MINUTES OF THE SENATE COMMITTEE ON JUDICIARY

Held in Room 519 S, at the Statehouse at 10:00 a. m./p. m., on February 9, 1979.

All members were present except: Senators Gaines and Hein

The next meeting of the Committee will be held at 1:15 a.m./p. m., on February 9, 1979.

These minutes of the meeting held on ~~xxxxxxxxxxxxxxxxxxxx, 19xxx~~ were considered, corrected and approved.

Elwaine F. Pomeroy
Chairman

The conferees appearing before the Committee were:

Frank A. Bien - League of Kansas Municipalities
Major General Edward R. Fry - Adjutant General
Robert F. Kruh - Kansas State University
Jack R. Euler - Kansas Bar Association
Ron Todd - State Department of Insurance
M. A. McGhehey - Kansas Association of School Boards
E. A. Mosher - League of Kansas Municipalities

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

Senate Bill No. 76 - Enacting a tort claims act applicable to the state and local units of government. Frank Bien testified in support of proposed amendments to the bill; a copy is attached hereto. Discussion with him followed.

General Fry testified that he was concerned about provisions in the bill relating to emergency preparadness activities. He referred to a letter from John Martin and a proposed amendment; a copy is attached hereto. He also referred to a letter from the Kansas contractors which is attached. Discussion with him followed.

Dr. Robert Kruh testified in support of the bill. He stated the protection that would be provided to employees of the State Board of Regents would be very helpful.

Jack Euler testified in support of the bill. He did suggest that it be amended to permit insurance to be purchased from any company doing business in Kansas and he urged the limitation on recovery to be increased to a more realistic figure. Discussion with him followed.

Ron Todd appeared at the request of the committee. A copy of his statement is attached hereto. Committee discussion with him followed.

Dr. McGhehey testified and suggested amendments to the bill. He indicated he would submit suggested language for some of his proposed amendments. Committee discussion with him followed.

Because time was running out, the chairman asked Don Simons to come back at another time, and also indicated we would hear the presentation from Chip Wheelen of the Research Department later.

Senator Gaar indicated that he favored making a policy decision to change to a closed end approach rather than the open end approach. The chairman indicated that this policy question would be decided when we began working on the bill.

Ernie Mosher gave a quick report from the study done by Marsh-McClennan regarding insurance costs. He indicated that the study indicated that the cost would be approximately $2.00 to $4.00 per person for insurance. He stated he would provide the committee a copy of the report.

Senator Berman moved that a committee bill be introduced to require supreme court justice appointments be subject to Senate confirmation. Senator Burke seconded the motion. A committee member questioned whether this could be done constitutionally or whether it would require a constitutional amendment. Following committee discussion, the motion carried.

The meeting adjourned.

These minutes were read and approved by the committee on 4-25-79.

2-9-79

GUESTS

SENATE JUDICIARY COMMITTEE

NAME	ADDRESS	ORGANIZATION
[illegible]		Eagle
C Wheeler	545-N	Legis. Rsrch
D Simons	Topeka	KDOT
Jarad A Burr	Topeka	League of Kan Mun
Neil Shortlidge	Overland Park	City of Overland Park
[illegible]	Lawrence	Municipal Judges
Jim Weigler	League of Kan Municipalities	
Jack R Euler	Troy Ks	KS BAR ASSN
Kathleen Selsius	Topeka	KTLA
Edward K Heyden	Topeka	Adjutant General Ks
Glen A Hartman	Topeka	Office of AG, Ks
Edward W Filepp	"	Kas. Contr's. assn. AP
Don Sidwell		
Ron Todd	"	KAN. INS. Dept
George Barbee	"	Kan Consulting Engrs.
Doug Dros	Lawrence	Sen. Hein/Topeka
Jay Norman	Topeka	Topeka Police Dept
Herbert E Treese	Lawrence	Attorney General's Office
M F McGHEHEY	TOPEKA	KASB
[illegible]	TOPEKA	
ROBERT F. KRUH		KANSAS STATE UNIV.
HARRY FELKER	~~235~~ CITY HALL	CITY OF TOPEKA
Marla Hanover	Topeka	Dist. Coroners
Jim Wallace	Topeka	Indep. Ins. Agents
Bill Gough	Topeka	KACI

