Approved April 23, 1983
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY.

The meeting was called to order by Senator Elwaine F. Pomeroy at
Chairperson

12:00 ~~a~~/p.m. on March 1, 1983 in room 519-S of the Capitol.

~~All~~ members ~~were~~ present ~~except~~ were: Senators Pomeroy, Winter, Burke, Feleciano, Hess, Mulich and Werts.

Committee staff present: Mary Torrence, Revisor of Statutes
Mike Heim, Legislative Research Department
Mark Burghart, Legislative Research Department

Conferees appearing before the committee:

Kathleen Sebelius, Kansas Trial Lawyers Association
Jerry Palmer, Kansas Trial Lawyers Association
Randy Hearrell, Kansas Judicial Council
Judge James P. Buchele, Shawnee County District Judge
Glenn Cogswell, Alliance of American Insurers
L. M. Cornish, Kansas Association of Property and Casualty Insurance Companies
Larry Smith, Western Insurance Companies
Jim Wright, Kansas Association of Defense Counsel
Jim Clark, Kansas County and District Attorneys Association
Georgia Nesselrode, Office of Johnson County District Attorney, Olathe, Kansas
Brad Smoot, Office of Attorney General
Marjorie Van Buren, Office of Judicial Administrator
Phil Magathan, Third Judicial District Crime Victims' Program
Douglas Smith, District Court, Salina, Kansas
Tom Tush, Tenth Judicial District, Probation Officer
Gene Johnson, Sunflower Alcohol Safety Action Project

Senate Bill 289 - Prejudgment interest.

Kathleen Sebelius appeared in support of the bill. A copy of a position paper prepared by the Kansas Trial Lawyers is attached (See Attachment #1).

Jerry Palmer appeared in support of the bill. He testified the bill will affect the speed of settlements, and it will reduce litigation. He stated two years ago when this was adopted, 10% was the adopted figure; they don't mind if the figure is lowered.

Randy Hearrell appeared in support of the bill. A copy of a presentation on pre-judgment interest is attached (See Attachment #2).

Judge James Buchele appeared in support of the bill. He testified it is time the legislature in Kansas addresses this subject. He stated there is a financial incentive not to settle, particularly in larger cases.

Glenn Cogswell appeared in opposition to the bill. He testified this legislation was defeated three times last year; it seems to him the decision was made. To have pre-interest judgment would promote litigation and would actually discourage settlement in cases. Sometimes in cases of disabled people, it would have the effect of slowing settlement of the case. Prejudgment interest increases the award, and it will increase attorneys' fees recoveries. Mr. Cogswell stated it is an unfair fee being earned throughout the proceeding by the attorney drawing interest on that fee. With increased recovery, attorneys' fees and settlements, it will mean increased costs. Mr. Cogswell testified his group thinks in terms of damage suits, and when you think in terms of prejudgment interest, this bill would apply to any judgment, property settlement, alimony in divorce cases. He stated this bill has a tremendous potential. It would be a great policy change in this state, and it would have far reaching effects if not thoroughly examined.

Senate Bill 289 continued

Bud Cornish appeared in opposition to the bill. His group feels this has had its day before the legislature, since it was defeated three times. There has been no need shown for a change in this law. He testified from a survey taken, you can expect a lawsuit in Kansas for each 694 policies issued. Mr. Cornish stated it is not always the defendant that holds back settlements, frequently it moves in the other directions. Large settlements do come in later than smaller settlements. He stated this bill will cause interest to be placed upon future damages. When the award is made in personal injury cases, all of those are matters into the future, but this is requiring interest on those. He noted we already have on the books a number of statutes dealing with prompt settlement. (See Attachment #3.)

Larry Smith appeared in opposition to the bill. He stated it is his company's position, until they get information to justify the payment, they cannot make those payments.

Jim Wright appeared in opposition to the bill. He testified this bill applies to any judgment after June 30,'83. There are a lot of cases pending now; hope it will only apply to actions filed after that date. He said he feels the bill won't lessen litigation. If defense is going to be penalized for not settling, plaintiffs should be penalized also.

Senate Bill 318 - Victim impact statement in presentence report.

Jim Clark appeared in support of the bill and stated his organization requested it be introduced. He pointed out there is a companion bill, House Bill 2494, which differs slightly from this bill, which is in the House Judiciary Committee.

