

Approved February 20, 1989  
Date

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY

The meeting was called to order by Representative Michael O'Neal at  
Chairperson

3:30 ~~a.m.~~/p.m. on February 9, 1989 in room 313-S of the Capitol.

All members were present except:

Representative Peterson, who was excused

Committee staff present:

Jerry Donaldson, Legislative Research Department  
Jill Wolters, Revisor of Statutes Office  
Mary Jane Holt, Committee Secretary

Conferees appearing before the committee:

Representative Frank Buehler  
Mike Keating, Great Bend  
Representative Rick Bowden  
Nelson Hartman, Kansas State High School Activities Association  
Peggy Gatewood, General Counsel, Doug Ruedlinger, Inc. administrator of liability insurance for sports officials.  
Representative Bob Mead  
Nancy Lindberg, Assistant to the Attorney General  
Jim Clark, Kansas County and District Attorneys Association

**HEARING ON H.B. 2123 -Limiting civil liabilities of athletic officials**

Representative Buehler informed the Committee H.B. 2123 would exempt interscholastic and intercollegiate athletic officials from civil liability. This bill would not cover wanton and negligent conduct of athletic officials while officiating at athletic events. Arkansas, New Jersey, Mississippi, Maryland and Rhode Island have already passed this type of legislation. He distributed copies of legislation from Arkansas and New Jersey and copies of articles about suits that have been filed against athletic officials, see Attachment I. He introduced Mike Keating, who is a high school athletic official.

Mike Keating testified he has officiated at the high school and college level for 23 years. He stated this legislation would provide some protection to officials. Incidents have occurred in other states that have resulted in lawsuits against officials for things they have no control over. If protection is not given officials, he said the time will come when officials will decide that the risk is too great. He also provided the Committee with the cost of equipment and yearly expenses, see Attachment II.

Representative Bowden testified he has been officiating football, basketball, and wrestling since 1976. He said officials spend hours learning the rules that govern interscholastic athletic contests and going over the application of the rules in KSHSAA sponsored rules meetings and area supervisor's meetings, however, no amount of preparation and knowledge can prevent injury from occurring. Officials are constantly watching for rules infractions. He stated he has considered the possibility of no longer officiating due to the possibility of a lawsuit should an injury occur in a contest he officiated. He said this bill offers some needed protection to the official who is acting in a professional manner. It will also help keep officials available to staff the large number of athletic contests provided for Kansas students, see Attachment III.

Nelson Hartman testified in support of H.B. 2123. He said the rule book and official's manual states when the jurisdiction of the official takes place. He suggested this language could be added to the bill. This bill will help eliminate nuisance lawsuits as a result of a judgment call made by an official.

Peggy Gatewood presented a handout of actual fact situations which have produced negligence claims against officials for damages, see Attachment IV. None of the cases are Kansas cases. She said this bill would be helpful in eliminating nuisance lawsuits. This bill would not change the terms of their insurance policies.

CONTINUATION SHEET

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY,  
room 313-S, Statehouse, at 3:30 ~~xxx~~p.m. on February 9, 1989.

The Chairman requested staff to research whether the states that have passed this type of legislation have adopted comparative fault or whether they have joint and severable liability.

The hearing was closed on H.B. 2123.

HEARING ON H. B. 2091 - INDECENT LIBERTIES WITH A CHILD, ELEMENTS, AFFIRMATIVE DEFENSE

Representative Mead testified this bill will switch the responsibility from the prosecution to show that the defendant is not married to the child that has been violated, to the defense to show that he or she is married to the child, if that is the case, see Attachment V. He also attached a copy of an article relating how a conviction was reversed because the complaint failed to specify that the defendant was not married to the children who were molested.

Nancy Lindberg distributed the testimony of Attorney General Robert T. Stephan, see Attachment VI. She stated the Attorney General submitted an identical bill to the Senate Judiciary Committee, S.B. 78. She stated the Attorney General recommends that K.S.A. 21-3506 should also be amended.

Jim Clark testified in support of H.B. 2091. In his prepared testimony he cited State v Wade, decided by the Supreme Court on January 20, 1989. In that case the information failed to allege that the victim was not married to the defendant, but it did allege that she was five years old. Finding that the marriage was a legal impossibility under the facts alleged, the Supreme Court found no jurisdictional defect. He also recommended changing the aggravated criminal sodomy statute, K.S.A. 21-3506, see Attachment VII.

There being no other conferees, the hearing on H.B. 2091 was closed.

The Committee meeting was adjourned at 5:15 p.m.



STATE OF KANSAS

FRANK BUEHLER  
REPRESENTATIVE, ONE HUNDRED THIRTEENTH DISTRICT  
BARTON COUNTY  
P.O. BOX 317  
CLAFLIN, KANSAS 67525-0317



TOPEKA

HOUSE OF  
REPRESENTATIVES

COMMITTEE ASSIGNMENTS  
CHAIRMAN: JOINT COMMITTEE ON ADMINISTRATIVE  
RULES AND REGULATIONS  
VICE-CHAIRMAN: PUBLIC HEALTH AND WELFARE  
MEMBER: JUDICIARY  
LABOR AND INDUSTRY

TO: CHAIRMAN O'NEAL AND HOUSE JUDICIARY COMMITTEE  
FROM: REPRESENTATIVE FRANK BUEHLER  
SUBJECT: HB 2123  
DATE: FEBRUARY 9, 1989

HB 2123 WAS INTRODUCED TO PREVENT A BAD SITUATION FROM HAPPENING, CALL IT PREVENTATIVE MAINTENANCE IF YOU WILL. IN AMATEUR ATHLETICS IN KANSAS THERE IS AN INCIDENT WAITING TO HAPPEN. HB 2123 IS NECESSARY TO CONTINUE TO HAVE YOUNG PEOPLE OFFICIATE AT HIGH SCHOOL AND COLLEGE ATHLETIC EVENTS. THIS IS A LABOR OF LOVE BECAUSE OF THE LOW PAY AND LONG HOURS AWAY FROM ONES NORMAL VOCATION. OLDER PERSONS OFTEN ARE NOT ABLE TO HANDLE THE EXTREME PHYSICAL REQUIREMENT TO OFFICIATE A GAME.

FIVE STATES HAVE SEEN FIT TO PASS LEGISLATION TO EXEMPT INTERSCHOLASTIC AND INTERCOLLEGIATE OFFICIALS FROM CIVIL LIABILITY. THOSE STATES ARE:

|              |      |
|--------------|------|
| ARKANSAS     | 1987 |
| NEW JERSEY   | 1987 |
| MISSISSIPPI  | 1988 |
| MARYLAND     | 1988 |
| RHODE ISLAND | 1988 |

*House Judiciary*  
*2/9/89*  
*Attachment I*

ATTACHED IS SOME INFORMATION TO LET YOU KNOW ABOUT THE  
KIND OF CHARGES AN OFFICIAL IS SUBJECTED TO. I WILL RESPOND  
TO QUESTIONS BUT I WILL NOW YIELD TO AND INTRODUCE TO YOU MR.  
MIKE KEATING - A HIGH SCHOOL ATHLETIC OFFICIAL FROM GREAT  
BEND, KANSAS WHO I KNOW CAN GIVE YOU FIRST HAND INFORMATION  
ABOUT THIS PROPOSAL.

