

Approved

4/23/86
Date

MINUTES OF THE SENATE COMMITTEE ON FEDERAL AND STATE AFFAIRS

The meeting was called to order by Senator Edward F. Reilly, Jr. at
Chairperson

8:30 a.m./~~p.m.~~ on April 23, 1986 in room 254-E of the Capitol.

All members were present except:

Committee staff present:

J. Russell Mills, Jr., Legislative Research
Emalene Correll, Legislative Research
Mary Torrence, Assistant Revisor of Statutes
June Windscheffel, Secretary to the Committee

Conferees appearing before the committee:

Mr. James Kaup, League of Kansas Municipalities, Topeka
Ms. Patricia Baker, Kansas Association of School Boards
Mr. Gerald L. Goodell, President, Kansas Bar Association (KBA)
Mr. Jerry R. Palmer of the Kansas Trial Lawyers Association (KTLA)

HB3114 - tort claims act.

Mr. James Kaup of the League of Kansas Municipalities was the first conferee. He distributed copies of proposed amendments to the bill and explained them to the Committee. He said that from talking with a number of city attorneys, representatives from the Kansas Association of School Boards and Kansas Association of Counties they arrived at a consensus of what amendments would be appropriate. (Attachment #1)

Ms. Pat Baker, representing the Kansas Association of School Boards, was the next conferee. She said they endorse the concept of the amendments proposed by the League of Kansas Municipalities and ask the Committee's support of this bill.

Mr. Gerald Goodell, President of the Kansas Bar Association, was introduced by the Chairman. Mr. Goodell distributed copies of his statement for the Committee. (Attachment #2) He said the KBA has no problem with the original intent of HB3114, but has not had the opportunity to discuss these amendments. They think the matter is worthy of an interim study.

Mr. Jerry Palmer, of the Kansas Trial Lawyers Association, was the next conferee. Mr. Palmer's written testimony is Attachment #3. He said he had not seen the proposed amendments until this morning. He said he understands the intent is to exempt the liability of the individuals who hold public office but that is not what the language says.

The Chairman thanked the conferees for appearing before the Committee.

The Chairman had written a letter to the Secretary of Corrections, relative to prison-made goods act and testimony that was made by the Secretary of Corrections on Saturday, April 12. It was distributed for the Committee's attention. (Attachment #4) Senator Morris said he feels the letter reflects what the Committee wants. Senator Morris moved that the letter be approved. 2d by Senator Martin. Motion carried. The letter will be sent to Secretary Richard Mills.

The Minutes of March 5, 10 and 24, 1986, were distributed to the Committee. Senator Arasmith moved that they be approved. 2d by Senator Walker. Motion carried.

HB2961 - cash deposit appearance bond prohibited.

Senator Strick moved to take HB2961 off the table and bring it up for Committee consideration. 2d by Senator Anderson. Motion carried.

The Committee will meet again today. The meeting was adjourned at 9:05 a.m.

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.

8:30 A.M.
4/23

Attachment #1
April 23, 1986

As Amended by Senate Committee

[As Amended by House Committee of the Whole]

As Amended by House Committee

Session of 1986

HOUSE BILL No. 3114

By Committee on Federal and State Affairs

3-20

0024 AN ACT concerning the Kansas tort claims act; relating to ex-
0025 ceptions from liability; amending K.S.A. 75-6102 and 75-6104
0026 and repealing the existing sections.

0027 *Be it enacted by the Legislature of the State of Kansas:*

0028 Section 1. K.S.A. 75-6102 is hereby amended to read as fol-
0029 lows: 75-6102. As used in K.S.A. 75-6101 through 75-6118, and
0030 amendments thereto, unless the context clearly requires other-
0031 wise:

0032 (a) "State" means the state of Kansas and any department or
0033 branch of state government, or any agency, authority, institution
0034 or other instrumentality thereof.

0035 (b) "Municipality" means any county, township, city, school
0036 district or other political or taxing subdivision of the state, or any
0037 agency, authority, institution or other instrumentality thereof.

0038 (c) "Governmental entity" means state or municipality.