Gerogia Nesselrode appeared in support of the bill. She stated the bill would benefit her program. She reported the federal government passed a victim protection act in October 12, 1982. She testified the bill would give the victim a chance to comment; it specifically shows the impact that the crime had on them. Basically it helps the prosecutor, the court services and would also help the courts know the attitude of the victim.

Brad Smoot appeared in support of the bill. He reported the attorney general's office had requested House Bill 2494, a companion bill, be introduced. He testified this will put the burden on the court service officers. They are in support of the bill, and support that the statement be prepared and be made available to the victim and returned to the courts. A committee member referred to the amendatory language and inquired if these are facts that will differ in a trial. Mr. Smoot answered, no.

Marjorie Van Buren appeared in support of the bill. She submitted a fiscal note prepared by her office based on the way the bill is written now (See Attachment #4). She stated the language in the bill places the responsibility on the court service officers, and they are not necessarily sure they have the skills to do that sort of thing. A good many of the districts are already using the form, and they have no problem with doing that. She said when speaking of shortages of personnel in the court services area, they are not blowing smoke; they have limited resources and have to extend it as far as they can. It is approximately four hours of investigation as opposed to a simple form of the victim filling out the form.

Phil Magathan stated he is supervisor of the Third Judicial District Crime Victims' Program, and they would like to see the form adopted that was handed out to committee members, the Victim Impact Statement (See Attachment #5). He stated they would like to have the form voluntarily submitted by the victim. He pointed out they were short of personnel.

During committee discussion, a committee member inquired what percentage of the forms get back. Mr. Magathan answered, 75% get back. Mr. Magathan also suggested the reference to probation officer in the bill be changed to court service officers. A ballooned copy of the bill is attached showing proposed amendments (See Attachment #6).

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY,

room 519-S, Statehouse, at 12:00 a.m./p.m. on March 1, 1983.

Senate Bill 318 continued

Douglas Smith appeared in support of the bill. He testified they have an ongoing relationship with the victims. The impact would basically be a disaster for court service officers working in the field. If this bill passes as written, they would find the impact would be three-fold; would find the court delays would mount; there would be delays in reports being completed. He supports the amendment proposed by Mr. Magathan.

Tom Tush testified he agrees with the intent of this legislation. They think it would be applicable and practical. They are already doing some of this in Johnson County. This could create a big impact on the number of hours in doing presentencing investigation. He urged the committee to take into consideration what all this entails. He stated he would support Mr. Magathan's amendment.

The chairman recognized Jim Clark, and he said he had no problem with the amendment.

Senate Bill 296 - Municipal courts; requiring restitution for violations of municipal ordinances.

Brad Smoot appeared in support of the bill. A copy of his testimony is attached (See Attachment #7). Committee discussion with him followed.

Gene Johnson testified they have a little problem with the wording in line 48 "the municipal judge shall order". He suggested changing the word "shall" to "may". Committee discussion with him followed. Senator Burke moved to amend the bill by changing the word "shall" in line 48 to "may"; Senator Feleciano seconded the motion. Following further discussion, Senators Burke and Feleciano withdrew their motion. Senator Burke then moved to report the bill favorably; Senator Hess seconded the motion, and the motion carried.

Senate Bill 318 - Victim impact statement in presentence report.

Senator Feleciano moved to amend the bill to provide for information obtained voluntarily from victims; Senator Hess seconded the motion, and the motion carried. Senator Feleciano moved to report the bill favorably as amended; Senator Hess seconded the motion, and the motion carried.

The meeting adjourned.