FB:fs  
ATTACHMENTS

*F. J.  
2/9/89  
Att. I pg 2*

For An Act To Be Entitled

1 "AN ACT GRANTING LIMITED TORT IMMUNITY TO DIRECTORS OF  
2 NONPROFIT CORPORATIONS AND MEMBERS OF BOARDS, COMMISSIONS,  
3 AGENCIES, AUTHORITIES, AND OTHER GOVERNING BODIES OF ANY  
4 GOVERNMENTAL ENTITY; AND FOR OTHER PURPOSES."

5  
6 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

7  
8 SECTION 1. The General Assembly has determined that nonprofit cor-  
9 porations serve important functions in providing services and assistance to  
10 persons in the State and that in order for these nonprofit corporations to  
11 function effectively, persons serving on the board of directors should not be  
12 subject to vicarious liability for the negligence of corporate employees or  
13 other directors. The General Assembly has further determined that potential  
14 exposure to vicarious liability has a detrimental effect on the participation  
15 of persons as directors of nonprofit corporations and that providing immunity  
16 to directors of such corporations for certain types of liability will be in  
17 the best interest of the State and that the same immunity should be extended  
18 to members of governing bodies of governmental entities.

19  
20 SECTION 2. Except as otherwise provided by this Act, no member of any  
21 board, commission, agency, authority, or other governing body of any govern-  
22 mental entity and no member of the board of directors of a nonprofit cor-  
23 poration that holds a valid federal income tax exemption issued by the  
24 Internal Revenue Service shall be held personally liable for damages resulting  
25 from:

26 (a) any negligent act or omission of an employee of the nonprofit  
27 corporation or governmental entity; or

28 (b) any negligent act or omission of another director or member of the  
29 governing body of the governmental entity.

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PRESIDENT OF SENATE  
CLERK OF SENATE

*[Handwritten notes]*  
D.J. 2/9/87  
Att I  
pg 3

1        SECTION 3. The same immunity provided by this Act shall be extended to  
 2 any athletic official during the officiating of an interscholastic, inter-  
 3 collegiate, or any other amateur athletic contest being conducted under the  
 4 auspices of a nonprofit or governmental entity. No official shall be held  
 5 personally liable in any civil action for damages to a player, participant, or  
 6 spectator as a result of his acts of commission or omission arising out of  
 7 officiating duties and activities. Nothing in this Section shall be deemed to  
 8 grant immunity to any person causing damage by his malicious, willful, wanton,  
 9 or grossly negligent act.

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 11        SECTION 4. The immunity provided by this Act shall not extend to acts or  
 12 omissions of directors of nonprofit corporations or members of boards, com-  
 13 missions, agencies, authorities or other governing bodies of any governmental  
 14 entity which constitute ordinary or gross negligence personal to the direc-  
 15 tor or member or to intentional torts committed by a director or member.  
 16 Provided further that the immunity provided by this Act shall not extend to  
 17 acts or omissions of directors of nonprofit corporations which are licensed or  
 18 permitted by the Arkansas Alcoholic Beverage Control to dispense alcoholic  
 19 beverages, beer or wine.

20  
 21        SECTION 5. If a nonprofit corporation transfers assets to a member of  
 22 the board of directors of such corporation or to another nonprofit corporation  
 23 in order to avoid claims against corporate assets resulting from a judgment  
 24 rendered as a result of a suit to recover damages for the negligence of the  
 25 corporation, a corporate employee or a director, the director to whom the  
 26 asset is transferred or any director of the corporation from which assets are  
 27 transferred to avoid such claims may be held personally liable for any such  
 28 judgment rendered and the immunity provided by this Act shall be of no force  
 29 or effect.

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 31        SECTION 6. This Act shall only apply to suits for recovery of damages  
 32 based upon causes of action that accrue after August 1, 1987.

33  
 34        SECTION 7. Nothing herein shall be construed to limit the liability of a  
 35 nonprofit corporate entity itself for damages resulting from any negligent act  
 36 or omission of an employee of the nonprofit corporation.

*Handwritten signatures and initials on the left margin, including what appears to be "H. G. 2/2/87" and "Att D".*

*Handwritten notes on the bottom right: "H. G. 2/2/87", "Att D", and "Pg 4".*

1 SECTION 8. All laws and parts of laws in conflict with this Act are  
2 hereby repealed.

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/s/ Jerry E. Hinshaw

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4/14/87  
APPROVED BY [Signature]  
GOVERNOR

H. J. 2/2/89  
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# Lawsuits against officials increasing

Arkansas only state to enact law which grants officials limited immunity

By Tom Canavan  
ASSOCIATED PRESS

NEWARK, N.J. — Mel Narol has been sounding a warning among sports officials for years: Be careful, very careful, or you might end up in court.

It's a message that is all too real for some referees and Narol should know. The Princeton lawyer has spent much of his career defending referees and other sports officials named in suits relating to their part-time professions.

"A referee is easy to sue, and more and more people are suing them when an athlete is injured," Narol said in a recent telephone interview from Pittsburgh, where he was giving a seminar. "There are not a lot of cases in New Jersey now, but more and more are coming every year."

## Number may decline

However, there is also a good chance the number will decline, and soon.

The state Assembly already has passed legislation that would make sports officials immune from lawsuits except in cases of gross negligence. The measure is to be taken up by the Senate on Monday.

Coaches and athletic directors

long have been immune from lawsuits under a state law that protects public entities from suits, Narol said.

Narol said Arkansas recently became the only state in the nation to grant sports officials limited immunity from suits.

"The law passed in Arkansas is a little more encompassing than the proposed New Jersey law because it protects college officials and those in Little League and Babe Ruth leagues," said Narol, who recently retired as a high school basketball referee to concentrate on his legal career. "The law in New Jersey only protects scholastic officials."

Those officials have been under attack.

Narol, a partner in the Princeton firm of Jamieson, Moore, Peskin and Spicer, has handled two cases involving scholastic officials in the past year.

In a case in Burlington County, a high school girl sued an official after she stepped on a bottle on a soccer field and broke her leg.

But Superior Court Judge Van Sciver said the official was entitled to the same protection afforded coaches and athletic directors, and ruled in favor of the official.

In a Bergen County case, a high school long-jumper hit a take-off board and fell, seriously injuring his leg. The athlete said the board was wet and sued the track official, claiming the injury jeopardized his football and track careers. The official said the board was new and its finish made it appear slippery.

The jury ruled in favor of the official after the judge instructed the panel that it must find the official guilty of gross negligence to side with the athlete.

"What is gross negligence is a good question," said Narol, who serves as legal counsel to the National Association of Sports Officials. "If a player lost his helmet in a football game and someone tripped over it and got hurt three plays later, that might be gross negligence."

Narol is quick to add that an official must know the helmet was on the field.

Being aware is the main thrust of many of Narol's seminars for officials. He conducts several each month.

"The first thing we tell officials is to look for visible hazards," he said. "We tell them walk around the playing facilities and look for things like bottles on the field."

