Approved March 6, 1987
Date

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY.

The meeting was called to order by Representative Robert S. Wunsch at
Chairperson

3:30 ~~xxx~~p.m. on February 17, 19 87 in room 313-S of the Capitol.

All members were present except: Representative Peterson, who was excused.

Committee staff present:
Mike Heim, Legislative Research Department
Mary Ann Torrence, Revisor of Statutes Office
Mary Jane Holt, Secretary

Conferees appearing before the committee:
Jim Clark, Kansas County and District Attorneys Association
Jerry Hanna, Kansas Trial Lawyers Association
Marjorie VanBuren, Office of Judicial Administration
Representative Harold Guldner
Representative Susan Roenbaugh
Representative Frank Buehler
David Crockett, Wichita Area Builders Assoc.
Kent Pellegrino, National Electrical Contractors Assoc.
Kathy Marney, Mechanical Contractors Assoc. of Kansas
Wayne Morris, Assistant Counsel, Security Benefit Life Ins. Company

The Chairman announced the Committee would receive bill requests.

Jim Clark requested the Committee introduce a bill that would allow hearsay evidence at a preliminary hearing. The language was borrowed from the model act. The Judiciary Committee introduced this bill last year. It was H.B. 2454, (see Attachment I).

Jerry Hanna requested four bills be introduced. A bill which amends the recreational statute so that the fee paid allows the person to become an invitee instead of a licensee; repeal of the blood statute; a bill concerning prejudgment interest; and a bill relating to pure comparative negligence, (see Attachment II).

The Chairman explained the Kansas Childrens Service League requests legislation be introduced in the area of adoption. They have incurred unnecessary delays in severing parental rights and getting the adoption underway.

The Kansas Association of Domestic Voilence has requested changes be made in the act on making a complaint against a spouse in the area of domestic violence. Their proposed legislation includes several pages of forms to be used when making a complaint. The Chairman proposed not having the forms printed in the bill at this time. If the bill is recommended for passage by the Committee, the forms can be amended into the bill.

Representative Roy requested a bill be introduced regarding notice of competency to stand trial.

District Judge Walker, Newton requested legislation ennumerating some traffic citations. The section in the act does not refer to a specific statute. He also requested legislation be introduced in connection with blood alcohol tests.

Marjorie VanBuren requested legislation concerning guardianship and conservatorship periodic reviews. She also proposed amending the notice to grandparents in deposition hearing under the child in need of care code.

Representative Bideau requested a bill be introduced amending the penalty for felony theft on an amount over $30,000 be raised to a Class D felony. He also requested a bill be introduced to provide that patient-physician privilege is not applicable in D.W.I. prosecutions.

The Kansas Bar Association reqested a John Doe fleeing bill be introduced.

A bill was requested by Char Schuknecht concerning the continuation of child support for disabled children.

A motion was made by Representative Buehler to introduce the bill requests as Committee bills. Representative Jenkins seconded the motion.

Representative Duncan objected to the Kansas Trial Lawyers Association's bill request concerning blood, and requested it be removed from the motion. A vote was taken and the Committee voted to remove the bill request concerning repeal of the blood statute.

A vote was taken on the amended motion. The motion passed.

The Chairman asked for a vote on introducing a bill concerning the repeal of the blood statute. The Committee voted not to introduce this bill.

Hearing on H.B. 2190-Divorce, disposition of property acquired by one spouse

Representative Guldner stated this bill amends K.S.A. 23-201 that any property acquired by either spouse, in the spouse's own right, would be excluded from consideration in making a division of property, unless the court determines that the result would be unjust and unreasonable.

Representative Roenbaugh informed the Committee she supports the intent of H.B. 2190 and urged the Committee to recommend this bill favorably for passage.

Representative Buehler testified this bill is important to a lot of people. It gives guidance and legislative intent to the courts. Fourteen other states separate property acquired in this manner.

Hearing on H.B. 2386-Concerning civil procedure, relating to limitations of actions

David Crockett testified H.B. 2386 is an important step in restoring balance and fairness to the Kansas legal system, and urged the Committee recommend the bill favorably, (see Attachment III).

Kent Pellegrino testified in favor of H.B. 2386 and urged the Committee's support, (see Attachment IV).

Don Williams did not appear. He stated in a letter to the Chairman that he supports the position taken by the Home Builders Association and urged favorable consideration of H.B. 2386, (see Attachment V).

Kathey Marney testified in support of H.B. 2386 and urged its passage, (see Attachment VI).

Hearing on H.B. 2122-Probate, insurance company payments to survivors with letters testamentary.

Wayne Morris testified in support of H.B. 2122. He submitted amendments which would allow the transfer of other types of personal property, (see Attachment VII).

The hearing was closed on H.B. 2122.

Representative Fuller submitted the subcommittee report on H.B. 2007. She stated the changes recommended by the subcommittee were cleanup amendments, (see Attachment VIII).

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY,

room _____, Statehouse, at _____ a.m./p.m. on February 17, 1987

Representative O'Neal submitted the subcommittee reports on H.B. 2021 and H.B. 2024. The recommended amendments to H.B. 2021 were attached to the Committee report, (see Attachment IX).

Representative Douville presented the subcommittee report on H.B. 2010. The subcommittee recommended an amendment to clarify the language, (see Attachment X).

Jim Kaup distributed some proposed amendments to the Kansas Tort Claims Act, H.B. 2023, (see Attachment XI).

The minutes of January 29, February 2 and February 3 were approved.

The Committee meeting was adjourned at 5:30 p.m.

The next meeting will be Wednesday, February 18, 1987, at 3:30 p.m. in room 313-S.

Kansas County & District Attorneys Association

827 S. Topeka Ave., 2nd Floor • Topeka, Kansas 66612 • (913) 357-6351

EXECUTIVE DIRECTOR • JAMES W. CLARK

PROPOSED LEGISLATION

AN ACT concerning criminal procedure; relating to preliminary examinations; amending K.S.A. 22-2902 and repealing the existing section.

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

Section 1. K.S.A. 22-2902 is hereby amended to read as follows: 22-2902. (1) Every person arrested on a warrant charging a felony or served with a summons charging a felony shall have a right to a preliminary examination before a magistrate, unless such warrant has been issued as a result of an indictment by a grand jury.

(2) The preliminary examination shall be held before a magistrate of a county in which venue for the prosecution lies within ten (10) days after the arrest or personal appearance of the defendant. Continuances may be granted only for good cause shown.

(3) The defendant shall not enter a plea at the preliminary examination. The defendant shall be personally present and the witnesses evidence shall be examined in said defendant's presence. The defendant's voluntary absence after the preliminary examination has been begun in said defendant's presence shall not prevent the continuation of the examination. The defendant shall have the right to crossexamine witnesses against the defendant and introduce evidence in his or her own behalf. If from the evidence it appears that a felony has been committed and there is probable cause to believe that a felony has been committed by the defendant the magistrate shall order the defendant bound over to the district judge or associate district judge having jurisdiction to try the case; otherwise, the magistrate shall discharge the defendant.

(4) If the defendant waives preliminary examination the magistrate shall order the defendant bound over to the district judge or associate district judge having jurisdiction to try the case.

(5) Any judge of the district court may conduct a preliminary examination, and a district judge or associate district judge may preside at the trial of any defendant even though such judge presided at the preliminary examination of such defendant.

(6) The complaint or information, as filed by the prosecuting attorney pursuant to K.S.A. 22-2905, or as amended, shall serve as

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the formal charging document at trial. When a defendant and prosecuting attorney reach agreement on a plea of guilt or nolo contendre, they shall notify the district court of their agreement and arrange for a time to plead, pursuant to K.S.A. 22-3210.

(7) The district judge or associate district judge, when conducting the preliminary examination, shall have the discretion to conduct arraignment at the conclusion of the preliminary examination.

New Section 2. In any pretrial or preliminary proceeding, hearing, or examination in connection with a criminal case, where the issue to be determined is whether probable cause exists to believe a defendant has committed the crime with which the defendant is accused, hearsay evidence shall be admissible, and the finding of probable cause may be based upon hearsay evidence in whole or in part. No victim or witness shall be required to appear unless the court, in light of the evidence and arguments submitted by the parties, determines that the appearance of the victim or witness likely would lead to a finding that there is no probable cause, or unless other compelling circumstances exist.

Section 2 3. K.S.A. 22-2902 is hereby repealed.

Section 3 4. This act shall take effect and be in force from and after its publication in the statute book.

ktla

suite 300 columbian building
112 west sixth
topeka, kansas 66603
(913) 232-7756

February 17, 1987

TO: House Judiciary Committee.
FROM: Jerry Hannah, Vice President for Legislation.
RE: Requests for Committee bills.

We appreciate the opportunity to present for your consideration four pieces of legislation. Attached you will find copies of the bills themselves. A summary of each follows.

RECREATIONAL STATUTE

Amends the statute so that payment of a fee deems an individual to be an invitee into the entire recreational area. This will protect consumers from the negligence of those operating a portion within the area for which they have not paid a specific fee.

REPEAL OF THE BLOOD STATUTE

The current statute provides immunity from liability, unless negligence is proven, for any person or entity providing human blood. It was enacted at a time when acquired immune deficiency syndrome was not a part of the debate. In its current form, it offers no incentive to insure blood does not contain the AIDS virus.

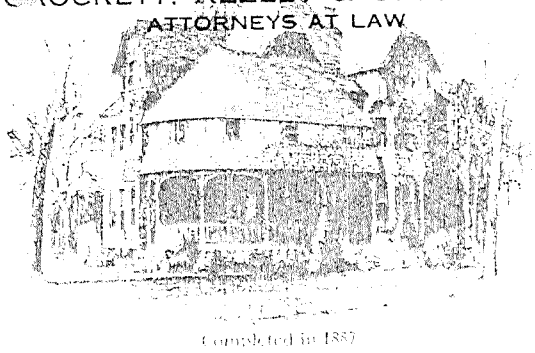
PREJUDGMENT INTEREST

Provides that interest shall be added to the damages awarded in a cause of action, and that the interest shall begin on the date the cause of action arose. When a judgment is rendered, it relates to the actual cause of action, and it is proper to provide the plaintiff with the benefits of the use of the award from that date.

PURE COMPARATIVE NEGLIGENCE

The purpose of the bill is to promote "equitable distribution of damages" in tort actions. Under the case law interpreting the statute, two slightly conflicting purposes of the statute emerged: (1) the distribution of loss rigidly on the basis of a party's proportionate fault share of the damages, and (2) merely the elimination of the harsh aspects of the former "all or nothing" contributory negligence defense. The first purpose was too rigid to allow for equitable distribution of loss in all cases, and the second purpose was too narrow in dealing with a wide variety of issues.

CROCKETT, KEELEY & GILHOUSEN
ATTORNEYS AT LAW



A PARTNERSHIP INCLUDING
A PROFESSIONAL ASSOCIATION:
DAVID G. CROCKETT, P.A.
EDWARD L. KEELEY
JAMES R. GILHOUSEN

DAVID A. GRIPP
OF COUNSEL

THE AMIDON HOUSE
1005 N. MARKET
WICHITA, KANSAS 67214
(316) 263-9662

Testimony of David G. Crockett
before the House Judiciary Committee
in Support of House Bill 2386
February 17, 1987

Mr. Chairman and Members of the Committee, my name is Dave Crockett. I am an attorney in Wichita, Kansas with the lawfirm of Crockett, Keeley & Gilhousen. I am appearing today on behalf of the Wichita Area Builders Association in support of H.B. 2386.

As you know, H.B. 2386 amends K.S.A. 60-513, the statute which establishes a limitation period of two years for certain types of lawsuits, including suits based on negligence. Specifically, H.B. 2386 addresses K.S.A. 60-513(b) which currently provides as follows:

> "(b) Except as provided in subsection (c) of this section, the cause of action in this action [section] shall not be deemed to have accrued until the act giving rise to the cause of action first causes substantial injury, or, if the fact of injury is not reasonably ascertainable until some time after the initial act, then the period of limitation shall not commence until the fact of injury becomes reasonably ascertainable to the injured party, but in no event shall the period be extended more than ten (10) years beyond the time of the act giving rise to the cause of action."

The current statutory section was enacted in 1963. It would appear from a straight-forward reading of the section that no action based on negligence could be filed more than ten (10) years after the act complained of in the lawsuit. The February 15, 1963 minutes of the House Judiciary Committee support such an interpretation as the legislative intent.

Nevertheless, the Supreme Court of the State of Kansas construed this section quite differently in Ruthrauff, Administratrix v. Kensinger, 214 Kan. 185, 519 P.2d 661 (1974). In order to fully appreciate the impact of the

Attachment III
House Judiciary 2/17/87

Ruthrauff decision, it is necessary to review the facts confronting the Court in that case. The lawsuit arose from a gas explosion and fire. The plaintiff sought damages from the defendant construction company and others, claiming that the construction company had negligently constructed the property thereby allowing the explosion to occur. The important dates are as follows:

1. May, 1959; all work completed by defendant
2. May, 1960; defendant sold property to Hall
3. December, 1969; Hall sold property to Smith
4. September 17, 1970; explosion
5. September 15, 1972; suit filed

The trial court concluded that the plaintiff's claim was barred by the same language which now appears as K.S.A. 60-513(b), because the suit was filed more than thirteen years after the alleged negligent act.

