The Immunity Provisions in the Kansas Tort Claims Act: The First Twenty-Five Years

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I. INTRODUCTION

Twenty-five years ago the Kansas legislature enacted the Kansas Tort Claims Act (KTCA).¹ Prior to the KTCA, Kansas recognized the common law doctrine of sovereign immunity that rendered the state and its subdivisions immune from any liability for harms caused by tortious conduct of its employees unless it first consented to being sued.² But as state and local governments grew in size and range of activities, the number of citizens injured by tortious acts of government also grew. Moreover, with an increase in the number of injuries caused by an activity of government further and further removed from core governmental functions, the perceived unfairness of denying a remedy to injured citizens also grew.³

Courts responded by recognizing an array of exceptions to immunity. First, courts began to distinguish between governmental and proprietary functions of government. While governmental functions continued to enjoy immunity,⁴ courts imposed liability on government for harms caused in the performance of proprietary functions.⁵ Unfortunately, courts had difficulty distinguishing between governmental and proprietary functions. Courts defined as governmental those functions

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that were mandatory, or which involved duties owed to the public at large, or which were the most fundamental legislative, judicial and executive activities of government. By contrast, courts defined as proprietary those functions that were permissive, which involved benefits to a class of citizens rather than to the public at large, and which were often handled by the private sector.

Second, courts created two exceptions to the immunity for governmental functions: liability for harms resulting from government created or maintained nuisances, and liability for highway and street defects. The nuisance cases tended to arise in situations where government owned or controlled land or other property that posed an ongoing interference with adjoining or nearby inhabitants, and the frequency, continuity or duration of the offending condition was a major factor used to distinguish nuisance from those ordinary acts of negligence in the performance of a governmental function that remained immune. Although courts characterized the construction and maintenance of a system of highways, streets and sidewalks as a governmental function, they have from an early date imposed on

6. E.g., Grover, 198 Kan. at 310, 424 P.2d at 259.
8. E.g., Krantz, 165 Kan. at 454, 196 P.2d at 231.
municipal government a duty to provide reasonably safe streets and sidewalks.\textsuperscript{15} Subsequently, the legislature imposed by statute a similar duty on the state,\textsuperscript{16} on the Kansas Turnpike Authority,\textsuperscript{17} and on counties and townships.\textsuperscript{18}

Third, government was always free to waive its immunity and subject itself to liability for certain claims. For example, a common waiver of immunity involved consent to tort liabilities covered by insurance.\textsuperscript{19} A major part of the rationale for immunity was the desire to protect the public treasury from claims based on an individual employee’s misconduct.\textsuperscript{20} If government had already paid premiums for insurance to cover a particular loss, the threat to the public treasury was limited and indirect. Fourth, when all else failed, the legislature had a private bill procedure that awarded compensation to injured citizens in a few select cases.\textsuperscript{21}

\textsuperscript{15} Liability for street defects can be traced to the earliest years of the Kansas Supreme Court. \textit{E.g.}, Jansen \textit{v.} City of Atchison, 16 Kan. 358 (1876); City of Topeka \textit{v.} Tuttle, 5 Kan. 186 (1870). Over the years courts have applied liability for street defects to the surface of streets, to traffic signs, to sidewalks, and to other conditions that make use of streets and sidewalks dangerous. \textit{See, e.g.}, Grantham, 196 Kan. 393, 411 P.2d 634 (knocked down or bent over one way street and stop signs); Snyder \textit{v.} City of Concordia, 182 Kan. 268, 320 P.2d 820 (1958) (water meter hole near edge of sidewalk); Dunn \textit{v.} City of Emporia, 181 Kan. 334, 311 P.2d 296 (1957) (same); McCollister \textit{v.} City of Wichita, 180 Kan. 401, 304 P.2d 543 (1956) (large pothole); Loftin \textit{v.} City of Kansas City, 164 Kan. 412, 190 P.2d 378 (1948) (iron water shutoff protruding above surface of unpaved street); Billings \textit{v.} City of Wichita, 144 Kan. 742, 62 P.2d 869 (1936) (depression in sidewalk surface); Turner \textit{v.} City of Wichita, 139 Kan. 775, 33 P.2d 335 (1934) (decayed tree limb that fell on and killed pedestrian on sidewalk); Williams \textit{v.} Kan. State Highway Comm’n, 134 Kan. 810, 8 P.2d 946 (1932) (holes in road surface).


\textsuperscript{18} \textit{Id.} \S 68-301 (repealed 1979). \textit{See also} Arnold \textit{v.} Bd. of County Comm’rs, 131 Kan. 343, 291 P. 762 (1930) (county); Cunningham \textit{v.} Township, 69 Kan. 373, 76 P. 907 (1904) (township).

\textsuperscript{19} \textit{See, e.g.,} Kan. Stat. Ann. \S 74-4707 (1992) (requiring all state agencies to purchase motor vehicle liability insurance and waiving their immunity up to the amount of such insurance); \textit{id.} \S 12-2601 (repealed 1979) (authorizing municipalities to purchase motor vehicle liability insurance and waiving their immunity up to the amount of such insurance). In the absence of a statutory waiver, courts held that the mere purchase of insurance by a governmental entity did not constitute a waiver of immunity. \textit{See, e.g.,} Smith \textit{v.} Bd. of Educ., 204 Kan. 580, 585, 464 P.2d 571, 575 (1970) (holding that the purchase of owners, landlords, and tenants policy of insurance by a school did not constitute waiver of governmental immunity); Heman Constr. Co. \textit{v.} Capper, 105 Kan. 291, 293, 182 P. 386, 387 (1919) (holding that a statute conferring power upon a state board to defend all proceedings necessary to protect the interests of the state is not a waiver of the state’s immunity). For interpretation of the statutory insurance waiver, see Shriver \textit{v.} Athletic Council of Kan. State Univ., 222 Kan. 216, 564 P.2d 451 (1977), and Mott \textit{v.} Mitchell, 209 Kan. 476, 496 P.2d 1297 (1972).

\textsuperscript{20} \textit{See, e.g.,} Brown \textit{v.} Wichita State Univ., 219 Kan. 2, 31, 547 P.2d 1015, 1037 (1976) ("Fears have frequently been expressed that the removal of governmental immunity would result in dissipation of public funds ... ").

These exceptions to immunity did not solve all problems. Courts continued to have difficulty determining whether certain activities were governmental or proprietary functions, and an injured citizen would still have no remedy for damages caused by routine everyday acts of negligence, such as failure to have lifeguards on duty at a public swimming pool if the operation of the pool is characterized as a governmental function. In 1969 the Kansas Supreme Court signaled in *Carroll v. Kittle* that henceforth government would be subject to liability for all harms other than those caused by the most fundamental legislative, judicial or discretionary executive activities. In response, the legislature enacted a statute restoring immunity to the state from damages resulting from implied contract, negligence or other torts unless specifically authorized by statute. The legislature made this restoration of immunity inapplicable to municipal governments, and in 1978 the Kansas Supreme Court in *Gorrell v. City of Parsons* announced a broad rule of municipal tort liability with only narrowly tailored immunities for legislative and judicial functions and policy-oriented executive decisions. Finally, in 1979 the legislature responded with the Kansas Tort Claims Act (KTCA).

The KTCA sought to transform the approach to governmental liability by waiving the sovereign immunity of the state and imposing on governmental entities within the state liability for the torts of their employees in the same manner as a private employer. In essence, the KTCA imputes to governmental entities liability for the torts of their employees under *respondeat superior* and also allows the state to be held liable for its own negligence in the manner of their hiring and

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22. *See, e.g.,* Krantz v. City of Hutchinson, 165 Kan. 449, 455, 196 P.2d 227, 232 (1948) (stating that decisions characterizing functions as governmental or proprietary are "replete with conflict and inconsistencies").


28. *Id.* at 650, 576 P.2d at 620.


30. *Id.* § 75-6103(a).

31. The language in section 75-6103(a) parallels the basic rule of *respondeat superior*. See RESTATEMENT (SECOND) OF AGENCY §§ 219, 243 (1958).
supervision of employees.  Moreover, the KTCA purports to make liability the rule and immunity the exception by broadly defining governmental entity to include the state and all its agencies and subdivisions and by broadly defining "employee" to include officers and employees, members of boards, commissions, committees, departments, divisions and the like, whether elected or appointed, "and persons acting on behalf or in service of a governmental entity in any official capacity, whether with or without compensation."  

The waiver of sovereign immunity is not absolute, however. The liability provisions of the KTCA impose some limitations on the scope of liability. The state is not liable for punitive damages or for prejudgment interest, and the state’s liability for compensatory damages is capped at $500,000 per occurrence or for the amount of the governmental entity’s insurance coverage, if greater than $500,000. The employee is also not liable for punitive damages or prejudgment interest except in cases involving the employee’s fraud or malice.

The most serious threat to a broadly based system of governmental liability for damages caused by tortious conduct, however, is the KTCA’s express retention of a series of specifically enumerated exceptions set forth in section 75-6104. Initial drafts of the KTCA preserved immunity for only a limited number of fundamental

36. Id. § 75-6105(a). When the total claims arising out of a single occurrence exceed the $500,000 cap, the parties may apply to the district court to allocate the $500,000 in proportion to each party’s loss. The Kansas legislature has not changed the amount of the cap since the original enactment of the KTCA in 1979. If the cap had been indexed for inflation, it would have by now increased approximately 223% to $1,385,000. For an online inflation calculation service, see http://inflationdata.com/inflation. The cap is currently worth approximately $197,500 in 1979 dollars. See http://www.jsc.nasa.gov/bu2/inflateCPI.html.
37. Kan. Stat. Ann. § 75-6111(a). The KTCA authorizes municipalities to enter into interlocal agreements to purchase insurance or make pooling arrangements to cover expenditures related to defending or settling claims. Id. § 75-6111(b).
38. Id. § 75-6105(c).
governmental functions. Yet before the legislation was final, the Kansas League of Municipalities successfully convinced legislators to add a number of additional immunities.\textsuperscript{39} In the twenty-five years since enactment, the KTCA has been repeatedly amended to add new immunities, and today the KTCA contains twenty-five specific immunities.\textsuperscript{40} Yet the catch-all provision at the end of section 75-6104 states that "[t]he enumeration of exceptions to liability in this section shall not be construed to be exclusive nor as legislative intent to waive immunity from liability in the performance or failure to perform any other act or function of a discretionary nature."\textsuperscript{41}

The interpretation of these many and diverse immunities will essentially determine whether the KTCA will remain the legal vehicle for holding government responsible for the harms that its activities inflict on citizens. In this regard the record of the Kansas courts has been uneven, interpreting some immunities narrowly while reading extraordinary breadth into others. The performance of the legislature is perhaps more uneven, mixing into section 75-6104 matters that are traditional immunities with other provisions that simply restate the negligence standard for liability, or impose a rule of limited liability, or create completely new immunities not known prior to the KTCA.

In this Article, Part II will discuss the various interpretative devices that arguably should govern the interpretation of these immunities. Substantively, courts should interpret the immunities consistent with the intent of the KTCA to hold governmental entities liable for the tortious acts of their employees to the same extent as private employers, and the catch-all admonition at the end of section 75-6104 indicates that all the enumerated immunities might be limited to their discretionary applications. In addition, the courts have repeatedly held that under the KTCA liability is the rule and immunity the exception, that the burden of proving entitlement to immunity is carried by the government, and that the KTCA is not intended to recognize immunity where none existed previously. These interpretative devices are in many cases not consistent

\textsuperscript{39} For a description of additional immunities in 1979 before the KTCA became final, see Jackson v. Unified Sch. Dist. No. 259, 268 Kan. 319, 326–27, 995 P.2d 844, 849–50 (2000). Since then, the legislature has amended the KTCA to add the public cemetery and minimum maintenance road immunities in 1981, KAN. STAT. ANN. § 75-6104(g), (r) (Supp. 2003); the independent duty and community service work immunities in 1987, id. § 75-6104(e), (s); the vending machine immunity in 1991, id. § 6104(t); the geographic information systems immunity in 1995, id. § 75-6104(u); the juvenile justice program immunity in 1997, id. § 75-6104(v); and the federal enclave immunity and the two donated fire and medical emergency equipment immunities in 2003, id. § 75-6104(w)–(y).

\textsuperscript{40} KAN. STAT. ANN. § 75-6104(a)–(y).

\textsuperscript{41} Id. § 75-6104.
with one another, and do not necessarily apply in the same manner to each of the twenty-five enumerated immunities.

Part III will discuss nine immunities applicable to fundamental governmental functions, such as immunities for legislative and judicial functions as well as various functions primarily associated with the executive branch of government. Thus, collection of taxes, enforcement of laws, inspection of non-governmental property, police and fire protection, and emergency management activities are all considered primarily governmental as opposed to propriety or commercial in nature. In addition, this Part includes a discussion of two specific immunities for community service programs and juvenile offender programs that may be viewed as related to the broad police function of government. An analogy to private sector liability has limited applicability to governmental functions, while the discretionary function may provide the more effective limitation on the scope of the governmental function immunities.

Part IV will discuss three immunities relating to government’s construction and maintenance of the highway system. The traffic signing and minimum maintenance road immunities are quite limited in scope and in large measure preserve the substantial liability for highway defects developed in the pre-KTCA era. In addition, an immunity of disputed scope concerns the obligation of government to respond to snow and ice conditions and other weather-related conditions. These immunities provide a unique challenge because although the maintenance of the highway system is viewed as a governmental function, the design, construction and maintenance of the system lends itself very well to the application of traditional negligence standards and thus a comparison to the private sector.

Part V will discuss five diverse immunities relating to government’s ownership of or control over land. The plan or design of public buildings and other property is a state of the art provision that essentially prevents any strict liability by adopting an essentially negligence-based standard. By contrast, the Kansas courts have interpreted the recreational use immunity in an overly broad manner without regard to any of the interpretative devices designed to limit the scope of immunities. The recreational use immunity is well suited to comparison with the standard of care owed by private landowners to persons entering upon their land, yet the courts have never seriously considered this comparison. The unimproved public land immunity, the public cemetery immunity, and the federal enclave immunity each address rather narrow problems, and the Kansas courts have not yet had any occasion to interpret them.
Part VI is an odd collection of very narrow immunities that appear to give the government immunity from the consequences of its involvement in certain personal property commercial ventures. One immunizes government from harms caused by vending machines operated by blind persons on highway rest areas. Another immunizes government from any claims arising out of the use of global positioning systems that use information provided by any governmental entity in Kansas. The final two immunities protect governmental entities from claims arising from the use by governmental entities of certain donated fire protection and medical emergency equipment and from claims based on the donation of such equipment by governmental entities.

None of these problems has apparently arisen in any Kansas cases to date, and each of them would seem to provide immunity for governmental participation in commercial activities for which comparable actors in the private sector could be held liable.

II. INTERPRETATION OF THE ENUMERATED IMMUNITIES: SUBSTANTIVE AND PROCEDURAL DOCTRINES

A. Governmental Liability Equated with the Liability of a Private Employer

The legislative intent underlying the KTCA is to impose on government the same liability for the negligence of its employees as on private employers. The question then becomes the extent to which this legislative intent should influence the interpretation of the enumerated immunities in the KTCA. In addition, two of those enumerated immunities are best viewed as defining or reaffirming limits on the doctrine of respondeat superior itself rather than recognizing an immunity based on particular acts or functions of government.

1. The Private Employer Analogy as a Guide to Interpreting the Enumerated Immunities

The cardinal rule of statutory construction is that the intent of the legislature governs.42 The KTCA declares its primary purpose to impose on every governmental entity liability for “damages caused by the

42. See, e.g., Nichols v. Unified Sch. Dist. No. 400, 246 Kan. 93, 97, 785 P.2d 986, 989 (1990) (stating that construction of the liability exception requires a focus on legislative intent and purpose); Carpenter v. Johnson, 231 Kan. 783, 786, 649 P.2d 400, 403 (1982) (stating that legislative intent governs when it can be ascertained from the statutes).
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." In essence, this provision reflects an intent to subject governmental entities to the doctrine of *respondeat superior* and thus impute to the governmental entity the negligence of a governmental employee. Thus, governmental entities are liable only when the negligence of their employees occurred "while acting in the scope of their employment." Courts should interpret and apply "scope of employment" in the same manner as they interpret and apply it to private employers.

Kansas courts should probably view the scope of a private employer's liability as a significant guide to interpreting the scope of the enumerated specific immunities. However, a note of caution is appropriate. Not all of the enumerated immunities lend themselves equally to a comparison with private employers or with the private sector generally. As one court noted in its interpretation of the legislative function, reference to the private sector is of little help because there is really no private sector analogy to the role fulfilled by government in performing legislative and judicial functions.

Nevertheless, the limited assistance of a private sector analogy does not eliminate it entirely from consideration. One of the serious problems prior to the KTCA was the distinction between the functions of government characterized as "governmental" and those characterized as "proprietary." Governmental functions enjoyed broad immunity, while proprietary functions were subject to liability in the same manner as their private sector counterparts. This distinction was too broad-based and tended to dictate the result in the cases without regard to the specific nature of the activity giving rise to injury. For example, no sound reason supported immunity from liability for damages caused by the

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43. KAN. STAT. ANN. § 75-6103(a) (Supp. 2003).
44. Restatement (Second) of Agency §§ 219, 243 (1958).
45. KAN. STAT. ANN. § 75-6103(a).
47. See supra notes 4–11 and accompanying text.
48. See Gorrell v. City of Parsons, 223 Kan. 645, 649–50, 576 P.2d 616, 619–20 (1978), in which a city crew improperly cut down the landowners' trees while city management ignored the landowners' calls for help. The court noted that under the governmental-proprietary distinction, the landowners would have a remedy if the crew came from the city's light plant or the city's gas department, but not if it came from the city's street department, the city's sewer department, the city's park department, or the city zoo. As the court noted, regardless of which department employed the work crew, "[p]roperty is as completely destroyed, people are as seriously injured, losses are as great." Id. at 650, 576 P.2d at 620.
negligent operation of a motor vehicle simply because the driver was
tangentially involved in a governmental function.\textsuperscript{49}

The private employer and private sector analogies are particularly
helpful in the interpretation of those immunities governing liability for
injuries caused by activities or conditions on government owned or
controlled land.\textsuperscript{50} Governmental entities collectively own or control an
enormous amount of diverse land within the state, and the discretionary
function would do little to limit the liability of government for the vast
array of injuries that might occur on its land. In the absence of effective
doctrines of limitation, however, these immunities could become the
rule, not the exception, with respect to injuries occurring on government
owned or controlled land. For example, courts have given the
recreational use immunity the broadest imaginable interpretation and
protection of governmental landowners far greater than premises law
protects private landowners.\textsuperscript{51} The private sector analogy would be a
rational and effective interpretive device for achieving reasonable
balance between the competing interests of government and injured
citizens in these cases.

By contrast, the private sector analogy is probably inappropriate for
interpreting a series of immunities concerning certain personal property
transactions.\textsuperscript{52} Although private parties would probably be liable if
involved in comparable transactions, the likely intent of the legislature is
to immunize government from any liability. Any interpretive device
should remain subordinate to the cardinal rule that the intent of the
legislature governs.

2. Immunity for Injury Caused by Governmental Co-worker

The negligence of a governmental employee could foreseeably injure
a co-worker. The KTCA provides an exception to liability for damages
resulting from

\begin{footnotes}
\item[49] The existence of both a motor vehicle code and well-established common law standards for
reasonable and proper driving make an analogy to the private sector appropriate. However, courts
have characterized driving as "ministerial" as opposed to "discretionary" in order to allow liability.
See, e.g., United States v. Gaubert, 499 U.S. 315, 325 n.7 (1991) (stating that although driving
requires the constant exercise of discretion, that discretion is not grounded in regulatory policy and
therefore not within the scope of employment).
\item[50] See infra Part V (discussing specific immunities relating to the possession or control of
land).
\item[51] See infra Part V.B (discussing recreational use immunity under the KTCA).
\item[52] See infra Part VI (discussing specific immunities relating to chattels and intellectual
property).
\end{footnotes}
any claim by an employee of a governmental entity arising from the
tortious conduct of another employee of the same governmental entity,
if such claim is (1) compensable pursuant to the Kansas workers
compensation act or (2) not compensable pursuant to the Kansas
workers compensation act because the injured employee was a
firemen’s relief association member who was exempt from such act
pursuant to [Kansas Statutes Annotated section] 44-505d, and
amendments thereto, at the time the claim arose.\(^{53}\)

The first part of this provision limits an employee of a governmental
entity to the statutory benefits awarded pursuant to the workers
compensation act when the injury is caused by a co-worker employed by
the same governmental entity. In Kansas, the exclusive remedy
 provision in the workers compensation act bars a common law action by
an injured worker against a co-worker or against their common employer
on a *respondeat superior* rationale.\(^{54}\) The governmental co-worker
immunity affords the same protection to the governmental employer as is
afforded the private employer. For example, in *Beck v. Kansas
University Psychiatry Foundation*\(^{55}\) defendants were members of the
Kansas Adult Authority (KAA), and thus employees of the State of
Kansas. The KAA released a prisoner on parole from the state
penitentiary despite his history of mental illness and various evaluations
that concluded he constituted a danger to others. Approximately one
year later he went to the University of Kansas Medical Center (UKMC)
and murdered Dr. Beck.\(^{56}\)

Dr. Beck was normally employed by the federal Veteran’s
Administration, but at the time was on loan to UKMC as a “special
employee.”\(^{57}\) A special employee is one whose general employer makes
him available to the special employer to perform the special employer’s
work. When the special employee works under the supervision and
control of the special employer for sufficient time and under certain
circumstances, the “special employer” becomes an employer, not an
outside third party, for purposes of workmen’s compensation coverage.\(^{58}\)
Therefore, Dr. Beck was an employee of UKMC and thus an employee

\(^{53}\) KAN. STAT. ANN. § 75-6104(g) (Supp. 2003).

\(^{54}\) Id. § 44-504(a) (2000).


\(^{56}\) Id. at 1567–69.

\(^{57}\) Id. at 1575–76.

(discussing the three-prong test for determining the existence of a “special employer”); *Bendure v.
Great Lakes Pipe Line Co.,* 199 Kan. 696, 703–04, 433 P.2d 558, 565 (1967) (stating that the degree
of control is an important factor).
of the State of Kansas at the time of his death. Accordingly, Dr. Beck and the defendants were all employees of the State of Kansas, Dr. Beck’s heirs qualified for death benefits under the Kansas Workman’s Compensation Act,\(^{59}\) and the co-worker immunity applied to prevent a tort claim under the KTCA.

Technically, the situation in Beck simply applies the co-worker immunity to an alleged negligence claim involving workers all employed by the State of Kansas and thus puts the State of Kansas on an equal footing with private employers. However, in practical terms the immunity afforded the State of Kansas is substantially broader than the immunity from common law liability available to a private employer. By treating employees of any state agency as having the State of Kansas as a common employer, the immunity applies to workers from entirely different employments who would rarely, if ever, be expected to be working together for the same employer. Thus, the immunity would apply if a state highway patrol officer collides with a university professor driving to a lecture at a remote campus location, or if a panel of court of appeals judges driving to a distant county to hear oral arguments goes off the road and crashes into an agriculture department employee inspecting cattle gates to a livestock holding pen.\(^{60}\) As a practical matter, in the private sector such diverse workers would probably not all be employed by the same corporate entity, but rather by a series of subsidiary corporations.

The second part of the provision was added by amendment during the litigation culminating in Jackson v. City of Kansas City.\(^{61}\) In that case some firefighters were injured when two fire department vehicles collided while responding to a fire alarm. In Kansas a firemen’s relief association may exempt itself from workers compensation and provide its own compensation plan.\(^{62}\) In such cases, the injured firefighter would have no greater right to maintain an action against his employer than he would have if he had remained under the protection of the workers compensation act. However, the amendment extending the governmental co-worker immunity to members of a firemen’s relief association with its own compensation system was enacted after the accrual of the claim in Jackson. The court declined to apply it retroactively to bar the

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\(^{60}\) Of course, if a high school teacher collides with the highway patrol officer, or a city parks department employee collides with the department of agriculture employee in the above examples, the immunity would not apply because now there are different governmental employers.


firefighters' claims against the city.\textsuperscript{63} In the future, the governmental co-worker immunity would bar such claims, and the firefighters would be limited to benefits from their relief association's compensation plan.

3. Immunity for Claims Barred or Limited by Some Other Law or Immunity

A variety of common law and statutory rules outside the KTCA may bar certain claims, provide a defense, or render certain actors immune from certain damage claims. The KTCA provides an exception to liability for damages resulting from

any claim which is limited or barred by any other law or which is for injuries or property damage against an officer, employee or agent where the individual is immune from suit or damages.\textsuperscript{64}

Under \textit{respondeat superior} courts impute the fault of the employee to the employer, but also make available to the employer any defenses available to the employee.\textsuperscript{65} The "other law or immunity" provision should be viewed as simply ensuring that a governmental entity has available to it the same defenses and limitations on liability that would be available to the private employer in comparable circumstances. The "other law or immunity" provision covers three general situations.