*L.J. 2/9/89  
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al situations, I have arrived at a "public figure—private individual" continuum for sports officials. At one end of the spectrum are professional officials who will probably be found to be public figures and will face the toughest standards when suing for defamation. Approaching the middle are Amateur Athletic Union, semiprofessional, and similar officials. In the middle are college sports officials. Approaching the opposite end are high school officials who fall within the private-individual category. At the end are officials who volunteer in Little League and at community centers. Obviously, these officials have the least restrictive standard.

Equally important is the subject matter of the alleged defamatory statement. If it is of public concern, the defendant might gain the protection of the malice standard.

In any defamation action, trial lawyers should evaluate the possibility of claims for invasion of privacy and negligent or intentional infliction of emotional distress. This might avoid the public-figure issue, thereby facilitating eventual recovery.

## Employment-Related Matters

Because amateur sports officials are generally independent contractors, employment issues relate to professional officials that are under contract to the professional major and minor leagues.

### Discrimination

Professional referees have charged the leagues with discrimination in discharge and failure to rehire. Basketball referee Jesse Hall has sued the NBA, claiming he was not hired because he is black.<sup>15</sup> When the NBA did not rehire Manny Sokol after his recovery from a heart attack, he sued under the New York civil rights laws based on age and physical handicap. Last year, an administrative hearing officer ruled for Sokol, awarding him back pay and reinstatement, but the decision was reversed.<sup>16</sup> Sokol is considering appealing.

Other professional arbiters have filed suits based on the effect of injury on their officiating performance. In 1984, NBA referee Joe Gushue filed in federal court in Pennsylvania, but was unsuccessful in alleging he

had been terminated because of a knee injury.<sup>17</sup> Last year, National League Umpire Jerry Dale instituted a lawsuit when he was discharged because of an alleged lack of mobility due to a knee injury.<sup>18</sup>

### Employee Benefits

Professional officials may be entitled to contractual employee benefits. In 1984, retired NBA referee Norm Drucker sued the NBA for pension monies he claimed he had accrued early in his career. The NBA defended the suit based on a provision in the pension plan it claimed resulted in Drucker forfeiting those monies when he joined the ABA. The case was settled last year, and Drucker said he was pleased with the settlement.<sup>19</sup>

## Player Injuries

American League Umpire Dale Ford has a T-shirt imprinted: "Once I thought I was wrong, but I was mistaken." Unfortunately, a sports official may be liable for not acting as a reasonably prudent official, and thus face liability for negligence. The trial lawyer suing a sports official, however, faces a difficult road in proving a violation of officiating standards.



### Before a Game

Before the start of an athletic contest, sports officials must determine whether playing conditions are safe. In baseball, umpires check for visible hazards, e.g., holes in the field, loose game equipment, or a base not properly fastened. In basketball, referees must be sure that there are no loose balls around the gym on which a player may trip, that the backboard has padding, and that the court and surrounding area are clear.<sup>20</sup>

Deciding whether to play in bad weather is similarly governed by rules included in all sports rule books. In New Jersey, high school football officials were sued for permitting a game to be played on an unsafe field. The field was allegedly extremely muddy. As a player tried to tackle, he fractured two vertebrae, resulting in partial paralysis from his neck down. The player sued not only his coach and school for failing to provide proper training and safe headgear, but also named the game officials, alleging that the condition of the field contributed to his injury. The case was eventually dismissed against the officials, and a settlement was reached.<sup>21</sup>

Clearly, rules of sports relate not only to the playing and administering of the game, but also to ensuring player safety. For example, baseball rules require players to use certain equipment and authorize umpires to remove potentially dangerous equipment. Football and softball have similar rules.

In slow-pitch softball, a catcher is not required to wear a mask. This, however, did not stop softball player Nash from suing the umpire when a softball struck him in the eye while he was catching without a mask during a municipal league game. Nash sustained partial loss of vision. He alleged that the umpire should have given him his mask and then officiated from a position behind the pitcher rather than behind home plate.<sup>22</sup>

### During a Game

Essentially, the same principles apply during a game as before one.<sup>23</sup> Officials must be aware of their potential liability for ensuring that athletic contests are played under safe conditions. Officials have the power to postpone or suspend a contest. Despite the tradition of playing certain sports in inclement weather if neces-

## Passage of New Jersey law protects umpires, referees

Umpires, referees and judges who officiate at high school sports events in New Jersey no longer have to worry about being sued over their decisions, thanks to a new law signed by Governor Thomas Kean.

"Enactment of this law was one of our top legislative priorities for 1987," said Robert Kanaby, executive director of the New Jersey State Interscholastic Athletic Association. "The soaring cost of liability insurance and the constant threat of harassing lawsuits had begun to deplete the ranks of high school sports officials, all of whom work for little or no compensation. Without officials' immunity from lawsuits, we could see that an enormous problem would result; no game, match or meet can be held without proper officials."

The NJSIAA is comprised of 441 public, parochial and private schools organized in 31 conferences. All high school interscholastic sports contests are governed by the organization, which conducts state championships in 33 sports.

"We're delighted that the legislature and Governor Kean have solved our problem by enacting this progressive new law," said Kanaby. "In recent years, our sports officials have been hit with any number of frivolous lawsuits, blaming them for off-court fights among spectators, charging them for responsibility for a player's sprained ankle, disputing a judgment call and so forth. While such lawsuits had no merit, they still led to considerable worry and legal expenses. Now this impediment to the reasonable conduct of high school sports has been removed."

Prime sponsors of the sports officials immunity law are Assemblymen Ralph Loveys (R-Parsippany), John Kelly (R-Nutley) and Senator Edward O'Connor (D-Jersey City).

## Louisiana athletic directors to convene at LHSAA meeting

The Louisiana High School Athletic Directors Association will hold its state conference in conjunction with the Louisiana High School Athletic Association's annual meeting January 27-29 in Baton Rouge.

New officers will be elected at the meeting, and the state's athletic director of the year will be announced.

Current officers of the LHSADA are Evelyn Cruse-Blanchard, athletic director, Jefferson Parish Public School System, Harvey, Louisiana, president, and Thomas McCoin, Baton Rouge, vice-president.

## CIF completes agreement with national shoe company

The California Interscholastic Federation has entered into a three-year agreement with Reebok, the largest shoe company in the United States. Through this relationship, California boys' and girls' high school sports programs will be assisted through a corporate sponsorship program.

With Reebok as the major name sponsor, all events will be named the "CIF/REEBOK" Championships. This will be the new, official name of the events as Reebok will be involved with the CIF on a long-term basis and has committed to more than one million dollars to the entire state program.



GOVERNOR SIGNS SPORTS OFFICIALS BILL — New Jersey Gov. Thomas Kean (seated) congratulates Robert Kanaby, executive director of the New Jersey State Interscholastic Athletic Association, after signing bill granting immunity from lawsuits to high school sports officials. Attending ceremony are, from left, NJSIAA President Laurie Fitchett of Green Brook, and sports officials Norman Van Arsdalen of Princeton, and Charles Lee of Hamilton Square. Enactment of the new law was one of the NJSIAA's top legislative priorities for 1987.

Coca-Cola USA, the No. 1 selling soft drink in America, has also entered into a three-year agreement with the CIF. Coca-Cola will be the Major Supporting Sponsor of the State CIF, as well as each of the 10 sections.

