Approved March 20, 1987
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY.

The meeting was called to order by Senator Robert Frey at
Chairperson

10:00 a.m./p.m. on March 19, 1987 in room 514-S of the Capitol.

All members were present except: Senators Frey, Hoferer, Burke, Gaines, Langworthy, Steineger, Talkington, Winter, and Yost.

Committee staff present:

Mike Heim, Legislative Research Department
Jerry Donaldson, Legislative Research Department
Gordon Self, Office of Revisor of Statutes

Conferees appearing before the committee:

Ron Smith, Kansas Bar Association
David Litwin, Kansas Chamber of Commerce and Industry
Jim Kaup, League of Kansas Municipalities
Daniel Denk, City of Kansas City, Kansas
David Ryan, Topeka Metropolitan Transit Authority
Dick Ruddell, Intercity Transit Authority
Larry Magill, Independent Insurance Agents of Kansas
Chip Wheelen, Kansas Legislative Policy Group
Gerald Henderson, United School Administrators of Kansas
Patricia Baker, Kansas Association of School Boards
John Hamilton, Kansas Trial Lawyers

House Bill 2025 - Punitive damage awards in civil actions.

Ron Smith, Kansas Bar Association, testified changing the state's common law concerning imposition of punitive damages in personal injury actions is a delicate business. Such change must be done carefully and with foresight. KBA supports the bill as drafted, but reserves the right to withdraw that support if the bill is materially altered. Mr. Smith recommended subsection (d) either be stricken or conform to the language of Kline, (See Attachments I).

David Litwin, Kansas Chamber of Commerce and Industry, testified, on the whole we support the bill, but urge the bill be amended to add further assurance that it will achieve its intended effect, namely to increase the probability that punitive damages will be awarded only where deserved and in proper amounts. A copy of his testimony is attached (See Attachment II). He stated, I submit that the provisions of the medical malpractice punitive damage limitation should be engrafted onto this bill. It seems strange to provide a full plate of procedural safeguards only for medical malpractice cases, since both the problem and the desired solution are the same.

House Bill 2023 - Kansas tort claims act amendments.

Jim Kaup, League of Kansas Municipalities, testified their membership has faced, and continues to face, a problem in the area of tort liability in Kansas. The dimensions of this problem are so severe as to threaten to erode the ability of some Kansas cities to provide basic services to their citizens. This is very important legislation to the league. We would ask you to recognize as our

House Bill 2023 continued

city officials do, that inevitably the increases in local budgetary expenditures for insurance protection or for larger liability awards come from the local tax base. That level of government which is least able to raise revenues is forced to foot the final bill for a statewide, and nationwide, problem which touches upon all aspects of society. A copy of the league's testimony is attached (See Attachment III).

Daniel Denk, City of Kansas City, Kansas, appeared in support of the bill. He represented the City of Kansas City in the Fudge decision. Mr. Denk stated you have to look at the guidelines that appear in the handout (See Attachment IV) because this takes away all discretion of the police officer in the field and there is no immunity in the tort claims act. The way the police officer should deal with family situations will change if this procedure is adopted. Should we adopt this guideline which will create liability under the Fudge decision? Or shall we adopt it anyway, because it is in the best interests of the citizens of Kansas City? These are the guidelines under consideration for adoption at this time in Kansas City, Kansas.

Jim Kaup recommended the stricken language in the bill in lines 92 through 95 be reinserted. He said they would be comfortable with this language. He brought to the committee's attention page 13 of his testimony (See Attachment III). In the case Allen v. SRS, this is going to penalize the city because of the decision of the supreme court. Everybody is at risk. The chairman suggested Mr. Kaup discuss this issue with each committee member.

David Ryan, Topeka Metropolitan Transit Authority, appeared in support of the bill. He stated the TMTA strongly supports the bill, and they also strongly support new section two. He recommended lines 29 through 95 be reinserted. They are concerned because of the potential liability. A copy of his testimony is attached (See Attachment V). Mr. Ryan testified citizens should not be asked to donate their essential service to the public, and then be subject to the modern reality of endless litigation as named or potential parties.

Dick Ruddell, Intercity Transit Authority, testified he would like to echo the testimony of general counsel, David Ryan.

George McCullough, Metropolitan Transit Airport Authority, testified MTAA is strongly in support of the bill. He said he has two airports and an industrial park to manage, and he hopes he can keep their good board. He recommended one amendment to the bill, that the effective date be changed to keep this board together.

Larry Magill, Independent Insurance Agents of Kansas, testified the association would like to see an amendment made to the bill dealing with insurance aspects of the Tort Claims Act. He said the amendment would be an improvement to the original language in the Tort Claims Act as it was passed in 1979. A copy of his testimony is attached (See Attachment VI). He said the proposed new language in the bill would change this automatic waiver, but only for pools. We would like to see the automatic waiver changed in all cases.

Chip Wheelen, Kansas Legislative Policy Group, testified in support of the provisions of the bill, as amended by the House. He stated their commissions are very concerned regarding the availability and cost of commercial liability insurance. Some Boards of County

House Bill 2023 continued

Commissioners are considering organization of risk pooling arrangements in accordance with the Interlocal Cooperation Act. We believe that enactment of this bill could clarify the intent of the 1979 Legislature and would facilitate the formation of interlocal risk management cooperatives. A copy of the testimony is attached (See Attachment VII).

Gerald Henderson, United School Administrators of Kansas, testified his organization would like to ask that consideration be given to extending that immunity to employees of those governing bodies, namely school district administrators. A copy of his testimony is attached (See Attachment VIII).

Patricia Baker, Kansas Association of School Boards, appeared in support of the bill. She testified with the steadily rising number of legal actions against public bodies and the potential for more in the future, we request your support for providing some level of protection to individual board members. She stated she would like to echo the comments on the proposal to reinsert the Fudge amendment into this bill. A copy of her testimony is attached (See Attachment IX).

John Hamilton, Kansas Trial Lawyers, testified KTL supports granting immunity to individual members who serve on boards of governmental bodies so feel the tort claims act should be amended for this purpose. Line 100 of the bill is not clear what that language means. He said he thinks this should not be included. They are concerned about the notice requirement under the bill and suggested extending the time to 60 days after the claim has been deemed to be denied. The claim should be filed in compliance with notice of claim. He stated the trial lawyers are opposed to the Fudge amendment language in lines 90 through 95 of the bill. He stated a municipality should not be treated any different than any other entity. A copy of the trial lawyers position on the bill prepared by Jerry R. Palmer is attached (See Attachment X).

Ron Smith, Kansas Bar Association, testified the KBA generally supports this bill as it came from the House. He said we would not support reimposition of the stricken language beginning at line 91 concerning the Fudge case. He said the association supports extending the entity's punitive damage immunity to those persons holding elective office in the entity so long as they act within the scope of their office. A copy of his testimony is attached (See Attachment XI).

The chairman announced due to lack of time, hearings on House Bill 2024 scheduled for today will be held tomorrow morning.

The meeting adjourned.

A copy of the guest list is attached (See Attachment XII).

A copy of a handout from the Kansas Association of Broadcasters is attached (See Attachment XIII).

GUEST LIST

COMMITTEE: SENATE JUDICIARY COMMITTEE DATE: 3-19-87

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
JON FLEENOR	840 Kentucky Lawrence, KS 66044	Intern
Pam Sjoholm	Topeka	Kansas Ins. Dept
Leo Hamilton	Topeka	Kansas Trial Lawyers Assoc.
Richard Mason	"	KTLA
Hosie L. Evans	2403 N. 65th Terr. KCK	Maint. of way assn.
A.J. Kolich	Topeka	DHR
Kevin M Hill	"	—
J. Sutton	Topeka	Ks. Eng. Society
Sue Hamilton	Lawrence	KS N.O.W.
Mike Germann	Topeka	Ks Railroad Ass'n.
T.C. Anderson	Topeka	KSCPA
Larry Magill	"	Indep Ins. Agents
Dick Ruddell	Topeka	Topeka MTA
Chip Wheelen	Topeka	Legis. Policy Group
Dale E. Ryan	Topeka Metropolitan Transit Authority Topeka, KS	
Daniel A. Kent	Kansas City	City of K.C.K.
Jim Kaup	Topeka	League of Municipalities
Steve McDonald	Topeka	M.T.A.A.
Gerald Anderson	Topeka	USA
Pat Baker	Topeka	KASB
Bill Henry	"	KS Eng Society
Dick Carlson	-	KTLA
Lynn Von Koch	"	KLSI
Ron Smith	"	KBA
Janet Stubbs	"	ABAK

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GUEST LIST

COMMITTEE: SENATE JUDICIARY COMMITTEE DATE:

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
Gerry Ray	Olathe	Jo Co Commission
Jeff Vacek	Topeka	KSCPA
Paul E. Fleener	Manhattan	Kansas Farm Bureau
Kevin M Fowler	Topeka	KSCPA
Belva Ott	Wichita	Dunt Bradstreet Inc
Marla Howard	Wichita	City of Wichita
Richard Harmon	Topeka	KS Assoc. of Prop./ Casualty Insurers
PATRICIA HENSHALL	TOPEKA	OJA
[illegible]	Topeka	KCCI
Heather Heaton	Colby	Page
Angela Rodriguez	Ellsworth	Page

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KANSAS BAR ASSOCIATION

1200 Harrison
P.O. Box 1037
Topeka, Kansas 66601
(913) 234-5696

March 19, 1987
HB 2025

Mr. Chairman. Members of the Senate Judiciary Committee. I am Ron Smith, KBA Legislative Counsel.

I. Changing the state's common law concerning imposition of punitive damages in personal injury actions is a delicate business. Such change must be done carefully and with foresight.

II. KBA Supports HB 2025 as drafted, but reserves the right to withdraw that support if the bill is materially altered.

The interim committee on Tort Reform and Insurance has suggested this change. As drafted, KBA supports this bill.

The Problem

For the past two years, KBA has had an ongoing committee discussing litigation costs and delays. We've had our Legislative Committee looking at issues such as punitive damage reform.

We have done so because that while punitive damages are an important part of the civil justice system, the misuse of a claim for punitive damages causes some litigants unnecessary defense costs, and such misuse acts to force risk-adverse persons or businesses to concede

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actual economic loss in settlements rather than risk exposure to punitive liability. We are searching for solutions to these problems. While experience shows appellate courts do not readily allow punitive awards to stand without strong supportive evidence, the legal expense -- some of it uninsured -- to get such courts to modify or reverse punitive awards is significant.

Solutions

Some advocate abolition of punitive damages. They do so directly -- by outright abolition -- or indirectly, by such means as having the entire amount of punitive damages paid to the state general fund.

We think such extreme positions are both inappropriate and unnecessary. The purposes of civil punitive damages in Kansas are punishment and deterrence of the defendant and others who might engage in similar inappropriate conduct [Newton v. Hornblower, 224 Kan. 506 (1978)].

Our own unscientific research of Kansas appellate cases citing punitive damages awarded since 1976 in Kansas show that awards for punitive damages are heavily scrutinized by the appellate courts and if unsupported by evidence, they are overturned. In addition, corporations are the plaintiff in almost one fourth of the cases appealed concerning punitive damages, indicating that corporations seek punitive damages from other businesses quite often. About 5% of the cases

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show government entities as plaintiffs. Average punitive damages awarded run less than $25,000. Amounts exceeding $100,000 were rare.

HB 2025 as drafted will do the following:

1. A bifurcated trial is required. While bifurcation is available now if the court agrees, they've not been readily wanting to make such bifurcations. We think bifurcation will be useful. In Phase I, the jury decides whether to award actual damages, and, based on the evidence, whether the defendant acted willfully, wantonly (which includes recklessly), or with fraud or malice. If the answer to that special question is "no," the defendant should not face punitive damages, and a second phrase is unnecessary.

   (a) If the jury decides the defendant acted willfully, wantonly or with fraud or malice, and so states, it is doubtful that a second hearing is necessary, since if there are also actual damages awarded, for "other considerations" (such as no appeal) the plaintiff may agree to forego the opportunity to seek punitive damages.

   (b) Bifurcation of the trial means the award of actual damages will be done without the wealth of the defendant figuring into the actual damage award.

2. Subsection 1(b) allows evidence of mitigation of punitive damages to be considered by the jury that ordinarily is not allowed to go to the jury. For example, since the purpose of punitive damages is to "punish and deter" the conduct of the defendant, in mass tort cases or product liability cases, the defendant may want to show under subsection 1(b)(7) that he has been punished in other jurisdictions. Current Kansas courts have no authority to hear evidence of unrelated punitive damage judgments rendered in other jurisdictions as being relevant to

the question of remittitur or additur in a pending case where multiple punitive awards arise from a single wrong.

3. The claim must be proved by "clear and convincing evidence standard." Most claims based on fraud have this requirement already. Some trial attorneys indicate claims for punitive damages often unofficially require extraordinary proof before juries award such damages. KBA does not believe the standard should be "beyond reasonable doubt;" that is a criminal code standard of evidence that is inappropriate in our civil code.