3-1-83
Room

GUESTS

SENATE JUDICIARY COMMITTEE

NAME	ADDRESS	ORGANIZATION
L.M. Cornish	Topeka	Ks Assn P&C
LARRY SMITH	FT SCOTT	WESTERN INS Cos
JIM WRIGHT	TOPEKA	Ks ASSN OF DEFENSE COUNSEL
DAVID ROSS	MISSION, KS.	FARMERS INS. GROUP
Dick Scott	" "	State Farm Ins. Co.
Glenn Cogswell	Topeka	Alliance of Am. Insurers
James P. Buchele	"	District Judge
BRAD SMOOT	Topeka	Atty General's office
Bruce Ropy	Topeka	SRS
Karla J. Hamm	Stat Off. Bldg.	SRS
Theodus A. Lockhart	Leavenworth	NAACP
Marjorie Van Buren	Topeka	OJA
Douglas P. Smith	Salina	Dist Court
Nancy L. Lebo	Salina	Dist Court
Thomas C. Bush	Geneva	18th Judicial District Court Services
Kathleen Sebelius	Topeka	KTLA
R. Hearrell	Jud Com. TOPEKA	Jud Com

#1

The Kansas Trial Lawyers Association supports the enactment of S.B. 289, legislation requiring prejudgment interest in civil suits.

JUSTIFICATION AND NEED FOR THE BILL.

Prejudgment interest has existed in the Kansas law since 1889. It is a common business concept and the current law, which is written in K.S.A. 16-201, specifies a rate of 10% interest unless some other rate is mandated by contract.

The current law only applies to "liquidated" damages, specific amounts which can be determined in advance. S.B. 289 applies to "unliquidated" damages, the compensation paid to an injured person which cannot be precisely determined in advance. In most cases there is no question that the damage occurred, and that the injured party should be compensated, but the exact amount is often determined by a jury during a lawsuit, or by settlement of the case prior to trial. Currently, these persons are excluded from collecting prejudgment interest.

Delay prior to trial is a serious and often overlooked aspect of the legal process. An injured person suffers immediate financial loss. This situation is further complicated by the disasterous effect such a loss has on the family unit if the injured party is the primary "bread winner". Few people carry sufficient first party insurance to fully compensate the family for medical bills and wage loss in the event of injury, but the bills must be paid immediately. Furthermore, if a lawsuit is recommended to ensure adequate compensation for injuries, substantial time is required for investigation and preparation.

The courts of Kansas are crowded with criminal cases. Recent United States Supreme Court and Kansas Supreme Court decisions have increased the amount of legal work necessary in order to insure that persons charged with criminal acts have fair and speedy trials. Criminal cases have a priority over civil cases and the result is that

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civil matters are delayed. It may take several years for a case to be tried. If the decision is appealed, the judgment is further delayed. During the years, money is held by the defense and collects interest. For example: A person is injured in January, 1983, and the damages are worth $100,000. The insurance company defendant invests $100,000 in commercial paper yielding 12% per year (or more). At the end of 1983, the defense has a total of $112,000. If it takes a total of four years for the injured party to be paid, the original $100,000 is worth $157,352. But the injured party is not paid this investment income; the $57,352 belongs to the insurance company. In fact, it frequently happens that the injured party has paid interest on personal loans needed to pay bills from the original injuries.

This system, as it presently exists, encourages delay. Even if the defense will ultimately pay a claim, there is no incentive to part with the money before it is absolutely necessary. In fact, there is financial incentive which rewards delay, in this case $93,536. Without a doubt, such a situation is unconscionable in its present form and only S.B. 289, with KTLA's amendments, presents an equitable solution to the problem.

HISTORY OF S.B. 289.

In 1979, the Kansas Trial Lawyers Association proposed H.B. 3045, which contained 2 sections: it increased the legal rate of interest in Kansas to 10% and increased postjudgment interest to 12%. At a hearing before the House Committee on Commercial and Financial Institutions, an amendment was added to mandate 10% prejudgment interest from the date an action was filed until the date of judgment.

The amendment was removed from the bill on the House floor, at the request of Rep. Joe Hoagland, who felt that the Judicial Council should be asked to study the issue of prejudgment interest in Kansas. During the summer of 1980, the Judicial Coun-

cil undertook the study and resolved that Kansas should implement prejudgment interest in cases of unliquidated damages and asked for the introduciton of H.B. 2150 in the 1981 Session.

The Judicial Council draft recognized the inequity in the current system and saught to fully compensate the injured party. At the same time, the Council was reluctant to create a system which would increase the filing of lawsuits, and would add to the crowded court schedule. Consequently, the interest was triggered by an offer of settlement, not a lawsuit.

H.B. 2150 was considered in the 1982 Session. The bill received favorable consideration from the House, was recommended favorable for passage by the Senate Committee, and was narrowly defeated on the floor of the Senate. The provision was added to a Conference Committee report and overwhelmingly passed the House (91-31) and was again narrowly defeated in the Senate.

