MINUTES OF THE SENATE COMMITTEE ON JUDICIARY

Held in Room 519 S, at the Statehouse at 12:00 a. m./p.m., on February 14, 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 February 15, 1979

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

Chairman

The conferees appearing before the Committee were:

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. The chairman stated that the first item to be decided by the committee would be whether to use the open end approach or the closed end approach. Senator Gaar moved to introduce a substitute bill, using the closed end approach, patterned after the Judicial Council suggestion of several years ago. Senator Burke seconded the motion. Considerable committee discussion followed. During the discussion, concerns were expressed concerning the cost, gross and wanton negligence, and insurance. Senator Gaines made a substitute motion to remove all references to insurance; Senator Allegrucci seconded the motion. Following further extensive committee discussion, the substitute motion failed on a vote of five to six. The original motion then carried on a vote of six to five. Senator Gaines moved to amend the bill to provide for a mandatory pooling arrangement; that motion failed for lack of a second. Senator Steineger moved to amend the bill to develop a method of financing not relying upon private insurance; Senator Gaines seconded the motion. Following committee discussion, the motion failed.

The chairman appointed a subcommittee consisting of Senator Steineger, Senator Gaines and Senator Hess to consider methods of financing. Also, staff was directed to prepare amendments to the first fifteen sections of the bill to incorporate the decision of the committee to go to the closed end approach.

Senator Parrish moved that the minutes of January 31 be approved; Senator Hess seconded the motion, and the motion carried.

The meeting adjourned.

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

2-17-79

PROPOSED GOVERNMENTAL IMMUNITY STATUTE

NOTE: The proposed governmental immunity statute is not complete. Amendatory sections relating to workmen's compensation were not approved in time to be published in this Bulletin. The title to the act and the repealing section were not completed at the time this issue of the Bulletin went to press. The following sections are printed with the thought that they will be of interest to the Bench and Bar of Kansas.

Section 1. (*a*) "Governing body" means the group or officer in which the controlling authority of any public body is vested.

(*b*) "Public body" means the state and any department, agency, board, commission or authority, of the state, any city, county, school district, or other political subdivision or municipal or public corporation and any instrumentality thereof.

Sec. 2. (*a*) It is hereby declared and provided that public bodies shall be immune from liability for negligence or any other tort or on an implied warranty except as provided herein or as is otherwise specifically provided by statute.

(*b*) Public bodies shall not be precluded from asserting any defense available to any other party.

Comment: The phrase implied warranty is used to refer to cases where in an attempt to avoid governmental immunity a theory of implied warranty is advanced.

Sec. 3. Public bodies are liable for damages caused by the negligence of their officers, employees and agents while acting within the scope of their employment or duties, in the operation of any motor vehicle as defined by K. S. A. 1971 Supp. 8-126 and acts amendatory thereof or supplementary thereto.

Sec. 4. Public bodies are liable for damages caused by negligence resulting from a dangerous or defective condition of any building or machinery, equipment or furnishings contained therein,

under their control, when open for use to members of the public, if any officer, employee or agent of the public body, having a duty to report or repair such defect, had actual or constructive knowledge of the defect, and for a reasonable time after acquiring knowledge failed to remedy the condition or to take action reasonably necessary to protect the public against the condition: *Provided, however,* That public bodies are not liable for damages resulting from the existence of such condition of any public property intended or permitted to be used as a park, recreational facility, playground or open area for recreational purposes.

Sec. 5. Public bodies are liable for damages caused by the negligence of their officers, employees and agents acting within the scope of their employment or duties in the operation of airports: *Provided, however,* That public bodies shall not be liable for damages due to the existence of any condition resulting from compliance with any federal or state law or regulation governing the use and operation of airports.

Sec. 6. Public bodies are liable for damages caused by the negligence of their officers, employees and agents acting within the scope of their employment or duties in the operation of the following public utilities: (*a*) Gas, (*b*) Electric, (*c*) Solid waste collection or disposal, (*d*) Heating, (*e*) Ground transportation systems, and (*f*) Water.

Sec. 7. (*a*) Public bodies are liable for damages caused by the negligence of their officers, employees and agents acting within the scope of their employment or duties in the operation of any hospital, infirmary, asylum, mental institution, clinic, dispensary, adult care home, health center, or similar and related facilities, except as hereinafter specifically provided.

(*b*) Public bodies shall not be liable for damages caused by the failure to make a physical or mental examination, or to make an adequate physical or mental examination of any person for the pur-

pose of determining whether such person has a disease or physical or mental condition that would constitute a hazard to health or safety of himself or others.

(*c*) Public bodies shall not be liable for damages resulting from diagnosing, or failing to diagnose, that a person is afflicted with mental or physical illness or addiction: *Provided, however,* That this subsection shall not be construed to exonerate a public body from liability for damages caused by the negligence of its officers, employees and agents in undertaking to administer any treatment prescribed for mental or physical illness or addiction.

(*d*) Public bodies shall not be liable for damages resulting from the failure to admit a person to any of the facilities designated in subsection (*a*) of this section.

(*e*) Public bodies shall not be liable for damages resulting from a determination to confine, treat or release a person for mental illness or addiction or for prescibing the terms or conditions of such confinement or release.

Sec. 8. Public bodies are liable for damages caused by negligence resulting from a dangerous or defective condition of any bridge, culvert, highway, roadway, street, alley, sidewalk, parking area, or other public thoroughfare which by law, or lawful agreement the public bodies are under a duty to maintain, if any officer, employee or agent of the public body, having a duty to report or repair such defect, shall have actual or constructive knowledge of the defect and for a reasonable time after acquiring such knowledge failed to remedy the condition or take action reasonably necessary to protect the public against the condition: *Provided,* Public bodies shall not be liable for damages caused by a defect in plan or design of any of the above improvements, except where such defect shall constitute a nuisance.

Officer, employee or agent, as used in this section, shall include, but is not limited to, the director of highways, state highway engi-

neer, member of the state highway commission, Kansas turnpike authority or the chief officer or director of any state office, board, commission, agency or authority, member of the board of county commissioners, the county engineer, or superintendent of roads and bridges for such county, township trustee, mayor of any municipality, member of the city council or commission, city engineer, city manager, commissioner or superintendent of streets, sheriff or deputy sheriff, highway patrolman or police officer.

Sec. 9. Public bodies, having a police force or law enforcement powers, are liable for damages caused by the action of a mob within the jurisdiction of such body if such police force or other law enforcement officers of the public body have not exercised reasonable care or diligence in the prevention or suppression of a mob.

Public bodies shall have all of the defenses in such action that are available to parties in tort actions.

As used in this section, the word "mob" shall mean an assembly of ten (10) or more persons intent on unlawful violence either to persons or property.

Sec. 10. Public bodies are liable for damages for creating or maintaining a nuisance on property under their control.

Comment: The purpose of this section is to extend to all governmental units the existing case law concerning the creating and maintenance of nuisances. In the past, these principles have applied only to cities and school boards, see generally the discussion in *Woods v. Kansas Turnpike Authority,* 205 Kan. 770, 772, 472 P. 2d 219 (1970).

Sec. 11. Public bodies are liable for damages caused by a breach of warranty, in the sale of goods, as defined by article 2, of the Uniform Commercial Code, K. S. A. 84-2-103, *et seq.*

Notice shall be given as required by section fifteen of this act, but the time of the breach, the accrual of the cause of action, and the period in which such action may be brought shall be controlled by the provisions of K. S. A. 84-2-725.

Comment: The warranties created by the Uniform Commercial Code are restricted by K. S. A. 84-2-105, to sales of goods or personal property by a merchant, as defined by K. S. A. 84-2-104, who regularly deals in goods of that kind or who holds himself out as having special knowledge attributable to his employment.