0039 (d) "Employee" means any officer, employee, servant or
0040 member of a board, commission, committee, division, depart-
0041 ment, branch or council of a governmental entity, including
0042 elected or appointed officials and persons acting on behalf or in
0043 service of a governmental entity in any official capacity, whether
0044 with or without compensation. "Employee" does not include an
0045 independent contractor under contract with a governmental en-
0046 tity. "Employee" does include former employees for acts and
0047 omissions within the scope of their employment during their
0048 former employment with the governmental entity.

0049 (e) "Community service work" means public or community

0050 service performed by a person (1) as a result of a contract of
 0051 diversion entered into by such person as authorized by law, (2)
 0052 pursuant to the assignment of such person by a court to a
 0053 community corrections program, (3) as a result of suspension of
 0054 sentence or as a condition of probation pursuant to court order
 0055 ~~or~~, (4) in lieu of a fine imposed by court order or (5) as a
 0056 condition of placement ordered by a court pursuant to K.S.A.
 0057 1985 Supp. 38-1663 and amendments thereto.

0058 Sec. 2. K.S.A. 75-6104 is hereby amended to read as follows:
 0059 75-6104. A governmental entity or an employee acting within the
 0060 scope of the employee's employment shall not be liable for
 0061 damages resulting from:

0062 (a) Legislative functions ~~[and governmental func-~~
 0063 ~~tions]~~, including, but not limited to, the adoption or failure to
 0064 adopt any statute, regulation, ordinance or resolution ~~[or any~~
 0065 ~~other action taken by the governing body or board~~
 0066 ~~of a municipality in its capacity as a governing~~
 0067 ~~body in the exercise of any governmental or dis-~~
 0068 ~~cretionary function];~~

0069 (b) judicial ~~function;~~

0070 (c) enforcement of or failure to enforce a law, whether valid
 0071 or invalid, including, but not limited to, any statute, regulation,
 0072 ordinance or resolution;

0073 (d) any claim based upon the exercise or performance or the
 0074 failure to exercise or perform a discretionary function or duty on
 0075 the part of a governmental entity or employee, whether or not the
 0076 discretion be abused;

0077 (e) the assessment or collection of taxes or special assess-
 0078 ments;

0079 (f) any claim by an employee of a governmental entity arising
 0080 from the tortious conduct of another employee of the same
 0081 governmental entity, if such claim is (1) compensable pursuant to
 0082 the Kansas workmen's compensation act or (2) not compensable
 0083 pursuant to the Kansas workmen's compensation act because the
 0084 injured employee was a firemen's relief association member who
 0085 was exempt from such act pursuant to K.S.A. 44-505d and
 0086 amendments thereto at the time the claim arose;

[or quasi-judicial functions;

[and regardless of the level of discretion involved;

0087 (g) the malfunction, destruction or unauthorized removal of
0088 any traffic or road sign, signal or warning device unless it is not
0089 corrected by the governmental entity responsible within a rea-
0090 sonable time after actual or constructive notice of such malfunc-
0091 tion, destruction or removal. Nothing herein shall give rise to
0092 liability arising from the act or omission of any governmental
0093 entity in placing or removing any of the above signs, signals or
0094 warning devices when such placement or removal is the result of
0095 a discretionary act of the governmental entity;

0096 (h) any claim which is limited or barred by any other law or
0097 which is for injuries or property damage against an officer,
0098 employee or agent where the individual is immune from suit or
0099 damages;

0100 (i) any claim based upon emergency preparedness activities,
0101 except that governmental entities shall be liable for claims to the
0102 extent provided in article 9 of chapter 48 of the Kansas Statutes
0103 Annotated;

0104 (j) the failure to make an inspection, or making an inadequate
0105 or negligent inspection, of any property other than the property
0106 of the governmental entity, to determine whether the property
0107 complies with or violates any law or regulation or contains a
0108 hazard to public health or safety;

0109 (k) snow or ice conditions or other temporary or natural
0110 conditions on any public way or other public place due to
0111 weather conditions, unless the condition is affirmatively caused
0112 by the negligent act of the governmental entity;

0113 (l) the plan or design for the construction of or an improve-
0114 ment to public property, either in its original construction or any
0115 improvement thereto, if the plan or design is approved in ad-
0116 vance of the construction or improvement by the governing body
0117 of the governmental entity or some other body or employee
0118 exercising discretionary authority to give such approval and if
0119 the plan or design was prepared in conformity with the generally
0120 recognized and prevailing standards in existence at the time
0121 such plan or design was prepared;