PREJUDGMENT INTEREST IN OTHER JURISDICTIONS.

At the present time, 22 states and the District of Columbia have some form of prejudgment interest. The majority of states adopting this rule have done so statutorily. Yet, during the 1970's and into the 80's, several state courts have judicially imposed the rule in the absence of legislative direction. As a result, the recent trend is one of judicial adoption rather than statutory language. Within, the midwest itself, Colorado, Iowa and Oklahoma all provide for prejudgment interest in civil actions. Iowa initially adopted the rule through judicial order, but has since incorporated the language within their statutory code.

Another growing movement toward prejudgment interest has occurred at the federal court level. Within the Northern District of Illinois, the district court in 1979 ordered the defendants to pay prejudgment interest in the case of In re Air Crash

Disaster Near Chicago, (32 M.D.L. 391, N.D.Ill. 1979). The court's justification was the "unjust enrichment" defendant's (insurers) had incurred during the litigation process at the expense of those plaintiffs involved.

Furthermore, the United States Congress has begun to act on the matter of prejudgment interest. During the 96th Congress, First Session, Senate Bill 1477 was introduced and passed by the Senate allowing for prejudgment interest "...where the facts of the controversy...indicate that an award of such prejudgment interest is appropriate to afford the prevailing party complete relief." Interest was at a rate established "...pursuant to section 6621 of the Internal Revenue Code of 1954 (26 U.S.C. 6621) as of the date." Senator Bob Dole (R-Kansas) was one of the chief supporters and helped push the bill through the Senate.

In this era of crushing inflation, the award of prejudgment interest is a recognition that full compensation requires some payment for the loss of the use of funds by the injured parties. Nearly half of the states and the District of Columbia have recognized the equity of this proposal.

CONCLUSION.

Although some courts have questioned the award of interest on "unliquidated" claims, or claims which are not precisely known at the outset, 22 states and the District of Columbia have recognized the equity of prejudgment interest. Since the injured person has actually lost the use of his or her money (i.e., lost wages or medical payments or property) if compensation is the actual goal of the system, then he or she should be entitled to interest on the loss. Interest is not a duplication of any other damage award, nor is it punitive. An award of interest is merely a recognition that the defendant owed some money to the injured party and the defendant has received gains

from holding the money. Under the current system, the wrongdoer makes financial gains from delaying compensation to the injured party.

The present system, which encourages delays, does a great disservice to the injured citizens of Kansas. Too often justified claims are contested and legal action is delayed because there is no pressure or incentive for speedy settlement. This proposal recognizes that money is very costly in a high interest period and unless the system encourages reasonable settlements and prompt action, then the money will be held as long as possible. The injured citizens of Kansas are further penalized by this outmoded and unfair state of the law which fails to recognize the economics market of the 1980's.

In the final analysis, this proposed legislation would be of great benefit to the public generally, the injured parties specifically, and would also promote the speedy disposition of civil suits currently left hanging by other priorities of the judicial system.

#1

PREJUDGMENT INTEREST

Currently 22 states and the District of Columbia allow prejudgment interest to be awarded by statute. In addition, some courts allow prejudgment interest in the absence of statutory authority. See: In re Air Crash Near Chicago, 15 Avi 17, 385 (1979). Within the midwest, Colorado, Iowa, North Dakota and Oklahoma allow some form of prejudgment interest in civil actions.

1. **ALASKA** - Allows prejudgment interest to accrue at 10.5% from the time of the cause of action. "Failure to award....creates a substantial financial incentive for defendants to litigate...."

2. **CALIFORNIA** - S.B. 203, which provides that if after plaintiff makes an offer of judgment which is not accepted and plaintiff's judgment is in excess of the offer, then interest at the rate of 10% will accrue on the entire judgment from the date of the offer passed the Legislature in 1982.

3. **COLORADO** - Plaintiff in tort actions may claim 9% interest from the time the cause of action arose. (Colo. Rev. Stat. §13-21-101).