First, if some other law bars the claim against the employee, there is no liability of the employee that could be imputed to the employer. For example, in cases where a driver under the influence of alcohol causes death or injury to another, Kansas does not recognize a claim against a commercial vendor who supplied the alcohol to the driver.\textsuperscript{66} If an employee of the vendor actually supplied the alcohol, there is no claim against the employee and thus no liability that could be imputed to the vendor-employer.

Second, any limitation on the liability of an employee would also limit the claim against the employer. Thus, the $250,000 limit on noneconomic loss in Kansas personal injury actions\textsuperscript{67} would cap the amount of damages involving pain, suffering and emotional distress, and

\begin{itemize}
\item \textsuperscript{63} 235 Kan. at 282–83, 680 P.2d at 883–84.
\item \textsuperscript{64} \textsc{Kan. Stat. Ann.} § 75-6104(1) (Supp. 2003).
\item \textsuperscript{65} \textsc{Restatement (Second) of Agency} § 219 cmt. c (1958).
\item \textsuperscript{67} \textsc{Kan. Stat. Ann.} § 60-19a01 (2000). \textit{See also id.} § 60-1903(a) (Supp. 2003) (setting a $250,000 limit on noneconomic losses in wrongful death actions).
\end{itemize}
the plaintiff's own contributory negligence could either bar or limit a claim against a defendant-employee whose negligence caused plaintiff's injury.\footnote{68} The limits on damages imposed by the cap on noneconomic loss and by the comparative negligence statute would limit the claim against the employer to the extent the employee is liable.

Third, any immunity outside the KTCA that attaches to the conduct of a governmental employee also limits any claim against the employee's governmental employer. Probably the most common application of this provision would be the immunity of police officers, prosecutors and others who receive qualified immunity in § 1983\footnote{69} civil rights actions. In addition, this provision would also encompass cases in which a negligent governmental employee enjoyed common law privileges to specific torts. For example, a police officer who tickets a driver for some motor vehicle code offense may be committing defamation by publishing an alleged criminal violation on the ticket, but the police officer would enjoy a qualified immunity to write the ticket.\footnote{70} Similarly, a qualified privilege would protect the governmental employee who writes an allegedly defamatory annual evaluation of a co-worker.\footnote{71}

Before another immunity will also prevent an action under the KTCA, the governmental entity must satisfy all prerequisites for the other immunity. For example, the immunity in the Kansas Code for Care of Children barring claims for damages caused by the reporting of suspected child abuse\footnote{72} would also prevent an action brought under the KTCA, but only if the report of suspected abuse satisfied the "without malice" limitation in the statutory immunity.\footnote{73}

All three situations simply ensure that a governmental employer is not held liable for any damages that could not legally be assessed against the employee, if the claim were brought against the employee rather than against the governmental entity. The traditional interpretation of \textit{respondeat superior} should dictate these results even without the benefit of the "other law or immunity" provision, and thus the provision should be viewed as reflecting legislative caution, not legislative intent to impose any limitations beyond those imposed by the doctrine of \textit{respondeat superior}.

\footnote{68} See \textit{id.} § 60-258a(a) (barring any claim when the plaintiff's fault is not less than the defendants' cumulative fault and reducing the damages when plaintiff's fault is less than the defendants' cumulative fault).
\footnote{72} KAN. STAT. ANN. § 38-1526 (1993).
B. The Meaning of Discretionary Function

The meaning of the phrase "discretionary function" is important in the KTCA in two respects. First, the discretionary function is arguably the most significant enumerated immunity designed to limit the KTCA's general rule in favor of governmental liability. It provides immunity from liability for damages resulting from any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee, whether or not the discretion is abused and regardless of the level of discretion involved.74

Second, the entire list of enumerated immunities in section 75-6104 is purportedly qualified by the catch-all provision that "[t]he enumeration of exceptions to liability in this section shall not be construed to be exclusive nor as legislative intent to waive immunity from liability in the performance or failure to perform any other act or function of a discretionary nature."75 This provision would seem to imply that courts should interpret the enumerated immunities as limited to their discretionary applications even when they are set forth in absolute and unqualified language.

The discretionary function immunity in the KTCA was patterned after the discretionary function immunity in the Federal Tort Claims Act (FTCA).76 Although the United States Supreme Court has defined discretionary primarily to mean policy-oriented decisions, two rather different models have subtly emerged in both the federal and Kansas cases: a strict discretionary function limited to policy-oriented decisions and a broad discretionary function encompassing all decisions other than those characterized as ministerial. Because the concept of discretionary function will have an effect on nearly all the enumerated immunities in Kansas, some effort to analyze these two models of discretionary function is important.

Finally, the discretionary function in Kansas has become further confused by the 1987 amendment that added an independent duty provision to the list of enumerated immunities.77 The legislature added this provision in apparent response to a controversial Kansas Supreme

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75. Id. § 75-6104 (emphasis added).
Court decision involving, among other issues, the discretionary function.\textsuperscript{78} Thus, an important issue is the analytical relationship between the independent duty provision and the discretionary function.

1. The Federal Standard

Immunity for a discretionary function in the KTCA was adopted from the comparable provision in the FTCA, which provides immunity for

\texttt{[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.}\textsuperscript{79}

The interpretation of “discretionary” under the FTCA has focused on the non-justiciable nature of policy-oriented decisions. In the \textit{Varig Airlines}--\textit{Berkovitz}--\textit{Gaubert} line of cases, the U.S. Supreme Court has developed a two-step test to determine whether an action is within the discretionary function. First, does the action involve “an element of judgment or choice”?\textsuperscript{83} Second, if so, is that judgment or choice “of the kind that the discretionary function exception was designed to shield,” i.e., a judgment or choice designed “to prevent judicial ‘second-guessing’ of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.”\textsuperscript{84}

The definition of discretionary causes little difficulty at the executive or planning level of decision making. Thus, a decision to establish a specific program, such as a program for shipping fertilizer for food production in occupied countries after World War II,\textsuperscript{85} authorizing private companies to manufacture a vaccine\textsuperscript{86} or creating a spot-check system of testing and inspecting commercial airplanes during and after manufacture\textsuperscript{87} is a discretionary function. Similarly, the promulgation of

\begin{itemize}
\item \textsuperscript{78} Fudge v. City of Kansas City, 239 Kan. 369, 720 P.2d 411 (1986).
\item \textsuperscript{79} 28 U.S.C. § 2680(a) (2000).
\item \textsuperscript{80} United States v. Varig Airlines, 467 U.S. 797 (1984).
\item \textsuperscript{81} Berkovitz v. United States, 486 U.S. 531 (1988).
\item \textsuperscript{82} United States v. Gaubert, 499 U.S. 315 (1991).
\item \textsuperscript{83} \textit{Id.} at 322 (quoting \textit{Berkovitz}, 486 U.S. at 536).
\item \textsuperscript{84} \textit{Id.} at 322–23 (quoting \textit{Varig Airlines}, 467 U.S. at 813–14).
\item \textsuperscript{85} Dalehite v. United States, 346 U.S. 15 (1953).
\item \textsuperscript{86} \textit{Berkovitz}, 486 U.S. 531.
\item \textsuperscript{87} \textit{Varig Airlines}, 467 U.S. 797.
\end{itemize}
regulations to carry out a program is a discretionary function. In both situations the element of judgment or choice is grounded in social, economic or political policy considerations. Moreover, these decisions tend to be not justiciable in the sense that no well-established negligence standards exist to enable effective judicial review as opposed to mere "second-guessing."

Some confusion about the scope of the discretionary function arose out of two early decisions interpreting the FTCA. In the seminal discretionary function case, Dalehite v. United States, the Court focused on the planning level decisions creating a post-World War II food supply program and promulgating the regulations needed to carry out the program. Dalehite, with its focus on the application of the discretionary function to planning level decisions, was followed by Indian Towing Co. v. United States. In that case the Court held that the United States could be held liable for the loss of a ship and its cargo when the light in a lighthouse became extinguished because of the failure of Coast Guard employees to perform necessary maintenance.

However, Dalehite and Indian Towing did not create a planning level-operational level distinction. The nature of the conduct, rather than the status of the actor, determines whether an action is discretionary. Thus, the discretionary function may encompass operational level decisions as well as planning level decisions. In Indian Towing, the government did not argue for immunity under the discretionary function, but only for immunity because maintenance of lighthouses is a governmental function with no private sector equivalent. The Supreme Court rejected this suggested governmental-proprietary distinction in Indian Towing. Subsequently in United States v. Gaubert, the Court explained that the reference to a planning level-operational level distinction in Dalehite was intended to include planning level decisions in the discretionary function, but not to exclude all operational level decisions from the discretionary function.

Decisions at the operational level qualify as discretionary when they involve an element of choice or judgment concerning social, economic or political policy considerations. Just as the planning level decision to create a spot-check testing and inspection system for airplane manufacture is a discretionary function, so also is the operational level

89. 346 U.S. 15 (1953).
91. Varig Airlines, 467 U.S. at 813.
92. Indian Towing, 350 U.S. at 64.
93. Gaubert, 499 U.S. at 326.
decision of when to make spot checks on individual airplanes if the regulations or procedures leave the decision to the discretion of the individual governmental employee. If a statute, regulation or policy leaves the actor no meaningful choice in how to proceed, the action is characterized as ministerial and not within the protection of the discretionary function immunity.

This extension of the discretionary function to operational level activities appears to be primarily responsible for the emergence of a divide in the cases between what might be called a strict discretionary function and a broad discretionary function. As depicted in Figure 1, the strict discretionary function immunizes the tip of the pyramid and exposes the remainder to potential liability under the traditional negligence system. By contrast, as depicted in Figure 2, the broad discretionary function characterizes the base of the pyramid as ministerial and thus outside the discretionary function and brings the remainder under the protection of the discretionary function.

Both of these “either-or” models is overly simplistic. If limited to those truly policy-oriented non-justiciable decisions, the strict discretionary function would protect only cases that ought not be subject to negligence liability in any event. If immunity were not available, courts would probably dispose of those cases under a “no duty” rationale that would reflect the non-justiciable nature of the problem. If the broad discretionary function encompasses all decisions that are not ministerial, discretion becomes a substitute for “any thought process” and would encompass every case in which a government employee had any freedom of choice in how to accomplish a task. Tort claims acts have been

95. Gaubert, 499 U.S. at 324.
enacted at the federal and state levels to make government more, not less, responsive to the needs of the citizens it has injured.

Both of the "either-or" models appear to ignore an apparently substantial middle zone of decisions between those that are truly policy-oriented and those that are ministerial. The opinion in Gaubert seems to contain support for both models without any discussion of the middle zone of decisions. On the one hand, the Court implied support for the strict model by observing that some decision making is simply not sufficiently policy-oriented to qualify as discretionary. Thus, the Court did not consider the failure to perform routine maintenance in Indian Towing to be discretionary, 96 and it used as an example of non-discretionary decision-making the choices involved in routine driving of an automobile. 97 On the other hand, it implied support of the broad model by suggesting that non-ministerial decisions are discretionary. Thus, it stated that day-to-day operational decisions should be considered discretionary if they involved any choice or judgment concerning permissible courses of action, 98 and it indicated that any regulation giving a governmental employee any choice or judgment at the operational level should be presumed to make that choice or judgment policy-oriented and discretionary. 99

![Diagram of decision-making levels](image)

**FIGURE 3**

As depicted in Figure 3, a more realistic model would involve policy oriented decisions at the tip of the pyramid, ministerial mandates set forth in statutes, regulations and policies that permit no meaningful decision-making at the base of the pyramid, and a wide array of non-policy decisions and judgments in the middle of the pyramid. The issue would then become the identification of those factors that should operate to divide cases in the middle zone between discretionary and non-discretionary.

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96. *Id.* at 326.
97. *Id.* at 325 n.7.
98. *Id.* at 325.
99. *Id.* at 324–25.
2. The Kansas Standard

Kansas courts have emphasized that the KTCA was patterned after the FTCA, and the discretionary function immunity appears to have developed in Kansas along lines similar to the principles set forth in the Varig Airlines—Berkovitz—Gaubert line of cases. Thus, the Kansas cases make three main points about the nature of the discretionary function. First, the discretionary function primarily involves policy-oriented decisions and decisions of such a nature that the legislature intended them to be beyond judicial review. Second, the immunity does not depend upon the status of the individual exercising discretion and thus may apply to discretionary decisions made at the operational level as well as at the planning level. The legislature confirmed this interpretation when in 1987 it amended the discretionary function immunity to add the phrase “and regardless of the level of discretion involved.” Third, the discretionary function does not encompass conduct that is deemed “ministerial,” i.e., conduct that involves no discretion. These three themes emerge in cases involving the discretionary function immunity as well as in cases in which “discretionary” is used as a limitation on the scope of some other immunity.

At the same time, the Kansas cases also reflect the divide between the strict discretionary function limited to policy-oriented decisions and the broad discretionary function encompassing decisions that are not ministerial. Thus, some cases describe the discretionary function as primarily involving policy-oriented decisions that the legislature intended to put beyond judicial review, decisions that refer to “basic

100. See, e.g., Robertson v. City of Topeka, 231 Kan. 358, 360, 644 P.2d 458, 460–61 (1982) (noting the similarity between section 75-6104(d) of the KTCA and 28 U.S.C. § 2680(a)).


107. See supra cases cited note 101.
matters,” such as determining the appropriate number of personnel, the amount of equipment, and the most efficient manner of deploying personnel and equipment,108 or those decisions that lend themselves to unhelpful “second-guessing.”109 Examples of decisions reflecting a significant element of policy-orientation probably include those involving the conditions of release imposed on a prisoner by the parole board,110 or the appropriate facility in which to place a troubled youth,111 or various decisions by social workers affecting family relations.112

By contrast, other Kansas cases reflect an approach more consistent with the broad discretionary function that views as discretionary all acts that are not characterized as “ministerial.” These cases often rely on a more generic definition of discretion:

Discretion implies the exercise of discriminating judgment within the bounds of reason... It involves the choice of exercising of the will, of determination made between competing and sometimes conflicting considerations. Discretion imparts that a choice of action is determined, and action should be taken with reason and good conscience in the interest of protecting the rights of all parties and serving the ends of justice.113

In essence, an act is discretionary simply if the actor has some choice about the best way to deal with a situation without the benefit of a legal rule dictating a particular course of action. To these courts, discretionary refers to conduct that is not subject to a hard and fast rule,114 unhampered

108. See Jackson, 235 Kan. at 292, 680 P.2d at 890. While the court in Jackson made its reference to “basic matters” in reference to the police and fire protection immunity, it is clear in context that the court was applying to the police and fire protection immunity the catch-all discretionary function limitation at the end of the list of enumerated immunities in the KTCA. For further discussion, see infra notes 283–317 and accompanying text. See also Gragg v. Wichita State Univ., 261 Kan. 1037, 1059–61, 934 P.2d 121, 136–38 (1997) (discussing a failure to provide police protection).


114. See, e.g., id.
by a legal rule,\textsuperscript{115} or not governed by a fixed and readily ascertainable standard.\textsuperscript{116}

Conversely, a ministerial act is simply an act in which the actor has no choice in the manner in which to proceed. Thus courts variously define ministerial as a course of conduct or duty spelled out by statute,\textsuperscript{117} by an ordinance,\textsuperscript{118} by internal guidelines,\textsuperscript{119} by a common law standard,\textsuperscript{120} by a constitutional standard,\textsuperscript{121} or by a contractual obligation.\textsuperscript{122} Thus, obeying an ordinance that spells out the speed limit for fire trucks,\textsuperscript{123} or cleaning up vomit in a hallway leading toward business premises,\textsuperscript{124} or the performance of routine maintenance of warnings painted on the highway\textsuperscript{125} are tasks that involve little, if any, choice and no element of policy formation.

Kansas courts do not openly and knowingly choose one model of discretion over the other. Indeed, the pattern of decisions seems rather \textit{ad hoc}, and occasionally an individual case will recognize one model of discretion, but then resolve the issue in a manner consistent with the other. For example, \textit{Robertson v. City of Topeka}\textsuperscript{126} was the seminal case in which the court defined discretionary function as not simply a mere exercise of judgment, but rather a policy-oriented decision that the

\begin{thebibliography}{99}
\item[115] E.g., \textit{Hopkins}, 237 Kan. at 610, 702 P.2d at 318.
\item[118] E.g., Watson v. City of Kansas City, 80 F. Supp. 2d 1175, 1198-99 (D. Kan. 1999) (discussing building and fire ordinances).
\item[125] E.g., Huseby v. Bd. of County Comm'rs of Cowley County, 754 F. Supp. 844 (D. Kan. 1990) (involving a county's failure to maintain a warning sign).
\end{thebibliography}
legislature intended to put beyond judicial review. In that case the homeowner plaintiff called police to remove from his home an intoxicated guest who was threatening to burn down plaintiff’s home. Three police officers arrived, assessed the situation, and removed plaintiff from his own home while leaving the intoxicated guest in the home. A few minutes later the guest burned down plaintiff’s home. The court held the police conduct to be discretionary because the departmental manual did not provide a clear guideline on how police should handle the situation. In essence, despite its formal adoption of the narrow discretionary function limited to policy-oriented decisions, the court actually employed a broad discretionary function approach by relying on the absence of a mandated police procedure to justify a discretionary characterization of the police officer’s conduct.

3. The Middle Ground Between Discretionary and Ministerial

A substantial middle ground would seem to exist between the strict discretionary function focusing on policy formulation and the broad discretionary function focusing on the absence of a clear ministerial standard. In limited situations, courts have articulated an approach to cases falling in this middle ground. More often, the cases merely contain hints concerning factors that might be relevant to why the court may have characterized the case as either discretionary or non-discretionary. A few factors tend to expand the field of cases not protected by the discretionary functions, while other factors tend to expand the meaning of discretionary to decisions beyond those that are clearly policy-oriented.

a. Matters of Professional Judgment

The clearest example of Kansas courts recognizing cases falling in the middle between discretionary and ministerial are the traffic signing immunity cases distinguishing between decision-making that is discretionary and immune and decision-making that is merely a matter of professional judgment and not immune. The traffic signing immunity protects governmental entities in cases involving the placement or

127. Id. at 361–62, 644 P.2d at 461–62. Robertson relied on Downs v. United States, 522 F.2d 990, 995 (6th Cir. 1975), which explained that “[j]udgment is exercised in almost every human endeavor,” so judgment alone cannot be the test for discretion.


129. See supra Figure 3.
removal of traffic signs, signals or warning devices, but only when such placement or removal is discretionary.\textsuperscript{130} Traffic signing decisions are guided by the Manual on Uniform Traffic Control Devices (MUTCD),\textsuperscript{131} which may provide relevant criteria to guide some, but not all, traffic signing decisions. In those situations in which the manual provides sufficient guidelines, the decision to place or remove a traffic sign, signal or warning device may be deemed a matter of professional judgment not protected as a discretionary function.\textsuperscript{132} These decisions may be complex and involve balancing many factors, but they are not particularly distinguishable from the many professional judgments in engineering and other professions that are routinely litigated in the private sector.

In other contexts, courts have treated similar matters of professional judgment to be immune as a discretionary function. For example, in \textit{Hesler v. Osawatomie State Hospital}\textsuperscript{133} a doctor determined that the benefits of a weekend home visit for a patient confined in a state mental hospital would outweigh any risk to his parents.\textsuperscript{134} However, the patient reacted unpredictably in the family car, causing the driver to lose control and crash the car.\textsuperscript{135} In \textit{Akbarnia v. Deming}\textsuperscript{136} a trial judge ordered licensed psychologists to evaluate husband and wife in a divorce-child custody case.\textsuperscript{137} In that case, the court reasoned that the professional person was required to make complex judgments that should be protected as discretionary functions.

\begin{footnotesize}
\begin{itemize}
\item[130.] KAN. STAT. ANN. § 75-6104(b) (Supp. 2003).
\item[132.] See, e.g., Kastendieck v. Bd. of County Comm’rs, 934 F. Supp. 387, 390–91 (D. Kan. 1996) (holding that placement of reflective delineators to mark a curve is discretionary because of optional language in the MUTCD); Huseby v. Bd. of County Comm’rs of Cowley County, 754 F. Supp. 844, 847 (D. Kan. 1990) (citing the MUTCD in determining whether the placement of a warning sign on a curve was mandatory or discretionary); Finkbiner v. Clay County, 238 Kan. 856, 860, 714 P.2d 1380, 1383 (1986) (same); Carpenter, 231 Kan. at 789–90, 649 P.2d at 404–06 (same).
\item[133.] 266 Kan. 616, 971 P.2d 1169 (1999).
\item[134.] Id. at 619–20, 971 P.2d at 1172.
\item[135.] Id. at 617, 971 P.2d at 1171.
\item[137.] Id. at 788.
\end{itemize}
\end{footnotesize}
b. Common Law Duty

Some courts have characterized the existence of a common law duty as a sufficient denial of legitimate choice to make conduct ministerial. In one sense, these cases are similar to the professional judgment cases. Both categories of cases involve a legal standard established at common law, but they use different approaches to the concept of discretion. The professional judgment cases recognize that not all decision-making is discretionary and view the professional judgment cases as complex decision-making that is simply not discretionary. Conceptually, the cases fall in the middle between discretionary and ministerial. By contrast, the common law duty cases purport to raise the level of ministerial by making a decision in violation of a common law duty ministerial. The common law duty eliminates any legitimate choice and thus the actor is engaged in a ministerial act.

Two problems should be briefly mentioned. First, the breach of the common law duty may be a very specific and clear obligation in some cases, but very complex, speculative and uncertain in others. What is required by the standard of reasonable care will vary with all the circumstances and usually is a question of fact left to the trier of fact. The level of judgment involved in many negligence cases is so much more complex than the decision on how to clean up a spill in a hallway or whether to withdraw a bench warrant once the matter justifying the warrant has been resolved. For example, although the standard of reasonable care may govern a doctor's decision of whether to release a mental patient, the determination of what constitutes reasonable care in that situation is highly complex and cannot be fairly characterized as ministerial if the jury finds a breach.

Second, if a breach of a common law duty renders conduct ministerial, all acts of negligence become ministerial and the opportunity to explore when a negligent act might also be a discretionary function is artificially preempted. The problem is not simply a matter of semantics. This approach would render the discretionary function a meaningless


protection because it would apply only to cases in which the governmental employee did not breach any duty and thus could not incur any liability to the plaintiff.\footnote{The court noted in \textit{Schmidt v. HTG, Inc.}, 265 Kan. 372, 392–94, 961 P.2d 677, 690–91 (1998), that a breach of duty does not necessarily prevent a discretionary finding.} In addition, the ministerial characterization of these cases allows courts to avoid explaining carefully which acts of negligence should be deemed discretionary.

c. Governmental Functions

Another factor that might influence whether a decision is discretionary is the distinction between governmental and proprietary functions, albeit with a different emphasis. Prior to the KTCA, immunity attached to activities that were related to a governmental function without regard to whether the activity was discretionary. Under the KTCA there is perhaps a tendency for courts to use a broader approach to discretionary functions when the activity is related to a fundamentally governmental function. For example, decisions by police to arrest an individual or to take specific actions regarding an intoxicated person seem to get the benefit of the broad discretionary function. Thus, the failure to ensure the safety of an intoxicated youth who wandered off from a tavern into freezing weather\footnote{Mills v. City of Overland Park, 251 Kan. 434, 837 P.2d 370 (1992).} or the failure to remove an intoxicated guest from the plaintiff’s home were discretionary.\footnote{Robertson v. City of Topeka, 231 Kan. 358, 644 P.2d 458 (1982).} Similarly, decisions by social workers concerning family relationships,\footnote{Bolyard v. Kan. Dep’t of Soc. & Rehab. Servs., 259 Kan. 447, 912 P.2d 729 (1992).} or the placement of troubled children in juvenile facilities\footnote{Jarboe v. Bd. of County Comm’rs of Sedgwick County, 262 Kan. 615, 938 P.2d 1293 (1997).} or in foster care,\footnote{Gloria G. v. State Dep’t of Soc. & Rehab. Servs., 251 Kan. 179, 993 P.2d 979 (1992).} or concerning investigations of possible child abuse\footnote{Kennedy v. Kan. Dep’t of Soc. & Rehab. Servs., 26 Kan. App. 2d 98, 981 P.2d 266 (1999); Beebe v. Fraktman, 22 Kan. App. 2d 493, 921 P.2d 216 (1996).} also tend to get the benefit of a broad discretionary function.

