Kansas Bar Association
2017 John E. Shamberg Memorial Series:
The Relevance of Civil Rights Encompassing the Daily Practice of Law

The Kansas Tort Claims Act

I. Introduction

In the broadest sense, civil rights might be described as those rights which we grant one another in a *civil* society. These are rights designed to promote the general welfare and *civility* of a group of people living together in an organized society. Importantly, like Lady Justice herself, these rights might be perceived by the governed as blind to the improper influence of power or corruption – providing rights to the minority as well as the majority – allowing the society to exist together with a unifying fabric of rights.

Among those civil rights which might be important in our daily life, but perhaps overlooked or taken for granted in "modern" times, is the civil right which we have freely and voluntarily given to ourselves – the civil right to pursue a civil action against our own government for wrongs caused by the government. Without this important civil right, the governed might find themselves disconnected from the exercise of power and its consequent responsibility, and instead perceiving a double standard between what we expect of one another in conducting our daily lives, versus what we can expect from our government.

In Kansas, the civil right to pursue an action against our own government for wrongs caused by the government is codified by the Kansas State Legislature in K.S.A. 75-6101 *et seq*, labeled the ***Kansas Tort Claims Act***.

II. Historical Framework of the Kansas Tort Claims Act

To fully appreciate the civil rights conferred by the Kansas Tort Claims Act, consider the historical framework from which it was enacted, starting with the concept of **sovereign immunity**, expressed in English law with the (Latin) legal maxim *Rex non potest peccare*:

> REX NON POTEST PECCARE. (2 *Roll. R.* 304).—*The king can do no wrong.*
>
> It is an ancient and fundamental principle of the English constitution, that the king can do no wrong (*f*).

As set forth in A Selection of Legal Maxims, by Herbert Broom, Esquire, in 1845, "It is an ancient and fundamental principle of the English constitution that the king can do no wrong." Under this principle, the sovereign is not amenable to suit.

When the American states united and broke free from the authority of the crown, the concept of federal sovereign immunity was not specifically mentioned in the United States Constitution. Under Article III, Section 2 of the United States Constitution, "The judicial Power shall extend to . . . to Controversies . . . between a State and Citizens of another State . . . ." Arguably, the United States Constitution, by its apparent plain language, allowed the federal courts to hear cases between a state and citizens of another state, thus eliminating state sovereign immunity. Within a few years following ratification of the Constitution, Alexander Chisolm sued the state of Georgia in the United States Supreme Court for debts incurred during the Revolutionary War. The State of Georgia did not appear, and the plaintiff asked the Court to enter a show cause order for Georgia to appear and show cause why judgment should not be entered against it. Before entering the order, the Court indicated that "it is proper that this Court should be satisfied it hath cognizance of the suit." *Chisolm v. Georgia*, 2 U.S. 419, 429 (1793).

Following a discussion of sovereign immunity and the presence of English common law in early American jurisprudence, the United States Supreme Court concluded that by the language of Article III, Section 2, the Constitution allowed the sovereign states to be sued in court.

One year later, in the first Constitutional amendment following the original ten in the Bill of Rights, Congress passed the Eleventh Amendment in response to *Chisolm*. Under the Eleventh Amendment, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

With the absence of any override to federal sovereign immunity in the United States Constitution, as well as the passage of the Eleventh Amendment, sovereign immunity continued to remain the law of the land throughout the next century and a half.

Beginning early in the twentieth century, however, Congress began to reconsider federal sovereign immunity. The **Federal Tort Claims Act** was passed by the Seventy-ninth Congress in 1946 as Title IV of the Legislative Reorganization Act, 60 Stat. 842, after nearly thirty years of congressional consideration. *Dalehite v. United States*, 346 U.S. 15, 24 (1953). It was the offspring of a feeling that the Government should assume the obligation to pay damages for the misfeasance of employees in carrying out its work. *Dalehite*, 346 U.S. at 24.

By the mid-twentieth century, with the enactment of the Federal Tort Claims Act, federal sovereign immunity for tort claims had eroded, and it was officially recognized that at least with respect to the United States Government, the king *could* do wrong.

Meanwhile, throughout much of the twentieth century, in the courts in the State of Kansas, sovereign immunity persisted with respect to the state itself, its counties, and its municipalities. *Woods v. Kan. Tpk. Auth*., 205 Kan. 770, 770-71, 472 P.2d 219, 220 (1970), *Caywood v. Bd. of County Comm'rs*, 194 Kan. 419, 421-23, 399 P.2d 561, 562-64 (1965), and *Jones v. City of Kansas City*, 176 Kan. 406, 408-09, 271 P.2d 803, 805-06 (1954).

