

Kansas Tort Liability Act Proposed

EDITOR'S NOTE. The Special Committee on Judiciary, an interim study committee of the Kansas legislature, has proposed the enactment of a comprehensive new state law dealing with the tort liability of state and local governmental units. The proposed law 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 the proposed bill are also summarized.

Background

In brief, a governmental tort is a wrongful act causing injury to persons and property, which results 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 monetary 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

— at 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 was waived by

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 and July, 1977 issues of the Journal.

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statute to the government carries liability insurance.

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 in 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.

The "sunset" provision of the 1978 law is emphasized. Without some positive enactment by the 1979 legislature, the *Gorrell* decision takes effect on July 1, 1979.

Brief Summary of Bill

In brief, the proposed bill (1) establishes a comprehensive tort claims act applicable to all Kansas state and local governments; (2) adopts the "open-end" approach with the general rule of liability unless there are exceptions; (3) sets forth a few such exceptions; (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 (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 substantially

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Explanation of Bill

Application. The proposed Kansas tort claims act applies 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. The basic rule would be liability, with immunity existing only when provided by law. This approach is generally called "open-end," in contrast to the "closed-end" approach. This basic rule is established in Section 3 of the bill, which provides that a governmental entity shall be liable, subject to the limitations described in the act, for "damages caused by the negligent or wrongful act or omission of any of its employees when acting within the scope of their employment under circumstances where the governmental entity, if a private person, would be liable under the laws of this state . . ." A general policy objective of the interim committee was to place governmental units and their employees in the same position as to tort liability as is a private person or a private business and its employees, with certain exceptions as noted below. (Sec. 4)

Exceptions to Liability. Three basic kinds of exceptions or immunities are provided: (1) for legislative functions; (2) for judicial functions; and (3) for "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." In addition, the bill provides immunity as to the enforcement of any law, ordinance or resolution, the assessment or collection of taxes and special assessments, and provides certain exemptions affecting highway signs. (Sec. 4) A municipality would not be liable for punitive damages. (Sec. 5(c))

Limits of Liability. The maximum amount of liability arising out of a similar occurrence or accident is set at \$500,000 (Sec. 5). However, this maximum amount is waived to the extent that any larger insurance coverage is in force. (Sec. 11)

Time Limitations. The injured party would have up to two years to file an action for damages. 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. 7).

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. 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. 8)

Employee Liability. The municipality is made liable for the acts or omissions of an employee acting within the scope of his or her employment. Thus, it would be required to pay any judgments rendered against the employee, subject to any insurance contracts. The effect of this provision and the provisions as to employee defense discussed above, is to shift the burden from the employee to the municipality. Recovery of payments for legal defense costs and judgments is permitted in certain situations. (Sec. 9)

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. 9)

Insurance. Municipalities are specifically authorized to pay for insurance coverage. The insurance must be purchased from a company or association authorized to transact insurance business in Kansas (which will probably prevent obtaining insurance for some risks). It may be purchased by competitive bids or by negotiation. (Sec. 11)

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 judgment, settlement, defense costs, and other direct and indirect expenses resulting from the implementation of the act. (Sec. 11)

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 unbudgeted or uncommitted moneys are unavailable, the municipality may issue no-fund warrants. (Sec. 11)

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. 10). If the judgment is made by the court, the court may, upon petition of the municipality, provide for deferred payment for up to 10 years, at eight percent annual interest, under K.S.A. 16-204 (Sec. 12). 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. 13)

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. 15). 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.

Federal Civil Rights. In part as a result of the U.S. Supreme Court decision in the *Monell* case on June 6, 1978, Section 16 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 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 other tort claims.

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. A judgment against the employee would create a lien right only if it was found that the employee's act of omission occurred outside the scope of employment, or as a result of actual fraud, corruption or actual malice of the employee.

Other Statutes. Numerous sections of the statutes are repealed or amended to bring them in conformity with the proposed act.

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12-105. Claims for damages; time for filing; settlement. No action shall be maintained by any person or corporation against any city on account of injury to person or property unless the person or corporation injured shall within six (6) months thereafter and prior to the bringing of the suit file with the city clerk a written statement, giving the time and place of the happening of the accident or injury received, the circumstances relating thereto and a demand for settlement and payment of damages: *Provided*, Any cause of action arising under the provisions of article 7 of chapter 82a of the Kansas Statutes Annotated, or acts amendatory thereof or supplemental thereto, may be maintained by filing such statement with the city clerk within one (1) year after such cause of action shall have accrued. Such city shall have thirty (30) days from the time of the filing of such statement to make settlement with the person or corporation if it so desires. If a settlement is made or the demand is thereafter fixed by judgment, the person or corporation shall file a claim and the claim shall be allowed pursuant to the provisions of K. S. A. 12-105b. [R. S. 1923, § 12-105; L. 1957, ch. 84, § 1; L. 1970, ch. 67, § 1; July 1.]

12-203. Mob action; city liability and defenses. 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. [L. 1967, ch. 80, § 1; July 1.]

12-204. Same; definition of "mob." As used in this act, the word "mob" shall mean an assemblage of ten (10) or more persons intent on unlawful violence either to persons or property. [L. 1967, ch. 80, § 2; July 1.]

MOTOR VEHICLE LIABILITY

12-2601. Definitions. As used in this act:

(a) "Municipality" shall mean county, city, township, municipal university, drainage district and any other political subdivision or taxing district of the state except that it shall not mean or include school districts;

(b) "governing body" shall mean the board, body, or persons in which the powers of a municipality as a body corporate, or otherwise, are vested. [L. 1955, ch. 248, § 1; L. 1968, ch. 204, § 1; July 1.]