The justification for a broader discretionary function may be based on a special need to protect governmental functions from the chilling effects of litigation. For example, \textit{Akbar}nia occurred in the context of the judicial function, which may merit the protection afforded by the broad discretionary function.\footnote{The fundamentally governmental nature of the judicial function might well justify protection of its activities beyond the scope of purely policy-oriented decisions. \textit{See infra} notes 208–25 and accompanying text.} Certain governmental functions must be afforded a reasonable protection from litigation in order to encourage a
vigorous and uninhibited performance of their public duties. Judges, counsel, witnesses and others involved in the judicial process might be deterred if their conduct and decisions could be constantly second-guessed in litigation. The same argument is far less persuasive in areas of substantial overlap with the private sector.\textsuperscript{148} By contrast, activities that once were viewed as proprietary functions might well be subjected to a stricter discretionary function. While complex judgments may be protected in governmental functions,\textsuperscript{149} the judgments should be compared to existing standards of liability applicable to private parties engaged in the same or similar activities.\textsuperscript{150} If the government's private sector counterpart is subject to liability for comparable conduct, little reason exists to afford the competing governmental entity anything more than the strict discretionary function.\textsuperscript{151}

d. Elements of Uncertainty and Speculation

Finally, a variety of circumstances may cause litigation to be uncertain and speculative. In such cases, even if similar litigation might be tolerated for some reason in the private sector, a sufficient level of uncertainty or speculation might justify sparing government the time, expense and other burdens of such litigation. For example, courts have always had some reluctance to recognize actions based on a failure to accurately predict future human behavior. Both the limited ability of medical science to make such predictions with accuracy, and the more limited ability of the judicial process to accurately determine when such a failure constitutes negligence may explain in part the determination that the medical evaluations in both \textit{Akbarnia v. Deming} and \textit{Hesler v. Osawatomie State Hospital} were discretionary functions. In addition,

\begin{itemize}
\item \textsuperscript{148} For an arguably ill-advised use of the deterrence rationale in the context of the recreational use immunity, \textit{see Jackson v. Unified Sch. Dist.} 259, 268 Kan. 319, 331, 995 P.2d 844, 852 (2000), in which the Kansas Supreme Court stated that the purpose of the KTCA is to encourage the building of recreational buildings without fearing additional costs for litigation.
\item \textsuperscript{149} \textit{See, e.g.,} Akbarnia v. Deming, 845 F. Supp. 788 (D. Kan. 1994) (explaining that professionals chosen by the government to resolve child custody disputes make complex judgments and their judgments and discretion qualifies for immunity).
\item \textsuperscript{150} For example, highway engineers make complex judgments, but those judgments are often considered matters of professional judgment that do not get the protection of the discretionary function. \textit{See infra} text accompanying notes 366–67.
\item \textsuperscript{151} An analogy might be made to the distinction between political speech and commercial speech. Both get constitutional protection, but courts tolerate greater restrictions on and regulation of commercial speech because the profit motive is generally an effective buffer against any meaningful chilling effect. \textit{Compare} N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964) (a public official must prove actual malice to collect an award of damages for defamatory falsehood related to his official conduct), \textit{with} Bates v. State Bar of Ariz., 433 U.S. 350 (1977) (holding that commercial speech is entitled to some First Amendment protection).
\end{itemize}
limited time within which to make decisions adds to the likelihood of a poor decision, and public officials whose jobs regularly force them to make decisions quickly may be entitled to a more lenient standard of discretion. Thus, the court in Robertson v. City of Topeka noted that in the absence of clear guidelines dictating a course of conduct for police, failure to recognize “the time frame in which police officers are required to take action . . . could lead to disastrous results” and “the police officers were required to make a determination of the factual situation within a few minutes without any opportunity to investigate.”

A related concern for police raises a proximate cause issue that might also be reflected in a broad discretionary function. The police officer cannot stop every driver who exceeds the speed limit, and a decision to stop may be influenced by the extent to which the driver is exceeding the limit, the time of day, the extent of traffic congestion, the perceived level of danger under all the circumstances, and the need to deter other violators by making a highly visible display of enforcement. A decision to not stop a speeding driver who then is involved in an accident may risk litigation which is too heavily dependent on second-guessing.

Much of the problem seems to stem from the “nature and quality” test that allowed the application of the discretionary function to operational level decisions. Decisions at the operational level may in some cases be just as deserving of the protection of the discretionary function immunity, but the rationale cannot simply rest on the policy-oriented nature of the decision. Treating operational level decisions as policy-oriented is usually somewhat of a legal fiction, and for state and local government the majority of discretionary function cases are operational level cases rather than planning level cases. During the first twenty-five years of the KTCA, unstated factors other than policy formulation have apparently driven the Kansas discretionary function cases. Perhaps by now a sufficient mass of cases has accumulated to permit the courts to analyze which factors or considerations in the cases are relevant to determining which governmental decisions falling between policy-formulation and ministerial should get the benefit of the discretionary function immunity.

152. 231 Kan. at 362, 644 P.2d at 462.
153. Decisions of this nature seem particularly common in police enforcement and social services.
4. The 1987 Independent Duty Amendment

Before a governmental entity will be liable for harm caused by an employee, the plaintiff must establish that the employee while in the course and scope of the employment breached a duty of care owed to the plaintiff. In 1986 the Kansas Supreme Court in Fudge v. City of Kansas City\(^\text{154}\) held a city liable for the failure of two police officers to take into custody a visibly intoxicated person, Henley. The departmental manual required police to take into custody persons whose impairment from alcohol or drugs makes them a danger to themselves or to others. However, in an attempt to diffuse an altercation outside a tavern, the police told Henley to leave the scene. Henley drove off in his automobile and later collided with and injured Fudge, who eventually died of his injuries. The violation of the departmental policy influenced the court to conclude that the officers breached a duty to Fudge, the victim, and that the officers' conduct was not discretionary.\(^\text{155}\)

Traditionally courts have described the performance of policing functions as involving only a duty to the public at large, not to any individual person.\(^\text{156}\) However, the court found a duty to Fudge individually based upon the failure-to-act doctrine, which imposes a duty of reasonable care on the actor who undertakes to aid a person in danger, fails to carry through in a reasonable manner, and thereby increases the risk to the person in peril.\(^\text{157}\) When the police had control of Henley outside the bar, they undertook to avoid a situation of danger, but failed to act reasonably when they violated departmental policy by sending Henley driving off in his car. In addition, the court concluded that the discretionary function did not provide the police officers with immunity because existence of the departmental procedure eliminated any choice they might otherwise have had to release Henley.\(^\text{158}\)

In the next legislative session the legislature reacted to the Fudge decision by amending the KTCA to add an additional immunity from liability when harm results from

adoption of enforcement of, or failure to adopt or enforce, any written personnel policy which protects persons' health or safety unless a duty of care, independent of such policy, is owed to the specific individual injured, except that the finder of fact may consider the failure to

\(^{155}\) Id. at 373-75, 720 P.2d at 1099–1100.
\(^{157}\) 239 Kan. at 373, 720 P.2d at 1098-99.
\(^{158}\) Id. at 373–75, 720 P.2d at 1099–1100.
comply with any written personnel policy in determining the question of negligence.\textsuperscript{159}

In addition, the legislature amended the discretionary function immunity to add the phrase "and regardless of the level of discretion involved."\textsuperscript{160}

These amendments have caused some confusion in the cases. Courts have suggested that the amendments were at least a partial overruling of \textit{Fudge} \textsuperscript{161} and rendered the police conduct of the nature involved in \textit{Fudge} discretionary.\textsuperscript{162} In \textit{Jarboe v. Board of County Commissioners of Sedgwick County}\textsuperscript{163} a juvenile escaped from a youth residence facility late at night, stayed with a friend, stole a vehicle, and, while driving around, shot at a pickup truck, severely and permanently injuring its driver. SRS may have breached its own guidelines by not reviewing all of the juvenile’s medical history before placing him in a non-secure facility.

In essence, plaintiffs were relying on \textit{Fudge} to argue that SRS should be held liable for failing to follow its own guidelines. The supreme court held, however, that the independent duty provision in the 1987 amendments overruled \textit{Fudge}. The rationale was that government agencies would be unwilling to develop guidelines for the safe and efficient handling of their public duties if those guidelines would later operate to take away their discretion to act.\textsuperscript{164} The court concluded that the independent duty provision barred a finding that the failure of SRS to follow its own guidelines could constitute a breach of duty owed to the plaintiff and, alternatively, a violation of its internal guidelines would not prevent a finding that the placement of the juvenile in a non-secure facility was the exercise of a discretionary function.\textsuperscript{165}

\textit{Jarboe} notwithstanding, the 1987 amendments did not necessarily overrule \textit{Fudge}. First, the addition of the “level of discretion” language to the discretionary function added nothing. In the seminal interpretation of the KTCA in \textit{Robertson}, the supreme court recognized that the “nature and quality” of the discretion, not the level of discretion, governed the
meaning of discretionary.\textsuperscript{166} In essence, the "nature and quality" test extends the discretionary function to decisions made at the operational level. Indeed, the decision at issue and held to be discretionary in \textit{Robertson} was, like in \textit{Fudge}, an operational level decision by police officers. Thus, the "level of discretion" amendment merely put into the statute the rule already well established in Kansas.

The independent duty provision simply prevents judicial reliance solely on an internal guideline or policy to find a duty owed to an individual citizen. In \textit{Fudge} the court did not base the duty owed to plaintiff entirely on the guideline, but merely used the guideline to establish a traditional common law duty based upon an undertaking by the police outside the tavern.\textsuperscript{167} The truly novel element in \textit{Fudge} was the willingness of the supreme court for the first time to impose liability on some actor in addition to the intoxicated driver when an intoxicated driver harms another on the highway. Despite the role intoxication plays in the extraordinary number of deaths and injuries on our highways annually, the Kansas courts continue adamantly to cling to the proposition that the intoxicated driver is the only actor responsible for those highway tragedies.\textsuperscript{168} The holding in \textit{Fudge} might not have required the internal guideline and, in any event, relied on a duty to the plaintiff independent of the internal guideline. The legislature threw at, but missed, the target with its independent duty provision, but the supreme court in \textit{Jarboe} decided to call it a strike nevertheless.

The final part of the \textit{Jarboe} rationale is a sensible conclusion that even when a breach of duty occurs, the discretionary function might still provide immunity. As previously discussed, the discretionary function would be virtually meaningless if every breach of a common law duty rendered an action ministerial.\textsuperscript{169} A breach of duty is an essential element of a negligence action, and the discretionary function exists to provide immunity for some, but not all, negligent actions falling in between non-justiciable policy decisions and ministerial acts.\textsuperscript{170} However, \textit{Jarboe} should not be read broadly to render as discretionary every governmental decision made pursuant to an internal procedure, guideline or policy.

\textsuperscript{167} \textit{See RESTATEMENT (SECOND) OF TORTS} § 324A (1965) (treating the duty resulting from an undertaking by a third party).
\textsuperscript{170} \textit{See supra} notes 101–04 and accompanying text.
C. Procedural Devices Designed to Limit the Scope of Immunities

Equating governmental liability with the liability of a private employer and limiting immunities to their discretionary applications are substantive doctrines that arguably should assist courts in avoiding overly broad interpretations of the enumerated immunities. In addition, the Kansas courts have identified at least three procedural devices that would similarly assist in limiting the scope of the enumerated immunities: an intent to prefer liability and limit the scope of immunity, an intent not to create any new immunities, and imposition of the burden on government to establish the existence and applicability of an immunity.

1. Liability is the Rule and Immunity is the Exception

The Kansas courts regularly state that in enacting the KTCA the legislature intended liability to be the rule and immunity the exception.\(^{171}\) This interpretive device seems to derive from the combination of two well-established rules of statutory construction. First, the cardinal rule of statutory construction is that the intent of the legislature should govern interpretation of statutory provisions.\(^{172}\) Second, exceptions in a statute are generally to be construed strictly or narrowly,\(^ {173}\) and the immunity provisions are viewed as exceptions to the general rule establishing the liability of governmental entities for the tortious acts of their employees.

Despite the almost pro forma recitation that liability is the rule and immunity is the exception, the cases have not consistently followed this guide to interpretation. Many cases apply an exceedingly broad view of discretionary function,\(^ {174}\) and other cases appear to apply immunities to situations in which a private employer would be liable for harm caused by the tortious act of an employee.\(^ {175}\)


\(^{174}\) See, e.g., Robertson v. City of Topeka, 231 Kan. 358, 362–63, 644 P.2d 458, 462–63 (1982) (applying discretionary function to police in case in which homeowner complained to police that intoxicated guest was threatening to burn down homeowner’s house, police removed the homeowner from his house, not the guest, and then the guest burned down the house a few minutes after police removed the homeowner).

\(^{175}\) See, e.g., Gonzales v. Bd. of County Comm’rs of Shawnee County, 247 Kan. 423, 799 P.2d 491 (1990) (failing to warn business invitee about dangerous condition on premises); Siple v. City of
However, a broad application of liability provisions coupled with a correspondingly narrow application of immunities in each and every case would not be desirable. Some immunities should probably be applied broadly to a wide array of activities. For example, the legislative function\textsuperscript{176} and judicial function\textsuperscript{177} immunities are fundamental governmental functions that merit broad protection. Other immunities appear to protect narrow interests simply from the danger that juries might impose liability without first finding the conduct of government to be negligent. For example, the first part of the traffic sign immunity merely imposes a negligence standard on government when harm results from the malfunction, destruction or removal of a traffic sign, signal or warning device.\textsuperscript{178}

Most importantly, none of the procedural devices that aid in the interpretation of the various provisions of the KTCA should apply mechanically. Every specific immunity is presumptively intended to address a particular problem concerning possible governmental liability. The intent of the legislature should govern not just with respect to the broad interpretation of the KTCA, but also with respect to individual immunity provisions. If the problem which the immunity was intended to address is first identified, the appropriate scope of the immunity should then become somewhat self-evident.\textsuperscript{179} In essence, treating liability as the rule and immunity as the exception should be a guide and a caution, not a mandate.

2. The KTCA Was Not Intended to Create Any New Immunities

Occasionally a court notes that the KTCA was not intended to create any new immunities.\textsuperscript{180} To a considerable extent, this guide to interpretation reinforces the interpretive guide that liability is the rule and

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177. \textit{Id.} § 75-6104(b).

178. \textit{Id.} § 75-6104(h).

179. The problem that would motivate adoption of an immunity concerning a failure to remove snow and ice is the financial and other burden on government to promptly and effectively remove all snow and ice from the streets and highways after a snowfall or freezing rain covers a large geographic area. The decision whether to warn motorists that water from a broken water main has frozen and makes one particular intersection dangerous would not motivate the adoption of such an immunity. \textit{See generally Lopez}, 31 Kan. App. 2d 923, 75 P.3d 1234.

immunity the exception. Any interpretation of the KTCA that significantly added to the number of occasions for immunity would seem inconsistent with a policy of strict construction of the immunity provisions.

Nevertheless, an admonition against new immunities should again be a guide and a caution, not a mandate. Prior to the KTCA, governmental immunity applied to governmental functions, but not necessarily to proprietary functions. By contrast, the KTCA adopted a general rule that government should be liable for the tortious acts of its employees to the same extent as a private employer, but subject to various immunities to protect various discretionary functions of government. On balance this new system should result in more liability and less immunity. However, it is probably too broad an assertion that any immunity where none existed prior to the KTCA previously would be inconsistent with legislative intent. Because the number of services government provides and the manner in which it provides those services is constantly evolving, courts should avoid putting questions of liability and immunity into a procedural and interpretive cocoon.

On the other hand, a proposed interpretation of the KTCA that would create immunity where none previously existed should at least raise a concern about possible misinterpretation. For example, interpretations extending the recreational use immunity to business invitees, to buildings, and to school children attending mandatory classes in school should have raised concerns that the immunity was expanding well beyond its apparent legislative intent.

181. See supra notes 4–11 and accompanying text.
182. In recent years the legislature has added some new immunities that might not have existed at common law prior to the KTCA. See, e.g., KAN. STAT. ANN. § 75-6104(u) (Supp. 2003) (creating immunity for the provision, distribution or selling of information from geographic information systems, either alone or in cooperation with other public or private entities). In addition, a new immunity for minimum maintenance roads might immunize government in a situation where previously it would have to establish an absence of any negligence. Id. § 75-6104(r).
185. See Jackson, 268 Kan. 319, 995 P.2d 844 (using gymnasium for mandatory class). See infra note 481 and accompanying text.
3. Government Has the Burden of Proving Its Entitlement to Immunity

Many cases state that government has the burden of proof that it is entitled to an immunity. Yet rarely does the court actually address the matter in a manner that suggests any substance to the burden-of-proof issue. Moreover, the burden of proof arguably plays no role in cases involving questions of law, such as whether the governmental entity owes a duty to the injured individual or whether a certain situation involves a discretionary function.

Yet a useful application of this procedural aide to interpretation would be to insist that a governmental entity satisfy a meaningful burden of persuasion that the immunity being sought is justified if a private employer would be liable, if no liability existed prior to the KTCA, or if the immunity would go beyond the plain meaning of the statutory language. For example, in Jackson v. Unified School District 259, the court applied a provision providing immunity for a “park, playground or open area” to a school gymnasium in which a mandatory class for public school pupils was being conducted. The court implied that the absence of any legislative history specifically excluding buildings from the immunity supported application of the immunity to buildings. A meaningful burden of persuasion on the school district in Jackson to establish legislative intent to apply the immunity to buildings might have helped the court define a more appropriate scope for this immunity.

III. IMMUNITIES PROTECTING THE PERFORMANCE OF FUNDAMENTAL GOVERNMENTAL FUNCTIONS

Many of the enumerated exceptions to liability concern fundamental governmental functions for which historically there has been no traditional private sector counterpart and which involve activities uniquely related to our system of government. They are intended to protect from liability the primary decision-making activities of the


187. In no case has the court analyzed carefully whether a governmental entity has actually met or failed to meet its burden of proving its entitlement to an immunity or actually decided that a governmental entity has failed to meet its burden of proof.


189. Id. at 323–25, 995 P.2d at 847–49.

190. For criticism of the unlimited scope given the recreational use immunity, see infra Part V.B.
legislative, judicial and executive branches of government. Each branch has a basic role in a system based on law: the legislative branch enacts, amends and repeals laws; the judicial branch interprets those laws; and the executive branch enforces those laws. At one time, these activities would have been immune from liability by the general characterization of “governmental” rather than “proprietary.”

The KTCA preserves immunity for these fundamental governmental functions by excepting from the general rule of liability judicial functions, legislative functions, and discretionary functions. The immunity for the executive branch is then set forth, or perhaps merely restated, in terms of narrower, more specific executive branch functions, such as the enforcement or failure to enforce a law, the method of providing police or fire protection, the conduct of emergency management activities, or the failure to inspect or negligent inspection of non-governmental property. Two initial observations seem appropriate. First, some of these specific immunities may protect the activities of more than one branch of government. For example, the immunity for the assessment or collection of taxes or assessments overlaps the legislative function in assessing taxes and the executive function of collecting those taxes. Second, each of these immunities is stated in absolute terms without any indication in their specific language that the immunity applies to some, but not all, functions within these categories. Nevertheless, although core activities and decision-making concerning these governmental functions will undoubtedly receive broad protection, these specific immunities are in all likelihood not absolute.

The issue becomes how courts should determine which acts are immune and which are not. Despite the expressly stated purpose of the KTCA, the private sector does not enact, interpret or enforce laws, and thus comparisons to the private sector will frequently be of little assistance except perhaps in those ancillary activities that employees of government share with society at large. Thus, negligent operation of an automobile probably would not be encompassed by any of these

192. See supra notes 4–11 and accompanying text.
193. KAN. STAT. ANN. § 75-6104(b) (Supp. 2003).
194. Id. § 75-6104(a).
195. Id. § 75-6104(e).
196. Id. § 75-6104(c).
197. Id. § 75-6104(n).
198. Id. § 75-6104(j).
199. Id. § 75-6104(k).
200. Id. § 75-6104(f).
immunities simply because the operator of the vehicle was a legislator, judge, or executive officer driving to some official activity. On the other hand, resort to concepts underlying the discretionary function may assist in defining the parameters of these immunities.

A. Legislative Function Immunity

The KTCA exempts from liability "legislative functions." To date only two cases have addressed this immunity, and in each case the court had occasion only to declare that the immunity did not apply to certain claims. In State ex rel. Stephan v. Kansas House of Representatives, the Kansas House of Representatives invoked the legislative function immunity as a defense to a mandamus action challenging the constitutionality of a statute that would give the legislature the power to adopt, modify or revoke administrative rules and regulations without presenting the legislation to the governor for approval. Although enacting legislation is clearly a legislative function, the supreme court rejected the asserted defense. It reasoned that the KTCA was enacted to correct certain harsh and unfair consequences of the former immunity system that protected government from liability for damages for personal injury or property damage caused by the negligence of governmental employees. The KTCA simply authorizes certain damage actions against government, and thus the legislative function immunity only bars damage actions, not other litigation such as mandamus actions that had long been recognized as a proper means of challenging the propriety or constitutionality of legislative actions.

A second limitation involves the determination of when an action is properly characterized as a legislative function as opposed to some other governmental function. In Jackson v. City of Kansas City, plaintiff firefighters were injured in a collision of two fire trucks responding to the same fire alarm call. A local ordinance imposed a speed limit of 35 miles per hour for fire trucks responding to calls, and a speed allegedly in excess of that limit was asserted as one of the causes of the collision. The supreme court held that this conduct was not within the scope of the legislative function immunity. It reasoned that the legislative function is "obviously not a blanket exemption of each act of every employee of every state, county, or municipal governmental entity simply because the

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204. Id. at 47, 687 P.2d at 626–27.
205. 235 Kan. at 283, 680 P.2d at 884.
employing governmental entity may exercise legislative powers." 206 While the enactment of, or the refusal to enact, a speed limit would constitute a legislative function, the subsequent violation of the speed limit by a governmental employee would involve perhaps a failure to enforce the speed limit or a method of police or fire protection, 207 but not a legislative function. Legislative bodies should be encouraged to address legislative matters with diligence and undeterred by the threat of claims that their legislative enactments contributed to causing some accident. This interpretation limits the immunity to functions that are legislative in nature rather than to persons who are employed by entities with legislative powers. This interpretation is consistent with the rule of construction that liability is the rule and immunity the exception.

B. Judicial Function Immunity

The KTCA also exempts from liability damage claims resulting from a "judicial function." 208 While the two limitations discussed above under the legislative function would undoubtedly also limit the scope of the judicial function, the cases to date have provided some refinement concerning which judicial branch activities qualify for the judicial function immunity.

In Cook v. City of Topeka, 209 an employee in the court clerk's office negligently failed to have a bench warrant for the plaintiff's arrest withdrawn after the plaintiff paid a traffic fine. As a result, the plaintiff was later arrested on the bench warrant and the error was not discovered until she appeared in court the next day. Although withdrawal of the bench warrant is part of the judicial process relating to adjudicating criminal cases, the court refused to characterize it as a judicial function entitled to immunity. The court characterized the clerk's act as the negligent performance of a ministerial act not entitled to immunity. 210 A ministerial act is one in which the actor has a statutory mandate to act in a certain manner without any discretion or power to adopt some other course of action. Thus, an immune judicial function is the opposite of a ministerial act because it involves some judgment or discretion. In essence, the court is adopting as a limitation on the scope of judicial

206. Id. (quoting Cook v. City of Topeka, 232 Kan. 334, 337, 654 P.2d 953, 957 (1982)).
207. In Jackson, both the failure to enforce a law immunity and the method of police or fire protection immunity covered the general conduct leading up to the collision of the two fire vehicles, but each of them failed for other reasons. See infra notes 240 and 294 and accompanying text.
208. KAN. STAT. ANN. § 75-6104(b) (Supp. 2003).
210. Id. at 337-38, 654 P.2d at 957.
function immunity in the KTCA the same or similar ministerial exception that has limited immunity for discretionary functions under both the KTCA and the FTCA.\textsuperscript{211}

Although \textit{Cook} implies a simple discretionary-ministerial dichotomy, confusion arises concerning those acts which involve some judgment and thus discretion in a general sense, but which lack the policy-oriented quality associated with a true discretionary function. In \textit{Akbarnia v. Deming}, a trial judge ordered licensed psychologists to perform evaluations of the husband and wife in a divorce-child custody case.\textsuperscript{212} The psychologists recommended that the court place one of the children in the custody of the SRS with a period of no contact between the child and her father. The court followed the recommendation. In a professional negligence claim by the parents against the psychologists, the court held that the psychologists were entitled to immunity because the court-ordered evaluations constituted a judicial function.\textsuperscript{213} The court reasoned that the psychologists' complex evaluations of difficult custody issues involved considerable discretion.\textsuperscript{214} Although the psychologists were performing a duty mandated by statute, this duty involved an exercise of independent professional judgment.

