Approved February 7, 1989
Date

MINUTES OF THE House COMMITTEE ON Insurance.

The meeting was called to order by Dale Sprague at 3:30
Chairperson

3:30 a.m./p.m. on February 6, 1989 in room 531-n of the Capitol.

All members were present except:

Representative Joann Flower, excused
Representative Michael Sawyer, absent

Committee staff present:

Chris Courtwright, Research Department
Bill Edds, Revisor of Statutes
Patti Kruggel, Committee Secretary

Conferees appearing before the committee:

Others present: see attached list.

The Chairman called the meeting to order at 3:30 p.m.

Representative Delbert Gross requested introduction of four Committee bills. They are regarding: (1) premium equity tax plan credit; (2) premium equity tax plan trip insurance; (3) tail coverage trip insurance; and (4) rate making

A motion was made to request the bills by Rep. Gross. Rep. Hoy seconded. The motion carried.

Hearings began on HB 2050.

HB 2050 -- An Act relating to municipal hospitals and the employees thereof; providing that claims for damages against such hospitals or employees arising out of the rendering of or failure to render health care services are subject to the Kansas tort claims act; amending the health care provider insurance availability act to exclude application to such hospitals and employees; amending K.S.A. 75-6115 and K.S.A. 1988 Supp. 40-3401 and repealing the existing sections.

Chris Courtwright, Legislative Research Department, gave a brief overview of the bill and explained that it was a late recommendation of the Interim Committee on Proposal No. 12. The legislation proposes to remove city and county hospitals from the purview of the Health Care Providers Act and place them under the monetary and liability exception of the Kansas Tort Claims Act.

Mike Heim, Legislative Research Department, briefly explained that HB 2050 would expand immunity to city and county hospitals where, at this time, there is none.

Tom Bell, Kansas Hospital Association, testified in support of HB 2050. He stated that the Association believes it is good policy to treat governmental hospitals as other governmental entities and bring them under the provisions of the Kansas Tort Claims Act. (Attachment 1)

Next appearing was Jerry Slaughter, Kansas Medical Society. The Kansas Medical Society supports the concept of HB 2050 stating that the fairer approach is to this the implementation of this policy to the final termination of the Health Care Stabilization Fund (HCSF).

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

CONTINUATION SHEET

MINUTES OF THE House COMMITTEE ON Insurance,

room 531-N Statehouse, at 3:30 a.m./p.m. on , 19 89

Appearing in opposition of HB 2050 was Ruth Benien, Kansas Trial Lawyers Association. She explained that the Association opposes the bill for three reasons: constitutionally; inconsistency; and workability. Written testimony was provided. (Attachment 2)

There were no other conferees wishing to testify to the bill and hearings on HB 2050 were concluded.

The meeting was adjourned at 4:30 p.m.

GUEST LIST

COMMITTEE: ____________________ DATE: 2/6/89

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
Laurie [illegible] Hartman	Topeka	Ks. Bar Assn.
Marlin Rein	KU Med Center	KC
Tom Bell	Ks Hosp. Assn.	
Jerry Slaughter	[illegible]	[illegible]
[illegible] Olson	Topeka	PA of KS
DAVID CORLISS	TOPEKA	League of Ks Munic.

Memorandum

Donald A. Wilson
President

February 6, 1989

TO: House Insurance Committee

FROM: Thomas L. Bell, Vice President

SUBJECT: H.B. 2050

Thank you for the opportunity to comment regarding H.B. 2050. This bill, as recommended by the Interim Committee on Commerical and Financial Institutions, would place municipal hospitals under the provisions of the Kansas Tort Claims Act, K.S.A. 75-6101, et. seq. The Kansas Hospital Association supports the concept of House Bill 2050. We think putting municipal hospitals into the KTCA makes sense and would be beneficial to the taxpayers supporting those hospitals.

