MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY

Held in Room 526, at the Statehouse at 3:30 a. m./p. m., on March 20, 1979.

All members were present except:

The next meeting of the Committee will be held at 3:30 a. m./p. m., on March 21, 1979.

These minutes of the meeting held on March 19, 1979 were considered, corrected and approved.

JOSEPH J. HOAGLAND
Chairman

The conferees appearing before the Committee were:

Ernie Mosher, League of Municipalities
Barry Bennington, City Attorney, St. John
Frank Gentry, Kansas Hospital Association
Kathleen Sebelius, Kansas Trial Lawyers
Jerry Palmer, Past President, Kansas Trial Laywers
Jim Wallace, Independent Insurance Agents Association
Ken Klein, Kansas Bar Association
Jack Euler, Member, Kansas Bar Association Executive Board
Dr. M. A. McGehehey, Kansas Association of School Boards

Chairman Hoagland called the meeting to order at 3:30 p.m. and the minutes of the last meeting were approved.

Ernie Mosher, League of Municipalities, was the first to testify on Substitute SB 76, the Tort Claims Act. He indicated the immediate need for passage of a Tort Claims Act, and asked the committee to consider several minor amendments the League suggests. (SEE ATTACHMENT # 1).

Mr. Mosher then introduced Barry Bennington, City Attorney of St. John, who explained the League's proposed amendments # 1, 2, 3 and 4 to the committee. (included in Attachment # 1).

Frank Gentry testified next on behalf of the Kansas Hospital Association. He indicated he was neither a proponent or opponent of Substitute SB 76. He was just interested in getting clarification on some points of the bill relating to the effect of the bill on certain hospitals. The Chairman asked Mr. Gentry to supply the committee with copies of the letter from their Counsel, which he referred to in his testimony.

Kathleen Sebelius, Executive Director of Kansas Trial Lawyers, next introduced their past-president, Jerry Palmer, who testified in favor of a Tort Claims Act being passed this session. He indicated they prefer the original Interim SB 76, but since the committee was hearing Substitute SB 76, he directed his comments to that bill and made recommendations for several amendments to the bill. (SEE ATTACHMENT # 2).

Ken Klein, Executive Director of the Kansas Bar Association indicated their support of the Tort Claims Act and introduced Jack Euler, a member of the Executive Board of their association.

Mr. Euler testified in support of the need for the Tort Claims Act, but indicated that Substitute SB 76 has nothing but the cosmetic appearance of a Tort Claims Act, and urged the committee to pass the original SB 76 or consider Mr. Palmer's suggested amendments to Substitute SB 76.

Dr. M. A. McGehehey, Executive Director of the Kansas Association of School Boards, testified next in opposition to certain parts of the Tort Claims Act, which their Counsel had advised. Chairman Hoagland asked Dr. McGehehey to provide the committee with a breakdown of the cases from their Counsel, which Dr. McGehehey referred to in his testimony.

The meeting adjourned at 4:55 p.m.

STATEMENT ON SUB. SB 76 - TORT LIABILITY

To the House Committee on Judiciary
From the League of Kansas Municipalities
March 20, 1979

The officers of the League of Kansas Municipalities considers the proposed tort liability bill the most significant issue affecting cities confronting the 1979 session. We will explain why we feel this so strongly later in this report.

At the outset, we call to your attention that we were offered and took advantage of a number of opportunities to present proposals and amendments to the interim study committee, and many of our suggestions were accepted. We were also involved in the senate committee discussion of the original bill and the substitute.

As background to this discussion, we present to you the League's Statement of Municipal Policy dealing with this subject, which was adopted at our 1978 City Convention. It is attached at the end of this report.

Perhaps the principal policy recommendation in our statement is that "We continue to advocate the general rule of immunity with liability existing when prescribed by law, as the best way to reconcile the rights of injured persons and the public interest." Thus, we support the basic thrust of Sub. SB 76.

By city convention action, the League established seven basic features which we think should be included in a Kansas tort claims act. We would like to present these recommended standards and comment briefly about their application to Sub. SB 76.

(1) The bill should "apply to the state as well as local governments". We are pleased that Sub. SB 76 does cover both the state and its local government. We continue to believe that the public interest is best served if both the state and local units are covered by a single act with the same set of standards.

(2) The bill should "contain reasonable and realistic limitations as to amounts". Section 11 of the bill sets a $300,000 limit, and we consider this reasonable and realistic.