For a time, the Kansas courts and Kansas legislature battled the limits of the fundamental fairness of the doctrine of sovereign immunity. The Kansas Supreme Court rendered five decisions between 1969 and 1979 on the issue of governmental immunity, four of which abrogated governmental immunity, either partially or completely. Kansas Legislator Briefing Book (2015). Finally, in 1979, the legislature officially waived sovereign immunity in the State of Kansas with the passage of the Kansas Tort Claims Act. K.S.A. 75-6101 to 75-6120. It has been noted that the Kansas Tort Claims Act is patterned after the Federal Tort Claims Act. Westerbeke, *The Immunity Provisions in the Kansas Tort Clams Act: The First Twenty-Five Years*, 52 Kan. L. Rev. 939, 960 (2003).

III. Text and Effect of the Kansas Tort Claims Act

The origins of sovereign immunity appear to be based in part on the infallibility of the monarch, but nonetheless, the doctrine persisted for a time in this country. There is no question that shielding the government from some wrongs, while allowing redress for other wrongs, seems fundamentally unfair, especially to victims who did not choose their wrongdoer.

One appeal of the Kansas Tort Claims Act is its simple approach to eliminating the double standard or fundamental unfairness of sovereign immunity. In the operative subsection of the Act, the Legislature put the government on the exact same footing as the general public:

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.

K.S.A. 75-6103 (emphasis added).

There are certain exceptions to liability, set out in K.S.A. 75-6104, and briefly summarized as follows:

(a) Legislative functions
(b) Judicial functions
(c) enforcement of or failure to enforce a law
(d) adoption or enforcement or any written personnel policy protecting health and safety
(e) the exercise or performance of a discretionary function
(f) the assessment or collection of taxes or special assessments
(g) certain claims by government employees against other government employees
(h) certain claims regarding traffic or road signs, signals, or devices
(i) certain claims against individuals immune from suit
(j) emergency management activities
(k) inspection of property
(l) snow and ice conditions
(m) the plan or design for the construction of or an improvement to public property
(n) failure to provide police or fire protection
(o) public property intended to be used as a park, playground, or open area
(p) the natural condition of unimproved public property
(q) public cemetaries
(r) minimum maintenance roads
(s) vending machines
(t) geographic information systems
(u) juvenile justice programs
(v) contaminant remediation
(w) donating used fire equipment
(x) accepting donated fire equipment

With respect to these exceptions, it has been observed:

> [T]he most serious threat to a broadly based system of governmental liability for damages caused by tortious conduct . . . is the KCTA's express retention of a series of specifically enumerated exceptions set forth in section 75-6104. Initial drafts of the KCTA preserved immunity for only a limited number of fundamental government functions. Yet before the legislation was final, the Kansas League of Municipalities successfully convinced legislators to add a number of additional immunities. In the twenty-five years since enactment, the KCTA has been repeatedly amended to add new immunities, and today the KCTA contains twenty-five specific immunities.

Westerbeke, *The Immunity Provisions in the Kansas Tort Clams Act: The First Twenty-Five Years*, 52 Kan. L. Rev. 939, 945-46 (2003).

Other important aspects of the Kansas Tort Claims Act are as follows:

- A limit of **$500,000** for any number of claims arising out of a single occurrence or accident, unless **insurance** has been purchased. K.S.A. 75-6105(a) and 75-6111(b).

- **No punitive or exemplary damages**, **except** for acts or omissions of employees because of **actual** fraud or **actual** malice. K.S.A. 75-6105(c).

- Allowing payment of judgments by **periodic payments**. K.S.A. 75-6112.

- Excepting certain **health care providers** from the Act. K.S.A. 75-6115.

- Providing a framework for defending and indemnifying employees for claims based on violations of the **civil rights** laws of the United States or of the state of Kansas. K.S.A. 75-6116.

- Establishment of a **tort claims fund** in the state treasury, administered by the Attorney General. K.S.A. 75-6117.

- Excepting members of: any governing body of a municipality, appointive board, commission, committee, or council. K.S.A. 65-6119.

- Discussing the actions of **charitable health care providers**. K.S.A. 75-6120.

IV. Notice and Timing Requirements for Certain Claims

The Kansas Tort Claims Act appears to be codified in K.S.A. 75-6101 through 6120, inclusively. Nonetheless, there is another **separate** and **required** notice provision in the Kansas Statutes which interestingly covers only claims against certain governmental entities, broadly labeled as "municipalities."

Under K.S.A. 12-105b(d), a notice of claim must be filed with the clerk or governing body of the entity prior to the filing of the claim.