4. The change in subsection (d) is drawn from the 1985 medical malpractice code, which was done because of the peculiar relationship of a physician with a hospital or the physician's medical corporation or partnership; it does not appear to readily translate to other types of defendants against which punitive damages are sought. Statutes allow insurance coverage for punitive damages awarded for vicarious liability of principals or employers for the tortious act of agents or employees. [Chapter 160, 1984 Kansas Session Laws.] The Kline v. Metromedia case sets forth a standard of what constitutes a "good faith" defense to vicarious liability for punitive damages. We suggest subsection (d) either be stricken, or (d) conform to the language of Kline, which is attached as an appendix.

5. Although not a condition of our support for this bill, the fact that this bill covers all punitive claims in civil actions ex-

cept medical malpractice claims means that medical malpractice punitive claims will be handled differently. Examples:

(a) The mitigation evidence in subsection 1(b) is unavailable to health care providers -- including hospitals.

(b) In Keltz v. Feltner, the Supreme Court of Kansas will decide the constitutionality of the 1985 SB 110, which included the physician's statute concerning punitive damages. That case is expected to be handed down in April. If 1985 SB 110 is declared unconstitutional, and this act doesn't include medical malpractice actions, we will still have two standards of handling punitive damage claims. There will be no restrictions on medical malpractice punitive claims, and health care providers will get none of the benefits of HB 2025.

Other Issues

Punitive damages should NOT be split with the state general fund, or for any other use, unless determined voluntarily by the plaintiff. To require any portion of the award to go to the state creates unnecessary conflicts of interest between plaintiffs counsel and the plaintiff. Further, the state does not participate in the plaintiff's costs of discovery of relevant evidence leading to successful prosecution of the punitive claim; the state therefore has no legitimate reasons for getting part of the award.

Conclusion

KBA supports this legislation. We believe our suggested amendments strengthen it.

Before discussing this issue any further, we will first set out the general rule regarding the liability of a corporation for punitive damages awarded for a tort committed by its employee:

> "A corporation is not liable for punitive damages awarded for an employee's tortious acts within the scope of employment unless (a) a corporation or its managerial agent authorized the doing and manner of the act; (b) the employee was unfit and the corporation or its managerial agent was reckless in employing or retaining him; (c) the employee was employed in a managerial capacity and was acting within the scope of employment; or (d) the corporation or its managerial agent ratified or approved the act of the employee. Following Restatement (Second) of Torts § 909 (1977); Restatement (Second) of Agency § 217C (1957)." *Kline v. Multi-Media Cablevision, Inc.*, 233 Kan. 988, Syl. ¶ 4, 666 P.2d 711 (1983).

See also *Plains Resources, Inc. v. Gable*, 235 Kan. 580, Syl. ¶ 5, 682 P.2d 653 (1984).

In the present case, plaintiff alleges the failure of Taco Bell's manager, Mark Wills, to call the police or intervene to prevent the fight provided a sufficient basis upon which to award punitive damages. Since Wells was employed in a managerial capacity and was acting within the scope of his employment, the corporation can be held liable if Wells' failure to act was willful, wanton, or grossly negligent.

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LEGISLATIVE TESTIMONY

Kansas Chamber of Commerce and Industry

500 First National Tower One Townsite Plaza Topeka, KS 66603-3460 (913) 357-6321

A consolidation of the Kansas State Chamber of Commerce, Associated Industries of Kansas, Kansas Retail Council

HB 2025

March 19, 1987

KANSAS CHAMBER OF COMMERCE AND INDUSTRY
Testimony Before the
Senate Judiciary Committee
by
David Litwin

Mr. Chairman, members of the committee. My name is David Litwin, and I appreciate the opportunity to testify in support of HB 2025 on behalf of the Kansas Coalition for Tort Reform and the Kansas Chamber of Commerce and Industry, a member of the Coalition.

The Kansas Coalition for Tort Reform is a federation of diverse groups that share the view that certain changes in our civil justice system are needed for two general purposes: 1) to make that system more efficient, more just, and less costly, and 2) to provide, over the long term, a more stable environment that would permit the writing of high quality liability insurance at affordable rates.

The Coalition's membership includes the following: Kansas Chamber of Commerce and Industry; Kansas Farm Bureau; Kansas Contractors Association; Independent Insurance Agents of Kansas; Kansas Railroad Association; Wichita Area Chamber of Commerce; Kansas Motor Carriers Association; Kansas Society of Architects; Kansas Medical Society; Kansas Hospital Association; Associated General Contractors of Kansas; Kansas Association of Broadcasters; Kansas Grain and Feed Dealers Association; Kansas Association of Property and Casualty Insurance Cos., Inc.; Kansas Consulting Engineers; Kansas Engineering Society; Kansas Motor Car Dealers Association; Kansas Lodging Association; Kansas Petroleum Council; Kansas Independent Oil and Gas Association; American Insurance Association; Kansas League of Savings Institutions; Wichita Independent Business Association; Western Retail Implement and Hardware Association; Alliance of American Insurers; Kansas Telecommunications Association; National Federation of Independent Business/Kansas; Merrell Dow Pharmaceuticals, Inc., Overland Park; Hutchinson Division, Lear Siegler, Inc., Clay Center; Becker Corporation, El Dorado; The Coleman Co., Inc., Wichita; FMC Corporation, Lawrence; Puritan-Bennett Corp., Overland Park; and Seaton Media Group, Manhattan.

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At the outset, let me make it clear that we do not advocate prohibition of punitive damages, although I would note that they are not allowed in several states. There are individuals and organizations in our society that are indifferent to the interests and rights of others, and where that indifference, or malevolence, results in harm to others, it does seem appropriate to add that extra sting not completely provided by compensatory damages. Hopefully, awards of punitive damages in appropriate amounts and where they are deserved will punish the transgressor and deter others from similar conduct.

On the other hand, punitive damages are very different than compensatory awards, in both their intent and their consequences. Under current Kansas law, they can be awarded without any regard to the amount of monetary damage, if any, suffered by plaintiff; they are a windfall to the plaintiff, awarded above and beyond the amount needed to make him or her whole for the injury; they are extraordinarily harmful to a defendant's reputation; they cannot be insured against, in general, as a matter of public policy; and the amount and frequency of such awards is unpredictable.

On the other hand, at least in theory, punitive damages cannot be assessed against a party unless it is proven that defendant acted malevolently or in gross disregard for others' rights. If that were the case, then one could say, if a party behaves according to civilized standards, he has nothing to fear.

Unfortunately, both the frequency and size of punitive awards have increased dramatically in recent years and, in the perception of many, they are imposed in many cases where their appropriateness is very doubtful and in excessive amounts. Thus in the business and professional world, increasing numbers of <u>good</u> corporate and individual citizens worry about large punitive damages being awarded <u>without justification</u>, and their fears are hardly groundless. There is a growing fear that with the advantage of hindsight, actions that seemed reasonable at the time will be later judged harshly and sanctioned by large punitive awards, since this is precisely what is happening.

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The result is that many products and services that would benefit humankind are not reaching the market or are being withdrawn. In the end, we are all the losers.

Indeed, people in the business and professional communities have the most to be concerned about in this sphere. A Rand corporation study of punitive awards in San Francisco and Chicago found that the average size of awards against individuals increased about 100% from 1960 to 1984, but over 400% against businesses. There were about 250 awards in these jurisdictions against individuals compared with only about 140 against businesses, but the business awards totaled almost five times as much as those against the individuals.

Some would assert that here in the nation's heartland, punitive damages are so rarely awarded that we needn't be concerned. This assertion is untrue. There was testimony before the interim Committee on Tort Reform and Liability Insurance that in the past couple of years, there have been several punitive judgments in the area of $1 million or more in Kansas. Just the other day, another punitive verdict of $1 million was entered in Kansas, against a business defendant.

I am not suggesting that these particular awards were or were not improper. I am suggesting that those who would foreclose any thinking about the subject at all based on the belief that we don't have big punitive damage awards in Kansas are ducking reality.

Indeed, research shows that in the Kansas City area, which includes portions of Kansas and Missouri, in 1980 there were 31 punitive awards totaling about $900,000; in 1984 there was the same number, but they aggregated over $20 million, an increase of over 2,000 percent.

The challenge, then, is to take appropriate measures to see to it that punitive damages are awarded only where they are called for, and in appropriate amounts. There are a number of established steps that can be taken to help achieve these goals. They include:

1. Bifurcation. This means having the initial issue of deciding whether punitive damages are appropriate determined first, and the amount decided later, normally by

the judge. As a law review article states:

> "This scheme offers several advantages over allowing the jury to determine such awards. First, it would reduce the probability that punitive damages awards might be unduly influenced by emotion, since most judges are presumably more detached in their deliberation and therefore more likely to render objective damages assessments. Additionally, evidence of the defendant's wealth that could prejudice the jury on the issue of liability could then be excluded from jury consideration. Further, judges would be able to call upon their experience in criminal sentencing...in evaluating the need for punishment and deterrence in particular cases..."

This latter point is incisive. Punitive damages are regarded as quasi-criminal, and they are the equivalent of the sentence in a criminal case. Yet while we have the jury determine guilt in a criminal case, we recognize that the judge is better qualified to impose sentence.

The bill under consideration creates bifurcation, a very important first step. But it then undermines itself by having the jury determine the amount of damages in the second stage of the trial. I submit this is self-defeating and if bifurcation is good policy, let's implement in a way that is most likely to achieve the desired end.

2. Requiring a higher standard of proof than "preponderance of the evidence". Since a punitive award is really a fine, it makes sense to require a standard of proof that's higher than what is normally required in civil proceedings. The bill would require "clear and convincing evidence" of entitlement to damages. This is a helpful innovation.

3. Establish standards to guide the determination of the amount of damages in the second phase of the trial. The bill lists 7 considerations that are very relevant, such as the profitability of the misconduct and whether damages have already been imposed in other cases.

4. Establish some kind of objective limit on the amount of damages that can be imposed. The bill fails in this regard. We suggest there be some kind of standard, such as limiting punitives to a multiple of actual damages (e.g., they could not exceed three times the amount of compensatory damages), a flat ceiling, or a formula, such as this legislature already adopted in the medical malpractice legislation, L.

1985, c. 179. The latter bill limits punitive awards to the lesser of 25% of defendant's highest income during the five preceding years or $3 million.

5. Award a substantial part of punitive damages to the state. Since punitives are like a fine, and are a windfall not necessary to compensate a plaintiff for his or her loss, it is illogical to allow plaintiff to receive all of an award. Fines vindicate the public interest, and they go to the state treasury. Perhaps a successful plaintiff should be given something to compensate for his costs and trouble in vindicating the public interest, but not all of the award. The medical malpractice legislation awards 50% to the state, and we think this is a good and appropriate figure.

On the whole, then, we support the bill, but urge it be amended as I have suggested to add further assurance that it will achieve its intended effect, namely to increase the probability that punitive damages will be awarded only where deserved and in proper amounts.

I submit that the provisions of the medical malpractice punitive damage limitation should be engrafted onto this bill. In both arenas, the goal is identical. It seems strange to provide a full plate of procedural safeguards only for medical malpractice cases, since both the problem and the desired solution are the same.

Thank you for your consideration. If there are any questions, I will be happy to answer them.

League of Kansas Municipalities

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

TO: Chairman Bob Frey and Members of the Senate Judiciary Committee

FROM: Jim Kaup, League Attorney

RE: **HB 2023 -- Amendments to the Kansas Tort Claims Act**

DATE: March 19, 1987

I. INTRODUCTION

Like the other conferees who have appeared before this Committee already this session, the League of Kansas Municipalities advises you that our membership has faced, and continues to face, a problem in the area of tort liability in Kansas. The dimensions of this problem are so severe as to threaten to erode the ability of some Kansas cities to provide basic services to their citizens.

We recognize that the current liability insurance "crisis" not only affects cities, but also reaches out to a wide cross-section of American society. Many groups -- from health care providers, small businesses and professionals, schools and others -- have felt the helplessness of expanding liability exposure and the shocking increase in insurance premiums. Often these two problems of liability exposure and insurance affordability or availability merge, creating a cause and effect scenario with drastic consequences. While cities may find some comfort in the fact that they are not alone in their struggle, local governments do not have the option open to many other parties suffering from the same ills. **A city simply cannot pull up stakes and move out. Certain functions have to be carried out, and certain services have to be provided regardless of the risk which insurance companies attribute to the performance of those activities.**

We would ask you to recognize, as our city officials do, that **inevitably the increases in local budgetary expenditures for insurance protection or for larger liability awards come from the local tax base.** That level of government which is least able to raise revenues is forced to foot the final bill for a state-wide, and nation-wide, problem which touches upon all aspects of society.

The League is well aware of the continuing controversy and finger-pointing between the liability insurance industry and advocates of our current tort system. We realize that when two influences bear on the same subject at the same time, each can tend to obscure the existence of the other. While our cities are first and foremost preoccupied with the affordability and unavailability of municipal liability insurance, we fear the dangers of this legislature overlooking the fact that this is a "crisis" arising out of both insurance industry practices and the evolution of this nation's tort law system. While we believe the hands of the insurance industry are far from clean, we also believe that a major cause of the problems we face involves tort liability

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awards that seem to accelerate daily in dollar terms and in terms of the nature of conduct for which cities can be held liable. Courts are awarding damages for actions that were not admissible in a court only a few years ago. Right versus wrong and the balancing of the needs of society versus the dangers to a few do not appear to be as important in today's tort system as is the public's expectation that someone, preferably a deep pocket such as a municipality, should pay for every injury suffered.

