

## **Legal Risk Assessment Framework**

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A city's liability is determined under the Kansas Torts Claims Act (KTCA) --- KSA 75-6102 *et seq.*

-The general rule is liability and immunity is the exception.

### **Framework for Determining Liability**

1. Is the injury one which is recognizable as compensable in tort?
2. Did the injury occur under circumstances where the governmental entity, if a private person, would be liable?
3. Was the claimant injured by a governmental person acting within the scope of their employment?
4. Were the employee's actions the proximate cause of the claimant's injury?
5. Does one of the immunity provisions of the KTCA apply?

### **Most Common Tort is Probably going to be Negligence.**

To show liability, claimant must establish:

1. Duty (that the city owes a duty of care to the claimant)
2. City breached that duty (that the city did not exercise reasonable care)
3. That the breach was the proximate cause of the injury
4. Damages i.e. not sufficient to show injury where the city did not enforce the social distancing, did not require masks to be worn, did not require the employee to leave work after they exhibited symptoms etc. if none of the other employees actually became positive for COVID 19 after the incident. There must be some compensable harm.

### **In determining if there is liability, the city must distinguish between a duty that is owed to the public generally, and a duty owed to an individual.**

Whether a duty exists is a matter of law. Very oversimplified, there is a duty if it is set up by statute, or there has been affirmative action that singles out the individual. If the claimant can't demonstrate that they are owed a duty of care, then the case will not succeed. Each of these analyses will be fact specific.

It's well established that an employer owes a duty to an employee. Some common examples include:

1. Employer has duty not to expose employee in the discharge of her employment to dangers against which the employer can guard by the exercise of reasonable care.

2. Employer has duty to warn employee of hazardous conditions that employer cannot guard against by the exercise of reasonable care.
3. Employer's duty to provide safe and suitable workplace and proper (adequate, safe) equipment to work with.
4. Employer should keep things/workplace in good repair (inspect/test).
5. Employee should be able to go about their work on the assumption that employer has discharged these duties

References; see Kansas Pattern instructions 107.51 employer's duty to employee; gives references to pertinent cases

**The final step in determining liability is where the KTCA establishes immunity for the particular action.**

Recreational Use is going to be the most pertinent immunity provision for most COVID claims brought by the general public.

Under K.S.A. 75-6104(o) there can be no claim for injuries resulting from the use of any public property intended or permitted to be used as an ark, playground or open area for recreational purposes UNLESS the government entity is guilty of gross and wanton negligence. "[A] wanton act is something more than ordinary negligence, but it is something less than willful injury. To constitute wantonness the act must indicate a 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." *Willard v. City of Kansas City*, 235 Kan. 655, 658, 681 P.2d 1067 (1984)

-Takes a lot to rise to that level.

-Covers a wide array of areas including parks, golf courses, building

**Key to decrease a city's risk for any negligence suit is to review the Guidelines for Health and Safety to ensure the city is using reasonable care.**

1. **Go to the COVID.KS.Gov page and review the Industry Guidance for each particular activity. City Hall probably falls under Professional Services. Make sure the city is following industry guidelines as city hall and other city facilities reopen.**
2. **Make sure that the city's personnel policies are up-to-date and enforced. If an employee is sick, send the employee home.**
3. **Review the EEOC guidance on how the Americans with Disabilities Act intersects with health safety guidelines at [https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws?utm\\_content=&utm\\_medium=email&utm\\_name=&utm\\_source=govdelivery&utm\\_term=](https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=)**
4. **Keep your city attorney in the loop!**