(3) The bill should "cover the liability of officers and employees as well as the governmental unit". Our interpretation of the bill is that it does a reasonably good job of coordinating and integrating the liability of the governmental unit and its employees and we

Atch. 1

generally support these provisions, including the mandatory defense and judgment payment responsibility of the employer except in extraordinary situations. Further, we think the provisions of Section 21 dealing with civil rights are important and will help obtain and retain competent local officers and employees in public service.

(4) The bill should "repeal the mob liability statute now applicable to cities". Well, the bill does repeal the existing statutes, in K. S. A. 12-203 and 12-204. But it reinserts the same basic provisions into Section 9. We are well aware that this matter has been before this committee in the past. We simply reassert our belief that the mob liability act which emerged in civil war days is obsolete in present day society and should be repealed. Perhaps the inclusion of counties makes it a little more logical. Incidentally, those cities and counties in which state institutions are located would appreciate the state becoming liable for mob actions that occur on state property.

(5) The bill should "establish an orderly procedure for the local handling of claims, avoiding costly legal defense where possible, with continuation of the present six months notice requirement applicable to cities". As members of this committee are well aware, the present statutory claim filing requirement for cities is six months (K.S.A. 12-105), which is repealed by the bill. We believe that the extensive vulnerability of cities to tort claims, because of the numerous functions, services and activities they perform, puts cities in a different position than private individuals or business. Conditions which provoke injuries should be corrected as soon as possible because of the continuing nature of governmental services and facilities, open and used by the public. The interim committee rejected our pleas for continuation of the six months notice provision.

(6) The bill should "provide discretion as to the method of financing tort liability, including insurance, self-insurance, pooled or joint insurance, long term borrowing and deferred payments to fund judgments, and unlimited tax authority to finance insurance costs, legal defense, claims payments and risk management activities". We believe that Sub. SB 76 does a good job of providing the broad authority necessary for local governments to meet their responsibilities under the act.

(7) Finally, our convention policy statement proposes that any act should "be as definitive as possible, thus permitting local governments to make sound public policy decisions as

to the elimination, curtailment, modification, undertaking or conduct of public services, programs, facilities, regulations and other activities, in light of predicted vulnerability to liability claims." We think the bill does a credible job in this regard. Indeed, it is, in our judgment, more definitive than the original SB 76.

THE IMPERATIVE NEED FOR ACTION, NOW.

As all members of this committee know, the existing statutory freeze on the status of municipal liability and immunity expires on July 1, 1979, just three months away. In the absence of any state legislative action, the Gorrell decision takes effect. In our judgment, this would be very unfortunate for Kansas local governments, for two basic reasons:

First, the Gorrell decision would result in wide-open, open-ended liability. You will recall that the court abolished the rule of immunity in the performance of governmental functions, except as to acts or omissions (1) constituting the exercise of a legislative or judicial function, or (2) "constituting the exercise of an administrative function involving the making of a basic policy decision". In our appraisal, the "basic policy decision" approach extends governmental liability much further than the discretionary function exception found in both SB 76 and Sub. SB 76.

Secondly, the absence of 1979 legislation and the resultant implementation of the Gorrell decision would leave local governments naked, without adequate statutory procedures or financing authority to deal with their extensive vulnerability to tort claims under the decision. As members of this committee are well aware, the bulk of the substantive provisions of Sub. SB 76 deal with procedural requirements and financing. Thus, we beg of you the enactment of a comprehensive tort claims act at this session of the legislature, considering the alternatives.

While we have a few amendments to suggest, the League strongly supports the enactment of Sub. SB 76. We think it reasonably balances the public interest and the private interests of individuals. There are probably few people who favor every provision of Sub. SB 76. It does, however, provide a vehicle for revisions in the future, as public policy justifies. For example, it would be relatively easy to transfer a function or act from the scope of gross and wanton negligence to the scope of liability with ordinary negligence. All that would be necessary would be the addition of a short section to specify liability as to that particular function or act.

From our perspective, the only reasonable alternative to the enactment of a comprehensive tort claims act at this session is a further one-year moratorium extension. In good faith, the League cannot urge such an extension, since we did promote the one-year extension at the last session.

AMENDMENTS

While we actively support Sub. SB 76, there are a few amendments which we think merit your serious consideration. These are attached to this report, with explanations.

CONCLUSION

Finally, we want to observe once again the vital necessity and urgency for the enactment of a comprehensive tort claims act at the 1979 session. We think the consequences of total inaction by the 1979 legislative session would border on being disastrous to local government. We need an act!