The Supreme Court, however, after seven pages of reasoning, reversed the trial court and held that:

1. The period of limitation does not begin to run until the date on which substantial injuries result; and
2. The ten-year provision refers only to injuries which are not reasonably ascertainable until some time after the initial act.

In other words, the Supreme Court limited the application of the ten-year provision to injuries which are not immediately ascertainable, e.g. injuries such as inhalation of toxic material causing noticeable damages a substantial period of time later. The Court construed the ten-year provision to mean that such injuries must be ascertained within ten years of the date of the act causing the injuries, otherwise the claim will be barred by the statute of limitations.

But what about sudden and immediately ascertainable injury, such as the injuries caused by the gas explosion in the Ruthrauff case? The Supreme Court concluded that the ten-year period has no application to claims for such

injuries, and consequently such claims are not barred if a suit is filed within two years of the date of the injury. Therefore the plaintiff in Ruthrauff was permitted to proceed, even though the plaintiff was seeking damages for an act which had occurred more than thirteen years before the lawsuit was filed. The Ruthrauff decision is still the law of this state.

Should the Ruthrauff decision remain the law of Kansas? Leaving aside the technical principles of statutory construction, and leaving aside whether the Supreme Court was correct in its interpretation of this section, should the law allow a suit for damages arising from an act or omission more than a decade old? I suggest to you that the answer to these questions is "no".

This issue is far from being merely academic. Two years ago I was hired by a client who had constructed a small medical office building for two doctors. My client completed his construction in October, 1972. In February, 1984, more than thirteen years later, an elderly lady slipped and fell when leaving one of the medical offices in the building. In March, 1985, more than fourteen years after my client drove the last nail in that building, he was sued by the lady on a theory of negligent design and construction. Because the plaintiff filed her suit within two years of the date of her injury, my client was completely unprotected by any statute of limitations. We were successful in our defense of the client on other grounds, but only after a substantial expenditure of time and money.

An even more dramatic example, albeit thank-goodness a hypothetical one, is my firm's own office building. Our firm is located in a Victorian mansion which has been adapted for office use. The building was completed in 1887 by the Garver family, and we're planning a 100th birthday party this spring. Suppose someone slips on the limestone front steps, or tumbles down the curving front staircase. There would be no legal barrier to such a person filing suit against poor old Mr. Garver himself, claiming that he was negligent in the design or construction of the steps or the stairway. Of course, Mr. Garver and his worldly assets are now long gone, but this would not be true if an entity such as a corporation had built our house a century ago. If that corporation were still in business, it would be every bit as exposed to liability claims in 1987 as it was in 1887.

My comments to this point have concerned builders and contractors. As I noted at the outset of my remarks, I am here on behalf of the Wichita Area Builders Association. I related the story about my client and the medical building he constructed, and I followed it with the anecdote about our office building. Even the Ruthrauff case involved a professional contractor.

But it would be a mistake to conclude that H.B. 2386 would help only contractors. Individual home sellers have found themselves increasingly the targets of negligence suits, and the time periods for those suits are just as unrestrained as they are for suits against contractors.

This state of the law is wrong. In addition to being wrong, it is dangerous. There must be some point in time at which liability exposure terminates. Otherwise, our society is like a person rolling a snowball uphill. The farther he goes, the bigger the snowball gets, and the bigger its gets the harder it is to roll, until finally it stops altogether.

There is nothing radical whatsoever about limiting the period of time in which a person is exposed to liability. Periods of limitation existed in Roman law, and England adopted the Limitation Act over 350 years ago. Developments in the Law: Statutes of Limitations, 63 Harv.L.Rev. 1177 (1950).

House Bill 2386 is an important step in restoring balance and fairness to our Kansas legal system. It establishes a ten year period during which suit may be filed. During that decade, the homes, shops, offices, and plants constructed by members of the Wichita Area Builders Association will be in daily use. If negligence really occurred in the design or construction of those facilities, it would surely become apparent during that ten-year period. Likewise, an individual who sells his home would be exposed to possible liability for negligence in repairs and maintenance for the same ten-year period. Ten years, after all, is a long time---twice the period of limitation even for written contracts.

It would be both fair and wise to adopt H.B. 2386, and we urge the Committee's favorable consideration.

Respectfully, submitted,

David G. Crockett

KANSAS (TOPEKA) CHAPTER
NATIONAL ELECTRICAL
CONTRACTORS ASSOCIATION, INC.

H. KENT PELLEGRINO
Manager

TESTIMONY

BEFORE THE

HOUSE JUDICIARY COMMITTEE

February 17, 1987

BY

H. Kent Pellegrino

NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION

Mr. Chairman & Members of the Committee:

My name is Kent Pellegrino, and I am here today on behalf of the members of the Kansas Chapters, National Electrical Contractors Association.

We support House Bill #2386 and urge the committee's support.

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5891 SOUTHWEST 29TH STREET • TOPEKA, KANSAS 66614 • PHONE 913/273-4810

Associated Builders & Contractors, Inc.
Chapter Office ● 1999 North Amidon ● Suite 100 ● Wichita, Kansas 67203-0057
Ph: 316/838-4774

February 23, 1987

Dear Representative Wunsch:

This letter is to advise you that the Sunflower Chapter of the Associated Builders & Contractors supports HB 2386 which was heard on Tuesday, February 17, 1987.

I apologize for being unable to attend the hearing but do wish to support the position taken by the Home Builders Association of Kansas and the testimony given by their attorney, David Crockett.

Our association urges favorable consideration of HB 2386, by the House Judiciary, in order to clarify the language of KSA 60-513.

Sincerely,

DON WILLIAMS

cc: House Judiciary Committee Members

Attachment V
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TESTIMONY
BEFORE THE
HOUSE JUDICIARY COMMITTEE
ON
FEBRUARY 17, 1987
BY
KATHY J. MARNEY
MECHANICAL CONTRACTORS ASSOCIATION OF KANSAS

Mr. Chairman and Members of the Committee:

My name is Kathy Marney, Executive Director of the Mechanical Contractors Association of Kansas. I appear before you to testify in favor of H.B. 2386, an act concerning civil procedure, relating to limitations of actions.

We support the testimony given by the Home Builders Association of Kansas on the new language to limit the liability of a contractor for 10 years. Thank you Mr. Chairman for allowing me to appear before you today.

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Security Benefit Life Insurance Company
A Member of The Security Benefit Group of Companies

Date: February 17, 1987

To: The Honorable Robert Wunsch, Chairman, and Honorable Members, House Committee on Judiciary

From: Wayne Morris, Law Department

Re: H.B. 2122--Affidavit Procedure for Payments to Heirs of Certain Decedents

I am Wayne Morris, Assistant Counsel for the Security Benefit Life Insurance Company. Security Benefit joins with other members of the insurance industry in strong support of H.B. 2122.

H.B. 2122 would amend K.S.A. 1986 Supp. 59-1507b to enact an affidavit procedure for the payment of small claims to a decedent's heirs, without the appointment of a personal representative and the probate of an estate.

We would respectfully request Committee consideration of the attached amendments which would allow the transfer of other types of personal property, in the same situation. Under the proposed amendments to H.B. 2122, any personal property, including the proceeds from an insurance policy and stock, could be transferred to a decendent's heirs if the total value of the estate is $10,000 or less, and the heirs submit a sworn affidavit stating that: 1) no petition for the appointment of an executor or administrator is pending or has been granted; 2) all debts have been paid; 3) all heirs are listed; and, 4) the affiants have the sole and exclusive right to succeed to the property of the decedent.

Under the laws governing life insurance policies, the proceeds of a policy are payable to the insured's estate if the beneficiary and contingent beneficiary have predeceased the insured. If an estate is not opened, however, the insurance company will not be able to obtain a binding release upon the payment of the claim to the insured's heirs, and it therefore risks multiple liabilities on one claim. For this reason, many insurance companies may be reluctant to pay such claims without an estate being opened.

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Similarly, stock or other personal property may be included in a decedent's estate, but the decedent's heirs may not be willing to bear the cost of opening an estate simply to receive a small amount of stock. If the insurance proceeds or stock are not transferred to the heirs, however, they will eventually escheat to the State.

To address these situations, 35 states have enacted some type of affidavit procedure for small estates, similar to the procedure proposed in H.B. 2122. We have proposed limiting its use to estates of $10,000 or less, but some states permit its use for estates of up to $50,000; we would certainly respect the Committee's judgment as to the maximum size of the estate for this procedure. We do believe, however, that this is an important piece of public interest legislation and we urge its adoption.

Thank you again for the opportunity to express our support for the bill and our proposed amendments. I will be happy to attempt to address any questions you may have.

WDM/lg

-Wayne

_____ (location), leaving an estate not exceeding $10,000 in value.

(2) The undersigned is the surviving spouse of _____ (decedent) and is entitled by _____ (decedent's will or by succession) to any money of _____ (decedent) deposited in _____ (specify bank, trust company, savings and loan association or credit union).

(3) There is on deposit with _____ (specify bank, trust company, savings and loan association or credit union and, if applicable, specify branch) the sum of $_____ in Account No. _____ in the name of _____ (decedent).

The undersigned requests that _____ (such sum or specify amount not exceeding $1,000) be paid to the undersigned, without procurement of letters _____ (testamentary or of administration).

(4) The undersigned has not, nor has anyone on behalf of the undersigned, withdrawn or received any funds on deposit in this account, except the sum of $_____ (if applicable).

(Jurat) (Signature)

(b) When a resident of the state dies, whether testate or intestate, if the total assets of the estate of the decedent do not exceed $10,000 in value, the successor or successors of the decedent, if entitled by will or by intestate succession to moneys payable to the decedent's estate by any insurance company, shall be paid, without having been granted letters testamentary or letters of administration, the moneys payable not in excess of $5,000, upon furnishing the insurance company with an affidavit showing the entitlement of the successor or successors to receive the moneys. Payment of the moneys to the successor or successors shall be deemed to be a payment to the personal representative of the decedent, and the receipt of the successor or successors shall constitute a full discharge and release from any further claim for such payment to the same extent as if the payment had been made to an executor or administrator of the decedent's estate. The affidavit required to be furnished under the provisions of this subsection shall be substantially as follows:

State of Kansas)
) ss.
County of)

_____ (name of affiant(s)) being duly sworn state:

(1) On _____, 19____, _____ (decedent) died _____ (testate or intestate) at _____ (location), leaving an estate not exceeding $10,000 in value, and I have attached a certified copy of the death certificate hereto.

(2) That no petition for the appointment of an executor or administrator of the decedent's estate is pending or has been granted.

(3) That all unpaid debts, claims or demands against the decedent or the decedent's estate and all estate and inheritance taxes due, if any, on the property transfers involved, have been or will be paid.

(4) That the following are the names, ages, relationships and addresses of the surviving relatives and heirs of the decedent:

Name	Age	Relationship	Address

(5) That the decedent's estate consists of the following property: (include the proceeds from policy no. _____):

Property	$ Value

(6) That affiant(s) has(have) the sole and exclusive right to succeed to the property of the decedent and that affiant(s) is(are) over 18 years of age and is(are) legally competent in all respects to make this affidavit and to receive the above mentioned property.

Wherefore, affiant(s) hereby request(s) that the proceeds from the above mentioned insurance policy be transferred to the affiant(s).

(Jurat)

_____
Signature(s)

Sec. 2. K.S.A. 1986 Supp. 59-1507b is hereby repealed.

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

personal

personal property

[stock, evidences of a debt, obligation, interest, or right]

[corporation or person]

[such personal property]

Session of 1987

HOUSE BILL No. 2007

By Special Committee on Judiciary

Re Proposal No. 20

12-15

AN ACT concerning children; relating to runaways; defining certain acts or omissions as crimes and providing penalties therefor; amending K.S.A. 1986 Supp. 21-3612 and repealing the existing section.

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

Section 1. K.S.A. 1986 Supp. 21-3612 is hereby amended to read as follows: 21-3612. (1) Contributing to a child's misconduct or deprivation is:

(a) Failure to report the location of a runaway when required by section 2;

(b) causing or encouraging a child under 18 years of age~~: (a)~~ to become or remain ~~a delinquent, miscreant, wayward or deprived child or~~ a traffic offender, child in need of care ~~or juvenile offender, as defined by the Kansas juvenile code,~~ *as defined by* the Kansas code for care of children or *a juvenile offender as defined by* the Kansas juvenile offenders code; ~~or~~

~~(b) to not~~ *(c) causing or encouraging a child under 18 years of age not to* attend school as required by law; ~~or~~

~~(c)~~ *(d) causing or encouraging a child under 18 years of age* to commit an act which, if committed by an adult, would be a ~~felony or~~ misdemeanor;

(e) failure to reveal, upon inquiry by a uniformed or properly identified law enforcement officer engaged in the performance of such officer's duty, any information one has regarding a runaway, with intent to aid the runaway in avoiding detection or apprehension;

(f) causing or encouraging a child under 18 years of age to commit an act which, if committed by an adult, would be a

strike lines 33 and 34

~~(d)~~ (c)

~~(e)~~ (d)

~~(f)~~ (e)

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felony; or

(g) sheltering, concealing or assisting a runaway with intent to aid the runaway in avoiding detection or apprehension by law enforcement officers.