Cross References to Related Sections:

Purchase of boiler and fire and extended coverage insurance by school districts, see 72-8401 et seq.

Research and Practice Aids:

Municipal Corporations 226.
C. J. S. Municipal Corporations §§ 976 et seq.

Law Review and Bar Journal References:

Mentioned in article on governmental tort immunity, Lynn R. Johnson, 10 W. L. J. 59, 71 (1970).

Cited; statutory deviation from common law doctrine of governmental immunity for tort liability, John W. Johnson, 11 W. L. J. 310, 311 (1972).

CASE ANNOTATIONS

1. Legislature by providing liability recognizes that absent such statute rule of immunity would prevail. Caywood v. Board of County Commissioners, 194 K. 419, 433, 399 P.2d 561.

2. Act mentioned; "governmental immunity" of operation of university of Kansas medical center considered. McCoy v. Board of Regents, 196 K. 506, 510, 413 P.2d 73.

3. Lower court ruled county welfare director an employee of the county and protected by county automobile liability insurance; reversed. Mott, Executor v. Mitchell, 209 K. 476, 485, 496 P.2d 1297.

12-2602. Types of insurance permitted; payment. The governing body of any municipality may purchase motor vehicle liability insurance, including medical payments insurance, for the protection and benefit of the municipality and those officers, agents and employees of the municipality responsible for the operation of vehicles owned, operated, maintained or controlled by the municipality, and of persons while riding in or upon, entering or alighting from such vehicles, and may pay for such insurance out of the general fund or other appropriate fund of the municipality for any or all motor vehicles owned, operated, maintained or controlled by such municipality. [L. 1955, ch. 248, § 2; L. 1961, ch. 75, § 1; June 30.]

Law Review and Bar Journal References:

Cited; statutory deviation from common law doctrine of governmental immunity for tort liability, John W. Johnson, 11 W. L. J. 310, 311 (1972).

12-2603. Waiver of immunity from liability. The governing body of any municipality securing liability insurance as hereinbefore provided, thereby waives its governmental immunity from liability for any damage by reason of death, or injury to person or property proximately caused by the negligent operation of any motor vehicle by an officer, agent or employee of such municipality when acting within the scope of his or her authority or within the course of his or her employment. Such immunity is waived only to the extent of the amount of insurance so obtained. [L. 1955, ch. 248, § 3; L. 1961, ch. 75, § 2; June 30.]

Law Review and Bar Journal References:

Cited; statutory deviation from common law doctrine of governmental immunity for tort liability, John W. Johnson, 11 W. L. J. 310, 311 (1972).

12-2604. Insurers and standard policies authorized; waiver of immunity defense by insurer. The contract of insurance purchased pursuant to this act must be one issued by some insurance company or association authorized to transact such business in the state of Kansas and must by its terms adequately insure such municipality and its officers, agents and employees under standard policies of insurance approved by the state insurance commissioner for the type of coverage mentioned in K. S. A. 12-2602, for any damages by reason of death, or injury to person or property, proximately caused by the negligent operation of any motor vehicle by an officer, agent or employee of such municipality when acting within the scope of his or her authority or within the course of his or her employment. Any company or association which enters into a contract of insurance as above described with a municipality by such acts waives any defense based upon the governmental immunity of the municipality and its officers, agents and employees. [L. 1955, ch. 248, § 4; L. 1961, ch. 75, § 3; June 30.]

Law Review and Bar Journal References:

Cited; statutory deviation from common law doctrine of governmental immunity for tort liability, John W. Johnson, 11 W. L. J. 310, 311 (1972).

12-2605. Actions against municipality; defenses; limitation of actions. Any person sustaining damages, or in case of death, his or her personal representative, may sue a municipality as provided in this act for the recovery of such damages in any court of competent jurisdiction in this state, in the county where the municipality is located; and it shall be no defense to any such action that the operation

of such motor vehicle, by such officer, agent, or employee, was in pursuance of a governmental, municipal, or discretionary function of such municipality, if and to the extent, such municipality has insurance coverage as provided in this act.

Except as hereinbefore expressly provided, nothing in this act shall be construed to deprive any municipality of any defense whatsoever to such action for damages, or to restrict, limit or otherwise affect any such defense, which said municipality may have at common law or by virtue of any statute (whether general, special, private or local); and nothing in this act shall be construed to require any person sustaining damages, or any personal representative of any decedent, to give notice of such claim to the municipality, and any claimant shall have two years within which to commence any civil action for the recovery of damages authorized by this act. [L. 1955, ch. 248, § 5; June 30.]

Research and Practice Aids:

Municipal Corporations 1025.
C. J. S. Municipal Corporations § 2201.

Law Review and Bar Journal References:

Cited; statutory deviation from common law doctrine of governmental immunity for tort liability, John W. Johnson, 11 W. L. J. 310, 311 (1972).

12-2606. Limit on municipal liability. A municipality may incur liability pursuant to this act only with respect to a claim arising after such municipality has procured liability insurance pursuant to this act, and only during the time when such insurance is in force. [L. 1955, ch. 248, § 6; June 30.]

Law Review and Bar Journal References:

Cited; statutory deviation from common law doctrine of governmental immunity for tort liability, John W. Johnson, 11 W. L. J. 310, 311 (1972).