The California Interscholastic Federation, Reebok and Coca-Cola have taken a bold new step that will affect the entire country's high school sports programs by creating ways of involving corporate finance and personnel to assist in the funding and development of high school sporting events.

## South Dakota officials plan state basketball association

South Dakota's high school basketball officials finalized plans for a statewide association at an August 4 meeting in Pierre. Representatives from the 10 area groups met with activities association officials to complete initial details.

Aims of the organizers are to improve the caliber of basketball officiating in the state, increase the number of registered officials and to receive backing from the association's Board of Control in meeting those goals.

Officials in attendance included Dan Albertson, Watertown; Larry Youngren, Brookings; Jim Peterson, Sioux Falls; Colin Kapitan, Yankton; Bob Krietlow, Stickney; Tom Long, Wessington Springs; Duane Donat, Aberdeen; Bill Kohn, Lemmon; Dana Nelson, Pierre, and Jim Aberle, Lead.

First meeting work included the scheduling of two meetings in each of the 10 areas to be held October 7, 1987 and January 13, 1988. Similar agendas were developed for both meetings. Each of the area groups will schedule other meetings later.

Other aims of the association in area meetings will be to work on recruitment and training of officials, work with coaches and athletic directors in the area and to offer clinics to teams, parents and fans in the area schools.

The group also adopted a series of requests to be made at the activities association Board of Control at the September meeting. They included mandatory registration with a local group at the same time of registration with the state, and ask-

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pg. 7

## Two states enact laws to limit officials' liability

FRANKSVILLE, Wis. — The Mississippi and Maryland state legislatures have each passed a bill limiting the times in which officials can be held legally liable. The new laws loosen slightly the legal nooses tied around the necks of officials in those two states.

On May 23, Mississippi Gov. Ray Mabus signed into law an edict which states in part: "Sports officials who officiate athletic contests at any level of competition...shall not be liable for injuries or damages claimed to have arisen by virtue of actions or inactions related in any manner to officiating duties."

That bill had the support of the National Association of Sports Officials (NASO) and mirrored NASO's model legislation. Its passage culminated months of work by NASO member Wilson Jeter, a manufacturers' representative who lives in Madison, Miss.

The Maryland bill passed the legislature and was signed by Gov. William Donald Schaefer. It took effect July 1.

John West III, an attorney in Baltimore and also a lacrosse official, told REFEREE that the Southern Lacrosse Officials' Assn. had conducted a lobbying effort during the 1988 legislative session.

West also forwarded to REFEREE a copy of the bill, which provides limited immunity for officials who work in "community recreation programs" and in "an interscholastic, intercollegiate or any other amateur athletic contest conducted by a non-profit or governmental body."

Officials covered under both new laws are not exempt from charges stemming from their willful, wanton or grossly-negligent acts or omissions.

Passage of the two bills reduces the officials' chances of being successfully sued for malpractice by mandating that mistakes, if made, be those of a grossly-negligent manner, not merely a negligent manner as previously applied.

Three other states (Arkansas, Rhode Island, New Jersey) within the past year and a half have passed similar legislation, bringing to five the total

number of states to provide such laws.

In other legal matters:

▶ Three Idaho Falls football officials were dismissed from a lawsuit filed by the parents of a player who allegedly was injured during a Sept. 9, 1985, high school JV game.

Jody Boline, Gerry Garn and John Sanders had officiated the game in question, involving Skyline High School of Idaho Falls. During that contest, Justin Bair allegedly injured his knee due to a late hit that was not penalized. Bair claimed a shortage of officials led to his injury and that the contest was "totally out of control...."

Four officials were scheduled to work the game, but only three were on hand to handle the officiating chores. The fourth official reportedly showed up a day late for the game.

The suit by Bair's parents sought \$371,000 in various damages and expenses.

"The dismissal was by agreement and was based in part upon the fact that one of the player's parents had filmed the entire game with a video camera and it

did not appear that the officials were out of line in their officiating of the game or in the play in question," noted Stephen McGrath, Idaho Falls, the officials' attorney.

The case was initially reported in REFEREE's 10/87 issue, page 14, "Trio of officials named in Idaho lawsuit."

▶ Amateur officials' status as "independent contractors" has been affirmed by the judgment of Sixth Judicial Circuit Court judge John Davis, who ruled that baseball and softball umpires who are paid by the Decatur (Ill.) Park District (DPD) are not employees of the District.

Judge Davis' decision overturned a ruling made by the Director of the State of Illinois Dept. of Employment Security and credited the DPD with over \$5,000 in unemployment-insurance contributions paid on behalf of those umpires.

Key reasons for the judgment: (1) Umpires had other occupations (none were "pro" umpires) and umpiring was merely an avocation; (2) they could take their services elsewhere; (3) they could accept or reject assignments; (4) the DPD had no supervisory control over the umpires. All of those mirror the status of an independent contractor.

Judge Davis found that the baseball and softball umpires work for and are paid by local leagues, with the DPD merely acting as a conduit to disburse umpires' remuneration.

May 23, 1988 — Mississippi Gov. Ray Mabus signs into law a bill limiting officials' liability. On hand for the signing, from left: Wilson Jeter, Gov. Mabus, Larry Thomas (state high school assn. supervisor of officials), Sen. Bob Montgomery.



*Handwritten notes:*  
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# Your Call

## If you could do over anything in your officiating career, what would it be and why?



**Ralph Hunter**  
Kennett Square, Pa.

*Truck driver. Basketball, softball. Age 42.*

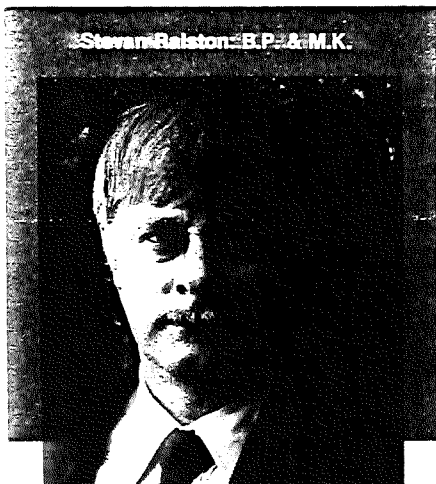
"I would start younger than 38, which was my age when I began. I would have had a longer time to become the best official I could be at each level, hopefully working a championship game at each level. However, since I'm in good health and continue to work hard, that may still be attained. I really enjoy officiating."



**Stevan Ralston** (see photo)  
Alma, Neb.

*Custodian. Baseball, softball. Age 48.*

"First of all, I'd always like to be better prepared, always more knowledgeable about what to look for. Next would be that I've missed a lot of years being certified and along with it lost chances to get good advice from other umpires on how to improve my game. But it's never too late to try. With each game I get better and better; if all goes well I should be umpiring for quite a while."



**Nick Finck**  
Wyoming, Ill.

*Farmer/rancher. Basketball, softball, football. Age 34.*

"I would have gone to summer basketball referees' camps earlier in my career. I've

gone to a one-week camp every year since 1984, during which I've learned much more than in the previous nine years. Camps are not for everyone, but they have been a tremendous help to me."