Contributing to a child's misconduct or deprivation *as described in subsection (1)(a) is a class B misdemeanor. Contributing to a child's misconduct or deprivation as described in* ~~subsection (1)(b), (c), (d) or (e)~~ is a class A misdemeanor~~, except that if the defendant caused or encouraged the child to commit an act which, if committed by an adult, would be a felony, the offense~~. *Contributing to a child's misconduct or deprivation as described in subsection (1)(f) or (g)* is a class E felony.

(2) A person may be found guilty of contributing to a child's misconduct or deprivation even though no prosecution of the child whose misconduct or deprivation the defendant caused or encouraged has been commenced pursuant to the ~~Kansas juvenile code,~~ Kansas code for care of children, Kansas juvenile offenders code or Kansas criminal code.

(3) *As used in this section, "runaway" means a child under 18 years of age who is willfully and voluntarily absent from:*

(a) The child's home without the consent of the child's parent or other custodian; or

(b) a court ordered or designated placement, or a placement pursuant to court order, if the absence is without the consent of the person with whom the child is placed or, if the child is placed in a facility, without the consent of the person in charge of such facility or such person's designee.

(4) This section shall be part of and supplemental to the Kansas criminal code.

New Sec. 2. (a) If a person provides shelter to a child whom the person knows or has reason to know is a runaway, such person shall report the child's location either to a law enforcement agency or to the child's parent or other custodian.

(b) If a person reports a runaway's location to a law enforcement agency pursuant to subsection (a) and a law enforcement officer of the agency has reasonable grounds to believe that it is in the child's best interests, the child may be allowed to remain

46 ~~(g)~~ (f) add "or" after the word "sheltering" and delete the comma ⟨,⟩ strike ⟨or assisting⟩

50 strike ⟨in subsection (1)(a) is a class B misdemeanor, contri-

51 strike all of line 51 and

52 line 52 through (e)

75 strike ⟨or has reason to know⟩

in the place where shelter is being provided, in the absence of a court order to the contrary. If the child is allowed to so remain, the law enforcement agency shall promptly notify the department of social and rehabilitation services of the child's location and circumstances.

(c) This section shall be part of and supplemental to the Kansas code for care of children.

Sec. 3. K.S.A. 1986 Supp. 21-3612 is hereby repealed.

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

STATE OF KANSAS

MICHAEL R. (MIKE) O'NEAL
REPRESENTATIVE, 104TH DISTRICT—HUTCHINSON
RENO COUNTY
P.O. BOX 1868
HUTCHINSON, KANSAS 67504-1868

TOPEKA

COMMITTEE ASSIGNMENTS
VICE-CHAIRMAN: JUDICIARY
MEMBER: LABOR AND INDUSTRY
PUBLIC HEALTH AND WELFARE

HOUSE OF
MEMORANDUM
~~REPRESENTATIVES~~

TO: CHAIRMAN WUNSCH
HOUSE JUDICIARY COMMITTEE

RE: SUB-COMMITTEE REPORT ON HB 2021

FROM: REPRESENTATIVE MICHAEL R. O'NEAL

DATE: FEBRUARY 17, 1987

Mr. Chairman, your sub-committee on HB2021 has met and respectfully submits its sub-committee report. Attached hereto is a balloon version of HB 2021 setting forth the sub-committee's recommendations. The sub-committee met on two occasions and received input from the following individuals and groups:

T. C. Anderson and Kevin Fowler on behalf of the Kansas Society of Certified Public Accountants
Bob Arbuthnot on behalf of the Kansas Trial Lawyers Association
Bill Sneed on behalf of the Kansas Association of Defense Counsel
Ron Smith on behalf of the Kansas Bar Association
Lori Callahan on behalf of the American Insurance Association and
Mike Germann on behalf of the Kansas Railroad Association

In addition to recommending a further breakdown of "non-economic injuries and losses," section 1(a) (1) the sub-committee recommends including in the statute language found in the comments to the PIK jury instruction on the elements of damage in a personal injury action to make it clear that not all possible elements of damage need be listed on a particular verdict form if there has been no evidence introduced in trial to support that category of damage.

The sub-committee also recommends conforming medical malpractice statutes with HB 2021.

Inasmuch as the intent of the bill is to begin collection of statistical information on jury verdicts in Kansas, the sub-committee suggests that we make the statute take effect upon publication in the Kansas Register so that we can begin collecting statistical data at the earliest opportunity.

Michael R. O'Neal, Sub. Ch.

Vincent Snowbarger, Comm. Member

Bill Roy, Comm. Member

Attachment IX
House Judiciary 2/1
8

Session of 1987

HOUSE BILL No. 2021

By Special Committee on Tort Reform and Liability Insurance

Re Proposal No. 29

12-15

AN ACT concerning civil procedure; providing for itemized verdicts in certain cases; amending K.S.A. 1986 Supp. 60-1903 , 60-3406 and 60-3408 and repealing the existing section.

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

New Section 1. (a) In any action for damages for personal injury, ~~other than a medical malpractice liability action as defined by K.S.A. 1986 Supp. 60-3401 and amendments thereto;~~ the verdict shall be itemized by the trier of fact to reflect the amounts , if any, awarded for:

(1) Noneconomic injuries and losses; , as follows:
(A) Pain and suffering,
(B) disability,
(C) disfigurement
and any accompanying mental anguish;

(2) reasonable expenses of necessary medical care, hospitalization and treatment received; and

(3) economic injuries and losses other than those itemized under subsection (a)(2)

(b) The amounts required to be itemized pursuant to subsection (a) shall be further itemized by the trier of fact to reflect those amounts awarded for injuries and losses sustained to date and those awarded for injuries and losses reasonably expected to be sustained in the future. Where applicable,

(c) In any action for damages for personal injury, the trial court shall instruct the jury only on those items of damage upon which there is some evidence to base an award.

Sec. 2. K.S.A. 1986 Supp. 60-1903 is hereby amended to read as follows: 60-1903. (a) In any wrongful death action, the court or jury may award such damages as are found to be fair and just under all the facts and circumstances, but the damages, other than pecuniary loss sustained by an heir at law, cannot exceed in the aggregate the sum of $100,000 and costs.

(b) If a wrongful death action is to a jury, the court shall not instruct the jury on the monetary limitation imposed by subsection (a) upon recovery of damages for nonpecuniary loss. ~~The~~

Subcommittee report

jury ~~shall separately state the amount of damages awarded for pecuniary loss and for nonpecuniary loss.~~ If the jury verdict results in an award of damages for nonpecuniary loss which, after deduction of any amounts pursuant to K.S.A. 60-258a and amendments thereto, exceeds the limitation of subsection (a), the court shall enter judgment for damages of $100,000 for nonpecuniary loss.

(c) In any wrongful death action, the verdict shall be itemized by the trier of fact to reflect the amounts awarded for:

(1) Nonpecuniary damages;

(2) expenses for the care of the deceased caused by the injury; and

(3) pecuniary damages other than those itemized under subsection (c)(2).

(d) The amounts required to be itemized pursuant to subsections (c)(1) and (c)(3) shall be further itemized by the trier of fact to reflect those amounts awarded for injuries and losses sustained to date and those awarded for injuries and losses reasonably expected to be sustained in the future.

Sec. ~~3.~~ 5 K.S.A. 1986 Supp. 60-1903 ~~is~~ hereby repealed.

Sec. ~~4.~~ 6 This act shall take effect and be in force from and after its publication in the ~~statute book~~ Kansas register.

, if any,

Where applicable,

(e) In any wrongful death action, the trial court shall instruct the jury only on those items of damage upon which there is some evidence to base an award.

Insert sections 3 and 4, attached

, 60-3406 and 60-3408 are

Sec. 3. K.S.A. 1986 Supp. 60-3406 is hereby amended to read as follows: 60-3406. As used in K.S.A. 1986 Supp. 60-3406 through 60-3410:

(a) The words and phrases defined by K.S.A. ~~1985~~ 1986 Supp. 60-3401 and amendments thereto shall have the meanings provided by that section.

(b) "Current economic loss" means costs of medical care and related benefits, lost wages and other economic losses incurred prior to the verdict.

(c) "Future economic loss" means costs of medical care and related benefits, lost wages, loss of earning capacity or other economic losses to be incurred after the verdict.

(d) "Medical care and related benefits" means ~~all reasonable---medical,---surgical,----hospitalization,----physical rehabilitation---and---custodial---services,---including---drugs, prosthetic--devices--and--other--similar---materials---reasonably necessary--to--provide--medical--services~~ reasonable expenses of necessary medical care, hospitalization and treatment required due to the negligent rendering of or failure to render professional services by the liable health care provider.

Sec. 4. K.S.A. 1986 Supp. 60-3408 is hereby amended to read as follows: 60-3408. ~~(a) In every medical malpractice liability action in which the--verdict--awards--compensatory--damages,--the verdict--shall--be--itemized--to--reflect-the-amounts-awarded-for economic-loss--and--noneconomic--loss.---The--amount--awarded--for economic--loss-shall-be-further-itemized-to-show-current-economic losses-and-future-economic-losses.---The-amount-awarded-for-future economic-loss-shall-be-further-itemized--to--show--amounts--found necessary-for-future-medical-care-and-related-benefits.~~

~~(b)~~ In every medical malpractice liability action in which the verdict awards damages for future economic losses, the verdict shall specify the period of time over which payment for such losses will be needed.

STATE OF KANSAS

MICHAEL R. (MIKE) O'NEAL
REPRESENTATIVE, 104TH DISTRICT—HUTCHINSON
RENO COUNTY
P.O. BOX 1868
HUTCHINSON, KANSAS 67504-1868

TOPEKA

COMMITTEE ASSIGNMENTS
VICE-CHAIRMAN: JUDICIARY
MEMBER: LABOR AND INDUSTRY
PUBLIC HEALTH AND WELFARE

MEMORANDUM

HOUSE OF REPRESENTATIVES

TO: CHAIRMAN WUNSCH
HOUSE JUDICIARY COMMITTEE

FROM: MICHAEL R. O'NEAL

RE: SUB-COMMITEE REPORT ON HB 2024

DATE: FEBRUARY 17, 1987

Mr. Chairman, your sub-committee on HB 2024 has met and respectfully submits its committee report. The sub-committee met on two occasions prior to this report and received input from the following individuals and groups:

T. C. Anderson and Kevin Fowler on behalf of the Kansas Society of Certified Public Accountants
Bob Arbuthnot on behalf of the Kansas Trial Lawyers Association
Bill Sneed on behalf of the Kansas Association of Defense Counsel
Ron Smith on behalf of the Kansas Bar Association
Lori Callahan on behalf of the American Insurance Association and
Mike Germann on behalf of the Kansas Railroad Association.

The committee will recall that HB 2024 was introduced by the special committee on tort reform and liability insurance to address concerns raised in the recent Kansas Supreme Court case of Federal Savings and Loan Insurance Corporation vs. Huff, 237 Kan. 873. In that case, the Supreme Court construed KSA 60-258a as having no application to an action in negligence seeking damage for economic loss only. The interim committee agreed with the Kansas Society of Public Accountants that the public policy of this state supports including negligence claims for economic loss only within the purview of the comparative negligence statute KSA 60-258a.

The Supreme Court in Huff also held that the absence of contributory negligence as a defense in a case bars the application of the comparative negligence statute (KSA 60-258a). This holding has raised a question as to the proper application of the comparative negligence statute in traditional negligence actions where for one reason or another contributory negligence on the part of the plaintiff is either unavailable as a matter of law or fact. The question arises as to how negligence actions should be governed where negligence is alleged against two or more defendants but where there are no allegations of negligence against one or more plaintiffs.

HB 2024 in its present form also attempts to codify the Supreme Court determination in Brown vs. Keill, 224 Kan. 195, that joint and several liability among joint tortfeasors no longer exists in Kansas.

Since the Supreme Court decision in Brown, however, there have been a number of cases where joint and several liability has been held applicable to

certain fact situations. One of the better examples is set out in the case of Lynn V. Taylor, 7 K. App. 2d 369 where one defendant was charged with negligence and the other with fraudulant representations. The court found joint and several liability under those circumstances holding that comparative negligence with all its ramifications is available in actions only where the culpability of at least two parties is comparable, i.e., of the same quality.

The interim committee decided the rule abrogating joint and several liability should be codified. The question arises as to what the public policy should be in cases where there are multiple defendants with varying degrees of culpability ranging from simple negligence all the way to intentional acts. Because it appears that the Kansas Supreme Court and the Kansas Court of Appeals have been struggling with this issue, it is the opinion of the sub-committee that this body should address the public policy considerations in determining what the proper application of the comparative negligence statute should be in such cases. Because this issue warrants some additional study and, in view of the fact that the issue of adding economic loss claims to the category of cases coming under KSA 60-258a has been endorsed by all parties interested in this legislation, it is the opinion of the sub-committee that a substitute HB 2024 should be drafted addressing the issue of economic loss claims only so that this issue can proceed on through the legislative process without further delay, and that a separate committee bill be drafted on the issue of the proper application of the comparative negligence statute in cases where there are varying degrees and quality of culpability.

The sub-committee has sought input from a number of members of the trial bar representing both the interests of plaintiffs and defendants and their responses are expected this week. The committee wishes to meet again to decide on what should be contained in the new committee bill and we request that staff be notified that there will be an additional bill request before the deadline for committees requesting drafts of legislation.