12-2607. Jury trial issues of law or fact; rights and duties of plaintiff and defendant. No part of the pleadings which relate to or allege facts as to defendant's insurance against liability shall be read or mentioned in the presence of the trial jury in any action brought pursuant to this act. Such liability shall not attach unless the plaintiff shall waive the right to have all issues of law or fact relating to insurance in such an action determined by a jury and such issues shall be heard and determined by the judge without resort to a jury, and the jury shall be absent during any motions, arguments, testimony or announcement of findings of fact or conclusions of law with respect thereto, unless the defendant shall ask for a jury trial thereon.

No plaintiff to an action brought pursuant to this act nor attorney, nor witness therefor, shall make any statement, ask any question, read any pleadings, or do any other act in the presence of the trial jury in such case so as to indicate to any member of the jury that the defendant's liability would be covered by insurance, and if such be done order shall be entered of mistrial. [L. 1955, ch. 248, § 7; June 30.]

Law Review and Bar Journal References:

Cited; statutory deviation from common law doctrine of governmental immunity for tort liability, John W. Johnson, 11 W. L. J. 310, 311 (1972).

12-2608. Motor vehicle liability insurance for emergency vehicles of political subdivisions; self-insurance, when; coverage required. On and after January 1, 1969, every city, county or other political subdivision of this state shall purchase motor vehicle liability insurance on all ambulance, fire and police emergency vehicles of said city, county or other political subdivisions for the protection and benefit of the city, county or other political subdivision and the officers, agents and employees of the city, county or other political subdivision responsible for the operation of vehicles owned, operated, maintained or controlled by said political subdivision and of persons while riding in or upon, entering or

alighting from such vehicles: *Provided, however,* Every city, county or other political subdivision may, by the adoption of a resolution at the option of the governing bodies thereof, become self-insurers to the extent required by this act and having done so are not required to purchase the insurance required by this act. The motor vehicle liability insurance policy so purchased shall provide coverage to a limit, exclusive of interests and costs, of not less than twenty-five thousand dollars (\$25,000) because of bodily injury to or the death of one person in any one accident and subject to said limit for one person, to a limit of not less than fifty thousand dollars (\$50,000) because of bodily injury to, or death of two or more persons in any one accident, and if the accident has resulted in injury to, or destruction of property to a limit of not less than five thousand dollars (\$5,000) because of injury to, or destruction of property of others in any one accident. [L. 1967, ch. 101, § 1; L. 1970, ch. 76, § 1; July 1.]

12-2608a. Same; acquisition by bid or negotiation; purchase with other types of insurance. The city, county or other political subdivision purchasing the insurance prescribed by this act may acquire such insurance by competitive bids or by negotiation. In the event competitive bids are taken, the governing body of the political subdivision shall invite sealed proposals for such insurance by advertising once weekly for at least two (2) consecutive weeks in the official city or county newspaper or in a newspaper of general circulation in other political subdivisions which have not designated an official newspaper. One or more other types of insurance such political subdivisions are authorized to purchase may be combined with the insurance prescribed by this act in the invitation for sealed proposals and the insurance so advertised shall be purchased from the responsible bidder whose bid for all insurance advertised is the lowest responsible bid. City, county or other political subdivisions may accept or reject any or all bids. [L. 1970, ch. 76, § 2; July 1.]

12-2609. Same; waiver of immunity from liability extent. The city, county or other political subdivision of this state securing insurance or becoming self-insurers as hereinbefore required, thereby waives its governmental immunity from liability for any damage by reason of death or injury to persons or property proximately caused by the negligent operation of any such emergency motor vehicle by an officer or employee of such city, county or other political subdivision when acting within the scope of his or her authority or within the course of his or her employment. Such immunity shall be waived only to the extent of the insurance so obtained or in the case of self-insurers to the extent of the self-insurance heretofore required. [L. 1967, ch. 101, § 2; July 1.]

12-2610. Same; insurers and standard policies authorized; waiver of immunity defense by insurer. The contract of insurance purchased pursuant to this act must be one issued by some insurance company or association authorized to transact such business in the state of Kansas and must, by its terms, adequately insure such city, county or other political subdivision, its officers, agents and employees under standard policies of insurance approved by the state insurance commissioner for the type of coverage provided for in K. S. A. 12-2608 for any damages by reason of death, or injury to personal property proximately caused by the negligent operation of any such emergency motor vehicle by an officer or employee of such political subdivision when acting within the scope of his or her authority or within the course of his or her employment. Any company or association which enters into a contract of insurance as above described with a city, county or other political subdivision of this state by such act waives any defense based upon the governmental immunity of the political subdivision and its officers, agents and employees. [L. 1967, ch. 101, § 3; July 1.]

12-2611. Same; actions against municipality; defenses; limitation of actions. Any person sustaining damages or in the case of death, his or her personal representative may sue a city, county or other political subdivision as provided in this act for the recovery of such damages in any court of competent jurisdiction in this state in the county where the political subdivision is located or in the county in which the damage was sustained, and it shall be no defense to any such action that the operation of such emergency motor vehicle by such officer, agent or employee was in pursuance of a governmental or proprietary function of such political subdivision, if and then only to the extent such political subdivision has insurance coverage as provided in this act.

All actions brought under this act shall be subject to the statute of limitations provided in the code of civil procedure for such actions. [L. 1967, ch. 101, § 4; July 1.]

12-2612. Same; limit on liability. A city, county or other political subdivision of this state may incur liability pursuant to this act only with respect to a claim arising after such political subdivision has procured liability insurance pursuant to this act and only during the time when such insurance is in force. [L. 1967, ch. 101, § 5; July 1.]