Policy Position on Governmental Immunity
League of Kansas Municipalities
By City Convention Action, September 19, 1978

L-3. Governmental Immunity. Because of the numerous functions, services and activities they perform, the cities of Kansas are very concerned about their vulnerability to tort claims. The recent Kansas Supreme Court decision abrogating the court-created governmental function defense, and prospective state legislation dealing with the liability or immunity of government for torts, is therefore of major importance. We support the enactment of a fair, equitable and fiscally-responsible comprehensive tort claims act. We continue to advocate the general rule of immunity with liability existing when prescribed by law, as the best way to reconcile the rights of injured persons and the public interest. An "open-end" approach, with liability the rule and immunity the exception, is considered appropriate for Kansas cities only if the exceptions are sufficiently broad to permit cities to effectively function in serving the public. A comprehensive tort claims act should contain the following features, among others: (1) Apply to the state as well as to local governments; (2) Contain reasonable and realistic limitations as to amounts; (3) Cover the liability of officers and employees as well as the governing unit (See L-4, below); (4) Repeal the mob liability statute now applicable only to cities; (5) Establish an orderly procedure for the local handling of claims, avoiding costly legal defense where possible, with continuation of the present six months notice requirement applicable to cities; (6) Provide broad discretion as to the method of financing tort liability, including insurance, self-insurance, pooled or joint insurance, long term borrowing or deferred payments to fund judgments and unlimited tax authority to finance insurance costs, legal defense, claims payments and risk management activities; and (7) Be as definitive as possible, thus permitting local governments to make sound public policy decisions as to the elimination, curtailment, modification, undertaking or conduct of public services, programs, facilities, regulations and other activities, in light of predictable vulnerability to liability claims.

L-4. Personal Liability. Any state tort claims act (see L-3) should also address the liability of individual officers and employees, as well as governmental units, and should specifically deal with suits for federal civil rights violations. The common law requirement that malice or bad faith be shown before liability ensues should be retained.

special city
legislative
bulletin

No. 12 March 20, 1979

Substitute for Senate Bill No. 76

PROPOSED KANSAS TORT LIABILITY ACT

Sub. SB 76 would create a comprehensive new state law dealing with the tort liability of state and local governmental units. The bill was introduced by the Senate Committee on Judiciary as a substitute for SB 76; SB 76 resulted from an interim legislative study. Sub. SB 76, like SB 76, would have a major impact on local units, in terms of public policy actions as well as local finances. This report presents a brief background discussion of the status of governmental liability in Kansas and a review of some of the developments which led to the interim study and the proposed bill. The principal provisions of Sub. SB 76 are also summarized.

Background

In brief, a governmental tort is a wrongful act causing injury to persons and property, resulting from the acts or omissions of a governmental unit's officers and employees while acting within the scope of their employment, for which the courts will allow the recovery of money damages or other remedy. Generally, a tort involving negligence occurs only if there was some duty to perform and there was negligence in the performance or the failure to perform that duty.(1)

The historic and general rule in Kansas -- as least until April 1, 1978 -- was that local units of government were subject to liability when engaged in a "proprietary" function, such as the operation of a water utility, but immune from liability and suits for torts committed by their officers and employees when engaged in a "governmental" function, such as the provision of education or police and fire protection or park and recreation services. As an exception to the rule of immunity when engaged in a governmental function, the courts have held local governments liable for the maintenance of nuisances and, in the case of cities, for highway defects. For municipalities, governmental immunity or liability as to a particular function or action was based primarily on common law, i.e., case law established by the courts over a period of time.(2)

Some rules of liability or immunity have been established by state law. For example, counties and townships have been liable by statute for highway defects, subject to certain notice requirements. Further, any immunity in the performance of a governmental function is waived by statute to the extent the local government carries liability insurance.

---

(1) Torts may also consist of intentional wrongs, such as assault, battery, false imprisonment, malicious prosecution and false arrest. A tort, by common definition, does not involve a breach of contract or criminal conduct.

(2) For a more detailed background discussion of this subject, see the article "Governmental Immunity" in the April, 1977 issue of Kansas Government Journal. See also the articles "Personal Liability of Local Public Officials and the Official Immunity Doctrine" in the June & July 1977 issues of the Journal.

The general rule of immunity for governmental functions continued as the common law in Kansas until April 1, 1978, when the Kansas Supreme Court issued the decision on the case of Gorrell v. City of Parsons, 223 Kan. 645. The court abolished the court-established rule that a municipality is not liable for the negligent act of its officers or employees in the performance of governmental functions, and held that a municipality would be immune only for acts or omissions (1) constituting the exercise of a legislative or judicial function, or (2) "constituting the exercise of an administration function involving the making of a basic policy decision."