0122 (m) failure to provide, or the method of providing, police or
0123 fire protection;

0124 (n) any claim for injuries resulting from the use of any public
0125 property intended or permitted to be used as a park, playground
0126 or open area for recreational purposes, unless the governmental
0127 entity or an employee thereof is guilty of gross and wanton
0128 negligence proximately causing such injury;

0129 (o) the natural condition of any unimproved public property
0130 of the governmental entity;

0131 (p) any claim for injuries resulting from the maintenance of
0132 an abandoned cemetery, title to which has vested in a govern-
0133 mental entity pursuant to K.S.A. 17-1366 through 17-1368, and
0134 amendments thereto, unless the governmental entity or an em-
0135 ployee thereof is guilty of gross and wanton negligence prox-
0136 imately causing the injury; or

0137 (q) the existence, in any condition, of a minimum mainte-
0138 nance road, after being properly so declared and signed as
0139 provided in K.S.A. 1982 Supp. 68-5,102 and amendments
0140 thereto; or

0141 (r) any claim for damages resulting from performance of
0142 community service work.

0143 ~~The enumeration of exceptions to liability in this section shall~~
0144 ~~not be construed to be exclusive nor as legislative intent to waive~~
0145 ~~immunity from liability in the performance or failure to perform~~
0146 ~~any other act or function of a discretionary nature.~~

0147 Sec. ~~3~~. K.S.A. 75-6102 and 75-6104 are hereby repealed.

0148 Sec. ~~4~~. This act shall take effect and be in force from and
0149 after its publication in the statute book.

New Sec. 3. A governmental entity or the members of the governing body thereof acting within the scope of their employment shall not be liable for damages resulting from any act of the governing body of the governmental entity irrespective of whether or not such act involved the exercise of discretion or the level of discretion involved.

New Sec. 4. The exceptions to liability specified in K.S.A. 75-6104 and section 3, and amendments to such sections, shall not be construed to be exclusive nor as legislative intent to waive immunity from liability in the performance of or the failure to perform any other act or function of a discretionary nature.

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**KANSAS BAR
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HB 3114

Governmental Immunity

April 23, 1986

Mr. Chairman, and Members of the Senate Federal & State Affairs Committee. I am Gerald L Goodell, 215 East 8th Street, Topeka, Kansas, the current President of the Kansas Bar Association. KBA would like to address the proposed amendment from the School Board Association. KBA has no problem with the original intent of HB 3114.

The history of governmental immunity legislation in Kansas indicates the legislature should move cautiously in this area. The amendment offered by the Kansas Association of School Boards has not had a hearing in any House committee, and is presented here this morning in a situation where the Senate is going to decide within the next 100 hours dozens of bills in conference committees, an entire state budget, whether to have a sales tax increase, and an economic development program. Clearly, this policy change is not going to get a thorough hearing.

Neither the KBA legislative committee, or its Executive Committee, have had the opportunity to discuss these amendments. Therefore the KBA cannot take an official position.

Rieley *GW*

Attachment #2
April 23, 1986

The KBA wishes to call several things to your attention concerning these amendments. A review of the legislative history of HB 3114 shows that you've not spent enough time on this proposed amendment, which appears to have far reaching consequences. As President of the KBA I would call several things to your attention:

1. HB 3114 as discussed in the House Committee was noncontroversial;
2. After 20-minutes of debate, Rep. Harper amended HB 3114 to resemble HB 2912. HB 2912 received less than a half-hour's hearing in the House Local Government Committee in late January.
3. Your committee elected to remove Rep. Harper's amendment from HB 3114, and did so on April 12th.
4. Now you're considering amendments that were not introduced in any bill in any committee of the House or Senate, and you have been asked to pass it within the last 96 hours of the session.

KBA believes that such haste will not serve the public good. The current problems with high insurance rates that affect public policy were at least eight years in the making. At the time the current Kansas Tort Claims Act was created, even the Insurance Commissioner's office admits that insurance companies were engaged in strong premium price competition in the property-casualty lines,¹ competition that served to drive down the cost of insurance for schools² and the general public.³

This issue should be studied by an interim committee to insure that the proposed change is appropriate and that it will speak to the issues that need addressing and will provide relief.