Michael R. O'Neal, Chairman

Bill Roy, Sub-committee member

Vincent Snowbarger, Sub-committee member

HB 2024

60-258a. **Contributory negligence as bar to recovery in civil actions abolished, when; award of damages based on comparative negligence; imputation of negligence, when; special verdicts and findings; joinder of parties; proportioned liability.** (a) The contributory negligence of any party in a civil action shall not bar such party or ~~said~~ party's legal representative from recovering damages for negligence resulting in death, personal injury ~~or~~, property damage, if such party's negligence was less than the causal negligence of the party or parties against whom claim for recovery is made, but the award of damages to any party in such action shall be diminished in proportion to the amount of negligence attributed to such party. If any such party is claiming damages for a decedent's wrongful death, the negligence of the decedent, if any, shall be imputed to such party.

(b) Where the comparative negligence of the parties in any such action is an issue, the jury shall return special verdicts, or in the absence of a jury, the court shall make special findings, determining the percentage of negligence attributable to each of the parties, and determining the total amount of damages sustained by each of the claimants, and the entry of judgment shall be made by the court. No general verdict shall be returned by the jury.

(c) On motion of any party against whom a claim is asserted for negligence resulting in death, personal injury ~~or~~ property damage, any other person whose causal negligence is claimed to have contributed to such death, personal injury or property damage shall be joined as an additional party to the action.

(d) Where the comparative negligence of the parties in any action is an issue and recovery is allowed against more than one party, each such party shall be liable for that portion of the total dollar amount awarded as damages to any claimant in the proportion that the amount of ~~his or her~~ causal negligence bears to the amount of the causal negligence attributed to all parties against whom such recovery is allowed.

(e) The provisions of this section shall be applicable to actions pursuant to this chapter and to actions commenced pursuant to the code of civil procedure for limited actions.

History: L. 1974, ch. 239, § 1; L. 1976, ch. 251, § 4; Jan. 10, 1977.

Session of 1987

HOUSE BILL No. 2010

By Special Committee on Judiciary

Re Proposal No. 20

12-15

AN ACT concerning the crime of indecent liberties with a child; amending K.S.A. 1986 Supp. 21-3503 and repealing the existing section.

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

Section 1. K.S.A. 1986 Supp. 21-3503 is hereby amended to read as follows: 21-3503. (1) Indecent liberties with a child is engaging in any of the following acts with a child who is not married to the offender and who is under 16 years of age:

(a) Sexual intercourse; ~~or~~

(b) any lewd fondling or touching of the person of ~~either~~ the child ~~or,~~ the offender ~~or another~~, done or submitted to with the intent to arouse or to satisfy the sexual desires of ~~either~~ *the child* ~~or,~~ the offender or ~~both~~ *another*.

(2) Indecent liberties with a child is a class C felony.

Sec. 2. K.S.A. 1986 Supp. 21-3503 is hereby repealed.

Sec. 3. This act shall take effect and be in force from and after its publication in the Kansas register.

Subcommittee report

either

or

or

both; or (c) soliciting the child to engage in any lewd fondling or touching of the person of another with the intent to arouse or satisfy the sexual desires of the child, the offender or another

Attachment X
House Judiciary 2/17/87

League of Kansas Municipalities

PUBLISHERS OF KANSAS GOVERNMENT JOURNAL/112 WEST SEVENTH ST., TOPEKA, KANSAS 66603/AREA 913-354-9565

TO: Chairman Bob Wunsch and Members of the House Judiciary Committee
FROM: Jim Kaup, League Attorney
DATE: February 17, 1987
SUBJECT: HB 2023--Amendments to the Kansas Tort Claims Act

Enclosed please find the following documents:

(1) A proposal by the League's Task Force on Tort Reform relating to the establishment of a written notice of claims procedure for tort actions brought under the Kansas Tort Claims Act.

(2) The League's proposed amendment to HB 2023 to provide a more adequate response to the expansion of municipal tort liability created by the 1986 Kansas Supreme Court decision of Fudge v. City of Kansas City.

(3) A photocopy of the Fudge decision, 239 Kan. 369.

Attachment XI
House Judiciary 2/17/87

League of Kansas Municipalities

PUBLISHERS OF KANSAS GOVERNMENT JOURNAL/112 WEST SEVENTH ST., TOPEKA, KANSAS 66603/AREA 913-354-9565

MEMORANDUM

TO: House Judiciary Committee
DATE: February 4, 1987
RE: HB 2023; Proposed Legislation Concerning **Written Claim Procedures for Municipalities**
FROM: David E. Retter, Chairman, League of Kansas Municipalities' Task Force on Municipal Tort Liability; City Attorney, Concordia

I. **Introduction:** This memorandum is submitted to support adoption of legislation clarifying the written claim procedure for claims against municipalities, set out in K.S.A. 12-105a and 12-105b as amended.

II. **Background:** Under current law, claims against Kansas municipalities are required to be submitted in writing under K.S.A. 12-105a and 12-105b.

The K.S.A. 12-105a and 12-105b written claim provisions were amended at the same time K.S.A. 12-105 was repealed by the passage of the Tort Claims Act, Chapter 186, 1979 Session Laws of Kansas. Now-repealed K.S.A. 12-105 had required notice of claims against cities to be filed within six months of the incident.

So, while the old K.S.A. 12-105 six-month claim period is gone, K.S.A. 12-105a and 12-105b still require filing of the claim against the municipality, in writing, as a condition precedent to filing of a lawsuit.

K.S.A. 12-105a(a) defines "municipality" very comprehensively to include counties, townships, cities, school districts, junior colleges, municipal universities, drainage districts, cemetery districts, fire districts, other political subdivisions or taxing units, and includes their boards, bureaus, commissions, committees and other agencies.

K.S.A. 12-105a(c) defines "claim" as a document relating to and stating an amount owing to the claimant by a municipality for material or service furnished to the municipality or some action taken by or for the municipality and for which the municipality may or may not be responsible in a liquidated or an unliquidated amount. This wording clearly contemplates claims arising either in tort or in contract. No rational basis presents itself to justify excluding tort claims from the claim procedure. Commentators have noted that the Tort Claims Act itself makes no provision for filing a claim (e.g. Palmer, "A Practitioner's Guide to the Kansas Tort Claim Act," 48 Journal of the Kansas Bar Association 299,303).

K.S.A. 12-105b(a) uses mandatory language in stating in relevant portion:

"**All** claims against a municipality must be presented in writing with a full account of these items, and **no claim shall be allowed except in accordance with the provisions of this section. . .**" (Emphasis supplied.)

Further, 12-105b(f) imposes mandatory claim auditing duties on municipal officers charged by law to approve claims.

If the claim procedure is used, and the claim is at least partially allowed, no costs can be recovered against the municipality. K.S.A. 12-105b(c).

Notwithstanding clear legislative intent, lawsuits are being filed without prior submission of the claim under the statutory procedure. A recent, quick survey of a handful of Kansas cities revealed that the cities of Fort Scott, Kansas City, Wichita and Overland Park have experienced lawsuits being brought without compliance with K.S.A. 12-105a and 12-105b.

While it is the League's Task Force's reading of the above statutes and the legislative history of the Kansas Tort Claims Act that a claim mechanism is provided by the above statutes for claims arising under the Kansas Tort Claims Act, clarification of the municipal claim statutes is needed to address such questions as:

1. The effect of failure to file a written claim on the claimant's right to sue:

   a. before the applicable statute of limitations runs; and

   b. after the applicable statute of limitations runs.

2. The proper time limit for a municipality to consider a claim and either allow it, or deny it (either expressly, or by inaction within a specific time) before suit is allowed.

III. **The effect of a failure to file a written claim upon the claimant's right to sue:**

A. After the applicable statute of limitations has run:

After the statute of limitations runs on a claim against a municipality it is barred. Filing a written claim will not revive it, since it can be denied on the basis of running of the statute of limitations.

B. Before the applicable statute of limitations has run:

If the claimant files suit before a written claim is filed with the municipality, the suit should be stayed, or dismissed without prejudice, so that the legislatively contemplated claim procedure can have an opportunity to work. The claim statutes should be clarified to state that filing the written claim with the municipality tolls the running of the statute of limitations. This is necessary so the claimant will not be precluded from filing suit by the occurrence of inaction by the municipality, in combination with the running of the applicable statute of limitations. This means that under no circumstances would the proposed clarification to the claims procedure work to shorten the applicable statute of limitations for any claimant.

IV. **The proper time limit for a municipality to consider a claim and either allow it, or deny it (either expressly, or by inaction within a specific time) before suit is allowed:**

Even though the filing of the written claim should toll the running of the statute of limitations, there should be a claim consideration period (120 days is suggested in the attached language) during which the city may consider the claim.

If the claim is allowed, presumably no suit would be allowed to be filed. If the claim is denied, suit would be required within the time allowed by the code of civil procedure.

If the municipality simply does not act within 120 days, this would be deemed to be a denial of the claim.

It should be noted that the time for filing suit could even be extended under this proposed legislation. Since filing the claim would toll the running of the applicable statute of limitations, time to file suit could be extended by up to 120 days (the claim consideration period).

V. Comments:

A number of advantages to all parties, the claimant and the public, flow from a claims procedure:

(1) The benefit to municipalities of this statutory clarification is that it reinforces the fact that meritorious tort claims can be considered and paid in the same fashion as contract claims, and prior to institution of costly litigation. The claim procedure is a responsible approach to contract claim payment and tort claims should be similarly treated.

(2) It should be the public policy of the state of Kansas to encourage municipal efforts to promptly and responsibly consider all claims, and pay meritorious ones.

(3) Written claim requirements should provide early notice of defective conditions to municipalities, which will lead to early remedies for past harm and possible avoidance of future harm resulting from those defective conditions.

VI. Suggested legislation of the League's Task Force on Municipal Tort Liability:

Following is the League's proposed amendment to HB 2023 that will clarify our reading of the law that claims brought under the Tort Claims Act are subject to the written notice of claims procedure found at K.S.A. 12-105a and 12-105b.

Our amendment, in addition to clarifying the applicability of claims procedure to the KTCA, would (1) specify the information to be submitted by the claimant when filing the claim; (2) establish a 120 day claims consideration period; and (3) provide that the filing of the claim tolls the statute of limitations.

12-105b. Same; presentment of claims; actions; payments in advance of approval; auditing; approval. (a) All claims against a municipality must be presented in writing with a full account of the items, and no claim shall be allowed except in accordance with the provisions of this section. A claim may be the usual statement of account of the vendor or party rendering a service or other written statement showing the required information.

(b) Claims for salaries or wages of officers or employees need not be signed by the officer or employee, if a payroll claim is certified to by the administrative head of a department or group of officers or employees or an authorized representative that the salaries or wages stated therein were contracted or incurred for the municipality under authority of law, that the amounts claimed are correct, due and unpaid and that the amounts are due as salaries and wages for services performed by the person named.

(c) [(1)] No costs shall be recovered against a municipality in any action brought against it for any claims allowed in part, unless the recovery shall be for a greater sum than the amount allowed, with the interest due. Subject to the terms of applicable insurance contracts, judgments and settlements obtained for claims recoverable pursuant to the Kansas tort claims act shall be presented for payment in accordance with this section or in such manner as the governing body may designate.

(d) Claims submitted by public utilities, as defined in K.S.A. 66-104, may be authorized to be paid in advance of approval thereof by the governing body in accordance with the provisions of this subsection. The governing body may designate and authorize one or more of its officers or employees to pay any claim made against the municipality by a public utility in advance of its presentation to and approval by the governing body if the amount of such claim becomes due and owing before the next scheduled regular meeting of the governing body. Any officer or employee authorized to pay claims under this subsection shall keep an accurate record of all moneys paid and the purpose for which expended, and shall submit the record to the governing body at the next meeting thereof. Payments of claims by an officer or employee of the municipality under authority of this subsection are valid to the same extent as if the claims had been approved and ordered to be paid by the governing body.

(e) Claims submitted by members of a municipality's self-insured health plan may be authorized to be paid in advance of approval thereof by the governing body. Such claims shall be submitted to the administrative officer of such insurance plan.

(f) Except as otherwise provided, before any claim is presented to the governing body or before any claim is paid by any officer or employee of the municipality under subsection (d), it shall be audited by the clerk, secretary, manager, superintendent, finance committee or finance department or other officer or officers charged by law to approve claims affecting his, her or its area of government, and thereby approved in whole or in part as correct, due and unpaid.

(2) Any person having a claim against a municipality which could give rise to an action brought under the Kansas tort claims act shall file a written notice as provided in this subsection before commencing such action. The notice shall be filed with the clerk or governing body of the municipality and shall contain the following: (a) The name and address of the claimant, and the name and address of his or her attorney, if any; (b) A concise statement of the factual basis of the claim, including the date, time, place, and circumstances of the act, omission, or event complained of; (c) The name and address of any public employee involved, if known; (d) A concise statement of the nature and the extent of the injury claimed to have been suffered; (e) A statement of the amount of monetary damages that is being requested. Once notice of the claim is filed, no action shall be commenced until after the claimant has received notice from the municipality that it has denied the claim, or until after 120 days has passed following the filing of the notice of claim, whichever occurs first. A claim is deemed denied if the municipality fails to approve the claim in its entirity within 120 days, unless the interested parties have reached a settlement before the expiration of that period. No person may initiate an action against a municipality unless the claim has been denied in whole or part. Any action brought pursuant to the Kansas tort claims act shall be commenced within the time period provided for in the code of civil procedure, or it shall be forever barred; except that, if compliance with the provisions of subsection (c)(2) would otherwise result in the barring of an action, such time period shall be extended by the time period required for compliance with the provisions of subsection (c)(2).

