STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
ANTITRUST: 296-5299

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ATTORNEY GENERAL OPINION NO. 81-98

The Honorable Carl B. Anderson, Jr.
Associate District Court Judge
Ninth Judicial District
County Courthouse
McPherson, Kansas 67460

Re: State Departments; Public Officers, Employees -- Tort Claims Act -- Liability of State and Courts for Acts of Probationers

Crimes and Punishments -- Code; Sentencing -- Community Or Public Service Work as Condition of Probation

Synopsis: Under the specific work restitution program devised for McPherson County, liability would not attach to the district court or judge in the event the probationer is injured or commits a tort while performing work within the scope of the program. Similarly, liability would not attach to the probation officer to the extent that his or her duties involve the exercise of a discretionary function. However, as this work restitution program is devised, the participating non-profit organizations located in McPherson County may be ultimately responsible for injuries suffered by probationers and torts committed by such probationers against third parties while acting within the scope of their designated work duties. Cited herein: K.S.A. 1980 Supp. 20-345, 20-346a, K.S.A. 21-4601, K.S.A. 1980 Supp. 21-4603, 21-4610, 75-4101, K.S.A. 75-4114, K.S.A. 1980 Supp. 75-6101, 75-6104 and 75-6115.

* * *

Dear Judge Anderson:

In reply to your inquiries concerning the possible liability of the State or of the District Court of McPherson County in the institution of a work restitution program, there are various factors to consider. In essence, the program which has been devised would require all convicted persons (15 years of age or older) who are placed on probation for the conviction of a crime or the adjudication of miscreancy or delinquency to perform public service work in the county for a period of time which would vary according to the terms of the probation. The program is administered by a probation officer, whose responsiblities include: (1) drawing a list of private, non-profit organizations that are willing to participate in the program; (2) scheduling the probationers for their respective work schedules; (3) checking to ensure all work is satisfactorily completed; and (4) ultimately reporting back to the sentencing judge whether the individual has fulfilled such condition of probation.

Based upon this set of facts, you have asked the following questions:

> "1. What liability would the Courts (State of Kansas) have if an individual was injured while performing the work which was required as a term of probation?
>
> "2. What liability would the Courts (State of Kansas) have if the person who is required to work as a term of probation causes damages to his employer or a third party while performing such work?
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> "3. Under any circumstances do you see the Courts (State of Kansas) having any liability under the above-described program?
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> "4. If the Courts (State of Kansas) could be held liable under any circumstances in carrying out the above-described program, does the District Court of McPherson County have authority to purchase a liability insurance policy covering such risks?
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> "5. If the District Court of McPherson County does not have the authority to purchase a liability insurance policy covering such risks, where would such authority rest?"

In view of the fact the district court judge, the probation officer and the participating organizations all play a substantial role in this program, it is necessary to determine whether liability extends to the State of Kansas and its agents under the Kansas Tort Claims Act (K.S.A. 1980 Supp. 75-6101 et seq.).

In answer to questions 1 and 2 above, relative to the participation and potential liability of the district court judge, if the extent of the judge's involvement is limited to determining sentences and conditions of probation, these decisions would constitute acts as part of the state's "judicial function" and, as a result, would qualify as an exception to tort liability under the Tort Claims Act. As provided in K.S.A. 1980 Supp. 75-6104:

> "A governmental entity or an employee acting within the scope of his or her employment shall not be liable for damages resulting from: . . .
>
> "(b) judicial function . . . ."

In State v. Miller, 214 Kan. 538 (1974), the Kansas Supreme Court had occasion to speak to the question of what acts constitute a "judicial function." In a discussion comparing the power to grant probations and to annul convictions, the Court stated:

> "Like the granting of probation the annulment of a conviction is part of the sentencing process. The sentencing judgment is a judicial function and the granting or denial of probation under 21-4603 is a part of the sentencing process vested in the trial court. (State v. Owens & Carlisle, 210 Kan. 628, 504 P.2d 249.) Likewise the granting or denial of an application for annulment of a conviction is a judicial function. Such power contemplates a judicial inquiry and the exercise of judicial discretion in the same way that a court exercises its discretion in the granting of probation, in setting conditions of probation, and in deciding whether or not probation should be revoked." 214 Kan. at 545. (Emphasis added.)