4. **CONNECTICUT** - In civil actions the plaintiff may file with the court an offer of settlement. If it is rejected and the plaintiff recovers an amount equal to or greater than the settlement offer, the court adds 6% interest to the verdict computed from the time the offer was filed. (Conn. Gen. Stat. Ann. §37-3a, 52-192(a)).

5. **DISTRICT OF COLUMBIA** - The court may add 6% interest from the time a contract or tort action is filed if it is, "(N)ecessary to fully compensate the plaintiff." (D.C. Code Ann. §15-109).

6. **GEORGIA** - Claimants in a civil action may send the defendant a damage claim. If rejected and the verdict is equal to or greater than the claim, the court will add 7% interest to the recovery. Interest is computed from 30 days after the claim is mailed. (Ga. Code Ann. §105-2016).

7. **HAWAII** - The court may add 8% interest on judgments computed from anytime after the cause arose. "(T)o conform with the circumstances of each case." (Hawaii Rev. Stat. §478-2, 636-6).

8. **IOWA** - The plaintiff may collect 10% interest from the time the action is filed. (1980 Legislative Service H.F. 673).

9. **LOUISIANA** - Legal rate of interest is due from date of judicial demand.

10. **MAINE** - Interest in non-contract actions is 8% and is computed from the time the complaint is filed. (Me. Rev. Stat. Ann. t.t. 14 (1602).

11. **MASSACHUSETTS** - Allows 8% interest to be added to tort verdicts computed from the time the action is filed. (Mass. Ann. Laws. ch. 231 §6B (Michie/Law Co-op)).

12. **MICHIGAN** - Interest of 6% is allowed in civil actions and is computed when the complaint is filed. If the defendant makes a settlement proposal which is rejected and the verdict is less than the offer, the court has the discretion to add interest from the time of the proposal. (Mich. Stat. Ann. §27A.6013).

13. **NEVADA** - A party to the action may make a compromise offer. If it is rejected and the verdict is equal to or greater than the offer, 8% interest is added to the verdict. Interest is added from the date of service of summons. (Nev. Rev. Stat. §17.115, 17.130).

14. **NEW HAMPSHIRE** - In tort actions interest of 6% is added from the time the petition is filed. (N.H. Rev. Stat. Ann. §524:1-9, 1-6).

15. **NEW JERSEY** - In tort actions 8% interest is added from the date the action is commenced or from six months after the tort occurs, whichever is later. Prejudgment interest is not allowed in actions against the state or political subdivisions. (N.J. Stat. Ann. §59:9-2).

16. **NEW YORK** - In actions for breach of contract and interference with the use, possession or enjoyment of property, the court awards 6% interest computed from the time the cause of action arose. (N.Y. Civ. Proc. §5001 (McKinney)).

17. **NORTH DAKOTA** - Prejudgment interest is discretionary with the jury. The return of a verdict in excess of the pleading is presumed to include interest. Century Code 32-03-04.

18. **OKLAHOMA** - Allows 10% interest in tort actions from the time the suit was filed. In claims against the state or political subdivisions, prejudgment interest of 6% is allowed. (Okla. Stat. Ann. t.t. 12 §727).

19. **PENNSYLVANIA** - In actions for bodily injury, death or property damage, the court awards 10% damages for delay. The interest is computed from the time the action is filed or one year after the cause of action arose, whichever is later. If the defendant makes an offer which is rejected and the verdict is less than 125% of the proposed settlement, the damages for delay are computed up to the time of the offer. (42 Pa. Cons. Stat. Ann. Rule 238).

20. **RHODE ISLAND** - In civil actions 8% interest is added to the verdict computed from the time the cause of action arose. (R.I. Gen. Laws §9-21-10).

21. **UTAH** - Allows 8% interest in personal injury tort actions computed from the time the actions arose. (Utah Code Ann. §78-27-44).

22. **WEST VIRGINIA** - Provided for prejudgment interest in 1981 Legislature with H.B. 932.

COPY

PRE-JUDGMENT INTEREST -- H.B. 2150

Mr. Chariman, Members of the Committee

I appear in support of House Bill No. 2150.

In Sec. 1C of the bill, it would establish a right to recover pre-judgment interest on an unliquidated claim, i.e., a claim, for which the liability and amount have not been previously determined.

The typical claim is that for damages to persons or property.

The Bill is the result of a study made by the Judicial Council at a request from the 1980 session of the Legislature.