The Kansas Tort Claims Act is referred to as "open-ended", meaning that liability of the governmental entity is assumed unless there is an exception. There are numerous exceptions to liability in our act, including legislative, judicial and discretionary functions. When the entity is subject to liability, the KTCA contains a limit of $500,000 per occurrence.

As stated earlier, H.B. 2050 would apply to municipal hospitals -- in other words, those hospitals owned by a city, county or hospital district. In general, these are the smaller Kansas hospitals. Most have less than 30 beds; the vast majority have under 50 beds. Because of a number of factors ranging from specific issues such as reimbursement and medical staff recruitment to general demographics, these are the hospitals that are most likely to be struggling for survival. These hospitals currently are provided none of the protections of the KTCA, even though they are clearly governmental entities. Instead, they are required to purchase $3 million worth of insurance, and subject to unlimited liability.

There are at least two alternative methods of placing governmental hospitals under the provisions of the KTCA. One method, adopted by H.B. 2050, would be to simply remove those hospitals from the definition of a "health care provider" in the Health Care Provider Insurance Availability Act and put them under the KTCA immediately.

Another alternative would be to tie the implementation of this policy decision to the future of the Health Care Stabilization

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Fund. It appears that when the KTCA was originally enacted in 1979, a major reason for excepting governmental hospitals from the provisions was their participation in the Health Care Stabilization Fund. Indeed, K.S.A. 75-6115 specifically refers malpractice claimants against governmental health care providers to the Health Care Provider Insurance Availability Act for their remedy. As such, if the Fund is phased out, the KTCA could become operative upon Fund termination. Also, the KTCA could become operative during a phase-out. For example, when the required level of liability insurance is lowered to $500,000, the KTCA could be made applicable. Those hospitals could be required to continue to pay a surcharge until the Fund is eliminated.

The Kansas Hospital Association believes it is good policy to treat governmental hospitals as other governmental entities and bring them under the provisions of the KTCA. Because of the history of that Act in relationship to the Health Care Stabilization Fund, however, the Legislature may want to tie the applicability of the KTCA to the elimination or phase-out of the Fund.

WRITTEN SUMMARY OF TESTIMONY
IN OPPOSITION TO H. B. 2050

February 6, 1989

Presented by
Ruth M. Benien
Kansas City, Kansas
on behalf of
Kansas Trial Lawyers Association

H. B. 2050 seeks to remove county and city hospitals from the purview of the Health Care Providers Act, K.S.A. 40-3401, et. seq, and place them instead under the monetary and liability exceptions of the Kansas Tort Claims Act, K.S.A. 75-6101, et. seq.

The Kansas Trial Lawyers Association opposes H. B. 2050 on behalf of the citizens of Kansas and the potential victims of medical negligence in county or municipal health care facilities who stand to be harmed by application of the proposed legislation.

KTLA opposes H. B. 2050 for three primary reasons: (1) constitutionality; (2) inconsistency; and (3) workability.

1. Historical Perspective.

To understand KTLA's concerns and opposition to the proposed statute, historical perspective as to the interplay between governmental immunity, the Kansas Tort Claims Act and the Kansas Health Care Provider Act, is required.

Over 100 years ago in Eikenberry v. Township of Bazaar, 22 Kan. 389 (1879), the Kansas Supreme Court recognized the principle of common law described as, "The King Can Do No Wrong." Under that principle, governmental agencies were not liable for their torts--they had sovereign immunity.

During the next 90 years, the Kansas Legislature and the courts created a series of exceptions to governmental immunity. The ultimate outcome was that governmental entities, namely cities and counties, were liable only for their proprietary, not governmental functions. One of the early "proprietary" functions recognized was that city or county hospitals, carrying on the same function of providing health care as private sector hospitals, were responsible for their acts of medical negligence. Stolp v. City of Arkansas City, 180 Kan. 197, 303 P.2d 123 (1956). In Carol v. Kittle, 203 Kan. 841, 457 P.2d 21 (1969), another hospital case, the Kansas Supreme Court held state agencies liable for medical negligence torts committed in their proprietary function.