Common sense tells us it is too simplistic to blame the insurance industry solely for rising insurance premiums. Many factors which are unique to the insurance industry had a great deal to do with the rising premiums which cities are now faced with. During the 1970's cities benefited from insurance company practices which encouraged selling of premiums at rates below what actuarial and experience data would indicate. High interest rates which premium payments would receive upon investment was the incentive for doing this for many companies. Thus, to sell more insurance and collect as much cash as possible, insurance companies slashed rates. Low reinsurance rates were readily available to insurance companies, providing them with affordable protection for major claims. Cities had no reason to object to these bargain premiums, which were the result of cash flow underwriting.

Today, in a grand example of the cyclical nature of the insurance industry, the practices of the 1970's have come back to haunt our cities. Interest rates have dropped to the point where insurance companies no longer reap the insurance profits from investments which they once did. The foreign reinsurance market has abandoned this nation after having been hit with too many large liability claims. Insurance company reserves are depleted as companies must still pay out on policies which were sold at a discount years ago. To remedy their financial situation companies have abruptly and dramatically raised premiums to reflect the "true" cost of risk. Some companies are refusing to underwrite certain types of policies, such as environmental pollution, because they are just too risky. Others limit the amount of risky policies they do write. It is also a fact of life that, true to the principle of insurance to spread risk over a pool, even cities with relatively few claims have faced increased premiums.

While the most recent data suggests that the insurance industry may be recovering, many uncertainties remain. Liability policy renewals for cities in 1986 show that the marketplace remains tight--as premiums climbed, retentions increased and limits decreased. In response, during 1986 cities in Kansas, and across the nation, became self-insured in greater numbers than ever before.

Recent results from a nationwide PRIMA (Public Risk and Insurance Management Association) survey indicated that in 1986 only 65.3% of the respondents reported that they were able to renew their policies. Of those being renewed, 90.6% experienced a rate increase ranging from 10% to 354%. In 1986, the average renewal increase exceeded 86%. By comparison, the average renewal increase in 1985 was a staggering 184%.

In 1986, 45% of those public agencies whose policies were renewed indicated that additional exclusions were added to their policies.

This national survey covered several public agencies although the majority of respondents were cities (56%).

In Kansas, cities are experiencing similar premium increases and reduced or non-existent coverage. For example, seven such cities contacted by the League during the week of February 2, 1987 reported the following increases:

	1984	1985	1986	Two Year Increase
Manhattan	$108,692	$191,440	$212,580	96%
Ottawa	107,076	228,300	327,864	306%
Hesston	41,026	52,951	57,303	40%
Dodge City	172,833	226,648	291,147	68%
Junction City	182,250	277,461	280,648	54%
Valley Center	26,886	43,273	43,500	62%
El Dorado	73,296	109,496	164,980	125%

The League recognizes that some parties challenge the assertion of the insurance industry that there has been a tort explosion in this country. Statistics on the number of cases filed and the average size of judgments awarded tort victims can be submitted to support that challenge. But whether the tort explosion is a myth, the insurance industry appears accurate in its claim that the types of liability for which cities can be sued has expanded. We recognize that the prospect of expanded liability and damages makes it almost impossible for insurers to predict losses with accuracy. Consequently, the mere threat of an increase in the types of lawsuits has made insurance companies avoid cities.

We also submit to you that the very existence of liability insurance over the years has hidden some of the abuses and excesses that have developed within our tort system. Insurance had shielded society from an accurate perception of the tremendous costs associated with tort law. We suggest to you that municipalities offer a sterling example of this societal-wide problem. The manifestations of these problems range from the annoying but relatively minor cancellation of fireworks displays clear to the other end of the continuum -- liability for the way in which basic governmental services, such as police and fire protection, are provided to individual members of the public. For example, in 1986 we read with alarm the Kansas Supreme Court decision of Fudge v. City of Kansas City, a decision which broke new ground for municipal tort liability -- cities can be held liable for what someone else did because the city failed to prevent something from happening.

Overall, this is a confusing situation for our member cities. We recognize that the figures show that the insurance industry is making healthy profits again -- yet our premiums continue to rise and the industry continues to press hard for civil justice reforms. We are exposed to more and more potential liability risks -- such as was recently created by the Fudge decision -- yet the claims record of Kansas cities remain exceptionally low. Because our obligation is to our citizens living in cities in Kansas -- and because those citizens are suffering as taxpayers and also as users (or former users) of municipal services and programs which are being curtailed or eliminated out of liability fears -- the League will ask the 1987 Legislature to take action on both tort law reform and insurance regulatory reform. More immediately we ask this Committee to approve HB 2023 and the League's amendment to that bill offered today.

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II. LEAGUE RESPONSE TO THE "LIABILITY INSURANCE CRISIS"

In response to the insurance cost and availability problems Kansas cities were facing, in 1986 the League proceeded on several fronts -- a risk management consultant was hired to study the dimensions of the problem in Kansas; a Task Force of city officials was created to identify possible shortcomings in Kansas tort law; and the League's 1986 Convention Delegates adopted a formal policy statement on tort reform which guides us in our testimony and proposals here today. Each of these initiatives is discussed, in turn, below.

A. Insurance Market Analysis.

In January 1986 the League retained a risk management consultant to prepare an insurance market analysis to determine whether the private insurance market was capable of meeting Kansas municipal insurance needs. These consultants surveyed 500 of the 627 Kansas municipalities. 160 responded to the survey, with those cities having a population representing 40% of Kansas' municipal population. Following is a listing of the major findings of that survey:

1. Municipal insurance availability is not as severe a problem in Kansas as it is in many other states. Only 15% of the respondents indicated difficulty in obtaining insurance during the most recent renewal period.

2. There were no wholesale policy cancellations during the time period surveyed. Most of the cancellations that did occur were for general liability and public official's liability coverage.

3. Liability premiums increased dramatically from 1984-85 to 1985-86. The increase over this period was 115%. The increase from 1983-84 to 1984-85 was 50%. As most policy years run from April 1 - April 1, 1984-85 to 1986-87 premium increases were not available at the time of the survey.

4. The dramatic increases in premiums which did occur cannot be attributed to sharp increases in policy exposures.

5. 60% of the respondents have never had a claim filed against the city or its officers or employees since the time the Kansas Tort Claims Act took effect on July 1, 1979.

6. 72% of the respondents (118 of 165) had never had a claim paid under the lifetime of the Kansas Tort Claims Act. Only 9% of the respondents (14) have paid more than five claims since July 1, 1979.

7. **". . .Kansas municipalities have not experienced a frequency problem on tort liability claims. Therefore the very sharp increases in premiums charged by the insurers over the last two years is probably not caused by actual Kansas municipal loss experience, but rather by the overall poor loss ratios experienced by the insurance industry and perhaps by the poor loss experience experienced by public entities in other states."**

8. **". . .Conditions may improve for liability coverages sometime late in 1987. Even when conditions start to improve. . .conditions will probably never return to normal. Generally speaking public entities will be forced to take more aggressive risks retention postures to focus more on risk assessment and risk control. . . (T)he commercial insurance market will not be a principal source of risk financing for the most difficult risk exposures, including public official's liability, law enforcement liability and environmental impairment liability."**

B. <u>League Task Force on Municipal Tort Liability.</u>

The Task Force on Municipal Tort Liability was created by action of the Governing Body of the League of Kansas Municipalities in July 1986. The Task Force is comprised of the six members of the League's standing Committee on Municipal Legal Defense and five members appointed by the League president.

The Task Force was created for the following purposes:

1. To identify the causes and affects, and extent, of the current tort liability and insurance "crisis" faced by local governments in Kansas.

2. To analyze the Kansas Tort Claims Act and state insurance laws for those amendments and revisions necessary to reach an appropriate level of immunity for local governments from tort liability which will balance the needs of harmed individuals with the public's need for governmental programs and services.

3. To assist the League in developing policy positions and legislative proposals regarding tort law reform and insurance regulatory efforts for the 1987 legislative session.

4. To assist the League staff in preparing proposed amendments for consideration by the Special Committee on Tort Reform and Insurance Liability during the Summer and Fall of 1986, and to follow through on those recommendations during the 1987 legislative session.

The membership of the Task Force is as follows:

David Retter, Chairman, City Attorney, Concordia
Dale Bell, City Attorney, Emporia
Greg A. Bengston, City Attorney, Salina
Robert Evans, City Manager, Bonner Springs
Irene B. French, Mayor, Merriam
Tom Glinstra, City Attorney, Olathe
Ron Miller, City Administrator, Topeka
David R. Platt, City Attorney, Junction City
Tom Powell, Director of Law, Wichita
Robert G. Suelter, City Attorney, Great Bend
Robert Watson, City Attorney, Overland Park

The Task Force held a number of meetings during the Summer and Fall of 1986 to prepare proposals for the Special Committee on Tort Reform and Liability Insurance. The Task Force also met following the Interim Committee's adoption of HB 2023 to discuss how well that bill addresses the need for tort law reform.

Task Force Findings. As the basis for its proposals for tort law amendments, the Task Force reached several conclusions as to the nature of the tort liability "crisis" facing Kansas municipalities:

1. Kansas municipalities benefit from a Tort Claims Act and insurance claims history that are favorable when compared to many other states.

2. While the liability situation could be worse, nonetheless many municipalities have experienced hardships in finding, and financing, municipal liability insurance coverage.

3. There is a growing concern that Kansas courts are gradually eroding the exceptions to tort liability created by the legislature in 1979 when the Kansas Tort Claims Act (KTCA) was enacted. Cases such as Schmeck v. City of Shawnee and Fudge v. City of Kansas City are graphic examples of that erosion.

4. The combination of (a) chaos in the private insurance industry, (b) court erosion of tort immunity, and (c) the efforts by many cities to self-insurance or to form pooling arrangements, justifies a rethinking of the scope and extent of tort liability that municipalities should have. While the Kansas Tort Claims Act may have once adequately balanced the competing private and public interests in having limited tort liability immunity for municipalities, such a public policy may not be the best public policy today.

Task Force Proposals. Having arrived at the above findings, and tailored proposals for amendments to the KTCA to those findings, the Task Force submitted a draft bill which would have made some 16 changes to the KTCA. Nine of those proposals were endorsed, in whole or in part, by the Interim Committee, and six were accepted by the House and are now before this Committee.

While these KTCA amendments do not in every instance parallel the language suggested to the Interim Committee by the Task Force, it is significant that every amendment has its origin with the Task Force, and none of these amendments conflicts with the proposals of the Task Force. Thus, these amendments are all positive from the League's perspective and all serve to either limit or more clearly define municipal tort liability or to procedurally improve upon the KTCA.

Major amendments to the KTCA are set out below in an abbreviated form, and a side-by-side comparison of the HB 2023 language with the Task Force's proposed language is offered. The League will offer more detailed testimony in support of each amendment.

	HB 2023, as amended		**League Task Force Proposal**
1.	Blanket immunity for all governing body members and appointive members of boards, committees and commissions acting within scope of their office.	1.	Substantially the same.

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	HB 2023, as amended		League Task Force Proposal
2.	Expand the application of the discretionary function exception to liability.	2.	Substantially the same.
3.	Provide a new exception for claims resulting from community service work.	3.	Same.
4.	Authorize municipality to compensate employees for legal expenses of defending a claim for punitive damages.	4.	Same.
5.	Clarifies that participation in a pooling arrangement does not automatically waive the $500,000 cap on liability.	5.	Same.
6.	Authorizes municipalities to compensate employees for legal expenses of defending a claim for punitive damages in a suit brought under the Federal Civil Rights Act and the actual judgment for such punitive damages provided certain criteria are met.	6.	Substantially the same.

In addition to the above six proposed amendments approved by the House, the League "lost" the following three amendments to the KTCA that had been recommended by the Interim Committee but removed by the House Judiciary Committee:

1. A response to the Fudge v. Kansas City (239 Kan. 369 (1986)) decision that provided an exception from liability for adoption on enforcement or failure to adopt or enforce "any written personnel policy which protects persons' health or safety unless a duty of care, independent of such policy, guideline or procedure, is owed to the specific individual involved" (see lines 92:95).

2. Clarification that pooling arrangements formed pursuant to K.S.A. 76-6111 are not subject to state insurance regulatory law (lines 308:311).

3. Authorization for municipalities to pay KTCA judgments via structured settlements (lines 332:333).

One Task Force proposal that was not recommended by the Interim Committee was approved, in a modified form, by the House:

1. Requiring written notice of claims as a prerequisite to bringing a KTCA lawsuit (lines 439:469).

Also, in addition to the above proposed amendments which had their origins with the Task Force, a number of additional amendments were submitted to the Interim Committee. While each of the following proposals had some support from Interim Committee members, none found their way into HB 2023. Items 3 and 4 are the subject of two bills introduced by the Senate Local Government Committee.

