

Held in Room 519 S, at the Statehouse at 12:00 ~~a.m.~~/p. m., on February 22, 19 79.

All members were present except: Senators Berman and Gaar

The next meeting of the Committee will be held at 10:00 a. m./p. m., on February 23, 19 79.

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


Chairman

The conferees appearing before the Committee were:

- Keith Sayler - Kansas Association of Commerce and Industry
- E. A. Mosher - League of Kansas Municipalities
- Neil Shortlidge - Overland Park Assistant City Attorney
- Jerry Palmer - The Kansas Trial Lawyers Association
- Bernard J. Dunn - Department of Corrections
- Ken Klein - Kansas Bar Association
- Jack Euler - Kansas Bar Association

Staff present:

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

Senate Bill No. 256 - Workmen's compensation, relating to payment of attorneys' fees. The chairman reviewed the amendments that the committee had previously made to the bill.

Keith Sayler made an appearance to discuss various provisions of the bill. Committee discussion with him followed.

Senator Hess moved to further amend the bill to insert in line 105 "on that portion of the claim that was wrongfully refused"; Senator Werts seconded the motion, and the motion carried. By consensus, the committee report will include this amendment, since the committee had previously voted to report the bill favorably as amended.

Proposed Substitute for Senate Bill No. 76 - Enacting a tort claims act applicable to the state and local units of government. The chairman reviewed the status of the bill and the decisions that the committee had previously made.

Ernie Mosher testified and strongly urged the committee to pass a bill. The bill is extremely important to local units of government; he would prefer that the committee pass the original bill rather than pass no bill. The proposed substitute bill is consistent with the convention policy of the league; he is concerned with the impact on employees with some of the provisions of the bill. He discussed the providing of legal defense to employees

Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

CONTINUATION SHEET

Minutes of the Senate Committee on Judiciary February 22, 1979

Prop. Sub. for SB 76 continued -

and reimbursing them for damages. He discussed new Section 10 of the proposed substitute bill and the relationship to mob liability; he suggested that Section 15 of the original bill was more appropriate. He urged the committee to consider how far the requirement of employer providing for legal defense should be carried. He felt that the provision relating to insurance should provide that the insurance can be purchased from any company. Committee discussion with him followed. Senator Parrish requested Mr. Mosher to present a written statement to the committee.

Mr. Griggs explained provisions of the proposed substitute bill.

Neil Shortlidge, the Assistant City Attorney of Overland Park, testified that the proposed substitute bill provides no immunity for the employee. He stated that there is a need for the same type of immunity for the employee as for the governmental entity. He is concerned about federal civil right actions; the bill should address this area.

Jerry Palmer testified; copies of statements from the Kansas Trial Lawyers Association and the Kansas Bar Association are attached. Also attached is Mr. Palmer's statement. He stated the bill should be open ended and urged the committee to pass the original bill. Committee discussion with him followed.

Bernie Dunn testified that clarification needs to be made concerning the liability of prisons and prison industries, particularly with regard to the substitute bill.

Ken Klein testified that the Kansas Bar Association is in general agreement with the statements made by Mr. Palmer.

Jack Euler testified that the Kansas Bar Association feels strongly that the best interest of the citizens of the state would be best served with the open end approach.

The chairman announced that there would be a working session of the committee at 1:15 p.m. tomorrow.

The meeting adjourned.

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

SENATE BILL No. 256

By Senator Chaney

2-6

0016 AN ACT concerning workmen's compensation; relating to the
0017 payment of attorneys' fees; amending K.S.A. 1978 Supp. 44-
0018 536 and repealing the existing section.

0019 *Be it enacted by the Legislature of the State of Kansas:*

0020 Section 1. K.S.A. 1978 Supp. 44-536 is hereby amended to
0021 read as follows: 44-536. (a) With respect to any and all proceed-
0022 ings in connection with any initial or original claim for compen-
0023 sation, no claim of any attorney for services rendered in connec-
0024 tion with the securing of compensation for an employee or his or
0025 her dependents, whether secured by agreement, order, award or a
0026 judgment in any court shall exceed twenty-five percent (25%) of
0027 the amount of compensation recovered and paid, in addition to
0028 actual expenses incurred, and subject to the other provisions of
0029 this section. Except as hereinafter provided in this section, in
0030 death cases, total disability and partial disability cases, the
0031 amount of an attorney's fees shall not exceed twenty-five percent
0032 (25%) of the sum which would be due under the workmen's
0033 compensation act for four hundred fifteen (415) weeks of perma-
0034 nent total disability based upon the employee's average gross
0035 weekly wage prior to the date of the accident and subject to the
0036 maximum weekly benefits provided in K.S.A. ~~1977~~ 1978 Supp.
0037 44-510c.