This amendment may well effectively repeal the Kansas Tort Claims Act.⁴ But because of Kansas' peculiar common law history, you are not guaranteed you've granted total governmental immunity for governmental functions. The KBA would further call your attention to the following:

- (a) Kansas has no joint and several liability; deep pocket organizations like municipalities pay only their proportionate share of the damages;
- (b) The Kansas modified comparative fault statute allows liberal use of phantom defendants, which in special cases further limits school board liability;
- (c) Kansas has not seen a rash of exotic new cases against school boards, such as suing the school for not educating the child;
- (d) Kansas has not seen any lawsuit that has come close to exceeding the current \$500,000 tort liability limit in Tort Claims lawsuits.
- (e) Kansas is one of a handful of states that limit pain and suffering in wrongful death cases. The majority rule is unlimited recovery.

The plain truth is the facts -- in Kansas -- do not support the hysteria of "tort reform" gripping other states. Liability for ordinary negligence under the Kansas Tort Claims Act results only when:

- (1) a negligent or wrongful act or omission by a government employee occurs,
- (2) the employee is acting within the scope of his employment, and
- (3) under circumstances where the governmental entity, if a private person, would be liable under the laws of Kansas. (KSA 75-6103)

Finally, HB 3114 will not do what the sponsors apparently want it to do, that is create a better insurance environment for schools or cities.

HB 3114 will not:

- (a) Immunize school boards against wrongful discharge litigation, or litigation based on gross negligence;
- (b) Immunize school boards against due process cases;
- (c) immunize school boards against federal civil rights laws, where school board officials indicate most litigation against USDs are filed;⁵
- (d) Change the fact that school insurance renewals ranged from premium reductions of 26% to increases of 481%₆ last year, with the median figure at 46% increase.
- (e) change the fact that the major Errors and Omissions insurance carrier for Kansas schools is National Union Fire Insurance Company. Their statistics show Kansas schools paid loss ratio was 31% in 1985, and 17% in 1984. The national average is 41%. These statistics⁷ show Kansas school boards are still a good risk.
- (f) 20% of the pending litigation⁸ in Kansas schools is in one school district.
- (g) The premium for errors and omissions liability in 1985 is "not terribly⁹ excessive over premium dollars spent in 1981."
- (h) change the fact that school districts can now pool resources to pay for various types of insurance, including₁₀ possibly E & O coverage, at considerable savings.

This legislature at this late date doesn't have the right statistics and information to be making this major change. You won't acquire the needed information in the next four days. KBA urges that you reject the proposed amendment and pass HB 3114 as it was originally introduced.

If the legislature wishes to do so, the proposed amendments should be referred to an interim committee. Commissioner Bell's Citizens Committee has just been appointed and will consider necessary changes to the Kansas Tort Claims Act before the 1987 session. A member of KASB is included on that Committee.

Footnotes And Supporting Data

1. Dick Brock, of the Kansas Insurance Commissioner's office, told a legislative subcommittee: "We don't know if there is a solution to the problem of affordability that can be legitimately addressed within the confines of the insurance mechanism. This does not mean the insurance industry has not contributed to the problem. To put it bluntly the fire and casualty insurance industry displayed a voracious greed during the late 1970s and early 1980s. Virtually without exception, fire and casualty insurers priced their products at less than cost in underwriting terms." (Brock's written presentation to the Joint Subcommittee on Insurance, Kansas Legislature, 2/18/86, page 6).

2. Testimony of Bill Curtis, KASB, to the Joint Insurance Subcommittee of the Kansas Legislature, March, 1986, p. 52 of the verbatim minutes provided by KBA: "The premium dollars for errors and omissions insurance in 1985 still were not terribly excessive over premium dollars spent in 1981."

3. "The (insurance premium cycle) that we have just been through has been extremely exaggerated by the high interest rates in the early 80s, and companies were willing to reduce rates to many insureds, large discounts were given in order to gain market share. Now the insurance business is extremely competitive. And this high degree of competition inures to the benefit of the consumer. And the consumer has been benefitting from this exaggerated rate reduction over the past years. Now anytime you reduce rates 40, 50 and 60 percent which has been the case, and the late 70s and early 80s, the conclusion of what's going to happen is obvious and that is the market conditions that you have today. Now this last market cycle was targeted toward commercial insurance because this is where the big bucks are." Testimony of Charles Baxter, Vice President, Kansas Farm Bureau Mutual Insurance Company, to the Joint Subcommittee on Insurance, February, 1986, p. 23 of the extended KBA committee minutes.