12-2613. Same; jury trial issues of law or fact; rights and duties of parties. No part of the pleadings which relate to or allege facts as to the defendant's insurance against liability shall be read or mentioned in the presence of the trial jury in any action brought pursuant to this act. All issues of law or fact with reference to determination of contractual liability and insurance shall be determined by the court, and the jury shall be absent during the motions, arguments, testimony or announcement of findings of fact or conclusions of law with respect thereto.

No plaintiff to an action brought pursuant to this act, or attorney, or witness therefor, shall make any statement, ask any question, read any pleadings, or do any other act in the presence of the trial jury in such case so as to indicate to any member of the jury that the defendant's liability would be covered by insurance, and if such be done, order shall be entered of mistrial. [L. 1967, ch. 101, § 6; July 1.]

12-2614. Same; severability. If any clause, paragraph, subsection or section of this act shall be held invalid or unconstitutional, it shall be conclusively presumed that the legislature would have enacted the remainder of this act without such invalid or unconstitutional clause, paragraph, subsection or section. [L. 1967, ch. 101, § 7; July 1.]

19-106. Service of process. In all legal proceedings against the county, process shall be served on the clerk of the board of county commissioners, and whenever such suit or proceedings shall be commenced, it shall be the duty of the clerk forthwith to notify the county attorney thereof, and to lay before the board of county commissioners, at their next meeting, all the information he may have in regard to such suit or proceedings. [C. S. 1868, ch. 25, § 6; Oct. 31; R. S. 1923, 19-106.]

46-901. Governmental immunity of state; implied contract, negligence or other tort; notice in state contracts. (a) It is hereby declared and provided that the following shall be immune from liability and suit on an implied contract, or for negligence or any other tort, except as is otherwise specifically provided by statute:

(1) The state of Kansas; and

(2) boards, commissions, departments, agencies, bureaus and institutions of the state of Kansas; and

(3) all committees, assemblies, groups, by whatever designation, authorized by constitution or statute to act on behalf of or for the state of Kansas.

(b) The immunities established by this section shall apply to all the members of the classes described, whether the same are in existence on the effective date of this act or become members of any such class after the effective date of this act.

(c) The state of Kansas and all boards, commissions, departments, agencies, bureaus and institutions and all committees, assemblies and groups declared to be immune from liability and suit under the provisions of subsection (a) of this section shall, in all express contracts, written or oral, with members of the public, give notice of such immunity from liability and suit. [L. 1970, ch. 200, § 1; March 26.]

Law Review and Bar Journal References:

Mentioned in discussion of sovereign immunity in "The 1970 Kansas Legislature in Review," Robert F. Bennett, 39 J. B. A. K. 107, 192 (1970).

Mentioned in comment on governmental immunity, John W. Johnson, 11 W. L. J. 310, 312, 313 (1972).

Mentioned; governmental immunity is applicable except in instances specifically provided by statute. John W. Johnson, 11 W. L. J. 310, 312-313 (1972).

CASE ANNOTATIONS

1. Cited; held, district court did not err in sustaining a motion to dismiss plaintiff's petition seeking recovery of damages for personal injuries alleged to have been sustained from the Kansas turnpike authority's creation or maintenance of a nuisance. *Woods v. Kansas Turnpike Authority*, 205 K. 770, 773, 472 P. 2d 219.

2. Mentioned in action against Kansas highway patrol and city of Salina in wrongful death action; recovery denied. *Daniels v. Kansas Highway Patrol*, 206 K. 710, 713, 482 P. 2d 46.

3. Mentioned in holding doctrine of governmental immunity from tort liability applicable to exercise of police power by a police officer. *Allen v. City of Ogden*, 210 K. 136, 138, 499 P. 2d 527.

46-902. Nonapplication of 46-901 to local unit; liability of local unit of government for torts of their officers or employees; exceptions. (a) Nothing in K.S.A. 46-901 shall apply to or change the liabilities of local units of government, including (but not limited to) counties, cities, school districts, community junior colleges, library districts, hospital districts, cemetery districts, fire districts, townships, water districts, irrigation districts, drainage districts and sewer districts, and boards, commissions, committees, authorities, departments and agencies of local units of government. Liabilities of such local units of government shall be determined as provided in subsection (b) of this section.

(b) Except as may be otherwise specifically provided by statute and except for causes of action based upon nuisance and, in the case of cities, actions based upon negligent failure to correct defects in streets, local units of government shall be immune from liability and suit for torts committed by officers or employees of such local unit of government when engaged in a governmental function. The provisions of this section shall not affect, change or diminish any procedural requirement necessary for recovery from any local unit of government, nor shall it grant any immunity to a local unit of government when engaged in a proprietary function.

History: K.S.A. 46-902; L. 1978, ch. 202, § 1; May 16.

68-2108. Liability of secretary of transportation or municipality not extended or enlarged. Nothing contained in this act shall be construed as extending or enlarging the liability: (a) Of the secretary of transportation for damages for defects in state highways under the provisions of K.S.A. 1975 Supp. 68-419, or acts amendatory thereof, or (b) of any municipality for damages for defects in roads, streets, alleys or highways.

History: K.S.A. 68-2108; L. 1975, ch. 427, § 213; Aug. 15.

72-8405. Public liability and property damage insurance; purchase authorized. The board of education of any unified school district is authorized to purchase public liability and property damage insurance for its members and for its officers, agents and employees. Such insurance may be purchased for the purpose of providing protection for said members, officers, agents and employees for any personal liability they might have as a result of any of their acts or omissions arising out of and in the scope of their services for the school district. [L. 1969, ch. 358, § 1; July 1.]