Several different kinds of warranties are created in the Code. Under K. S. A. 85-2-313, express warranties may be created by affirmation, promise, description or sample. A warranty of good title and rightful transfer is created by K. S. A. 84-2-312, and implied in every sale of goods except where excluded by the buyer. The implied warranty of merchantability, created by K. S. A. 84-2-314, arises out of trade usage. An implied warranty of fitness for a particular purpose, K. S. A. 84-2-315, is brought into operation by the sellers' awareness of the reliance of the buyer upon his skill or expertise in selecting goods. Between the parties to the agreement, warranties can be excluded or modified by the methods set out in K. S. A. 84-2-316, but cannot be excluded under K. S. A. 84-2-318, as to certain classes of third party beneficiaries who are not in privity with the seller and purchaser. Conflicts between warranties are controlled by the rules of construction in K. S. A. 84-2-317.

Warranties are controlled by the four-year statute of limitations in K. S. A. 84-2-725, which provides that the cause of action accrues when the breach occurs regardless of the aggrieved parties lack of knowledge of the breach. A breach of warranty occurs when a tender of delivery of the defective goods is made. Notice to the seller of the breach of warranty is not required by the Code.

Under Kansas law, the implied warranty is not contractual, but imposed as a matter of public policy, see *Rupp. v. Norton Coca-Cola Bottling Co.*, 187 Kan. 390, 357 P. 2d 802 (1960). The legal consequence of a breach of warranty is that of strict liability in tort, see Nugent, *Manufacturers Strict Liability in Kansas—Coming or Already Here?* 39 K. B. J. 219 (1970).

Sec. 12. (*a*) In any action against public bodies for damages, as provided in this act, the judgment shall not exceed the sum of _____ per person or the sum of _____ for each occurrence. Such judgments shall not include an award for exemplary or punitive damages.

(*b*) Public bodies are hereby authorized to purchase liability insurance coverage without regard for limits of liability contained herein. If public bodies have insurance coverage in an amount exceeding the limits of liability, as set forth in subsection (*a*) of this section, the limits of liability are extended to the amount of such coverage.

Comment: The committee is unable to reach an agreement on what the limits of liability should be. The committee therefore recommends maximum and minimum figures for such limits. The committee recommends that the limit of liability, per person, be not less than fifty thousand dollars nor more than one hundred thousand dollars, and that the limit of liability, per occurrence, be not less than one hundred thousand dollars nor more than three hundred thousand dollars.

Sec. 13. Except for judicial tax foreclosure, all lands, buildings, moneys, debts due a public body and all other property and other assets of every description belonging to any public body shall be exempt from levy, execution and sale, and no judgment against a public body shall be a charge or lien on such property.

Nothing in this section shall relieve any public body of the obligation to levy taxes or otherwise providing funds to pay judgments, and no such taxes, levy or funds provided for such purpose shall be exempt from any appropriate judicial process to enforce such judgments.

Public bodies which, on the effective date of this act, are without power or authority to levy a tax or provide funds for the purpose of paying judgments or premiums on a contract of insurance, provided for or made necessary by the provisions of this act, are hereby authorized to levy a tax or transfer any available or previously uncommitted funds for the purpose of paying any such judgments or premiums. Any such levy shall be made and certified pursuant to K. S. A. 1971 Supp. 79-2930.

Sec. 14. The venue of actions permitted by this act shall be as follows: (*a*) When a state office, board, commission, department, authority, or other agency of the state of Kansas, is the sole defendant, the action shall be brought in the county where the act or omission causing the damages occurred, or in the county where the plaintiff is a resident.

(*b*) When any other public body is a defendant, the action shall be brought only in the county where the act or omission causing the damages occurred.

(*c*) When the action is filed by a non-resident of the state of Kansas such action shall be brought in the county where the act or omission causing the damage occurred.

(*d*) When an action is filed against any public body, summons shall issue and service of process shall be made in accordance with K. S. A. 1971 Supp. 60-304 (*d*).

Committee Note: The Committee intends that the Venue Section be a part of the substantive law and any such actions should be limited to trial in state courts. Expense and inconvenience to governmental units for trial in distant Federal court locations are the basis of subsection (*c*).

Sec. 15. Public bodies shall not be liable for damages unless: (*a*) (1) within one-hundred-eighty (180) days of the date of the damage and prior to bringing of the suit, or (2) if the claim is authorized under Section 7, of this act, and the damages are not reasonably ascertainable until a future time, within one-hundred-eighty (180) days of the date the fact of damages is reasonably ascertainable to the injured party, (*b*) a written statement, giving the time and place of the happening causing the damages, the circumstances relating thereto, and a demand for payment of a fixed sum therefor, shall be served upon a person designated to receive process under K. S. A. 1971 Supp. 60-304 (*d*).

Mailing of the above notice by certified mail shall be sufficient service of notice of the claim.

Sec. 16. (*a*) The governing body of public bodies, other than the state of Kansas, is hereby authorized to consider, ascertain, adjust, determine, compromise and settle claims brought under the provisions of this act against such public bodies. The governing body of each public body shall adopt such rules and regulations as may be necessary for the establishment of a procedure for the settle-

ment of claims brought against such public body. Such rules and regulations shall not be inconsistent with this act.

(*b*) The state of Kansas is hereby authorized to consider, ascertain, adjust, determine, compromise and settle claims brought against it under the provisions of this act. The head of the department against which the claim is asserted, with the approval of the Attorney General, is empowered to settle claims in the amount of $10,000 or less. If the amount of the claim is more than $10,000 the settlement of such claim may be made by the department head with the approval of the Attorney General and with the approval of the State Finance Council.

(561 P.2d 907)

No. 48,334

JAMES A. BELL, *Appellee*, v. KENT-BROWN CHEVROLET COMPANY, *Appellant*.

SYLLABUS BY THE COURT

1. KANSAS CONSUMER PROTECTION ACT—*Representation Goods Are New—Deceptive Acts and Practices.* Representation by a seller that goods are new, if they are deteriorated, altered, reconditioned, or otherwise used to an extent that is materially different from the representation, is declared to be a violation of the Kansas Consumer Protection Act under K.S.A. 1975 Supp. 50-626 (*b*) (1) (C) [now K.S.A. 50-626 (*b*) (1) (C)].
2. SAME—*Intent or Prior Knowledge by a Seller of Damaged Goods—No Requirement.* Intent or prior knowledge by a seller of damage to goods is not a requirement under the Kansas Consumer Protection Act.
3. APPEAL AND ERROR—*Findings Supported by Evidence.* Where the trial court's findings are supported by sufficient evidence, they will not be disturbed on appeal. (Following *Farmers State Bank of Ingalls v. Conrardy*, 215 Kan. 334, Syl. 1, 524 P. 2d 690.)
4. KANSAS CONSUMER PROTECTION ACT—*Civil Damages and Attorney Fees—Judicial Discretion.* The award of civil damages and attorney fees pursuant to K.S.A. 1975 Supp. 50-636 (*a*) [now K.S.A. 50-636 (*a*)] and K.S.A. 1975 Supp. 50-634 (*e*)[now K.S.A. 50-634 (*e*)] is discretionary with the trial court.
5. SAME—*Actual Damages or Civil Penalty—Prevailing Party Not Entitled to Both.* In an action brought pursuant to the Kansas Consumer Protection Act, it is *held*: the prevailing party is entitled to either actual damages or a civil penalty, whichever is greater, but not both.

Appeal from Shawnee district court, division No. 2; MICHAEL A. BARBARA, judge. Opinion filed March 18, 1977. Affirmed in part and reversed in part and remanded with directions.