4. In Hopkins v. State of Kansas et al, 237 Kan. 601 (1985), the Supreme Court unanimously stated the general rule regarding governmen-

tal immunity: "The general rule is that a state (sovereign) cannot be sued without its consent. . . . When the concept of governmental immunity was first conceived in this state, the state and its agencies devoted their time and energy to the function of governing. As the needs and wants of citizens increased, our state government began to engage in endeavors that were not governmental, but proprietary functions. The judiciary began the erosion of governmental immunity and denied tort immunity to municipal governments performing 'proprietary' or 'permissive' acts. . . . Courts had provided general rules for determining whether the governmental body had embarked on an enterprise which was commercial in character or which was usually carried on by private individuals or private companies, thereby losing its immunity."

5. These causes of action are brought in federal court pursuant to federal law. The Supremacy Clause prevents state tort limits from applying in civil rights cases. Bill Curtis, KASB's lobbyist, acknowledges "limits aren't going to apply" in federal courts. (ibid, p. 55)

6. Curtis, KASB, ibid, p. 51.

7. Curtis, ibid.

8. Curtis, ibid.

9. Curtis, ibid, p. 52. He stated: "Of course when premiums dipped, nobody complained and no one put that money away, either, for a rainy day."

10. Curtis, ibid, reports school districts in western Kansas have pooled resources to purchase health insurance at considerable savings over individual purchasing power. P. 56.

Report Says Litigation Explosion Is a 'Myth'

By DAVID LAUTER

National Law Journal Staff Reporter

THE GREAT LITIGATION explosion of the 1980s is a "myth," according to a detailed new study of court filings in 25 states by the National Center for State Courts, which was obtained last week by The National Law Journal.

In fact, the report shows, most courts surveyed reported that litigation declined between 1981 and 1984, the most recent year with available data.

The study, the first effort to compile nationwide data on the latest litigation trends, examined filings from 1981-'84 and 1978-'81 in both general-level trial courts and small-claims courts for the three sorts of cases most frequently filed by individuals: torts, including wrongful-death, personal injury and malpractice claims; contract disputes; and fights over real estate.

As the first major research to compare recent filing rates nationally, the study is likely to be cited frequently in the continuing debate over changes in the country's legal system.

And most apt to be controversial is the report's central conclusion that "a careful examination of available data... provides no evidence to support the often cited existence of a 'litigation explosion.'"

It lends considerable weight to arguments by plaintiffs' lawyers that blame poor financial practices by the insurance industry, rather than runaway litigation, for the recent highly publicized wave of cancellations that has hit liability policyholders.

'Irrational Focus'?

Insurance industry publicists and other observers of the legal system widely quoted in media reports have argued that a profound change in social attitudes has made Americans more prone to sue after being injured.

Chief Justice Warren E. Burger, for example, in an interview earlier this year with a publication of the U.S. Chamber of Commerce, complained that the public "has an almost irrational focus — virtually a mania — on litigation as the way to solve all problems."

The study's data, by contrast, shows that litigation has declined in most states in recent years. The states that do show increases primarily are the ones that have seen large population growth.

"Changes in the number of these filings are not attributable to an increase in the propensity of the average American to sue, but rather to a simple increase in the numbers of average Americans," reported the study's chief author, Robert Roper, the state court center's director of court statistics.

One example of Mr. Roper's point comes from California. Because the state is so large, the rise in California tort filings reported by units of the state's Superior Court accounted for almost the entire ag-

gregate national increase in reported tort filings, Mr. Roper's study noted.

But the state's 12 percent increase in tort filings between 1978 and 1984 exactly equals the rise in the state's population during those years, the state's data show.

Comparable Numbers

Of 37 court systems in 25 states that provided data to the Williamsburg, Va.-based court organization, 22

reported decreases in the number of cases filed.

Only seven courts said the number of cases filed increased during those years. Another eight states reported that case loads either remained level or grew only in step with overall population increases.

The survey included some of the largest court systems in the country, such as the courts in New York, California, Florida and Texas. While the data from several states are incomplete and the study does not cover all courts in all states, "I think it's a pretty fair representation," Mr. Roper said, adding that "if there's a litigation explosion, it should be happening everywhere."