The Kansas Legislature has granted the power to a district court judge to exercise discretion in determining the conditions of probation and suspended sentences through K.S.A. 1980 Supp. 21-4610(3). Pertinent to the situation at hand, K.S.A. 1980 Supp. 21-4610(3)(m) states:

> "(3) The court may include among the conditions of probation or suspension of sentence the following and any other conditions that it deems proper: The defendant shall
>
> . . . .
>
> "(m) Perform community or public service work for local governmental agencies, private corporations organized not for profit, or charitable or social service organizations performing services for the community . . . ."

In our judgment, the program proposed by McPherson County fully complies with the scheme of prescribing conditions of probation envisioned by the legislature and, from an organizational standpoint, does "appear practicable and not detrimental to the needs of public safety and the welfare of the offender." K.S.A. 21-4601. As a result, it is our opinion that when the district court exercises its discretion by assigning a probationer to this program as a condition of probation, it is clearly performing a judicial function and is, therefore, immune from tort liability in the event the probationer is injured or commits a tort while performing work under the program.

Relative to the potential liability of the probation officer, an analysis of the probation officer's position in the work restitution program will indicate whether there is such potential.

Probation officers are provided for in K.S.A. 1980 Supp. 20-345:

> "Within staffing limits prescribed by the supreme court and appropriations therefor, the administrative judge of each judicial district, with the approval of a majority of the other district judges and associate district judges of such judicial district, shall appoint such bailiffs, court reporters, secretaries, parole and probation officers and other clerical and non-judicial personnel as are necessary to perform the judicial and administrative functions of the district court."

This statute subsequently provides that the employees enumerated above shall perform duties and functions either prescribed by law or assigned by the administrative judge, subject to guidelines or rules of the Supreme Court. Probation officers are further discussed in K.S.A. 1980 Supp. 20-346a(b):

> "(b) On and after July 1, 1979, all probation officers supervising adults and juveniles placed on probation by the district courts of this state and all parole officers supervising misdemeanants placed on parole by the district courts of this state shall be appointed by the district courts as provided by law. The supreme court shall prescribe the qualifications required of persons appointed as parole or probation officers of the district courts. The compensation of parole or probation officers of the district courts shall be paid by the state either in accordance with a compensation plan adopted by the supreme court or as may be otherwise specifically provided by law."

It is clear from these statutory provisions that the probation officer is an employee of the state and that his assigned duties may properly include the responsibility for the administration of the work restitution program. In carrying out this responsibility, it is our opinion the probation officer, in assigning a probationer to a particular recipient organization is performing a discretionary function or duty which necessarily flows from the district court's exercise of its judicial function in setting terms and conditions of probation. This being the case, K.S.A. 1980 Supp. 75-6104(d) exempts such probation officer from liability resulting from the exercise of such discretionary function or duty. Moreover, notwithstanding such conclusion, we find it difficult, if not impossible, to envision a situation wherein the probation officer's actions in merely placing a probationer with a recipient organization could be construed as the proximate cause of any injury sustained or caused by the probationer while working in the program. However, we emphasize that the foregoing conclusion has relevance only to the probation officer's discretionary functions and duties. To the extent that a probation officer is assigned duties and responsibilities which are not discretionary in nature, the negligent performance thereof, or the breach of any duty in connection therewith, may subject the probation officer to liability. Of course, the determination of whether a probation officer's act or omission is in connection with a discretionary function or duty is a question of fact, to be determined on a case by case basis.

In light of the foregoing, therefore, it would appear the ultimate responsibility for injuries sustained or caused by probationers while assigned to this program may well be borne by the recipient organizations, since a master-servant relationship will exist between the probationers and the organizations enjoying the free labor being furnished them. The general rule of whether a master-servant relationship exists was described in Atwell v. Maxwell Bridge Co., 196 Kan. 219, 224 (1966):

> "[A] master is a principal who employs another to perform service in his affairs and who controls or has the right to control the physical conduct of the other in the performance of the service. A servant is a person employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master. (Evans v. Board of Education of Hays, 178 Kan. 275, 278, 284 P.2d 1068.) It is not the exercise of direction, supervision or control over a workman which determines whether he is a servant or an independent contractor, but the right to exercise such direction, supervision or control. (Bowler v. Elmdale Developing Co., 185 Kan. 785, 787, 347 P.2d 391; Schroeder v. American Nat'l Bank, 154 Kan. 721, 121 P.2d 186; Davis v. Julian, 152 Kan. 749, 756, 107 P.2d 745.) The necessity of the control element was also recognized in Henderson v. Sutton's Food City, 191 Kan. 145, 379 P.2d 300."