William E. Enright and *George A. Scott*, of Scott, Quinlan & Hecht, of Topeka, for the appellant.

Jerry R. Palmer, of Topeka, for the appellee.

En Banc

PARKS, J.: This is an action brought pursuant to the Kansas Consumer Protection Act, K.S.A. 1975 Supp. 50-623, *et seq.* (since amended, K.S.A. 50-623, *et seq.*). The trial court rendered judgment for the plaintiff, James A. Bell, in the total sum of $3,305 ($2,000 civil penalty, $1,000 attorney's fees, and $305 actual damages). The defendant, Kent-Brown Chevrolet Company, appeals. This appeal brings the act before our appellate courts for the first time.

On August 16, 1974, plaintiff purchased a 1974 Open Road van from the defendant for $6,170, less a trade-in. Defendant represented to the plaintiff that the vehicle was new. After delivery of the vehicle, it was discovered by the plaintiff that it had been damaged. He became aware of the damage when he noticed repainting on the side and paint flaking off the right rear corner. While installing trailer lights and taking the panel out of the inside, the plaintiff found body putty. In order to discover part of the damage to the vehicle, plaintiff had to remove an interior wood panel and a seat bench. Additional damage included a replacement bumper, a bent brace for the bumper, and file marks which indicated that the sliding door on the right side had been repaired. Plaintiff was advised by defendant that some of the damage could be repaired under warranty and offered in the alternative to give him another 1974 Open Road van of the same model and style. The substitute vehicle offered by defendant was found not to be equivalent to the one plaintiff had purchased, thus it was rejected by the plaintiff.

The trial court found as a matter of law, and as a part of its conclusion, that the failure to disclose the damages was a deceptive practice and that when the vehicle was sold to the plaintiff it had been altered materially different from the representation as a new vehicle.

In order to determine this case, it is necessary to examine certain sections of the Kansas Consumer Protection Act. They read, in part, as follows:

K.S.A. 1975 Supp. 50-623:

"This act shall be construed liberally to promote the following policies:

. . . .

"(*b*) To protect consumers from suppliers who commit deceptive and unconscionable sales practices."

K.S.A. 1975 Supp. 50-626:

"(*a*) No person shall engage in any false, misleading, deceptive or unconscionable trade practice in the sale, lease, rental or loan or in the offering for sale, lease, rental or loan of any goods or services.

"(*b*) Deceptive acts and practices include, but are not limited to, the following, each of which is hereby declared to be a violation of this act:

"(1) Representations that:

. . . .

"(C) goods are original or new, if they are deteriorated, altered, reconditioned,

repossessed or second-hand or otherwise used to an extent that is materially different from the representation."

In lieu of setting forth the provisions of K.S.A. 1975 Supp. 50-624, we would simply state that the defendant qualifies as a "person" under subsection (*h*), and the vehicle sold constitutes "goods" under subsection (*e*) of this statute.

The first issue presented to this court is whether defendant's representation that the vehicle was "new," when in fact the vehicle had been damaged and thereafter repaired, constitutes a deceptive consumer sales practice under the Kansas Consumer Protection Act.

Defendant contends that the legislature, in enacting the Kansas Consumer Protection Act, was attempting to protect consumers from conduct intentionally done by suppliers. It argues that since the trial court found no evidence of any willful nondisclosure on its part, there was no violation of the act.

K.S.A. 1975 Supp. 50-626 (*b*) (1) (C) specifically declares it to be a violation of the act to make representations that goods are new, if they are deteriorated, altered, reconditioned or otherwise used to an extent that is materially different from the representation.

The Kansas Comment to K.S.A. 1975 Supp. 50-626 says:

"1. Subsection (*a*) generally prohibits any deceptive practice in a consumer transaction. . . . The acts and practices listed in subsection (*b*) are *treated as per se deceptive*, and are merely illustrative of the acts and practices which violate the act as set forth in the broadly worded subsection (*a*). . . ." (Emphasis added.)

In connection with the argument that its representation did not constitute a violation of the act, the defendant further contends that it had no actual knowledge of the damage prior to being advised by the plaintiff.

The trial court in the present case found that the defendant knew or should have known, by any reasonable visual inspection of the vehicle prior to the sale and delivery, that this vehicle had been damaged and repairs had been made.

Unlike many statutes, *i.e.* criminal statutes, a careful analysis of the act reveals that it imposes no requirement of intent or prior knowledge on the part of a supplier.

Under the circumstances, we cannot say that the trial court erred in finding that the defendant violated the Kansas Consumer Protection Act.

The second issue presented is whether there was evidence to support the trial court's finding that when the vehicle was sold to the plaintiff it had been altered materially different from the representation of a new vehicle.

A review of the record clearly indicates that the evidence is undisputed that the vehicle had been damaged prior to the sale and delivery to the plaintiff; that Mr. Paporello represented the vehicle as new when he sold it to the plaintiff; that the trial judge made a personal inspection of the vehicle at the time of trial; that Mr. Peterson, area service manager for Chevrolet Motor Division of General Motors, testified that the brace had been pushed in and pulled loose from the outer body panel, and further that such damage was caused by an impact of being hit on the right rear quarter of the vehicle.

The case was tried to the court and under such circumstances the court is the finder of facts. The extent of our review is set forth in *Highland Lumber Co., Inc. v. Knudson*, 219 Kan. 366, Syl. 4, 548 P. 2d 719:

"Upon appellate review this court accepts as true the evidence, and all inferences to be drawn therefrom, which support or tend to support the findings in the trial court, and disregards any conflicting evidence or other inferences which might be drawn therefrom. Where findings are attacked for insufficiency of evidence, or as being contrary to the evidence, this court's power begins and ends with determining whether there is evidence to support such findings. Where the findings are so supported, they will not be disturbed on appeal. It is of no consequence there may have been contrary evidence adduced which, if believed, would have supported different findings. (Following *Farmers State Bank of Ingalls v. Conrardy*, 215 Kan. 334, Syl. 1, 524 P. 2d 690.)"

We are convinced that there was sufficient evidence to support the trial court's finding that the vehicle had been altered materially from the representation that it was a new vehicle.

Now we turn our attention to defendant's complaint that the award of a $2,000 civil penalty pursuant to K.S.A. 1975 Supp. 50-636 is excessive, and that the trial court erred in awarding attorney's fees in the amount of $1,000.

K.S.A. 1975 Supp. 50-636 (*a*) provides:

"The commission of any act or practice declared to be a violation of this act shall render the violator liable for the payment of a civil penalty, recoverable in an individual action, including an action brought by the attorney general or county attorney or district attorney, in the sum of not more than two thousand dollars ($2,000.00) for each violation."

K.S.A. 1975 Supp. 50-634 (*e*) provides:

"Except for services performed by the attorney general, the court may award to the prevailing party a reasonable attorney's fee limited to the work reasonably performed. . . ."

We interpret these statutes to mean that the award of civil damages and attorney's fees is purely discretionary with the trial court. The court is restricted to a maximum of $2,000 for civil penalties and limited to the award of attorney fees based on the work reasonably performed.

Judicial discretion is abused when judicial action is arbitrary, fanciful or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion. (*Stayton v. Stayton*, 211 Kan. 560, 562, 506 P. 2d 1172.)

After consideration of the facts and circumstances contained in the present case, we are unable to find anything which would justify a conclusion that the trial court abused its judicial discretion in awarding the civil damages and attorney's fees to the plaintiff.

Defendant maintains that the court erred in awarding actual damages in the amount of $305 to the plaintiff. We find that the defendant is correct in this assertion.