1. Modifying the KTCA from "open-ended" to "closed-ended" liability.

2. Prohibiting any punitive damage awards under the KTCA.

3. Authorizing the use of temporary notes to pay KTCA judgments and settlements.

4. Clarifying that no-fund warrants issued to pay KTCA judgments or settlements do not require the prior approval of the State Board of Tax Appeals.

5. Creating a new exception from tort liability for "quasi-judicial" functions.

6. Creating an exception from liability for all traffic signing and marking.

C. League 1986-1987 Policy Statement on Tort Reform

L-2. **Governmental Immunity; Insurance.**

(a) **Tort Claims Act.** In recent years cities have suffered from the effects of a steady expansion of exposure to tort liability, accompanied by the cancellation of insurance for some cities and dramatic increases in premiums and reduced coverages for others. Because of this expansion of tort liability, primarily by the courts, coupled with the uncertain future of present-day exceptions from liability, we witness the threatened disruption of the balance thought to have been achieved in 1979 when the Kansas Tort Claims Act was enacted--a balance between the legitimate needs of individuals harmed by wrongful conduct and the public's need for an appropriate level of immunity for cities from tort liability, which makes possible the continued provision of governmental programs and services. In an effort to restore this balance, we support the recommendations of the League's Task Force on Tort Reform to amend the Kansas Tort Claims Act, as follows:

(1) change the focus of the Act from one of "open-ended" liability where liability is the rule and immunity the exception, to one of "closed-ended" liability where immunity for actions of municipalities is the rule and liability the exception;
(2) require written notice of claims by persons alleging injury from acts of municipalities as a jurisdictional prerequisite to commencing a lawsuit under the Act;
(3) prohibit the awarding of punitive damages against the officers or employees of municipalities;
(4) establish blanket tort immunity for municipal governing body members;
(5) clarify that no duty of care arises from the local adoption or implementation of policies or guidelines, and that, accordingly, no liability arises when an employee fails to follow such policies or guidelines;
(6) authorize the payment of tort claims judgments and settlements by structured settlements;
(7) clarify the authority of cities to issue no-fund warrants and temporary notes to pay tort claims judgments and settlements; and

(8) create a clear distinction between "insurance purchased" by cities for tort liability coverage as opposed to participation in pooling arrangements, and to further clarify that pooling arrangements are not insurance companies subject to state laws regulating such companies.

(b) **Insurance.** We further support legislation intended to correct flaws in the state's insurance regulatory laws which have exposed municipalities to the "feast or famine" cycle of the commercial insurance industry. We support legislation to (a) require insurance companies to return excess profits earned from premiums to policy holders; (b) provide the insurance commissioner greater authority to regulate insurance rating plans and to limit premium credits and debits in the rating plans; and (c) establish an assigned risk program for municipalities.

III. ANALYSIS OF HB 2023, AS AMENDED BY THE HOUSE.

Section 1. K.S.A. 75-6102; Definition for Community Service Work.

Provides a definition in the KTCA for the term "community service work." This amendment relates to the new exemption from liability for damages arising from community service work (see lines 168:170). The language of the amendment is the same as that in HB 3114, passed by the 1986 Legislature, but vetoed by then-Governor Carlin due to a multiple-subject problem with the bill.

Section 2. Qualified Personal Tort Immunity.

This amendment creates personal immunity from liability for actions brought under the KTCA for members of municipal governing bodies (e.g. county commissioners, mayors and city councilmembers, school board members, township trustees) (line 57) and for persons appointed to serve on "any appointive board, commission, committee or council of a municipality" (lines 62:63).

This immunity is qualified in that the action taken must be within the scope of office and undertaken without actual fraud or actual malice (lines 58:59 and 63:64). The amendment is clear that this personal immunity in no way limits the tort liability of the municipality itself (lines 68:78).

The intent of this amendment is to help reduce the fears the League has often heard voiced by local government officials -- the fear that by running for or holding elective or appointive public office a person will be jeopardizing his or her personal assets. Whether such a concern is real or largely perceived, the important point is that it has discouraged citizens from contributing their time and talents to public service. This has been especially felt at the local government level, where many offices are uncompensated, or where compensation is nominal. By passing this amendment local officials will know that if their actions fall within the scope of the new immunity, they cannot be held personally liable under the KTCA.

It should be noted that this amendment is somewhat analogous to the tort immunity endorsed by this Committee earlier this session by passage of SB 28, which gave immunity to volunteers of nonprofit organizations.

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Section 3. K.S.A. 75-6104; Exceptions from KTCA Liability.

Three amendments to this section of the KTCA are supported by the League: (1) Restoration of the response to the Fudge v. Kansas City decision that was recommended by the Special Committee on Tort Reform and Liability Insurance but deleted by the House (lines 92:95); (2) Refinement of the current exemption for discretionary functions and duties in response to the Allen v. SRS decision (lines 100:103); and (3) Creation of a new exemption for damages arising from community service work (lines 168:170). Each of these amendments is discussed below.

(1) Fudge v. Kansas City response.

Probably the single-most important amendment which the League urges this Legislature to make to the KTCA concerns the infamous Fudge v. Kansas City ruling of the Kansas Supreme Court (239 Kan. 369). That 1986 decision presents serious and far-reaching ramifications for tort liability for law enforcement officers under the KTCA. Further, we believe the Fudge's impact will extend well beyond law enforcement to encompass virtually all municipal services and programs, especially fire, ambulance, animal control and building and health inspections.

The League proposed a legislative response to Fudge to the 1986 Interim Committee. That Committee discussed and rejected our proposal, but substituted for it the language at lines 92:95. The House Committee struck that language. With all due respect the League would suggest that the membership of the House had a fundamentally flawed understanding of the logical consequences the public will suffer if Fudge is left untouched. We hope we are able today to paint a clearer picture of what happened in Fudge, and what the short-term and long-term effect of the decision will be. **We ask this Committee to restore to HB 2023 the language struck at lines 92:95.**

To appreciate the dire results we see in Fudge, some details of the facts and decision are offered below. In addition the League has requested that counsel for Kansas City in the Fudge case, Mr. Daniel Denk, appear before this Committee. Also, the full text of the Fudge decision is set out at Attachment #1.

The case involved two Kansas City police officers who were called to a tavern to deal with a disturbance causd by an intoxicated patron. Upon arrival at the club the police officers determined a disturbance was no longer occurring, and that the bar patrons had left the bar and were assembled in the tavern parking lot. While conflicting testimony was presented as to whether the police officers observed the state of intoxication of one of the patrons, that patron proceeded to drive from the premises and almost immediately was involved in a accident fatally injuring a third party.

A Wyandotte County District Court jury found the decedant 7% at fault, the intoxicated driver 75% at fault, and the City of Kansas City and its police officers 18% at fault. Total damages awarded were $1,095,103.66.

The holding of the Kansas Supreme Court, in affirming the district court decision, is that where police officers are subject to a specific, mandatory set of guidelines to use (here, guidelines with regard to handling intoxicated persons) those police officers and the employing city are subject to liability under the Kansas Tort Claims Act for the failure to follow those guidelines.

In the decision the Court first discussed the tort law in force in Kansas and specifically dealt with the public duty doctrine--the tort concept of no governmental liability absent a special duty to act. The Court also noted that police officers have a duty to the public-at-large rather than to any individual citizen. The Court held that where the police are subject to guidelines or owe a specific duty to an individual the public duty doctrine does not apply and the police owe a special duty accordingly. In Fudge, the Kansas City police department had a standard operating procedure manual which set out mandatory procedures for handling a variety of police situations. One of those situations involves handling intoxicated individuals. Specifically, that order states, in part, "an individual... who is incapacitated by alcohol... will be taken into protective custody...". The existence of that general order, and language from previous Supreme Court decisions allowed the Court to conclude that the police officers had a duty to take the intoxicated driver into protective custody.

The Court then went on to discuss the 1982 decision Schmeck v. City of Shawnee which adopted the Restatement of Torts, Section 324A which provides in part: "One who undertakes... to render services to another which he should recognize as necessary for the protection of a third party... 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...".

The court stated the police officers should have realized that taking the intoxicated driver into protective custody was necessary for the protection of third parties. "Their failure to do so significantly increased the risk that (the intoxicated driver) would cause physical harm to others." Therefore, once having established a special duty to take the intoxicated person into protective custody, they were able to extend this special duty to the deceased plaintiff. In other words, **it was the court's holding that the failure to enforce a law, in this case the police department's own general order which sets out mandatory arrest guidelines, creates a special duty owed by the police to a third party who suffers injury because of that failure to follow the department's general order.**

In a dissent two justices argue that there was no special relationship existing here so as to create any liability for the plaintiff's death.

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

"If police officers are to be the insurers of the public for acts done by alcohol intoxicated persons then they will, of necessity, detain any individual who might possibly be a danger to himself or others... Therefore, non-criminal persons who may be intoxicated will be subject to a far greater risk of detention by the police than those involved in possible criminal conduct."

Regarding the much-discussed police general order, the dissent said the order creates no new duty to the public-at-large, of which the decedant was a member. Any violation of this general order is not a lawful basis of liability for the death of a third party. Violation of a general order only makes the officer subject to departmental discipline.

It has been the League's constant position that the Fudge decision represents a potentially dramatic increase in tort liability. Fudge will force municipalities -- counties, cities, townships, schools... -- to choose between two evils, to the public's detriment:

Municipalities will respond to Fudge by either (1) Accepting the expansion of tort liability and simply paying the extra insurance premiums or they will add tax dollars to tort liability defense funds or self-insurance reserves; or by

(2) Attempting to minimize the impact of Fudge by revising or repealing existing policies, regulations, etc. which create "a specific mandatory set of guidelines" for employees and/or by reviewing all proposed new policies, regulations, etc. not just for their desirability and necessity, but also for whether (or how) their adoption might increase the municipality's tort liability.

Specifically we must have a Legislative response to Fudge because:

(1) **Fudge penalizes progressive government.** The irony of Fudge is that those municipalities which are the most progressive -- those which have voluntarily chosen to enact the most effective policies, procedures and guidelines for their officers and employees to follow in the discharge of their duties -- are the municipalities that suffer from Fudge-type liability. The Court has very effectively created a monumental disincentive for municipalities to take action to control the performance of persons on the public payroll. The impact of this upon the performance of officers and employees, and the corresponding harm this will cause the public, cannot be hidden behind protestations that Fudge was correctly decided because Mr. Fudge's survivors should be compensated for their loss.

(2) **Fudge will, by definition, cause unequal result for plaintiffs in tort actions.** City A has mandatory guidelines, so Plaintiff X can recover. City B, which engaged in identical conduct harming Plaintiff Y, has no such guidelines -- so no liability, no recovery. Where is the public policy?

(3) **Fudge is also grossly unfair to municipalities which find that the rules of the tort liability game have suddenly changed.** Municipalities have been adopting, revising and improving upon their personnel-related

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guidelines for many years. Never, until Fudge, was it suggested that by so doing they were defining the scope of their liability under the KTCA. Policies, etc. intended to have only consequences for the internal operation of the municipality suddenly serve as the basis for a duty of care owned to specific members of the public! This incredible situation is made even less understandable when it is recognized that many policies, etc. such as in Fudge are adopted by administrative offices or bodies, often without the ratification of, or even the knowledge of, the policy-making, legislative body of the municipality!

(4) **If dramatic expansions of tort liability under the KTCA are to be made, the authors of the KTCA -- the Kansas Legislature not the Courts -- should make those expansions on the basis of public policy considerations.** No one has suggested that there exists any legislative history to support the proposition that the 1979 Legislature, in passing the KTCA, intended to create tort liability for municipalities when their employees fail to follow procedure manuals or other personnel-related policies.

(5) **When the full impact of Fudge is felt, the costs to the public will be enormous.** Citizens will feel Fudge either in their taxes, or in decreased public services. It is that simple. The price of living with Fudge is one or the other -- and the cost will always be extracted from the same source -- the citizens of Kansas.

(2) Allen v. SRS response.

In a unanimous decision of the Kansas Supreme Court, handed down January 16, 1987, the Court held that the discretionary decision to undertake a purely ministerial task (in this case the performance of certain janitorial work) "cannot cloak the negligent performance of the ministerial act with immunity under the discretionary function exception (K.S.A. 75-6104(d))." The facts of the case, and the public policy endorsed by the Supreme Court, are simple and straight forward. Defendant-SRS leased office space. Under the lease, SRS had no duty to clean or maintain the hallway adjacent to the leased premises. Janitorial services for the building were provided by a maintenance company under contract with the building owner. Quoting from the decision: "On March 15, 1985, an SRS client vomited in the hallway adjacent to the SRS offices. An SRS employee notified the management firm of what had occurred: when no one from the management firm arrived to remedy the problem, SRS sent one of its employees to clean up the mess. The employee cleaned the area. Thereafter, Plaintiff,. . .slipped and fell on the wet hallway floor. . . Fault was apportioned (by the jury) as follows: Plaintiff (0%); Gateway Complex, Inc. (45%); and SRS (55%)." SRS raised the defense of the discretionary function exception of the Tort Claims Act. The District Court sustained its motion to dismiss SRS on that grounds of immunity. The Court, in rejecting the District Court dismissal of SRS said: "Clearly SRS had no contractual duty to clean the hallway. The notification to the corporation responsible for hallway maintenance was all SRS was legally obligated to do under the circumstances. Had Plaintiff fallen because the building management had failed to clean up the vomit or had improperly cleaned

the area, dismissal of SRS would clearly have been proper. . . Although under no legal obligation to do so, SRS voluntarily undertook to clean the hallway floor. This decision was clearly within the discretionary function exception, but was the actual physical cleanup activity an indivisible part of the exercise of the discretionary function and hence immune from liability under K.S.A. 75-6104(d)? We believe not. . . The discretionary decision to undertake a purely ministerial task of janitorial work cannot cloak the negligent performance of the ministerial act with immunity under the discretionary function exception contained in K.S.A. 75-6104(d)."