The study's findings basically agree with most of the academic research on litigation trends done in

recent years, according to a leading researcher in the field, Prof. Marc S. Galanter of the University of Wisconsin Law School.

"There's nothing to suggest that Americans recently have turned to the courts; Americans have always used the courts heavily," Professor Galanter said.

In addition, he noted, while the comparatively large number of lawyers in the United States has been widely publicized, the rate of litigation in the country appears to be roughly the same as in such other common-law jurisdictions as England, Australia and New Zealand.

The consistency, however, in the pattern of decreases in case loads that the study uncovered was "surprising," Mr. Roper said in an interview last week.

Small Claims Down

Among the more surprising findings was that even in small-claims courts, in which simplified legal procedures are supposed to ease barriers to filing suits, filings have been decreasing.

The 29 court systems reporting small-claims data showed a decline of 6 percent from 1981 to 1984. For

ample, filings in small-claims courts in California dropped 9 percent, in Ohio they decreased 1 percent, and in Kentucky 17 percent.

Of the courts providing data to the national center, the only system reporting a clear increase in all the categories of litigation studied was in New York City. Although the city's population has not grown, its civil court case load rose 50 percent from 1978 to 1984.

One other widely watched system, not covered by the report, is the federal courts. Federal case loads have shown a major increase in recent years — a major focus of Chief Justice Burger's concern.

But the federal system is only a bit player in the national litigation arena. More than 95 percent of all civil cases in the country are handled in state, not federal, courts, according to statistics from the National Center and the federal courts' administrative office.

Moreover, while commentators on the legal system often have used federal case-load numbers to describe the national picture, the forces driving up federal case loads are unique to the federal system, noted Professor Galanter.

For example, stricter government debt-collection policies have meant that suits in which the government is seeking to collect money from individuals have increased 6,600 percent since 1975. And Social Security cases have burgeoned as the government has attempted to restrict benefits.

'Up-Down' Pattern

In the state courts, the typical pattern shown by the National Center's report is seen in North Carolina, where a drop in filings from 1981 to 1984 of 12 percent largely erased an earlier 20 percent increase recorded between 1978 and 1981.

Overall, from 1978 to 1984, case filings in North Carolina lagged just slightly behind the state's population growth — a 6 percent filing increase as opposed to a 7 percent rise in total population.

The pattern in North Carolina and several other states — increases during 1978-'81 reversed by declines in the more recent 1981-'84 period — may show that "there was a litigation explosion that peaked around 1981," but that the nation's courts are now "over the hump," Mr. Roper wrote.

The "up-down" pattern of litigation increases appears in the data from a wide variety of states and therefore is likely to reflect a national trend, rather than the impact of changes in local economies.

Similar fluctuations in litigation rates historically have been fairly common, according to Prof. Frank W. Munger Jr., a legal sociologist at the State University of New York at Buffalo School of Law who has conducted extensive studies of litigation in American courts in the 19th and early 20th centuries.

"When socioeconomic development is taking place quickly, litigation goes up, otherwise it doesn't," said Asst. Prof. Wayne V. McIntosh, a political scientist at the University of Maryland. The data show a change in the types of cases as courts respond to social and legal developments over the years, he noted.

Debt and property litigation have diminished drastically while tort and divorce litigation have increased, for example.

"There are an incredible number of popular myths surrounding the court system," Professor McIntosh noted. The 'litigation explosion' of the 1980s "is the latest in a long line."

STUDY'S AUTHOR: Robert Roper, the director of court statistics at the National Center for State Courts, says 'changes in the number of filings are not attributable to an increase in the propensity of the average American to sue, but rather to a simple increase in the numbers of average Americans.'

Attachment #3
April 23, 1986

MEMORANDUM

TO: SENATE COMMITTEE ON FEDERAL AND STATE AFFAIRS

FROM: JERRY R. PALMER OF THE KANSAS TRIAL LAWYERS ASSOC.

DATE: APRIL 23, 1986

SUBJECT: HB 3114, AMENDMENTS PROPOSED BY THE KANSAS ASSOCIATION OF SCHOOL BOARDS

The amendment proposed even though it is now no longer part of K.S.A. 75-6104 still attempts to do the same thing which is re-invoke the concept of "governmental functions" as distinguished from "proprietary functions" as the standard for liability.