K.S.A. 1975 Supp. 50-634 (*b*) provides:

"A consumer who suffers loss as a result of a violation of this act may recover, but not in a class action, actual damages *or* a civil penalty as provided in K.S.A. 1973 Supp. 50-636 (*a*), as amended, whichever is greater." (Emphasis added.)

It is obvious in reading this statute that the prevailing party is not entitled to both actual damages and a civil penalty. Inasmuch as the civil penalty is greater than the actual damages incurred by plaintiff, we hold it was error for the trial court to award the plaintiff $305 as actual damages.

In view of our decision, other points raised on appeal become immaterial and need not be discussed or decided.

The judgment below is affirmed (a) insofar as the allowance of a $2,000 civil penalty to plaintiff, and (b) insofar as the allowance of fees in the sum of $1,000 to plaintiff for his attorney's fee. It is reversed insofar as it required defendant to pay actual damages in

the sum of $305 to plaintiff. This case is remanded to the trial court for further proceedings in accordance with the views herein expressed.

negotiation at the buyer's home. The $25 minimum figure is included to exempt small-ticket transactions where the trouble of complying was felt to outweigh the protection given to the consumer.

Subsection (*h*):

This definition, as well as the definition of "warranty" in subsection (*m*), is intended to expand the warranty obligations of a seller of merchandise. They incorporate in large part the definitions and concepts in the Uniform Commercial Code (UCC). The definition of "merchantable" now includes compliance with statutes designed to set standards for products sold or furnished to consumers. This could include the safety provisions for automobiles under the federal law, standards of grading for meat and food stuffs, useful life of products that are so dated, and the like. On the other hand, it is recognized that what is "merchantable" may not involve obligations in excess of those appropriate to the goods, *i. e.*, an antique automobile is not rendered "unmerchantable" simply because its useful life is substantially shorter than that of a new car. In short, the definitions of "merchantable" and "warranty" are limited by section 50-639 (*d*) of this act.

Subsection (*i*):

The term "organization" would include corporations, trusts, estates, partnerships, cooperatives and associations. The definition is important in determining which buyers are protected by the act.

Subsection (*j*):

The term "person" is all-embracing to include both natural persons and organizations.

Subsection (*k*):

The term "services" is broadly defined to include work, labor, the granting of privileges, and other acts which do not directly involve the sale of goods, real estate or intangibles.

Subsection (*l*):

In addition to manufacturers, wholesalers, and dealers, debt collection agencies and advertising agencies fall within this definition. No direct contact with the consumer is required. Section 50-635 should be consulted in order to ascertain the conduct by suppliers which is exempt from the act.

Revisor's Note:

Kansas Comment, subsection (*f*) no longer applicable. For home solicitation sales, see 50-640.

Law Review and Bar Journal References:

Mentioned in "The New Kansas Consumer Legislation," Barkley Clark, 42 J. B. A. K. 147, 190 (1973).

Discussed in note on landlord-tenant implied warranty of habitability, 22 K. L. R. 666, 682 (1974).

Discussed in note, "A New Kansas Approach to an Old Fraud," consumer protection, Polly Higdon Wilhardt, 14 W. L. J. 623 (1975).

50-625. Waiver; agreement to forego rights; settlement of claims. (*a*) Except as otherwise provided in this act, a consumer may not waive or agree to forego rights or benefits under this act.

(*b*) A claim, whether or not disputed, by or against a consumer may be settled for less value than the amount claimed.

(*c*) A settlement in which the consumer waives or agrees to forego rights or benefits under this act is invalid if the court finds the settlement to have been unconscionable at the time it was made. The competence of the consumer, any deception or coercion practiced upon the consumer, the nature and extent of the legal advice received by the consumer, and the value of the consideration are relevant to the issue of unconscionability. [L. 1973, ch. 217, § 3; Jan. 1, 1974.]

KANSAS COMMENT, 1973

Unlike the UCC (K. S. A. 84-1-102 (3)), which broadly permits variation by agreement, this act starts from the premise that a consumer may not in general waive or agree to forego rights or benefits under it. Compare K. S. A. 84-9-501 (3). Waiver or other variation is specifically provided for in some sections, such as section 50-640 (*a*) (5) relating to home solicitation transactions in an emergency; in the absence of such a provision, however, waiver or agreement to forego must be part of a settlement, and settlements are subject to review as provided in this section.

50-626. Deceptive acts and practices. (*a*) No supplier shall engage in any deceptive act or practice in connection with a consumer transaction.

(*b*) Deceptive acts and practices include, but are not limited to, the following, each of which is hereby declared to be a violation of this act:

(1) Representations made knowingly or with reason to know that:

(A) Property or services have sponsorship, approval, accessories, characteristics, ingredients, uses, benefits or quantities that they do not have;

(B) the suplier has a sponsorship, approval status, affiliation or connection that he or she does not have;

(C) property is original or new, if such property has been deteriorated, altered, reconditioned, repossessed or is second-hand or otherwise used to an extent that is materially different from the representation;

(D) property or services are of particular standard quality, grade, style or model, if they are of another which differs materially from the representation; or

(E) the consumer will receive a rebate, discount or other benefit as an inducement for entering into a consumer transaction in return for giving the supplier the names of prospective consumers or otherwise helping the supplier to enter into other consumer transactions, if receipt of benefit is contingent on an event occurring after the consumer enters into the transaction;

(2) the intentional use, in any oral or written representation, of exaggeration, innuendo or ambiguity as to a material fact;

(3) the intentional failure to state a material fact or the intentional concealment, suppression or omission of a material fact, whether or not any person has in fact been mislead;

(4) disparaging the property, services or business of another by making, knowingly or with reason to know, false or misleading representations of material facts;

(5) offering property or services without intent to sell them;

(6) offering property or services without intent to supply reasonable, expectable public demand, unless the offer discloses the limitation;

(7) making false or misleading representations, knowingly or with reason to know, of fact concerning the reason for, existence of or amounts of price reductions, or the price in comparison to prices of competitors or one's own price at a past or future time;

(8) falsely stating, knowingly or with reason to know, that a consumer transaction involves consumer rights, remedies or obligations;

(9) falsely stating, knowingly or with reason to know, that services, replacements or repairs are needed;

(10) falsely stating, knowingly or with reason to know, the reasons for offering or supplying property or services at sale or discount prices. [L. 1973, ch. 217, § 4; L. 1976, ch. 236, § 3; July 1.]

KANSAS COMMENT, 1973

1. Subsection (*a*) generally prohibits any deceptive practice in a consumer transaction. It is modeled after section 5 of the Federal Trade Commission Act and the old Kansas Buyer Protection Act. The acts and practices listed in subsection (*b*) are treated as *per se* deceptive, and are merely illustrative of the acts and practices which violate the act as set forth in the broadly worded subsection (*a*). The old Buyer Protection Act contained no list of *per se* deceptive practices, but relied on general language.

2. Subsection (*b*) (1) (A) forbids such conduct as misrepresenting the durability or components of a product, or the efficacy of a service.

Subsection (*b*) (1) (B) would, for example, preclude a seller from holding himself out as an authorized dealer, or having received a favorable rating from an organization like Underwriters' Laboratories, when such was not the case.

Subsection (*b*) (1) (C) forbids such conduct as misrepresenting that returned goods which were used by the original purchaser are unused. On the other hand, repossessed goods which were never used by the consumer might be represented as new.

Subsection (*b*) (1) (D) forbids such conduct as misrepresenting that a superseded style or model is the latest style or model of a product, or that a particular product, service, or intangible is the equivalent of another product, service, or intangible; misrepresenting that a two-ply tire is the equivalent of a four-ply tire would be an example.