**Roger Ware**  
College Park, Ga.

*Manager, information-management systems. Basketball. Age 44.*

"The one thing I would do over is try a different approach (other than total silence) during an intramural game between Navy and Marine Corps teams. In that contest, I 'swallowed' my whistle and the game got out of control; there were two or three fights.

"My partner tried as best as he could to keep the peace while at the same time urging me to say something, anything! Any means of verbal communication would have let the coaches, players, fans and my partner know that I was still on THIS planet, even though I was doing a rotten job."



**Robert Gentzel**  
North Pole, Alaska

*Minister. Basketball, softball. Age 35.*

"It was my first year of organized basketball officiating. With 16 seconds to go in a boys' high school JV game, the home team had the ball with the score tied. I chose that point in the game to call a technical on a fan of the visiting team. At half-time I'd asked the guy to cool it; you can guess what effect that had on him.

"Of course, there are occasions when technicals can be called on fans, but I realized about a half second after I blew the whistle that perhaps that was not one of those times.

"I did not want my call to determine the outcome of that game, but at that point any decision I made was going to influence the outcome. After consulting with my partner and the two varsity officials (who were dressed and watching), I decided to withdraw the technical. After the game one coach told me: 'You are the fairest ref I've ever had.' Another said: 'You killed us.' The visiting team won on

a shot at the horn; you can easily guess which coach made what statement.

"If I had to do it over, I would put up with the obnoxious fan for another 16 seconds, since I had already done that for 31 minutes, 44 seconds. I would also have tried to ask veteran officials how to handle those types of situations BEFORE they happen rather than after."



**C.J. Pat Brown**  
St. Paul, Minn.

*Retired manufacturing engineer. Football, basketball, baseball, softball. Age 64.*

"I'd start officiating earlier in my life; age 43 was too late. I was too busy playing and didn't think it was as necessary as it is to start earlier. Due to that, I urged my sons to start officiating right out of college."

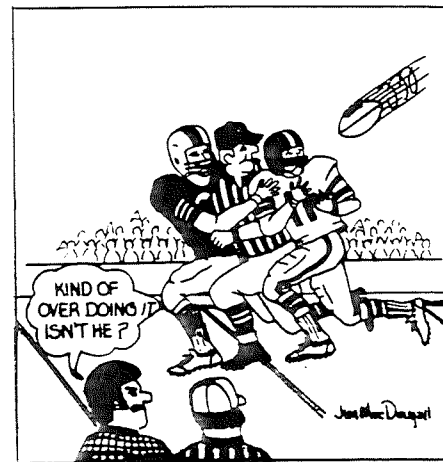


**William Stewart**  
Bronx, N.Y.

*College counselor, part-time teacher. Basketball. Age 39.*

"I would not talk to any of the other officials about the problems of officiating because most of them use that information to destroy you. I also would not mention the weight problems of my fellow officials because most of them can't see the forest for the trees; the kitchen, the stove and the deep freezer are all part of some of my fellow officials' anatomies.

"I guess if I could change my career or start over again, I would become one of the boys, or should I say one of those with excess baggage hanging around the middle because that's in and slim is out. Being 6'1" and 186 is not perfect, but it beats looking like Santa."



ASSEMBLY, No. 3718  

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STATE OF NEW JERSEY  

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INTRODUCED FEBRUARY 19, 1987

By Assemblymen LOVEYS, KELLY, Zecker, Colburn, Martin, Deverin,  
Adubato, Riley, Gargiulo and Schuber

AN ACT exempting certain sports officials from liability for  
damages under certain conditions.

1 BE IT ENACTED *by the Senate and General Assembly of the State*  
2 *of New Jersey:*

1 1. Notwithstanding any provisions of law to the contrary, no  
2 person who is accredited as a sports official by a voluntary asso-  
3 ciation as provided by P. L. 1979, c. 172 (C. 18A:11-3) and who  
4 serves that association, a conference under the jurisdiction of the  
5 association, or a public entity as defined in Title 59 of the New  
6 Jersey Statutes in the capacity of a sports official, whether or not  
7 compensated for his services, shall be liable in any action for dam-  
8 ages as a result of his acts of commission or omission arising out  
9 of and in the course of his rendering the services. Nothing in this  
10 act shall be deemed to grant immunity to any person causing dam-  
11 age by his willful, wanton, or grossly negligent act of commission  
12 or omission, nor to any person causing damage as the result of  
13 his negligent operation of a motor vehicle.

1 2. This act shall take effect immediately and shall apply to all  
2 causes of action arising on or after the effective date.

---

STATEMENT

This bill would grant immunity to certain sports officials who are accredited by the Interscholastic Athletic Association from liability for damages resulting from their activities as sports officials, or referees, while working for the association, its conferences, or a public entity.

---

TORT LIABILITY AND MALPRACTICE

Grants certain immunity to certain sports officials.

*H. G. 2/9/89*  
*Att I*  
*Pg. 9*

NAME: Mike Keating  
CITY: Great Bend

I first started officiating basketball games at the grade school level when I graduated from high school. I have officiated at the high school and college level for 23 years.

Over the years I have met and made a lot of friends thru officiating.

Officiating is something you have to enjoy to keep doing.

For any of you who have never worked any games of any kind you probably do not realize the time spent in attending rules meetings, traveling to and from games, and money spent to belong to associations and the cost of equipment.

I feel very strongly that from incidents which have occurred in other states that have resulted in lawsuits against officials for things they had no control over, that there is a definite need to give some protection to the officials.

If that protection is not given, I feel the the time will come when you will see officials taking a long look at the situation and deciding that it is not worth the risk even though it is something they enjoy.

If the time comes when you no longer have people willing to give the time involved to officiate sports because of the risk hanging over their heads, it will be a sad day for school athletics.

Several years ago I officiated for a coach at Chase who had coached basketball in Australia for three years. He told me that they had very few registered officials and during the season the two coaches or a player from each team would call the games. He made the comment that he really appreciated coaching back in the United States where they had regular officials for every game.

I think these are some things you need to think about, or there may come a time when you go to a game, and you may be asked to work it as there are no officials.

I am not saying that officials should not be held liable if there is really neglect on their part, but there really is a need for some protection for us.

As I said, the most of us are doing this because we like to be around athletics and the kids involved. I know, speaking for myself, if it were for the money alone, I would have given it up long ago.

