duty to provide police protection at an athletic event if any of the participants or spectators are what might be termed "trouble-makers" or "police characters."

Cities are concerned about this decision because of the effect it will have on use of limited police resources and their operation of recreational programs. It places an impossible burden on cities because it will require cities to define who is a "trouble-maker" or "police character" and then monitor the attendance of such persons at all athletic events, or even church picnics held in their city, on the ground that such persons may incite mob action. It must be also noted that because of this case many cities may decide to limit or abandon city-sponsored recreational programs such as basketball or baseball leagues.

The scope of the legal duty which has been imposed by the court on cities to prevent mob action under the present mob law is so broad as to place an unwarranted and socially undesirable burden on cities and for that reason the law should be repealed.

3-16-78

Kansas Recreation and Park Association

TO: Senate Committee on the Judiciary

BY: Don Jolley, Superintendent of Recreation at Salina and Chairman of Kansas Recreation & Park Association Legislative Committee

RE: Substitute for HB 2929

DATE: March 14, 1978

The Kansas Recreation and Park Association supports the passage of this amendment to KSA 12-203, a portion of what is generally referred to as the city mob liability statute.

The Jenkins vs. Bonner Springs case (please see the attached analysis taken from Kansas League of Municipalities testimony on the original bill in the House Committee on the Judiciary) poses some extremely difficult questions for all recreation programs in Kansas. The decision seems to imply that any time a recreation commission conducts a program at which ten or more people attend and where there is any remote possibility of violence taking place, it shall be the responsibility of that recreation commission or department to have sufficient law enforcement officers on hand to either prevent such violence or to stop it, should it occur. If you have the time to examine this information, you will see that the ramifications of this court case could be disastrous for a recreation program. The Salina Recreation Commission, along with the League of Municipalities and the Kansas Recreation and Park Association, strongly support the substitute for HB 2929.

Failure of this important amendment could place public recreation programs in a position of having to do one of the following:

1. Discontinuing any recreation programs or services where there is a potential for a mob to congregate. Please understand that in this case, a "mob" is defined as ten or more persons intent upon unlawful violence.

2. Hiring a sufficient number of law enforcement officers to police all recreation programs at which there is any remote possibility of violence. What is a sufficient number in a given instance?

3. Continuing to operate programs with the ever present possibility that if violence occurs, you, your recreation commission, your

city, school district, etc. are subject to law suit.

The city of Bonner Springs has eliminated its basketball program as a result of this case and may not proceed to build the swimming pool they have planned. The ramifications of this court decision are staggering. Are we going to have to have all our sports team rosters reviewed by the police department for "police characters"? What about spectators? How do you know if "trouble makers" will attend a particular ball game? Lawrence as well as all cities have potential trouble makers at all ball games! Thus, we would need to pay police at about all recreation events. Where does the money come from to pay police protection at sporting events or facilities such as recreation centers, swimming pools, etc? What a waste of time and resources! What about the invasion of privacy law?

It is our opinion that the amendment contained in the substitute for HB 2929 effectively and reasonably reduces the scope of the legal duty to prevent mob action which has been imposed by the courts.

We urge the committee to favorably report the substitute to HB 2929.