Subsection (*b*) (1) (E) forbids referral commission arrangements in which a consumer is to receive future commissions based upon events which occur after the time at which he enters into a related consumer transaction. The old Buyer Protection Act outlawed only those referral sales involving a cash price in excess of $50; there is no dollar minimum under this subsection. Since this subsection includes cash referral sales as well as credit transactions, its scope is somewhat broader than the parallel provision in the Kansas Consumer Credit Code (K. S. A. 16a-3-309).

Subsection (*b*) (2) is intended to cover those cases where the supplier goes beyond innocent "puffing" expected by the consumer.

Subsection (*b*) (3) makes it clear that the act covers not only affirmative misrepresentation, but omissions of act as well.

Subsection (*b*) (4) is aimed at unfair trade practices flowing from competition among suppliers.

Subsections (*b*) (5) and (6) outlaw "bait and switch selling." This is a practice by which a supplier seeks to attract customers through advertising bargains which he does not intend to sell in more than nominal amounts. In order to induce acquisition of unadvertised items on which there is a greater mark-up, acquisition of the "bait" is discouraged through various artifices, including disparagement and exhaustion of an undisclosed miniscule stock. A supplier who is willing to sell all of the advertised items that he has in stock can avoid violating this subsection by disclosing that he has only "limited quantities" available. However, in the absence of such a willingness and disclosure, the existence of a violation should be determined on the basis of such objective factors as the representations made, and, in view of reasonably expectable public demand, the reasonableness of the quantity of the advertised goods, services, or intangibles available.

Subsection (*b*) (7) parallels the FTC Deceptive Pricing Guides which proscribe former price comparisons (former price must be actual, bona fide price at which article was offered on a regular basis for a reasonably substantial period of time in the recent, regular course of business), competitor price comparisons (advertised higher price must be price at which substantial sales are being made by other sellers in the same trade area), and comparable value comparisons (other merchandise must be of essentially similar quality and obtainable in the area). However, general pricing claims or descriptions, such as "good prices," are not proscribed.

Subsection (*b*) (8) proscribes statements such as one asserting that an installment contract must be paid in full irrespective of a defense, or that a supplier can garnish exempt wages.

Subsection (*b*) (9) forbids such conduct as misrepresenting that a television picture tube must be replaced or that a roof needs repair.

Subsection (*b*) (10) forbids conduct such as representations that a sale is for "seasonal clearance" or to facilitate "going out of business," when such is not the case.

Law Review and Bar Journal References:

Section discussed in "The New Kansas Consumer Legislation," Barkley Clark, 42 J. B. A. K. 147, 152, 189 (1973).

Cited in discussion of consumer protection in Tenth Judicial District, William P. Coates, Jr., 44 J. B. A. K. 67, 71 (1975).

Chapter 50.—MONOPOLIES AND UNFAIR TRADE

Article 1.—RESTRAINT OF TRADE

50-115.

CASE ANNOTATIONS

2. Plaintiff sustained no damage; no basis for recovery. Winter v. Kansas Hospital Service Ass'n., Inc., 1 K.A.2d 64, 66, 68, 562 P.2d 98.

Article 6.—CONSUMER PROTECTION

KANSAS CONSUMER PROTECTION ACT

Law Review and Bar Journal References:

Consumer Protection Act referred to in note discussing strict liability in tort as adopted in Kansas, 25 K.L.R. 462, 463, 467 (1977).

50-623.

Law Review and Bar Journal References:

Mentioned in note concerning the uniform commercial code, the statute of frauds, and the farmer, 25 K.L.R. 318, 322 (1977).

CASE ANNOTATIONS

1. Section applied; salesman used deceptive and unconscionable sales practice. Bell v. Kent-Brown Chevrolet Co., 1 K.A.2d 131, 132, 561 P.2d 907.

50-624.

Law Review and Bar Journal References:

Mentioned in note concerning the uniform commercial code, the statute of frauds, and the farmer, 25 K.L.R. 318, 322 (1977).

Mentioned in note discussing strict liability in tort as adopted in Kansas, 25 K.L.R. 462, 467 (1977).

CASE ANNOTATIONS

1. Defendant qualifies as "person"; vehicle sold constitutes "goods". Bell v. Kent-Brown Chevrolet Co., 1 K.A.2d 131, 133, 561 P.2d 907.

2. Sale and installation of transmission and piping system constituted a service; act applicable. Meyer v. Diesel Equipment Co., Inc., 1 K.A.2d 574, 578, 570 P.2d 1374.

50-626.

CASE ANNOTATIONS

1. Violation of section; vehicle repaired and represented as new. Bell v. Kent-Brown Chevrolet Co., 1 K.A.2d 131, 132, 133, 561 P.2d 907.

50-627.

CASE ANNOTATIONS

1. Referred to; advertising contract limiting company liability not unconscionable. Wille v. Southwestern Bell Tel. Co., 219 K. 755, 757, 549 P.2d 903.

2. Question of conscionability of an act to be by court; conclusion upheld. Meyer v. Diesel Equipment Co., Inc., 1 K.A.2d 574, 579, 570 P.2d 1374.

50-634. Private remedies. (a) Whether a consumer seeks or is entitled to damages or otherwise has an adequate remedy at law or in equity, a consumer aggrieved by an alleged violation of this act may bring an action to:

(1) Obtain a declaratory judgment that an act or practice violates this act; or

(2) enjoin or obtain a restraining order against a supplier who has violated, is violating or is likely to violate this act.

(b) A consumer who is aggrieved by a violation of this act may recover, but not in a class action, actual damages or a civil penalty as provided in K.S.A. 1978 Supp. 50-636 (a), and amendments thereto, whichever is greater.

(c) Whether a consumer seeks or is entitled to recover damages or has an adequate remedy at law, a consumer may bring a class action for declaratory judgment, an injunction and appropriate ancillary relief, except damages, against an act or practice that violates this act.

(d) A consumer who suffers loss as a result of a violation of this act may bring a class action for the actual damages caused by an act or practice:

(1) Violating any of the acts or practices specifically proscribed in K.S.A. 50-626, 50-627 and 50-640, and amendments thereto, or

(2) declared to violate K.S.A. 50-626 or 50-627, and amendments thereto, by a final judgment of any district court or the supreme court of this state that was either officially reported or made available for public dissemination under K.S.A. 50-630 (a) (3) by the attorney general ten (10) days before the consumer transactions on which the action is based, or

(3) with respect to a supplier who agreed to it, was prohibited specifically by the terms of a consent judgment which became final before the consumer transactions on which the action is based.

(e) Except for services performed by the office of the attorney general or the office of a county or district attorney, the court may award to the prevailing party a reasonable attorney's fee limited to the work reasonably performed if:

(1) The consumer complaining of the act or practice that violates this act has brought or maintained an action he or she knew to be groundless and the prevailing party is the supplier; or a supplier has committed an act

or practice that violates this act and the prevailing party is the consumer; and

(2) an action under this section has been terminated by a judgment, or settled.

(f) Except for consent judgments, a final judgment in favor of the attorney general under K.S.A. 50-632 is admissible as prima facie evidence of the facts on which it is based in later proceedings under this section against the same person or a person in privity with him or her.

(g) Notice of an action commenced pursuant to subsection (b) or (c) shall be given to the attorney general, but failure to do so shall not provide a defendant a defense in such action.

History: K.S.A. 50-634; L. 1978, ch. 210, § 1; July 1.

CASE ANNOTATIONS

1. Prevailing party entitled to actual damages or civil penalty; not both. Bell v. Kent-Brown Chevrolet Co., 1 K.A.2d 131, 135, 561 P.2d 907.

