



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

June 19, 1981

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

ATTORNEY GENERAL OPINION NO. 81- 139

Ms. Ann Victoria Thomas
General Counsel
University of Kansas
227 Strong Hall
Lawrence, Kansas 66045

Re: State Departments; Public Officers, Employees --
Tort Claims Act -- University of Kansas Institu-
tional Review Boards

Synopsis: A private citizen serving as the consumer repre-
sentative on an institutional review board super-
vising research projects involving human beings is
an employee within the meaning of the Kansas Tort
Claims Act. Such person is not rendering profes-
sional services so as to be excepted from the Act
by the terms of K.S.A. 1980 Supp. 75-6115, and such
person is entitled to the defenses provided in the
Act, (see K.S.A. 1980 Supp. 75-6104), legal repre-
sentation, (see K.S.A. 1980 Supp. 75-6108), and
indemnification (see K.S.A. 1980 Supp. 75-6109).
Cited herein: K.S.A. 1980 Supp. 40-3401, 75-6102,
75-6103, 75-6104, 75-6108, 75-6109, 75-6111, and
75-6115, 21 CFR §§56.101-124, 45 CFR §§46.101-110,
45 Fed. Reg. 77384 (Nov. 21, 1980).

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Dear Ms. Thomas:

You request the opinion of this office as to the applicability
of the Kansas Tort Claims Act to members of institutional re-
view boards (hereinafter IRB) established pursuant to federal
regulations on both University of Kansas campuses. The IRB
at the Medical Center, otherwise known as the Human Subjects
Committee, is established pursuant to 45 CFR §§46.101-110 and
21 CFR §§56.101-124. The IRB's on the Lawrence campus include the

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Advisory Committee on Human Experimentation and the Biohazards Committee, the latter of which is governed by 45 Fed. Reg. 77384 (Nov. 21, 1980). The function of these boards is to regulate and approve projects involving human subjects. Each of these IRB's is required by federal regulations to have at least one member whose only affiliation with the institution in question is membership on the IRB. However, you advise that the responsibilities of the consumer representative "do not involve the provision of medical care or professional services or the attendance of hospital patients." The problem of protecting these nonaffiliated members from liability has prompted your inquiry.

The Kansas Tort Claims Act, K.S.A. 1980 Supp. 75-6101 et seq., allows aggrieved parties to maintain tort claims against a governmental entity, which is defined to include the state of Kansas and its municipalities. K.S.A. 1980 Supp. 75-6102(c). For the purposes of the Act, "state" is defined by K.S.A. 1980 Supp. 75-6102(a) as "the state of Kansas or any office, department, agency, authority, bureau, commission, board, institution, hospital, college, university or other instrumentality thereof." Both the University of Kansas and Kansas University Medical Center qualify as instrumentalities of the state for purposes of the Act.

K.S.A. 1980 Supp. 75-6103 imposes liability on governmental entities for the negligent or wrongful acts or omissions of employees working within the scope of their employment. K.S.A. 1980 Supp. 75-6102(d) defines "employee" as follows:

"(d) 'Employee' means any officer, employee or servant or any member of a board, commission or council of a governmental entity, including elected or appointed officials and persons acting on behalf or in service of a governmental entity in any official capacity, whether with or without compensation, but such term shall not include an independent contractor under contract with a governmental entity. The term 'employee' shall include former employees for acts and omissions within the scope of their employment during their former employment with the governmental entity."

Because this definition of "employee" includes members of boards and persons acting on behalf of a governmental institution in an official capacity, with or without compensation, we would conclude that non-affiliated members of the IRB's in

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question are employees of a governmental entity for purposes of the Tort Claims Act. However, your inquiry is further complicated by an exception to the Act in K.S.A. 1980 Supp. 75-6115, which states:

"The Kansas tort claims act shall not be applicable to claims arising from the rendering of or failure to render professional services by a health care provider or an employee thereof, when the health care provider is a governmental entity. Claims for damages against a health care provider that is a governmental entity, arising out of the rendering or failure to render professional services by such health care provider may be recovered in the same manner as claims for damages against a health care provider that is not a governmental entity. The term 'health care provider,' as used in this section, shall have the meaning ascribed thereto in K.S.A. 1979 Supp. 40-3401, and amendments thereto."