THE CITY OF WICHITA

February 9, 1987

House Judiciary Committee
Bob Wunsch, Chairman
State Capital Building
Topeka, Kansas 66612

RE: House Bill No. 2023,
Relating to Tort Reform

Ladies and Gentlemen:

My comment on House Bill 2023 deals with Section 3d of the Bill. I did appear before the Committee on this matter on the 5th day of February, 1987 and thus, these written comments are made as a supplement to my oral comments and also made for purposes of reference.

As to Section 3d of House Bill 2023, I do respectively offer to the Committee an amendment. The amendment being as follows:

"(d) Adoption or enforcement of, or failure to adopt or enforce, any policy governing any employee's discharge of duties which protects a person's health, safety or property unless a duty of care, independent of such policy is owed to the specific individual injured; . . . ."

After offering the amendment, I will first address the Bill as proposed. It is my impression that the Bill, as proposed, is intended to very narrowly address the liability created against cities and other governmental entities that arise out of the case of Fudge v. Kansas City, 239 Kan. 369.

The area of Section 3d that creates as proposed in House Bill 2023 that creates a problem are the words "written" and "personnel". The word "written" presents a problem for the reason that City of Wichita, as I assume most cities and other governmental entities have policies that are followed by police officers, firemen, health officers and building inspectors that are not written policies but are nonetheless policies that have been developed over the years.

It is simply not possible to reduce to writing all policies that are developed.

As mentioned above, the word "personnel" also presents a problem. The problem with the word "personnel" is that its meaning as presently set forth in House Bill 2023 is not clear. In the City of Wichita, the police department does not consider their guidelines that direct police officers in given situations to be personnel policies. Instead, the Police Department has a manual that is titled, "Policy and Procedure Manual". The City of Wichita Fire Department again has guidelines of policies that are not part of the personnel manual and are not related to any official personnel policy. The Fire Department's guidelines are titled, "Operation Manual".

The language suggested in the above amendment does not extend protection to governmental entities beyond what is presently intended by Section 3d of House Bill 2023. It simply clarifies what is intended to be covered, i.e., policies governing an employee's discharge of duties which protect a person's health or safety. The suggested amendment to Section 3d still addresses the liability created under Fudge v. Kansas City in a very narrow manner.

The next area that will be addressed is that there is justification from a policy standpoint for inserting in House Bill 2023 an amendment to the Kansas Tort Claim Act that responds to the Fudge v. Kansas City case. If the liability created under Fudge v. Kansas City is not addressed, then cities and other governmental entities will be discouraged from creating policies in the future that protect persons and property because of the potential liability, i.e., creation of future policies in these areas will be closely scrutinized in order to avoid creating additional liability.

The existence of liability as created under Fudge v. Kansas City will have the effect and has, I am sure, had the effect of causing governmental entities to reexamine policy guidelines that presently protect persons and property. This reexamination will result in elimination of guidelines where possible and narrowing of guidelines. Again, protection to property and individuals will be reduced.

A second policy reason for enactment of Section 3d of House Bill 2023 is based on the fact that the policies and guidelines particularly as developed and used by police departments and fire departments are used to measure performance of individual firemen and

policemen and to bring about a consistency to the way various matters are handled within a fire department or a police department. Thus, more uniform protection is provided to the public and to persons and property.

In conclusion, it is urged that House Bill 2023 be passed with the amendment to Section 3d as set out above. This amendment is being presented by the League Task Force on Municipal Liability.

Sincerely,

Thomas R. Powell

Thomas R. Powell
Interim City Attorney and
Member of League Task Force
on Municipal Tort Liability

TRP:kh

No. 58,240

DEBORAH K. FUDGE, *et al.*, *Appellees*, v. CITY OF KANSAS CITY, KANSAS, *et al.*, *Appellants*.

SYLLABUS BY THE COURT

1. POLICE AND SHERIFFS—*Liability of Law Enforcement Officer When Performing Duty Owed to Public at Large.* As a general rule, the duty of a law enforcement officer to preserve the peace is a duty owed to the public at large. Absent some special duty owed an individual, liability will not lie for damages.

2. TORTS—*Liability to Third Person for Negligent Performance of Service Necessary for Protection of Third Person.* One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if (a) his failure to exercise reasonable care increases the risk of such harm, or (b) he has undertaken to perform a duty owed by the other to the third person, or (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

3. POLICE AND SHERIFFS—*Liability of Law Enforcement Officer for Failure to Follow Mandatory Guidelines.* Where police officers are subject to a specific, mandatory set of guidelines to use with regard to handling intoxicated persons, the officers and the employing municipality are subject to liability under the Kansas Tort Claims Act for the failure to follow those guidelines.

4. TRIAL—*Jury Verdict—Irregularities in Form—Effect.* So long as a verdict manifests the intentions and findings of the jury upon the issues submitted, it will not be overthrown for irregularities in form.

5. WRONGFUL DEATH—*Evidence of Remarriage of Surviving Spouse—Admissibility in Wrongful Death Action.* Evidence of the remarriage of a surviving spouse is inadmissible in a wrongful death action.

6. DAMAGES—*Pain and Suffering—Evaluation of Award.* The standard of evaluation by which an award for pain and suffering is measured is such amount as reasonable persons estimate to be fair compensation when that amount appears to be in harmony with the evidence and arrived at without passion or prejudice.

Appeal from Wyandotte district court, WILLIAM M. COOK, judge. Opinion filed June 13, 1986. Affirmed.

Daniel B. Denk, of Kansas City, argued the cause, and *Robert J. Watson*, city attorney, and *Jody Boeding*, assistant city attorney, were with him on the brief for appellants.

Bryson R. Cloon, of Cloon & Bennett, of Overland Park, argued the cause and was on the brief for appellees.

The opinion of the court was delivered by

HERD, J.: This is a wrongful death and survival action arising out of an automobile accident. The City of Kansas City and Kansas City police officers appeal from a jury verdict finding them 18% at fault for the accident.

The facts are that on the night of July 29, 1981, and in the early morning hours of July 30, 1981, Delmar Henley was drinking with friends at the Sixteenth Round bar located at 2847 Roe Lane, Kansas City, celebrating his sister-in-law's birthday. Henley was very drunk, having consumed, by his own estimate, 29 to 30 beers and 10 "kamikazees". He stumbled around, knocked over chairs and was belligerent, loud and obnoxious. Janice Heckman, the bartender, asked Henley to leave. Henley refused and Ms. Heckman called the Kansas City police. Before the police arrived, all of the bar patrons, including Delmar Henley, left the bar and migrated to the adjoining parking lot.

According to witnesses, two police officers arrived at the scene while Henley was in the parking lot. The officers got out of their cars, approached to within four or five feet of Henley and observed his intoxicated condition. The policemen, Officers Conchola and Gorham, instructed those patrons remaining in the parking lot to leave the scene. Everyone complied, leaving on foot, except Henley, who left in his car. These same witnesses testified the officers told Henley to get in his car and leave. Henley corroborated this testimony. The policemen denied these statements, testifying instead that they did not see Henley and that there was no disturbance in the parking lot while they were there. Testimony of two other officers who arrived at the parking lot after it had been vacated corroborated the testimony of Conchola and Gorham.

Janice Heckman testified that when Delmar Henley drove out of the parking lot he veered his car into the southbound lane of Roe Lane, heading north. His action nearly resulted in a collision with a southbound Kansas City police car, which stopped to avoid an accident. Henley then swerved into the proper traffic lane and proceeded north, as the policeman continued south on Roe Lane.

Simultaneously with these events, James E. Fudge left his home with his son, Jamie, to deliver Kansas City Star newspapers to coin-operated dispensers in Wyandotte County. Fudge

was driving south on Roe Lane when Henley's car approached from the opposite direction, swerving from lane to lane. Henley's car collided with Fudge's delivery van, throwing Fudge out the open door and pinning him beneath the van until firefighters and emergency medical personnel were able to lift the van off him. James Fudge died twenty days later of injuries received in the accident.

The results of a blood alcohol test taken shortly after the accident showed Henley's blood alcohol level to be .26%. As a result of the accident, Henley was convicted of vehicular homicide and served six months in jail.

The wife and children of James Fudge brought a wrongful death and survival action against Delmar Henley and the City of Kansas City. After a one-week trial, the jury found the decedent 7% at fault, Henley 75% at fault, and the City of Kansas City and the police officers 18% at fault and awarded damages in the amount of $1,095,103.66. The City of Kansas City and the police officers perfected this appeal. Henley was not active in the trial and is not a party to this appeal.

The first issue we will consider on appeal is whether the City of Kansas City was immune from liability for the actions of its law enforcement officers in this case. Determination of this primary issue requires an examination of the Kansas Tort Claims Act, K.S.A. 75-6101 *et seq.* We recently reviewed the concept of governmental immunity and its common-law and statutory history in this state and need not repeat that background discussion here. See *Hopkins v. State,* 237 Kan. 601, 608-09, 702 P.2d 311 (1985).

Basically, the Kansas Tort Claims Act makes governmental liability for tort claims the rule (K.S.A. 75-6103[a]), subject to numerous exceptions (K.S.A. 75-6104). Appellants argue this case fits within three exceptions to the general rule: K.S.A. 75-6104(c), (d) and (m). Prior to considering the application of these exceptions to the present case, we must first consider a preliminary issue.

Before a governmental entity can be liable for damages there must be (1) a negligent or wrongful act or omission by one of its employees; and (2) the employee (a) must be acting within the scope of his employment, and (b) under circumstances where the governmental entity, if a private person, would be liable under

the laws of this state. *Hopkins v. State*, 237 Kan. at 609; K.S.A. 75-6103.

In order for an individual to be liable for a negligent or wrongful act, there must be a duty to act. Appellants, relying upon the "public duty doctrine," argue the City of Kansas City and its police officers did not owe a duty of care to James Fudge. The public duty doctrine provides a governmental entity is not liable for torts committed against a person in absence of a special duty owed to the injured party. Under this doctrine, the police officers owed a duty to the public at large, rather than to any individual. While this issue is raised for the first time on appeal, and thus may not ordinarily be considered (*Lostutter v. Estate of Larkin*, 235 Kan. 154, 166, 679 P.2d 181 [1984]), we hold that because it involves a legal issue arising from proven facts determinative of a significant issue in the case, it will be considered as an exception to the rule. *Wortman v. Sun Oil Co.*, 236 Kan. 266, 271, 690 P.2d 385 (1984); *Pierce v. Board of County Commissioners*, 200 Kan. 74, 80-81, 434 P.2d 858 (1967).

Appellants find support for their argument in *Hopkins v. State*, 237 Kan. at 611, where we stated:

"Defendants correctly state that, as a general rule, the duty of a law enforcement officer to preserve the peace is a duty owed to the public at large. *Absent some special relationship with or specific duty owed an individual, liability will not lie for damages. Robertson v. City of Topeka*, 231 Kan. at 363. *Absent guidelines*, police officers are vested with the necessary discretionary authority to act in an appropriate manner to protect the public." (Emphasis added.)

While *Hopkins* did not turn on this issue and is thus distinguishable from this case, the foregoing statement of law is the key to the police duty in this case. Where the police are subject to guidelines or owe a specific duty to an individual, the general rule does not apply and the police owe a special duty accordingly. Here, the Kansas City Police Department had a standard operating procedure manual which detailed mandatory procedures for handling a variety of police situations. This manual was not made a part of the record. However, the police were also subject to a General Order which set out the procedures to be followed by the police in handling individuals incapacitated by alcohol or drugs. That order (General Order 79-44) was made a part of the record and provides in pertinent part:

"An individual, *male* or *female*, who is incapacitated by alcohol or drugs, and because of such condition, is likely to do physical injury to himself or herself or others if allowed to remain at liberty will be taken into protective custody and processed in the following manner . . . ."

Thus, the police officers had a duty to take the intoxicated Delmar Henley into protective custody. Appellants argue the officers' testimony that they did not see Henley and were unaware of his intoxicated condition relieves the City of any liability. However, there was also testimony that the police saw Henley from a close proximity and that because of his staggering and belligerent demeanor, the police could not have avoided noticing his intoxicated condition. This conflicting testimony gave rise to a question of fact which was resolved against appellants by the jury.

While we have determined that the police owed a special duty to Delmar Henley, we are now faced with the question of how that special duty became an obligation to James Fudge. The controlling case on this issue is *Schmeck v. City of Shawnee*, 232 Kan. 11, 651 P.2d 585 (1982). There, we adopted Restatement (Second) of Torts § 324A (1965), which provides in pertinent part:

"One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if

"(a) *his failure to exercise reasonable care increases the risk of such harm*, or

"(b) he has undertaken to perform a duty owed by the other to the third person, or

"(c) the harm is suffered because of reliance of the other or the third person upon the undertaking." (Emphasis added.)