See, also, Chasteen v. Childers, 218 Kan. 519, 530 (1976).

It should be noted from the discussion above that the right to control test is the most important aspect of the existence of a master-servant relationship, and whether the servant receives compensation is generally not a decisive point, in that consideration is not necessary to create the relationship of master and servant. In Re Read's Petition, 224 F.Supp. 241 (S.D. Fla. 1963); Bollman v. Kark Rendering Plant, 418 S.W.2d 39 (Mo. 1967); Lunt v. Fidelity & Casualty Co. of New York, 28 A.2d 736 (Maine, 1942); Lowry v. Kneeland, 117 N.W.2d 207 (Minn. 1962).

When the probationers are assigned by the probation officer to work for a particular organization, it is that organization which will directly control the physical movements of the workers, issue them any necessary tools or equipment, decide if the work has been satisfactorily completed and then report to the probation officer with the results.

Associated with the responsibility of directing the probationers' work being done on, about, or within their place of business, is the liability for accidents or torts committed by the probationers while acting in the scope of their assigned duties. As stated in Hall v. Atchison, Topeka and Santa Fe Railway Company, 349 F.Supp. 326 (U.S.D.C. Kansas 1972), which was an action by a truck passenger against the truck owner and railroad for injuries sustained in a collision with the defendant's train:

> "The doctrine of respondeat superior is predicated upon the master-servant relationship. The vicarious liability of the master is not based upon the knowledge or lack of knowledge of a third party concerning that relationship but upon the relationship itself." 349 F.Supp. at 329.

It should be noted the organizations will be responsible for the acts of the probationers only to the extent of their assigned work duties. As stated in Hollinger v. Stormont Hospital and Training School for Nurses, 2 Kan.App.2d 302, 311-12 (1978):

> "An employee is acting within the scope of his authority when he is performing services for which he has been employed or when he is doing anything which is reasonably incidental to his employment. The test is not necessarily whether the conduct was expressly authorized or forbidden by the employer, but whether such conduct should have been fairly foreseen from the nature of the employment and the duties relating to it. The liability of an employer for the acts of his employee depends not upon whether the injurious act of the employee was willful and intentional or was unintentional, but upon whether the employee, when he did the wrong, was acting in the prosecution of the employer's business and within the scope of his authority or had stepped aside from that business and had done an individual wrong. The now generally recognized rule is that the employer is liable for the reckless, willful, intentional, wanton, or malicious acts of his employee as well as for his heedless and careless acts if they are committed while the employee is acting in the execution of his authority and within the course of his employment, or with a view to the furtherance of his employer's business, and not for a purpose personal to the employee. Williams v. Community Drive-in Theater, Inc., supra. See also, Beggerly v. Walker, 194 Kan. 61, 397 P.2d 395 (1964). . . If an assault by an employee is motivated entirely by personal reasons

> such as malice or spite or by a desire to accomplish some unlawful purpose, and does not have for its purpose the furtherance of the employer's business, it will be considered personal to the employee and not such as will make the employer answerable. Williams v. Community Drive-in Theater, Inc., supra."

Thus, if a probationer causes damages to a third party while acting within the scope of his work assignment, liability may result for the participating organization.

In the event the probationer suffers an injury while performing his work duties prescribed under this program, there are certain factors to consider in determining liability for such injuries. This subject was discussed in Murphy v. Owens-Corning Fiberglass Corp., 447 F.Supp. 557 (D.C. Kan. 1977), wherein the court ordered a new trial to redetermine the award of damages granted by the trial court to an employee of Owens-Corning for his permanent disability which allegedly had resulted from hazardous working conditions:

> "Under Kansas law, there is no question but that an employer has a duty not to expose his employees to perils and dangers against which the employer may guard by the exercise of reasonable care, and that a part of this duty is to furnish a reasonably safe place in which to work. E.g., Taylor v. Hostetler, 186 Kan. 788, 352 P.2d 1042 (1960); Fishburn v. International Harvester Co., 157 Kan. 43, 138 P.2d 471 (1943). It is equally clear, however, that a master is not an insurer against all injuries which his servants may suffer in the discharge of their duties. E.g., Uhlrig v. Shortt, 194 Kan. 68, 397 P.2d 321 (1964); Blackmore v. Auer, 187 Kan. 434, 357 P.2d 765 (1960). The Kansas Supreme Court has reiterated time and time again the legal axiom that an employer's duty to furnish safe working conditions is not absolute and that an employee's recovery for breach thereof is dependent upon proof of negligence. In Allen v. Shell Petroleum Corp., 146 Kan. 67, 68 P.2d 651 (1937), the Kansas Supreme Court formulated the test of employer negligence as follows:
>
> "'The master is not required to furnish the best, the safest, or the newest appliances or methods of operation, nor to adopt extraordinary or unusual safeguards against