The definition referred to above is found in K.S.A. 1980 Supp. 40-3401 (f), which states as follows:

"'Health care provider' means a person licensed to practice any branch of the healing arts by the state board of healing arts, a person who holds a temporary permit to practice any branch of the healing arts issued by the state board of healing arts, a person engaged in a post-graduate training program approved by the state board of healing arts, a medical care facility licensed by the department of health and environment, a health maintenance organization issued a certificate of authority by the commissioner of insurance, an optometrist licensed by the board of examiners in optometry, a podiatrist registered by the state board of healing arts, a pharmacist registered by the state board of pharmacy, a licensed professional nurse who is licensed by the board of nursing and certified as a nurse anesthetist by the American association of nurse anesthetists, a professional corporation organized pursuant to the professional corporation law of Kansas by persons who are authorized by such law to form such a corporation and who are health care providers as defined by this

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subsection, a dentist certified by the state board of healing arts to administer anesthetics under K.S.A. 65-2899, a physical therapist registered by the state board of healing arts, or a mental health center or mental health clinic licensed by the secretary of social and rehabilitation services."

Certainly, in light of this definition, Kansas University Medical Center is a medical care facility licensed by the Department of Health, and is thus a "health care provider." The University of Kansas, Lawrence campus, however, is not a licensed health care provider, except as to the Watkins Student Hospital facility, and thus would not be viewed as a health care provider under the language of 40-3401 or 75-6115.

However, both the IRB on the Lawrence campus and the IRB at the medical center in Kansas City are performing governmental functions in directing academic research on human subjects. Neither of the IRB's is, in our opinion, rendering or failing to render professional services to patients as a health care provider. The clear language of K.S.A. 1980 Supp. 75-6115 requires an examination of both the nature of the governmental entity (whether it is a health care provider) and analysis of the service performed by the entity (whether it is a "professional service"). To illustrate, although the Kansas University Medical Center is a health care provider within the meaning of 40-3401 and 75-6115, not all acts performed by employees of the Medical Center constitute the rendering of professional services. Hence, claims of negligence or other tortious conduct arising from such acts are not exempted from the Tort Claims Act and are, correspondingly, not likely to be covered by the professional liability insurance purchased by the University. For example, injury to a visitor or a student at the medical center in a "slip and fall" accident giving rise to a tort claim would fall within the coverage of the Tort Claims Act and would not be exempted by the terms of 75-6115.

Thus, assuming the function of the IRB and, specifically, its consumer representative, is not the delivery of professional health care services, the actions of the consumer representatives on the IRB's could not, in our judgment, give rise to a tort claim for the rendering or failure to render professional services. Hence, such representative normally would be indemnified by the State of Kansas under K.S.A. 1980 Supp. 75-6109, which provides:

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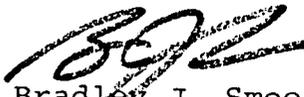
"Except as otherwise provided in the Kansas [tort] claims act, a governmental entity is liable, and shall indemnify its employees against damages, for injury or damage proximately caused by an act or omission of an employee while acting within the scope of his or her employment. A governmental entity shall not be liable under the provisions of this act for any punitive or exemplary damages against an employee, nor for payment of any costs, judgments or settlements which are paid through an applicable contract or policy of insurance. The governmental entity shall have the right to recover any payments made by it for any judgment, or portion thereof, and costs or fees incurred by or on behalf of an employee's defense if the employee fails to cooperate in good faith in the defense of the claim or action or if the trier of fact finds that the act or omission of the employee was because of such employee's actual fraud or actual malice."

In summary, it is our opinion that a private citizen serving as the consumer representative on an institutional review board supervising research projects involving human beings is an employee within the meaning of the Kansas Tort Claims Act. Such person is not rendering professional services so as to be excepted from the Act by the terms of K.S.A. 1980 Supp. 75-6115, and such person is entitled to the defenses provided in the Act (see K.S.A. 1980 Supp. 75-6104), legal representation (see K.S.A. 1980 Supp. 75-6108), and indemnification (see K.S.A. 1980 Supp. 75-6109).

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Bradley J. Smoot
Deputy Attorney General

RTS:BJs:hle