72-8406. Same; policy limits; method of purchase. The amounts of coverage provided in insurance policies purchased pursuant to section 1 [72-8405] of this act shall be in such amounts and for such specific risks as the board deems advisable. Insurance authorized to be obtained under authority of this act may be acquired by competitive bids or by negotiation in the discretion of the board of education. In the event competitive bids are taken, the board of education shall purchase insurance only after it has invited sealed proposals for such insurance by advertising once each week for two (2) consecutive weeks in a newspaper having general circulation in the school district. Such insurance shall be purchased from the lowest responsible bidder, but any or all bids may be rejected. [L. 1969, ch. 358, § 2; July 1.]

72-8407. Same: authorization; policy limits; method of purchase. On and after January 1, 1970, the board of education of any school district is authorized and permitted to purchase public liability and property damage insurance for the protection and benefit of said school district and the officers, agents, teachers and employees from liability as a result of any of their acts or omissions arising

out of and in the scope of their services for the school district which shall result in damage or injury: *Provided, however,* The public liability and property damage insurance policy so purchased shall provide coverage to a limit, exclusive of interest and costs of not less than one hundred thousand dollars (\$100,000) because of death, bodily injury and/or damage or destruction of property in any one occurrence. The insurance purchased as provided in this act shall be limited to the kinds of insurance hereinbefore set out. Such insurance may be acquired by competitive bids or by negotiation in the discretion of the board of education. In the event competitive bids are taken, the board of education shall purchase insurance only after it has invited sealed proposals for such insurance by advertising once each week for two (2) consecutive weeks in a newspaper having general circulation in the school district. Such insurance shall be purchased from the lowest responsible bidder, but any or all bids may be rejected. [L. 1969, ch. 360, § 1; July 1.]

72-8408. Same; waiver of governmental immunity by school district, extent. The board of education of any school district of this state securing insurance as hereinbefore authorized thereby waives its governmental immunity from liability for any damage by reason of death or injury to persons or property proximately caused by the negligent acts of any officer, teacher or employee of such school district when acting within the scope of his authority or within the course of his employment. Such immunity shall be waived only to the extent of the insurance so obtained. [L. 1969, ch. 360, § 2; July 1.]

72-8409. Same; waiver of governmental immunity by insurance company. The contract of insurance purchased pursuant to this act must be one issued by some insurance company or association authorized to transact such business in the state of Kansas and must by its terms adequately insure such school district, its officers, agents, teachers and employees under standard policies of insurance approved by the state insurance commissioner for the type of coverage provided for in section 1 [72-8407] of this act for any damages by reason of death or injury to person or property proximately caused by the negligent acts of any person acting for or on behalf of said school district within the scope of his authority or within the course of his employment. Any company or association which enters into a contract of insurance as above described with the school board of any school district of this state by such act waives any defense based upon the governmental immunity of the school district and its officers, agents, teachers and employees. [L. 1969, ch. 360, § 3; July 1.]

72-8410. Same; suits authorized; defenses limited; limitation of actions to apply. Any person sustaining damages or in the case of death his personal representative may sue the school district as provided in this act for the recovery of such damages in any court of competent jurisdiction in this state in the county where the school district is located or in the county in which the damage was sustained, and it shall be no defense to any such action that the negligent acts of the officer, agent, teacher or employee was in pursuance of a governmental or proprietary function of such school district, if and then only to the extent such political subdivision has insurance coverage as provided in this act.

All actions brought under this act shall be subject to the statute of limitations provided in the code of civil procedure for such actions. [L. 1969, ch. 360, § 4; July 1.]

72-8411. Same; application of act to liability. Any school district of this state may incur liability pursuant to this act only with respect to a claim arising after such political subdivision has procured liability insurance pursuant to this act and only during the time when such insurance is in force. [L. 1969, ch. 360, § 5; July 1.]

72-8412. Same; trial limitations. No part of the pleadings which relate to or allege facts as to the defendant's insurance against liability shall be read or mentioned in the presence of the trial jury in any action brought pursuant to this act. All issues of law or fact with reference to determination of contractual liability and insurance shall be determined by the court, and the jury shall be absent during the motions, arguments, testimony or announcement of findings of fact or conclusions of law with respect thereto.

No plaintiff to an action brought pursuant to this act, or attorney, or witness therefor, shall make any statement, ask any question, read any pleadings, or do any other act in the presence of the trial jury in such case so as to indicate to any member of the jury that the defendant's liability would be covered by insurance, and if such be done, order shall be entered of mistrial. [L. 1969, ch. 360, § 6; July 1.]

48-915. Immunity from liability of the state, local governments and certain individuals. (a) Neither the state nor any political subdivision of the state, nor the agents or representatives of the state or any political subdivision thereof, shall be liable for personal injury or property damage sustained by any person appointed or acting as a volunteer worker, or member of any agency, engaged in emergency preparedness activities. The foregoing shall not affect the right of any person to receive benefits or compensation to which he or she might otherwise be entitled under the workmen's compensation law or any pension law or any act of congress.

(b) Whenever a proclamation is issued declaring a state of disaster emergency pursuant to K. S. A. 48-924, neither the state nor any political subdivision of the state nor, except in cases of willful misconduct, gross negligence or bad faith, the employees, agents, or representatives of the state or any political subdivision thereof, nor any volunteer worker, or member of any agency, engaged in any emergency preparedness activities, complying with or reasonably attempting to comply with this act, or any proclamation, order, rule or regulation promulgated pursuant to the provisions of this act, or pursuant to any ordinance relating to blackout or other precautionary measures enacted by any political subdivision of the state, shall be liable for the death of or injury to persons, or for damage to property, as a result of any such activity performed during the existence of such state of disaster emergency or other such state of emergency. [L. 1951, ch. 323, § 14; L. 1975, ch. 283, § 25; April 11.]