Under K.S.A. 12-105a, a "municipality" means and includes **county, township, city, school district of whatever name or nature, community junior college, municipal university, city, county, or district hospital, drainage district, cemetery district, fire district, and other political subdivision or taxing unit, and including their boards, bureaus, commissions, committees and other agencies, such as, but not limited to, library board, park board, recreation commission, hospital board of trustees having power to create indebtedness and make payment of the same independently of the parent unit.**

Under K.S.A. 75-6102(c), a municipality includes **any county, township, city, school district or other political or taxing subdivisions of the state, or any agency, authority, institution, or other instrumentality thereof**.

The notice requirement does not apply to the state itself and its agencies.

Specifically, K.S.A. 12-105b(s) reads as follows:

Any person having a claim **against a municipality** which could give rise to an action brought under the Kansas tort claims act shall file a **written notice** as provided in this subsection **before commencing** such action. The notice shall be filed with the **clerk or governing body** of the municipality and shall contain the following:

(1) The name and address of the claimant and the name and address of the claimant's attorney, if any;

(2) a concise statement of the factual basis of the claim, including the date, time, place and circumstances of the act, omission or event complained of;

(3) the name and address of any public officer or employee involved, if known;

(4) a concise statement of the nature and the extent of the injury claimed to have been suffered; and

(5) a statement of the amount of monetary damages that is being requested.

In the filing of a notice of claim, **substantial compliance** with the provisions and requirements of this subsection shall constitute valid filing of a claim. The contents of such notice shall **not be admissible** in any subsequent action arising out of the claim.

Once notice of the claim is filed, no action shall be commenced **until after** the claimant has received notice from the municipality that it has **denied** the claim **or until after 120 days** has passed following the filing of the notice of claim, whichever occurs first.

A claim is **deemed denied** if the municipality fails to approve the claim in its entirety within 120 days unless the interested parties have reached a settlement before the expiration of that period. No person may initiate an action against a municipality unless the claim has been denied in whole or part.

Any action brought pursuant to the Kansas tort claims act shall be commenced **within the time period** provided for in the code of civil procedure or it shall be forever barred, **except** that, a claimant shall have **no less than 90 days from the date the claim is denied or deemed denied** in which to commence an action.

V. Particulars Of The Notice and Timing Requirements

"**Against a municipality**" - The jurisdictional bar in K.S.A. 2013 Supp. 12-105b(d) unambiguously applies only to lawsuits against municipalities. Failure to comply with the statute does not deprive a district court of jurisdiction over a lawsuit against a municipal employee. *Whaley v. Sharp*, 301 Kan. 192, 201, 343 P.3d 63, 69 (2014).

"**Clerk or governing body**" - K.S.A.2011 Supp. 12-105b(d) requires a notice of claim against a county to be served on the county clerk or the board of county commissioners. Here, there is no evidence in the record that Huehl furnished a written notice of claim on either the clerk or the board of county commissioners. Because Huehl failed to provide written notice of his claim as required by K.S.A.2011 Supp. 12-105b(d), the trial court lacked jurisdiction over his claims against the defendants. As a result, the trial court properly dismissed the case with prejudice. *Huehl v. Board of County Com'rs of County of Lincoln*, 298 P.3d 1139 (Kan. App. 2013); see also *Meara v. Douglas County*, 293 P.3d 168 (Kan. App. 2013); *Steed v. McPherson Area Solid Waste Utility*, 43 Kan.App.2d 75, 221 P.3d 11 (2010); and *Orr v. Heiman*, 270 Kan. 109, 114-15, 12 P.3d 387 (2000) (filing with school superintendent complied with clerk requirement); *Smith v. Kennedy*, 26 Kan.App.2d 351, 361, 985 P.2d 715, rev. denied 268 Kan. 848 (1999) (filing with CEO of entity complied with clerk requirement).

"**Substantial compliance**" - The prior version of the municipality notice provision of this statute did not contain language regarding substantial compliance. It was added in a later version. *Ayalla v. Unified Gov't of Wyandotte County*, 349 P.3d 491 (Kan. App. 2015) discusses the meaning of this phrase:

> When considering whether a notice substantially complies with the requirements found in K.S.A. 2014 Supp. 12-105b(d), the Kansas Supreme Court has held that "substantial compliance means 'compliance in respect to the essential matters necessary to assure every reasonable objective of the statute.' 297 Kan. at 775 (quoting *Dodge City Implement, Inc. v. Board of Barber County Comm'rs*, 288 Kan. 619, 639, 205 P.3d 1265 [2009]). Further, "the question of compliance is not based upon a 'mechanical counting' of information addressing each enumerated category in the statute. Instead, notice is sufficient if it gives the municipality what it needs for a 'full investigation and understanding of the merits of the claims advanced.' [Citations omitted.] This is achieved when the notice advises the municipality of the time and place of the injury, affords the municipality an opportunity to ascertain the character and extent of the injury sustained, and allows for the early investigation and resolution of claim disputes. [Citation omitted.]" *Sleeth v. Sedan City Hospital* (Sleeth II), 298 Kan. 853, 865, 317 P.3d 782 (2014).