*House Judiciary  
2/9/89  
Attachment II*

EQUIPMENT

| <u>1987-88</u> |                 | <u>1988-89</u>   |                 |
|----------------|-----------------|------------------|-----------------|
| Football shoes | \$ 50.00        | Basketball shoes | \$ 50.00        |
| Striped shirt  | 40.00           | Jacket           | 25.00           |
| Football pants | 25.00           | Socks            | 15.00           |
| Football socks | 10.00           | Slacks           | 25.00           |
| Football caps  | 15.00           | Cards            | 35.00           |
| Cards          | 35.00           | Football caps    | 15.00           |
| Whistles       | 5.00            | Whistles         | 5.00            |
| Gold flag      | 3.00            |                  |                 |
| Bean bag       | 3.00            |                  |                 |
|                | <u>\$186.00</u> |                  | <u>\$170.00</u> |

YEARLY EXPENSES

|   |         |                |                 |
|---|---------|----------------|-----------------|
| Phone calls   | \$50.00 |                |                 |
| Postage   | 25.00   |                |                 |
| Insurance (Ruedlingler)   | \$7.00  |                |                 |
| Dues:   |         |                |                 |
| KSHSAA (Kansas State High School Activities Association)          |         | \$20.00        |                 |
| KCOA (Kansas Collegiate Officials Association)                    |         | \$30.00        |                 |
| NFIOA (National Federation Interscholastic Officials Association) |         | \$ 6.00        |                 |
| NASO (National Association of Sports Officials)                   |         | <u>\$44.00</u> |                 |
|   |         |                | <u>\$100.00</u> |

| <u>1987-88</u> | <u>Approximate Miles</u> | <u>Approximate Time</u> |
|----------------|--------------------------|-------------------------|
| Rules meetings | 270                      | 32 HRS                  |
| Games          | 4,200                    | 270 HRS                 |
| Meals          | \$ 275                   |                         |
| Net income     | \$1,200                  |                         |

| <u>1988-89</u> | <u>Approximate Miles</u> | <u>Approximate Time</u> |
|----------------|--------------------------|-------------------------|
| Rules meetings | 665                      | 45 HRS                  |
| Games          | 5,000                    | 300 HRS                 |
| Meals          | \$ 275                   |                         |
| Net income     | \$2,000                  |                         |

Shrine Bowl: Motel - \$50    Meals - \$25    Miles - 360    Income - 0

*L.G. 2/9/89  
att II*



EQUIPMENT NEEDED FOR NEW OFFICIALS TO START OUT PROPERLY

FOOTBALL

|                            |                 |
|----------------------------|-----------------|
| Short sleeve shirt (1)     | \$18.50         |
| Long sleeve shirt (1)      | 20.00           |
| Football cap (1)           | 6.50            |
| Striped lined jacket (1)   | 35.50           |
| White knickers (1)         | 21.50           |
| Football shoes (1)         | 40.00           |
| Accessories                | 30.00           |
| Striped football socks (1) | 4.00            |
|                            | <u>\$176.00</u> |

BASKETBALL

|                        |                 |
|------------------------|-----------------|
| Short sleeve shirt (1) | \$ 18.50        |
| Lined jacket (1)       | 24.95           |
| Black slacks (1)       | 25.95           |
| Black boxer shorts (1) | 6.00            |
| Basketball shoes (1)   | 40.00           |
| Black socks (2)        | 5.00            |
|                        | <u>\$120.00</u> |

Cost to get started

|            |                 |
|------------|-----------------|
| Football   | \$176.00        |
| Basketball | <u>\$120.00</u> |
|            | <u>\$296.00</u> |

Should have

|            |                 |
|------------|-----------------|
| Football   | \$208.00        |
| Basketball | <u>\$152.00</u> |
|            | <u>\$360.00</u> |

Officials should really have duplicates of a lot of this equipment, and most of it needs replacing every couple of years.

*A. J. 2/9/89*  
*Att II*  
*pg. 3*

MEMORANDUM: HOUSE JUDICIARY COMMITTEE  
February 9, 1989

SUBJECT: HB 2123

FROM: Rep. Rick Bowden

I want to thank the Committee for hearing HB 2123. I wanted to speak to you today not as a member of the Legislature, but rather as an active official here in Kansas. I have been officiating football, basketball and wrestling here in Kansas since 1976. During that time, I have officiated junior high and high school level contests; worked intersquad practices and matches and also officiated the State Wrestling Tournament, State Basketball Tournament, and worked in qualifying games in the football playoffs.

Officials spend a great deal of time learning the rules that govern inter-scholastic athletic contests. We spend hours going over the application of these rules in KSHSAA sponsored rules meetings and area supervisor's meetings. However, no amount of preparation and no amount of knowledge can prevent injury from occurring when athletes go after each other in interscholastic sports. That is an unfortunate fact of athletic competition. Serious injuries, even though they do occur, are very rare in Kansas sports. It is safer for a student to be playing in a high school football game than riding around with their buddies after the game.

Officials are constantly watching for rules infractions. When we see them, we call them and penalties are assessed. Every one of you has attended sporting events and I dare say, the officials who called the game never made every call the way you saw it. We're much like Legislators, always offending someone when we call a penalty (in the case of legislators casting our votes). However, officials like Legislators, prepare, weigh the facts, and make the call. Officials must always assess penalties after a violation - we are constantly schooled to not "anticipate the foul" and to call it "when we see it". Because of that, we have been open for possible litigation if an injury took place due to an illegal act. We do a lot to try and prevent that act but we can't prevent some illegal acts from taking place.

Over the years, I have seen a decline in the number of people who are getting involved in officiating. Now there will be a lot of reasons given for this, but one is the fear of possible litigation should an athlete be injured and a lawsuit results. At many rules meetings, we

*House Judiciary  
2/9/89  
Attachment III*

have heard stories about claims being filed against officials who worked athletic contests in which an athlete was injured. I, myself, have thought about the possibility of no longer officiating due to the possibility of a lawsuit should an injury take place in a contest I worked.

Today, with the use of video tape cameras, almost every athletic contest is taped. These tapes provide a valuable source of information should an injury occur that results in a lawsuit. Through these tapes we can get a good idea of whether or not an official displayed willful or wanton misconduct or intentionally tortious conduct. My experiences also lead me to believe that any official that is clearly inept or unable to fulfill their duties in a professional and ethical manner, showing not only knowledge of the rules, but also the ability to apply them will not get games or matches to work.

This bill offers some needed protection to the official who is acting in a professional manner while not closing the door to possible action if they are officiating in a manner that presents increased opportunity for injury to our young athletes. It will also help keep officials available to staff the large number of athletic contests we provide our Kansas students.

TO: House Judiciary Committee

RE: Testimony of Margaret A. Gatewood\* on H.B. 2123

DATE: February 9, 1989

Following are actual fact situations which have produced negligence claims against officials for damages:

Plaintiff was a 9-year-old acting as bat girl during an American Legion Championship Baseball Game when she received a blow to her head from a baseball bat as Defendant player took a practice swing while waiting his turn at bat. As a result of the blow, plaintiff sustained an open depressed skull fracture and is still undergoing rehabilitation. Plaintiff claims the officials failed to properly mark the on-deck circle and failed to direct batters to a particular area to practice swings. Plaintiff seeks damages in six figures.

A hitter tucked his arms and charged baseman to breakup play at 1st base. The ball was overthrown, and batter continued toward 2nd base. Seeing that he would be thrown out, runner again charged, this time into 2nd baseman, causing injury. Runner was thrown out of the game by the officials for unsportsmanlike conduct. Plaintiff second baseman is suing for his injuries alleging officials were negligent for failing to eject the runner after he charged the first baseman. Officials defend their professional judgment that the first base incident alone did not warrant stopping the play.

A basketball official was accosted by an angry spectator during a time-out. In his effort to avoid the spectator's advances, the official fell into a cheerleading pyramid and caused plaintiff to fall from the top and suffer injuries. The cheerleader is suing the official.