68-301. Recovery of damages from county or township; notice of defects; action against two or more counties or townships. Any person who shall without contributing negligence on his part sustain damage by reason of any defective bridge, culvert, or highway, may recover such damage from the county or township wherein such defective bridge, culvert or highway is located, as hereinafter provided; that is to say, such recovery may be from the county when such damage was caused by a defective bridge, culvert or highway which by law, or agreement entered into pursuant to law, the county is obligated to maintain, and when any member of the board of county commissioners, the county engineer or superintendent of roads and bridges of such county shall have had notice of such defects for at least five days prior to the time when such damage was sustained; and in other cases such recovery may be from the township, where the trustee of such township shall have had like notice of such defect.

When such damage is sustained by reason of any defective bridge, culvert or highway which by law or agreement entered into pursuant to law, two counties are obligated to maintain, or two townships are obligated to maintain, or a county and a township are obligated to maintain, both such counties, or both such townships, or the county and the township, may be sued in a single action for damages brought in the district court of either county, and the liability of either or both may be determined therein. [R. S. 1923, 68-301; L. 1947, ch. 340, § 1; June 30.]

68-419. Action for damages against state for defect in bridge, culvert or highway; notice of defect; venue; service of process; time limitations; limitations on liability. (a) Any person who shall without negligence on his or her part sustain damage by reason of any defective bridge or culvert on, or defect in a state highway, not within an incorporated city, may recover such damages from the state. Such recovery may be from the state when the secretary of transportation, or state transportation engineer, geographic engineer, supervisor or foreman in charge of the construction, maintenance or upkeep of such highway, shall have had notice of such defects five (5) days prior to the time when such damage was sustained, and for any damage so sustained, the injured party may sue the secretary of transportation, and any judgment rendered in such case shall be paid from any funds in the state highway fund on the order of the secretary of transportation. For any damage so sustained action may be brought in the district court of the county in which such damage was sustained, or in the district court of the county of which the plaintiff is an actual resident at the time of the sustaining of such damage; and upon the filing of such action in such court a summons shall issue out of such court directed to the secretary of transportation of Kansas, and shall together with a copy of plaintiff's petition, be forwarded to the sheriff of Shawnee county, Kansas, for service, and service thereof shall be made by delivering to the secretary of transportation personally a copy of such summons and copy of the petition, or by leaving copies thereof at the office of the secretary of transportation, in Shawnee county, Kansas, by said sheriff, or his or her undersheriff or deputy sheriff, and said summons shall require the secretary of transportation to serve upon plaintiff's attorney or upon plaintiff if he or she has no attorney named in the petition and file in the office of the clerk of the court from which said summons issued a pleading to said petition within sixty (60) days after service of said summons exclusive of the day of service: *Provided*, That no such action shall be maintained unless within ninety (90) days after the sustaining of such damage, written notice, stating the date, when, and place where such damage was sustained, the name and correct post-office address of the person sustaining such damage, and the character of the damage sustained, shall be served upon the secretary of transportation, either in person or by registered or certified mail at his or her office in Topeka, Shawnee county, Kansas. Any such action must be commenced within two (2) years next immediately following the date said damage was sustained. Mailing of the notice required by this section by registered or certified mail within ninety (90) days after such damages are sustained, shall be deemed sufficient service of notice of a claim.

(b) Neither the state or the secretary of transportation, or any officer or employee of the state or the department of transportation, shall be liable to any person for any injury or damage caused by the plan or design of any state highway, or of any bridge or culvert thereon or of any addition or improvement thereto, where such plan or design, including the signings or markings of said high-

way, bridge or culvert, or of any addition or improvement thereto, was prepared in conformity with the generally recognized and prevailing standards in existence at the time such plan or design was prepared.

(c) For the purpose of this section, the term "state highway" shall include any road or highway constructed pursuant to subsection (c) of K.S.A. 1975 Supp. 68-406.

History: K.S.A. 68-419; L. 1975, ch. 350, § 2; L. 1975, ch. 427, § 104; Aug. 15.

72-8113. Same; severability. If any clause, paragraph, subsection or section of this act shall be held invalid or unconstitutional, it shall be conclusively presumed that the legislature would have enacted the remainder of this act without such invalid or unconstitutional clause, paragraph, subsection or section. [L. 1969, ch. 360, § 7; July 1.]

74-4708. Same; waiver of immunity, extent. The state agency securing insurance as hereinbefore required thereby waives its governmental immunity from liability for any damage by reason of death or injury to person or property proximately caused by the negligent operation of any motor vehicle by an officer or employee of such state agency when acting within the scope of his authority or within the course of his employment. Such immunity shall be waived only to the extent of the amount of insurance so obtained. [L. 1963, ch. 411, § 3; May 1.]

74-4709. Same; type of contract; coverage; waiver of defense of immunity. The contract of insurance purchased pursuant to this act must be one issued by some insurance company or association authorized to transact such business in the state of Kansas and must by its terms adequately insure such state agency, its officers, agents and employees under standard policies of insurance approved by the state insurance commissioner for the type of coverage provided for in section 2 [74-4707] of this act for any damages by reason of death, or injury to person or property, proximately caused by the negligent operation of any motor vehicle by an officer or employee of such state agency when acting within the scope of his authority or within the course of his employment. Any company or association which enters into a contract of insurance as above described with a state agency by such act waives any defense based upon the governmental immunity of the state agency and its officers, agents and employees. [L. 1963, ch. 411, § 4; May 1.]