Clearly, the professional judgments in \textit{Akbarnia} are distinguishable from the ministerial duty to withdraw the bench warrant in \textit{Cook}. In \textit{Cook}, the clerk had no choice or discretion to do anything other than withdraw the bench warrant once the fine had been paid. Liability was premised on the clerk's failure to do a specific act mandated by statute which did not vest any discretion in the clerk to vary the procedure. In \textit{Akbarnia}, by contrast, the psychologists had to exercise professional judgment to decide which course of action, among many, would be most appropriate for the plaintiffs' particular situation. The professional judgment exercised by the psychologists may be every bit as complex as the legal judgment exercised by the judge.

Nevertheless, it is not clear that either the professional judgment exercised by the psychologists or the legal judgment exercised by the trial judge in \textit{Akbarnia} should qualify as true discretionary functions. Both lack the policy-creation quality that renders true discretionary functions beyond judicial review. Both tend to involve the application of professional standards that could easily be tested under negligence analysis. In essence, both seem to involve conduct that many Kansas

\textsuperscript{211} See supra notes 74–128 and accompanying text.
\textsuperscript{213} Id. at 790.
\textsuperscript{214} Id.
cases have excluded from the immunity for discretionary functions because the conduct was governed by professional standards rather than conduct involving an element of policy-formulation that was beyond judicial review. 215

A possible distinction between discretionary functions and judicial functions is found in Smith v. State. 216 In that case, Kansas statutes authorized three types of appearance bonds for the pretrial release of criminal defendants: own recognizance, surety, or cash deposit. By administrative order, the Kansas Supreme Court then authorized a fourth type of bond known as the “Own Recognizance—Cash Deposit Bond.” 217

Plaintiffs alleged that use of this new form of bond in lieu of the statutorily-authorized type of bond requested by plaintiffs caused some delay in the plaintiffs’ release on bond and forced them to forfeit some money deposited during the bonding-out process. The supreme court held that the bond decisions of the judges were immune judicial functions because they were discretionary acts of judges setting bail, not the ministerial acts of court clerks collecting the bail. Moreover, these bond decisions were carried out by judges performing their judicial responsibilities.

The reasoning in Smith draws no distinction between true discretionary acts involving policy creation and the middle tier of conduct that involves some professional judgment. Indeed, although the trial court characterized the immunity as one based on the discretionary function, the supreme court was careful to emphasize that the relevant immunity was the judicial function immunity, 218 i.e., immunity based on the performance of judicial functions left to the judgment or discretion of a trial judge, not on the discretionary function immunity. 219 The supreme court did not explain the significance of this distinction, but it suggests that the middle tier of cases involving judicial decision-making


217. Id. at 348, 955 P.2d at 1295.
218. KAN. STAT. ANN. § 75-6104(b) (Supp. 2003).
219. Id. § 75-6104(e).
somewhat akin to the exercise of professional judgment, but not rising to the level of true discretionary functions, will be included in the judicial function immunity.

This broader application of immunity might not fully reflect the rule of construction that immunities, as exceptions to the statute, should be narrowly construed and protect only decisions that involve an element of policy formulation. It might also not fully reflect the policy that government should be liable for the negligence of its employees in the same manner as private employers. After all, judges may write opinions that if written by a private attorney might subject the attorney to a malpractice claim. For example, consider how easily a judge’s legal opinion might contain a basis for malpractice if the same research and reasoning were contained in an attorney’s opinion letter. In 1986 the Kansas Supreme Court in Fudge v. City of Kansas City held that mandatory police department guidelines in a manual created a duty to individuals injured by a policemen’s failure to follow those guidelines. The following year the Kansas legislature amended the KTCA to add a provision partially overruling Fudge by excepting from liability any claim based upon enforcement or failure to enforce a written personnel policy unless a duty independent of the written personnel policy duty is owed to the injured individual. However, regardless of whether a private attorney might be negligent in comparable circumstances, the freedom to draft opinions and decide cases free of any threat of tort liability is critical to an independent judiciary and thus the broader scope of the immunity for judicial functions is quite appropriate.

222. For example, a reasonably prudent attorney might be negligent in failing to discover a statutory amendment reflecting a legislative attempt to partially overrule a judicial decision. Thus, in Carl v. City of Overland Park, 65 F.3d 866, 870–71 (10th Cir. 1995), the court found a special duty owed by police to a driver based on mandatory police department guidelines without apparent awareness that the independent duty limitation in Kansas Statutes Annotated section 75-6104(d) was an apparent attempt to narrow the holding in Fudge v. City of Kansas City, 239 Kan. 369, 720 P.2d 1093 (1986).
224. KAN. STAT. ANN. § 75-6104(d) (Supp. 2003). For further discussion, see supra notes 159–68 and accompanying text.
225. Although the cases have not yet addressed the issue, the same reasoning fully supports a similarly broad view of discretion governing legislative functions.
C. Enforcement of, or Failure to Enforce, Any Law Immunity

The KTCA does not afford the executive branch immunity for its overall range of functions in a manner comparable to the legislative and judicial function immunities. Nevertheless, the "enforcement of a law" immunity may well serve that purpose. That provision relieves government of liability for "damages resulting from . . . enforcement of or failure to enforce a law, whether valid or invalid, including, but not limited to, any statute, rule, regulation, ordinance or resolution."226 This immunity is undoubtedly drawn from a comparable provision in the FTCA, which immunized the federal government from any claim "based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid."227

The primary difference between the FTCA and the KTCA derives from the omission of the qualifying language "exercising due care" in the Kansas provision. The "exercising due care" limitation affords a simple and clear rationale for the federal provision. Both the federal and Kansas statutes require negligence as a prerequisite to governmental liability. In the federal cases, if the employee is otherwise exercising due care, the immunity provision would simply mean that the mere act of enforcing a statute or regulation cannot constitute the "negligent act" necessary for governmental liability.228 As a general proposition, a governmental employee should not have to decide upon the legality or propriety of the law he or she is asked to enforce. Some Kansas cases certainly fit this model. For example, the courts have held the immunity applicable in cases in which the alleged wrongful act was the collection of a special assessment enacted by the legislature, but later declared unconstitutional by the Kansas Supreme Court,229 the posting of notices on property and other acts required in the enforcement of a city housing code,230 or the

226. KAN. STAT. ANN. § 75-6104(c).
228. See Collins v. Heavener Prop., Inc., 245 Kan. 623, 633, 783 P.2d 883, 890 (1989) (holding that the Kansas exception is broader than its federal counterpart); Barber v. Williams, 244 Kan. 318, 323-24, 767 P.2d 1284, 1288-89 (1989) ("Federal courts have not allowed invocation of this exception where government employees, in the execution of laws, did not manifest 'at least some minimal concern for the rights of others.'" (quoting Note, Governmental Liability: The Kansas Tort Claims Act [or The King Can Do Wrong], 19 Washburn L.J. 260, 271 (1980))); Lantz v. City of Lawrence, 232 Kan. 492, 495-96, 657 P.2d 539, 541-43 (1983) (citing appellants' argument that the federal standard is one of due care).
release of a prisoner on the date prescribed by regulations governing the calculation of prison sentences.\textsuperscript{231}

Confusion results from the omission of the "exercising due care" limitation in the Kansas provision. As the Kansas Supreme Court has noted,\textsuperscript{232} virtually every function undertaken by any governmental employee is to some extent mandated or authorized by some law. Without the "exercising due care" limitation, the Kansas provision could in theory extend immunity to virtually every negligent act or omission of a governmental employee. Immunity would become the rule and liability the rare exception.

The omission of the "exercising due care" limitation extends immunity to any negligent failure to enforce a law.\textsuperscript{233} Thus, the immunity barred a claim based on a city's failure to enforce a speed limit on railroad trains traveling through the city.\textsuperscript{234} It also extends immunity to affirmative efforts to enforce a law that are negligently performed. For example, the Kansas courts have used the immunity to bar actions based on negligent enforcement efforts such as the negligent review of papers on file that would show the unsuitability of a tract of land for a septic system,\textsuperscript{235} negligent review of SRS files before referring an alleged child molestation charge to a district attorney for prosecution,\textsuperscript{236} and the negligent failure to conduct a proper background search before licensing a fortuneteller.\textsuperscript{237}

In response to concern about overly broad application of this immunity, the Kansas courts have attempted to define some limitations on the "enforcement of law" immunity in the negligent enforcement cases. For example, in \textit{Lantz v. City of Lawrence}\textsuperscript{238} a city weed abatement ordinance authorized the city to cut weeds if the landowner failed to do so. After satisfying all procedural prerequisites, the city sent


\textsuperscript{232} See Cansler v. State, 234 Kan. 554, 568, 675 P.2d 57, 68 (1984) (stating that "state agencies all are created by law; their powers and their duties are established by law; and . . . they carry out or enforce the law").

\textsuperscript{233} The legislature may have intended this provision to prevent liability for failure to enforce a law enacted in the interest of public welfare. See, e.g., Everly v. Adams, 95 Kan. 305, 147 P. 1134 (1915) (holding that failure to enforce an ordinance prohibiting cattle from running at large is not a proper basis for a claim for damages by a plaintiff who had been attacked by a vicious cow). In such a case a duty owed only to the public at large and not to the individual person would mean that the governmental employee did not breach a duty to the plaintiff and thus there would be no actionable negligence to be imputed to the governmental entity under \textit{respondeat superior}.


\textsuperscript{237} Barber v. Williams, 244 Kan. 318, 767 P.2d 1284 (1989).

\textsuperscript{238} 232 Kan. 492, 657 P.2d 539 (1983).
a crew to the landowner's property. The crew used weed trimmers and chain saws to cut down not only the weeds but also sixty-three trees on the landowner's property. In *Cansler v. State* prisoner authorities failed to warn area law enforcement officers in a timely manner about the escape of seven prisoners, all of whom had been convicted of murder. One of the escapees shot a police officer who was investigating suspicious behavior by the escapee but was unaware of the prison escape or the dangerous nature of the escapees. In *Jackson v. City of Kansas City* a collision between two fire trucks responding to the same emergency call resulted from driving the fire trucks at an excessive speed. Finally, in *Fudge v. City of Kansas City* a police officer was breaking up a loud gathering in a parking lot outside a tavern and ordered a visibly intoxicated patron in his car to leave despite a departmental directive not to allow persons under the influence of alcohol or drugs to continue to operate a vehicle. The patron then collided with and killed the driver of another car. In all four cases the supreme court held that the enforcement immunity would not apply to wrongful acts that were outside the purview of the statute, ordinance, regulation or resolution purportedly being enforced. In these cases, the court viewed the tortious conduct as being more than "mere" enforcement of the law.

While the effort to limit the scope of the immunity is admirable, the precise circumstances that make negligent conduct more than "mere" enforcement are not clearly defined in the cases. First, in *Lantz* the supreme court implied a distinction based on some level of aggravated fault. It relied on an Indiana case involving a high speed police chase for the proposition that an act done "in the performance of [a] duty, might be so outrageous as to be incompatible with the performance of the duty . . . [and] beyond the scope of the employment" that neither the employee nor the governmental entity should be immune. Yet in Kansas a governmental entity is liable only for an employee's "negligent or wrongful act or omission," but not for an employee's aggravated misconduct in the form of "actual fraud or actual malice," and, regardless of the level of fault, only "while acting within the scope" of

245. *Id.* § 75-6105(c). For additional cases denying the enforcement of law immunity in cases of aggravated misconduct, see *Watson v. City of Kansas City*, 80 F. Supp. 2d 1175 (D. Kan. 1999), and *Lindeman v. Umscheid*, 255 Kan. 610, 875 P.2d 964 (1994).
employment. Conduct so outrageous as to be outside the scope of employment would arguably fail both prerequisites to liability in the KTCA.

Second, the court in Lantz implied an alternative distinction based on mistake. Although the ordinance did not authorize the cutting of trees, the court noted that if the trees cut down on plaintiffs' property were indistinguishable from the weeds covered by the ordinance and chain saws were necessary and proper in the removal of weeds and overgrowth, then the employees would have been acting "within the purview of the weed abatement ordinance." If the court meant to imply that a mistake of fact is within immunity, then it would seem that immunity is lost when the employees knew they were cutting down the plaintiffs' trees. If immunity is lost when the employees know they are acting outside the purview of the ordinance, then their conduct is intentional and probably not covered by the KTCA in any event.

Third, in Cansler v. State prison officials failed to warn area law enforcement officials that seven convicted murderers had escaped from the state penitentiary, and in Fudge v. City of Kansas City police violated departmental rules about detaining intoxicated drivers who are a danger to themselves or to others when they told an intoxicated person to drive away from an altercation in a parking lot. In both cases the court held that the immunity does not apply when, in addition to the enforcement of a law, the governmental employee commits some additional tortious act or omission that would constitute common law negligence. In some cases, this approach seems sound. For example, in Burgess v. West a police officer was enforcing the law when he arrested an intoxicated person driving a car, but striking the car itself or a passenger in the car with the officer's flashlight would not be conduct related to enforcement of that law.

Yet other cases seeking to identify some other tortious act or omission constituting common law negligence cannot be effectively distinguished from cases granting immunity for mere negligent enforcement of the law. For example, failure to enforce a speed limit applicable to trains passing through a community was "mere" failure to

248. Id. at 498, 657 P.2d at 544.
251. Id. at 374-75, 720 P.2d at 1099-1100; Cansler, 234 Kan. at 572, 675 P.2d at 70-71.
253. Id. at 1524-26.
enforce and thus immune,254 while failure to enforce a speed limit on fire trucks responding to a call also constituted common law negligence and thus was not immune.255 The failure to enforce a statute or regulation that is related to safety will in virtually all cases overlap with common law negligence.

Determinations of when such failures to enforce are “mere” negligence entitled to immunity and when they are separate common law torts are seemingly arbitrary. Unfortunately, the confusion is traced to the failure of the legislature to include the “exercising due care” limitation found in the FTCA, and the courts are forced to cope with a flawed provision. The best solution might be to limit the enforcement-of-law-immunity to those acts or omissions that are discretionary in the broader sense used in the legislative and judicial function immunities.

D. The Assessment or Collection of Taxes Immunity

One specific function that distinguishes government from the private sector is the power to tax. While government may raise revenues through sales and user fees, the substantial majority of the revenues needed to operate government in the modern era comes from the collection of various taxes. The KTCA provides that governmental entities and their employees “shall not be liable for damages resulting from . . . the assessment or collection of taxes or special assessments.”256

To date this immunity has received little judicial attention. In 1978 the Kansas legislature enacted certain assessments to be imposed in the district courts on fines and bail forfeitures to fund an expansion of the Kansas Law Enforcement Training Center. Two years later the supreme court held the legislation imposing these special assessments invalid because the legislation combined two separate topics in one bill in violation of Article 2, Section 16 of the Kansas constitution. In Wheat v. Finney,257 plaintiffs filed a conversion and breach of implied contract action to recover all sums collected pursuant to the special assessment. The supreme court held that the conversion claim was in tort and barred by the “assessment and collection of taxes” immunity258 and that the

256. KAN. STAT. ANN. § 75-6104(f) (Supp. 2003).
258. Id. at 219-20, 630 P.2d at 1162-63. The court also found the state immune under section 75-6104(c), which granted immunity for the “enforcement of or failure to enforce a law, whether valid or invalid.” Id. at 220, 630 P.2d at 1162. An action to recover the special assessments collected during the year prior to the effective date of the KTCA was barred by section 46-901, which declared in blanket form the State of Kansas and its boards, commissions, departments,
implied contract action was barred by plaintiffs' failure to pursue the claim in the special claims committee procedure required by statute.\textsuperscript{259} The court in \textit{Wheat} did not, however, provide any analysis of issues concerning the scope of this immunity. One issue would be the breadth of the phrase "taxes or special assessments." In \textit{Wheat} the provision applied to a special assessment on fines and forfeitures, and in \textit{LaBarge v. City of Concordia}\textsuperscript{260} the court of appeals applied the immunity to protect a county and city in a slander of title action based on the allegedly wrongful description of ownership of a tract of land listed on the county's tax assessment rolls.\textsuperscript{261} Whether the immunity would apply to various user fees, license fees and other charges imposed by the state or its subdivisions must await appropriate cases. A second unanswered issue is whether any acts relating to assessing or collecting taxes or special assessments might be outside the scope of the immunity either by limiting the immunity to matters of discretion\textsuperscript{262} or by excluding from the immunity acts that may be characterized as ministerial.\textsuperscript{263} Finally, there remains a question of when and under what circumstances the immunity might have to yield to the constitutional prohibition against taking without just compensation.\textsuperscript{264}

\textit{E. The Inspection or Failure to Inspect Immunity}

In the modern era government regulates many activities in society. One common aspect of regulation is the obligation or authority to inspect various conditions in various private sector activities in order to protect the public interest. The "inspection immunity" provides that government shall not be liable for damages resulting from

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\item[\textsuperscript{259}] Kansas Statutes Annotated sections 46-903 and 46-907 require implied contract claims to be filed with a special claims committee. The court held that compliance with that requirement was a condition precedent to maintaining an implied warranty action against the state. \textit{Wheat}, 230 Kan. at 221, 630 P.2d at 1163.

\item[\textsuperscript{260}] 23 Kan. App. 2d 8, 927 P.2d 487 (1996).

\item[\textsuperscript{261}] 1d. at 16-17, 927 P.2d at 492-93.

\item[\textsuperscript{262}] Other immunities concerning specific governmental activities have been limited to discretionary functions. For a discussion of the judicial function and the police and fire protection immunities, see \textit{supra} Parts III.B and III.F.

\item[\textsuperscript{263}] Various record-keeping matters relating to the collection of taxes would appear to be ministerial in nature and thus analogous to the failure to withdraw the bench warrant in \textit{Cook v. City of Topeka}, 232 Kan. 334, 654 P.2d 953 (1982).

\item[\textsuperscript{264}] In \textit{Wheat} the issue was apparently moot because the state had a special claims committee procedure to pursue recovery of funds collected pursuant to an unconstitutional special assessment.

\end{enumerate}
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the failure to make an inspection, or making an inadequate inspection, of any property other than the property of the governmental entity, to determine whether the property complies with or violates any law or rule and regulation or contains a hazard to public health or safety.\footnote{265}

To date, the courts have interpreted narrowly the meaning of inspection. Thus, the failure to review other relevant public records before issuing a permit for a septic system,\footnote{266} the failure to record the identity of a lienholder on an automobile certificate of title,\footnote{267} or listing a driver’s license as ‘suspended on the driving records of another driver who happened to have the identical name as the suspended driver,’\footnote{268} have all been held to constitute something other than an inspection within the meaning of the inspection immunity.

To date, the courts have limited the immunity in cases in which an unperformed or inadequate inspection would have prevented personal injury or physical damage to property, as when a tree limb falls on a car,\footnote{269} a train collides with an automobile,\footnote{270} a building deemed to be a public hazard is razed,\footnote{271} or a cemetery grave stone falls over onto a child.\footnote{272} The use of inspections by governmental employees for some ulterior purpose other than protecting public health and safety is outside the immunity. For example, a complaint that inspections were part of a malicious prosecution scheme to shut down plaintiffs’ day care center,\footnote{273} and a complaint that visible inspection activities impaired the plaintiffs’ ability to rent or sell their housing properties\footnote{274} were both held to be outside the scope of the immunity. The immunity apparently applies only when the failure to inspect or the inadequacy of an inspection is causally related to some injury that could have been avoided by a proper inspection.

However, two unresolved issues concern the “public health or safety” language in the immunity. Does a limitation to “hazard to public health and safety” modify only “property” or also “any law or rule or regulation”? In either event, does “public health or safety” limit the immunity to cases in which an inspection, if properly performed, would

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\footnote{265}{KAN. STAT. ANN. § 75-6104(k) (Supp. 2003).}
\footnote{267}{Mid Am. Credit Union v. Bd. of County Comm’rs of Sedgwick County, 15 Kan. App. 2d 216, 806 P.2d 479 (1991).}
\footnote{269}{Siple v. City of Topeka, 235 Kan. 167, 679 P.2d 190 (1984).}
\footnote{271}{Busch v. City of Augusta, 9 Kan. App. 2d 119, 674 P.2d 1054 (1983).}
\footnote{272}{Brock v. Richmond-Berea Cemetery Dist., 264 Kan. 613, 957 P.2d 505 (1998).}
\footnote{273}{Lindenman v. Umscheid, 255 Kan. 610, 875 P.2d 964 (1994).}
\footnote{274}{Green v. City of Wichita, 47 F. Supp. 2d 1273 (D. Kan. 1999).}
\end{footnotesize}
have prevented not physical injury or damage to property, but only some
impairment of an economic interest?275 Normally negligence en-
compasses personal injury and physical damage to property, not mere
economic loss. Thus, courts should be cautious about bringing mere
economic loss claims within the KTCA.

The inspection immunity is also limited to cases in which the
inspection would be of property other than the property of the
governmental entity. Thus, in Brock v. Richmond-Berea Cemetery
District276 a child was injured when a gravestone tipped over onto her.
The immunity applied to any inadequate inspection by the cemetery
district because while the cemetery and the individual gravesites are its
own property, the gravestones are the private property of the families of
the deceased.277 However, courts have not yet addressed whether the
immunity applies to cases in which the unperformed or inadequate
inspection was of governmental property other than the property of the
governmental entity charged with performing the inspection. Thus, it is
not clear whether the immunity would protect a city building inspector
who inadequately inspected a school district’s building.278

Although courts have carefully limited that which constitutes an
inspection for purposes of the inspection immunity, they have apparently
not sought to limit the immunity in cases in which there clearly was an
inspection. For example, in the seminal case Siple v. City of Topeka279
neighbors had complained that a homeowner’s tree was a public hazard,
but the city forester inspected it visually and decided that it was sound.
Subsequently, a large branch fell off the tree in a storm and crushed
plaintiffs’ car. The supreme court held that the inspection immunity was
not limited to building inspections, but rather applied to a wide variety of
inspections that are required of state and municipal governments.280
Once the court concluded that the inspection was within the purview of
the immunity, it declined to consider any limitation on the immunity

275. To date, courts have found other grounds for finding the immunity inapplicable in those
cases involving mere economic loss. For example, in Mid Am. Credit Union, 15 Kan. App. 2d 216,
806 P.2d 479, the court held that the failure to list a lienholder on a certificate of title was not an
inspection.
277. Id. at 618–19, 957 P.2d at 510–11.
278. At the state level this issue may be influenced by the holding in Beck v. Kan. Univ.
Psychiatry Found., 671 F. Supp. 1563 (D. Kan. 1987), that the State of Kansas is the common
employer of employees working in different state agencies. Id. at 1577. See supra notes 55–59 and
accompanying text.
280. Id. at 172, 679 P.2d at 195.
based on either the non-discretionary nature of the inspection or an analogy to the liability of a private employer.\textsuperscript{281}

It is unclear whether courts should limit the immunity to inspections that are discretionary. A limitation to narrow discretion in its policy-making sense would probably largely negate the immunity altogether and thus be an undue intrusion upon the legislature’s intent. A limitation using the broad approach treating as discretionary only those inspections that are not so perfunctory as being fairly characterized as ministerial would be more appropriate, but inapplicable to \textit{Siple}, which seemed to involve conduct tested by professional standards in the middle tier between narrow discretion and ministerial.

A limitation based on an analogy to the private sector liability seems even more appropriate in the specific circumstances of \textit{Siple}. A private landowner has a duty of reasonable care to inspect and remove those trees on the edge of his property that pose a danger to the public way.\textsuperscript{282} The supreme court simply avoided any inquiry of this nature by declaring the city’s duty as one owed only to the public at large. The overly-broad use of the public duty doctrine in cases having a clear and direct parallel in the private sector seems inconsistent with the stated intent of the KTCA.

\textbf{F. The Police or Fire Protection Immunity}

Providing citizens with security from crime, fire and related matters has long been a fundamental governmental function. Three immunities—the “police and fire protection” immunity, the “emergency management activities” immunity\textsuperscript{283} and the community service immunity\textsuperscript{284}—relate to this public security function, although other immunities overlap with one or all of these three public security immunities. The “police and fire protection” immunity provides immunity from liability for damages resulting from “failure to provide, or the method of providing, police or fire protection.”\textsuperscript{285} Two general issues concern the scope of this immunity: first, the parties or entities included within the immunity, and second, the activities excluded from the immunity.

\textsuperscript{281} \textit{Id.} at 173–74, 679 P.2d at 195. The trial court had characterized the inspection as a non-discretionary and non-governmental proprietary function that did not merit immunity. \textit{Id.} at 169, 679 P.2d at 193.

\textsuperscript{282} \textit{Restatement (Second) of Torts} § 363(2) (1965).