1. If the words "governmental functions" is to carry the same meanings in this statute that they did before the Tort Claims Act was enacted in 1979, then this effectively repeals the Kansas Tort Claims Act and would have the following effects:

a. If a person was struck by the negligent driver of a vehicle which maintained the roads of either the city or the state, the entity would not be liable (even if it had insurance). However, if the person was struck by a truck owned by the city water department (a proprietary activity) there would be liability.

b. It is possible that all governmental entities that operate roadways (the state, county, township, and cities) would no longer be liable for their roadway defects or negligent conduct in the maintenance of roadways.

2. Under the pre Tort Claims law certain well defined exceptions were in place. For example, for motor vehicles the liability of the state was waived by statute in the face of existing insurance. However, we would now have the anomaly that under the Motor Vehicle law the state vehicles would have to have insurance but that the insurance companies would have the defense of governmental functions when the vehicles were being used for a government function. Likewise, roadways were the subject of statutory exception for the state, counties and townships but, of course, that is not comprehended by these amendments.

3. With the existence of K.S.A. 75-6104 and its laundry lists of exceptions to liability (which basically are an elucidation of the most fundamental governmental function exception) there may be a great disagreement over what a "governmental function" is. On the one hand if you have roadways which are maintained as a "government function" for which there is no longer tort liability against the entity, then what meaning do those subsections dealing with signing and marking, snow and ice removal, have to do with the liability of the state? Thus, governmental function would have to be reinterpreted to mean something that it didn't mean before.

4. Since July 1, 1979 only one of the 20 cases which have gone to the Appellate Courts and reported through January of 1986 shows only one case affirmed for a plaintiff. That was a case involving six firemen who were injured when two firetrucks collided from different jurisdictions injuring six people with an aggregate judgment of \$500,000. Surely, if there were some crises because of the judgments that are being awarded against government entities it would show up in the appellate courts; if it isn't, then where is the evidence?

5. I had on another occasion within the last two weeks talked with a staff attorney for the Kansas Association of School Boards about what liability problems these school districts were having. It appears that their primary areas of litigation are due process problems with students and teachers, administrators, which would in no way be affected by alterations of the Tort Claims Act since this is covered by federal law. The staff attorney with whom I spoke had little knowledge of tort claims indicating that that was probably an insurance matter and in further discussions indicated that the primary insurance problems of the school districts in Kansas were that they were lumped in with other municipalities such as the police and fire departments of Houston which were mentioned as examples. It was also his speculation that if Kansas school boards were permitted to pool rather than insure that the rates would drop considerably.

6. The problem is not one of judgments against the governmental entities. There may be an insurance problem but there is no relationship shown between our law as it stands and that insurance increase.

For these reasons we respectfully submit that at this late hour it is inappropriate to make such a devastating change of the Tort Claims Act.

