



STATE OF KANSAS

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November 21, 1979

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ATTORNEY GENERAL OPINION NO. 79- 268

Theodore H. Hill
County Counselor
Suite 315, County Courthouse
Wichita, Kansas 67203

Re: Counties and County Officers--Elections--Liability
for Injuries to Voters

Synopsis: Election commissioners are officials of counties,
not the state, and therefore were not within the
scope of the governmental immunity afforded by
K.S.A. 46-901(a)(2) (now repealed by L. 1979,
ch. 186, §33).

Under the Kansas Tort Claims Act, L. 1979, ch. 186,
§§1-15, a county may be liable for injuries
sustained by a voter resulting from a
negligently-maintained or erected voting
machine. Prior to the effective date of
the act, however, such conduct is immune
from suit under the terms of K.S.A. 1978
Supp. 46-902(b) (now repealed by L. 1979,
ch. 186, §33).

* * *

Dear Mr. Hill:

Your office has requested an Attorney General's opinion on
the liability of Sedgwick County for injuries which a voter
could sustain while using a voting machine which has been
either negligently maintained or operated by local election
board personnel.

Initially, it is our opinion that Kansas statutes make it
the responsibility of each county to conduct the county-
wide elections that are held therein. In the case of Sedgwick
County, this duty is carried out by the election commissioner,

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as provided by K.S.A. 19-3419 et seq. Although the commissioner is appointed by the secretary of state (K.S.A. 19-3419), he or she is paid by the county, which also pays for all the expenses of holding elections in the county. K.S.A. 1978 Supp. 19-3419a, K.S.A. 19-3420, K.S.A. 19-3435. The county also provides office space for the election commissioner (K.S.A. 19-3421), as well as paying for the acquisition, storage and repair of voting machines. K.S.A. 25-1315, 25-1317. The actual control of the machine during an election is in the hands of the commissioner, or such custodians or election board officials as the commissioner may appoint. K.S.A. 1978 Supp. 25-1322, K.S.A. 25-2801 et seq. In view of the above, an election commissioner could not be considered a state official for the purposes of K.S.A. 46-901 (repealed by L. 1979, ch. 186, §33) which codified the doctrine of governmental immunity for state officials and agencies.

Since you did not state in your inquiry whether the question you pose is hypothetical or in fact arose from an actual injury, our answer to your question (whether the doctrine of governmental immunity shields the county from liability) must be in the subjunctive. Prior to 1978, public officials in Kansas enjoyed immunity from liability for acts they performed which were considered "governmental," as opposed to "proprietary" in nature. As applied to counties, the latter term was held to include activities which were either commercial in nature or normally carried on by private individuals. Mt. Carmel Medical Center v. Bd. of County Commissioners, 1 Kan.App.2d 374, 376-77 (1977). Clearly, the holding of elections fits into neither of these categories, but instead represents a cornerstone of our system of government, benefitting the public at large. In our opinion, the process of electing those who are to govern cannot be anything other than a governmental function, and accordingly would have been immune from liability for negligent acts.

In 1978, the Kansas Supreme Court in Gorrell v. City of Parsons, 223 Kan. 645 (1978), abolished governmental immunity for municipalities, except when activities involving legislative or judicial functions, or administrative decisions involving basic policy, were present. Any effect this decision may have had on counties was obviated by the passage of K.S.A. 1978 Supp. 46-902, which expressly reaffirmed the existence of governmental immunity for "local units of government," including counties. However, K.S.A. 1978 Supp. 46-902a provided that such legislatively-imposed protection would expire as of July 1, 1979.

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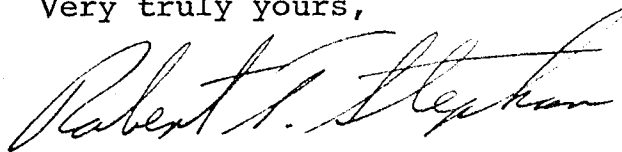
If the injury occurred after July 1, 1979, the terms of the new Kansas Tort Claims Act (L. 1979, ch. 186, §§1-15) would apply. That act states in section 3 that:

"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."

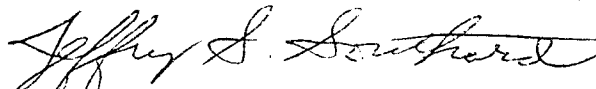
While fifteen limitations are set out in section 4 (which is not inclusive, however), none would appear to apply here, leaving the county liable for injuries after the effective date of the act, which by its terms is limited to claims arising from acts or omissions occurring on or after that date.

In conclusion, under the Tort Claims Act, a county could be liable for injuries sustained by a voter resulting from a negligently-maintained or erected voting machine. Prior to the effective date of the act, however, such conduct is immune from suit under the terms of K.S.A. 1978 Supp. 46-902(b) (repealed by L. 1979, ch. 186, §33).

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Jeffrey S. Southard
Assistant Attorney General

RTS:BJS:JSS:gk