The language added to HB 2023 at lines 100:103 was inserted on the floor of the House rather than by the House Committee for the simple reason that neither the League, nor apparently anyone else, had paid attention to the Allen decision prior to House floor debate of HB 2023. The League strongly supports the House floor amendment for the same reason which we ask for the legislature's response to the Fudge decision: The Kansas Supreme Court, by its decision, has once again ruled in a manner to discourage public agencies, both state and local, from taking positive actions designed to protect the public's health, safety and welfare. Here we have the situation, somewhat analogous to the Fudge case, where a governmental agency undertook an activity when it was not under a legal duty to do so. It exercised its discretionary authority to correct an unsafe condition, and by doing so incurred tort liability. Once more, the irony is clear: Had SRS simply ignored the dangerous condition outside its leased offices, the plaintiff would have no cause of action against SRS. But because SRS did so undertake measures intended to protect the public, it faces tort liability if the District Court finds that the cleanup was done in a negligent manner and that that negligence caused the plaintiff injury. The reaction to the Allen decision, if left untouched by this Legislature, will be certain--local governments will be advised that should they elect to undertake any act, regardless of how well intentioned or necessary for the protection of the public, to correct a situation for which they are not legally liable, they run the risk of incurring liability under the KTCA. Kansas municipalities which are already feeling enormous financial pressures, and which are often self-insured or under-insured, will likely respond to this court-created liability in a way which does not make for progressive government nor does it serve the interests of the Kansas public. By approving the amendment at lines 100:103, to effectively overturn the Allen decision, this Legislature will not only be preventing a repeat of Allen-type tort liability, it will be sending a clear message to the Kansas courts as to how the elected representatives of the state intend to have the discretionary function exception to liability applied.

The full text of the Allen decision is reproduced at Attachment #2.

(3) Exemption for Community Service Work.

The proposed language at lines 168:170 would create a broad exception from tort liability for claims arising out of the performance of community service work, except where a motor vehicle is involved. The

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policy behind the amendment is simple -- community service programs as an alternative to incarceration has been promoted by the state. Many local governments which might prefer to establish and use such programs are fearful of doing so because of the threat of tort liability. By statutorily exempting the municipality from KTCA liability, this amendment should further the state's policy favoring community service programs.

Section 4. K.S.A. 75-6105; Liability for Claims.

All amendments are technical in nature and originated from the Revisor's office.

Section 5. K.S.A. 75-6108; Defense of KTCA Suits.

The single amendment to this statute would authorize a municipality to reimburse an employee for costs he or she incurs in the defense of a KTCA claim seeking punitive damages. While the KTCA clearly states a municipality cannot be held liable for punitive damages (K.S.A. 75-6105(c)) it is unclear whether there exists legal authority for a municipality to reimburse an employee for costs incurred in defense of a claim for punitive damages. The amendment would give the municipality the discretionary authority to so reimburse if it finds the employee was acting within the scope of employment and he or she cooperated in good faith in the defense of the claim (lines 250:258).

Testimony before the House was offered on this amendment by Kathy Peters, assistant city attorney of Kansas City. That testimony is reproduced at Attachment #3. Ms. Peters noted that, with the amendment, governmental entities will still not be required to pay punitive damages, but they will have discretion to relieve their officers and employees of the legal costs of defending against punitive damage awards in cases where their conduct was not motivated out of actual fraud or actual malice. The intent of this amendment is obvious -- it is another way the employer-municipality can reassure its employees that they can, for the most part, be "protected" against personal exposure to liability when KTCA lawsuits are brought against them.

Section 6. K.S.A. 1986 Supp. 75-6111; Insurance or Pooling Arrangements.

Under the KTCA, municipalities enjoy a cap on liability of $500,000 for claims arising from a single accident (K.S.A. 75-6105(a)). That cap is "automatically" waived whenever insurance coverage in excess of $500,000 is obtained (Supp. 75-6111(a), at lines 278:283 of HB 2023). The purpose of the amendment at lines 283:289 is to remove the KTCA automatic waiver of the cap and require the governing body to take affirmative action (i.e. pass an ordinance or resolution waiving the cap) before a higher liability limit is imposed. While this amendment is offered in part to accommodate municipalities which want to define which types of activities for which they are willing to accept liability limits higher than the KTCA mandates, it is also intended to aid the functioning of public risk management pools such as the Kansas Intergovernmental Risk Management Agency (KIRMA). Because pools such as KIRMA typically will procure excess coverage far above the $500,000 liability limits, it has been a concern that the "automatic" waiver provision of K.S.A. 75-6105(a) would

jeopardize the viability of pooling arrangements, as that statute could be interpreted as allowing a successful claimant to recover an amount far in excess of $500,000 just because the defendant - municipality participated in a pooling arrangement which had purchased excess lines of coverage.

The amendment at lines 303:307 is simply the reinsertion of the existing statutory language at lines 298:303. The League requests that this current language be retained. It had originally been proposed for repeal by the League as surplusage because of the proposed new language at lines 308:311. Because the League has withdrawn its earlier request for the amendment at lines 308:311 we ask for the present language to be kept in the KTCA.

Section 7. K.S.A. 75-6112; Payment of KTCA Judgments.

This amendment (lines 334:335) would clarify the authority to satisfy KTCA judgments via structured annuities.

The struck language at lines 332:333 was an amendment recommended by the 1986 Interim Committee but removed by the House Committee. The League does not ask for its reinsertion.

Section 8. K.S.A. 1986 Supp. 75-6116; Federal Civil Rights Act Liability.

Under the existing provisions of this statute it is uncertain whether a municipality can lawfully reimburse an employee for attorney fees, costs and expense incurred in defending a punitive damages claim brought under 42 U.S.C.A. 1983 (The Federal Civil Rights Act of 1871). This authority would be clarified by the new language at lines 359:369.

The amendment at lines 375:400 has the effect of authorizing a municipality to pay the punitive damages judgment awarded against an employee if certain conditions are met. While punitive damages in KTCA actions cannot, and should not, be allowed to be paid by the municipality (i.e. the public), there is a difference between the availability of punitive damages under the KTCA for state law torts, and under the United State Constitution and federal civil rights statutes for civil rights violations:

Under the KTCA an employee acting within the scope of employment can only be held liable for punitive damages if the employee's act or omission was because of actual fraud or actual malice (K.S.A. 75-6105). But, under the Federal Civil Rights Act an employee acting within the scope of employment can be held liable for punitive damages not only when the employee's act or omission was because of evil motive or intent, but also when the employee's act or omission constituted "reckless or callous indifference to the federally protected rights of others." Smith v. Wade, 461 U.S. 30, 56 (1982). This difference in standards means that local governmental officials and employees in Kansas can be, and have been, assessed punitive damages for actions and omissions where there was no actual fraud, actual malice, or any other kind of evil motive or intent.

The amendment allows cities to pay punitive damages awards in federal civil rights cases where there was no actual fraud or actual malice (lines 383:394). Governmental entities will not be required to pay punitive damages in instances where there was actual fraud, actual malice, or evil intent, but will have discretion to relieve their officials and employees of punitive damage awards where the conduct was not so motivated.

There is one other problem with punitive damages: plaintiffs' attorneys telling juries that punitive damage awards will be paid by the municipality, leading to increased likelihood that punitive damages will be assessed. To correct this potential problem, the League proposed the language at lines 395:400.

The complete written testimony given the House on amendments to Section 8 is reproduced at Attachment #3.

Section 9. K.S.A. 1986 Supp. 12-105b; Written Notice of Claims Procedure.

Under current law, claims against Kansas municipalities are required to be submitted in writing (K.S.A. 12-105a and 12-105b). These statutory 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(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)).

While it is the League's reading of the above statutes and the legislative history of the KTCA 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.

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

1. 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.

2. 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.

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, see line 459) 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).

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.

IV. SUMMARY.

This Committee has the opportunity to help the taxpayers who foot the bill for ever-expanding municipal tort liability and for the associated, and ever-increasing, costs of insuring against that liability.

The League has never sought to exploit the perception of a "crisis" in liability. While our cities have been hurt, and are being hurt, by the same pressures which have brought tort reform and insurance reform throughout this country, we have not made any unreasonable requests of this Legislature. HB 2023 is a bill of very modest proportions.

Our efforts over the past nine months have been based on a number of simple facts:

(1) The cost to the public of the present KTCA is too high. Our cities pay too much for liability insurance and receive too little coverage. The taxpayer is overcharged and underprotected. Court cases such as Fudge and Allen support the argument of the insurance industry that the dramatically escalating cost of commercial municipal insurance is not so much due to Kansas loss experience as it is to the lack of predictability of future tort liability exposure.

(2) Regardless of whether the insurance "cycle" has bottomed-out, tort reform is essential as more and more municipalities have decided not to play the game anymore and instead will self-insure or form pooling arrangements such as KIRMA. For those municipalities the tiresome question "will this tort reform result in premiums being reduced?" is irrelevant. For the taxpayers in those municipalities every dollar saved as a result of tort reform is a dollar saved, period.

(3) While the KTCA is still viewed as a good, well-conceived law, decisions such as Fudge and Allen have expanded liability to the point where public

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services and functions are either disrupted or made prohibitively expensive. It is the taxpayer who ultimately bears the fiscal burdens of unlimited liability, and reasonable restrictions on the liability of municipalities and their employees are necessary to protect the taxpayers from those excessive fiscal burdens. Amendments are needed to the KTCA to better protect the interest of the public for viable municipal governments.

We ask for your help in restoring that delicate balance that has been the dominant feature of the KTCA since 1979: **A balance between the legitimate needs of individuals harmed by wrongful conduct and the public's need for an appropriate level of immunity for cities from tort liability which makes possible the continued provision of governmental programs and services.**

It is to restore that balance that we ask for the amendments set out in HB 2023, and for our proposal today to restore the language responding to the Fudge decision.

ATTACHMENT #1

FUDGE v. KANSAS CITY

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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.

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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

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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

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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

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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).

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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:

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"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.

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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

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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

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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).

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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

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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

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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 au-

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thority 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

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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.

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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.

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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

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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

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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

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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

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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

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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

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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

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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.

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No. 59,579

VIRGINIA ALLEN, *Appellant*, v. KANSAS DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES, *Appellee*.

SYLLABUS BY THE COURT

1. TORTS—*Governmental Immunity—Application of Discretionary Function Exception to Tort Claims Act.* The decision to clean up a hallway outside of leased premises was within the discretionary function of the defendant Kansas Department of Social and Rehabilitation Services but the actual physical cleanup operation is held to involve a purely ministerial activity not within the discretionary function exception to liability (K.S.A. 75-6104[d]) of the Kansas Tort Claims Act (K.S.A. 75-6101 *et seq.*), all as is more fully set forth in the opinion.

2. SAME—*Personal Injury Action against Governmental Agency—Error for Trial Court to Dismiss Agency Based on Discretionary Function Exception to Tort Claims Act.* In an action wherein plaintiff seeks recovery for injuries sustained by falling on a slick hallway floor, the record is examined and it is *held*: The district court erred in sustaining the motion to dismiss defendant state agency on the ground of the discretionary function exception to liability (K.S.A. 75-6104[d]) of the Kansas Tort Claims Act (K.S.A. 75-6101 *et seq.*)

Appeal from Wyandotte district court, CORDELL D. MEEKS, JR., judge. Opinion filed January 16, 1987. Reversed and remanded for further proceedings.

Michael R. McIntosh, of Kansas City, argued the cause and was on the brief for appellant.

James F. Savage, of Kansas Department of Social and Rehabilitation Services, argued the cause and was on the brief for appellee.

The opinion of the court was delivered by

MCFARLAND, J.: This is an action by plaintiff Virginia Allen seeking damages against defendant Kansas Department of Social and Rehabilitation Services (SRS) for injuries she sustained when she fell in a hallway outside of office premises leased by defendant SRS. The district court sustained a motion to dismiss filed by SRS on the ground of immunity under the discretionary function exception (K.S.A. 75-6104[d]) of the Kansas Tort Claims Act (K.S.A. 75-6101 *et seq.*). Plaintiff appeals therefrom.

SRS leased office space on the first floor of One Gateway Center, Kansas City, Kansas. Under the lease SRS had no duty to clean or maintain the hallway adjacent to the leased premises. The building was owned by Gateway Complex, Inc. Janitorial services in the building were provided by B & G Maintenance Management, Inc., through a contract with the owner.