We reaffirmed *Schmeck* in *Cansler v. State*, 234 Kan. 554, 566-67, 675 P.2d 57 (1984), and *Ingram v. Howard-Needles-Tammen & Bergendoff*, 234 Kan. 289, 295, 672 P.2d 1083 (1983).

The police officers should have realized that taking Henley into protective custody was necessary for the protection of third persons. Their failure to do so significantly increased the risk that Henley would cause physical harm to others. Accordingly, the City of Kansas City is subject to liability to James Fudge for the officers' failure to take Delmar Henley into custody.

We now turn to the issue of whether appellants are immune from liability under any of the exceptions to the Kansas Tort Claims Act. Appellants contend three exceptions are applicable to the facts of the present case: K.S.A. 75-6104(c), (d), and (m).

We will first consider 75-6104(m). That section provides an exception for "failure to provide, or the method of providing, police or fire protection." We discussed this exception in *Jackson v. City of Kansas City*, 235 Kan. 278, 292, 680 P.2d 877 (1984), stating:

"We believe subsection (m) is aimed at such basic matters as the type and number of fire trucks and police cars considered necessary for the operation of the respective departments; how many personnel might be required; how many and where police patrol cars are to operate; the placement and supply of fire hydrants; and the selection of equipment options. Accordingly, a city is immunized for such claims as a burglary could have been prevented if additional police cars had been on patrol, or a house could have been saved if more or better fire equipment had been purchased. We do not believe subsection (m) is so broad as to immunize a city on every aspect of negligent police and fire department operations. Should firemen negligently go to the wrong house and chop a hole in the roof thereof, we do not believe the city has immunity therefor on the basis the negligent act was a part of the method of fire protection."

The police action in this case does not fall within the scope of K.S.A. 75-6104(m) and the appellants were not immune from liability on this ground.

K.S.A. 75-6104(c) creates another exception from liability for:

"enforcement of or failure to enforce a law, whether valid or invalid, including, but not limited to, any statute, regulation, ordinance or resolution."

This subsection is inapplicable because appellants' liability is based on the police officers' failure to follow mandatory internal rules and not for failure to enforce the laws against driving under the influence of alcohol.

K.S.A. 75-6104(d) grants immunity for:

"any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee, whether or not the discretion be abused."

We discussed this exception as it relates to the actions of police officers in *Robertson v. City of Topeka*, 231 Kan. 358, 644 P.2d 458 (1982). In *Robertson*, the plaintiff called the Topeka city police to seek their assistance in removing an intruder. When the police came, they ordered the plaintiff to leave the premises and fifteen minutes later the home burned. We refused to impose liability upon the City or the police because the police actions were discretionary and protected under K.S.A. 75-6104(d). We explained why the City and individual police officers were not liable:

"It would be virtually impossible for police departments to establish specific guidelines designed to anticipate every situation an officer might encounter in the course of his work. *Absent such guidelines*, police officers should be vested with the necessary discretionary authority to act in a manner which they deem appropriate . . . ." p. 362. (Emphasis added.)

Following *Robertson*, we decided *Carpenter v. Johnson*, 231 Kan. 783, 649 P.2d 400 (1982). That case involved the question of whether or not a governmental entity's decisions to place or not to place traffic signs fell within the purview of K.S.A. 75-6104(g), a comparable subsection dealing with road signs. We held the Secretary of Transportation had "adopted the Manual on Uniform Traffic Control Devices for Streets and Highways" and the employees operating under the manual were exercising professional judgment and not discretion and were therefore not immune as a matter of law; therefore, summary judgment was improper in this instance.

Our most recent case in point is *Jackson v. City of Kansas City*, 235 Kan. 278. There, two fire trucks collided, injuring the firemen and damaging property in the vicinity of the collision. A fire department bulletin set a maximum speed limit of 35 m.p.h. for department vehicles. We concluded once the speed limit was established "the City no longer had discretion" and held the City liable if the trucks exceeded the limit.

In the present case the City adopted a specific mandatory set of guidelines for police officers to use with regard to handling intoxicated persons. The guidelines left no discretion and K.S.A. 75-6104(d) is inapplicable to the facts at hand.

We conclude the officers' actions do not fall within the exceptions found at K.S.A. 75-6104(m), (c) and (d) and accordingly, appellants were subject to liability under the Kansas Tort Claims Act.

Appellants next argue since K.S.A. 1985 Supp. 41-715 makes it a misdemeanor for any person to "knowingly" provide liquor to "any person who is physically or mentally incapacitated by the consumption of" alcohol, this court should impose civil liability upon bar owners for such acts. We rejected this argument in *Ling v. Jan's Liquors*, 237 Kan. 629, 703 P.2d 731 (1985). In *Ling*, we held that at common law dispensers of alcohol are not liable to the victims of intoxicated tortfeasors. We then refused to change the common law on grounds that the legislature is best equipped to make such a substantive public policy change. 237 Kan. at 640.

Ling is controlling on this issue and there are no grounds for imposing liability upon the vendor.

Alternatively, appellants argue K.S.A. 60-258a requires the fault of the vendor be compared with all other parties even if the vendor cannot be held liable. The common law, as *Ling* makes clear, holds a vendor is not liable to the victims of intoxicated tortfeasors. The vendor is not at fault as a matter of law; therefore, there remains nothing to compare. This issue is without merit.

Appellants next object to jury instruction 10, which pertains to the credibility of a witness. Appellants contend the instruction should have stated that Delmar Henley was convicted of a crime. They contend Henley had an "extensive criminal record" and had been convicted of vehicular homicide as a result of the accident in this case. There is no evidence of Henley's criminal history in the record, nor evidence of a proffer of his "extensive criminal record"; however, the record does establish a conviction for vehicular homicide and shows he served six months in jail for this crime. Since appellants made no effort to introduce evidence of Henley's "extensive criminal record" they cannot complain of error on appeal.

As for Henley's conviction of vehicular homicide, K.S.A. 60-421 requires that before evidence of a conviction may be used to impeach a witness it must be evidence of a crime involving dishonesty or false statement. The crime involved here is vehicular homicide, which is defined at K.S.A. 21-3405 as:

"the killing of a human being by the operation of an automobile . . . in a manner which creates an unreasonable risk of injury to the person or property of another and which constitutes a material deviation from the standard of care which a reasonable person would observe under the same circumstances."

Vehicular homicide does not involve dishonesty or false statement and, hence, failure to give the instruction was not error.

Appellants make numerous objections to Instruction 12, which pertains to the parties' contentions. Appellants' first objection relates to the following statement found in the instruction:

"Plaintiffs claim that defendants, City of Kansas City, Kansas, and Officers Richard Gorham and Robert Conchola caused or contributed to the injuries and death of James E. Fudge in one or more of the following respects:

"(a) In failing to stop and perform field sobriety tests or other tests to determine the intoxicated condition of Delmar Henley."

Appellants object to this instruction on the ground that the action it requires is discretionary under the Kansas Tort Claims Act. The trial court ruled that the clear and mandatory provisions of the standard operating procedures manual required the police to stop a car swerving out of a parking lot and into the wrong lane, as Delmar Henley's did. Appellants contend no general order, operating procedure, or regulation imposes this duty. The standard operating procedures manual is not a part of the record. It is appellants' burden to create a record sufficient for review. In the absence of such a record, error will not be presumed. *First Nat'l Bank & Trust Co. v. Lygrisse*, 231 Kan. 595, 602-03, 647 P.2d 1268 (1982). Accordingly, error cannot be predicated on this ground.

The appellants contend it was error not to instruct the jury that James Fudge was not wearing his seat belt. Such an instruction would have been error. In *Ratterree v. Bartlett*, 238 Kan. 11, 18, 707 P.2d 1063 (1985), we adopted the following language from *Taplin v. Clark*, 6 Kan. App. 2d 66, Syl. ¶ 1, 626 P.2d 1198 (1981):

"A passenger in an automobile has no legal duty to use an available seat belt in anticipation of the driver's negligence, and evidence of nonuse is inadmissible under the comparative negligence doctrine either on the issue of contributory negligence or in mitigation of damages."

Just as a passenger has no duty to anticipate the negligence of the driver of a vehicle, a driver need not anticipate the negligence of the drivers of other vehicles and has no duty to use an available seat belt.

Appellants also allege error in the court's failure to instruct on the defendant's allegations of fault against the Sixteenth Round bar and its bartender, Janice Heckman. Given the fact that Kansas has no dram shop liability, this was not error. We find no error in Instruction 12.

For their next contention, appellants argue Instruction 13 should have contained the following language:

"While as a general rule it may be said that a driver, absent knowledge to the contrary, may assume that an approaching vehicle will obey the rules of the road and thus get over and stay on its own side of the road, yet he will not be permitted to act on the assumption where the factual basis for it has disappeared, as for example, where it appears that the driver of such vehicle on the wrong side of the road either will not or cannot turn back to his own side.

"The purpose and object of rules of the road are to avoid accident, but one is not justified in asserting his right to use his side of the road when, by not doing

so, he can avoid a collision. The fact a motorist is on the proper side of the road does not entitle him to make an unreasonable use thereof nor relieve him of the duty to exercise due care to avoid injury to others, including those who may be on the wrong side of the road."

There was no evidence introduced to support this theory; therefore, it was not error to refuse to give the requested instruction.

Appellants next contend Instruction 16 broadens the jury's consideration into areas of discretionary activities. The appellants requested this instruction and therefore waived any objection to it.

Appellants contend the court should have instructed the jury that Delmar Henley's negligence was an intervening cause which cut off the liability of the City. This contention is erroneous because the alleged negligence of the City was in failing to place Delmar Henley in protective custody. Thus, the City's negligence and Delmar Henley's negligence were concurring causes of the injury.

Appellants object to Instruction 19, which allowed the jury to assess fault against "Police officers of Kansas City, Kansas, including but not limited to Officers Richard Gorham and Robert Conchola." Appellants claim prejudice as the introduction of this phrase to the pretrial order on the morning of trial was their first notice that police officers other than Gorham and Conchola would be involved. The appellants made no objection to amending the pleading, nor did they request time to prepare for this "new claim." The potential fault of other police officers had been an issue in the case from the beginning because of the appellees' allegation that Delmar Henley almost hit a third police vehicle after leaving the bar parking lot. We find no error.

Appellants contend that the verdict form was improper because items of damages were separated into several categories and the form "allowed the jury to have numerous blanks to complete, which understandably led to a larger verdict." Appellants cite no authority supporting their position. Further, they did not object to the form. In order to overcome their failure to object, appellants must show the verdict form, as a part of the instructions, was clearly erroneous. *Lostutter v. Estate of Larkin*, 235 Kan. 154, 164, 679 P.2d 181 (1984).

We discussed the problem of verdicts which are irregular as to form in *Mackey v. Board of County Commissioners*, 185 Kan. 139, 150, 341 P.2d 1050 (1959).

"The trial court submitted two verdict forms to the jury. The jury by mistake completed both verdict forms and returned them into court. The one form indicated that the jury had found for the defendant on each count of the petition. The other, intended as a verdict form should the plaintiff be entitled to recover, was worded so that the jury was required to fill in the amount which the plaintiff was entitled to recover on each of the six counts. In each of these six blank spaces was written the word 'None.' The verdict which the jury returned was clearly apparent from both forms. The plaintiff's objection has no merit. So long as the verdict manifests the intention and findings of the jury upon the issues submitted to them, it will not be overthrown merely because of defects in form."

We find further discussion at 76 Am. Jur. 2d, Trial § 1141:

"In the absence of some express provision of the practice statutes or the governing rules of practice prescribing the form of the general verdict to be returned, there is no hard and fast rule governing such form. The responsibility of returning a true verdict rests with the jury, and it is a matter of accommodation, and not a legal requirement, that the trial judge supply the jury with the proper forms in any given case. Any words which convey the meaning and intention of the jury are usually deemed to be sufficient. A verdict is sufficient in form if it expresses the decision of the jury on the issues submitted so as to enable the court to intelligibly render a judgment thereon. So long as the verdict manifests the intention and findings of the jury upon the issues submitted to them, it will not be overthrown merely because of defects of form."

The verdict in this case clearly expresses the intentions and findings of the jury and we find no error.

Appellants next allege the trial court erred in prohibiting the admission of evidence of Deborah Fudge's remarriage, including voir dire of the jurors about whether any of them knew Deborah (Fudge) Abels or her current husband. This prohibition was based on the trial court's conclusion that the potential prejudice of such evidence outweighed its probative value. In *Pape v. Kansas Power & Light Co.*, 231 Kan. 441, 447, 647 P.2d 320 (1982), we adopted a rule excluding evidence of a surviving spouse's remarriage in mitigation of damages. The appellants are taking a different approach by arguing the purpose of admitting the evidence is to protect the integrity of the jury process. We hold evidence of the remarriage of a surviving spouse is inadmissible in a wrongful death case and the court correctly exercised its discretion in refusing to admit the evidence. *Cf. Betts v. General Motors Corp.*, 236 Kan. 108, 114-15, 689 P.2d 795 (1984); *Talley v. J & L Oil Co.*, 224 Kan. 214, 220, 579 P.2d 706 (1978).