The 1978 Legislature responded to this landmark decision on the last day of the session by enacting Chapter 202 (Sub. SB 972), which essentially placed a moratorium on the effective date of the court decision, until July 1, 1979. In short, the legislature "froze" the status of municipal liability and immunity as it existed immediately prior to the Gorrell decision. Proponents of the moratorium bill, sponsored by the League of Kansas Municipalities, argued that some statutory procedural requirements and financial provisions were necessary to effectively implement any basic change in the rules; and secondly, that such a sweeping change to the historical traditions in Kansas should not occur without a comprehensive interim legislative study. SB 76, as introduced by the Senate Committee on Judiciary, resulted from such an interim study by the 1978 Special Committee on Judiciary. Sub. SB 76 was introduced as a substitute to the original bill, its procedural and financial provisions are substantially identical to SB 76.

The "sunset" provision of the 1978 moratorium law is emphasized. Without some positive enactment by the 1979 Legislature, the Gorrell decision take effect on July 1, 1979. The Gorrell decision is generally interpreted as extending municipal liability much farther than either SB 76 or Sub. SB 76.

Brief Summary of Bill

In brief, Sub. SB 76 (1) establishes a comprehensive tort claims act applicable to all Kansas state and local governments, (2) adopts a modified "closed-end" approach, specifying liability for defined areas in which municipalities have traditionally been held liable, (3) adopts an "open-end" approach of liability "for damages caused by gross and wanton negligence", specifying exceptions thereto, (4) establishes a maximum limitation as to claims involving a single incidence, (5) provides for the settlement of claims, (6) requires the municipality, with some exceptions, to provide for the legal defense of its employees, directly or by reimbursement, (7) requires the municipality to pay claims or judgments against an employee when the incident occurred during the course of employment and the entity would be liable under the act, and (8) establishes the authority and procedures for a municipality to finance the direct and indirect costs of liability resulting from the implementation of the act. The bill contains other provisions, such as those relating to mob liability and federal civil rights, summarized below. While most of the provisions of the bill deal with the procedural and financial aspects of liability, the general thrust of the proposed act is to expand the liability of governmental entities beyond that which existed prior to the Gorrell decision only for gross and wanton negligence.

Explanation of Bill

Application. The bill proposes a "Kansas tort claims act" which would apply to the state as well as to all municipalities. The word "municipality" is defined to include any county, city, school district, or any other political or taxing subdivisions of the state. The term "employee" is broadly defined and includes any officer or employee, elected or appointed, acting on behalf of, or in the service of, a governmental entity in any official capacity, whether or not compensation is paid. (Sec. 2)

Basic Rule. Sub. SB 76 enacts as a basic rule a modified "close-end" approach, whereby immunity from liability for negligence is the general rule (Sec. 3), with the defined areas of liability being those functions or actions for which municipalities have been traditionally held liable (see below). However, the bill also establishes an "open-end" approach as to liability "for damages caused by the gross and wanton negligence"of employees, specifying exceptions thereto, (see below). The bill also makes cities and counties liable for mob

actions, discussed below. In addition, governmental entities are declared liable "for the intentional torts of their employees while acting within the scope of their employment".

Ordinary Negligence. Governmental entities are declared by statute to be liable when engaged in the performance of proprietary functions (Sec. 6), for the negligent failure to correct defects in streets, roads and highways (Sec. 7), for the operation of motor vehicles (Sec. 8), and for creating or maintaining a nuisance (Sec. 10). These are areas or functions for which municipalities have previously been declared liable, by statute or court decision.

Gross Negligence. The act provides that "governmental entities shall be liable for damages caused by the gross and wanton negligence of their employees, while acting within the scope of their appointment", with certain exceptions. These exceptions include (a) legislative functions; (b) judicial functions; (c) enforcement or failure to enforce laws, ordinances or resolutions; and (d) "any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee, whether or not the discretion be abused." A few other special exceptions are provided. (Sec. 5)

Intentional Torts. The bill provides, in Sec. 4, that "Governmental entities shall be liable for the intentional torts of their employees while acting within the scope of their employment, subject to the right of the governmental entity to recover payments made therefor from the employee." There is no definition as to what constitutes an "intentional" tort, or its distinction from "gross and wanton negligence".

Mob Liability. The existing mob liability statute, in K.S.A. 12-203 and 12-204, now applicable only to cities, is repealed and made a part of the proposed act (Sec. 9). In addition, mob liability is extended to counties in the case of injuries to persons or property which result from the actions of a mob (10 or more persons) occurring outside the corporate limits of a city. (Sec. 9)

Limits of Liability. The maximum amount of liability arising out of a similar occurrence or accident is set at $300,000 (Sec. 11). However, this maximum amount is waived to the extent that any larger insurance coverage is in force. (Sec. 17(c))

Time Limitations. Presumably, the injured party would have up to two years to file an action for damages, under the code of civil procedure. The existing six months notice requirement applicable to cities in K.S.A. 12-105 would be repealed.