0038 (b) All attorneys' fees in connection with the initial or original
0039 claim for compensation shall be fixed pursuant to a written
0040 contract between the attorney and the employee or his or her
0041 dependents, and every attorney, whether the disposition of the
0042 original claim is by agreement, settlement, award, judgment or
0043 otherwise, shall file his or her contract with the director who shall
0044 approve said contract only if it is in accordance with all provi-

2-22-79
PM

0045 sions of this section. Any contracts for attorneys' fees not in
0046 excess of the limits provided in this section and approved by the
0047 director shall be enforceable as a lien on the compensation due or
0048 to become due.

0049 (c) No attorneys' fees shall be charged with respect to com-
0050 pensation for medical expenses, except where an allowance is
0051 made for proposed or future treatment as a part of a compromise
0052 settlement.

0053 (d) No attorneys' fees shall be charged in connection with any
0054 temporary total disability compensation unless the payment of
0055 such compensation in the proper amount is refused, or unless
0056 such compensation is terminated by the employer and the pay-
0057 ment of such compensation is obtained or reinstated by the
0058 efforts of the attorney, whether by agreement, settlement, award
0059 or judgment.

0060 (e) With regard to any claim where there is no dispute as to
0061 any of the material issues prior to representation of the claimant
0062 or claimants by an attorney, or where the amount to be paid for
0063 compensation does not exceed the offer made to the claimant or
0064 claimants by the employer prior to representation by an attorney,
0065 the fees to any such attorney shall not exceed either the sum of
0066 two hundred fifty dollars (\$250), or a reasonable fee for the time
0067 actually spent by the attorney, as determined by the director,
0068 whichever is greater, exclusive of reasonable attorney's fees for
0069 any representation by such attorney in reference to any necessary
0070 probate proceedings.

0071 (f) All attorneys' fees for representation of an employee or his
0072 or her dependents shall be only recoverable from compensation
0073 actually paid to such employee or dependents, except as specifi-
0074 cally provided otherwise in subsection (g) ~~and~~, (h) and (i) of this
0075 section.

0076 (g) In the event any attorney renders services to an employee
0077 or his or her dependents, subsequent to the ultimate disposition
0078 of the initial and original claim, and in connection with an
0079 application for review and modification, a hearing for vocational
0080 rehabilitation, a hearing for additional medical benefits, or oth-
0081 erwise, such attorney shall be entitled to reasonable attorney's

0082 fees for such services, in addition to attorney's fees received or
0083 which he or she is entitled to receive by his or her contract in
0084 connection with the original claim, and such attorney's fees shall
0085 be awarded by the director on the basis of the reasonable and
0086 customary charges in the locality for such services and not on a
0087 contingent fee basis.*If the services rendered under this subsection
0088 tion by an attorney result in an additional award of compensation,
0089 the attorney's fees shall be paid from such amounts of compensation.
0090 If such services involve no additional award of compensation, the director shall fix the proper amount of such attorney's
0091 fees in accordance with this subsection and such fees shall be
0092 paid by the employer.
0093

0094 (h) Any and all disputes regarding attorneys' fees, whether
0095 such disputes relate to which of one or more attorneys represents
0096 the claimant or claimants or is entitled to the attorneys' fees, or a
0097 division of attorneys' fees where the claimant or claimants are or
0098 have been represented by more than one attorney, or any other
0099 disputes concerning attorney's fees or contracts for attorneys'
0100 fees, shall be heard and determined by the director, after reasonable
0101 notice to all interested parties and attorneys.

0102 (i) *Whenever an attorney renders services to an employee or*
0103 *his or her dependents on a successful claim for compensation and*
0104 *it appears from the evidence that the employer refused without*
0105 *just cause or excuse to pay such compensation, the attorneys' fees*
0106 *shall be paid by such employer.*

0107 (j) After reasonable notice and hearing before the director,
0108 any attorney found to be in violation of any provision of this
0109 section shall be required to make restitution of any excess fees
0110 charged.