The jury awarded $50,000 for pain, suffering, disabilities or disfigurement and any accompanying mental anguish. Appellants contend the evidence does not support this award. Mr. Fudge lost consciousness a few minutes after the accident and never regained consciousness. Medical records showed he did not respond to stimuli. Appellants' witness, Dr. Alan Hancock, the Wyandotte County Coroner, testified Mr. Fudge was in such a deep state of unconsciousness he could have felt no pain. He further testified that records of KARE (a Kansas City emergency ambulance service) showed Mr. Fudge lapsed in and out of consciousness for ten minutes after the accident. Shirley Magee, Deborah Fudge's mother, countered with testimony that three days after the accident James Fudge squeezed her fingers twice in response to things she told him about the children, and that it happened two or three more times before he died. Thus, the issue was controverted, resulting in a question of fact for the jury.

In *Tucker v. Lower*, 200 Kan. 1, 9, 434 P.2d 320 (1967), we held:

"There is no exact yardstick by which pain and suffering can be measured and the various factors involved are not capable of proof in dollars. For this reason the only standard for evaluation is such amount as twelve reasonable persons estimate to be fair compensation when that amount appears to be in harmony with the evidence and arrived at without passion or prejudice."

The amount arrived at by the jury in this case is supported by competent evidence and there has been no showing that the award was the result of passion or prejudice. We find no error.

Appellants next object to the exclusion of a portion of a witness' deposition relating to the speed of the vehicles. The witness, Buford Botteron, died before trial. The judge excluded this evidence because the deposition laid no foundation for showing that the witness was in any position to determine the speed of the vehicles. Appellants do not address the foundation issue and the deposition is not part of the record on appeal. We find no error.

Appellants next argue the jury's reconsideration of its verdict is reversible error. The first verdict form returned by the jury contained an award of $632,000.00 for loss of time or income between July 30, 1981, and August 20, 1981. This was an obvious mistake. Upon observing the error, the judge pointed it out to the jury and asked them to make sure the verdict reflected their intent. The jury retired for a few minutes and returned with a

new verdict form which gave *no* compensation for the July 30-August 20 period. Under K.S.A. 1985 Supp. 60-248(g), the trial judge has discretion to have the jury correct its defective verdict. That statute provides:

"Whenever the jury consists of 12 members, the agreement of 10 jurors shall be sufficient to render a verdict. In all other cases, subject to the stipulation of the parties as provided in subsection (a), the verdict shall be by agreement of all the jurors. The verdict shall be written, signed by the presiding juror and read by the clerk to the jury, and the inquiry made whether it is their verdict. If less than the required number of jurors agree, the jury must be sent out again. If agreement of the required number is expressed, and no party requires the jurors to be polled individually, the verdict is complete, and the jury discharged from the case. If the verdict is defective in form only, it may be corrected by the court, with the assent of the jury, before it is discharged."

The trial judge did not err in allowing the jury to reconsider its verdict.

Appellants next contend the evidence is insufficient to sustain the jury's damages award of $1,095,103.66. When a verdict is attacked on the ground it is contrary to the evidence, it is not the function of this court on appeal to weigh the evidence or pass on the credibility of the witnesses. If the evidence, with all reasonable inferences to be drawn therefrom, when considered in a light most favorable to the successful party below, will support the verdict this court should not intervene. *Manley v. Wichita Business College*, 237 Kan. 427, 432, 701 P.2d 893 (1985). Applying this standard, the award should be upheld.

The appellees presented expert testimony by David E. Shulenburger, who is a professor of business administration at the University of Kansas. His calculations showed a present value of lost wages of $499,739.00, based on a projected lifetime earning of $1.7 million. He further figured a present value of $46,981 for lost services (the economic value of work performed in and around the home). These figures were based on projections from the date of trial. Added to that were the value of lost wages and services since James Fudge's death to the date of trial for a total of $688,254.00. The lifetime totals were based on an assumed rate of inflation of 5.39% for the lost services (which represents the 31-year average annual increase from 1950-1981) and an annual increase in wages of 5.24% (which represents the national annual average for the twenty-five years from 1957-1982). These present day values assumed an investment (in government bonds) at the then current rate of 11.25%. However, the average

return for the previous 25.8 years on government bonds has been 7%. Use of the 7% figure would produce a present value for wages and services, from the date of trial, in the vicinity of $900,000.00. The jury verdict of $1,095,103.66 was well within this limit where the wages and services lost before trial ($141,534) are added in, and the award should be upheld.

The judgment is affirmed.

LOCKETT, J., concurring: I agree with the majority decision, except where the majority finds that § 324A of the Restatement (Second) of Torts creates a special relationship between Kansas City police officers and a motorist who was later injured in an automobile accident with a drunk driver. Both the officers' and the City's liability are subject to the Kansas Tort Claims Act and its exceptions. Restatement (Second) of Torts § 324A is not an exception to the immunity provided governmental entities and law enforcement officers by the Kansas Tort Claims Act.

Before the City can be liable for damages there must be (1) a negligent or wrongful act or omission by one of its employees; and (2) the employee (a) must be acting within the scope of his employment and (b) under circumstances where the governmental entity, if a private person, would be liable under the laws of this state. *Hopkins v. State*, 237 Kan. 601, 702 P.2d 311 (1985). For the police officers to be individually liable for a negligent or wrongful act, there must be a duty to act. Individual liability of police officers is limited by the "public duty doctrine." The public duty doctrine provides that neither a governmental entity nor its police officers are liable for torts committed against a person in the absence of a special duty owed to the injured party. A police officer's duty to enforce the law is owed to the public at large, rather than to any individual, absent some special relationship with or specific duty owed an individual. *Robertson v. City of Topeka*, 231 Kan. 358, 644 P.2d 458 (1982).

K.S.A. 65-4027(A) and 65-5203(a) allow a law enforcement officer to take into custody any person who is intoxicated or incapacitated by alcohol or drugs that is a danger to himself or others. The City of Kansas City had adopted General Order 79-44 which required the officers to take into protective custody individuals incapacitated by alcohol or drugs that might injure themselves or others.

Ignoring the fact that the officers had specific statutory authority and a specific duty under the general order to protect third parties from individuals incapacitated by alcohol or drugs, the majority simply states that under *Schmeck v. City of Shawnee*, 232 Kan. 11, 651 P.2d 585 (1982), which adopted Restatement (Second) of Torts § 324A (1965), a special duty was owed by police officers to James Fudge. For additional authority, the majority cites *Ingram v. Howard-Needles-Tammen & Bergendoff*, 234 Kan. 289, 672 P.2d 1083 (1983), and *Cansler v. State*, 234 Kan. 554, 675 P.2d 57 (1984).

The majority's reliance on these cases is misplaced. Not one of the cited cases implies that the failure to enforce a law creates a special duty to a third party, resulting in liability for a governmental entity or individual police officers. In *Schmeck*, the plaintiff was injured when the motorcycle he was riding was struck by an automobile. The city was not exempt from liability for a street defect under the Kansas Tort Claims Act. The city was held responsible because of a street defect. Kansas City Power and Light (KCPL) had contracted with the city to design its traffic signal system. KCPL was found negligent when it failed to include a traffic signal in its design for the city traffic system. Based on § 324A, it was KCPL that was responsible to the plaintiff, not the city.

In *Ingram*, the surviving spouse recovered damages for the wrongful death of her husband. The husband was injured and died when the truck he was driving struck a hole in the traffic lane on a bridge and plunged nearly 30 feet to the ground. The plaintiff sued both the Kansas Turnpike Authority (KTA) and the engineers hired by the KTA to inspect the bridges. KTA was found negligent under the statutes that required KTA to provide a safe highway. The engineers were liable to the plaintiff because they had failed to fulfill the implied duties under their employment contract with the KTA. The rationale of *Schmeck* and § 324A were used to impose liability on the engineers to an injured third party.

In *Cansler*, several armed prisoners escaped from Lansing Penitentiary in an automobile. The defendant, Leavenworth County, had an agreement with the penitentiary to warn surrounding law enforcement agencies of escapes from the penitentiary. The County failed to warn the plaintiff, a law enforcement officer, of the escape. The officer attempted to stop a

speeding car. The occupants of the vehicle, the escaped prisoners, abandoned the car. Not knowing that he was after armed escaping prisoners, the officer gave chase on foot. When he attempted to capture the prisoners, he was shot and wounded. The County was found to owe the plaintiff a duty under § 324A to warn the plaintiff of the escape because of its contract with the penitentiary. The *Cansler* court determined there was a breach of a duty owed to a third party arising from the contract.

The majority has misapplied § 324A in this case. By its decision, the majority has judicially repealed a major portion of the Kansas Tort Claims Act and overruled *Robertson*.

The Kansas Legislature has taken action to protect users of our highways from drivers that are intoxicated or incapacitated by alcohol or drugs. K.S.A. 65-4027(A) and 65-5203(a) impose authority on law enforcement officers to arrest an intoxicated or incapacitated driver, to protect not only the impaired driver but also others. Here the special authority was created by statute and the duty was created by the general order adopted by the City. It was not a duty imposed under *Schmeck*.

MCFARLAND, J., concurring in part and dissenting in part: The facts in certain areas need to be stated with more specificity. On the evening of July 29, 1981, defendant Henley, along with his wife and some of her relatives, was drinking in a private club situated at 2847 Roe Lane in Kansas City, Kansas. The only club employee present was the bartender, Janice Heckman. Henley became loud and obnoxious in his behavior. Closing time for the club was 2:00 a.m. Shortly before closing time, Heckman asked Henley to leave. He refused. David Sparks, a club patron who was a personal friend of Heckman's, tried to assist her in getting Henley to leave. Henley did not leave. Heckman advised Henley that if he would not leave, she would call the police. Still, Henley did not leave. Heckman then called the Kansas City, Kansas, police department reporting a *disturbance in the club*. The call was made at approximately 1:45 a.m. Henley and his party then moved to the parking lot. Sparks and Henley continued to argue in the parking lot. No customers remained in the club and Heckman watched from outside the front door. The parking lot was dark except for a dim light from a billboard. Only two or three cars and a few persons were present in the parking lot.

Officer Gorham was first on the scene. He arrived at 1:48 a.m. (approximately three minutes after the call was received). David Sparks walked over to the police car and talked with Officer Gorham. The two were old acquaintances. The police dispatch had reported a *disturbance at the club. There was no one in the club at this time.* Sparks told Gorham the disturbance was over as the party causing the disturbance had left the club. About this time (1:50 a.m.), a second police car arrived—driven by Officer Conchola. This officer saw Sparks and Gorham talking and pulled in close. Gorham advised Conchola the trouble (disturbance) was over. This was wholly consistent with the scene viewed by both officers. Neither saw any disturbance at any time. Only a few cars and a handful of patrons remained in the parking lot. Gorham told the few remaining patrons to leave. There is no evidence either officer had a personal two-way conversation with Henley. Gorham simply addressed a general go-on-your-way instruction to the little group of patrons standing by the patrons' parked cars. Another police car arrived and departed after being told and seeing that the trouble was over. All police cars were gone from the scene within approximately seven minutes after the first had arrived.

Heckman finished closing up the club and came out to go home shortly after closing time. No police cars remained on the scene. Heckman then saw Henley drive out of the parking lot and nearly strike a police car proceeding in the opposite direction on Roe Lane. Heckman stated the vehicle was not one of the police cars that had responded to the disturbance call. She testified it was a black and white vehicle and she did not know whether it was a Kansas City, Kansas, police vehicle. There was evidence that a number of police departments in Johnson County had, in July of 1981, black and white, or dark blue and white, or dark green and white, police vehicles (any of which could appear black and white at night), and that they often proceeded down Roe Lane returning to their own areas.

The tragic accident that cost James Fudge his life occurred on Roe Lane approximately a block and a half from the club. It was so close to the club that Heckman heard the collision from the parking lot and was the first person on the scene. There was no evidence the officer driving the unidentified police vehicle could have turned around and stopped the Henley vehicle prior to the Fudge collision even if he or she had tried to do so.

Under the instructions given herein, the jury could find liability on behalf of defendant City on the basis of the acts of Gorham or Conchola or any other Kansas City, Kansas, police officers (presumably referring to the driver of the unidentified police car which may or may not have been defendant City's vehicle).

Disregarding the question of immunity for the time being, we must first consider the threshold question of whether or not defendant City (and its officers) committed a tort. Under the evidence most favorable to plaintiff, Gorham was close enough to Henley in the parking lot to see he was intoxicated. Assuming the officer should have seen and correctly evaluated Henley's intoxicated condition, did the officer breach some duty owed to James Fudge by not administering full sobriety tests to Henley and, assuming Henley failed same, taking Henley into custody? Did the officer breach some duty to Fudge in not entering the club and talking to Heckman?

In *Robertson v. City of Topeka*, 231 Kan. 358, Syl. ¶ 1, 644 P.2d 458 (1982), a property owner, Robertson, called the police for assistance in removing an intoxicated trespasser from his property. Robertson told the officers who arrived on the scene that he was afraid the trespasser would burn down the house if not removed immediately. The officers would not remove the trespasser and asked Robertson to leave. Fifteen minutes later the intoxicated trespasser set fire to the house. Robertson sued the officers and the city for damages. In affirming the district court's dismissal of the case, this court held there was no liability as a matter of law on two grounds:

1. The duty of a law enforcement officer to preserve the peace is a duty owed to the public at large, not to a particular individual. Absent some special relationship with or specific duty owed an individual, liability will not lie for damages; and

2. Immunity under the discretionary function or duty exception (K.S.A. 75-6104[d]) contained in the Kansas Tort Claims Act (K.S.A. 75-6101 *et seq.*).