\textsuperscript{283} \textit{See infra Part III.G.}

\textsuperscript{284} \textit{See infra Part III.H.}

Courts will probably give a broad interpretation to the persons or entities who are protected by the police and fire protection immunity. The immunity is clearly available to city and county police officers dealing directly with actual and suspected criminal activities and to city and county firefighters responding to fires. Yet the courts have also made the immunity available to campus police and security personnel to an airport authority's fire protection personnel and to personnel operating state prisons and county and municipal jails. The immunity should also be available to parole officers and others who fall within the statutory definition of "law enforcement" officer. Arguably, the immunity should also be available to volunteer firefighters. The definition of "employee" in the KTCA includes "persons acting on behalf or in service of a governmental entity in any official capacity, whether with or without compensation."

While the immunity is stated in absolute language and, read literally, would encompass every act by a police officer or firefighter committed in the course of his or her employment, the courts have given the immunity a more limited interpretation. In Jackson v. City of Kansas City two fire trucks collided while they were responding to the same fire alarm. A city ordinance imposed a 35 mile-per-hour speed limit on fire trucks, even when responding to emergency calls, and evidence indicated that one or both vehicles were violating that speed limit. The court refused to apply the police and fire protection immunity in this situation.

We believe subsection (m) [now (n)] is aimed at such basic matters as the type and number of fire trucks and police cars considered necessary for the operation of the respective departments; how many personnel might be required; how many and where police patrol cars are to operate; the placement and supply of fire hydrants; and the selection of

292. See KAN. STAT. ANN. § 22-2202(13) (1995 & Supp. 2003) (including "parole officers" in the definition of "law enforcement officer"). Courts have relied on this definition to apply the immunity to personnel operating penal institutions and jails. See, e.g., Allen, 773 F. Supp. 1442; Cansler, 234 Kan. 554, 675 P.2d 57.
293. KAN. STAT. ANN. § 75-6102(d) (Supp. 2003).
equipment options. Accordingly, a city is immunized from such claims as a burglary could have been prevented if additional police cars had been on patrol, or a house could have been saved if more or better fire equipment had been purchased. We do not believe that subsection (m) [now (n)] is so broad as to immunize a city on every aspect of negligent police and fire department operations. Should firemen negligently go to the wrong house and chop a hole in the roof thereof, we do not believe the city has immunity therefore on the basis the negligent act was a part of the method of fire protection.294

Although not using the word "discretionary," the court clearly limited the immunity to policy-oriented discretionary functions.

Cases limiting the police and fire protection immunity to discretionary functions reflect the same basic confusion about the meaning of "discretionary" as found elsewhere in the KTCA. Some cases focus on the policy-oriented nature of the decision. For example, in Busch v. City of Augusta295 fire gutted the plaintiffs' building and the fire chief determined that the walls that remained standing constituted an "immediate hazard to public safety."296 Therefore, rather than extinguish the fire, he decided to let it burn and destroy the remaining shell of the building. The court properly characterized that decision as discretionary in nature.297

Similarly, in Gragg v. Wichita State University298 plaintiffs' decedent was shot and killed in a field adjacent to a campus stadium used for a July Fourth celebration. The supreme court properly held that the decisions of the campus police about how many police officers to deploy and where to deploy them was discretionary in nature.299 Such decisions are always subject to second-guessing, are virtually non-justiciable, and are essentially identical to the decisions identified in Jackson as discretionary in nature.300

Other decisions seem to assume that any decision not guided by a precise standard set forth in a statute, regulation, ordinance or published policy is ipso facto discretionary. Thus, in Eames v. Board of County Commissioners of County of Phillips301 plaintiff was injured when her car
struck cattle that had wandered onto the highway. Although the sheriff’s department had been alerted about the cattle and their location, the dispatcher did not promptly send a patrol car to investigate. The court indicated that the conduct would be discretionary if the county had no specific policy or procedure mandating a prompt investigation, but not if the county had a specific policy guideline or procedure requiring prompt investigation. Yet the absence of a specific policy or procedure eliminating any choice by an actor falls short of what is generally considered the essence of a discretionary function. Although one could equate the failure to respond promptly to a “discretionary” decision concerning allocation of resources, the court did not discuss the need to determine why the dispatcher failed to send a patrol car to investigate, only whether there was a specific policy or procedure.

Whatever the standard for discretionary function, the police and fire protection immunity cases mirror the general parameters of the discretionary function immunity cases in excluding certain situations from immunity. Because a governmental actor has no discretion to violate the law, an act cannot be discretionary when it violates a statutory mandate, or a common law rule, or an internal policy or procedure. Thus, conduct that enabled a group of violent and dangerous prisoners to escape from the state prison could not be deemed discretionary if it violated a statutory duty to keep prisoners confined, and a failure to warn law enforcement agencies about the prison escape could not be deemed discretionary if it violated a common law duty to warn about the danger posed by the escaped prisoners. Similarly, a failure to provide firefighting services promised to a commercial tenant, to provide sprinkler systems for the protection of tenants in a public housing project, or to protect a prisoner in law enforcement’s custody and control could not be discretionary if the failures breached a common law duty created by a special relation between the parties such as landlord-tenant or jailor-prisoner. Finally, driving fire department vehicles at a certain speed while responding to a fire alarm cannot be

302. Id. at 325.
303. For further discussion of the meaning of “discretionary function” in Kansas, see supra notes 100–28 and accompanying text.
305. Id.
discretionary if the speed violates a speed limit imposed by an internal departmental policy and by a local ordinance. 309

On the other hand, some questions exist about the continued vitality of certain cases finding a non-discretionary act that gave rise to possible governmental liability. For example, in Watson v. City of Kansas City 310 plaintiff had a long history of suffering physical abuse at the hands of her husband, a policeman that other police considered a time bomb just waiting to go off. She asked the police department to restrain her husband after they had separated and she saw him following her home from a store. Despite agreeing to protect her, her husband was at her home when she arrived, and he raped, beat and stabbed her before fleeing and later committing suicide. Because police had agreed to restrain the husband, the court held that the police had undertaken a duty of reasonable care to her. 311 Accordingly, the failure of the police to restrain the husband could not be discretionary. The court relied on Fudge v. City of Kansas City as authority for a duty owed to the individual, 312 and the legislature then amended the KTCA to add the independent duty requirement to the list of enumerated immunities in 1987. 313 Because Watson was decided a year after that amendment and without apparent awareness of the amendment, its continued vitality is somewhat debatable.

Finally, the police and fire protection immunity does not apply to intentional torts committed by police against individuals. Thus, in Caplinger v. Carter 314 plaintiff alleged that police physically attacked him while he was handcuffed in a police car and again later at the police station, 315 and in Watson v. City of Kansas City 316 plaintiffs alleged that police used knowingly false facts to get warrants to search their rental properties. 317 In both cases the courts held that the immunity cannot cover intentional misconduct. While perhaps such misconduct ought to be outside the purview of the KTCA itself, intentional misconduct invariably violates some specific standard governing behavior and thus cannot be fairly viewed as discretionary in nature.

310. 857 F.2d 690 (10th Cir. 1988).
311. Id. at 692–93.
312. Id. at 698.
315. Id. at 288, 676 P.2d at 1302.
317. Id. at 1184.
G. The Emergency Management Activities Immunity

A traditional role of government is to provide preparation for and perform emergency functions “to prevent, minimize and repair injury and damage resulting from disasters.”318 Disasters may include natural occurrences such as tornadoes and floods, or man-made occurrences such as explosions or exposure to hazardous substances. Governmental entities could be parties to litigation to the extent that disaster-related injuries might arguably have been caused in part by negligence in the government’s warning about a pending disaster or providing emergency services in response to a disaster. Accordingly, the KTCA provides that government shall be immune from liability for damages resulting from “any claim based upon emergency management activities, except that governmental entities shall be liable for claims to the extent provided in article 9 of chapter 48 of the Kansas Statutes Annotated.”319

In Bradley v. Board of County Commissioners of Butler County320 local officials were aware of the approach of severe weather, but the warning sirens failed to work. Police then drove through the community with their police sirens activated. Nevertheless, plaintiff was severely injured when a tornado struck her home.321 She sued the county for failure to have an approved emergency preparedness plan on file as required by the Kansas Emergency Preparedness Act (KEPA).322 The court of appeals held that the county was immune because the “emergency management activities” immunity allows only those actions permitted by KEPA and KEPA does not authorize claims based on noncompliance with the requirement of having an approved plan on file.323 In essence, the “emergency management activities” immunity defers to a separate statutory scheme all questions of liability in this area.324 Because governmental tort liability exists only to the extent government consents to be sued, this approach is perfectly proper.

319. Id. § 75-6104(j) (Supp. 2003).
321. Id. at 606, 890 P.2d at 1232.
The court also held that the activities of the county constituted "emergency preparedness" as defined in KEPA. Although the KTCA and KEPA do not specifically refer to each other, the court reasoned that they relate to the same subject matter and class of things. Therefore, the court could infer that the phrase "emergency preparedness activities" in the KTCA referred to KEPA. Out of an abundance of caution, the court concluded in the alternative that if plaintiff's action was somehow outside the purview of KEPA, it was still barred because warning about approaching severe weather is deemed to be a "discretionary function" and law enforcement officers cannot be held liable unless their actions involve malice, oppression in office or wilful misconduct.\textsuperscript{325}

This alternative rationale may interject unnecessary confusion into the analysis. A sound argument may be made that the immunities covering specific governmental functions should be limited in some manner to their discretionary as opposed to ministerial applications. A decision to warn about approaching severe weather may be viewed as discretionary, but a failure to maintain disaster sirens in good working order hardly seems to meet even a liberal interpretation of discretionary.\textsuperscript{326} On the other hand, if the matter is wholly governed by KEPA, the discretionary or ministerial nature of the county or city's failure to warn may well be irrelevant.

\textbf{H. The Community Service Immunity}

In Kansas a judge may sentence certain offenders to perform community service in lieu of more traditional punishments such as imprisonment or a fine.\textsuperscript{327} The judge, a court services officer, or a community correctional services officer would then assign the offender to a specific project to satisfy the community service requirement. To date the courts have not had the opportunity to interpret the community service immunity. It provides that a governmental entity shall not be liable for damages resulting from "any claim for damages arising from the performance of community service work other than damages arising from the operation of a motor vehicle as defined by K.S.A. 40-3103, and


\textsuperscript{326} Courts have consistently characterized failure to perform normal maintenance as ministerial. \textit{E.g.}, Indian Towing Co. v. United States, 350 U.S. 61 (1955); Huseby v. Bd. of County Comm'rs of Cowley County, 754 F. Supp. 844 (D. Kan. 1990).

\textsuperscript{327} \textit{See KAN. STAT. ANN.} § 75-6102(e) (1997 & Supp. 2003) (defining community service work). \textit{See also id.} §§ 75-5290 to -52,111 ("community corrections act").
amendments thereto. Claims arguably affected by this immunity fall into two broad categories: claims based on injuries suffered by one performing community service work; and claims based on injuries caused to another by one performing community service work.

In the absence of an immunity, the KTCA should recognize the claim of an injured community service worker brought against the governmental entity for the negligence of another community service worker, for negligent supervision, or for other negligence in failing to protect the worker or provide him with a safe work environment. Generally, prisoners in the custody and under the control of governmental employees operating a penal institution may bring an action under the KTCA for negligent failure to protect them from foreseeable dangers. The community correctional services program should owe a duty of care to the worker individually, not just to the public at large, because the program technically has custody or control over the community service worker. In essence, the criminal offender sentenced to community service should be treated comparably to the criminal offender in a penal institution.

A claim by an injured community service worker may be subject to two specific immunities. First, in some instances the claim may be barred by the workers compensation immunity. An individual performing community service work is deemed an employee of the governmental entity for purposes of the Kansas workers compensation act if the governmental entity elects to extend workers compensation coverage to community service workers. If coverage is extended to community service workers, then the workers compensation immunity would mandate that his exclusive remedy be his workers compensation benefits.

If the governmental entity does not elect workers compensation coverage for community service workers, the issue becomes whether the community service immunity bars the worker’s claim. Presumably the injury would have occurred during the performance of the community service work, but the immunity applies only if the claim “arises out of” the performance of the community service work. If the injury results

328. *Id.* § 75-6104(s) (Supp. 2003).
331. *See supra* notes 54–60 and accompanying text.
332. KAN. STAT. ANN. § 44-508(b) (2000).
333. *See id.* § 44-501(b) (limiting employer liability).
from the negligence of another community services worker performing his work, the issue is probably avoided because the injury has apparently arisen out of the other worker’s performance of his community service work and the “arising out of” requirement should be satisfied. If the worker’s injury results from the negligent supervision of the community correctional services officer or court services officer, the “arising out of” requirement might not be satisfied. The injury could be viewed as simply an injury from some cause inflicted upon one who is performing community service work, not an injury “arising out of” the performance of community service work. This narrower interpretation would be consistent with the policy of strict construction in order to make liability the rule and immunity the exception. The governmental entity would then be entitled to immunity only if the conduct of the community correctional services officer or court services officer was of such a nature and character as to constitute a discretionary function.

The second category of claims arises from injuries caused by the community service worker to third persons. To the extent the injury resulted from a decision by a judge to sentence the individual offender to community service in lieu of incarceration, it should be barred by the judicial function and discretionary function immunities. To the extent the injury resulted from a policy-oriented decision by a judge, court services officer, or a community correctional services officer, the claim should be barred by the discretionary function immunity.

The hard question is to what extent should a governmental entity, not otherwise immune, be liable for injuries caused by non-discretionary or ministerial acts of the community service worker. Courts have limited other immunities to situations in which the activity qualified as discretionary or at least as non-ministerial.334 This approach is rendered difficult by the express qualification of the immunity to exclude claims for damages arising “from the operation of a motor vehicle as defined by K.S.A. 40-3103, and amendments thereto.”335 That section is part of the Kansas Automobile Injury Reparations Act, and it contains twenty-seven definitions, one of which defines “motor vehicle” to mean “every self-propelled vehicle of a kind required to be registered in this state . . . but such term does not include a motorized bicycle.”336 The other definitions in this statute have no relevance to community service work. Accordingly, the qualification seems simply designed to exclude motor

334. The best example would be the police and fire protection immunity. See supra notes 284–317 and accompanying text.
336. Id. § 40-3103(m) (2000).
vehicle injuries from the immunity. This exclusion eliminates the most obvious non-discretionary cause of injury from the immunity. The issue becomes whether the express exclusion of one non-discretionary cause of injury constitutes exclusion of other non-discretionary causes of injury. If so, it is unclear why this aspect of the penal system should enjoy an immunity broader in scope than either the discretionary function immunity, the judicial immunity, or the police and fire protection immunity.

I. The Juvenile Justice Program Immunity

The Juvenile Justice Reform Act of 1996\(^{337}\) imposed upon the commissioner of juvenile justice a number of additional duties, including the duty to develop new juvenile justice programs and to restructure existing juvenile justice programs.\(^{338}\) To carry out that duty, the Act authorizes the commissioner to contract with public, private or nonprofit agencies to secure the functions and services necessary to operate the juvenile justice authority.\(^{339}\) The legislature then added to the list of specific immunities in the KTCA an immunity from liability for damages resulting from “any claim arising from providing a juvenile justice program to juvenile offenders, if such juvenile justice program has contracted with the commissioner of juvenile justice or with another nonprofit program that has contracted with the commissioner of juvenile justice.”\(^{340}\) Although the courts have not yet had an opportunity to interpret this provision, two basic issues seem appropriate: which program providers share in the immunity, and whether the immunity is limited to discretionary actions.

The first issue is whether the immunity is available to private providers of juvenile justice programs. The immunity applies to any claim “arising from providing a juvenile justice program” without regard to whether the program is provided by a governmental entity, a nonprofit entity, or a private entity. The statute only requires that the program have a contract with the commissioner or a contract with another nonprofit program that has a contract with the commissioner. Nothing in the statute indicates that the immunity would not be available to a privately operated program so long as the required contract with the commissioner existed. In other contexts, the courts have extended the

\(^{337}\) Id. §§ 75-7022 to -7053 (1997 & Supp. 2003).
\(^{338}\) Id. § 75-7024(a)(1)-(2).
\(^{339}\) Id. § 75-7024(a)(3).
\(^{340}\) Id. § 75-6104(v) (Supp. 2003).
protection of an immunity to private parties, such as the Jaycees who were running a softball league using city-owned fields. 341

However, the definition of employee in the KTCA generally excludes independent contractors, but then lists certain independent contractors who may be considered employees protected by the KTCA. One of the statutory exceptions is for

a person who is an employee of a nonprofit program, other than a municipality, who has contracted with the commissioner of juvenile justice or with another nonprofit program that has contracted with the commissioner of juvenile justice . . . to provide a juvenile justice program for juvenile offenders in a judicial district provided that such employee does not otherwise have coverage for such acts and omissions within the scope of their employment . . . through a liability insurance contract of such nonprofit program. 342

This definition would seem to exclude the private-for-profit provider of a juvenile justice program. The exclusion may be rational. Even the employee of a nonprofit provider would be without immunity to the extent that the nonprofit provider has liability insurance to cover the claim. Private-for-profit providers would normally be expected to have liability insurance, and that insurance would then apply in lieu of any immunity.

The second issue is whether this immunity should be limited to its discretionary applications. To a considerable extent, this immunity and the community service immunity both seem to be specific variations of the police and fire protection immunity. 343 That immunity has been limited to its discretionary applications, and the catch-all provision at the end of the enumerated immunities implies that all the immunities should be limited to their discretionary applications. Little reason exists to treat the juvenile justice program immunity differently.

IV. SPECIFIC IMMUNITIES RELATING TO HIGHWAYS

Historically the State of Kansas and its subdivisions had a duty to maintain highways in a reasonably safe condition. Courts imposed a common law duty on municipalities as an exception to the immunity for

342. KAN. STAT. ANN. § 75-6102(d)(3).
343. For a discussion of the police and fire protection immunity, see supra notes 283–317 and accompanying text.
governmental functions. The legislature waived immunity for the State of Kansas and for the Kansas Turnpike Authority. Counties and townships were subdivisions of the state and thus, unlike municipalities, were immune until the state waived immunity by statute. Under the KTCA these earlier duties were abolished and replaced by the general rule imposing liability on governmental entities for negligence, subject to exceptions for specific immunities. Three specific immunities purportedly limit to some extent government’s liability for highway defects: the traffic signing immunity, the minimum maintenance road immunity, and the snow and ice condition immunity.

A. The Traffic Signing Immunity

The “traffic signing” immunity is a mixture of discretionary and non-discretionary function immunity. It provides immunity from liability for damages resulting from

the malfunction, destruction or unauthorized removal of any traffic or road sign, signal or warning device unless it is not corrected by the governmental entity responsible within a reasonable time after actual or constructive notice of such malfunction, destruction or removal. Nothing herein shall give rise to liability arising from the act or omission of any governmental entity in placing or removing any of the above signs, signals or warning devices when such placement or

344. A duty to maintain streets and sidewalks in a safe condition has been “maintained and promulgated by the supreme court of Kansas nearly ever since its first organization, and such is now the unquestioned doctrine in this state.” Gould v. City of Topeka, 32 Kan. 485, 488-89, 4 P. 822, 824 (1884). For early examples of this common law duty in Kansas, see, e.g., Burns v. City of Emporia, 63 Kan. 285, 65 P. 260 (1901), Jansen v. City of Atchison, 16 Kan. 356 (1876), and City of Atchison v. Chaliss, 9 Kan. 410 (1872).


350. KAN. STAT. ANN. § 75-6104(h) (Supp. 2003).

351. Id. § 75-6104(r).

352. Id. § 75-6104(f).
removal is the result of a discretionary act of the governmental entity. 353

The first sentence adopts a routine negligence test for liability. It provides that government may be liable for harm caused by the malfunction, destruction or unauthorized removal of a traffic sign, signal or warning device only if the government had actual or constructive notice of the situation and failed to correct it within a reasonable time. 354 The basis for liability is negligence because liability exists only when the governmental entity fails to respond reasonably after actual notice of the danger or after the lapse of a sufficient period of time that the governmental entity should have reasonably discovered the danger, i.e., constructive notice. 355 This situation does not involve a discretionary function. At some earlier point in time the government exercised discretion when it decided to put in place the traffic sign, signal or warning device, and now the only question is whether the government failed to exercise reasonable care in not correcting the situation after its actual or constructive notice of the malfunction, destruction or unauthorized removal. 356

The duty to maintain in good condition signs, signals and warning devices is not eliminated or modified simply because the decision to install them initially was discretionary. In Huseby v. Board of County Commissioners of Cowley County 357 rumble strips and a warning painted onto the highway had worn away and were no longer effective in warning about a railroad crossing. Liability for failure to maintain them in good condition was appropriate even though the rumble strips and painted warning were not mandated either by statute or by the Manual on Uniform Traffic Control Devices (MUTCD). This ruling is analogous to the traditional rule in negligence law that one who has no duty to go to

353. Id. § 75-6104(h).
354. See, e.g., Huseby v. Bd. of County Comm’rs of Cowley County, 754 F. Supp. 844 (D. Kan. 1990) (finding liability for failure to repair rumble strips and a warning painted onto the pavement that had both worn away and thus did not give adequate warning of highway intersection with railroad).
355. See, e.g., id. (finding no liability for failure to replace a sign warning about a curve in the highway when the evidence failed to establish either actual or constructive knowledge of the sign’s removal).
356. Of course, the plaintiff must still satisfy all the elements of a negligence claim, including causation. Thus, a county would not be liable for its failure to replace a sign warning about a curve in the highway when the driver was admittedly not looking at the highway and would not have seen a sign at the time his truck went off the highway. Kastendieck v. Bd. of County Comm’rs, 934 F. Supp. 387 (D. Kan. 1996); see also Tomberlain v. Haas, 236 Kan. 138, 689 P.2d 808 (1984) (finding that the lack of a stop sign at an intersection was not causally connected to an accident where plaintiff claimed to have stopped at the intersection anyway).
the aid of another may incur a duty of reasonable care by undertaking to provide assistance.\textsuperscript{358}

However, this provision only applies to those signs, signals and warning devices that relate to the safe and efficient handling of traffic on public roads and sidewalks. For example, in \textit{Tuley v. City of Kansas City},\textsuperscript{359} a temporary barricade with flashing lights intended to warn pedestrian traffic about a defective catch basin near a sidewalk was considered to fall within the meaning of “warning device.” On the other hand, in \textit{Collins v. Douglas County},\textsuperscript{360} the court held that failure to install a “no diving” or “low water” sign on a bridge over a creek was immune as a discretionary function under the second part of the immunity provision. Indeed, it is questionable whether a sign warning about a danger wholly unrelated to highway safety should be covered at all by the traffic signing provision.

Moreover, this immunity applies only to the malfunction, destruction or unauthorized removal itself and not to any other governmental misconduct that might have also contributed to an injury. Thus, in \textit{Tuley v. City of Kansas City} the city had placed a sawhorse-type temporary barricade with a flashing light across a sidewalk near plaintiff’s home to warn about a catch basin defect near the sidewalk. The city had known about the catch basin defect for more than four months, and it knew a small child almost fell into the catch basin. Then a snowfall concealed the catch basin and, unknown to the city, some unauthorized person moved the temporary barricade into the street. Plaintiff was attempting to move the barricade back onto the sidewalk when he stepped into the catch basin and was injured.\textsuperscript{361} The court of appeals held that the city had immunity for damages caused by the unauthorized removal of the barricade from the sidewalk, but not for its negligent failure to keep the

\textsuperscript{358} \textit{Restatement (Second) of Torts} § 324A (1965). In applying the KTCA in other contexts, courts hold that once discretion has been exercised in making an initial decision, the subsequent carrying out of the decision is frequently deemed to be ministerial, not discretionary. \textit{See, e.g., Burgess v. West}, 817 F. Supp. 1520, 1525 (D. Kan. 1993) (“[O]nce a stated policy is in place to govern conduct, governmental employees are no longer exercising discretion.”); \textit{Nero v. Kan. State Univ.}, 253 Kan. 567, 588, 861 P.2d 768, 782 (1993) (finding that the decision to build coed housing was discretionary, but created a duty to protect the occupants); \textit{Kan. State Bank & Trust Co. v. Specialized Transp. Servs., Inc.}, 249 Kan. 348, 368, 819 P.2d 587, 601 (1991) (finding that the development of a school bus reporting scheme was discretionary, but the decision to follow it was not); \textit{Allen v. Kan. Dep’t of Soc. & Rehab. Servs.}, 240 Kan. 620, 622–23, 731 P.2d 314, 315–16 (1987) (finding that the decision to clean a floor was discretionary, but actually cleaning it was not); \textit{Jackson v. City of Kansas City}, 235 Kan. 278, 289, 680 P.2d 877, 888 (1984) (finding that once discretionary policies were promulgated, the city did not have discretion on whether to adhere to them).


\textsuperscript{361} 17 Kan. App. 2d at 663, 843 P.2d at 270.
sidewalks in a reasonably safe condition.\textsuperscript{362} This decision is probably sound because the city has no immunity for failing to keep streets and sidewalks in a safe condition, and a moveable barricade is not necessarily sufficient as a permanent solution to a sidewalk defect. After passage of a reasonable time without attempting any repairs on the catch basin, the condition could fairly be deemed to constitute an unreasonably dangerous highway defect. Thus, the county’s liability is for its failure to repair the catch basin defect and not for any failure to discover the moving of the temporary barricade.