> risks and dangers. The limit of his duty here is to exercise ordinary care to supply reasonably safe places, appliances, and methods. The test of his discharge of this duty is the exercise of ordinary care to supply such places, appliances, and methods as persons of ordinary intelligence and prudence commonly furnish in like circumstances.'
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> "Further, because under fundamental principles of tort law the risk of injury defines the duty to be obeyed, Palsgraf v. Long Island R. R. Co., 248 N.Y. 339, 162 N.E. 99, 59 A.L.R. 1253 (1928), the Kansas Supreme Court has held that ' "the master is not compelled to foresee and guard against an accident which reasonable and prudent men would not expect to happen, and where an injury to a servant could not reasonably have been anticipated, a failure to take precautionary measures is not negligence on the part of the master for which he is liable to the servant." ' Dodd v. Wilson & Co., Inc., 149 Kan. 605, 88 P.2d 1116 (1939). An employer is therefore not liable for failing to anticipate idiosyncratic injury to a particular employee, arising from the employee's peculiar physical condition of which the employer had and could have no notice. Allen, supra. An employer's duty does not extend to the prevention of or warning against remote, improbable, and exceptional occurrences; it is limited to such perils as reasonably are to be anticipated." 447 F.Supp. 561, 562.

Resultantly, all the circumstances of each injury accident will have to be considered before deciding where the responsibility lies for injuries suffered by the probationer.

In answer to your third question, we cannot realistically offer a complete reply because: (1) the program is still in the planning stages; and (2) even if we were given the circumstances of a particular incident, we could but speculate what cause of action a creative attorney may plead, or a receptive jury may accept.

In answer to your fourth and fifth questions, relative to the purchase of liability insurance for the district court of McPherson County, the Committee on Surety Bonds and Insurance (K.S.A. 1980 Supp. 75-4101 et seq.) has the authority to decide which governmental entities of state government may purchase liability insurance. Related specifically to this subject, K.S.A. 75-4114 provides:

> "The committee, in addition to the coverages specified in K.S.A. 75-4109, may, within the limitations of appropriations made by the legislature therefor, purchase such liability insurance as they deem necessary for the protection of the state and its officers, employees and agents against any liability for injuries or damages resulting from any tortious conduct of such officers, employees or agents arising from the course of their employment or from any liability for injuries or damages resulting from conduct or decisions of such officers, employees or agents in carrying out the official duties of their offices pursuant to existing law, rule or regulation or court order."

Since the enactment of the Kansas Tort Claims Act, it has been the general practice of the Committee that: (1) the State acts as a self-insurer for liability claims against the state, its officers and employees (e.g., judges); (2) the committee authorizes the purchase of liability insurance from private insurance companies only for: (a) organizations specifically exempted from the Tort Claims Act (e.g., medical malpractice for "health care providers"; see K.S.A. 1980 Supp. 75-6115); and (b) organizations it determines have an extraordinary need for an exclusive liability insurance policy (e.g., state funded attorneys for indigent defendants). As a result, district courts are indemnified by the State and cannot purchase liability insurance without the prior approval of the State Committee on Surety Bonds and Insurance.

In summary, under the specific work restitution program devised for McPherson County, liability would not attach to the district court or judge in the event the probationer is injured or commits a tort while performing work within the scope of the program. Similarly, liability would not attach to the probation officer to the extent that his or her duties involve the exercise of a discretionary function. It is further our opinion that, as this work restitution program is devised, the participating non-profit organizations located in McPherson County

may be ultimately responsible for injuries suffered by probationers and torts committed by such probationers against third parties while acting within the scope of their designated work duties.

Very truly yours,

Robert T. Stephan

ROBERT T. STEPHAN
Attorney General of Kansas

C. Y. Meek

Christopher Y. Meek
Assistant Attorney General

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