The Carol court invited the Legislature to enact a tort claims act to deal with the various questions of immunity which the Legislature did. Various versions of a tort claims act were proposed and rejected by the Kansas courts and Legislature until the current version of the Act, K.S.A. 75-6101, et. seq, became effective on July 1, 1979.

The Kansas Tort Claims Act, as adopted by the Legislature was an open-ended act, i.e., one under which liability was the rule and immunity the exception. The exceptions to immunity were set forth in the Act and basically codified earlier judicial rulings that government was liable for proprietary, but not for legislative, judicial, administrative or basic policy-making functions. The Act covered both states and municipalities, including counties, townships, city school districts and any other political or taxing subdivision of the state. The term "employee" was broadened to cover not only traditional employees, but members of boards, commissions, elected officials, appointed officials and individuals, both paid and unpaid. K.S.A. 75-6102(d).

When the Kansas Health Care Providers Act was passed, there was a specific exclusion for any medical care facility under the supervision or control of the State Board of Regents, Department of Social and Rehabilitation Services or Department of Human Resources. K.S.A. 40-3401(f).

When the Kansas Tort Claims Act was enacted, however, the language exempting the state was stricken from the Health Care Provider Act. A specific provision was inserted in the KTCA wherein claims for professional negligence against a health care provider or an employee thereof were referred to the Health Care Provider Act for their remedy. K.S.A. 75-6105. The change made liability for the proprietary function of providing health care the same for public and private hospitals and institutions.

Any non-medical negligence torts, i.e., premises liability, etc., were still subject to the KTCA and its limitations.

2. Constitutionality.

The constitutionality of H. B. 2050 is at issue for two reasons: (1) it seeks to limit recovery of a particular class of individuals, i.e., users of county or city medical facilities when other individuals, i.e., users of private or state facilities, are not so limited, and (2) it creates the potential for returning Kansas to the rule of the "King Can Do No Wrong" with respect to the proprietary function of rendering health care. Similar limitations previously have been stricken down as unconstitutional by Kansas and other courts.

3. Inconsistency and Workability.

Over and above constitutional considerations, H. B. 2050 presents significant problems in terms of consistency and workability.

First, although the bill supposedly covers only city or county hospitals and their employees, it may also, by the broad definition of "employee" under the KTCA, cover private medical doctors appointed to hospital staff or using hospital facilities.

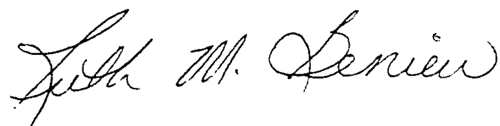
Second, because of recent changes in the language of the KTCA immunity "exceptions," including the "discretionary function" exception, city and county hospitals may seek absolute immunity from liability for purely medical decisions. Such assertions will needlessly increase the costs of litigation, cause court delay in awaiting decision and ultimately create the

situation, if successful, wherein a private doctor may be subjected to different liability standards, i.e., the standard of reasonable care for a medical practitioner, while city or county employees such as doctors, nurses, and therapists, may claim their actions are totally immune from liability.

Third, the transfer of city and county hospitals to KTCA coverage would require city officials to understand, review and approve medical negligence settlements. It would also require city and county governments to provide legal defense for medical negligence claims or obtain $500,000.00 or greater in insurance coverage for potential losses.

Finally, KTLA opposes H. B. 2050 as it seeks to remove a substantial segment of the current health care providers from the Health Care Stabilization Fund at a time when solutions to the insurance problem are being sought for that Fund. It may also, in fact, increase insurance costs for private doctors in counties or cities where hospitals have successfully negotiated decreased insurance premiums for their employees and doctors using the hospital's enhanced bargaining position.

Respectfully submitted,



Ruth M. Benien