50-636. Civil penalties. (a) The commission of any act or practice declared to be a violation of this act shall render the violator liable to the aggrieved consumer, or the state or a county as provided in subsection (c), for the payment of a civil penalty, recoverable in an individual action, including an action brought by the attorney general or county attorney or district attorney, in a sum set by the court of not more than two thousand dollars ($2,000) for each violation. An aggrieved consumer is not a required party in actions brought by the attorney general or a county or district attorney pursuant to this section.

(b) Any person who willfully violates the terms of any injunction or court order issued pursuant to this act shall forfeit and pay a civil penalty of not more than ten thousand dollars ($10,000) per violation, in addition to other penalties that may be imposed by the court, as the court shall deem necessary and proper. For the purposes of this section, the district court issuing an injunction shall retain jurisdiction, and in such cases, the attorney general, acting in the name of the state, or the appropriate county attorney or district attorney may petition for recovery of civil penalties.

(c) In administering and pursuing actions under this act, the attorney general and the county attorney or district attorney are authorized to sue for and collect reasonable expenses and investigation fees as determined by the court. Civil penalties or contempt penalties sued for and recovered by the attorney general shall be paid into the general fund of the state. Civil penalties and contempt penalties sued for and recovered by the county attorney or district attorney shall be paid into the general fund of the county where the proceedings were instigated.

History: K.S.A. 50-636; L. 1978, ch. 210, § 2; July 1.

CASE ANNOTATIONS

1. Award of civil damages and attorneys' fees; discretionary with trial court. Bell v. Kent-Brown Chevrolet Co., 1 K.A.2d 131, 134, 561 P.2d 907.

50-639.

Law Review and Bar Journal References:

Mentioned in "Torts: Strict Liability in Tort and Assumption of Risk," William T. Kilroy, 15 W.L.J. 503 (1976).

Mentioned in note discussing strict liability in tort as adopted in Kansas, 25 K.L.R. 462, 467, 468 (1977).

Kansas Consumer Protection Act discussed in "Lemon Aid for Kansas Consumers," Barkley Clark, 46 J.B.A.K. 143, 144, 147, 149 (1977).

50-644. Thermal insulation, flame spread standards. (a) No person shall manufacture, distribute, offer for sale, sell or install any thermal insulation in this state unless such insulation has been tested in accordance with the American Society for Testing and Materials Standard E 84, Standard Method of Test for Surface Burning Characteristics of Building Materials, and certified, by an independent testing laboratory approved by the state fire marshal, as having a flame spread rating of seventy-five (75) or less, or as having a classification representing a flame spread rating not in excess thereof, and is clearly labeled to that effect on the package or, if not contained in a package, is accompanied by a written statement to that effect.

(b) Nothing in this section shall be construed to prevent a city or county from requiring a lower maximum flame spread rating than required herein for thermal insulation which is manufactured, distributed, offered for sale, sold or installed within the jurisdiction of the city or county.

(c) As used in this section, "thermal insulation" means any material designed for installation in the walls, floors or ceilings of

2-18-79
12:00 noon

STATEMENT OF THE

ALLIANCE OF AMERICAN INSURERS

TO

SPECIAL COMMITTEE ON JUDICIARY

STATE OF KANSAS

Re:

PROPOSED KANSAS TORT CLAIMS ACT

BY:
ROBERT F. FORTIER
ATTORNEY
GOVERNMENT AFFAIRS
(Wayne Stratton)

STATEMENT

Mr. Chairman, members of the Committee, the Alliance of American Insurers is pleased to have this opportunity to present its views with respect to the preliminary draft of the Proposed Kansas Tort Claims Act. The Alliance is a national insurance trade association composed of over 100 property and casualty insurers doing business throughout the United States, including the State of Kansas. We have been following the work of the Special Committee on Judiciary with interest and wish to compliment the Committee for its fine work in achieving a constructive solution to the problems of governmental liability. We would like to offer the Committee a number of specific suggestions for additions to the preliminary draft which we believe will eliminate problems in the future and avoid the necessity for piecemeal legislative change.

The Alliance would like to urge the Committee to consider adding a number of specific immunity provisions to Section 4 of the draft. While the present section covers the obvious areas where governmental entities should be immune from suit, it does not go far enough in providing for activities which are creating liabilities around the nation. These additional exposures and the uncertain state of the law make it difficult for underwriters to price governmental risks and create disruptions in the insurance market for governmental liability.

The Alliance urges the Committee to broaden Section 4 of the draft to include the following additional provisions:

1. A provision relating to the decison to provide utility services

While it is likely that the decision either to provide or not to provide utility services may be immune under the provision relating to discretionary functions, it is desirable to include a specific immunity on this subject to eliminate the uncertainty of court construction. If constituents desire a governmental entity to provide heat, light, or water services, reliance on the political process rather than tort remedies is the proper approach. The following language would achieve this result while permitting actions for the negligent performance of services once it is decided to undertake them:

> "(i) Without in any way limiting the provisions of paragraph (d), the decision not to provide communications, heat, light, water, electricity, gas or solid or liquid waste collection, disposal,or treatment services;"

2. A provision concerning claims over the quality of education

Recently, the press reported that an action in tort was brought by a young man for his deficiency in reading and writing. The lower court denied recovery and the case is now on appeal. Growing attention to the problem by national media is likely to increase the frequency of such suits. Many factors enter into the quality of education, including the effort and competence of the students involved. Good education can't be mandated by tort action; it can only be produced by a societal commitment through public and social action. We suggest the following language:

> "(j) The quality, inadequacy or insufficiency of public education or instruction;"

3. A provision relating to the design of public roads and structures

Many claims are brought against public entities on the ground that roads or buildings, planned years previously, do not conform to the latest design, materials, or technique. Public entities have the obligation to construct and maintain thousands of miles of public roads and many buildings. It is simply not feasible to reconstruct them based upon new designs. There should be no liability where construction or improvements were made in accordance with approved plans which a reasonable and prudent official could approve. The Alliance suggests the addition of the following provision to eliminate uncertainty in this area:

> "(k) The plan, design, specifications or standards of property of a governmental entity either in its original construction or any improvement thereto, (a) where such plan, design, specification or standard has been approved by the legislature or the governing body of the governmental entity or some other body or employee exercising discretionary authority to give such approval of the court determines that: (1) a reasonable and prudent public employee exercising due care and diligence could have adopted the plan, design, specifications or standards; or (2) a reasonable and prudent legislative or other body or employee could have in the exercise of due care and diligence approved the plan, design, specifications or standards therefore;"

4. A provision granting immunity for certain uses of recreational facilities

Often, public recreational or athletic facilities such as those in parks or schools are used after hours or when there is no organized play or supervised activity. Public entities do not have the resources to police

such areas 24 hours a day. There should be no liability for use of facilities after business hours. The following language achieves this result while permitting an action where injury is due to a defect in the facility or equipment or the failure to maintain them:

> "(l) Use of public or school recreational or athletic facilities at times other than during activities supervised by the governmental entity except for defects in such facilities or their equipment or failure to maintain the same;"

5. A provision relating to the use of unimproved public lands and unpaved roads and trails

Large tracts of public land are made available to the public for recreational and other outdoor activities. Once again, governmental entities do not have the resources to police such areas twenty-four hours a day. There should be no liability arising out of the public use of such areas. Therefore, the following provision should be added to Section 4:

> "(m) Use of unimproved public lands and unpaved roads or trails."