The Study was undertaken by the Civil Code Advisory Committee of the Council.

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The committee was materially aided in its study by detailed submissions by the Kansas Trial Lawyers Association as well as the Kansas Association of Property and Casualty Insurance Companies.

As you will know, Kansas provides for the allowance of pre-judgment interest only in designated cases:

1. When the parties have contracted for a rate of interest, like in a promissory note.

2. When no contract rate has been agreed upon, pre-judgment interest at 10% is allowed to creditors only in these special circumstances:

   a. For any money, <u>after</u> it becomes due, like on the purchase of merchandise;

   b. For money due on settlement of accounts from the date of liquidating the account and determining the balance;

c. For money received for the use of another and retained without the owner's knowledge of its receipt.

(Embezzlement)

d. For money due and withheld by an unreasonable and vexatious delay;

e. For wages from the end of each month, unless paid within 15 days.

(K.S.A. 16-201)

Thus under current Kansas law, statutory interest --10%--is added to the amount due only in those special categories where:

1) The amount and due date are already known -- i.e.:

(a) The purchase of merchandise at an agreed or posted price;

(b) Wages of an employee.

2) Those wrongful-withholding-of-money cases -- described as vexatious delay or--politely-- embezzlement.

The listing excludes the allowance of interest on unliquidated claims, until the amount due, if any, has been determined by a trial and judgment.

Consequently, interest on claims for damages to persons and property and other claims where the amount is not known, do not bear interest until the amount is determined by judgment.

On unliquidated claims, there never is a time prior to judgment when the ~~creditor~~ debtor knows the amount he owes, if any, as compared to a promissory note, the payment of which would stop any interest.

The result of the Committee's study is embodied in H.B. 2150, Sec. 1C. Its provision will give the claimant the opportunity to have the claim treated as a liquidated amount for pre-judgment interest purposes.

Under Sec. 1C -- 10% interest would be allowed on the compensatory portion of an unliquidated claim, if the claimant shall make a written offer of settlement, and at the trial recovers an amount in excess of the amount of the offer of settlement.

The interest would be allowed from the date 30 days after the date of service of the offer of settlement.

The offer of settlement would be open for 30 days and if not accepted, is deemed withdrawn. The offer is accepted by payment or by giving credit for the amount.

If the offer is accepted the case is terminated.

If the offer is not accepted, then claimant is entitled to 10% interest, if he is adjudged to recover more than the offer.

It is basically a middle position between those who would allow interest from the date the claim arose and those who insist on maintaining the position of allowing interest only from the date of the judgment.

Summary of Other States:

1. Pre-judgment interest from date action accrued:

   3 states: Colorado, Rhode Island, Utah

   1 state: California at discretion of jury

   1 state: Hawaii at discretion of the court

2. Pre-judgment interest from date of filing complaints:

   5 -- without reservation

   4 -- with reservation

3. Interest allowable from date of settlement offer, if judgment finally obtained equal to or in excess of offer:

   Connecticut

   Georgia.

   Nevada--from date of service

4. More than half of our sister states still deny any pre-judgment interest.

There are those who would have the claim, when and if finally established, draw interest from the date the cause of action arose.

Three (3) states have in fact adopted legislation so providing--2 other states at the discretion of the court or jury.

Most of the states--two-thirds--including Kansas, continue to allow interest only from the date of judgment when the fact of liability and the amount of damages are known.

It is basically unfair to impose interest on a claim when there remains a question of liability.

But it is particularly unfair when, prior to judgment, there is never a time the alleged debtor can pay an amount owing and stop the interest.

The present law of allowing no interest until the fact of liability and the amount have been established needs to be changed.

It may make it profitable to delay the time when the fact of liability and the amount are established.

It does nothing to encourage the parties to reach a settlement until shortly before trial.

Some 12 states have adopted some sort of pre-judgment interest provision.

5 states -- from the date of filing suit without reservation.

4 states -- from the date of filing suit but with some reservations.

3 states -- Connecticut, Georgia and Nevada make the allowance of pre-judgment interest contingent on the claimant making an offer to settle for a definite amount.

The Solution:

H.B. 2150 would make the allowance of interest contingent upon the claimant submitting a definitive offer of settlement.