First plaintiff is a lacrosse player who was attacked during a time-out by an opponent during a match officiated by defendant official. Second plaintiff, a teammate, came to his aid and was gouged in the face by the broken lacrosse stick being used on first plaintiff. Both players claim severe injury, disablement, disfiguration, great pain, and mental and physical torment and demand damages from the official.

\*VP/General Counsel, Doug Ruedlinger, Inc., administrator of liability insurance for sports officials.

*House Judiciary*  
*2/9/89*  
*Attachment IV*

Plaintiff was wrestling in the second round of the National Junior College Athletic Wrestling Tournament when he allegedly cried out in pain to notify defendant referee to stop the match. Plaintiff claims defendant disregarded plaintiff's notification and negligently permitted the match to continue, which resulted in injury to plaintiff's shoulder. He seeks damages for his injuries from the official.

A basketball official hurrying off the floor collided with an elderly spectator knocking him to the floor. The tense game atmosphere made the official apprehensive about his safety and that of his colleagues. He was looking over his shoulder as he hurried off the floor to check on his colleagues' safety when the collision occurred. The spectator sued the official.

Youth league baseball official announced the game would end at commencement of next inning, due to approaching storm. Lightning was visible in distance. Five minutes after announcement, player was struck by lightning and died. Deceased was nephew of Manny Mota with a potential pro career and demand is in seven figures.

Defendant basketball referee stopped play turned to make a call and accidentally struck Plaintiff in face. Plaintiff suffered fractured nose and underwent surgery for reduction of nasal fracture and will probably undergo cosmetic rhynoplasting.

Football official pulled a player out of scuffle. The player claimed neck injury. Player was back in school the following Monday with minimal injuries, but threatens suit against the official.

Plaintiff injured his spinal cord during a football game. He recovered from temporary quadriplegia. Plaintiff alleges failure to enforce anti-spearing rules caused his injury and he is suing the officials.

High school base runner injured leg while sliding into 2nd base. Stake securing base worked out of ground and cut his leg. He sued official for not checking condition of bases after first game of double header.

Suit was filed against umpire by city recreation league player who hurt ankle sliding into base. Plaintiff alleges base which he (plaintiff) furnished caused injury because it was slick. Official allegedly forced him to furnish base because official didn't have the recommended kind of base for use as required by league rules.

Basketball player in Atlantic Ten conference alleged fouls not called in basketball game and opposing player was allowed to assault plaintiff and break his jaw. He is suing the officials. The assault occurred after whistle was blown.

Allegation is that officials organization was negligent in assigning one particular official because he did not render medical aid to injured plaintiff, and allowed injured plaintiff to continue play. Plaintiff alleges severe spinal injuries due to illegal conduct of opposing player. No foul called after injury play.

*L.J. 2/9/89*  
*Att IV*  
*pg 3*

STATE OF KANSAS

BOB J. MEAD  
REPRESENTATIVE, 112TH DISTRICT  
P.O. BOX 224  
509 HOUCK  
PAWNEE ROCK, KANSAS 67567



TOPEKA

HOUSE OF  
REPRESENTATIVES

COMMITTEE ASSIGNMENTS  
MEMBER: ECONOMIC DEVELOPMENT  
LABOR AND INDUSTRY  
TRANSPORTATION

TESTIMONY TO THE HOUSE JUDICIARY COMMITTEE

Representative Bob Mead

February 9, 1989

Thank you for the opportunity to appear before you on House Bill 2091.

House Bill 2091 concerns crimes and punishments relating to indecent liberties with a child. It amends K.S.A. 12-3503 and repeals the existing section.

At first glance it may appear that this bill creates no major change in the existing statute. However, let me assure you that the change is significant and proper.

Stated quite simply the bill will switch the responsibility from the prosecution to show that the defendant is not married to the child that has been violated, to the defense to show that he or she is married to the child, if in fact that is the case.

Mr. Chairman, and members of the committee, the article before you is not the first time a conviction such as this has been reversed because of a technicality. Today, with your passage of this bill, you can take a step in the right direction to correct a law that tends to favor the criminal over the victim.

Mr. Chairman, I will attempt to answer any questions.

*House Judiciary*  
*2/9/89*  
*Attachment V*

BOB J. MEAD  
REPRESENTATIVE, 112TH DISTRICT  
P.O. BOX 224  
509 HOUCK  
PAWNEE ROCK, KANSAS 67567



TOPEKA

HOUSE OF  
REPRESENTATIVES

COMMITTEE ASSIGN  
MEMBER: ECONOMIC DEVELOPMENT  
LABOR AND INDUSTRY  
TRANSPORTATION

Friday, Dec. 23, 1988 Page 3

# Convictions reversed

PARSONS (AP) — The Kansas Court of Appeals reversed a man's convictions of taking indecent liberties with two children because the complaint failed to specify that he was not married to the children, officials said.

"It seems kind of silly, but it's the law," said Labette County Attorney John Bullard, who represented the prosecution during Silven R. Lee's appeal.

The court reversed the May 1987 convictions of Lee, of Oswego, on two felony counts of taking indecent liberties with a child. In an opinion filed last Friday, the court said the original complaint filed against Lee was "fatally defective" in not specifying that Lee was not married to the two children he was charged with molesting.

In its opinion, the court referred to the state law that defines indecent liberties as the commission of a sexual act "with a child who is not married to the offender and who is under 16 years of age." Although the complaint filed against Lee included a reference to the age of the alleged victims, no allegation was made in the document that the children were not married to Lee.

Lee was convicted by a Labette County jury of molesting a 7-year-old girl and a 5-year-old boy in the back seat of a car on Dec. 20, 1986.

He was sentenced in June 1987 to two concurrent five- to 20-year prison terms and served 10 months at the Kansas State Penitentiary in Lansing before being released on bond in May 1988.

*Regarding  
H.B. 2091  
Bob Mead*

*7/9 2/9/89  
Att V  
pg 2*





STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612-1597

ROBERT T. STEPHAN  
ATTORNEY GENERAL

MAIN PHONE: (913) 296-2215  
CONSUMER PROTECTION: 296-3751  
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STATEMENT OF  
ATTORNEY GENERAL ROBERT T. STEPHAN  
TO THE HOUSE JUDICIARY COMMITTEE  
RE: H.B. 2091  
February 9, 1989

It is always a pleasure to address lawmakers in a request to support a matter such as is before you with H.B. 2091.

The Kansas Court of Appeals has interpreted K.S.A. 21-3503 to require that the prosecution include in the complaint a statement that the victim is not married to the offender. This element must be included even when the victim and offender are of the same sex and when the victim is a small child.

The injustices that have arisen due to this requirement are the release of serious sexual offenders into society based solely upon an oversight of the prosecuting attorney involved.

As you can see, this is an understandable oversight as these are extremely emotional cases by nature and quite often are filed quickly when the information comes to light to avoid further harm. In such cases, it is easy to allow ourselves to see the obvious and to forget that the complaint must clearly state that a four year old male victim is not married to a 50 year old male offender, for instance.