SENATE COMMITTEE ON JUDICIARY

The broad objectives of Senate Bill No. 76 are unknown to me, thus I am without qualification to render a judgment of value on a broad basis. However, I do perceive dire consequences as the Bill pertains to the amendment of K.S.A. 48-934 and the repeal of K.S.A. 48-915 as they apply to the effective response of all individuals and agencies identified in the "State Disaster Emergency Plan." While my concern largely lies in the welfare of those volunteer individuals or agencies who are identified in the Plan, certainly, similar consideration is due those individuals of governmental entities who are likewise responding to the Governor's proclamation of a State disaster emergency under K.S.A. 924. The volunteer agencies listed under the Plan are the Red Cross, American Radio Relay League, Civil Air Patrol, Kansas Adventist Disaster Service, Kansas Area Disaster Committee, Mennonite Disaster Service, Salvation Army, and the Kansas Contractors Association and the Associated General Contractors of Kansas. This latter group of contractors operate under "Plan Bulldozer" to provide their special expertise and heavy equipment to mitigate further loss of life and to enhance restoration of community life to near normalcy in a proclaimed disaster or emergency situation. This plan had its genesis in Kansas and has since been adopted in several additional States. The potential devastation created by Senate Bill No. 76 to "Plan Bulldozer" is most adequately described in the January 16, 1979 letter issued by the Kansas Contractors Association, Inc., a copy of which is attached.

The Bill likewise creates a hazardous potential to Emergency Preparedness/Civil Preparedness/Civil Defense personnel who respond to the proclaimed disaster emergency. It also impacts most unfavorably upon the individuals of the Kansas National Guard who are ordered into active emergency State duty in accordance with K.S.A. 48-242, et seq. The overall effect of Senate Bill No. 76 could well create a situation whereby an emergency occurred and no volunteers responded!

Thus I conclude with the strong recommendation that K.S.A. 934/915 continue in force without amendment or repeal as they apply to Senate Bill No. 76.

Edward R. Fry

EDWARD R. FRY
Major General, KSANG
The Adjutant General

Atch
Ltr, Kansas Contractors
Association, dtd Jan 16, 1979

2-9-79

STATE OF KANSAS
DEPARTMENT OF *Administration*

OFFICE OF THE CHIEF ATTORNEY

Telephone 296-3012 Statehouse Topeka, Kansas 66612

February 5, 1979

TO: The Honorable Elwaine Pomeroy
The Honorable Jack Steineger

FROM: John R. Martin JRM

RE: Senate Bill 76 - Tort Claims Bill

General Fry contacted me about the captioned bill, to express his concern that certain provisions removing immunity from disaster relief efforts might cripple assistance arrangements which have been worked out with two state contractors associations. Under these agreements, called "Operation Bulldozer," contractors' groups provide men and heavy equipment for work in the immediate wake of a disaster, say, within the first 24 hours, on a no-compensation basis, and on a for-compensation basis in succeeding periods.

The contractors cannot obtain insurance to provide coverage for this work, he advises, or if they can, the cost is prohibitive. He is concerned that certain provisions of this bill remove immunity provisions on which they have relied heretofore.

Section 24, line 685, deletes a reference to "civil" liability.

K.S.A. 48-915, an immunity provision respecting emergency preparedness activities, is repealed outright.

His concerns could be allayed, I think, if the Committee saw it appropriate, to restore the reference to civil liability or in section 24, line 685, restore K.S.A. 48-915, and insert a subsection in section 4 specifying some immunity for emergency preparedness activities. If, as he advises, contractors have relief on these provisions for protection in the past for lending assistance to governmental agencies in cases of natural disaster and the like, and they are in fact repealed, both state and local governments will very likely be hard pressed to obtain the assistance, both in manpower and equipment, from private contractors, which are needed to respond to critical emergenc needs.

cc: Major General Edward R. Fry

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THE KANSAS CONTRACTORS ASSOCIATION, INC.

TAC File

316 WEST 33RD ST. P. O. BOX 5061
TOPEKA, KANSAS 66605
PHONE 266-4152

January 16, 1979

Major General Edward R. Fry
Adjutant General of Kansas
P.O. Box C-300
Topeka, Kansas 66601

Dear General Fry:

Please refer to recently introduced Senate Bill 76, establishing the Kansas tort claims act, and especially to Section 24 of that bill.