Settlement of Claims. Subject to the terms of any insurance contract, a tort claim could be finally settled or compromised by the governing body of the municipality, or in such manner as the governing body shall direct (Sec. (12)).

Employee Defense. The municipality is required, on request, to provide for the legal defense of an employee in any tort action against such employee, with certain exceptions. The legal defense may be provided by the municipal attorney, special counsel, or pursuant to an insurance agreement. Municipalities may refuse to provide defense in certain situations, such as when it is determined that the act or omission was not within the scope of employment, that there was actual fraud or malice, or that defense of the employee would create a conflict of interest between the municipality and the employee. However, upon failure to provide for the employee's legal defense, the municipality must reimburse the employee for his costs if it is found that the act occurred within the scope of employment and no fraud or malice was involved. (Sec. (14))

Employee Liability. With regard to damages for which a municipality is liable pursuant to the act, a municipality must indemnify its employees against damages, for injury or damage proximately caused by an act or omission of an employee while acting within the scope of his or her employment. With regard to damages for which the municipality is immune, it may indemnify its employees (Sec. 15). Recovery of payments from the employee for legal defense costs and judgments is permitted in certain situations, such as when actual fraud or malice is found. (Sec. 15)

Financial Procedures. Payments by municipalities for the cost of providing for its defense, for the defense of employees, for payments of claims and for "other direct and indirect costs resulting from implementation of the act", may be paid from the general or other existing fund of the municipality or from a newly authorized special liability expense fund. Moneys for the liability expense fund could come from existing revenue sources or from the proceeds of a special tax levy, which would be outside the tax lid law. The special fund could be used as a reserve fund, without the necessity of annually budgeting the expenditures therefrom. (Sec. 16)

Insurance. Municipalities are specifically authorized to pay for insurance coverage. It may be purchased by competitive bids or by negotiation. (Sec. 17)

Pooling Arrangements. Municipalities are authorized to enter into agreements under the interlocal cooperation act (K.S.A. 12-901 et seq.) to provide for the purchase of insurance or to share and pay expenditures for judgments, settlements, defense costs, and other direct and indirect expenses resulting from the implementation of the act. (Sec. 17(d))

1979 Fiscal Impact. Any municipality which has failed to budget sufficient funds for use in 1979 may expend money notwithstanding the budget law for such purposes as purchasing insurance, payment of risk management and insurance consulting services and for other direct and indirect costs of implementing the act during 1979. If other budgeted or uncommitted moneys are available, the municipality may issue no-fund warrants. (Sec. 17(e))

Payment of Judgments. Several procedures are established for the payments of claims, whether determined by court judgment, compromise or settlement. As noted above, uncommitted moneys in existing general or other funds of a municipality could be used for such purposes, or the special liability expense fund may be used (Sec. 16). If the judgment is made by the court, the court may, upon petition of the municipality, provide for deferred payment for up to ten years, at eight percent annual interest, under K.S.A. 16-204 (Sec. 18). If the municipality is authorized to levy taxes, it may issue no-fund warrants or general obligation bonds to pay judgments, compromises or settlements. Taxes levied for payments of warrants or bonds would be exempt from the tax lid law. (Sec. 19)

Federal Civil Rights. In part as a result of the U.S. Supreme Court decision in the Monell case on June 6, 1978, Section 21 authorizes the governmental entity to provide for the payment of defense costs and the payment of any judgments or settlements of a claim or suit against an employee involving noncriminal violations of the civil rights laws of the United States. While this section is not made a part of the tort claims act, the municipal costs of providing for the defense, judgments or other costs involved in actions involving civil rights violations could be handled in the same manner as under the tort claims act. (Sec. 21)

Liens Against Employees. The provisions of K.S.A. Supp. 60-2202 and 60-2203(a) would be amended to provide that a petition filed in district court or a filing of a notice of the pendency of an action does not create a lien on real property owned by the governmental employee prior to the judgment.

Amendments and Repeals

Numerous sections of the statutes are either amended or repealed by the bill to bring them in conformance with the proposed act. Some of the changes are substantive. These are summarized below.

Sections Amended. The following sections are amended:

K.S.A. 12-105a and 12-105b -- technical amendments to the municipal claims statute to bring the sections in conformity with the proposed act.
K.S.A. 12-2904 -- amendments to extend the interlocal cooperation act to include tort liability.