*House Judiciary*  
*2/9/89*  
*Attachment VI*

At any rate, it does not matter if there is blame or not. The important thing is that by simply amending the law, as is now before you, the people we are here to protect, the children, may be less victimized. The simple fact is that this is a problem which arises like a specter numerous times each year and invariably results in a sex offender being released into society to cause more harm and damage or destroy more lives.

I see no need to recite to you the horror stories of sex abuse victims. The victims who, because of their injuries to mind as well as to body, quite often go on to be offenders themselves.

I strongly urge you to support House Bill 2091, which will simplify and hopefully stop a serious problem within our criminal justice system.

*N. J. 2/9/89  
Att VI  
pg 2*

SUGGESTED AMENDMENT TO  
K.S.A. 21-3506

21-3506. Aggravated criminal sodomy.  
Aggravated criminal sodomy is:

(a) Sodomy with a child ~~who -is -not married-to-the-offender-and~~ who is under 16 years of age;

(b) causing a child under 16 years of age to engage in sodomy with any person or an animal; or

(c) sodomy with a person who does not consent to the sodomy or causing a person, without the person's consent, to engage in sodomy with any person or an animal, under any of the following circumstances:

(i) When the victim is overcome by force or fear;

(ii) when the victim is unconscious or physically powerless;

(iii) when the victim is incapable of giving consent because of mental deficiency or disease, which condition was known by the offender or was reasonably apparent to the offender; or

(iv) when the victim is incapable of giving consent because of the effect of any alcoholic liquor, narcotic, drug or other substance administered to the victim by the offender, or by another person with the offender's knowledge, unless the victim voluntarily consumes or allows the administration of the substance with knowledge of its nature.

(2) It shall be an affirmative defense to a prosecution under subsection (a) of this section that the child is married to the accused.

(3) Aggravated criminal sodomy is a class B felony.

History: L. 1969, ch. 180, § 21-3506; L. 1983, ch. 109, § 6; July 1.

Z. J. 2/9/89  
Att VI  
Pg. 3

Soliman  
12/24/88

# Molestation conviction reversed because of wording of complaint

By Harris News Service

TOPEKA — The Kansas Court of Appeals has reversed the May 1987 Labette County conviction of an Oswego man for child molestation because the complaint against him failed to say he was not married to the victims.

The court reversed the conviction of Silven R. Lee on two felony counts of taking indecent liberties with a child. The court said the original complaint filed against Lee was "fatally defective" in not specifying that Lee was not married to the two children he was charged with molesting.

"It seems kind of silly, but it's the law," Labette County Attorney John Bullard said of the reversal. Bullard represented the prosecution during Lee's appeal.

Lee was convicted by a Labette County jury in connection with an incident on Dec. 20, 1986. He was accused of molesting a 7-year-old girl and a 5-year-old boy in the back seat of a car while it was en route from Columbus to Oswego.

During Lee's trial, the jury was shown videotapes on which the two children reportedly described the incident. Lee later testified that he did nothing at all to the boy and only kissed the girl on the cheek.

He was sentenced in June 1987 to five- to 20-year prison terms on the two felony convictions. He served 10 months at the Kansas State Penitentiary in Lansing before being released on bond in May 1988 pending the appeal.

The appeals court heard the case Nov. 30, and announced its decision Dec. 16.

In its opinion, the court referred to the state law that defines indecent liberties as the commission of a sexual act "with a child who is not married to the offender and who is under 16 years of age." Although the complaint filed against Lee included a reference to the age of the alleged victims, no allegation was made in the document that the children were not married to Lee.

In reversing the conviction, the appeals court cited a prior case.

1/2/89  
Att VI  
Pg. 4

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EXECUTIVE DIRECTOR • JAMES W. CLARK

Testimony in Support of House Bill 2091

by

James W. Clark, KCDA Executive Director

House Bill 2091 amends K.S.A 21-3503, indecent liberties with a child, by removing the requirement that the State must prove a negative, that the child victim is not married to the offender, and adding the affirmative defense of marriage. Such an amendment may help to eliminate many of the reversals of conviction that are now taking place due to the State's failure to allege the element of non-marriage, which began with State v. Jackson, 239 Kan. 232 (June 13, 1986) and are continuing.

Admittedly, many of these cases resulted from an attempt by the Kansas County and District Attorneys to assist prosecutors by preparing complaint forms for use in drawing up the initial charge. When the Jackson case hit, we notified all the prosecutor offices in the state, but unfortunately, the damage had already been done.

There is a similar problem in cases charging aggravated criminal sodomy, 21-3506. In Ditges v. State, an unpublished opinion decided on September 9, 1988, the Court of Appeals applied the Jackson rationale and reversed a conviction of aggravated criminal sodomy for the State's failure to allege that the victim was not married to the offender. There have been numerous cases since then. One glowing exception has been State v. Wade, 61678, decided by the Supreme Court on January 20, 1989. In that case the Information failed to allege that the victim was not married to the defendant, but it did allege that she was five years old. Applying common sense, the Supreme Court, after finding no statutory minimum age for marriage in Kansas, applies the common law minimum of 12 for a female and 14 for a male. Finding that marriage was a legal impossibility under the facts alleged, the Supreme Court finds no jurisdictional defect.

In conclusion, while we support HB 2091, we also suggest that if this change is determined to be the appropriate remedy, that similar changes should be made to the aggravated criminal sodomy statute.

*House Judiciary*  
*2/9/89*  
*Attachment VII*

**Indecent Liberties with a Child**  
**Sec. 21-3503, K.S.A.; Penalty Sec. 21-4501 [c]**  
unlawfully, feloniously and willfully

A

engage in an act of sexual intercourse with a child under the age of sixteen (16); to-wit: \_\_\_\_\_, who was not his spouse.

or B

engage in lewd (fondling) (touching) of the person of —(child), a child under the age of sixteen (16) years, with the intent to (arouse) (satisfy) the sexual desires of —(child)——  
OR (offender) OR both.

or C

engage in lewd (fondling) (touching) of his (her) person by a child under the age of sixteen (16) years; to-wit: \_\_\_\_\_  
\_\_\_\_\_, with the intent to (arouse) (satisfy) the sexual desires of —(child)—— OR —(offender)—— OR both.

*D.J. 2/9/89*  
*Att VII*  
*pg. 2*

**21-3506. Aggravated criminal sodomy.**  
Aggravated criminal sodomy is:

(a) Sodomy with a child who is not married to the offender and who is under 16 years of age;

(b) causing a child under 16 years of age to engage in sodomy with any person or an animal; or

(c) sodomy with a person who does not consent to the sodomy or causing a person, without the person's consent, to engage in sodomy with any person or an animal, under any of the following circumstances:

(i) When the victim is overcome by force or fear;

(ii) when the victim is unconscious or physically powerless;

(iii) when the victim is incapable of giving consent because of mental deficiency or disease, which condition was known by the offender or was reasonably apparent to the offender; or

(iv) when the victim is incapable of giving consent because of the effect of any alcoholic liquor, narcotic, drug or other substance administered to the victim by the offender, or by another person with the offender's knowledge, unless the victim voluntarily consumes or allows the administration of the substance with knowledge of its nature.

(2) Aggravated criminal sodomy is a class B felony.

*H.G. 2/9/89*  
*Att. VII*  
*pg. 3*