It will encourage the claimant to submit a realistic offer. If the offer is not realistic, claimant takes the risk of the eventual judgment being less than the offer, and then no interest is allowed.

It will present the debtor with a definitive amount, the payment of which will avoid any interest. But the failure to accept the offer puts the debtor at the risk of the trial producing a greater amount, and interest from the date the debtor rejected the offer.

The adoption of the bill would require both sides to take a realistic view of the lawsuit, and more likely to produce an early settlement.

The Kansas Trial Lawyers Association has presented some proposed amendments to the bill. They have been considered by the Civil Code Advisory Committee.

1. They recommend changing the interest rate from 10% to 12%, as being more in line with current investment interest rates.

Or, in the alternative, incorporate the variable rate computed by I.R.S. on tax deficiencies or overpayment.

The committee would stick with 10%. This is the statutory rate on liquidated claims where the parties have not agreed on some other rate. The interest rate should not be different for unliquidated claims.

2. They recommend a provision to encourage the alleged debtor to make a counter-offer.

The committee has rejected this provision because it does not encourage realistic evaluations by the parties. It would tend to reduce their negotiations to a bidding auction--with each side attempting to measure at what point the other will settle.

* * * * * * *

3-1-83
Neal

#3

POSITION OF KANSAS INSURANCE INDUSTRY
RE: SB 289

The Kansas Insurance Industry opposes SB 289 which would require prejudgment interest to be assessed on unliquidated claims. This bill would authorize claimants, before or after suit is filed, to make offers of settlement in which interest will run from a date 30 days after the offer is served on the defendant, at 10% interest, provided the award exceeds the offer.

1. This is contrary to traditional Kansas law which has restricted interest on unliquidated claims. Prejudgment interest has been allowed where compensation can be measured by market value or other definite standards. In other words an ascertainable amount.

2. There has been no showing of a need to make this drastic change in our law. There has been no proof that this bill would accelerate claim payment or reduce litigation. To the contrary there is strong indication that adding interest will simply prolong litigation and encourage claimants to "roll the dice" with the jury. Claimants will be inclined to send a series of offers of "high side offers" and then go to the jury on the chance they can hit one of the high side offers.

3. The bill will increase the cost of insurance by the interest upon awards. This cost will be passed to policyholders in the form of premiums. Kansas policyholders do not need higher premiums.

4. This bill will impact all litigation - not only personal injury litigation concerning insurance companies.

5. This bill will require prejudgment interest to be paid upon awards for future damages, such as medical payment, wage loss, pain and suffering, etc.

6. Numerous Kansas statutes provide the means of encouraging defendant to make early settlements. These statutes assess attorney fees against insurance companies if a judgment against an insurance company exceeds the claimant's offer of settlement. We believe this is sufficient incentive for insurance companies to pay reasonable offers of settlement. A copy of current Kansas statutes which encourages prompt settlement by insurance companies is attached.

Att. 3

3-1-83
Noon
#4

State of Kansas

Office of Judicial Administration

Kansas Judicial Center
301 West 10th
Topeka, Kansas 66612
(913) 296-2256

February 28, 1983

To: Lynn Muchmore, Director of the Budget

From: Jerry Sloan, Fiscal and Budget Officer

Re: S.B. 318

This bill would mandate that presentence investigation reports include a verified statement assessing the financial, social, psychological and medical impact of the crime upon the victim.

We estimate that this requirement would add an additional four hours of court services officer time to prepare each of these reports. Utilizing the figures available for FY 1983 and extrapolating to a full year, we estimate 4,922 presentence investigation reports that are mandatory, 3,762 nonfelony reports that are not required but will be done, and 5,070 juvenile reports. This would amount to an estimated 13,754 presentence investigation reports for FY 1983, which we estimate would require 55,016 additional hours.

In order to comply with this bill, we would need 27.5 additional court services officer positions. With salary and fringe benefits, we estimate that this would cost $507,843.00 in FY 1984.

JS:sb

District Court of Kansas
Third Judicial District
Shawnee County, Kansas

3-1-83

#5

@A

@B
@C
@D

RE: @E
Case No.: @F

Dear @G:

The Court has requested a presentence investigation on the above-named individual. The Court and I are concerned about you, the victim, and we encourage any input you may have.