This legislation as written removes Plan Bulldozer volunteers and workers from the present immunity which we enjoy from civil liability "for acts reasonably done by them in the performance of their duties..." We would continue to be immune from suits for criminal liability.

The provisions of K.S.A. 48-915 and 48-934, were written many years ago to make it possible for volunteer groups such as Plan Bulldozer to assist in time of a disaster. We turned to the statutes books for help in this instance when we found that our people could not purchase liability insurance to protect themselves against civil and/or criminal suits, mostly civil. The risk is so great that the insurance industry will not write such protection for any premium. From the Kansas law, which was one of the first, states all over the nation have adopted similar protection for Plan Bulldozer Volunteers.

I am sure you can understand my great distress at the provisions of Section 24 of SB 76 and I know you will understand when I tell you that should this section become law as presently written, it will be necessary for the Kansas Contractors Association and the Associated General Contractors of Kansas immediately to abrogate their "Statement of Understanding" first made in 1977 and recently renewed with the State of Kansas, Division of Emergency Preparedness.

We will take this action with great reluctance and sadness, but we will have absolutely no choice. If individual members of the two above listed Associations desire to participate in activities during a state of disaster emergency, that will be their individual decision, independently arrived at. But the two Associations cannot and will not commit individual members to such a pact without the protection of KSA 48-914 and 48-934.

I presume that at some point during the progress of Senate Bill 76 through the Legislative process your department will be called upon to testify as to the effect which Section 24 (and I am sure a number of others) would have on the prosecution of rescue operations during a disaster. Hopefully the lawmakers can be made to realize the impact of this legislation.

We will be available to appear and testify on the matters I have discussed here.

I hope that we will continue to be able to offer our services to the people of Kansas through your Division of Emergency Preparedness.

Cordially,

Edward Weilepp

Edward Weilepp
Manager

CEW:cah

cc: Bob Douglas
Glen Gilpin
John Harrelson

2-9-79

KANSAS
INSURANCE DEPARTMENT

State Office Building—First Floor
Topeka 66612 913-296-3071

STATE OF KANSAS

FLETCHER BELL
Commissioner

February 8, 1979

The Honorable Elwaine F. Pomeroy
Senator, 18th District
Room 141-N, State Capitol Bldg.
Topeka, Kansas

Cost Study on Professional Liability Insurance for Medical Care Facilities Currently Exempted from the H.C.P.I.A. Act (K.S.A. 1978 Supp. 40-3401 et seq.)

Dear Senator Pomeroy:

Estimated premium cost information which appears to be pertinent if the currently exempted medical care facilities (i.e., state hospitals) were made subject to the provisions of the Health Care Provider Insurance Availability Act would be as follows:

		(a) Current H.C.P.I.A. Plan Rates	
Number of Facilities	No. of Beds	Initial Cost	Mature Cost
12	3,798	$386,512	$695,009
Plus the Health Care Stabilization Fund Surcharge		$154,605	$278,004
TOTAL COST*		$541,117	$973,013

*Note: These figures do not include additional malpractice insurance costs for outpatient visits. Other premium estimates were based on limited data available.

Bringing these currently exempted governmental hospitals under the provisions of the H.C.P.I.A. Act would also require these hospitals to participate in the Health Care Stabilization Fund which was developed to assist non-governmental health care providers. If losses should be sustained by the Health Care Stabilization Fund necessitating higher annual surcharges, the state would, via the state hospital's participation, be sharing directly in the medical malpractice losses created by the private sector's health care providers. Of course the opposite situation could happen and the private sector may be required to make higher surcharge payments attributed to the losses of governmental hospitals. Another relevant factor to be considered is the unlimited excess coverage of the Health Care Stabilization Fund which may not be applicable to state hospitals due to the liability limitation contained in the proposed tort claims act.

It is, therefore, this department's recommendation, as administrator of the Health Care Stabilization Fund, that state hospitals, which will be subject to the provisions of the pending tort claims act, continue to be exempt from the provisions of the Health Care Provider Insurance Availability Act.

Yours very truly,

Fletcher Bell
Commissioner of Insurance

Ron Todd

Ron Todd
Assistant Commissioner

RT:RDH:jcs

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.

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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, beidge 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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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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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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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 proximately 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 would for example, protect 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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2-9-79

ISSUANCE, DENIAL, SUSPENSION OR REVOCATION OF PERMIT, LICANSE, 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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