74-4710. Same; actions against state agencies; venue; defenses; statute of limitations. Any person sustaining damages, or in case of death, his personal representative, may sue a state agency as provided in this act for

the recovery of such damages in any court of competent jurisdiction in this state, in the county where the state agency is located, or in the county in which the damage was sustained and it shall be no defense to any such action that the operation of such motor vehicle, by such officer, agent or employee, was in pursuance of a governmental or discretionary function of such state agency, if and to the extent, such state agency has insurance coverage as provided in this act.

All actions brought under this act shall be subject to the statute of limitations provided in the code of civil procedure for such actions. [L. 1963, ch. 411, § 5; May 1.]

74-4711. Same; liability of state agency limited. A state agency may incur liability pursuant to this act only with respect to a claim arising after such state agency has procured liability insurance pursuant to this act, and only during the time when such insurance is in force. [L. 1963, ch. 411, § 6; May 1.]

74-4712. Same; reference to insurance coverage in presence of jury prohibited; insurance issues determined by judge; waiver. No part of the pleadings which relate to or allege facts as to defendant's insurance against liability shall be read or mentioned in the presence of the trial jury in any action brought pursuant to this act. Such liability shall not attach unless the plaintiff shall waive the right to have all issues of law or fact relating to insurance in such an action determined by a jury, and such issues shall be heard and determined by the judge without resort to a jury, and the jury shall be absent during any motions, arguments, testimony or announcement of findings of fact or conclusions of law with respect thereto.

No plaintiff to an action brought pursuant to this act nor attorney, nor witness therefor, shall make any statement, ask any question, read any pleadings, or do any other act in the presence of the trial jury in such case so as to indicate to any member of the jury that the defendant's liability would be covered by insurance, and if such be done order shall be entered of mistrial. [L. 1963, ch. 411, § 7; May 1.]

74-4713. Same; definitions. As used in this act, the term "state agency" shall have the same meaning as prescribed in section 74-4701 of the General Statutes Supplement of 1961. As used in this act, the term "motor vehicle" shall include motor vehicles, vehicles and mobile equipment. [L. 1963, ch. 411, § 8; May 1.]

74-4714. Definitions. As used in this act, the following words and phrases shall have the meanings respectively ascribed to them therein, unless the context requires otherwise:

(a) "State" means any agency, board, commission, institution, bureau, authority or department of the state of Kansas;

(b) "Officer" means any elected or appointed state, county or city official;

(c) "Employee" means any employee of the state or a county or a city; and

(d) "Agent" shall mean any person duly authorized by an officer or employee to perform an act within the course of his service or employment. [L. 1970, ch. 318, § 1; July 1.]

74-4715. Authorization for procurement of liability insurance; purchase by board or governing bodies of counties or cities; bids or negotiations. (a) The procurement of insurance is hereby authorized for the purpose of insuring the state or any county or city, and their officers, employees and agents against any liability, in addition to liability covered by the Kansas workmen's compensation law, for injuries or damages resulting from any tortious conduct of such officers, employees and agents arising from the course of their employment.

(b) Such insurance may be procured for the state or employee thereof, by the committee on surety bonds and insurance established by K. S. A. 75-4101, subject to the applicable limitations of the acts contained in article 41 of chapter 75 of the Kansas Statutes Annotated and any amendments thereto, and subject to appropriations being made therefor.

(c) Such insurance may be procured by the governing body of any county or city only from an insurer or insurers licensed to transact such insurance business in this state and deemed by the governing body to be responsible and financially sound in relation to the extent of coverage required. Such insurance may be acquired by competitive bids or by negotia-

tion. In the event competitive bids are taken, the governing body shall invite sealed bids for such insurance by advertising once each week for two (2) consecutive weeks in a newspaper having general circulation in the respective city or county, and such insurance shall be purchased from the lowest responsible bidder, but any or all bids may be rejected. [L. 1970, ch. 318, § 2; July 1.]

Law Review and Bar Journal References:

Mentioned in "The 1970 Kansas Legislature In Review," Robert F. Bennett, 39 J. B. A. K. 107, 192 (1970).

74-4716. Waiver of governmental immunity; extent. Upon procuring such insurance, the state, city or county thereby waives its governmental immunity from liability for injuries or damages resulting from tortious conduct of its officers, employees or agents during the course of their employment only to the extent of the insurance so obtained. Upon issuing such insurance, the insurer or insurers thereby waive any defense based upon the governmental immunity of the state, county or city or their officers, employees or agents. [L. 1970, ch. 318, § 3; July 1.]

75-4356. Defense of state and local governmental officers and employees in actions for damages; former officers and employees, when; legal counsel or payment of expenses. In the event any officer or employee of the state of Kansas or any political or taxing subdivision thereof shall be sued for damages for any alleged nonfeasance, misfeasance or malfeasance of the duties of his or her office or employment or in the event any former officer or employee of the state or any political or taxing subdivision shall be sued for damages for any alleged nonfeasance, misfeasance or malfeasance of duty of his or her office occurring while holding such office or while so employed, the state or political or taxing subdivision, except as otherwise provided in K.S.A. 75-4357a, may provide necessary legal counsel and pay other necessary expenses for the defense of the action. The legal counsel may be the attorney general, the legislative counsel when authorized by the legislative coordinating council, the attorney for the political or taxing subdivision or other counsel employed for such purpose.