K.S.A. 19-261 and 19-3621 -- strikes immunity provisions relating to the operation of ambulance services and certain fire departments by certain local units.
K.S.A. 46-903 -- technical amendments relating to state tort claims to bring the section in conformity with the act.
K.S.A. Supp. 60-2202 and 60-2203a -- relating to liens on property of employees, discussed above.
K.S.A. 72-8404 -- strikes certain immunity from liability of school districts for transportation provided by the district.
K.S.A. 74-4702 and 75-4109 -- technical amendments relating to state insurance.
K.S.A. 80-1423, 80-1502 and 80-1923 -- strikes certain provisions relating to the immunity of townships for ambulance services and municipalities and townships for failure to attend or extinguish a fire.
K.S.A. 82a-934 -- technical changes applicable to contracts of the Kansas water resources board.

Sections Repealed. The following sections are repealed:

K.S.A. 12-105 -- requiring notice of tort claims against cities to be filed within six months of the incident.
K.S.A. 12-203 and 12-204 -- relating to city mob liability, discussed above.
K.S.A. 12-2601 and 12-2614 -- authorizes municipalities to purchase motor vehicle liability insurance and waiving immunity to the extent of insurance, requiring liability insurance for emergency vehicles, and providing certain conditions in a jury trial relating to the existence of insurance.
K.S.A. 19-106 -- relating to the service of process against counties.
K.S.A. 46-901 -- provides statutory immunity for the state against liability.
K.S.A. Supp. 46-902 and 46-902a -- the municipal liability moratorium statute discussed in the background portion of this article.
K.S.A. Supp. 68-2108 -- relates to enlargement of state and municipal liability for highway defects.
K.S.A. 72-8405 to 72-8413 -- relates to the purchase of public liability and property damage insurance by school districts, waiving governmental immunity to the extent of such insurance.
K.S.A. 74-4708 to 74-4716 -- relating to the purchase of liability insurance by state agencies and by counties and cities, waiving immunity to the extent of the insurance.
K.S.A. 75-4356, 75-4357, 75-4357a, 75-4359, 75-4361 and Supp. 75-4358 -- the present statutory act relating to the defense of state and local government employees and the payment of judgments against officers and employees.

LEAGUE PROPOSED AMENDMENT NO. 1

On page 2, strike out all of Section 4, on lines 67 to 74.

Explanation. To mandate employer liability by statute for the intentional torts of employees could discourage considerate behavior. The question should be left to the courts.

Insurance is generally not available to cover "intentional torts".

0067 New Sec. 4. Governmental entities shall be liable for the
0068 intentional torts of their employees while acting within the scope
0069 of their employment, subject to the right of the governmental
0070 entity to recover payments made therefor from the employee.
0071 This section shall not be applicable to emergency preparedness
0072 activities, and the liability of governmental entities and their
0073 employees for such activities shall be governed by the provisions
0074 of article 9 of chapter 48 of the Kansas Statutes Annotated.

LEAGUE PROPOSED AMENDMENT NO. 2

On page 3, in line 109, insert before the word "Cities" the following: "Except for thoses streets where another governmental entity is responsible for maintenance,"

On page 3, in line 110, insert before the period ", within a reasonable time after actual or constructive notice of such defect."

Explanation. Cities should not be responsible for streets maintained by the state. If the common law status of city liability for street defects is made statutory, the common law requirement of some kind of notice should likewise be made statutory. It should be noted that the five days notice of defects requirement for state, county and township roads and highways is continued by the reference to and continuation of K.S.A. Supp. 68-419 and K.S.A. 68-301.

Except for those streets where another governmental entity is responsible for maintenance,

within a reasonable time after actual or constructive notice of such defect.

0109 New Sec. 7. Cities shall be liable for the negligent failure to
0110 correct defects in streets. The state shall be liable for defects as
0111 provided in K.S.A. 1978 Supp. 68-419 and counties and town-
0112 ships shall be liable for defects as provided in K.S.A. 68-301.

LEAGUE PROPOSED AMENDMENT NO. 3

On page 4, in line 153, insert before the word "Governmental" the following: Subject to the provisions of subsection (c) of section 17,"

Explanation. The purpose of the amendment is simply to clearly note the fact that the $300,000 is the limit only if a larger amount is not covered by insurance. As written, Section 11(a) implies a limit which may not exist in fact.

Subject to the provisions of subsection (c) of section 17,

New Sec. 11. (a) The liability of a governmental entity for claims within the scope of this act shall not exceed three hundred thousand dollars ($300,000) for any number of claims arising out of a single occurrence or accident.

