MINUTES OF THE SENATE COMMITTEE ON JUDICIARY

Held in Room 519 S, at the Statehouse at 10:00 a. m./p.m., on January 25, 1979.

All members were present except: Senator Hein

The next meeting of the Committee will be held at 10:00 a. m./p.m., on January 26, 1979.

~~Those minutes of the meeting held on ..... 19.... were considered, corrected and approved.~~

Chairman

The conferees appearing before the Committee were:

Charles Wheelen - Legislative Research Department
E. A. Mosher - League of Kansas Municipalities
Harry Felker - City of Topeka
Neil Shortledge - City of Overland Park
Richard Chesney - City of El Dorado

Staff present:
Art Griggs - Revisor of Statutes
Jerry Stephens - Legislative Research Department
Wayne Morris - Legislative Research Department

Senate Bill No. 76 - Enacting the tort claims act. The chairman briefly reviewed the presentations that had previously been made concerning the bill. Mr. Chip Wheelen from the Reserach Department presented information concerning fiscal implications. A copy of the fiscal note concerning the bill and the material distributed by Mr. Wheelen are attached hereto. He stated a reliable estimate concerning fiscal implications cannot be projected; such a projection would depend upon the number of claims filed and the settlements resulting from such claims.

Mr. Ernie Mosher appeared in support of the bill; a copy of his statement is attached hereto. He stated he feels this is one of the most significant bills confronting the legislature. He stated it was a well drafted bill; he would like to see it amended as indicated in his statement. He stated the League of Kansas Municipalities has contracted with the Marsh and McLennan, Inc., insurance consulting firm to do a pilot study for the City of Ottawa on the availability of insurance, the range of costs, and cost estimates. This report is not yet available, he hopes to have it available to the committee in several weeks.

Commissioner Harry Felker testified in support of the bill. He urged that the mob liability sections be amended, so as to hold the state responsible for any mob activity on state owned

SB 76 continued

property; and to provide some relief to cities from the present law. Committee discussion with him followed.

Neil Shortledge, an assistant city attorney for Overland Park, testified in support of the bill. He stated this is one of the priorities for this legislative session for his city. Committee discussion with him followed. He stated that he would prefer a closed end approach, but an open end bill can be just as effective.

Dick Chesney, the city manager of El Dorado, testified in support of the bill. He reported that when El Dorado renewed its liability insurance policies last December, they found that the premiums had decreased from prior years. Committee discussion with him followed.

The meeting adjourned.

These minutes were read and approved by the committee on 2-12-79.

1-25-79

GUESTS

SENATE JUDICIARY COMMITTEE

NAME	ADDRESS	ORGANIZATION
[illegible]	204 W 5th Topeka	Topeka Police Dept
Neil Shortlidge		City of Overland Park
Brent McFall	City of Lawrence	
[illegible]	Topeka	A.I.A.
[illegible]	Dodge City	Intern - Sen. Angell
John Deardoff	" "	" " "
[illegible]	Topeka	League of Kansas Municipalities
[illegible]	TOPEKA	CITY OF TOPEKA
Harold Main	Topeka	Topeka/Sh Co/Schools
[illegible]	"	[illegible]
[illegible] Wheelen	Legis' Rsrch	—
Jon Kessler		Intern to Sen Allegrucci
Mary Ellen Conlee	Wichita	City of Wichita
[illegible] Landreth	Lawrence	Indep. Insurance Agents of Kansas
[illegible] Weisgerber		League of KS Municipalities
[illegible] A Brien	Topeka	League of Ks Municipalities
[illegible]	KC	KC Star
[illegible]	Topeka	Ks Bar Assn.
Richard Chesney	El Dorado	City of El Dorado
[illegible]	Topeka	KTLA
Charles P. Hamm	State Office Bldg	S.R.S.
Barry Smith	Ft Scott KS	[illegible]
Glenn O. Cogswell	Topeka	Alliance of Am. Insurers
[illegible]	Iowa	intern Ness

1-25-79

Statement on SB 76 - Tort Liability

To: The Senate Committee on Judiciary
By: E.A. Mosher, Executive Director, League of Kansas Municipalities
January 25, 1979

At the outset, I would like to observe that the League considers the proposed tort liability bill to be one of the most significant issues affecting cities confronting the 1979 session. While we have not urged a lot of city officials to attend this meeting, we do want you to understand that we appreciate its importance. With a few exceptions, which we will note late, we think it is a well drafted bill. 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.