History: L. 1972, ch. 324, § 1; L. 1977, ch. 290, § 1; July 1.

75-4357. Same; payment of premiums on insurance in lieu of furnishing counsel. In lieu of furnishing legal counsel as authorized by K.S.A. 75-4356, the state or any political or taxing subdivision thereof may pay the premiums on insurance protecting its officers and employees in event of such suit and providing for the defense of any such action. In the case of the state such insurance shall be purchased in the manner and subject to the limitations prescribed by K.S.A. 75-4114, and amendments thereto.

History: L. 1972, ch. 324, § 2; L. 1977, ch. 290, § 2; July 1.

75-4357a. Same; defense unautho- rized without written notice of action; filing of notice. Neither the state of Kansas nor any political or taxing subdivision thereof shall provide for the defense of any officer or employee or former officer or employee in the manner provided by K.S.A. 75-4356 and 75-4357 unless notified in writing of such action by the plaintiff or the officer or employee involved within fifteen (15) days after the commencement of the action. In actions involving officers or employees of the state of Kansas such notice shall be filed in the office of the attorney general. In actions involving officers or employees of political or taxing subdivisions such notice shall be filed with the governing body of the subdivision.

History: L. 1977, ch. 290, § 5; July 1.

75-4358. Defense of state and local governmental officers and employees in actions for damages; creation of special fund; payments to fund from tax levy or employee benefits contribution fund. All payments authorized by K.S.A. 75-4356 and 75-4357 to be made by any political or taxing subdivision of the state shall be paid from the general fund of such political or taxing subdivision or from a special fund created and established by such political or taxing subdivision for such purpose. Whenever the governing body of any political or taxing subdivision of the state shall determine that it is advisable to establish a permanent fund for the payment of such costs in lieu of paying the same out of the general fund of the subdivision such governing body may create and establish a special fund for the payment of such costs and may place therein any moneys received by the political or taxing subdivision from any source whatsoever which may be lawfully utilized for such purpose including the proceeds of tax levies hereinafter authorized and provided. Whenever the governing body of any political or taxing subdivision of this state which is authorized by law to levy taxes upon property has established a special fund under the provisions of this section and shall determine that moneys from other sources will be insufficient to pay such costs the governing body is hereby authorized to levy an annual tax upon all taxable tangible property within the political or taxing subdivision in an amount determined by the governing body to be necessary for such purpose. All such tax levies shall be exempt from the limitations imposed under the provisions of K.S.A. 79-5001 to 79-5016, inclusive, and shall not be subject to or limited by any other tax levy limitation prescribed by law. In lieu of levying the tax authorized in this section, any taxing subdivision may make payments to such special fund from moneys in any employee benefits contribution fund established pursuant to K.S.A. 1978 Supp. 12-16,102.

History: K.S.A. 75-4358; L. 1978, ch. 67, § 11; July 1.

75-4359. Same; applicability of act. The provisions of this act shall not apply in any instance wherein an elected officer or appointed deputy or assistant is charged with a violation of the criminal laws of this state or of the United States and it shall not apply in any ouster action or other type of action brought by the state or other proper authority seeking to remove the officer or deputy from office.

History: L. 1972, ch. 324, § 4; July 1.

75-4361. Political or taxing subdivisions may pay certain judgments against officers or employees; source of moneys for payment of judgments; board of tax appeals may authorize issuance of no fund warrants or bonds. Any political or taxing subdivision of the state is hereby authorized to pay any judgment obtained against any officer or employee thereof for nonfeasance or misfeasance while acting within the scope and in the performance of the duties of his or her office or employment. Payment of any such judgments may be made out of the general or other fund of the political or taxing subdivision or if the subdivision is authorized by law to levy taxes upon property such payment may be made from moneys received from the issuance of no-fund warrants or general obligation bonds when approved by the state board of tax appeals as hereinafter provided.

Whenever the governing body of any political or taxing subdivision of the state which is authorized by law to levy taxes upon property shall determine that revenues for the general or other fund for the current budget year are insufficient to finance both the adopted budget of expenditures for such fund and the payment of any judgment authorized to be paid under the provisions of this section said governing body may make

application to the state board of tax appeals for approval of the issuance of no-fund warrants or general obligation bonds for such purpose. Such application shall be in writing and shall state the amount of the judgment, the amount of no-fund warrants or general obligation bonds to be issued and such other information as may be necessary to inform the board of tax appeals of the need for issuing such warrants or bonds in lieu of paying such judgment out of the general or other fund of the political or taxing subdivision. If, upon hearing being had, the state board of tax appeals shall determine that such judgment cannot be paid from the general or other fund of such political or taxing subdivision the board shall issue its order in writing and under its seal authorizing said subdivision to issue warrants or bonds for the purpose of paying the same and to levy taxes upon all taxable tangible property within the subdivision for the purpose of paying such warrants or bonds. Such warrants may mature serially at such yearly dates as to be payable by not more than five (5) tax levies. Bonds issued under the authority of this act shall be issued in accordance with the provisions of the general bond law and shall be in addition to and not subject to any bonded debt limitation prescribed by any other law of this state. Taxes levied for the payment of warrants or bonds shall be exempt from the limitations imposed under the provisions of K.S.A. 79-5001 to 79-5016, inclusive, and shall not be subject to or limited by any other tax levy limitation prescribed by law.

History: L. 1977, ch. 290, § 4; July 1.