On March 15, 1985, an SRS client vomited in the hallway

adjacent to the SRS offices. An SRS employee notified the management firm of what had occurred: When no one from the management firm arrived to remedy the problem, SRS sent one of its employees to clean up the mess. The employee cleaned the area. Thereafter, plaintiff, on her way to attend class at the Dickinson Business School which was also located at One Gateway Center, slipped and fell on the wet hallway floor, sustaining serious injury.

Plaintiff brought this action against SRS, Gateway Complex, Inc., and B & G Maintenance Management, Inc. The action between plaintiff and B & G was settled. As previously stated, the district court dismissed the action as to SRS. The case went to trial as to plaintiff's claim against Gateway, with SRS remaining in the action for comparison of fault purposes only. The jury found in favor of plaintiff and fixed her damages at $80,000. Fault was apportioned as follows: plaintiff (0%); Gateway Complex, Inc. (45%); and SRS (55%).

The only issue on appeal is the propriety of the district court's dismissal of plaintiff's claim against SRS on the ground of immunity.

K.S.A. 75-6103 provides in part:

"(a) Subject to the limitations of this act, each governmental entity shall be liable for damages caused by the negligent or wrongful act or omission of any of its employees while acting within the scope of their employment under circumstances where the governmental entity, if a private person, would be liable under the laws of this state."

K.S.A. 75-6104 provides in pertinent 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."

As we stated in *Jackson v. City of Kansas City*, 235 Kan. 278, 680 P.2d 877 (1984):

"In construing subsection (c) and all other exemptions specified in K.S.A. 1983 Supp. 75-6104, it should be borne in mind the Kansas Tort Claims Act takes an open-ended approach to governmental liability. In other words, liability is the rule while immunity the exception. This approach is consistent with the general principle of law that for negligent or tortious conduct, liability is the rule, immunity the exception. *Durflinger v. Artiles*, 234 Kan. 484, 501, 673 P.2d 86 (1983); *Noel v. Menninger Foundation*, 175 Kan. 751, 762, 267 P.2d 934 (1954).

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K.S.A. 1983 Supp. 75-6103(a) declares:

" 'Subject to the limitations of this act, each governmental entity shall be liable for damages caused by the negligent or wrongful act or omission of any of its employees while acting within the scope of their employment under circumstances where the governmental entity, if a private person, would be liable under the laws of this state.'

K.S.A. 1983 Supp. 75-6104 contains the immunity exceptions to the general rule of governmental liability. In *Broadhurst Foundation v. New Hope Baptist Society*, 194 Kan. 40, 397 P.2d 360 (1964), this court observed ordinarily a strict or narrow interpretation must be applied to statutory exceptions. 194 Kan. at 44. In construing a statute, any doubt should be resolved against the exception, and anyone claiming to be relieved from the statute's operation must establish it comes within the exception. In other words, the burden is not upon the claimants herein to establish the defendants do not come within one or more of the K.S.A. 1983 Supp. 75-6104 exceptions. Rather, the burden is upon the defendant governmental entity, or defendant employee, to establish governmental immunity under one or more of the exceptions of K.S.A. 1983 Supp. 75-6104. If the party claiming this exception cannot meet this burden, the general rule of liability, in K.S.A. 1983 Supp. 75-6103, governs." 235 Kan. at 286.

For the purposes of the issue before us, we must assume that the physical cleanup was done in a negligent manner by the SRS employee and that such negligence was a cause of plaintiff's injury. Did the district court correctly determine that SRS had carried its burden to establish governmental immunity therefor under K.S.A. 75-6104(d)? We believe not.

SRS contends its decision to clean the floor and the actual physical cleanup constituted one discretionary activity for which immunity is granted under K.S.A. 75-6104(d). Plaintiff contends two actions occurred. The first act was the SRS determination to undertake the cleanup of the floor although SRS was under no legal obligation to do so. The second act was the actual physical cleanup of the area. Plaintiff argues the discretionary function exception is inapplicable to the actual cleanup operation.

Clearly SRS had no contractual duty to clean the hallway. The notification to the corporation responsible for hallway maintenance was all SRS was legally obligated to do under the circumstances. Had plaintiff fallen because the building management had failed to clean up the vomit or had improperly cleaned the area, dismissal of SRS would clearly have been proper. However, this is not the factual situation before us. Although under no legal obligation to do so, SRS voluntarily undertook to clean the hallway floor. This decision was clearly within the discretionary function exception, but was the actual physical cleanup

activity an indivisible part of the exercise of the discretionary function and hence immune from liability under K.S.A. 75-6104(d)? We believe not. Whether the employee used a wet or dry mop or plain water or a detergent, in carrying out his assignment, were choices not involving any particular skill or training. The actual cleanup of vomit on a floor is about as ministerial as an act can be. The discretionary decision to undertake a purely ministerial task of janitorial work cannot cloak the negligent performance of the ministerial act with immunity under the discretionary function exception contained in K.S.A. 75-6104(d).

We conclude the district court erred in dismissing the action as to defendant SRS on the ground of immunity under K.S.A. 75-6104(d).

The judgment is reversed and the case is remanded for further proceedings.

ALLEGRUCCI, J., not participating.

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ATTACHMENT #3

LEGAL DEPARTMENT of KANSAS CITY, KANSAS

Ninth Floor - Municipal Office Building
One Civic Center Plaza
Kansas City, Kansas 66101
Phone (913) 573-5060

February 5, 1987

House Judiciary Committee
Bob Wunsch, Chairman
State Capital Building
Topeka, Kansas 66212

Re: H.B. No. 2023, Relating to Tort Reform

Ladies and Gentlemen:

My comments on H.B. 2023 deal with the issue of punitive damages. For the Committee's ease of reference, I present this letter outlining my comments.

1. There is a difference between the availability of punitive damages under the Kansas Tort Claims Act for state law torts, and under the United States Constitution and federal civil rights statutes for civil rights violations.

a. KTCA: An official or employee acting within the scope of employment can only be held liable for punitive damages if the employee's act or omission was because of actual fraud or actual malice. K.S.A. 75-6105; H.B. 2023, Sec. 4.

b. Federal Civil Rights: An official or employee acting within the scope of employee can be held liable for punitive damages not only when the employee's act or omission was because of evil motive or intent, but also when the employee's act or omission constituted "reckless or callous indifference to the federally protected rights of others." Smith v. Wade, 461 U.S. 30, 56 (1982).

2. The difference in standards means that local governmental officials and employees in Kansas can be, and have been, assessed punitive damages for actions and omissions where there was no actual fraud, actual malice, or any other kind of evil motive or intent.

a. Experience of Board of Public Utilities: $80,000 in punitive damages assessed against several Board elected members and employees for a major employee reorganization when they had only voted to implement the reorganization

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b. Experience of Kansas City, Kansas: $70,000 in punitive damages assessed against police officers and police chief for failure to follow extradition procedure for individual arrested in sting operation, held for 2-1/2 hours, charges dismissed after individual showed that he had not been the person with the same name and similar driver's license number passing the bad checks. Officers had only acted on information and warrants supplied by the County District Attorney's office, under a plan approved by the D.A. and Police Chief, and there was no evidence that any of the defendants had acted with actual fraud or malice.

c. Neither case involved charges of race or sex discrimination or similar civil rights violation, but instead had to do with procedural problems.

d. If either action had been brought under the KTCA, punitive damages could not have been assessed. However, the federal judges are allowing punitive damages against individuals any time there is any civil rights violation, whether or not there is evidence the individual acted with actual fraud, actual malice, or evil intent. The judges say that any time any kind of civil rights violation occurs, it establishes reckless or callous disregard for federally protected rights, and that punitive damages can be assessed.

3. The cities support H.B. 2023, which has been drafted to address the problem of different standards for assessing punitive damages in state tort and federal civil rights cases.

a. The bill allows cities to pay the costs of defending an individual against punitive damages claims in either case. K.S.A. 75-6105(f); H.B. 2023, Sec. 4(f).

b. The bill allows cities to pay punitive damages awards in federal civil rights cases where there was no actual fraud or actual malice. K.S.A. 75-6116(c); H.B. 2023, Sec. 8(c).

c. Both protections are necessary. Governmental entities will not be required to pay punitive damages in instances where there was actual fraud, actual malice, or evil intent, but will have discretion to relieve their officials and employees of punitive damage awards where the

conduct was not so motivated.

4. There is one other problem with punitive damages that has just become apparent: plaintiffs' attorneys telling juries that punitive damage awards will be paid by the cities, leading to increased likelihood that punitive damages will be assessed.

a. To correct this problem, we propose one additional section to be included in H.B. 2023, in Section 8 after existing subsection (c), as follows:

> "The possibility that a governmental entity may pay that part of a judgment that is for punitive or exemplary damages or attorney's fees or other costs related thereto shall not be disclosed in any trial in which it is alleged that an employee of that entity is liable for punitive or exemplary damages, and such disclosure shall be grounds for mistrial."

In conclusion, the City of Kansas City, Kansas, joins the League of Kansas Municipalities and other Kansas cities in urging the passage of H.B. 2023.

Sincerely,

Kathryn Pruessner Peters

Kathryn Pruessner Peters
Assistant City Attorney

KPP:djj

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3-19-87

GENERAL ORDER	DATE OF ISSUE	EFFECTIVE DATE	NUMBER #87-49
SUBJECT			
REFERENCE	RESCINDS		DISTRIBUTION

I. PURPOSE

A. To establish Departmental policy regarding Domestic Abuse and Family Violence situations encountered by officers in the performance of duty.

B. To familiarize personnel with statutes and procedures regarding PROTECTION FROM ABUSE ACT, K.S.A. 60-3101 et. seq., and TRESPASS in violation of retraining orders under K.S.A. 60-1607 (A)(1), as covered by City Ordinance 23-53.

II. AUTHORITY

A. By the authority of the Chief of Police.

III. DEFINITIONS

A. Domestic Abuse or Family Violence: A violent confrontation between members of the same family or household.

B. Primary Abuse: An incident of violence between family members where probable cause exists to believe that physical injury is present to the extent necessary to establish the elements of Battery as defined by K.S.A. 21-3412.

C. Secondary Abuse: An incident involving a physical confrontation between family members where probable cause exists to believe that an assault has occurred as defined by K.S.A. 21-3408; or where probable cause exists to believe that an assault or battery is likely to occur if no action is taken.

D. Potential Abuse: Incidents where no probable cause or evidence exists to indicate that an act of violence has occurred but the potential exists for a violent act to occur unless action is taken.

E. Positive Action: A posture of positive suggestion and action that will be assumed by officers in Potential Abuse situations.

F. Human Service Organizations: Agencies recognized by the Department that provide counseling, aid or assistance to victims or potential

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victims of Domestic Abuse or Family Violence.

IV. POLICY

A. In instances of family violence, arrest of the offender is the preferred response, however, such arrest must be consistent with state and federal law. In no instance will arrest be made without full probable cause.

B. Domestic Abuse and Family Violence is a serious incident which requires officers to file written reports on such incidents and presumes that arrest, consistent with state law, is the appropriate response in situations involving physicial injury to the victim, use or threatened use of a weapon, violations of protection from abuse orders or other imminent danger to the victim. If, in the discretion of the officer, an arrest is not made, the officer should clearly document the reasons in the written report.

C. In instances of family violence the officer should advise the victim and the abuser of the victim's rights. Both parties should be informed that any person who uses force to physically injure a household member has violated the law. The victim should be informed that they have the right to be protected from further assault, injury or abuse, by pressing criminal charges against the abuser and obtaining a protective order against further abuse from a court of law in appropriate cases.

V. PROCEDURE

A. The officer will complete a written report anytime he/she has probable cause to believe that family violence has occurred. The report should document observations and statements of the victim and abuser, visible injuries, weapons present and other circumstances significant to the situation. The degree of abuse should be included as defined in section III of this order. The frequency and severity of prior incidents should be included as well as the number of prior phone calls for assistance and the disposition of those calls.

B. If possible, the victim's injuries should be photographed as well as any property damage sustained during the incident.

C. Victim, abuser and witnesses should be interviewed separately so that they may speak freely without being inhibited by the presence of the offender.

D. When an arrest is not made, the abuser should be requested to leave the premises. However, if the victim chooses to leave the officer should stand by to allow the victim to remove personal and necessary belongings. Positive Action will be taken and the victim should be informed about shelters and other appropriate Human Service Organizations and transportation if necessary arranged to a shelter or medical treatment facility. This Positive Action

will be documented in the report. In either event, the officer should stand by and preserve the peace until one party leaves. When both parties decline to leave and there is no probable cause to arrest the officer will leave the scene and complete the necessary report(s).

E. Dangerous weapons should be removed from the premises and turned in to the Logistics Unit for safekeeping if requested by the victim. If a weapon is used in the commission of a crime, standard procedure requires custody of the weapon as evidence.

VI. COURT ORDERS

A. Officers will bear in mind that it is not normally within the domain of the Police Department to assist in the enforcement of Civil Court Orders. There are however, exceptions, two of which are as follows:

1. Protection From Abuse Order that protects abused wives and children when no divorce action is pending and,

2. to a limited extent, Trespass in violation of Restraining Orders under K.S.A. 60-1607 (a)(1), as covered by City Ordinance 23-53. This statute applies to pending divorce proceedings.