6. A provision relating to inspections by public entities

Governmental entities are charged with the enforcement of many safety laws, health statutes, environmental protection laws, etc.. Most of these laws involve the performance of inspections. It is evident that despite good enforcement many violations occur. Tort liability should not be placed on public entities based upon the alleged inadequacy of inspections unless there is a requirement that the inspection be conducted or where reliance upon certification is evident. The following language would provide for this:

> "(n) Adequacy or failure to make an inspection of property, other than property of the governmental entity or where inspection

is mandated by legislative act or where a certification of fitness is issued, for the purpose of determining whether the property complies with or violates any enactment or regulation or contains or constitutes a hazard to health or safety."

7. A provision relating to decisions concerning public assistance programs

Disputes over the payment of welfare benefits are resulting in suits against the public entity involved. Such assistance programs generally provide for review and appeals of decisions concerning the payment of benefits. These mechanisms provide adequate protection to persons aggrieved. Tort liability is not the proper remedy for review of welfare decisions. While paragraph (d) concerning discretionary functions would seem to cover this problem, an explicit provision, such as the following would give insurance underwriters the added security of certainty:

"(o) Termination, reduction, delay or denial of benefits under public assistance programs, but nothing herein shall affect rights of review and appeals of such determinations provided by law;"

8. A provision relating to crime control

Under the best program of law enforcement, crimes will occur. Like the quality of education, the community gets the crime control it is willing to support. Governmental entities should not be exposed to tort liability because crime cannot be prevented. The following provision should be added to Section 4:

"(p) Failure to prevent or control crime, riots or public disturbances;"

9. A provision relating to fire control

As with crime control, even the best fire prevention and protection program will not prevent some fires. Communities should not be subject to suit for

failure to prevent these occurrences. The provision below would bar such liability while permitting actions for injuries caused by improper operation of fire equipment such as vehicles or actions arising by reason of a failure to maintain existing equipment:

> "(q) Failure to prevent or control fires, other than in or on property of the governmental entity. Nothing herein shall be interpreted to provide immunity for a failure to exercise reasonable care in the maintenance of fire fighting equipment."

While all of the suggestions are important for dealing with today's climate of litigation, the provisions relating to design of public roads, recreational facilities, unimproved public lands, and inspections are crucial. These provisions could be expected to impact directly on the Kansas market.

The Committee can go far towards a solution of the volative insurance market for governmental risks by building into the law as much certainty as possible. This should aid carriers in the difficult task of rating and underwriting such insureds.

While some may argue that suits relating to crime control, fire control, or the quality of education are unlikely in Kansas, other communities have learned through bitter experience to distrust such predictions. In our "claims conscious" society, such "absurd" actions are brought daily. The latest issue of the American Bar Association Journal reports a suit by an

individual against a gas station attendant. The person was shot by the attendant while attempting to rob the station. He claimed the attendant had negligently used the weapon and used "excessive force." While the situation may be absurd, some insurance carrier must incur the cost of defense of the action and pay any judgment awarded.

Once again, the Alliance is encouraged by the steps the Committee has undertaken and hopes the suggestions made herein will be of assistance in producing the best law possible for Kansas. The Alliance stands ready to assist the Committee in any way we can be of further service.

RFF/e

2-18-79

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.

# # # # # # # # #

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.

# # # # # # # #

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.

# # # # # #

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).

# # # # # # # # # #

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.

# # # # #

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).

# # # # # # # # #

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)

KSU
KANSAS STATE UNIVERSITY

University Attorney

Anderson Hall
Manhattan, Kansas 66506
913-532-5730

February 9, 1979

Senator Elwaine F. Pomeroy
Chairman, Senate Judiciary Committee
State House
Topeka, Kansas 66612

RE: Senate Bill No. 76

Dear Senator Pomeroy:

We are writing this joint letter, as the attorneys for the Board of Regents and Kansas State University respectively, to express our support for passage of this bill.

Faculty members and administrators at our state colleges and universities are extremely concerned about the risk of judgments against them personally, either in tort or civil rights actions. Their concern seems justified, in light of the present tendency to litigate and in light of the state's general unavailability as a defendant.

In any event, faculty have become reluctant to take their students on field trips, to serve on grievance committees, and generally to participate in university governance. Passage of the Kansas Tort Claims Act would alleviate these fears and permit our faculty to function as teachers, researchers and participants in governance in the fashion they should.

Insurance against these risks is very difficult to procure on an individual private basis, and the breadth of coverage in those policies which are available is never sufficient.

We would urge your committee to take favorable action on Senate Bill No. 76, as a necessary protection not only for the rights of the injured, but for the faculty and administrators of our state educational institutions.

Very truly yours,

William R. Kauffman
Staff Attorney
Board of Regents

Richard H. Seaton
University Attorney
Kansas State University

tk

2-13-79

TORT CLAIMS ACTS

1. ALASKA - (09.50.250) ("A person may bring an action")

   Open end --- three exceptions - discretionary function, quarantine and assault, etc.

2. CALIFORNIA - (Govt. 815.2) - liable for acts - if employees would be liable.
   (Govt. 820) - employee liable same as private person.

   Open end --- Exceptions (820.2) discretionary acts
   (820.4) execution or enforcement of law
   Additional listed exceptions not in fed.

3. COLORADO - (24-10-106) (24-10-107)

   Closed end --- (six areas of liability)
   Waiver in amount of insurance (24-10-104)
   Insurance required (24-10-116)

4. FLORIDA - (768.28)

   Open end --- liable same as private individual
   Limitations - three - punitive, interest prior to judgment and participation in riot (768.28)
   (limit on attorney fees as in fed.)
   May request assistance of Insurance Dept. in consideration adjustment and settlement of claims.
   (Limited procedures)

5. HAWAII - (662-2) (Form similar to fed.)

   Open end --- Shall be liable as private individual
   Exceptions - six- similar to fed. (662-15)
   Attorney fees - 20% limit (662-12)

6. IDAHO - (6-903) (Form similar to fed.)

   Open end --- Subject to liability if private person liable.
   Exceptions - eight - similar to fed. (6-904)

7. INDIANA - (34-4-16.5-1 et seq.)

   Open end - fourteen exceptions (34-4-16.5-3) (34-4-16.5-4)
   Governor may settle or compromise (34-4-16.5-13)
   Attorney General advises and assists governor (34-4-16.5-14)

8. IOWA - (25A.4) State liable as private individual.

   Open end - eight exceptions - similar to fed. (25A.14)
   (interest and punitive damages (25A.4)
   Payment of award (25A.11)
   State appeal board may compromise or settle (25A.3)
   State appeal board must act before suit permitted (25A.5)

9. LOUISIANA - Constitution, Art. 12, Sec. 10, mandates act - (adopted in 1974, effective Dec. 31, 1974)
   Apparently no act passed as yet.

10. MINNESOTA - (3.736)

Open end --- state will pay if private person would be liable. Twelve exceptions - procedures.

11. MONTANA - (82-4310) State insurance plan and tort claims act (82-4301 et seq.)
State liable for its torts and those of employees

Open end --- except intentional and felonious acts (82-4322.1) and punitive damages, attorney fees or interest (82-4324)

12. NEBRASKA - (81-8,209 et seq.)

Open end --- (81-8,215) - liable same as private individual.
Exceptions (81-8,219) six -
No suit until disposition by State Claims Board (81-8,213)
(Board members - Lt. Gov., State Treasurer, and Auditor of public accounts - 81-8,220)
Court in judgment, Board in making award and attorney general in compromise settlement - fix reasonable attorney fees (81-8,228)

13. NEVADA - (41.031 et seq.)

Open end --- liability determined as with individuals and corporations (41.031)
Exceptions - six - (41.032, 41.033, 41.0333 and 41.035)
No action until state board of examiners fails to act (41.036)

14. NEW JERSEY - (59:2-2) - liable same as private individual

Open end --- Exceptions
4 types of discretionary (59:2-3)
7 general (adoption or failure to adopt or enforce laws; permits and license; inspection; recreational facilities; public assistance; slander of title and crime or willful misconduct of employees (59:2-4 to 59:2-10)

(Comprehensive)

Specific areas of liability and exceptions:
1. Conditions on public property - (59:4-1 et seq.)
2. Corrections and police activity - (59:5-1 et seq.)
3. Medical, hospital and public health activity - (59:6-1 et seq.)
4. Taxation (59:7-1 et seq.)