Thus the court found there was no duty owed Robertson under the circumstances and there could, accordingly, be no breach thereof. That is, *there was no tort* as a matter of law. Secondly, even if there had been a tort, defendants were immune under

K.S.A. 75-6104(d). In *Robertson*, the officers were in direct contact with the person injured prior to the injury and directed him to leave. Still there was no special relationship such as to create liability. In the case before us, no officers were in contact with Fudge—he was purely and simply a member of the public at large. This is a much weaker factual situation than that present in *Robertson*.

The majority attempts to create a special relationship through the fact Henley was an intoxicated person. This is fallacious. Police officers have a duty to arrest lawbreakers. Crimes and offenses are set forth in statutes. It is not necessary to grant officers specific authority to arrest in each statute defining a crime or offense. Instead, the authority to arrest is set forth in one statute applicable to all crimes. That statute is K.S.A. 1985 Supp. 22-2401, which provides:

"A law enforcement officer may arrest a person under any of the following circumstances:

(a) The officer has a warrant commanding that the person be arrested.

(b) The officer has probable cause to believe that a warrant for the person's arrest has been issued in this state or in another jurisdiction for a felony committed therein.

(c) The officer has probable cause to believe that the person is committing or has committed:

(1) A felony; or

(2) a misdemeanor, and the law enforcement officer has probable cause to believe that:

(A) The person will not be apprehended or evidence of the crime will be irretrievably lost unless the person is immediately arrested;

(B) the person may cause injury to self or others or damage to property unless immediately arrested; or

(C) the person has intentionally inflicted bodily harm to another person.

(d) Any crime, except a traffic infraction, has been or is being committed by the person in the officer's view."

If an officer sees a person acting very suspiciously in a residential area at night, he would have authority to arrest the person. He would have a duty to investigate the suspicious conduct. However, if he fails to investigate and a home in the area is subsequently burglarized, the owner thereof has no cause of action against the officer and his employer as there is no special duty owed the homeowner. The duty owed was to the public at large. A special duty could arise if an officer tells a homeowner he believes that the home will be burglarized that night, but that the homeowner should take no defensive action as

police will be continually watching the house and will make sure that no damage or loss occurs. If, under such circumstances, the police fail to watch the home, and the homeowner acts in reliance on the earlier statements to his detriment, breach of a special duty owed the homeowner could well be found.

The majority holds failure to take an intoxicated person (as opposed to a criminal) into custody creates some special relationship between the officer and every member of the public. There is simply no legal basis for this conclusion.

In earlier days, police were permitted to take a rather paternalistic view of what were commonly known as drunks and "crazies." Through general statutes making criminal offenses of loitering, vagrancy, disturbance of the peace, and disorderly conduct, intoxicated and insane persons could be arrested, transported or detained with little formality. In recent years, however, the strong trend has been to eliminate this loose procedure. Police can no longer arrest a drunken or insane person who is committing no crime or is causing no trouble or who is not likely to cause trouble. The drunken or insane person sitting quietly on a park bench in the spring sunshine cannot be hassled by the police, however disreputable or disagreeable his or her appearance may be. Generally, intoxicated persons, drug addicts, insane persons and mentally deficient individuals have the right to go their own way undisturbed as long as they do not violate a law. Should treatment be necessary for their own safety, or the safety of others, formal commitment proceedings are available. The rights of the individuals with such afflictions are safeguarded. There are, however, situations where time-consuming commitment proceedings are not feasible. Something needs to be done immediately. In these emergency situations, officers are empowered to act.

K.S.A. 59-2908(a) provides:

"(a) *Any peace officer who has reasonable belief upon observation, that any person is a mentally ill person and because of such person's illness is likely to do physical injury to himself or herself or others if allowed to remain at liberty may take such person into custody without a warrant.* Said officer shall transport such person to any treatment facility where such person shall be examined by a physician on duty at such facility. If no physician is on duty at the time such person is transported to the facility, such examination shall be made within a reasonable time not to exceed seventeen (17) hours. If a written statement is made by such physician at the treatment facility that after preliminary examination such physician believes such person to be a mentally ill person and because of such person's illness is likely to do physical injury to himself or herself or others if allowed to remain at liberty, and if such treatment facility is willing to admit such person the peace officer shall present to such treatment facility the application provided for in subsection (b) of K.S.A. 59-2909. If the physician on duty at the treatment facility does not believe such person to be a mentally ill person, the peace officer shall release such person." (Emphasis supplied.)

K.S.A. 65-5203(a) provides:

"(a) *Any law enforcement officer who has reasonable belief, upon observation, that any person is intoxicated or incapacitated by drugs and because of this condition is likely to be injured or to injure others if allowed to remain at liberty may take such person into custody without a warrant.* The officer shall transport the person to any treatment facility where such person shall be examined by a physician or psychologist at the facility. If no physician or psychologist is available at the time the person is transported to the facility, such examination shall be made within a reasonable time not to exceed 17 hours. If a written statement is made by such physician or psychologist at the treatment facility that after preliminary examination the physician or psychologist believes the person to be intoxicated or incapacitated by drugs and because of this is likely to do physical injury to self or others if allowed to remain at liberty, and if such treatment facility is willing to admit such person, the law enforcement officer shall present to the treatment facility the application provided for in K.S.A. 65-5204. If the physician or psychologist does not believe the person is intoxicated or incapacitated by drugs, the law enforcement officer shall release the person." (Emphasis supplied.)

K.S.A. 65-4027(A) provides:

"(A) *Any law enforcement officer who has reasonable belief, upon observation, that any individual is intoxicated or incapacitated by alcohol and because of this condition is likely to be physically injured or to physically injure others if allowed to remain at liberty may take such individual into custody without a warrant.* The officer shall transport such individual to any treatment facility, or other facility for care or treatment, which has a physician or psychologist on staff where such individual shall be examined by a physician or psychologist at such facility. If no physician or psychologist is available at the time such individual is transported to the facility, such examination shall be made within a reasonable time not to exceed 17 hours. If a written statement is made by such physician or psychologist at the treatment facility that after preliminary examination such physician or psychologist believes such individual to be intoxicated or incapacitated by alcohol and because of this is likely to be physically injured or to physically injure others if allowed to remain at liberty, and if such treatment facility is willing to admit such individual the law enforcement officer shall present to such treatment facility the application provided for in subsection (B) of K.S.A. 65-4028 and amendments thereto. If the physician or psychologist does not believe such individual to be intoxicated or incapacitated by alcohol, the law enforcement officer shall release such individual." (Emphasis supplied.)

Thus, on the authority of these three statutes, police, in an emergency situation, may detain an insane person or person

intoxicated or incapacitated by drugs or alcohol and take such person to an appropriate treatment facility where a medical evaluation of his condition can be made. Such legislation is necessary. An insane, alcohol intoxicated, or drug addicted individual lying late at night in the snow in bitter weather can be taken for treatment without the filing of a formal commitment procedure the next day. Failure to take an insane, alcohol intoxicated or drug addicted person into custody does not create a special duty to every member of the public. To hold otherwise makes the officer (and his employing governmental unit) the insurer of the public against later harm caused by the individual.

The clear intent of the Act for Obtaining Treatment for a Mentally Ill Person (K.S.A. 59-2901 *et seq.*); the Act for Treatment of Drug Abusers (K.S.A. 65-5201 *et seq.*); and the Alcoholism and Intoxication Treatment Act (K.S.A. 65-4001 *et seq.*) is to provide treatment for such afflicted persons with numerous safeguards to the rights of the patients. Formal proceedings are the rule. The formalities are permitted to be dispensed with only in a limited manner in an emergency situation and then a medical judgment has to be made very shortly after the emergency detention. I believe the majority opinion will have, as one effect, an expansion of the limited emergency detention provision of these acts. If police officers are to be the insurers of the public for acts done by alcohol intoxicated persons, insane persons and drug addicts, then they will, of necessity, detain any individual who might possibly be a danger to himself or others. An officer failing to arrest an individual who has committed a crime or who gives probable cause to believe criminal conduct is imminent is not the insurer of the public against future harm caused by such person. Therefore, noncriminal persons who may be insane or intoxicated by drugs or alcohol will be subject to a far greater risk of detention by the police than those involved in possible criminal conduct. This is contrary to the modern concept of rights of the individual. A good example of the type of situation where the change could occur is present in the facts before us. An officer (not one of the named defendants) heard the disturbance call dispatch in question before us. On his way to respond he saw some individuals walking down the street near the scene. Thinking they were from the club (which they were), he stopped near them and asked some questions. He testified all

had been drinking but he did not think they were in such a bad way that they should be placed in protective custody for intoxication. Let us suppose one of them had later walked in front of a car—causing injuries to himself and occupants of the car. Under the majority opinion, the officer is the insurer of these individuals and responsible for any harm caused by them. The officer under the new rules enunciated in the majority opinion might well act differently when the same situation arises in the future. Officers may, in responding to dispatch calls, spend more time checking bystanders for drug or alcohol intoxication or insanity than finding the culprit or treating the injured victim.

The majority opinion relies heavily on the Kansas City Police General Order No. 79-44 which provides:

"An individual, *male or female*, who is incapacitated by alcohol or drugs, and because of such condition, is likely to do physical injury to himself or herself or others if allowed to remain at liberty will be taken into protective custody and processed in the following manner . . . ."

This order implements K.S.A. 65-5203(a) and K.S.A. 65-4027(A) relative to emergency detention of persons intoxicated or incapacitated by drugs or alcohol. It uses the words "will be taken" rather than "may take" as found in the statutes, but cannot expand the statutory authority to detain. The order creates no new duty to the public at large, of which James Fudge was a member. Any violation thereof is not a lawful basis of liability for the death of James Fudge. Violation of a general order makes the officer subject to departmental discipline.

Inasmuch as the majority concludes the officers did breach some special duty to James Fudge, and that, accordingly, the officers committed a tort against James Fudge, it is necessary to discuss the Kansas Tort Claims Act (K.S.A. 75-6101 *et seq.*). I agree with the majority that immunity herein is not afforded through the exceptions from liability contained in K.S.A. 75-6104(c) (enforcement or failure to enforce a law) or K.S.A. 75-6104(m) (failure to provide police protection).

I do not agree with the majority that K.S.A. 75-6104(d) (discretionary function or duty) is inapplicable. K.S.A. 75-6104 provides in part:

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

. . . .

(d) any claim based upon the exercise or performance or the failure to exercise

or perform a discretionary function or duty on the part of a governmental entity or employee, whether or not the discretion be abused;"

Liability herein is based on the defendant officers' conduct in failing to detain and place Henley in protective custody. The majority likens the situation herein to that in *Jackson v. City of Kansas City*, 235 Kan. 278, 680 P.2d 877 (1984). In *Jackson* two fire trucks collided. One was being operated in an unsafe manner in excess of the Kansas City Fire Department's regulation relative to maximum speed at which fire trucks were to be driven. In rejecting the claim of immunity under the discretionary function exception (K.S.A. 75-6104[d]), the court, in an opinion authored by myself, stated:

"[I]t would be difficult to visualize a situation where just the actual physical operation of a motor vehicle upon the highway would be a 'discretionary function or duty' within the meaning of section (d)." 235 Kan. at 288.

Physical operation of a motor vehicle is clearly not a discretionary function. Neither is the engineering decision of where to place traffic signs utilizing a standard manual a discretionary function (see *Carpenter v. Johnson*, 231 Kan. 783, 649 P.2d 400 [1982]). In order to have authority to detain Henley, the officers herein had to have a reasonable belief, "upon observation," that Henley was "intoxicated or incapacitated by alcohol and because of this condition is likely to be physically injured or to physically injure others if allowed to remain at liberty." This is a probable cause standard. Failure of an officer to believe he or she has probable cause for an arrest of a criminal suspect or detention of an alcohol or drug intoxicated person or a mentally ill person is as discretionary as an act can get. In a given set of circumstances, one officer might believe he or she had probable cause to arrest or detain; another officer under like circumstances might not. In a given set of circumstances, one officer might warn a speeding motorist while another would issue a citation.

In the case before us, the officers were dispatched on a call reporting a disturbance inside a private club. When the first officer arrived he was told by an acquaintance the disturbance was over and the instigator had left. It was undisputed there was then no disturbance inside the club. When the officer arrived there was no disturbance in the parking lot. The trouble the police had been called to quell no longer existed. It was the closing time of the club. The trouble was over. The police

dispersed. Under these circumstances, the majority grants no discretion to the officers responding to the call. Liability is imposed for failure to check out all persons in the parking lot. Suppose 25 people had been standing quietly in the parking lot when the officers arrived. At approximately 2:00 a.m. in a bar parking lot, it is safe to assume a sizeable percentage of patrons would show at least some indicia of intoxication. Does an officer have a ministerial duty to check each person and administer field sobriety tests to all who do not speak clearly or seem a little unsteady on their feet and then decide just who does or does not meet the statutory criteria?

Unlike a speeding motorist, the officer does not get a digital read-out on the ultimate question. He or she must rely on his or her own judgment and experience. Clearly, the officers' failure to place Henley in protective custody was a matter of discretion.

I would reverse the judgment against the defendant police officers and the City of Kansas City.

SCHROEDER, C.J., joins the foregoing concurring and dissenting opinion.