For this presentation, it is planned that I will submit some general and policy observations about the bill. Mr. Frank Bien, the League's Legal Counsel, will then suggest some specific amendments, and a few other city officials are scheduled to present general remarks.

As background to the discussion, we sould like to 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 my remarks.

Perhaps the principal policy recommendation in the 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. 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." As all of you are well aware, the interim committee rejected the closed-end approach, and opted for the open-end approach. Incidentally, our review of the statutes of other states indicate that the proposed Kansas act is one of the most open, open-ended acts in the nation. But you will hear more about this later.

In our consideration of this proposal, the League established seven basic features which we think should be included in a Kansas tort claim bill. I would like to present these recommended standards and comments about their application to SB 76.

(1) the bill should "apply to the state as well as local governments". We are pleased that SB 76 does cover both the state and its local government. We continue to believe that both the state and local units are in the same boat, and that the public interest would be 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 5 of the bill sets a $500,000 limit for any number of claims arising out of a single occurrence or accident. We continue to suggest, as we have in the past, that $300,000 is a more appropriate figure, although we recognize the $500,000 amount seems to be one of consensus.

(3) The bill should "cover the liability of officers and employees as well as the governing unit". Our interpretation of the bill is that it does coordinate and integrate the liability of the unit and its employees and we 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 16 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 15. 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. I suspect 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 requirement for cities is six months (K.S.A. 12-105). 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, as has this same committee in years past.

(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 SB 76 does a good job of providing the broad authority necessary for local governments to meet their responsibilities under act.

We do object to the provisions in Section 11 which requires that all liability insurance must be purchased from a company or association authorized to transact insurance business in the state. These provisions are found on page seven, beginning on line 253. We hear that companies have experienced an extremely profitable year. Some companies formerly hesitant to write tort liability insurance are now apparently ready to do so. Premiums have dropped substantially, we are advised. None the less, there are forms of insurance which are simply not available from companies admitted to transact business in Kansas. This is notably true for the excess or surplus lines companies. At the minimum, we suggest a provision that insurance must be purchased from Kansas admitted companies only when the desired insurance is available from such companies.

(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." Rather than take your time to explore this general matter, I have attached an editorial I wrote on "Public Policy and Governmental Tort Liability", published in the January issue of our magazine, Kansas Government Journal. In substance, the editorial notes that there are two types of "public costs" involved in governmental tort liability. We are, of course, concerned about the direct fiscal costs. Public funds spent for tort liability, whether in the form of insurance payments or in the cost of providing legal defense or payment of claims, is money not available for some other important purpose. But there are also some other potential public benefit costs involved, which deserve consideration. As a simple example, if a city is liable for injuries which result from the use of swings in the park, one solution is to remove the swings - no swings, no liability. I assure you that the potential threat of liability, even if somewhat remote, will affect local public policy decisions. Thus we plead for a bill which is as definitive as possible. Mr. Bien has some proposals for your consideration.

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.

Public Policy and Governmental Tort Liability

One of the major issues confronting the 1979 legislature is the matter of governmental tort liability. As noted in a feature article in this issue of the *Journal*, legislative action on governmental liability appears imperative. This article presents background information on the Kansas situation and summarizes the provisions of the interim legislative committee's proposed comprehensive tort claims act affecting both state and local governments.

Presumably, the basic policy objective of the legislature will be to establish some reasonable and equitable balance of the concerns of the private individual and the general public. Events do occur whereby private individuals occasionally suffer injury as the result of the actions or inactions of a governmental unit or its employees. When this occurs, some redress for the injured party, at the expense of the general public, must be considered. The essential question is where is the proper dividing line between protecting the private interest and protecting the public interest?

There are two types of "public costs" involved in governmental tort liability. One type involves the direct or indirect expenditure of public funds, such as for the purchase of liability insurance, establishment of reserve funds, provision of legal defense, and the payment of damages as well as the cost of risk management and prevention activities. The second type of public "cost" is the loss of public benefits which result from the actions or inactions taken by a governmental unit in the light of its vulnerability to tort claims. This nonfiscal, public benefits cost of liability has received little consideration in the past and needs to be addressed by the 1979 legislature.