0111 Sec. 2. K.S.A. 1978 Supp. 44-536 is hereby repealed.

0112 Sec. 3. This act shall take effect and be in force from and after
0113 its publication in the statute book.

in bad faith

In cases where insurance coverage has been obtained by the employer for workmen's compensation claims, the insurer shall pay the attorneys' fees provided by this subsection for such a refusal.

KANSAS TRIAL LAWYERS ASSOCIATION
COMMENTS ON OPEN-END VERSUS CLOSED-END

TO: SENATE JUDICIARY COMMITTEE
DATE: February 22, 1979
FROM: The Kansas Trial Lawyers Association

Dealing with the substitute for Senate Bill 76, generally:
We stand firm in the position that this should be an open-ended bill and that SB 76 and the Interim Committee work that went behind it, drafted a reasonable compromise position between the rights of injured parties and the legal liability of cities and their financial capacity to handle that risk. We oppose the closed-end approach, since it is not designed to fill the objective of, so far as possible, bringing the government into the same posture as a private tortfeasor. Moreover, one of the objectives espoused in the hearings this summer, the hearings the summer before, and by municipal and state employees and people who serve in government in every sector, is that they do not personally want to stand the risk of a suit and judgment because of their exposure due to public service. A closed-end bill may be fine for the government, but still leaves its employee-appointee and elected public official, "slowly twisting in the wind".

Specifics:

1. Motor Vehicle Operation - We believe that this provision should be amended, e.g., in Maine, statutes 14 Section 8104 to include aircraft, watercraft, machinery and other equipment.
2. Dangerous and Defective Conditions - There is no justifiable reason for the exclusion of parks recreation facilities and playground - that would mean no liability for drowning in a defective swimming pool, no liability when a defective seat on a swing broke and dumped the child on the ground. Further, it does not account for any liability for negligence in the supervision of any of these premises.
3. Airports - Okay.
4. Public Utitlity - Okay, as far as it goes, but it should be generic, e.g. sanitary sewer systems and storm sewer systems are not included. There are probably other governmental utility type functions, which would have prior to this act, been regarded as proprietary, which aren't included.
5. Hospitals and Clinics - This is a very complicated statute. It would appear that there would be no liability for "misdiagnosis" and what do Subsections (b) and (c) mean? If there is no exposure for the failure to admit, does that mean that a public hospital who refuses a patient admission and that patient suffers injury because of the negligence of the hospital and failure to admit, is without a remedy? We believe, on the whole, it would be better to have medical facilities covered by the Health Care Provider's Act and some recognition be made that the exclusion presently present in that Act be stricken and that a public facility is equally as liable as a private facility. It must be remembered that the whole citadel

of sovereign immunity started to crumble with Carol vs. Kittel, dealing with the liability of the Kansas University Medical Center.

6. Highway, Plan or Design - This seems to indicate that there is no responsibility for a defective plan or design, even if it was defective at the time it was planned or designed. We do not believe that is the effect of the holding of the Kansas Supreme Court in Martin vs. State Highway Commission which does exonerate responsibility from the public for upgrading or holding a plan or design defective by more modern standards. But, this goes beyond the present law and is regressive in its effect.

The Sections that we would suggest be added to those that are presently in existence:

1. We are somewhat unsure as to whether this Act assumes a waiver where there is liability insurance. At the present time, there are many existing policies, which essentially makes cities or other municipalities as liable for negligence as a private person would be. The reason this insurance has been purchased, for the most part, is to protect the public employee. Insofar as there is insurance, which does not write in an exclusion and governing bodies maintain that insurance, it would seem unfair to give insurance companies defenses that they did not bargain for and thus the approach presently taken in Chapter 46 and recently affirmed in the Kansas State University case.

2. We will recommend the adoptions of California Code 815.2, 815.4 and 815.6, which adds liability whereas an employee is liable, where an individual contractor is liable and where there is a mandatory duty on the part of the governmental unit to protect certain persons from certain risks.

3. We would recommend from Maine's Act, the all inclusive concepts of vehicular travel, including special mobile equipment, trailers, aircraft, watercraft, machinery and equipment. (Maine 14, Section 8104). In addition, from that State, under the same Section, is liability for sudden and accidental discharge, dispersal or release of smoke, gas, fumes, etc. into the air, upon the land or into the waterways.

