

To: Senate Judiciary Committee

From: Amanda L. Stanley, General Counsel

Date: May 19, 2020

RE: Thoughts on Liability Protections from a City Perspective

I want to thank Chairman Wilborn and the members of the Committee for affording the League of Kansas Municipalities the opportunity to provide testimony on our thoughts regarding liability protections.

The last eight weeks have produced numerous challenges for local governments and unfortunately the challenges never seem to end as our state gradually reopens.

One of the biggest questions the League has received from members in the last few weeks is what liability risks do we face if we reopen playgrounds, city hall, municipal court, the pool, golf courses, allow baseball, and the list keeps going. In listening to the testimony presented on May 13, 2020 to the House Judiciary Committee, Mr. Morantz is most likely correct that these will not be easy claims to win but that does not mean that this body should do nothing.

A city's liability is determined under the Kansas Torts Claims Act (KTCA), KSA 75-6102 et seq. The general rule is liability and immunity is the exception. The general framework for determining liability is as follows:

1. Is the injury one which is recognizable as compensable in tort?
2. Did the injury occur under circumstances where the governmental entity, if a private person, would be liable?
3. Was the claimant injured by a governmental person acting within the scope of their employment?
4. Were the employee's actions the proximate cause of the claimant's injury?
5. Does one of the immunity provisions of the KTCA apply?

If a Covid-19 lawsuit is brought, the most common tort is probably going to be negligence. To show liability, claimant must establish:

1. Duty (that the city owes a duty of care to the claimant)
2. City breached that duty (that the city did not exercise reasonable care)
3. That the breach was the proximate cause of the injury
4. Damages i.e. not sufficient to show injury where the city did not enforce the social distancing, did not require masks to be worn, did not require the employee to leave work after they exhibited

symptoms etc. if none of the other employees actually became positive for COVID 19 after the incident. There must be some compensable harm.

In determining if there is liability, the city must distinguish between a duty that is owed to the public generally, and a duty owed to an individual. Whether a duty exists is a matter of law. Very oversimplified, there is a duty if the duty is established by statute, or there has been affirmative action that singles out the individual. If the claimant cannot demonstrate that they are owed a duty of care, then the case will not succeed. Each of these analyses will be fact specific.

The final step in determining liability is where the KTCA establishes immunity for the particular action. Some of the areas of concern regarding liability are likely going to be covered under the recreational use immunity provision. See KSA 75-6104(o). Other areas of concern, such as duties owed to employees, are unlikely to fit under an immunity provision.

The key to decreasing a city's risk for any negligence suit is to review the Guidelines for Health and Safety to ensure the city is using reasonable care in any particular situation. The problem with that, as articulated by the Kansas Chamber, is that so much is unknown about this virus. The standard of care is constantly evolving and that makes it extremely difficult to provide peace of mind as we move to reopen our state. While these suits may very well not be ultimately successful, defending a lawsuit takes time and it takes money.

Section 3 of the proposed legislation by the Kansas Chamber would be helpful for cities as they begin to reopen city facilities.

While cities are not directly included in Section 4, under the KTCA, a city is only liable for a tort if a private person would also be liable for the tort. By creating immunity for private persons for COVID-19 claims, that should extend protections to cities and help provide some peace of mind that a city will not be dragged into extended litigation.

We understand that this is complex policy and, in an ideal world, would be carefully studied over the interim but nothing about this COVID-19 Pandemic has been ideal. Our state cannot wait to reopen until the next legislative session. Maybe the Kansas Trial Lawyers Associations is correct, and these claims will not be brought in Kansas, but it is hard for businesses and cities to move forward as all these potential liability issues swirl around us regarding a novel virus.

We urge you to carefully consider these issues and attempt to strike a balance.