The second sentence of section 75-6104(h) immunizes governmental decisions not to place a traffic sign or signal at a particular location so long as the decision is discretionary in nature. Thus, in \textit{Force v. City of Lawrence}\textsuperscript{363} plaintiff was seriously injured when a van turned in an intersection in front of plaintiff’s oncoming motorcycle. The court of appeals held that the failure to install a left turn arrow on the traffic signal in an intersection was immune as a discretionary function because the MUTCD provides no guidance on when such a turn signal is required and instead leaves the matter to the city’s discretion. Similarly, in \textit{Toumberlin v. Haas}\textsuperscript{364} failure to place traffic control signs at an unmarked rural “low volume” intersection was discretionary where plaintiff provided no engineering studies, no accident history, and no evidence that the MUTCD would require any signs at that location.\textsuperscript{365}

Decisions not to install traffic signs, signals or warning devices are not automatically discretionary in nature. Clearly, when the MUTCD requires a sign, signal or warning device at a certain location, the matter is no longer discretionary. However, even if the MUTCD does not mandate a sign, signal or warning device, it may provide sufficient directions and guidelines to render a decision by highway engineers one of professional judgment rather than discretion. Thus, in \textit{Carpenter v. Johnson}\textsuperscript{366} a decision whether to install a sign warning about a curve in the highway involved professional judgment rather than discretion because the MUTCD guidelines indicated that, under the totality of circumstances, a curve warning sign would be required.\textsuperscript{367}

\textsuperscript{362} \textit{Id.} at 664, 843 P.2d at 270.
\textsuperscript{365} For the same reasons, the failure to install on a bridge a sign warning that the water in a creek was shallow and diving off the bridge was unsafe was discretionary. \textit{Collins v. Douglas County}, 249 Kan. 712, 822 P.2d 1042 (1991). However, as previously noted, the proposed signs are unrelated to highway safety and probably should not be subject at all to the traffic signing immunity.
\textsuperscript{366} 231 Kan. 783, 649 P.2d 400 (1982).
\textsuperscript{367} \textit{See Finkbiner v. Clay County}, 238 Kan. 856, 714 P.2d 1380 (1986) (finding that when MUTCD provides standards for installing signs, the decision to install a sign becomes one of
One final point requires brief mention. In *Toumberlin v. Haas* the court held that a county has no duty to remove from its right-of-way weeds, brush or other growth blocking a driver’s view of an intersection so long as the obstruction was not on the highway itself.\(^{368}\) The court reasoned that cases prior to the KTCA held that these obstructions did not constitute highway defects\(^{369}\) and that a duty to clear away these obstructions would be burdensome because there were some 1,700 intersections in the county.\(^{370}\) This matter is technically not covered by the traffic signing immunity, and the old highway defect statutes have been repealed, the purpose of the KTCA was to make government liable for its negligently caused harms unless excepted by one of the enumerated immunities, and blind intersections seem inconsistent with the concept of reasonably safe highways. Perhaps the courts should have left this matter to the legislature which could add a specific immunity, if it deemed the matter appropriate for an immunity.

**B. Minimum Maintenance Road Immunity**

A minimum maintenance road is one that is determined by a county commission to be used only occasionally or by only a limited number of individuals. A governmental entity is not liable for damages resulting from “the existence, in any condition, of a minimum maintenance road, after being properly so declared and signed as provided in K.S.A. 68-5,102, and amendments thereto.”\(^{371}\)

The Kansas courts have not yet had occasion to interpret this immunity. Nevertheless, the intent of the legislature would seem reasonably clear. Under the KTCA, any governmental entity that

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\(^{369}\) The court relied specifically on *Lyke v. State Highway Comm’n*, 160 Kan. 709, 165 P.2d 228 (1946). That case pre-dated modern thinking about governmental responsibility for the tortiously-caused harms inflicted on citizens. It also involved highway equipment which posed only a temporary obstruction rather than an obstruction such as bushes which would be permanent unless cut down. *Id.* at 709, 165 P.2d at 229.

\(^{370}\) *Toumberlin*, 236 Kan. at 143–44, 689 P.2d at 813–14. The burden imposed on a county is not as much a function of the total number of intersections in the county as it would be the number of those intersections that would in fact require affirmative brush clearing activities by the county and how often the county would have to clear them.

\(^{371}\) KAN. STAT. ANN. § 75-6104(r) (Supp. 2003).
maintains roads is under a duty of reasonable care to maintain those roads in a reasonably safe condition. Most Kansas counties are rural in nature, have a relatively sparse population and thus a limited tax base, and yet may have more than a thousand miles of roads, many of which could meet the definition of a minimum maintenance road. In such a situation, the traditional negligence analysis would support a conclusion that the county would owe "no duty" to provide maintenance or specific improvements to such a road because the burden on the county would outweigh the risk to the limited number of users of the road.

Even without an immunity, a rational application of the traditional risk-benefit analysis underlying negligence would find in favor of the county in the vast majority of cases. Yet the jury system provides no guarantees. An occasional jury might consider certain isolated conditions sufficiently dangerous to justify some maintenance or repairs despite the limited use of the road, and a single adverse verdict could badly damage a rural county's financial situation. Even if the county eventually prevailed in the litigation, the cost of defense could become unduly burdensome. Moreover, the fear of litigation might pressure the county to incur inappropriate levels of spending on inspection, maintenance and repair of minimum maintenance roads.

However, before the immunity exists, two preconditions must be met. The county must designate a road as a minimum maintenance road, and then its must publish in the official county paper notice of a public hearing on that designation. In addition, the county must promptly post signs on the road stating "Minimum maintenance, travel at your own risk."

At least three issues concerning the scope of the minimum maintenance road immunity merit brief mention. First, courts should probably not interpret this immunity to be limited to its discretionary applications. The possibility of liability for injuries resulting from the existence or condition of a minimum maintenance road would undermine the legislative intent to relieve counties of any need to anticipate

372. For example, according to the Kansas Department of Transportation, Russell County, Kansas has 1422 miles of roads, and Douglas County, Kansas has 1192 miles of roads. KANSAS DEP'T OF TRANSP., SELECTED STATISTICS 21–22 (2002), http://www.ksdot.org/divplanbning/selstat/SelectedStatistics.pdf.

373. For cases involving sparsely used county roads not formally designated as minimum maintenance roads, see Finkbiner v. Clay County, 238 Kan. 856, 864, 714 P.2d 1380, 1385 (1986), discussing how the road was "the most primitive class of road in the state—a Type C road," and Toumberlin v. Haas, 236 Kan. 138, 143, 689 P.2d 808, 813 (1984), noting that a sign was not required because of the low volume of traffic.

374. KAN. STAT. ANN. § 68-5,102(a)–(c) (2002).

375. Id. § 68-5,102(d).
exceptions to the immunity. Moreover, the immunity is not limited to section 75-6104(r), but is also set forth in absolute terms in section 68-5,102(f). Unlike section 75-6104 with its qualifying language implying that all the specific immunities might be limited to their discretionary applications, section 68-5,102 sets forth the immunity in absolute terms without any suggestion of a limitation to discretionary applications.

Second, the immunity is essentially limited to counties. The minimum maintenance road immunity set forth in section 75-6104(r) specifically refers to section 68-5,102 in defining a minimum maintenance road. Section 68-5,102 limits the authority to designate a road as a minimum maintenance road to counties. It is unlikely that—except in the rarest of cases—some other governmental entity could step into the shoes of a county and become a beneficiary sharing in the county’s immunity.

Third, the immunity is limited to “the existence, in any condition, of a minimum maintenance road.” The immunity applies to harms in which the condition of the road allegedly was unreasonably dangerous and contributed to an accident, not more broadly to any accident occurring on the road. For example, a county employee should not have immunity for damages resulting from injuries caused by the employee’s negligent operation of a vehicle on a minimum maintenance road.376

C. The Snow or Ice Immunity

The “snow or ice” immunity raises another clash between statutory ambiguity and the apparent purpose of the specific immunity. It provides that a governmental entity shall not be liable for damages resulting from “snow or ice conditions or other temporary or natural conditions on any public way or other public place due to weather conditions, unless the condition is affirmatively caused by the negligent act of the governmental entity.”377

Taylor v. Reno County378 is a classic illustration of the perceived need for this immunity. In that case the sheriff’s department advised the public works department one evening that a winter rain was causing

376. Arguably an action based on the negligent driving of a county employee could, for purposes of comparative fault loss allocation, bring in the condition of the road as an additional cause of the accident. In Kansas a defendant may join any immune, unknown or unavailable other tortfeasor for comparative fault purposes. Brown v. Keill, 224 Kan. 195, 206, 580 P.2d 867, 876 (1978). In such a case, the courts must be careful not to assume that the existence of the immunity means that an allegedly dangerous condition of the road truly constitutes negligence.


some slickness to develop on county bridges and overpasses, and that some accidents were occurring.\textsuperscript{379} The public works department indicated that it would start applying sand and salt early the next morning.\textsuperscript{380} Later that evening plaintiff lost control of her car on a sheet of ice that formed on a bridge, but not on the adjoining roads, causing the death of one of her children and serious injury to another.\textsuperscript{381}

In concluding that both the county and its director of public works were immune from liability, the supreme court essentially reasoned that the legislature intended the “snow and ice” immunity to preserve a governmental immunity that had existed prior to the KTCA.\textsuperscript{382} Prior to the KTCA, Kansas recognized the liability of governmental entities for harms caused by so-called highway defects.\textsuperscript{383} Courts have consistently held, however, that neither municipalities nor counties would be liable for injuries caused by natural accumulations of snow and ice.\textsuperscript{384} The rationale was simply that the legislature could not have intended liability because the burden of removing snow and ice on miles and miles of sidewalks and streets “would be so great and so impracticable, if not impossible.”\textsuperscript{385} In many parts of the country, including Kansas, inclement weather may adversely affect a wide geographic area encompassing thousands of miles of a road system, including roads, bridges, overpasses, sidewalks and other areas generally used in connection with public travel. The road system cannot be built in a manner safe for travel in snowy or icy conditions,\textsuperscript{386} and government could not afford the massive amounts of labor and equipment necessary to clear the road system promptly and then keep it clear while winter storms are covering large geographic areas with snow and ice. In essence, this classic “no duty” rationale recognizes a burden that outweighs the risk. Had the legislature not adopted an immunity, courts would have undoubtedly reached the same result by simply determining that governmental entities owe no duty to remove natural accumulations of snow and ice promptly from the road system.

\begin{itemize}
\item \textsuperscript{379} \textit{Id}. at 308, 747 P.2d at 101.
\item \textsuperscript{380} \textit{Id}.
\item \textsuperscript{381} \textit{Id}.
\item \textsuperscript{382} \textit{Id}. at 312, 747 P.2d at 104.
\item \textsuperscript{383} \textit{See supra} note 344 and accompanying text.
\item \textsuperscript{384} \textit{See} Gorges v. State Highway Comm’n, 135 Kan. 371, 373–74, 10 P.2d 834, 836 (1932) (discussing the non-liability of the state for injuries caused by natural accumulations of snow and ice); Evans v. Concordia, 74 Kan. 70, 74, 85 P. 813, 815 (1906) (discussing the non-liability of municipalities).
\item \textsuperscript{386} \textit{E.g.}, Butcher v. Racine, 208 N.W. 244, 246 (Wis. 1926); Foss v. Town of Kronenwetter, 273 N.W.2d 801, 805 (Wis. Ct. App. 1978).
\end{itemize}
The immunity basically recognizes that public officials have discretion concerning when and to what extent they will expend public resources to alleviate snow and ice conditions. Thus, in Taylor the county’s decision to wait until the next morning to begin the spreading of sand and salt was within its discretion. After all, even if the county began at once spreading sand and salt, it is not clear that it would have treated the location of the plaintiff’s accident before she lost control of her car, or that spreading sand and salt there would have prevented her loss of control of the car, or that further overnight rain might not have eliminated by morning, when traffic is heavier, the effectiveness of sand and ice spread the previous evening.387

Although in its basic application the “snow and ice” immunity seems sound, ambiguity in its statutory language poses a difficult question concerning the scope of the immunity. In two cases, breaks in municipal water mains released water into a street, and the eventual freezing of the water caused injuries to motorists who lost control of their cars on the ice. In Draskowich v. City of Kansas City388 employees of the Board of Public Utilities (BPU) initially turned off the water, only to later turn it back on in order to be able to locate the precise location of a break in the water main. Although water flowed into the street and eventual freezing was likely, the BPU did not place any warnings in plaintiff’s westbound lanes. The BPU repeatedly requested a sand truck, but the truck did not arrive until nearly three hours after the first request and an hour after plaintiff’s accident. In upholding a verdict for plaintiff, the supreme court reasoned that the ice was “not the product of natural weather conditions” and “affirmative acts of the City caused the accident.”389

In Lopez v. Unified Government of Wyandotte County390 ice formed on a street in the early morning after a break in a water main. The Board

387. This is a classic example of the policy-oriented decision-making protected by the discretionary function immunity. Decisions concerning how best to expend limited resources in a manner to maximize the benefit to the public, but of necessity not eliminating all risk, should arguably not be subject to second-guessing in the litigation process.


389. Id. at 741, 750 P.2d at 416.

390. 31 Kan. App. 2d 923, 75 P.3d 1234 (2003). In the interest of full disclosure, I have assisted the attorneys representing plaintiff-appellant in the appellate proceedings in Lopez. Subsequent to the editing of this Article, the Kansas Supreme Court affirmed the court of appeals decision in Lopez, 89 P.3d 588 (Kan. 2004). The court noted the various doctrines purporting to limit the scope of immunities and extend liability to match that of private employers. However, the court held that the use of “or” in the statutory phrase “snow or ice conditions or other temporary or natural conditions” (emphasis added) suggested that “conditions not entirely due to natural sources may have been contemplated in the legislative phrasing.” Id. at 590. Something that simply “may have been contemplated” by the legislature is not the equivalent of a statute’s plain meaning and should not dictate a result completely at odds with the policy bases of the statutory scheme.
of Public Utilities discovered the break an hour prior to plaintiff's accident, but failed to set up any barricades or other warnings for motorists. The court of appeals affirmed summary judgment for the county because the icy condition was not caused by any affirmative negligent act of the county. In essence, the court interpreted the statute as requiring an "affirmative negligent act" even though the water on the street was not the result of a "temporary or natural condition . . . due to weather conditions." 391

The statute is clearly ambiguous. May water from a broken water main that freezes due to "natural" temperature qualify as a "condition . . . due to weather conditions," 392 or must the source of the ice be natural precipitation plus freezing temperatures? Conversely, is an affirmative negligent act required for liability regardless of the source of the dangerous condition? If temperature alone without regard to the source of the water is sufficient to trigger immunity and thus an affirmative negligent act required in all cases, the statute would be given its broadest possible interpretation. Any water-related accident on a highway would be "due to weather conditions." 393 Cold temperature would cause ice, which in turn could cause loss of control of a motor vehicle. Warm temperature would prevent water from freezing, but would still enable a motor vehicle to lose control through hydroplaning on a wet road surface. In no case could there be liability for a failure to warn the traveling public of the danger unless an affirmative negligent act first created the danger. This broad interpretation seems inconsistent with every policy deemed relevant to the proper interpretation of the immunity provisions.

First, this broad interpretation expands the immunity well past any limitations based on a discretionary function. Whereas the discretionary nature of the immunity is evident when large areas are suddenly covered with snow or ice from natural precipitation, localized and isolated conditions of danger on one or a few streets do not involve the same considerations. Governmental entities have a duty to exercise reasonable care to correct street defects, and localized and isolated conditions of danger on streets are commonplace and governed by well-established notions of reasonable conduct. Indeed, the court in Draskowich recognized that providing routine warnings about a dangerous street condition is not a discretionary function. 394

391. KAN. STAT. ANN. § 75-6104(f) (Supp. 2003).
392. Id.
393. Id.
394. 242 Kan. at 739, 750 P.2d at 415.
Second, this broad interpretation of the immunity is inconsistent with the statutory intent to impose on government liability equal to that imposed on private parties. A private water company would have a duty to warn about the icy street condition in a case with facts similar to Lopez. An actor has a duty to exercise reasonable care to warn or protect third persons when that actor negligently\textsuperscript{395} or innocently\textsuperscript{396} causes a condition of danger. Thus, even if the break in the water main did not result from negligence, the water company would have a duty of care to third persons possibly endangered by it. The immunity was intended to protect governmental entities from the enormous burden involved in making a road system safe after snow and ice suddenly cover a large geographic area. A comparable burden cannot be assumed to exist when the condition of danger is isolated and localized and lends itself to effective, immediate and cost-effective precautions, as in both Draskowich and Lopez.

Third, this broad interpretation of the immunity is inconsistent with the policy of making liability the rule and immunity the exception. Admittedly, it would not be appropriate for courts to give each and every immunity provision the narrowest possible interpretation of its statutory language without regard to other policy considerations. It would be appropriate, however, for courts to require governmental entities to demonstrate that a broad interpretation is consistent with the basic policies governing the immunity provisions, or at least that a narrower interpretation is not consistent with those policies. Such a requirement would be consistent with the oft-repeated proposition that the governmental entity has the burden of proving its entitlement to immunity.\textsuperscript{397}

Finally, Lopez may have read too much into Draskowich. The court in Draskowich did not hold that turning the water back on to locate the break constituted an affirmative negligent act and did not even hold that an affirmative negligent act creating the danger was required as a precondition to liability. The court merely recited the facts that the BPU turned the water back on, that the BPU did not set up barricades or provide other warnings about the danger, and that the sand truck did not arrive until nearly three hours after it was first requested. It then stated that under these circumstances “affirmative acts of the City caused the accident.”\textsuperscript{398} Indeed, turning the water back on was probably not a

\textsuperscript{395} Restatement (Second) of Torts § 321 (1965).
\textsuperscript{396} Id. § 323.
\textsuperscript{397} See supra Part II.C.3.
\textsuperscript{398} 242 Kan. at 741, 750 P.2d at 416.
negligent act because service to customers could not be restored until the break was located and then repaired. More likely, the negligence consisted of not providing warnings or not promptly sanding the icy location. If so, then the reference to “affirmative acts” was surplusage and not required as a precondition to liability.\footnote{399}

This suggested interpretation does not render the “affirmative negligent act” requirement without meaning. The requirement provides a basis for courts to distinguish between the classic situation calling for immunity, i.e., injury caused by untreated or inadequately treated roads following a snow or ice accumulation caused by “weather conditions,” and situations where government adds to the danger of a natural snow or ice accumulation some additional danger, such as blocking motorists’ vision of intersections by piling plowed snow unreasonably high on the side of the road.\footnote{401}

V. SPECIFIC IMMUNITIES RELATING TO POSSESSION OR CONTROL OF LAND

Five immunities relate to governmental control of or activities on public property other than the road system: the “plan or design” immunity,\footnote{402} the “recreational use” immunity,\footnote{403} the “unimproved public land” immunity,\footnote{404} the “public cemetery” immunity,\footnote{405} and the “federal enclave” immunity.\footnote{406} These immunities relate to the government’s role as landowner, although the “plan or design” immunity may apply to certain features of a road system as well as to buildings and other structures on public land. Accordingly, courts should consider the duties owed by private owners and occupiers of land to persons outside the land or coming onto the land as especially relevant to the interpretation of all of these immunities except the federal enclave immunity, which is probably out of place in the KTCA.

\footnote{\textbf{399}. It is important to note that the court in \textit{Draskovich} did not identify any of these “affirmative acts” as “negligent acts.” Accordingly, nothing in the opinion negates an interpretation that the negligence in \textit{Draskovich} consisted solely of a failure to provide adequate warnings.}

\footnote{\textbf{400}. \textsc{Kan. Stat. Ann.} § 75-6104(f).}

\footnote{\textbf{401}. The state could incur liability if a defect in its highway design or construction caused an accumulation of snow or ice on the highway. \textsc{Trout v. Koss Constr. Co.}, 240 Kan. 86, 92, 727 P.2d 450, 455 (1986).}

\footnote{\textbf{402}. \textsc{Kan. Stat. Ann.} § 75-6104(m).}

\footnote{\textbf{403}. \textit{Id.} § 75-6104(o).}

\footnote{\textbf{404}. \textit{Id.} § 75-6104(p).}

\footnote{\textbf{405}. \textit{Id.} § 75-6104(q).}

\footnote{\textbf{406}. \textit{Id.} § 75-6104(w).}
A. Plan or Design of Construction or Improvements to Public Property

One recurring function of government involves the approval by an appropriate governmental entity for the plan or design of some building, improvement to a building or other structure to be constructed on public property. Buildings and other structures may continue in use for long periods of time spanning decades. Yet as time passes the original plan or design for a building or other structure may compare unfavorably to more recently constructed buildings and structures employing improved building materials, newer technology, advances in understanding safety aspects of construction and other matters. For an earlier plan or design decision to be judged by contemporary—and perhaps improved—standards involves considerable unfairness to the decision-maker. Accordingly, the KTCA provides immunity for

the plan or design for the construction of or an improvement to public property . . . if the plan or design is approved in advance . . . by the governing body of the governmental entity . . . exercising discretionary authority to give such approval and if the plan or design was prepared in conformity with generally recognized and prevailing standards in existence at the time such plan or design was prepared. 407

In *Johnson v. Board of County Commissioners of Pratt County* 408 the negligent design of a bridge over a river caused erosion of plaintiff’s property. The supreme court held that the “plan or design” immunity did not apply to the county because the county failed to get the proper prior approval. 409 It is important to note, however, that the failure to receive prior approval, by itself, is not sufficient for liability. 410 This provision is not a true immunity because it adopts a negligence standard and declares the governmental entity to be immune when it is not negligent. Liability is imposed only if the plan or design does not conform with generally recognized and prevailing standards in existence at the time the plan or design was prepared. A “generally recognized” standard existing “at the

407. *Id.* § 75-6104(m).
409. *Id.* at 330, 913 P.2d at 137.
410. Failure to get prior approval would be analogous to the violation of a licensing statute. Courts refuse to allow a party’s failure to have a license for some activity to be used in evidence to establish a negligence per se claim. The rationale is that the absence of a license does not indicate that the conduct of the party fell below the standard of a reasonable and prudent person. RESTATMENT (THIRD) OF TORTS: BASIC PRINCIPLES § 14, cmt. h (Tentative Draft No. 1, 2001). Similarly, the failure to get prior approval does not indicate that the resulting plan or design fell below acceptable standards.
time” of preparation is a “state of the art” limitation that prevents the imposition of strict liability. Thus, although the county could not avail itself of the immunity provision to avoid liability, the county’s liability would nevertheless depend upon the same proof in any case, i.e., proof by a preponderance of the evidence that the design of the bridge did not conform with the then-prevailing generally recognized standards governing bridge design. The “plan or design” immunity provides immunity only from strict liability, not from negligence, and to date Kansas has not imposed strict liability on private parties who plan or design real estate construction or improvements.411

Moreover, the “plan or design” immunity does not apply to every danger in construction of or improvement to real property, but only to the plan or design of the construction or improvement. In Dunn v. Unified School District No. 367412 the Kansas Court of Appeals rejected an attempt to broaden the interpretation of this immunity. In that case a glass door in a busy hallway of a high school was designed to open by pushing on a crossbar across the door. Two high school students severely lacerated their hands when one student’s hand slid off the crossbar, hit the glass, which shattered into razor-sharp shards. The door had been installed in the 1960s using ordinary glass rather than safety glass. The court of appeals held that the “plan or design” immunity applied only to the actual design of the door, and not to other breaches of duties such as a failure to warn, a failure to inspect, or a failure to keep the door open during particularly busy periods.413

The court’s decision was based solely on a careful and limited statutory construction of the actual language in the provision, which applied only to claims for “damages resulting from . . . the plan or design for the construction of or improvement to public property.” In Dunn a narrow interpretation limiting the provision to the plan or design of the door was supported both by the general policy of treating liability as the rule and immunity as the exception and by the more specific rule expressio unius est exclusio alterius, i.e., the rule of statutory construction that inclusion of a specific matter in a statute implies the exclusion of other matters omitted from the statute. Thus, inclusion of

411. Traditionally, courts have been reluctant to extend strict liability for defective products to real property. Some courts have done so. E.g., Schipper v. Levitt & Sons, Inc., 207 A.2d 314, 320–21 (N.J. 1965). However, most of these courts have limited strict liability to cases involving mass produced housing or defective products incorporated within a construction project. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 19(a) & cmt. e (1998). Kansas has never applied strict liability for defective products to a seller of real estate.
413. Id. at 229, 40 P.3d at 325.
immunity for the “plan or design” specifically mentioned in the statute implied exclusion of immunity for any duty to warn or to keep the door open during busy periods.