(b) When the amount awarded to or settled upon multiple claimants exceeds the limitations of this section, any party may apply to the district court which has jurisdiction of the cause to apportion to each claimant his or her proper share of the total amount limited herein. The share apportioned to each claimant shall be in the proportion that the ratio of the award or settlement made to him or her bears to the aggregate awards and settlements for all claims arising out of the occurrence.

(c) A governmental entity shall not be liable for punitive damages or for interest prior to judgment. An employee acting within the scope of his or her employment shall not be liable for punitive damages or interest prior to judgment, except for any act or omission of an employee because of actual fraud or actual malice.

LEAGUE PROPOSED AMENDMENT NO. 4

On page 12, line 426, change "shall" to "may". Also, see line 432, below.

Explanation. At this time in the development of federal civil rights violations in application to public entities (since the Monell case decision June 6, 1978), it appears advisable to permit, rather than require, the governmental entity to pay the costs of judgments and legal defense for actions against employees. If an employee causes a civil rights violation by action contrary to the approved public policies, there is a question whether the employer should be mandated to pay the costs of legal defense and the judgment. On the other hand, we do believe that the option should exist.

New Sec. 21. If an employee of a governmental entity is or could be subject to personal civil liability for a loss occurring because of a noncriminal act or omission within the scope of his or her employment which violates the civil rights laws of the United States, and the act or omission was in good faith, and the employee reasonably cooperates in good faith in defense of the action, the governmental entity ~~shall~~ may, subject to procedure requirements imposed by statute, ordinance, resolution or written policy, pay or cause to be paid any judgment or settlement of the claim or suit and all costs and fees incurred by the employee in defense thereof. A municipality may pay for the cost of providing defense, judgments and other costs involving actions for civil rights violations in the same manner as that provided in the Kansas tort claims act.

against the employee or the municipality

TO: Members of the Committee on Judiciary
House of Representatives

DATE: 3/20/79

FROM: Jerry R. Palmer, Kansas Trial Lawyers Association

1. The Kansas Trial Lawyers Association favors a Tort Claims Act being passed by the legislature this year.

2. The best Bill so far presented is Senate Bill No. 76, which is the work-product of the Interim Committee, which convened during the summer of 1978.

3. If substitute for Senate Bill No. 76 is considered by the Committee as a place to work from, we would suggest several amendments.

SUGGESTED AMENDMENTS TO SUBSTITUTE FOR S.B. 76

New Section 5: Strike the words "gross and wanton". The effect of this is essentially to restore the substitute bill to the position of S.B. 76 and makes it an open ended bill as to negligence with the exceptions that were considered by the Interim Committee. The Interim Committee used as a model the Oklahoma Bill, which is very close to the Federal Tort Claims Act and then modified the exceptions to more basically conform to the needs of Kansas.

New Section 7: A revision should be made to indicate that governmental entities shall be liable for defects in streets, highways and bridges. There is a considerable body of law on what constitutes a defect in a highway, street or bridge. New Section 7 as currently constituted, adopts K.S.A. 68-419 and K.S.A. 68-301 which have in them two (2) different procedural requirements, which as Don Simon, Chief Attorney for the Department of Transportation, has described as "hoops" through which claimants must jump in order to make recovery. One of those is that they must prove the defect existed for a period of time and second that a claim be filed within a six (6) month period of time. Failing either of these, the total claim fails. This is not the spirit of the Tort Claims Act and is liable to be quite deceptive since there is no similar shortened claims period for any other kind of liability of a governmental entity.

New Section 11: The Interim Committee considered, and up until the last days the Senate Judiciary Committee considered, that $500,000 as an aggregate limit for a single occurrence or accident was fair. In the last days it was limited to $300,000. The rationale advanced in the Interim Committee for the $500,000 figure was that it covered all but a very small percentage of any single injury and would probably take care of most multiple injury accidents unless there was a catastrophe such as the Wichita State University catastrophe. The figure of $300,000 is most commonly found in automobile insurance when the high limits policies considered $100,000 per individual and $300,000 per occurrence. Recalling, of course, this is based on a single automobile accident which usually would involve two (2) cars. It is also to be noted that this high limits policy was the standard written some ten (10) years' ago and in periods of inflation the dollar loss for both

Atch. 2

medical and wage loss has increased. It does, on the other hand, protect the State from the enormous catastrophes or from the catastrophic injury to one person.

New Section 15: As presently written, the wording is:

> "With regard to the damages for which a governmental entity is immune from liability pursuant to this Act, the governmental entity may indemnify its employees against damages, for injury or damage proximately caused by an act or omission of an employee while acting within the scope of his or her employment.