The basic public policy question centers on whether governmental functions or facilities, of benefit to the general public, will be eliminated, reduced in scope or not undertaken because of the potential vulnerability of that function or facility to tort claims. For example, Kansas local governments have generally been immune as to park and recreation programs or facilities. This would be changed by the proposed act; the "governmental function" defense to tort claims would be eliminated. Thus, if a city is made liable for injuries which result from the use of swings in a public park, one solution is to remove the swings— no swings, no liability. This is a simplistic example, but tends to show that public decisions will, and indeed should be, influenced by the extent to which governmental units are liable in tort. To cite another example, if a local unit could be held liable for the negligent inspection of a building under construction, should the inspection service be eliminated?

There has been a number of developments in recent years, largely an outgrowth of state and federal laws and regulations, which generally tend to force local governments to go first class or not at all. The problem is, many local units can't afford to go first class. In an effort to provide as many needed and wanted services as possible, within the fiscal resources available, compromises in service levels are to be expected. For example, continuous supervision of playgrounds and better maintenance of equipment and grounds may be desirable, but choices have to be made. Money spent for this is not available for that. The potential risk of tort liability will affect public policy decisions!

Hopefully, the tort claims act that ultimately passes the 1979 legislature will properly balance the need to protect the interest of the individual with the broad public interest. If the pendulum swings too far in the protection of the rights of the individual, it must be at the cost of the general public. There is no free lunch. The bill will have to be paid, sooner or later, either in direct public expenditures or in reduced public service benefits.

—E.A.M.

special city
legislative
bulletin

SB 76--TORT LIABILITY BILL

This report presents a summary of SB 76, the proposed "Kansas tort claims act." The bill is identical to the bill recommended by the interim legislative Special Committee on Judiciary. The following is reproduced from the January issue of Kansas Government Journal.

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 statute to the extent the local 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" appoach 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

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.

expand the liability of governmental entities.

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 subdivisons 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.

1-25-79

ISSUANCE, DENIAL, SUSPENSION OR REVOCATION OF PERMIT, LICENSE, ETC.

"A governmental entity or an employee acting within the scope of his or her employment shall not be liable for damages resulting from:

(10) "The issuance, denial, suspension, or revocation of, or failure or refusal to issue, deny, suspend or revoke, any permit, license, certificate, approval, order or similar authorization, where the authority is discretionary under the law." (Indiana Code 34-4-16.5-3. Similar provision: Cal. Gov't. Code Sec. 821.2; Ill. Anno. Stat. Title 85, Sec. 2-104; N.J.S.A. 59:3-6.)

NOTE: This immunity is necessary because of the unlimited exposure to which governmental entities would otherwise be subjected. Most actions of this type can be challenged through an existing administrative or judicial review process.

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FAILURE TO INSPECT OR NEGLIGENT INSPECTION OF PROPERTY

"A governmental entity or an employee acting within the scope of his employment is not liable if a loss results from:

> (11) failure to make an inspection, or making an inadequate or negligent inspection, of any property, other than the property of a governmental entity, to determine whether the property complies with or violates any law or contains a hazard to health or safety." (Indiana Code 34-4-16-5-3(11); similar provisions: Cal. Code Gov't., Sec. 821.4; Illinois Anno. Stat. Title 85, Sec. 2-105.)

NOTE: Building codes, electrical codes, etc., are enacted to secure to the public at large the benefits of such codes. Inspection activities are to be encouraged rather than discouraged by the imposition of civil tort liability. It is generally held that inspection under such codes is not a private service to the owner or occupier of property so as to create a duty to him as an individual. This immunity has been recognized by the New York courts in the absence of statute. Under the Cal. Code liability may be imposed for negligently failing to discover a dangerous condition by reasonable inspection.