This narrow interpretation was also consistent with the broad policy of the KTCA that government should be exposed to the same liability as private parties. Any liability of a private party for the design of the door in Dunn in the 1960s would be barred by the ten-year repose provision in the two-year statute of limitations governing negligence claims. The repose provision would not protect the private party from liability for a failure to warn about the dangerousness of the design at the time of the accident decades later. However, Kansas law does not currently contain any statutory provision or judicial doctrine that would automatically protect the private owner of premises for continued maintenance of an original plan or design that has subsequently proven to be unreasonably dangerous. The limited interpretation of the “plan or design” immunity in Dunn is not fully consistent with the scope of private party liability, but an extension of the immunity to failures to warn would make the immunity far less consistent with the scope of private party liability. Thus, the narrow interpretation of the “plan or design” immunity is essentially consistent with all the policy considerations relevant to interpreting the immunity provisions in the KTCA.

Dunn also contained an important point for future reference. The court left open the possibility that the design immunity might not protect the government in perpetuity for injuries caused by the plan or design if the governmental entity takes no precautions against injury even after the dangerous condition has been brought to its attention. The court noted that the purpose of the design immunity was to “prevent a jury from second-guessing the decision of a public entity by reviewing the identical questions of risk that had previously been considered by the government officers who adopted or approved the plan or design.” Whether this comment suggests that a governmental entity may be liable for failing to repair or replace the physical object involved in the earlier “plan or design,” as opposed to a failure to warn, must await an appropriate case.

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415. 30 Kan. App. 2d at 228–229, 40 P.3d at 325 (quoting Cornette v. Dep’t of Transp., 26 Cal. 4th 63, 69, 109 Cal. Rptr. 2d 1, 5, 26 P.3d 332, 336 (2001)).
B. The Recreational Use Immunity

The "recreational use" immunity has probably become the most controversial provision in the KTCA. It affords immunity from liability for damages resulting from "any claim for injuries resulting from the use of any public property intended or permitted to be used as a park, playground or open area for recreational purposes, unless the governmental entity or an employee thereof is guilty of gross and wanton negligence proximately causing such injury." The legislative intent underlying the recreational use immunity is virtually non-existent and unclear. The Kansas Supreme Court has suggested that the legislature intended to encourage governmental entities to fund, undeterred by the high costs of litigation, the development and maintenance of parks, playgrounds and other recreational facilities for the benefit of the public. This rationale does not provide special justification for the immunity for recreational land and facilities. Rather, it applies equally to every activity and every facility that government might provide for its citizens. In essence, this rationale is overly broad and represents the first step in the inexorable march back to an unrestricted doctrine of governmental immunity. Immunity would become the rule and liability the rare exception.

The recreational use immunity is perhaps better understood by comparison to Kansas premises law as it existed when the legislature enacted the KTCA. In 1979 a private owner or possessor of land owed an invitee a duty of reasonable care, and an invitee could be one who conferred an economic benefit on the landowner or one who entered in response to a public invitation. By contrast, a licensee was one who entered the land with permission, but conferred no economic benefit on the landowner, who owed the licensee only a duty to avoid injury by willful or wanton conduct. People using parks, playgrounds and open areas for recreational purposes could be classified either as public

416. For an excellent detailed analysis of this immunity, see Will Wohlford, The Recreational Use Immunity of the Kansas Tort Claims Act: An Exception or the Rule?, 52 KAN. L. REV. 211 (2003). See also William E. Westerbeke, Torts, 13 KANSAS ANNUAL SURVEY 293, 308–11 (2002) (discussing the recreational use exception).
418. See Jackson v. Unified Sch. Dist. 259, 268 Kan. 319, 331, 995 P.2d 844, 852 (2000) (stating that "[t]he purpose of [section] 75-6104(o) is to provide immunity to a governmental entity when it might normally be liable for damages which are the result of ordinary negligence").
419. See RESTATEMENT (SECOND) OF TORTS § 343 (1965).
420. See id. § 332.
421. See id. § 330.
invitees or licensees, and the recreational use immunity could be viewed as placing them in the licensee category.\footnote{423}

This approach would be more consistent with the basic interpretation devices used to define and limit the enumerated immunities. First, the discretionary function has no practical application because conduct that would rise to the level of wanton is simply incompatible with the kind of policy formulation that the discretionary function seeks to protect from judicial scrutiny.\footnote{424} Second, an interpretation consistent with private sector premises law would honor the legislature’s general intent that governmental liability under the KTCA parallel that of the private sector. Finally, this approach would provide a principled method of ensuring that liability become the rule and immunity the exception with respect to an immunity written in potentially far-reaching language.

Government has traditionally provided parks, playgrounds and open areas for recreational use by its citizens. The difficulty confronting government is that it cannot fully control who uses its parks, playgrounds and open areas, the time that they use them, or the manner in which they use them. A pastoral campus hillside with large shade trees perfect for leisurely walks becomes a place of danger when after a snowfall students slide down the hill on metal trays from the cafeteria,\footnote{425} and public school recreational facilities suitable for supervised activities during school hours may pose some danger to members of the general public using them without supervision after hours.\footnote{426} If the general public were characterized in all these situations as public invitees, governmental entities would be subject to the reasonable care standard with the likely obligation to make the premises safe for the public at large and its many unsupervised uses of the property or facilities. Thus, it is likely that the

\footnote{423. A full duty of reasonable care for a “public invitee” raises unique problems when entry on the land is permitted for a wide variety of recreational uses that may occur at any time without supervision. After an injury occurs, hindsight is a great teacher about how the premises might have been maintained to prevent such an injury. By characterizing the user of these premises as a licensee, the user “takes the premises as he finds them and assumes all risks incident to” their condition. \textit{Graham v. Loper Elec. Co.}, 192 Kan. 558, 561, 389 P.2d 750, 753 (1964).}

\footnote{424. Under the narrow meaning of discretion only the initial decision to develop a park or playground would be discretionary, and the on-going maintenance, operation and supervision of it would be in most cases non-discretionary (i.e., either ministerial or subject to professional standards).

\footnote{425. See \textit{Boaldin v. Univ. of Kansas}}, 242 Kan. 288, 747 P.2d 100 (1987) (holding that recreational use immunity was applicable and university’s conduct did not constitute gross or wanton negligence).

\footnote{426. For example, an elementary school baseball diamond on its playground is reasonably safe for small children despite its shorter distances between bases and rough infield surface. The same diamond becomes dangerous for adults who can hit a ball much harder and would expect unusual sudden bounces of the baseball on the rough infield surface. The more confined area also makes adult play more dangerous to others present on the playground.}
legislative intent was to create an immunity that had the practical effect of treating as licensees those members of the general public who come onto parks, playgrounds or open areas of a governmental entity with consent, but without providing any economic benefit.

Unfortunately, the Kansas courts have not seriously delved into the legislative intent underlying the recreational use immunity. They have not honored the rule, recited in virtually every case, that under the KTCA liability is the rule and immunity is the exception. On the contrary, the courts have given the immunity the most expansive interpretation imaginable, applying it to public facilities for which an admission fee is charged, to buildings and personal property, to conduct and activities, and to both extracurricular and mandatory supervised school activities. More significantly, the courts have not tailored the liability of governmental entities to that of private parties. Thus, many applications of the immunity are frequently inconsistent with the analogous treatment of private landowners under premises law and in some cases create immunity where none existed prior to the KTCA.

1. Gross and Wanton Negligence

The recreational use immunity is not a traditional immunity that purports to bar all claims for damages resulting from a particular activity or condition. Rather, the recreational use immunity merely purports to condition liability in those cases in which damages from the use of a park, playground or open area proximately result from the governmental entity’s “gross and wanton negligence.”427 This heightened level of fault operates as a precondition to liability and thus precludes actions based on ordinary negligence in a manner similar to the requirement of willful and wanton conduct as a threshold for liability under Kansas’ former automobile guest statute428 or in the trespasser and licensee cases in Kansas premises law.429 The phrase “gross and wanton negligence” poses a minor issue because there is no separate and identifiable category of fault in modern tort law known as “gross negligence.”430 However, the Kansas cases to date have essentially treated “gross and wanton

427. The “gross and wanton negligence” standard is also employed in the public cemetery immunity. See infra notes 515–23 and accompanying text.

428. KAN. STAT. ANN. § 8-122b (repealed 1974). The guest statute precluded damage actions by a nonpaying guest passenger against an owner or operator of an automobile unless the owner or operator had committed “gross and wanton negligence.” The Kansas Supreme Court held the guest statute unconstitutional in Henry v. Bauder, 213 Kan. 751, 518 P.2d 362 (1974).


negligence” as “wanton,” which is described as fault greater than negligence but less than willful conduct.\footnote{E.g., Boaldin v. Univ. of Kansas, 242 Kan. 288, 293, 747 P.2d 811, 814 (1987); Lee v. City of Fort Scott, 238 Kan. 421, 423, 710 P.2d 689, 691 (1985).} Although this definition distinguishes wanton from willful conduct, many cases refer to “willful, wanton and reckless” as a category of fault between negligence and intentional misconduct.\footnote{The modern trend has been to ignore any possible shadings of difference in these words and to treat them as essentially synonymous. KEETON ET AL., supra note 430, at 212–14.}

The Kansas courts define wantonness as the actor’s “realization of the imminence of danger and a reckless disregard or a complete indifference or an unconcern for the probable consequences of the wrongful act.”\footnote{Boaldin, 242 Kan. at 293, 747 P.2d at 814; Lee, 238 Kan. at 423, 710 P.2d at 691.} In \textit{Lanning v. Anderson}\footnote{22 Kan. App. 2d 474, 921 P.2d 813 (1996).} a high school track coach told plaintiff and the other members of the relay team to run two laps and then go into the locker room to take a shower. After finishing the laps, plaintiff and the others started to cross the center of the practice field approximately eighty to ninety feet from the discus throwers’ practice area. Plaintiff was struck in the head by a thrown discus. The coach had not told them to cut across the practice field, and at the time of the accident the coach was instructing the girls’ relay team and did not see the accident.

In reversing a jury verdict for plaintiff, the court of appeals held that wantonness requires the actor’s subjective appreciation of the danger and thus the evidence was insufficient to support a finding of wantonness.\footnote{Id. at 482, 921 P.2d at 820.} The plaintiff had urged an objective test of wantonness in the hope of being able to prove that the coach “should have known” of the imminence of danger. The court reasoned, however, that the essence of wantonness is the mental attitude of the wrongdoer and, therefore, actual or subjective notice of the danger is an essential prerequisite to proof of reckless disregard of or complete indifference to the consequences.\footnote{Id. at 479–81, 921 P.2d at 818–19.} The coach had testified that he did not believe the students were in danger, and apparently no evidence contradicted his testimony. Thus, under a subjective test, the coach lacked the actual knowledge of danger necessary to establish wantonness.

This conclusion seems appropriate, but some doubt exists whether this appropriateness is based on the desirability of an exclusively subjective approach or on the overriding perception that this case involved at best nothing more than ordinary negligence. Section 500 of
the Restatement (Second) of Torts defines reckless conduct in a hybrid manner that blends subjective and objective knowledge and appreciation of the risk.\textsuperscript{437} Yet even if an objective approach would provide a better result in some cases, Lanning was not such a case. That a jury was willing to find “wantonness” on this set of facts suggests the need for some legal mechanism to prevent erosion of the standard governing wantonness. Rejecting an objective test is perhaps one way to prevent such erosion. Formal recognition of judicial control in supervising the wantonness standard, whether it be subjective or objective, is another.\textsuperscript{438}

Actual or subjective knowledge of a risk is only one element of wantonness. The plaintiff must also establish an awareness of the imminence of danger and a reckless disregard of or complete indifference toward the likely consequences of the conduct. For example, in Boaldin v. University of Kansas\textsuperscript{439} the university knew that students would slide down a certain hill after a snow storm even though the hillside had some trees on it. Yet the apparent lack of any prior sledding accidents tended to negate an awareness of the imminence of danger, and under these circumstances a failure to prohibit sledding on the hill, cut down the trees, or take other precautions could not fairly imply a complete indifference to injury.\textsuperscript{440}

A similar holding in Lee v. City of Fort Scott\textsuperscript{441} is more controversial. In response to repeated vandalism to a golf course in a city park, the city hung wire cables between trees along the outer perimeter of the golf course. Plaintiffs’ decedent was severely injured and eventually died when he collided with the wire cables while riding his motorcycle through the park. While the conduct of the city seems akin to the improper use of a springgun or other deadly trap to defend

\textsuperscript{437} RESTATEMENT (SECOND) OF TORTS § 500 (1965):
The actor’s conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.

\textsuperscript{438} Courts have often recognized the role of courts in making initial determinations of mixed fact and law issues to prevent erosion of a protective standard by unrestricted jury decisions. See, e.g., RESTATEMENT (SECOND) OF TORTS § 46 cmt. h (1965) (“extreme and outrageous” in an action for intentional infliction of emotional distress); id. § 520 cmt. i (“abnormally dangerous” in a strict liability action for abnormally dangerous activities); id. § 614 (“defamatory” in a defamation action).


\textsuperscript{440} See Willard v. City of Kansas City, 235 Kan. 655, 681 P.2d 1067 (1984) (holding that the city’s failure to replace or repair jagged edges of chain link fence used as outfield fence on baseball diamond was mere negligence).

\textsuperscript{441} 238 Kan. 421, 710 P.2d 689 (1985).
property, the Kansas Supreme Court found no evidence of wantonness and affirmed a summary judgment in favor of the city. The court has subsequently explained that the dangerous condition was above ground and thus observable, but the city had attached no warnings to draw attention to the cables and at dusk or in the dark they would not be readily visible. If the result is sound, its justification lies in the fact that prior to this accident the cables had been in place for seven years without causing any injuries, thereby weakening the inference of an awareness of imminence of danger.

An inference of wantonness may arise when actual knowledge of the danger is coupled with additional facts relating to both imminence of and indifference to the danger. In Gruhin v. City of Overland Park, plaintiff was injured when he drove a golf cart into a hole on a municipal golf course. The court held that a jury question existed whether the City had been wanton in not taking greater precautions against injury. The actual knowledge prerequisite for the subjective approach was present because the city had marked the hole with chalk dust. Moreover, the imminence and indifference elements were supported by the facts that the city chose not to fill the hole, but merely marked it with chalk, and the hole was barely visible because the chalk had become faded. The court distinguished Boaldin and Lee on the ground that they both involved above-ground obstructions that should have been visible to the injured parties.  

442. For liability for using deadly force or force calculated to cause serious bodily harm in defense of property, see RESTATEMENT (SECOND) OF TORTS § 85 cmt. a (1965) and Katko v. Briney, 183 N.W.2d 657 (Iowa 1971). While the decedent in Lee was apparently about to commit an act of vandalism, vandalism is not a capital offense in Kansas.  
444. I would strongly urge that other governmental entities not emulate this tactic. While the court found no evidence of wantonness, it may have misinterpreted the traditional portrayal of Lady Justice as wearing a blindfold. I suspect that a repeat incident of this nature might severely test the court’s willingness to adhere to the doctrine of stare decisis.  
446. Although not mentioned in the opinion, the hole may also have been difficult to see because most golf courses allow the grass to grow long in the rough and the golfer is usually looking for his ball.  
447. In those cases in which the plaintiff would be characterized as a licensee, had he or she been injured on private land, the same wantonness standard would have applied. But see infra notes 421–24 and accompanying text (explaining that Kansas courts have departed from the statutory purpose of extending liability to governmental entities to the same extent that it is imposed on private parties by applying the recreational use immunity to invitees).
2. Public Property Used as a Park, Playground or Open Area for Recreation

"Public property" is entitled to the immunity if it is "intended or permitted" to be used as a "park, playground or open area" for "recreational purposes." Each of these phrases helps define the scope of the immunity. First, property is "public" for purposes of the immunity if it is owned by the public as opposed to private property and if it is made available to the public for recreational purposes. It does not lose its "public" characterization simply because some limitations may be placed upon its availability or use. For example, a school gymnasium qualifies as "public" despite not being available at all during school hours, but available to the public after hours or on weekends. Property also qualifies as "public" despite being limited to a specific use such as golf courses, baseball and softball fields, and swimming beaches and pools. Finally, property qualifies as "public" despite conditioning its use to persons who pay an admission fee, greens fee or a team softball league fee.

The meaning of "park, playground or open area" has a certain common sense meaning that is reflected in most of the cases. City parks and school playgrounds seem self explanatory. Open areas include school practice fields and a large open hill on campus. A park or playground does not lose its "public" designation simply because the injury occurred on a more specific part of the premises used for only a limited purpose, such as a ballfield or golf course located within a

448. KAN. STAT. ANN. § 75-6104(o) (Supp. 2003).
general purpose city park. In addition, an open area does not require some formal designation as a place for recreational use so long as recreation is in fact permitted.

More controversial, however, is the line of cases applying the recreational use immunity to buildings such as a high school gymnasium, a municipal auditorium, and the rest room in a football stadium. For example, in Jackson v. Unified School District 259 a student in a mandatory physical education class broke bones in his arm when he fell off a springboard being used to jump up and touch a basketball rim in the school gymnasium. The court rejected any limitation of the immunity to outdoor recreational areas and held that the gymnasium was an "open area" within the meaning of the statute. It reasoned a distinction between injuries based on whether the recreational facility was indoors or outdoors would be illogical, that the plain meaning of "open area" includes a high school gymnasium, and that the legislature has not indicated otherwise.

The court's statutory interpretation seems unsound. Notwithstanding its rather cavalier statement to the contrary, the plain meaning of the phrase "open area" does not include buildings. If the legislature really had intended to include buildings in the recreational use immunity, it could have easily done so by using the phrase "parks, playgrounds, open areas, buildings and other enclosed recreational facilities," which the Illinois legislature used to show an intent to include both outdoor and indoor facilities in its recreational use statute. By including the phrase "park, playground and open area" and omitting the phrase "building and other enclosed recreational facility," the plain meaning of the statute clearly excludes buildings. Moreover, a simple recognition that the

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467. At best, whether "open area" includes buildings is ambiguous, and ambiguity should not be resolved in favor of expanding the scope of immunities. See supra notes 171-90 and accompanying text (discussing procedural devices that limit the scope of the immunities).
468. 745 ILL. COMP. STAT., 10/3-106 (West 1998) (emphasis added).
469. Elsewhere in Jackson the court rejected a proposed limitation on the recreational use immunity to supervised activities and noted that the legislature could always include such a limitation in the statute. Yet the court has regularly limited other immunities in a manner not consistent with the absolute language used in the immunity provision. Thus, the courts have limited the immunity from damages resulting from "failure to provide, or the method of providing, police or fire protection" to failures or methods that are discretionary in nature. See supra notes 226-55 and accompanying text.
legislature chose not to include buildings and other indoor recreational facilities would be consistent with the legislative intent to make liability the rule and immunity the exception.

3. Recreational Use

A casual reading of the statute might suggest that it is intended to bar claims by plaintiffs who were injured while engaged in some recreational activity on the land. Indeed, many cases meet that description. The immunity would clearly apply to property that is being used as intended for recreational purposes, such as ball fields, golf courses or swimming beaches. However, the wording of the statute concerning “use” of the property is not so limited. It bars “any claim for injuries resulting from the use of any public property intended or permitted to be used as a park, playground or open area for recreational purposes.” Read literally, the immunity is not confined to cases in which the injury occurred while plaintiff was engaged in some recreational activity on the property. The immunity applies to any injury occurring on land that was “intended or permitted to be used for recreational purposes” regardless of the nature of the plaintiff’s activity at the time of the injury.

Thus, the immunity applies to one who is on the land merely as a spectator watching some recreational or sporting activity. It also applies to one who is on the property for reasons entirely unrelated to the recreational use of the property, such as a teenager riding his motorcycle onto a golf course with no apparent intent to play or watch golf. In theory, the immunity could apply to an electrician, plumber or other worker injured while making repairs to a recreational facility. In Jackson v. Unified School District 259 a child was injured in a mandatory physical education class being supervised by a teacher in the school’s gymnasium. Even though the subject of the class was physical education, the court held that it was educational, not “recreational,” i.e.,

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473. KAN. STAT. ANN. § 75-6104(o) (Supp. 2003).
an activity undertaken for its own sake solely to amuse the actor. However, because the gymnasium had been permitted to be used by the public at other times for recreational purposes, the property was subject to the recreational use immunity while a mandatory non-recreational class was being conducted. In essence, once recreational activity has been permitted on the property, the property itself thereafter confers blanket immunity from claims of any nature simply because they arise on that property.

However, the statute does not require an intent to devote the land generally or primarily to recreational use. The immunity applies to property which has as its primary and predominant purpose some use other than recreation, but is "permitted" to be used for recreational activity on more than an incidental basis. Thus, a high school gymnasium that is primarily used for educational purposes, but is made available to the public after hours or on weekends, is "permitted" to be used for recreational purposes. Moreover, this interpretation may extend immunity to situations which previously were not immune despite statements in other contexts that the KTCA is not intended to create immunity where none existed previously. For example, a municipality may be liable in negligence for failure to maintain streets and sidewalks in a reasonably safe condition. However, if a sidewalk in front of a school is "permitted" to be used for games of hopscotch or other recreational purposes, liability for injury caused by a sidewalk defect may require proof of wantonness.\(^{477}\) The only apparent limitation on this interpretation of "permitted" is that a merely incidental recreational use of property may be insufficient to trigger the immunity.

4. Status of the Person on the Property

Two problem situations concern the status of the injured person to whom the recreational use immunity is applied. First, courts have applied the immunity to persons who would probably be classified as invitees. Second, the courts have applied the immunity to children attending secondary school under legal compulsion.

The Kansas courts have applied the recreational use immunity to parks, playgrounds and open areas for which an admission fee,\(^{478}\) greens

\(^{477}\) See id. at 328, 995 P.2d at 850 (citing with apparent approval Bubb v. Springfield Sch. Dist., 657 N.E.2d 887 (Ill. 1995), wherein the Illinois Supreme Court held that the immunity extended to a sidewalk outside a school because the sidewalk was intended for some recreational purposes). This result would be counter to the stated intent of the KTCA not to create immunity when none existed prior to the KTCA.

fee,\textsuperscript{479} or other charge\textsuperscript{480} is required. In the private sector, one who
confers some economic benefits on the landowner becomes an invitee
upon the premises and is owed a full duty of reasonable care.
Application of the recreational use immunity in those situations fails to
comport with the fundamental statutory purpose of extending liability to
governmental entities to the same extent that it is imposed on private
parties. It is also an unnecessary extension of immunity that violates the
rule of construction that liability is the rule and immunity the exception.

Equally troubling is the application of the immunity to school
children participating in a compulsory physical education class under the
supervision of a trained teacher.\textsuperscript{481} None of the equitable considerations
that justify a proper use of the recreational use immunity fit this
situation. The children must participate; they are not free to opt out of
the activity. The children are in class at scheduled hours, not coming
onto the premises at odd or unexpected times. They are supervised by a
trained professional teacher, and are not acting in an unsupervised
manner that may involve risks that the school has had no opportunity to
control. There is no suggestion in the sparse legislative history or in the
specific terms of the KTCA itself that the KTCA was intended to permit
a school district to take charge of a community’s children without the
the corresponding obligation to exercise ordinary care for their safety.

5. Condition Versus Conduct and the Shifting Standards of Kansas
Premises Law

The cases have applied the recreational use immunity to both
dangerous conditions and dangerous conduct on the premises. Thus, the
immunity has been applied to permanent conditions of the premises such
as cables strung between trees along the perimeter of a golf course,\textsuperscript{482} a
hole in the ground on a golf course,\textsuperscript{483} a depression in the ground near a
football practice field,\textsuperscript{484} the condition of home plate\textsuperscript{485} or the outfield
fence\textsuperscript{486} in a softball or baseball field, a deep water area on a portion of a
beach marked as shallow water,\textsuperscript{487} and trees on a hillside used for

\textsuperscript{480} Bonewell v. City of Derby, 236 Kan. 589, 693 P.2d 1179 (1985) (applying the immunity
where a team fee for a softball league was assessed).
\textsuperscript{481} Jackson, 268 Kan. 319, 995 P.2d 844.
\textsuperscript{482} Lee v. City of Fort Scott, 238 Kan. 421, 710 P.2d 689 (1985).
\textsuperscript{483} Gruhin, 17 Kan. App. 2d 388, 836 P.2d 1222.
\textsuperscript{485} Bonewell, 236 Kan. 589, 693 P.2d 1179.
\textsuperscript{487} Gonzales, 247 Kan. 423, 799 P.2d 491.
sledding. It has also been applied to temporary conditions such as water on the floor of a hallway between a swimming pool and the adjoining locker room and an "unknown [chemical] substance on a toilet seat in a restroom at a football stadium." Finally, the immunity has been applied to conduct or activities occurring on the premises, such as throwing a baseball or discus in the direction of another person during practice or pre-game preparations, failing to adequately hydrate high school football players during practice, or other alleged failures of supervision of recreational activities.