4. We, of course, urge the same type of approach on Civil Rights violations as was existing in SB 76.

5. New Mexico, Section 5-14-12, provides liability where an officer would be liable in the case of false arrest, false imprisonment, malicious prosecution, etc.

We have not had long to study this bill and we might have other recommendations. By pointing up these recommendations, though, it should be obvious to the committee, how political and specially oriented the listing approach can be and it maybe a legislatively unweildy object to handle. The courts have done a decent job in

Senate Judiciary Committee
Open-End vs. Closed End
February 22, 1979
Page 3

handling the tort liability system. The attacks that have been mounted on the tort liability system, have fallen time and time again on the basis of really not very credible evidence that there are deficiencies in that system. It is for that reason that we would urge the committee to return to the Open-Ended approach and pass SB 76 on to the full Senate for its consideration, so that there is not a tort liability crisis in the closing hours of the session where time for cool reflection is lost. Our recent experience with comparative negligence and the interpretation given to K.S.A. 60-258(a) in Brown vs. Keill and other cases after it, indicate the Supreme Court's growing disgust with legislation that is not clearly understood. The laundry list approach subjects itself to that kind of abuse and the open-end approach is less likely to have that kind of abuse.

RESPECTFULLY SUBMITTED,

JERRY R. PALMER
The Kansas Trial Lawyers
Assocaation

THE POSITION OF THE KANSAS TRIAL LAWYERS ASSOCIATION
AND THE KANSAS BAR ASSOCIATION RESPECTING FINANCING
OF SB 76 OR ANY SUBSTITUTE THEREFORE

TO: SENATE JUDICIARY COMMITTEE

DATE: February 22, 1979

FROM: The Kansas Trial Lawyers Association
The Kansas Bar Association

After a study of the financing arrangements that have been proposed, it would be the recommendation of both the Kansas Trial Lawyers Association and the Kansas Bar Association that the provisions of Senate Bill 76, new Section 11 through new Section 14, should be integrated with Senate Bill No. 316 to provide the basic mechanism for the payment of tort claims.

The concepts of SB 316 are very good. Questions would be raised, though, with respect to the following:

- (a) Should SB 316 provide one fund or two (2) funds; the one fund being for either all coverage for municipalities or in the alternative for excess coverage for municipalities over that which is insured by primary insurance and the other fund be exclusively State financed to cover the risk of the State and its various agents for the tort claims risk?
- (b) Should new Section 13 be amended to provide that municipalities may obtain coverage for such risks as Director of Risk Management shall determine to be covered by the fund (s)?
- (c) Does new Section 13(c) correctly state its intent?

The essential differences between SB 76 and SB 316, is that SB 316, more or less, obligates all governmental units subject to the Director's direction, to be covered by the public liability fund and bear its proportionate share by assessment. The Director has the authority to buy insurance of various kinds. It might be, perhaps, better, to permit the municipalities to carry their own basic protection, either up to an aggregate amount or a per claim amount up to an aggregate amount, for example, the first \$25,000.00 of any risk would be excess to be paid out of a fund, rather than having the fund be responsible for first dollar coverage. It is, of course, possible that the rule making powers of the Director of Risk Management could deal with these kinds of issues, making the municipalities liable for the smaller claims and excluding them from coverage by the fund.

Health Care Providers: It would also be the recommendation that the Health Care Providers Act be amended in line with our prior recommendation, so as to bring the State system within that fund, which is already in existence. By doing so, the reasons for limiting liability in the very complex way, described in substitute for SB 76, can be obviated and thus a patient has the same rights as the Health Care Providers, the same responsibility in the private sector as they do in the public sector, which is generally the intent of the Tort Claims Act. The risk then, is not spread on the public-private basis so much as it is spread on a general risk of health care. It has been recognized in hearings before the Interim Committee that the largest verdict and settlements in recent years in Kansas have been in this area of Health Care, and perhaps a substantial amount of the

SENATE JUDICIARY COMMITTEE

February 22, 1979

Page 2

financial risk can be allocated to the Health Care Sector as opposed to dividing on a public-private basis and since the Legislature has so recently dealt with the Health Care situation, it would not have to again concern itself with that complex subject.

RESPECTFULLY SUBMITTED,

The Kansas Trial Lawyers Association
The Kansas Bar Association