



STATE OF KANSAS

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May 4, 1988

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ATTORNEY GENERAL OPINION NO. 88- 62

The Honorable Henry Helgerson
State Representative, Eighty-Sixth District
State Capitol, Room 273-W
Topeka, Kansas 66612

Re: State Departments; Public Officers and Employees --
Kansas Tort Claims Act -- Liability of Governmental
Entities for Damages

Synopsis: When the state operates an information network, it may be subject to liability for damages if liability would exist were the network operated by an individual. To state a cause of action for negligence, an injured party must show a duty, a breach of that duty, and damages which were caused by the breach of duty. The state, in operating an information network, may be gratuitously rendering services which are recognized as necessary for the individual's protection, thus giving rise to a duty. If negligence is established, the state may avail itself of exceptions from liability found in the tort claims act. Cited herein: K.S.A. 75-6101; 75-6103(a); K.S.A. 1987 Supp. 75-6104.

* * *

Dear Representative Helgerson:

As Representative for the Eighty-Sixth District, you request our opinion regarding state liability in providing information to disabled individuals and their families concerning certain services available to them. Your inquiry arises in deciding

whether, in operating an information network, the Kansas Department of Health and Environment (KDHE) should provide information only on service providers that are licensed or certified by the state, or whether the information network should provide information on all service providers with a blanket disclaimer about the quality of the services.

Regarding the possibility of state liability for distributing information about available disability services, we direct your attention to the Kansas tort claims act, K.S.A. 75-6101 et seq. This act makes liability the rule, subject to several exceptions, for governmental entities and their employees when the employees are "acting within the scope of their employment under circumstances where the governmental entity, if a private person, would be liable under the laws of the state." K.S.A. 75-6103(a).

The Kansas Supreme Court stated the elements of negligence in Kansas in an advisory opinion to the 10th Circuit:

"Negligence exists where there is a duty owed by one person to another and a breach of that duty occurs, and, if recovery is to be had for such negligence, the injured party must show a causal connection between the duty breached and the injury received, and that he or she was damaged by the negligence." Durflinger v. Artilles, 234 Kan. 484, answer to certified question conformed to 727 F.2d 888 (1983).

In short, negligence does not exist if there is no duty owed to the victim. Finkbiner v. Clay County, 238 Kan. 856, 862 (1986).

One means of establishing the existence of a duty and a breach of that duty is discussed in the Restatement (Second) of Torts § 324A (1965), which states:

"One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if

"(a) his failure to exercise reasonable care increases the risk of such harm, or

. . .

"(c) the harm is suffered because of reliance of the other or the third person upon the undertaking."

Section 324A was adopted in Kansas in Schmeck v. City of Shawnee, 232 Kan. 11, 24 (1982).

By attempting to provide information about services to families and disabled persons, it is at least arguable that the state is undertaking to render services to another which should be recognized as necessary for the protection of a third person, thus establishing a duty.

The second prong in establishing liability in negligence is whether there is a failure to exercise reasonable care in providing the service, and whether such failure increases the risk of harm. Therefore, if the network provides information which is, or should be known by the state to put the party in danger, then the state may be liable for damages caused by the service provider. It would appear that reasonable inquiry regarding the service provider prior to including the provider on the list would increase an injured party's burden of establishing liability. Notwithstanding that reasonable care is exercised in providing the service, liability may exist if the injured party relied on the network's undertaking. To establish such a claim, the victim would be required to show that the information provided by the network was coupled with a statement, either expressed or implied, regarding the value of the services. A disclaimer of liability based on such a statement would not be valid if found to be unconscionable. While unconscionability is a factual question, we believe that, based on Wille v. Southwestern Bell Tel. Co., 219 Kan. 755 (1976), a disclaimer would not be unconscionable if it gives notice that the information network is not attended with a statement upon which the other party may rely.

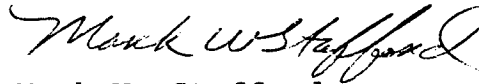
If liability is established, the state may avail itself to any one of a number of exceptions to liability found in K.S.A. 1987 Supp. 75-6104. The applicability of an exception must be resolved in a case-by-case determination of particular circumstances surrounding the claim.

In conclusion, it is our opinion when the state operates an information network, it may be subject to liability for damages if liability would exist were the network operated by an individual. To state a cause of action for negligence, an injured party must show duty, a breach of that duty, and damages which were caused by the breach of duty. By operating an information network, the state may be gratuitously rendering services which are recognized as necessary for the individual's protection, thus giving rise to a duty. If negligence is established, the state may avail itself of exceptions from liability found in the tort claims act.

Very truly yours,



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