"**Until after . . . 120 days**" - We hold that the 120-day review period requirement of K.S.A. 2012 Supp. 12-105b(d) establishes a statutory condition precedent that must be met before a court has subject matter jurisdiction over a claim against a municipality under the Kansas Tort Claims Act. Its time constraint may be shortened only if a municipality acts to deny the claim in whole or in part before a petition is filed in the district court. The 120-day review period cannot be waived to give a court subject matter jurisdiction over a prematurely filed lawsuit. *Sleeth v. Sedan City Hosp*., 298 Kan. 853, 871, 317 P.3d 782 (2014).

"**Except . . . 90 days**" - Assuming Isaiah's notice of claim was filed on March 29, 2007, the claim was deemed denied 120 days later on July 27, 2007, not the 121st day on July 28, 2007. Because Isaiah's claim was deemed denied on July 27, 2007, the statute of limitations expired 90 days later on October 25, 2007, pursuant to K .S.A.2010 Supp. 12-105b(d). Thus, the district court correctly determined that Isaiah's petition filed 4 days later on October 29, 2007, was barred by the applicable 2-year statute of limitations. *Isaiah v. Unified Gov't of Wyandotte County/Kansas City*, 249 P.3d 912 (Kan. App. 2011)

VI. What Is Not Covered by the Kansas Tort Claims Act.

In addition to studying the effect of the Kansas Tort Claims Act on a particular cause of action, it may also be helpful to remember what is **not** covered by the Act. Governmental actors are often sued, almost always in federal court, for violations of federal laws. The Kansas Tort Claims Act will not apply to federal causes of action. *Reidenbach v. USD No. 347*, 878 F.Supp. 178 (D. Kan. 1995) ("The court is at a loss to understand this argument.") In *Reidenbach*, a school bus driver brought a § 1983 action against her employer, the school district, alleging that her First Amendment rights were violated when the district terminated her employment after she complained to her supervisor about the a matter of public concern, the safety of students on school buses. *See also Sage v. Williams*, 933 P.2d 775, 23 Kan.App.2d 624 (Kan.App. 1997)

VII. Choice of Law

Babbs v. Block, Case No. 15-00194-CV-W-HFS (W.D. Mo. Mar. 10, 2016) (dismissing plaintiff's complaint) ("The dispositive issue for me is comity, that is, whether Kansas governmental immunity law should be applied when the alleged injury occurred in Missouri.") In *Babbs*, a Kansas police officer entered Missouri bar with his weapon, consumed several alcoholic beverages, flashed his weapon, was asked to leave, was escorted out of the bar by plaintiff (who was a security guard) and others, and in the process, his weapon went off, striking plaintiff in the torso. The Missouri federal court used **comity** to **apply** Kansas law.

VIII. Notable Recent Decisions

Below are a few notable recent decisions with tragic facts, and which test the bounds of governmental liability and immunity:

Patterson v. Cowley County, 388 P.3d 923 (Kan. App. 2017) – SUV with two intoxicated passengers drove into Arkansas River after travelling down an road within a recreation area; an action was brought under the Kansas Tort Claims Act. The Court of Appeals discussed various **immunity exceptions** to the Act, and allowed the case to proceed on the grounds that the recreational use immunity exception did not apply to the County.

Cullison v. City of Salina, 371 P.3d 374 (Kan. App. 2016) – 12-year old slipped and fell and was electrocuted on exposed electrical junction box, causing her death. The Court of Appeals also discussed the **recreational use exception**, allowing the case to proceed.

Keiswetter v. Kansas, 304 Kan. 362, 373 P.3d 803 (2016) – Inmate escaped while on a work detail, hid during the search, entered a woman's house at night to attempt to steal her car keys, and encountered the woman, kicking her, causing her to fall and hit her head, and as a result, she passed away. The Supreme Court of Kansas held that the State was entitled to summary judgment because it was immune from liability under the KCTA's **police protection exception**.

One final practice point – as suits against the government often involve both violations of federal laws as well as state torts, remember that federal courts may accept ancillary jurisdiction over the state law claims, and there will be federal decisions interpreting the Kansas Tort Claims Act.