We would suggest that "may" be changed to a "shall". This is consistent with the approach taken by California in its Tort Claims Act, which is a "closed-end" approach. Many of the concerns raised by the Interim Committee were from State employees who could be sued in an individual capacity, who did not enjoy the immunity of the State, who were defended by the State, but who were told they would have to pay the judgment out of their own pockets if they lost. Governmental immunity leaves its agents, servants and employees in a precarious position unless there is a requirement of indemnity for the acts of the agent when he is in his agency relationship.

Additional Suggestions: We would also suggest that the hospitals of the State, be brought under the Health Care Providers Act, which could be done by going to K.S.A. 40-3401(f) and striking the parentheses and the words: "excluding" and insert in place of the word: "excluding", the word "including". This would recognize that the State and Municipal Hospitals and other health care providing facilities, be treated as any other hospital or health care providing facility within the State of Kansas. Also, there is a $10,000,000 fund being built, which has been built more rapidly than anyone ever assumed that it would and insurance rates in this area have gone down considerably. It gives a way of shifting the finances of the excess over $100,000 per claim to this large fund for health care providers and may well relieve the State of one of its largest exposures for medical expenses. This also removes the lid from recovery by an individual in case there is some totally catatrosphic injury. It gives both the hospitals and the patients the advantages of the JUA that were contemplated when the Health Care Provider Act was passed several years' ago.

RESPECTFULLY SUBMITTED,

JERRY R. PALMER
Kansas Trial Lawyers Association

Testimony on SB-76 - Tort Claims Act
Independent Insurance Agents of Kansas
James D. Wallace

We appeared several times before the Interim Committee and hearings in the Senate. We are supportive of SB-76 and believe it will be much easier for governmental entities to comply with its provisions than to rely solely on the Supreme Court's decision.

.e extent of liability insurance that is currently in effect in Kansas varies considerably. Some entities have purchased a full schedule of liability insurance for their own protection anticipating removal of immunity and to liquidate their moral responsibility to persons injured due to the negligence of their employees. Other entities are operating proprietary enterprises that required insurance prior to the Supreme Court's decision. Many entities have relied on their immunity and will be faced with implementation of insurance that will impact on their budget. Some entities have engineering problems with their has plant, water or sewage treatment and other operations that will greatly effect the rates they will have to pay.

SB-76 is scheduled to become effective July 1st, which does not leave a great deal of time for the insurance industry to respond to its provisions. Our Association is conducting educational sessions in Wichita and Topeka next week, for example, to cover the insurance needs of municipalities under the provisions of SB-76 as it is constituted at that time.

We are supportive of all of the provisions of the bill except one. Since this provision is somewhat complex we will speak to it specifically.

Page 9, lines 317 through 320 and lines 330 through 335 remove the ability of an insurance company to rely upon the immunity of a governmental entity as a ense. These provisions were not in the Interim Committee bill, which allowed the insurance company to use whatever defenses were available to the governmental entity. We assume that the change was brought about by the switch to a closed end approach which occurred in the Senate Judiciary Committee.

these provisions were not in the bill and a municipality did not desire an insurance company to use its immunity defense, the policy could be endorsed waiving immunity as a defense. This is a very common endorsement in other states. By placing the provision contained in 317 through 320 in the law, the option is moved.

If an insurance company is unable to use a governmental entity's immunity, it then becomes impossible for that entity to insure against gray areas of liability. In this bill, and in law generally, there will be many areas where entities do not know whether or not they are liable. That is, the law has not been definitely established so that in a particular activity or operation there may be a chance that liability could be imposed and immunity denied. With the provisions of lines 317 through 320 in effect, it becomes impossible to insure this exposure as though it were a gray area since the minute insurance is purchased liability becomes effective.

A good example is contained in lines 329 through 335 where liability applies if a governmental entity purchases insurance in excess of $300,000. In this case the insurance company must apply rates as though there were no immunity, whereas without this provision the governmental entity could purchase insurance in case the Supreme Court held the $300,000 limit to be unconstitutional.

These provisions are not detrimental to insurance companies since they merely charge rates on the basis of full liability being applied. They are restrictive on municipalities since they removed the option of insuring on a liability basis or an immune basis. Our recommendation is that line 317 after the word employ- down to line 320 be eliminated. A further recommendation is that lines 327 after the word thereto be re-worded to say that insurers of governmental entities may avail themselves of any defense that would be available to a governmental entity defending itself in an action within the scope of this act.

If these provisions remain it will not be fatal to purchasing insurance, but will merely cause an insurance problem for certain gray areas. We wish to restate that generally we are supportive of the passage of SB-76 at the earliest possible time.