B. A record of all valid Protection From Abuse Orders will be maintained by the Police Legal Advisor with a copy in the Communications Unit for verification by the Field Supervisor and officer. The records will be reviewed and periodically updated by the Police Legal Advisor and the Communications Unit.

C. A record of Restraining Orders in a divorce action which provides for the use, occupancy, management and control of certain property, will not normally be maintained by the Department. The office and the supervisor must determine whether probable cause exists to believe the order is current and valid.

D. Officers called upon to act in accordance with the Protection From Abuse Act; or a Trespass under City Ordinance 23-53 by a person who enters or remains at a location in defiance of a Restraining Order pursuant to K.S.A. 60-1607 (a)(1), will notify a supervisor.

1. Protection From Abuse, K.S.A. 60-3101 et. seq. when properly served on the Chief of Police and on file, gives the Police Department authority to evict a party from a listed residence or household and secure the residence for one party to the exclusion of the other party involved.

2. Trespass in disregard of K.S.A. 60-1607 (a)(1) as covered by City Ordinance 23-53: if probable cause exists to believe that there is a violation of a provision of an order restraining

a person from entering or remaining in a listed property, that person may be ordered away from that property by the officer, issued a citation and ordered away from the property or person, arrested on a charge of Trespass (City Ordinance 23-53). Violation of any other ordinances or statutes may also be cited by the officer. See Section VI for disposition. The protected party will also be advised to contact the respective Attorney for additional legal recourse.

3. Officers will make a concerted effort to resolve a dispute involving a court order using sound judgement.

4. Officers will initiate an Investigative Report, complete with disposition, and forward it to the Police Legal Advisor anytime they are dispatched, requested to assist, or take official action in a situation involving Protection From Abuse or Trespass in disregard of K.S.A. 60-1607 (a)(1).

VII. POST ARREST DISPOSITION

A. In instances of Primary Abuse where a felony arrest has been made, Departmental procedures for effecting felony arrests will apply.

B. In situations of Secondary or Potential Abuse and Trespass where a misdemeanor arrest has been made, Departmental procedures for effecting misdemeanor arrests will apply, with the following addition:

1. Subjects arrested in connection with Secondary or Potential Abuse or Trespass may be booked in the City Jail, and the officer and field supervisor will sign a six (6) hour hold order to detain the arrestee if probable cause exists to believe that the individual may harm himself or another person if not detained.

C. Valid and justifiable reasons for effecting arrests will be required. Pertinent facts should be recorded in the appropriate reports.

VIII. DEVIATION

A. Any deviation from this policy may result in disciplinary action.

TESTIMONY OF TOPEKA METROPOLITAN TRANSIT AUTHORITY
BY DAIVD L. RYAN, GENERAL COUNSEL
BEFORE THE SENATE JUDICIARY COMMITTEE

House Bill No. 2023

March 19, 1987

My name is David L. Ryan, General Counsel for the Topeka Metropolitan Transit Authority (TMTA). On behalf of the TMTA I appear before you today to urge you to enact H.B. 2023.

This legislation is needed. TMTA, the mass transit system for Topeka, was created in early 1973 as authorized by state statutes by the City of Topeka. TMTA consists of a five member "citizen" board appointed by the city. The challenge of building, operating and maintaining the multi-million dollar transit system with over 80 employees, and maximizing public service while operating in the most cost effective and efficient manner in times of serious financial stress is a lot to ask as a public service duty of any citizen. In short, these members have donated enormous time and energy and their invaluable professional and personal talents to serve their city and state.

As an operating public corporation, litigation and liability exposure is a constant stress. Due to unavailable insurance coverage, or exorbitant rates when available, TMTA has converted to a self-insurance program for all its external operating and most of its internal corporate liability concerns. Normal external operating liability claims and internal employment-corporate claims are constant. Multiple litigation is almost always pending. The technical potential personal liability and constant exposure of the individual TMTA members to this litigation is an unwarranted and unneeded reality. Several TMTA members have told me they considered resigning or refusing to accept renewed appointment because of this constant technical personal litigation exposure.

TMTA as an entity should alone be responsible for the claim and litigation exposure. Public service on citizen boards should not be discouraged due to needless personal liability and litigation exposure. Citizens should not be asked to donate their essential service to the public, and then be subject to the modern reality of endless litigation as named or potential parties. TMTA <u>strongly supports</u> passage of H.B.2023.

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Testimony on HB 2023
Before the House Judiciary Committee
March 19, 1987
By: Larry W. Magill, Jr., Executive Vice President
Independent Insurance Agents of Kansas

The Independent Insurance Agents of Kansas has 620 member agencies across the state employing approximately 2,500 people, the majority licensed as insurance agents. We are independent insurance agents because we are free to represent a number of different insurance companies offering our professional advice, the best product and the most competitive cost we can find in the open marketplace to our clients.

Our association would like to see an amendment made to HB 2023 dealing with insurance aspects of the Tort Claims Act. The amendment would be an improvement to the original language in the Tort Claims Act as it was passed in 1979.

The present wording of the Tort Claims Act beginning on line 262 of HB 2023 waives the $500,000 cap on a public entity's liability if they purchase insurance in excess of that limitation, in which case the limitation on liability shall be fixed at the amount for which insurance coverage has been purchased. Proposed new language in HB 2023 would change this automatic waiver, but only for pools. We would like to see the automatic waiver changed in all cases.

A great deal of confusion still exists among public entities and their advisers including their insurance agents and attorneys over the $500,000 cap and what coverage limits a public entity should carry on liability insurance. This confusion arises first because of the federal court cases under the Federal Civil Rights Act, section 1983,

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involving alleged discrimination, wrongful discharge and other employee-related suits. The second problem is from the potential out-of-state exposure. Most public entities have an out-of-state exposure when they send people to meetings where the Kansas Tort Claims lid of $500,000 does not apply.

Another factor that affects this problem involves the way insurance is normally purchased for high or excess limits. In most cases, very high limits of coverage, limits in excess of $1 million, are provided under umbrella or excess liability policies that apply over and above virtually all or all of a public entity's insurance policies. This is normally the least expensive way to obtain the excess limits and avoid potential gaps in coverage for the public entity.

However, if the entity purchases an umbrella or excess liability policy over their automobile liability, general liability, public official and other liability coverages, they automatically waive their $500,000 cap under the Kansas Tort Claims Act for all claims, not just for those exposures where the cap does not apply, federal civil rights actions and out-of-state lawsuits.

In our view, this undermines the legislative intent of the $500,000 cap and the automatic waiver wording that is in present law. We do not believe the legislature considered the out-of-state exposure or federal civil rights actions and the way insurance policies are normally written when the original law was passed.

One possible solution would be to convince an excess insurer to attach a manuscript endorsement to their policy just providing the excess coverage where the Kansas $500,000 cap does not apply.

Unfortunately, the companies we have approached have so far refused to draft and use such an amendment. One carrier's underwriter told us that he thought it would be "illegal" under the Kansas Tort Claims Act. Other possible reasons might include that Kansas is a small market and the carriers do not want to take the time and effort to draft a special endorsement; or the carriers may be concerned that the courts would not interpret the wording of such a manuscript endorsement according to their intent. For whatever reason, we have not been successful in convincing either of the two insurance companies we have approached to draft such an endorsement. It is my understanding that the Chicago Insurance Company did provide excess coverage on this basis at one time, but they have since pulled out of the market in Kansas.

A second, and preferable approach in our view, would be to amend the Tort Claims Act to state that public entities must affirmatively waive the cap in advance of a claim. This approach has the advantages of:

1. Preserving the legislative intent regarding the cap and the assumption that public entities would not waive the cap unless they voluntarily wanted to carry more coverage than $500,000.

2. It would eliminate a lot of confusion about what to recommend to entities as far as limits of liability are concerned.

3. It would protect the public entity's experience in Kansas from large shock losses and preserve the integrity of the $500,000 cap while at the same time allowing them to protect themselves from huge awards under either federal civil rights or out-of-state actions.

4. It would <u>hopefully</u> convince umbrella insurers to charge less based on the limited exposure and <u>may</u> make excess coverage more readily available in the Kansas market. Umbrellas and excess liability are generally judgement rated and often involve non-admitted markets outside of the Insurance Department's control.

Attached to my testimony is a balloon copy of a proposed amendment that would accomplish this.

The House has approved our concept but only for group self-insurance pools which are essentially assessable mutual insurance companies. The same dilemma is faced by every public entity, regardless of whether they have traditional insurance or join a pool.

We urge the committee to favorably consider our amendment. I would be happy to answer questions or provide additional information.

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the case of municipalities any such insurance may be obtained by competitive bids or by negotiation. In the case of the state, any such insurance shall be purchased in the manner and subject to the limitations prescribed by K.S.A. 75-4114~~,~~ and amendments thereto, except as provided in K.S.A. 1986 Supp. 76-749 *and amendments thereto.* With regard to claims pursuant to the Kansas tort claims act, insurers of governmental entities may avail themselves of any defense that would be available to a governmental entity defending itself in an action within the scope of this act, except that the limitation on liability provided by subsection (a) of K.S.A. 75-6105 and amendments thereto shall not be applicable ~~where the contract of insurance provides for coverage in excess of such limitation in which case the limitation on liability shall be fixed at the amount for which insurance coverage has been purchased or,~~ *where the governmental entity* ~~*has entered into a pooling arrangement or agreement pursuant to subsection (b)(2) and*~~ *has waived, by ordinance or resolution of its governing body, the limitation on liability provided in K.S.A. 75-6105 and amendments thereto, in which case the limitation on liability shall be fixed at the amount specified in such ordinance or resolution.*

(b) Pursuant to the interlocal cooperation act, municipalities may enter into interlocal agreements providing for:

(1) The purchase of insurance to provide for the defense of employees and for liability for claims pursuant to this act; or

(2) pooling arrangements or other agreements to share and pay expenditures for judgments, settlements, defense costs and other direct or indirect expenses incurred as a result of implementation of this act including, but not limited to, the establishment of special funds to pay such expenses. ~~With regard to establishing and maintaining such pooling arrangements or other agreements to share in expenditures incurred pursuant to this act, governmental entities and employees or agents thereof shall not be required to be licensed pursuant to the insurance laws of this state.~~ **With regard to establishing and maintaining such pooling arrangements or other agreements to share in expenditures incurred pursuant to this act, governmental entities and**

3-19-87

Kansas Legislative Policy Group
301 Capitol Tower, 400 West Eighth, Topeka, Kansas 66603, 913-233-2227
TIMOTHY N. HAGEMANN, Executive Director

March 19, 1987
TESTIMONY
to
SENATE JUDICIARY COMMITTEE
HB 2023

Mr. Chairman and members of the Committee, I am Chip Wheelen of Pete McGill and Associates. We represent the Kansas Legislative Policy Group which is an organization of County Commissioners from rural areas of the State. We appear today in support of the provisions of House Bill 2023, as amended by the House.

As you know, this bill is the product of a great deal of discussion and deliberation during the 1986 interim. We appreciate the endeavors of the Special Committee on Tort Reform and Liability Insurance and extend our thanks to those of you who served as members. You may also be aware that 1987 HB 2023 is somewhat similar to 1986 HB 3114 which passed the Senate by a vote of 37 - 3.

For those reasons, I will not dwell upon the merits of each proposed amendment to the Tort Claims Act. Instead, we wish to communicate that our Commissioners are very concerned regarding the availability and cost of commercial liability insurance.

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Because of those concerns, some Boards of County Commissioners are considering organization of risk pooling arrangements in accordance with the Interlocal Cooperation Act. We believe that enactment of HB 2023 would clarify the intent of the 1979 Legislature and would facilitate the formation of interlocal risk management cooperatives. In addition, passage of HB 2023 might improve the availability of commercial liability coverage for local units of government which select that option.

For those reasons, we respectfully request that you recommend HB 2023 for passage. Thank you for your time and consideration.

3-19-87

HB 2023

Testimony presented before the Senate Judiciary Committee
by Gerald W. Henderson, Executive Director
United School Administrators of Kansas

March 19, 1987

Mister Chairman and members of the committee.

I appreciate this opportunity to take my maiden flight before your committee to support that section of HB 2023 which provides immunity from liability for members of governing bodies of municipalities.

My organization would ask that you consider extending that immunity to employees of those governing bodies, namely school district administrators. As you well know, many suits claiming damages against a board of education and its members will also list the district superintendent and a building principal as defendants.

In our judgment, these administrators ought also be immune from liability caused by acts performed within the scope of their employment.

We would ask that you consider this amendment and recommend the bill favorably for passage.

GWH/ed

Attch. VIII
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3-19-87

3-19-87

KANSAS ASSOCIATION OF SCHOOL BOARDS

5401 S. W. 7th Avenue Topeka, Kansas 66606
913-273-3600

TESTIMONY ON HOUSE BILL NO. 2023
BEFORE THE SENATE JUDICIARY COMMITTEE

BY

PATRICIA E. BAKER, SENIOR LEGAL COUNSEL
Kansas Association of School Boards

March 19, 1987

Mr. Chairman, members of the Committee, I appreciate the opportunity to appear before you in support of House Bill 2023 on behalf of the Boards of Education of our Kansas schools.