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PLAN OR DESIGN OF CONSTRUCTION OF, OR IMPROVEMENT TO, PUBLIC PROPERTY

"Neither a public entity nor a public employee is liable under this chapter for an injury caused by the plan or design of a construction of, or an improvement to, public property where such plan or design has been approved in advance of the construction or improvement by the legislative body of the public entity or by some other body or employee exercising discretionary authority to give such approval or where such plan or design is prepared in conformity with standards previously so approved, if the trial or appellate court determines that there is any substantial evidence upon the basis of which (a) a reasonable public employee could have adopted the plan or design or the standards therefor or (b) a reasonable legislative body or other body or employee could have approved the plan or design or the standards therefor." (Cal. Gov't. Code, Sec. 830-6)

NOTE: This particular area of governmental activity provides a broad and extensive amount of exposure to liability against which there would be great difficulty in providing economical and adequate protection. This immunity has been granted by judicial decision to public entities in New York. (Weiss v. Fote, 167 NE 2d 63, 1960). Under this section there would be no immunity if a plan or design was arbitrary and made without adequate consideration or there was a manifestly dangerous defect.

Under K. S. A. Supp. 68-419a(b) enacted in 1975 the state and its officers are immune from liability for injury or damage caused by the plan or design of any state highway, bridge or culvert, or of any addition or improvement thereto, where the plan or design, including the signings or markings was prepared in conformity with generally recognized and prevailing standards in existence at the time such plan or design was prepared.

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IMMUNITY FOR CONDITIONS OF UNIMPROVED PROPERTY

> "Neither a public entity nor a public employee is liable for an injury caused by a condition of any unimproved public property, including but not limited to any natural condition of any lake, stream, bay, owner or beach." (Cal. Gov't. Code, Sec. 831.2)

NOTE: The grant of this type immunity reflects a policy determination that it is desirable to permit public use of public property in its natural condition and that the expense of putting such property in a safe condition, as well as the expense of defending claims, would probably result in closing of such areas to public use. Areas that have been improved by construction of roads, sidewalks, buildings, parking lots, playgrounds and other recreational facilities would not be covered by this exception.

Some states also provide immunity for the conditions of unpaved roads, trails or footpaths the purpose of which is to provide access to a recreation or scenic area. (Ind. Code 34-4-16.5).

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RECREATIONAL FACILITIES

" A public entity is not liable for failure to provide supervision of public recreational facilities; provided, however, that nothing in this section shall exonerate a public entity from liability for failure to protect against a dangerous condition as provided in Chapter 4."
(N.J.S.A. 59: 2-7)

NOTE: Section 59: 4-2 of the N.J.S.A. provides that a public entity is liable if it is established that the property was in dangerous condition which was created by the public entity or the entity had actual or constructive notice of the condition and there was sufficient time to protect against the dangerous condition. Immunity for failure to provide supervision for public playgrounds and recreational facilities recognizes that this is a governmental policy determination that must remain free from the threat of tort liability. As a practical matter, government cannot afford to provide continuous supervision or guards for its parks and recreational areas to insure that no one is injured while using that property.

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WEATHER CONDITIONS

"Neither a public entity nor a public employee is liable for an injury caused by the effect on the use of streets and highways of weather conditions as such. Nothing in this section exonerates a public entity or public employee from liability for injury proximated caused by such effect if it would not be reasonably apparent to, and would not be anticipated by, a person exercising due care. For the purpose of this section, the effect on the use of streets and highways of weather conditions includes the effect of fog, wind, rain, flood, ice or snow but does not include physical damage to or deterioration of streets and highways resulting from weather conditions." (Cal. Code, Gov't., Sec. 831)

NOTE: The main reason for including this section is to forestall unmeritorious litigation that might be brought in an effort to hold public entities liable for injuries caused by weather. The Kansas Supreme Court has held that a person cannot recover for injuries arising out of ice and snow conditions on streets, highways and sidewalks. (135 Kan. 368, 74 Kan. 70, 137 Kan. 340).

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MISREPRESENTATION BY EMPLOYEES

"A public entity is not liable for an injury caused by misrepresentation by an employee of the public entity, whether or not such misrepresentation be negligent or intentional." (Cal. Gov't. Code, Sec. 818.8)

NOTE: This section protects the public entity against possible tort liability where it is claimed that an employee negligently misrepresented that the public entity would waive the terms of a construction contract requiring approval before changes were made. Another section of the Cal. Code provides that: "A public employee is not liable for an injury caused by his misrepresentation, whether or not such representation be negligent or intentional, unless he is guilty of actual fraud, corruption or actual malice." (Cal. Gov't. Code, Sec. 822.2)

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Fiscal Note | Bill No.
1979 Session
January 18, 1979

The Honorable Elwaine F. Pomeroy, Chairperson
Committee on the Judiciary
Senate Chamber
Third Floor, Statehouse

Dear Senator Pomeroy:

SUBJECT: Fiscal Note for Senate Bill No. 76 by the Committee on the Judiciary

In accordance with K.S.A. 75-3715a, the following fiscal note concerning Senate Bill No. 76 is respectfully submitted to your committee.