The Kansas courts have consistently refused to limit the immunity to natural conditions of the premises as opposed to artificial conditions or equipment or to conditions generally as opposed to conduct. The basic rationale is that the statute "is plain and unambiguous" in encompassing any claim resulting from use of a park, playground, or open area, regardless of whether it was caused by a condition on the property or by conduct on the property. Had it so desired, the legislature could have easily drafted the provision to limit the immunity to conditions on the property.

Even if the Kansas courts looked to Kansas premises law to make the liability of government parallel to the liability of a private landowner, the distinction between condition and conduct would probably not have altered the results of these cases. In 1979 a landowner owed a licensee or trespasser only a duty to avoid injury through willful, wanton or reckless conduct. It was not until 1985 in Bowers v. Ottenand that the Kansas Supreme Court held that a licensee was owed a duty of reasonable care with respect to conduct or activities on the premises, and

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495. See Bonewell v. City of Derby, 236 Kan. 589, 593, 693 P.2d 1179, 1182 (1985) ("We do not recognize the artificial condition or equipment exception . . . .").
496. See Nichols v. Unified Sch. Dist. No. 400, 246 Kan. 93, 97, 785 P.2d 986, 989 (1990) ("To require an injury to be the result of a condition of the premises is too restrictive a reading of the recreational use exception statute.").
497. Id.
498. Id.
not until 1994 in *Jones v. Hansen* that supreme court merged the invitee and licensee categories and held they were all owed a duty of reasonable care with respect to both conduct or activities and conditions. If the Kansas courts were to limit the recreational use immunity by reference to Kansas premises law, the novel issue would become whether the interpretation of the immunities concerning government-owned land should change in response to changes in Kansas premises law. If so, *Jones v. Hansen* would eliminate the recreational use immunity in its entirety with respect to invitees and licensees entering upon the land, and the immunity would apply only to injured trespassers. Yet of all the recreational use cases to date, only *Lee v. City of Fort Scott* involved injury to a person who arguably might have been considered a trespasser when he attempted to ride his motorcycle onto a municipal golf course.

The recreational use immunity is the only immunity that the Kansas courts have failed to limit in some meaningful manner. Although other immunities also employ rather absolute language, the Kansas courts have tended to limit their scope in some manner. Thus, the judicial function immunity excludes ministerial acts, and the police and fire protection immunity excludes non-discretionary acts. The recreational use immunity is an anomaly in having a judicial interpretation that greatly exceeds the apparent problem that motivated adoption of the immunity in the first instance.

C. The Unimproved Public Property Immunity

The final immunity relating to government's control or ownership of property provides that a governmental entity or its employee "shall not be liable for damages resulting from . . . the natural condition of any unimproved public property of the governmental entity." The Kansas courts have not yet had an occasion to interpret this provision. Nevertheless, questions concerning its scope and interaction with other immunities will undoubtedly arise, and a few observations are appropriate.

First, the KTCA does not define "unimproved public property." Nevertheless, the plain meaning of that phrase would seem to provide a basic framing of the scope of the immunity. At the outset, one must

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501. See supra notes 441-44 and accompanying text.
502. See supra notes 208-25 and accompanying text.
503. See supra notes 283-317 and accompanying text.
504. KAN. STAT. ANN. § 75-6104(p) (Supp. 2003).
assume that “unimproved public property” in fact applies only to unimproved public land.\footnote{505} Moreover, the immunity applies only to claims for damages resulting from the natural condition of the land. It does not apply to claims based on artificial conditions,\footnote{506} assuming that \textit{unimproved} land could somehow contain an artificial condition,\footnote{507} and not to any claims based on either the negligent conduct of governmental employees or the negligent failure of a governmental entity to control the conduct of others on that land.

Second, with respect to matters covered by the immunity, all claims are barred without regard to whether the wrongful conduct was ordinary negligence or wanton conduct, and claims that may arise from conduct or perhaps artificial conditions on unimproved public land do not need to satisfy the wanton conduct threshold, but may be based on ordinary negligence. Accordingly, courts may confront cases in which the issue becomes whether unimproved public land is also an “open area” intended or permitted to be used for recreational purposes. If so, claims based on negligent conduct or unreasonably dangerous artificial conditions would be barred unless the plaintiff could prove wanton conduct, while claims based on harm caused by natural conditions would be barred even if plaintiff could prove wanton conduct.

Third, the statutory language does not distinguish between harms caused by natural conditions on unimproved public land to persons who are on the public land and persons who are outside the public land. One purpose of the KTCA is to define governmental liability in terms of liability to comparable situations in the private sector. In premises law, a landowner’s liability for harm caused to persons outside the property is usually broader than his liability to persons coming onto his property.\footnote{508}

\begin{footnotes}
\footnote{505}{The concept of an unimproved public chattel would seem to be an oxymoron.}
\footnote{506}{In premises law rules often distinguish between natural and artificial conditions on the land. See, e.g., \textit{RESTATEMENT (SECOND) OF TORTS} §§ 335, 337, 339, 363 (1965). The use of “natural” to modify “condition” in the statute would suggest that the legislature intended to contrast natural condition with artificial condition. When “condition” is not modified, it refers to both natural and artificial conditions. See, e.g., \textit{id.} § 342 cmt. e.}
\footnote{507}{Because the KTCA does not define “unimproved” land, some uncertainty must exist whether land containing any artificial conditions could constitute \textit{unimproved} land. Yet a court might consider land otherwise unimproved in any manner to remain “unimproved” despite the abandonment of or storage upon the land one or more chattels dangerous to others.}
\footnote{508}{A possessor of land owes a duty of reasonable care to persons outside the land concerning the possessor’s artificial conditions and activities on the land. \textit{RESTATEMENT (SECOND) OF TORTS} §§ 364, 371 (1965). By contrast, the possessor of land owes no duty to trespassers coming upon the land to make the land reasonably safe for trespassers or to conduct activities so as not to endanger trespassers. \textit{id.} § 333. Until recently in Kansas, the possessor owed only the limited duty to avoid injury to a licensee by wilful wanton conduct, but now the possessor owes a full duty of reasonable care to both licensees and invitees. Jones v. Hansen, 254 Kan. 499, 867 P.2d 303 (1994).}
\end{footnotes}
The common law rule has long been that a landowner owes no duty of care to persons outside the premises to prevent harms from natural conditions on his land. However, one widely recognized exception imposes on the landowner a duty of reasonable care in certain situations to inspect the perimeter of the property for dead trees that might fall over and injure some user of the adjoining public way. On its face, the language of the immunity is absolute and would permit no such exception. Yet if the purpose is truly to make parallel the liability of government and private parties, then the same exception should apply to harms to persons outside the public land harmed by dead trees.

Persons coming onto the land of another have been accorded different duties depending on their status on the land as an invitee, licensee or trespasser. In Kansas the landowner owes a trespasser only a duty to avoid injury through willful or wanton conduct. In nearly every other state, the landowner owes an undiscovered trespasser no duty of care at all, but owes a discovered trespasser a warning about known latent dangerous conditions on the land and a duty of reasonable care in the carrying on of activities on the land. In a practical sense, the immunity purports to characterize all persons coming onto unimproved public land as undiscovered trespassers who are thus owed no duty, and it would bar even those claims that in identical circumstances would be allowed against a private landowner.

This approach to persons entering upon unimproved public property is comparable to the statutory protection afforded the private landowner who allows the public to use the land for recreational purposes. The Recreational Use Act provides in pertinent part that

an owner of land who either directly or indirectly invites or permits any person to use such property, or any part of such property, for recreational purposes or an owner of nonagricultural land who either directly or indirectly invites or permits without charge any person to use such property, or any part of such property, for recreational purposes does not hereby:

(a) Extend any assurance that the premises are safe for any purpose.

509. Restatement (Second) of Torts § 363(1) (1965).
510. Id. § 363(2).
511. Retaining the dead trees exception would also be consistent with the interpretation that the KTCA was not intended to create immunity where none existed prior to the KTCA. See supra notes 180–85 and accompanying text.
512. Because wanton conduct requires actual knowledge of the situation of danger, see supra notes 433–47 and accompanying text, the Kansas rule in essence is the same as the general rule, i.e., the landowner owes no duty to protect an undiscovered trespasser.
(b) Confer upon such person the legal status of an invitee or licensee to whom a duty of care is owed.
(c) Assume responsibility for or incur liability for any injury to person or property caused by an act or omission of such persons. 513

Unimproved public land is probably very comparable to the private land protected by the Recreational Use Act. It may provide the more appropriate reference for determining which exceptions, if any, courts might apply to the unimproved public property immunity. 514

D. The Public Cemetery Immunity

A rather narrow immunity relating generally a governmental entity's ownership or control of real property is the immunity from liability for damages resulting from

any claim for injuries resulting from the use or maintenance of a public cemetery owned and operated by a municipality or an abandoned cemetery, title to which has vested in a governmental entity pursuant to K.S.A. 17-1366 through 17-1368, and amendments thereto, unless the governmental entity or employee thereof is guilty of gross and wanton negligence proximately causing the injury. 515

To date no cases have arisen under this immunity. The immunity appears to anticipate the litigation in Brock v. Richmond-Berea Cemetery District. In that case a child was injured when a headstone fell over on her while she and her mother were visiting the cemetery. 516 The public had unlimited access to the cemetery and used it for various leisure activities such as bicycling, walking, walking dogs, and, as to children, playing. The common areas were clearly public property, and the court concluded that despite purchase of the burial site by private parties, burial sites also remained public property. 517 Accordingly, virtually all of the cemetery was immune under the recreational use immunity because it was public property permitted to be used as an open area for recreational purposes. 518

514. The traditional but evolving common law rules governing duties owed persons entering upon the land of another apply equally to heavily developed urban and suburban lands.
515. KAN. STAT. ANN. § 75-6104(q) (Supp. 2003).
517. See id. 617–18, 957 P.2d at 510 (stating that the purchase of a burial lot “does not acquire a fee simple interest” in the lot).
518. Id. at 619–20, 957 P.2d at 510–11.
One small portion of the cemetery was not covered by the recreational use immunity. The gravestones on individual grave sites remained private property. As a result, the court held that the immunity for failure to inspect or inadequate inspection of property not owned by the governmental entity would apply if the cemetery district was unaware of the dangerous condition of the gravestone because it failed to inspect it at all or made an inadequate inspection. On the other hand, if the caretaker in fact discovered the dangerous condition through inspection or otherwise, then the injuries resulted not from the failure to adequately inspect, but from the failure to correct a known dangerous condition.  

The municipal cemetery immunity is comparable to the recreational use immunity. Both immunities protect the governmental entity against claims for ordinary negligence, and limit their liability to claims based on wanton conduct. However, the municipal cemetery immunity has two advantages over the recreational use immunity. First, the municipal cemetery immunity would bar ordinary negligence claims even when the cemetery was not permitted to be used for recreational purposes. Second, it would also apply to claims where the injury was caused in whole or in part by private property located in the cemetery.

By its terms the immunity applies to both cemeteries owned and maintained by a municipality and to abandoned private cemeteries taken over by a cemetery district, city or county pursuant to sections 17-1366 and 1367 of the Kansas code. Section 17-1368 authorizes the municipality acquiring an abandoned cemetery to contract with an individual, firm, corporation or association for the care, maintenance and operation of the cemetery. However, such a contract does not “relieve such municipality of the duties and responsibilities imposed under the provisions of this act.” The issue then becomes whether the “individual, firm, corporation or association” will be viewed as sharing in the immunity.

First, there is some precedent for treating a private organization as a governmental employee and thus sharing in an immunity. In Bonewell v.

519. Id. at 625, 957 P.2d at 514.
520. Kansas Statutes Annotated section 17-1366(a) defines a private cemetery as abandoned when mowing and maintenance work has not been performed for a period of one year. An abandoned cemetery is to be taken over by a cemetery district, if any part of the cemetery is located within the district. If not, then it is to be taken over by a city, if any part of the cemetery is located within a city. If not, then it is to be taken over by the county within which it is located. Kansas Statutes Annotated section 17-1367 provides for the dissolution of the private corporation that abandoned the cemetery and the transfer of title, books and records, and any funds to the municipality taking over the cemetery.
City of Derby\textsuperscript{522} the Jaycees scheduled softball games and organized the recreational use of a softball field during the summer months. They had no lease or other right to exclusive use of the field, and they were not responsible for maintenance of the field. Nevertheless, the court held they were employees of the city because the KTCA broadly defines employee as anybody "acting on behalf or in service of a governmental entity in any official capacity, whether with or without compensation."\textsuperscript{523} However, the definition of employee does not include an independent contractor, and a person who by contract undertakes to maintain a cemetery for a municipality is likely to be viewed as an independent contractor.

Second, the statutory mandate that the municipality remains responsible for the cemetery despite contracting for its on-going operation and maintenance would arguably mean that the municipality has a nondelegable duty for the operation and maintenance of the cemetery. If the person under contract with the municipality is not an employee of the municipality and thus not sharing in the immunity, it would be liable for ordinary negligence. By contrast, the KTCA limits the municipality to liability only for wanton conduct. At this point, a conflict arises between the nondelegable duty imposed by section 17-1368 and the immunity.

How the Kansas courts will resolve this apparent conflict is unclear. They could find the person undertaking the operation and maintenance of the cemetery to be an employee of the municipality, not an independent contractor, thereby extending the immunity from liability for ordinary negligence to that person. Conversely, they could find that the municipality does not have a nondelegable duty and remains not liable for any damages caused by the ordinary negligence of the person operating and maintaining the cemetery.

E. The Federal Enclave Immunity

From World War II to the present the federal government has owned land in DeSoto, Kansas on which it maintained and operated a munitions factory. A by-product of this factory during its decades of operation was the buildup of a substantial amount of toxic material in the surrounding soil. As a result, the magnitude of any liability for cleanup costs under

\textsuperscript{523} KAN. STAT. ANN. § 75-6102(d) (Supp. 2003).
CERCLA is likely to be substantial. However, the land has been essentially unused since the factory ceased operations, and Kansas has an interest in reacquiring the land in order to make it available to private parties for economic development. States are generally not exempted from liability under CERCLA. If Kansas reacquired title to the DeSoto enclave, even if only for an instant before transferring the land to a private party, Kansas might acquire some share of the liability for cleaning up toxic materials from the site.

Accordingly, the legislature created an immunity from damages resulting from the performance of, or failure to perform, any activity pursuant to K.S.A. 74-8922, and amendments thereto, including, but not limited to, issuance and enforcement of a consent decree agreement, oversight of contaminant remediation and taking title to any or all of the federal enclave described in such statute.

This immunity is misplaced in the KTCA. The legislature did not intend the KTCA to address all claims of governmental immunity, but only the personal injury claims of individuals injured by the conduct of governmental employees. CERCLA and other environmental legislation should be viewed as fundamentally economic in nature, and unrelated to the tort problem addressed by the KTCA. Moreover, the usual interpretative devices governing the KTCA do not apply to the federal enclave immunity. It does not purport to equate the liability of government with that of a private employer or private landowner. Indeed, the legislature enacted this provision to ensure that government does not incur a liability that a private landowner could not avoid. Nor does the immunity rationally relate to any discretionary activities of government.

This criticism does not concern the merits of attempts to immunize the state in any such federal enclave transaction. The criticism is limited to the placement of such a provision in the KTCA. The addition of specific immunities not related to the tort claims problem simply clutters the KTCA with irrelevancies and increases the potential for erroneous interpretations in some future cases. If the same immunity were located

525. Id. § 9620(h)(4).
somewhere else in the Kansas statutes, then any attempt to maintain a tort claim against the state or any of its subdivisions under the KTCA would be barred by the other immunity provision.\footnote{528}

VI. SPECIFIC IMMUNITIES RELATING TO CHATELLES AND INTELLECTUAL PROPERTY

A final series of specific immunities involves some diverse provisions relating generally to chattels and intellectual property. In recent years, the Kansas legislature has been engaged apparently in a proactive process of trying to anticipate lawsuits that might someday arise and result in possible governmental liability. These immunities do not appear to have been in response to any appellate decisions in Kansas that imposed or threatened to impose liability on some governmental entity. The proliferation of new immunities tends to belie the rules of construction of the KTCA that liability is the rule and immunity the exception and that the KTCA is not intended to create immunity where none previously existed.

A. The Vending Machine Immunity

In order to assist the blind in becoming self-sufficient and independent, the Randolph-Sheppard Act \footnote{529} authorizes and encourages the employment of blind persons in vending operations on federal property and encourages states to provide incentives for similar vending facilities on state property. By statute, Kansas has authorized the division of services for the blind to license blind persons to operate vending facilities on the right of way of state highways in Kansas \footnote{530} and to operate vending machines at rest and recreation areas and in safety rest areas within the right of way on interstate highways in Kansas.\footnote{531} In 1991 the legislature added a provision that provides immunity from liability for damages resulting from "any claim for damages arising from the operation of vending machines authorized pursuant to K.S.A. 68-432 or K.S.A. 75-3343a, and amendments thereto."\footnote{532}

The scope of the immunity is somewhat puzzling because it is limited to claims arising from the operation of vending machines, not the

531. Id.  
532. Id. § 75-3343a (1997).}
broader activity of operating vending facilities. This distinction suggests that the legislative concern was not broadly trying to avoid claims by third persons that might arise if the blind person is deemed an employee of the state.\textsuperscript{533} Rather, the concern may well have been to avoid having the state be deemed a distributor of the vending machine for purposes of a products liability claim. There have been apparently some claims in the system in which individuals have been injured or killed when they cause a vending machine to fall over on top of them. It is unclear if current product liability law would deem the owner-operator of the vending machine to be a seller in the stream of distribution of the vending machine, as opposed to a seller of the merchandise distributed through the machine.\textsuperscript{534}

In all likelihood, the Kansas courts would reach the common sense conclusion that the state is not a distributor of vending machines, should such a case ever arise in Kansas. The legislature might consider leaving future odd scenarios to the courts to see if they are able to reach a sensible decision without the need for additional clutter in the Kansas statutes.

B. The Geographic Information Systems Immunity

In recent decades courts have struggled with the question of when and under what circumstances does information constitute a product for purposes of a products liability action brought in strict liability, negligence or implied warranty. A number of courts have treated aeronautical charts as products when information in those charts is inaccurate and causes an accident.\textsuperscript{535} In 1995 the Kansas legislature

\textsuperscript{533} \textit{Id.} § 75-6104(t) (Supp. 2003).

\textsuperscript{534} It is not clear if a blind person would be an employee within the scope of the KTCA or an independent contractor excluded from the provisions of the KTCA. One lower court concluded that a blind operator of a vending facility in a post office building was an employee of the State of Louisiana, which was apparently involved in the vending facility. However, the employment status of the blind person became moot when the appellate court concluded that he had not been negligent in causing the injury to that plaintiff in that case. Roberts v. Louisiana, 396 So. 2d 566 (La. Ct. App. 1981).

added a provision that provides immunity from liability for damages arising from

providing, distributing or selling information from geographic information systems which includes an entire formula, pattern, compilation, program, device, method, technique, process, digital database or system which electronically records, stores, reproduces and manipulates by computer graphic and factual information which has been developed internally or provided from other sources and compiled for use by a public agency, either alone or in cooperation with other public or private entities.\textsuperscript{536}

This immunity is limited to claims against the state or any of its subdivisions based on the sale or other distribution of geographic information by a governmental entity, alone or in cooperation with a private entity. To the extent that the state or its agencies make geographic information available as a free or at-cost service, the immunity may be prudent. To the extent, however, that the state or its agencies enter into some commercial venture for the sale or other distribution of geographic information, the immunity may be a regrettable public policy. Moreover, the immunity is not consistent with the concepts that government should bear liability to the same extent as its private sector counterparts, that immunity should be limited to the discretionary aspects of governmental activities, or that liability is the rule and immunity is the exception. In any event, this immunity is not likely to arise in many, if any, cases.

\textbf{C. The Donated Equipment Immunities}

In 2003 the legislature enacted two immunities concerning the donation of used or excess firefighting or emergency medical services equipment either to or by a governmental entity. These provisions afford immunity from liability for damages resulting from

(x) any claim arising from the making of a donation of used or excess fire control, fire rescue, or emergency medical services equipment to a fire department, fire district, volunteer fire department, medical emergency response team or the Kansas forest service if at the time of making the donation the donor believes that the equipment is serviceable or may be made serviceable. This subsection applies to equipment that is acquired through the Federal Excess Personal

Property Program established by the Federal Property and Administrative Services Act of 1949 (P.L. 81-152; 63 stat. 377; 40 United States Code Section 483). This subsection shall apply to any breathing apparatus or any mechanical or electrical device which functions to monitor, evaluate, or restore basic life functions, only if it is recertified to the manufacturer’s specifications by a technician certified by the manufacturer; or

(y) any claim arising from the acceptance of a donation of fire control, fire rescue or emergency medical services equipment, if at the time of the donation the donee reasonably believes that the equipment is serviceable or may be made serviceable and if after placing the donated equipment into service, the donee maintains the donated equipment in a safe and serviceable manner.

Both provisions recognize that state and local governments occasionally donate certain fire control, fire rescue, or emergency medical equipment or receive donations of that equipment. The first immunity applies to equipment donated by a governmental entity and is apparently intended to immunize the governmental entity from any products liability claims based upon the governmental entity’s role in distributing used equipment. Used product distributors may be held liable in negligence, implied warranty, and even occasionally in strict products liability actions. Accordingly, the immunity could be looked upon as simply a variation of a used product distributors’ frequent efforts to disclaim liability.

The second immunity is applicable to equipment donated to governmental entities and protects the government from claims that the negligence of governmental employees failed to detect or adequately correct some defect or danger in the equipment and that the defect or danger resulted in injury or damage to some individual. The owner of such equipment arguably has a duty of reasonable care to inspect it, maintain it and keep it in safe working condition. One would expect that the governmental entities most frequently the recipients of such donated

537. Id. § 75-6104(x).
538. Id. § 75-6104(y).
539. See Restatement (Third) of Torts: Products Liability § 8(a) (1998) (addressing liability of commercial seller of defective used products).
equipment and thus most in need of the immunity would be volunteer fire departments and smaller communities unable to afford new equipment. While the decision to accept a donation of such equipment might be a discretionary function, the on-going inspection and maintenance would probably be ministerial. Therefore, the separate immunity may be important to the donees of such equipment.

VII. CONCLUSION

Twenty-five years ago the Kansas legislature enacted the KTCA in order to modernize the liability of government for the torts of its employees and to escape the confusion and occasional harshness of the common law system of governmental immunity. In lieu of the former governmental-proprietary distinction, the KTCA imposed on governmental entities the same liability as private employers had for harms caused by their employees in the course of their employment. Liability was to be the rule and immunity the exception, and government would have the burden of demonstrating its entitlement to any immunity. However, the KTCA recognized a short list of enumerated immunities that quickly grew to quite a long list of immunities. The enumerated immunities were purportedly qualified by a catch-all provision allowing for any other "discretionary function."

Twenty-five years later, the promise of the KTCA has been substantially, but not entirely, fulfilled. Under the KTCA government still has immunity for its so-called governmental functions, but it has been limited to the discretionary aspects of that governmental function. Government is still liable for its proprietary functions, but any discretionary activities would be immune even if the overall area of activity is considered proprietary. Other than some minor adjustments, government has the same liability for highway defects as existed before the KTCA. In essence, government probably does not have a great deal more liability than before the KTCA, but that liability seems more fairly aligned with conduct for which government ought to bear liability.

At the same time, the courts might consider a more structured and analytical approach to issues of immunity. Two major substantive devices exist to guide interpretation: the private employer analogy and

544. Once the decision to purchase equipment is made, the on-going maintenance of the equipment is considered ministerial. E.g., Huseby v. Bd. of County Commrs of Cowley County, 934 F. Supp. 387 (D. Kan. 1996).
the discretionary-ministerial distinction. The former seems more appropriate and suited to governmental activities that parallel reasonably closely the private sector, while the discretionary-ministerial distinction seems more suited to many of the immunities available to the governmental functions. The cases might benefit from a more structured use of the interpretative devices. The applicability of the enumerated immunities is probably a question of law in most cases, but the government should be given a meaningful burden of persuasion to establish why it should be immune if a private employer or private party in a comparable situation would be liable. Perhaps a more meaningful burden of proof on government might have helped the courts develop a less one-sided recreational use immunity.

Finally, the legislature ought to give more consideration to the appropriateness of adding immunities to the KTCA before any cases on point have arisen. The Kansas courts deserve a modicum of deference to see if they can handle potential immunity situations effectively without an additional specific immunity added to the KTCA. Respect for a co-equal branch of government calls for this measure of trust.