Procedure - (59:8-1 et seq.)
Suit and judgment - (59:9-1 et seq.)

15. NEW YORK - (Judiciary - Court of Claims Sec. 8) - liability same as individuals and corporations.

Open end --- no exceptions cited.

Indemnifies public officers and employees - (Public officer law Sec. 17)

16. OHIO - (2743.02) - liability determined same as in suits between private parties.
Court of Claims created to handle claims (1743.03)

Open end --- apparently no exceptions.

17. OREGON - (30.265) - liable for its torts and those of its officers and employees

Open end --- eight exceptions (30.265) (30.270)

(limited procedures)

18. TEXAS - (Art. 6252-19)

Closed end --- liable for acts involving motor vehicles (with exceptions) and acts involving use of tangible property - real and personal as if a private person (Art. 6252-19 Sec.3)

12 exceptions (Art. 6252-19 Sec. 14)

Applicable to school districts and juco only as to vehicles (Art. 6252-19 Sec. 19A)

State pays damages adjudged against certain officers and employees (Health & institutions primarily) (Art. 6252-26)

19. UTAH - (60-30-1 et seq.)

Open end --- waived as to
1. Operation of vehicles
2. Highways - defects
3. Public buildings, structures, dams etc. defects
4. Negligent acts or omissions of employees

11 exceptions

Awards reduced to amount of insurance coverage (63-30-34) or statutory minimums of insurance coverage

20. VERMONT - (Title 12 Sec. 5601) - liable same as private person

Open end --- Exceptions - seven (similar to fed.)
(brief 3 page act)
5 sections

COLORADO

24-10-106. Immunity and partial waiver. (1) A public entity shall be immune from liability in all claims for injury which are actionable in tort except as provided otherwise in this section. Sovereign immunity, whether previously available as a defense or not, shall not be asserted by a public entity as a defense in an action for damages for injuries resulting from:

(a) The operation of a motor vehicle, owned or leased by such public entity, by a public employee while in the course of his employment, except emergency vehicles operating within the provisions of section 42-4-106 (2) and (3), C.R.S. 1973;

(b) The operation of any public hospital, penitentiary, reformatory, or jail by such public entity or a dangerous condition existing therein;

(c) A dangerous condition of any public building;

(d) A dangerous condition which interferes with the movement of traffic on the traveled portion and shoulders or curbs of any public highway, road, street, or sidewalk within the corporate limits of any municipality, or of any highway which is a part of the federal interstate highway system or the federal primary highway system, or of any paved highway which is a part of the federal secondary highway system, or of any paved highway which is a part of the state highway system on that portion of such highway, road, street, or sidewalk which was designed and intended for public travel or parking thereon;

(e) A dangerous condition of any public facility, except roads and highways located in parks or recreation areas, public parking facilities, and public transportation facilities maintained by such public entity. Nothing in this paragraph (e) or in paragraph (d) of this subsection (1) shall be construed to prevent a public entity from asserting the defense of sovereign immunity to an injury caused by the natural condition of any unimproved property, whether or not such property is located in a park or recreation area or a highway, road, or street right-of-way.

(f) The operation and maintenance of any public water facility, gas facility, sanitation facility, electrical facility, power facility, or swimming facility by such public entity or a dangerous condition existing therein.

(2) Nothing in this section shall be construed to constitute a waiver of sovereign immunity where the injury arises from the act, or failure to act, of a public employee where the act is the type of act for which the public employee would be or heretofore has been personally immune from liability.

Source: L. 71, p. 1206, § 1; C.R.S. 1963, § 130-11-6.

Cross reference. As to privileges afforded operators of emergency vehicles, see § 42-4-106.

Am. Jur. See 57 Am. Jur.2d, Municipal, etc., Tort Liability, § § 24-26, 69-72.

C.J.S. See 81 C.J.S., States, § § 130, 214, 215.

24-10-107. Determination of liability. Where sovereign immunity is abrogated as a defense under section 24-10-106, liability of the public entity shall be determined in the same manner as if the public entity were a private person.

Source: L. 71, p. 1207, § 1; C.R.S. 1963, § 130-11-7.

Cross reference. As to abrogation of sovereign immunity as defense, see § 24-10-106.

Corp. of San Antonio v. Bustamante (Civ. App.1978) 562 S.W.2d 266.

2. Pleading

In absence of appropriate pleading raising issue of unconstitutionality of statute, trial court was without authority to find that this article was overbroad, vague, conflicting, unauthorized delegation of legislative function, and discriminatory; however, in view of importance of question, appellate court would elect not to dispose of issue of constitutionality on basis of failure to plead affirmative defense. Houston Chronicle Pub. Co. v. City of Houston (Civ.App.1975) 531 S.W.2d 177, 82 A.L.R.3d 1, ref. n. r. e. 536 S.W.2d 559.

2.8 Summary judgment

Where, in suit seeking public disclosure of information contained in workman's compensation claim files, trial court did not consider individual files, and some files clearly would contain personal information which, if published, would be highly objectionable to reasonable persons, material issues of fact existed which precluded rendition of summary judgment. Industrial Foundation of the South v. Texas Indus. Acc. Bd. (Sup.1976) 540 S.W.2d 668, certiorari denied 97 S.Ct. 1550, 430 U.S. 931, 51 L. Ed.2d 774.

3. Review

Since city, whose police records newspaper wished to examine, had not filed application for writ of error complaining of portion of Court of Civil Appeals' judgment which held that the newspaper was entitled to view some police records, the Supreme Court would reserve question as to whether press and public had statutory or constitutional right to obtain all of the information which the Court of Civil Appeals found to be public information. Houston Chronicle Pub. Co. v. City of Houston (Sup.1976) 536 S.W.2d 559.

Art. 6252—18. Interpreters for deaf or severely hard-of-hearing persons taking state examinations

Cross References

Texas State Technical Institute, interpreters for the deaf, see V.T.C.A. Education Code, § 135.05.

Art. 6252—19. Tort Claims Act

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Liability of governmental units

Sec. 3. Each unit of government in the state shall be liable for money damages for property damage or personal injuries or death when proximately caused by the negligence or wrongful act or omission of any officer or employee acting within the scope of his employment or office arising from the operation or use of a motor-driven vehicle and motor-driven equipment, other than motor-driven equipment used in connection with the operation of floodgates or water release equipment by river authorities created under the laws of this state, under circumstances where such officer or employee would be personally liable to the claimant in accordance with the law of this state, or death or personal injuries so caused from some condition or some use of tangible property, real or personal, under circumstances where such unit of government, if a private person, would be liable to the claimant in accordance with the law of this state. Such liability is subject to the exceptions contained herein, and it shall not extend to punitive or exemplary damages. Liability hereunder shall be limited to $100,000 per person and $300,000 for any single occurrence for bodily injury or death and to $10,000 for any single occurrence for injury to or destruction of property.

Sec. 3 amended by Acts 1973, 63rd Leg., p. 77, ch. 50, § 1, eff. Aug. 27, 1973.

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Notice of death or injury

Sec. 16. Except where there is actual notice on the part of the governmental unit that death has occurred or that the claimant has received some injury or that property of the claimant has been damaged,