Senate Bill No. 76 is an act to be known and cited as the Kansas Tort Claims Act. Except for specified functions, a governmental entity would become liable for damage caused by the negligent or wrongful act or omission of any of its employees while acting within the scope of their employment under those circumstances where the governmental entity would be liable if they were acting as a private person. Additionally, cities and counties would be liable for injuries to persons or property caused by the action of a mob within the respective jurisdictions if the proper authorities have not exercised reasonable care or diligence in the prevention or suppression of such a mob. Currently, this liability for mob action applies only to cities. Functions for which a governmental entity or an employee thereof would not be liable include:

(a) Legislative functions, including, but not limited to, the adoption or failure to adopt any statute, regulation, ordinance or resolution;

(b) Judicial functions;

(c) Enforcement of or failure to enforce a law, whether valid or invalid, including, but not limited to, any statute, regulation, ordinance or resolution;

(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;

(e) The assessment or collection of taxes or special assessments;

(f) Any claim by an employee arising from the tortious conduct of another employee of the same governmental entity, if such claim is compensible pursuant to the Kansas Workmen's Compensation Act;

(g) The malfunction, destruction or unauthorized removal of any traffic or road sign, signal or warning device unless not corrected by the governmental entity responsible within a reasonable time after actual or constructive notice of such malfunction, destruction or removal. No liability arises from the act or omission of any governmental entity in placing or removing any of the above signs, signals or warning devices when such placement or removal is the result of a discretionary act of the governmental entity; or

(h) Any claim which is limited or barred by any other law or which is for injuries or property damage against an officer, employee or agent where the individual is immune from suit or damages.

The liability of a governmental entity is limited to $500,000 for any number of claims arising out of a single occurrence or accident except where a contract of insurance provides coverage in excess of $500,000 in which case the limitation on liability is fixed at the amount of coverage. If the amount awarded or settled upon involves multiple claimants and exceeds the limitations, any party may apply to the district court of jurisdiction for apportionment as provided by the act. A governmental entity is not to be liable for punitive damages or for interest prior to judgment. Judgment against an entity or employee constitutes a bar to any further claim.

Subject to the terms of an insurance contract, if any, a claim against the state or employee may be settled by the Attorney General and a claim against a municipality or employee thereof may be settled by the governing body. Acceptance of such settlements constitutes a complete release to any further prosecution concerning the same matter.

Except under certain circumstances, the governmental entity must provide legal defense for its employees. The governmental entity must provide for reimbursement for costs and expenses incurred by the employee if the entity fails or refuses to provide counsel as required.

In the absence of insurance, municipalities may use the general or other existing fund or a special liability expense fund established for such purpose or, in certain cases, no-fund warrants to finance costs resulting from the implementation of the act. In lieu of or in combination with insurance, the state may use current funds available for such purpose. If insurance and current funds are not sufficient, a claim against the state is to be filed with the House and Senate Ways and Means Committees for inclusion in appropriation acts of the Legislature.

Finally, the Act amends various related sections of the statutes to establish conformity to the Tort Claims Act.

Subject to the number of claims filed, additional operating funds may become necessary to allow the Office of the Attorney General to carry out duties related to receiving and settling claims against the state. Similar

additional costs may accrue to municipalities. Fiscal liability resulting to the state or a municipality for each occurrence is limited to $500,000 or the limitation on liability financed by insurance coverage, whichever is greater; however, the number of occurrences cannot be estimated.

Passage of Senate Bill No. 76 may have significant fiscal implications; however, a reliable estimate concerning such implications cannot be projected as such a projection will depend upon the number of claims filed under provisions of the act and the settlements so resulting.

James W. Bibb
Director of the Budget

JWB:GLS:mkr