CASES UNDER K.S.A. 75-6104

<u>Case Name and Citation</u>	<u>Affirmed for π</u>	<u>Affirmed for 4</u>	<u>Rev. for π</u>	<u>Rev. for 4</u>
1. <u>Murphy v. City of Topeka</u> , 6 K.A.2d 488, 630 P.2d 186 (1981)			Rev. & remanded	
2. <u>Wheat v. Finney</u> , 230 K. 217, 630 P.2d 1160 (1981)		X		
3. <u>Robertson v. City of Topeka</u> , 231 K. 358, 644 P.2d 458 (1982)		X 12(b) (6)		
4. <u>Carpenter v. Johnson</u> , 231 K. 783, 649 P.2d 400 (1982)			Rev. S.J. & remanded	
5. <u>Cook v. City of Topeka</u> , 232 K. 334, 654 P.2d 953 (1982)			Rev. & remanded	
6. <u>Thorton v. Shore</u> , 232 K. 394, 654 P.2d 475 (1982)		X Equally divided court 4-4		
7. <u>Lantz v. City of Lawrence</u> , 232 K. 492, 657 P.2d 539 (1983)		Affmd. in part	Rev. in part	
8. <u>Warden v. City of Wichita</u> , 232 K. 838, 658 P.2d 1043 (1983)		X		
9. <u>Busch v. City of Augusta</u> , 9 K.A.2d 119, 674 P.2d 1054 (1983)		Affirms S.J. for Def.		
10. <u>Thorton v. Shore</u> , 233 K. 737, 666 P.2d 655 (1983)		X		
11. <u>Cansler v. State</u> , 234 K. 554, 675 P.2d 57 (1984)		Affmd. in part	Rev. in part	
12. <u>Caplinger v. Carter</u> , 9 K.A.2d 287, 676 P.2d 1300 (1984)		Affmd. in part	Rev. in part	
13. <u>Siple v. City of Topeka</u> , 235 K. 167 679 P.2d 190 (1984)				X (3,072.64)
14. <u>Jackson v. City of Kansas City</u> , 235 K. 278, 680 P.2d 877 (1984)	X 6 Pls. 500,000 limit K.C.K. firetrucks collided			
15. <u>Beck v. Kansas Univ. Psychiatric Foundation</u> , 580 F.Supp. 527 (1984)				
16. <u>Willard v. City of Kansas City</u> , 235 K. 655, 681 P.2d 1067 (1984)		X		
17. <u>Mendoza v. Reno County</u> , 235 K. 692, 681 P.2d 676 (1984)		X Affirms S.J. for Def.		
18. <u>Stephan v. Kansas House of Reps.</u> , 236 K. 45, 687 P.2d 622 (1984)	< No. Pls. >			
19. <u>Toumberlin v. Haas</u> , 236 K. 138, 689 P.2d 808 (1984)		X		
20. <u>Bonewell v. City of Derby</u> , 236 K. 589, 693 P.2d 1179 (1985)		X		

Totals

1 case \$500,000 since 1981	13 cases (8 cases whole) (5 cases part)	6 cases (3 cases wh.) (3 in part)	1 case 3,072.64
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Attachment #4
April 23, 1986

STATE OF KANSAS



TOPEKA

SENATE CHAMBER

April 23, 1986

EDWARD F. REILLY, JR.
SENATOR, THIRD DISTRICT
LEAVENWORTH AND JEFFERSON COUNTIES
430 DELAWARE
LEAVENWORTH, KANSAS 66048-2733
913/682-1236

COMMITTEE ASSIGNMENTS
CHAIRMAN: FEDERAL AND STATE AFFAIRS
AND INSURANCE SUBCOMMITTEE
VICE CHAIRMAN: ELECTIONS
MEMBER: CONFIRMATIONS
FINANCIAL INSTITUTIONS AND
INSURANCE
PUBLIC HEALTH AND WELFARE

Richard Mills, Secretary
Department of Corrections
Jayhawk Tower
Topeka, Kansas 66612

Dear Secretary Mills:

At its meeting on Saturday, April 12, 1986, the Senate Federal and State Affairs Committee reviewed the concept embodied in H.B. 2655 (Prison-Made Goods Act). The Committee felt strongly that it should encourage the Department of Corrections to adopt a formal policy of publicizing, through public meetings and forums, the fact that the Department is willing to make available minimum custody classification inmates for work in cities or on projects where they would not be in direct competition with or replace civilian workers in the work force.

You indicated in your appearance before the Committee on April 12th that it was your intention to conduct such public forums, in order to convey to the general public the fact that the Department of Corrections would make available such inmates for certain projects, providing the community was favorably responsive. The Senate Committee on Federal and State Affairs would encourage this concept and, by virtue of its action in authorizing me to direct a letter to the Department, supports the concept wholeheartedly.

We feel the image of the Department of Corrections could be enhanced; the work ethic of the inmates could certainly be improved; and the acceptance and pride of the Kansas taxpayers heightened in seeing that persons committed to the Department of Corrections are engaged in productive and meaningful tasks. We are all aware of the tremendous cuts in revenue from the federal government and the impact that it will have on various communities, counties and townships, and school districts in the years ahead. It would seem to us that utilization of certain of those inmates under the Department of Corrections' jurisdiction would be a great asset to various governmental units in assisting them in conducting and assuring services that are so vitally necessary.

We wholeheartedly encourage you in your efforts and will be very supportive of them in the Committee.

Warmly and sincerely,

EDWARD F. REILLY, JR., Chairman
For the Committee on Federal and State Affairs

Sen. Fed. & State Affairs
Attachment #4 4/23/86