The provisions of this bill provide protection for individual members of governing bodies without limiting the rights of aggrieved individuals to recover damages for injuries.

School board members serve without pay and essentially as volunteers in support of public education. Serving on a board of education is time consuming and often difficult. It is in the interest of the State of Kansas to insure that the most qualified and dedicated individuals seek to be elected and serve in these positions. With the steadily rising number of legal actions against public bodies and the potential for more in the future, we request your support for providing some level of protection to individual board members. Not only would the passage of H.B. 2023 provide immunity but would also, we believe, help to alleviate the problem of individual elected officials feeling it necessary to retain independent legal counsel to protect their interests.

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This bill has the advantage of protecting the governing body members while protecting the rights of plaintiffs to recover damages under the Kansas Tort Claims Act.

A proposal similar to House Bill 2023 passed both houses of this legislature last year. Due to the fact that a second subject was added to the bill in the waning hours of the session, the bill was vetoed.

Provisions of the bill which allow payment by the governmental body for defense costs and punitive damages and provisions allowing for pooling for risk management, we believe are in the interest of good government and the public.

I request your favorable action on House Bill 2023.

Thank you.

3-19-87

MEMO

TO: THE SENATE JUDICIARY COMMITTEE

FROM: KANSAS TRIAL LAWYERS ASSOCIATION AND JERRY R. PALMER

DATE: MARCH 18, 1987

RE: HB-2023

The Kansas Trial Lawyers Association has always had a continuing interest in the development of the Kansas Tort Claims Act. It is our general position that the Act should not be tampered with and that the body of law should be permitted to be developed and that the Legislature should only make changes when compelling reasons are presented. If the Legislature makes changes frequently, then it will be much harder for governmental units and litigants to understand the rights and responsibilities under the Act.

An example of something that probably needed to be changed and is contained within this Bill are the provisions which give immunity to the members of governing bodies. These people were faced with a practical problem. If they served on the bodies, they became involved as personal defendants. This encumbered them through lis pendens and made real estate transactions more difficult. Likewise, they had the problem of insuring themselves against this risk even though the governmental entity would cover their cost of defense and pay any resulting judgment. The construct of the sections of 2023 which deal with this immunize the governing members but impute the liability to the governmental entity. Thus, the plaintiffs do not lose the ability to recover but the board members retain immunity and thus do not have to insure themselves against the risk. This has the positive aspect of encouraging rather than discouraging persons from holding public office.

However, other amendments were made to the Act. The community service work exception does not alter much in the Act

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and for that reason our organization does not oppose it.

However, there are changes made which we do oppose which were sections of the Bill introduced after the close of hearings on the Bill in the House Judiciary Committee.

1. Discretionary function elaboration - At line 100 there is language that says

> Including, but not limited to, the discretionary decision to undertake a ministerial task, whether or not the discretion is abused and regardless of the degree or level of discretion involved.

This provision in the Bill was a floor amendment made by Representative O'Neal in response to his concerns over the impact of a decision called Allen v. Kansas Department of SRS, 240 Kan. 620 filed January 16, 1987. It is to be noted it is a unanimous opinion of the Court written by Justice McFarland. In essence the case concerned a classic situation that someone who did not have the duty to something undertook to perform an act and was found to be negligent in the performance of the act. This is hornbook law as to non-governmental entities.

It is fundamentally fair that if someone undertakes to do something that they do it without negligence and if they do it with negligence, that they be held liable. Otherwise, the possibility existed that somebody with the duty would undertake the responsibility without negligence. In this specific case some SRS client vomited in the hallway of an office building. The ordinary responsibility would have been with the maintenance people for the building to clean it up. However, someone for SRS did clean it up, apparently negligently, and plaintiff was caused to fall and sustain serious injuries. The Supreme Court considered the issue whether or not SRS had carried its burden to establish its immunity within the exception 75-6104(d). The Court ruled that although it was within their discretion to undertake the clean up, the Court could not imagine a more "ministerial" act than the actual physical clean up, and thus found that the discretionary function did not cloak the government with immunity.

At the time this was raised on the floor of the House,

the opinion was only in slip form and the advance sheets had not even been published. There is substantial question as to whether anybody else in the chamber had ever read the opinion. However, if one understands that K.S.A. 75-6104(d) is modeled after the Federal Tort Claims Act and was meant to incorporate by reference that substantial body of law interpreting that section, you would also understand what violence is done to the language and the lack of clarity that is accomplished by adding the words that have been added by the House. The foreign concepts particularly are "discretionary decision to undertake a ministerial task" and "regardless of the degree or level" of discretion involved.

Describing discretionary functions as having either a degree or level is like discussing the personality attributes of a stick. It is probably going to cause more problems than it will solve and the opinion to which it is directed probably doesn't create a problem anyway. It is at least the author of this memorandum's opinion that even with the language proposed, the result in the Allen case would be exactly the same, even though the intention was to overcome that case.

2. Commencing at line 415 a new §9 is added and which was introduced in the Committee after the hearings. This section goes on and the language that causes problems really begins at about line 439. The requirement is that a tort claim against a municipality be commenced by the filing of a written notice and may have some mandatory content. Thereafter the municipality has 120 days within which to act and if a claim is not acted upon within that time, it is "deemed denied." The "denial" or "deemed denial" as a predicate to an action is necessary and then the case must be "commenced within the time period provided for in the Code of Civil Procedure." However, if the denial takes one past the statute of limitations then the statute of limitations is extended by "such time period shall be extended by the time period required for compliance with the provisions of this subsection."

The primary problems are

a. When in line 443, the word "shall" is used, as to the contents of the complaint, then an argument may be made that it is jurisdictional if some part has not been complied with. So it is either necessary that in line 443 the word

"shall" should be changed to "should." In other words, changing it to directive rather than mandatory. This will then avoid the problem of it becoming jurisdictional. Another way of resolving it would be to add that substantial compliance with this section is all that is necessary for the purposes of the notice.

b. The biggest problem is the impact of the statute of limitations. It is quite possible that in the rare case someone would file the claim at approximately one year, 240 days. Thereafter the municipality would wait 120 days, deny the claim or have it deemed denied and you would have five days within which to file your lawsuit. Substantively the reason that we have a statute of limitations is put a defendant on notice that a claim is being made against it so that a proper defense can be constructed. That function is served by the claim. In fact, in the Federal Tort Claims Act that is the only period of limitation that is specifically referenced which is filing the claim within the two year period.

However, in this case the deemed denial comes at 120 days. Under the Federal Tort Claims Act in practice it is about 180 days which is their deemed denial period before anything really starts rolling. It would be far better to modify line 458 to strike the word "is" and insert the words "may by the claimant be" so that you are not forced to go to court while you still may actually be negotiating. However, if the plaintiff feels that no resolution is in sight, they can go ahead and deem the claim denied. It would seem if we are interested in fostering settlement between the entity and the litigant and avoiding the thing winding up in the court with all the attendant expenses, that this is a better approach.

Likewise, some savings clause is needed at the end of 469 such as putting a comma where the period now exists and adding the words "but in no event shall a claimant have less than 60 days after the claim is denied within which to file suit against the municipality." This way a claimant has at least 60 days to get a case on file and not have to worry about the impact of the statute of limitations which has become largely irrelevant due to the claims procedure.

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KANSAS BAR ASSOCIATION

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March 18, 1987
HB 2023 as amended
by the HCW

Mr. Chairman. Members of the Senate Judiciary Committee. I am Ron Smith, KBA Legislative Counsel.

> KBA generally supports this bill as it came from the House. We would not support reimposition of the stricken language beginning at Line 92 concerning the Fudge case.

Last year, KBA supported Section 2 of this bill but it was vetoed. We support Section 2 as a necessary change in our law.

KBA supports extending the entity's punitive damage immunity to those persons holding elective office in the entity so long as they act within the scope of their office.

Statutory Change to Fudge

We opposed subsection 3(d) language that was later stricken in the House. Our opposition would also extend to the new language in lines 100-103 concerning the Allen case. KBA believes the 1979 Tort Claims Act was fundamentally fair legislation speaking to important issues of governmental immunity. Many of its provisions were derived from the Federal Tort Claims Act. Wholesale changes to the KTCA or changes to correct isolated cases are not desirable because lost to

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Kansas litigants -- including municipalities who are litigants -- would be important federal case law that could be used as guidance and controlling in some issues.

The policy question is whether entities should be encouraged to provide written guidelines for their officers, or that encouragement be dampened by the threat of liability if the guideline is not followed.

First, Fudge could be viewed as imposing on governmental units no more responsibility to follow appropriate guidelines than product liability defendants. For example, under KSA 60-3304(a), if a manufacturer complies with written governmental policies, guidelines, or safety standards the product is not deemed defective, and the burden is on the claimant to show a "reasonably prudent product seller" could and would have taken additional precautions." Further, if the injury causing aspect of a product was in compliance with "a mandatory government contract specification" then it is an absolute defense to liability. [60-3304(d)] In Fudge, the written guidelines were not followed, yet the governmental unit asks that it be immunized anyway.

A second policy question is whether a city should be immune for liability when employees violate the city's own written guidelines designed to protect the public from recognized dangers.

Third, such immunization of Fudge type decisions may create situations where claimants may use §1983 civil rights actions to a greater extent. There is already a growing body of federal case law where §1983 actions are used as the basis of liability in wrongful

death cases and personal injury actions caused by local governments. This area of law is growing precisely because local state laws have immunized state liability. [See, generally, Steven Steinglass, Wrongful Death Actions and Section 1983, 60 Indiana Law Journal 4 (1985).]

Does it make sense to hold a police officer who, against written department policy, negligently fires his weapon into a crowd, killing a bystander, liable under federal §1983 actions, yet in state court if the same officer recklessly drives his police car to an accident--in violation of written internal guidelines--and runs the plaintiff down--that governmental immunity should lie?

The elusive savings the governments acquire for state actions may be added to the federal court column. Also available in §1983 actions is attorney fees paid by the losing defendant.

Need for Changes

On the House side, the League testified that the "very sharp increases in premiums charged by the insurers over the last two years is probably not caused by actual Kansas municipal loss experience, but rather by the overall poor loss ratios experienced by the insurance industry and perhaps by the poor loss experience by public entities in other states."

Further, that "Municipal insurance available is not as severe a problem in Kansas as it is in many other states. Only 15% of the respondents indicated difficulty in obtaining insurance during the most recent renewal period."

Further, there are no wholesale policy cancellations during the time period surveyed. Most cancellations that did occur were for general liability and public official's liability coverage."

And that 60% of Kansas municipalities have never had claim filed against them. 72% have never have had to pay on any claim.

Raises the serious policy question of why we need to further restrict the Kansas Tort Claims Act, with suggestions in Section 3(d). New pooling arrangement -- getting Kansas municipalities away from national-based liability policies into a Kansas-only claims system (through KIRMA) should dramatically help costs of insurance for Kansas municipalities.

Other Public Policy Considerations

1. In line 48 of the bill is the definition of community service work, which includes people placed on diversion for any crime. Note further on page 5, lines 168-170 that any claim for damages that arise from the performance of community service work leaves the entity immune from liability unless a motor vehicle was being operated.

What that means is that if a community service worker is mowing the city park, and runs over a child, the city is not liable. However, if the city's own employee were to run over the child, unless subsection (n) beginning at line 151 were applicable, the city is liable.

2. The League wants to require written notice of claim as prerequisite to bringing a KTCA lawsuit. That is new Section 9 beginning on page 11. KBA has no position on such claims statutes itself.

However, it appears to be a bureaucratic response, since it is not intended to affect statute of limitation. Very few cases arise without the city or county having some idea that it is "out there." If people are filing lawsuits without justification against cities, the city can use KSA 60-211 sanctions against them.

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Kansas Association Of Broadcasters

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March 19, 1987

TO: SENATE JUDICIARY COMMITTEE

FROM: Harriet J. Lange
Executive Director

RE: HB 2025

Our interest in HB 2025 is related to its application in libel cases. We urge the committee to consider placing a cap on punitive damages that can be awarded.

Although the media for some time has had the "clear and convincing" standard apply in libel cases, it is interesting to note that over the past five years, 60 percent of media libel cases in the U.S. have included punitive damage awards. According to the Libel Defense Resource Center, the average amount of these punitive damage awards has been $3 million.

Punitive damages create uncertainty in media litigation, and the cost of litigating such cases is beyond the reach of most media organizations; not to mention the chilling effect that (the probability of) punitive awards has on the concept of a "free and unfettered" press.

Although the broadcast media in Kansas takes seriously its responsibility of accurate reporting and serving the "public interest, convenience and necessity", libel litigation can occur at any time. We would urge your favorable consideration of removing the uncertainty of libel litigation by devising a formula or standard which would place a cap on the amount of punitive damage awards.

The KAB also supports allowing the court, instead of a jury, to determine the amount of punitive damage awards; and that in such cases a portion of the punitive damages be awarded to the state.

HJL/pkm

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