Any assistance you can lend us in this case would be greatly appreciated and will be treated as confidential. Will you please answer the questions on the attached sheet and forward your responses to me. Feel free to contact me by phone or make an appointment if you wish to discuss this matter in person. This case is now pending and your prompt response is appreciated. If no response has been received within fifteen days of this letter, I will assume that you have no interest in this case.

Sincerely,

@H
@I

@J
Encl. (H-3A)

H-3

Atch. 5

#5

VICTIM IMPACT STATEMENT

VICTIM: @B

RE: @E

CASE NO.: @F

(1) What were the circumstances centered around this offense which involved you as the victim?

(2) As a result of this incident, were you physically injured? _____ If yes, please describe the extent of your injuries.

(3) Has this incident affected your ability to earn a living? _____ If yes, please describe your employment, and specify how and to what extent your ability to earn a living has been affected, days lost from work, etc..

(4) Have you received any counselling or therapy as a result of this incident? _____ If yes, please describe the psychological impact which the incident has had on you.

(5) Amount of expenses incurred to date as a result of counselling or therapy received: $ _____

(6) Please describe what being the victim of crime has meant to you and to your family.

(7) What are your feelings about the criminal justice system? Have your feelings changed as a result of this incident? Please explain.

(8) Do you have any thoughts or suggestions on the sentence which the Court should impose herein? Please explain, indicating whether you favor imprisonment or probation.

(9) Please provide an accurate account of any cost to you incurred as a result of this offense. If you were insured, please indicate your insurance company, policy number, and if you had any deductible to pay. It is important you provide this information and include verified statements of losses to help us establish restitution in this case, if owing.

THIS FORM IS SUBSCRIBED AND AFFIRMED BY THE VICTIM AS TRUE UNDER THE PENALTIES OF PERJURY. THE INFORMATION AND THOUGHTS YOU HAVE PROVIDED ARE VERY MUCH APPRECIATED.

Date: _____

_____
Signature

H3A

3-1-83
noon

Session of 1983

SENATE BILL No. 318

By Committee on Judiciary

2-18

AN ACT concerning crimes and punishments; relating to presentence investigation reports; amending K.S.A. 21-4604 and repealing the existing section.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 21-4604 is hereby amended to read as follows: 21-4604. (1) Whenever a defendant is convicted of a misdemeanor, the court before whom the conviction is had may request a presentence investigation by a probation officer. Whenever a defendant is convicted of a felony, the court shall require that a presentence investigation be conducted by a probation officer or in accordance with K.S.A. 21-4603 *and amendments thereto*, unless the court finds that adequate and current information is available in a previous presentence investigation report or from other sources.

(2) Whenever an investigation is requested, the probation officer shall promptly inquire into the circumstances of the offense; the attitude of the complainant or victim, and of the victim's immediate family, where possible, in cases of homicide; and the criminal record, social history, and present condition of the defendant. Except where specifically prohibited by law, all local governmental and state agencies shall furnish to the officer conducting the presentence investigation such records as such officer may request. If ordered by the court, the presentence investigation shall include a physical and mental examination of the defendant.

(3) Presentence investigation reports shall be in the form and contain the information prescribed by rule of the supreme court; ~~and~~. *In addition, each report* shall contain ~~such~~ *a* ~~verified~~ *statement* ~~assessing the financial, social, psychological and medical~~ crime victim impact

Atch. 6

impact of the crime upon the victim submitted by the victim *and any* other information ~~as may~~ be prescribed by the district court.

(4) The judicial administrator of the courts shall confer and consult with the secretary of corrections when considering changes or revisions in the form and content of presentence investigation reports so that the reports will be in such form and contain such information as will be of assistance to the secretary in exercising or performing the secretary's functions, powers and duties.

Sec. 2. K.S.A. 21-4604 is hereby repealed.

Sec. 3. This act shall take effect and be in force from and after its publication in the statute book.

3-1-83

#7

STATE OF KANSAS

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TESTIMONY OF DEPUTY ATTORNEY GENERAL BRADLEY J. SMOOT

BEFORE THE SENATE JUDICIARY COMMITTEE

HONORABLE ELWAINE F. POMEROY, CHAIRMAN

Re: Senate Bill 296

March 1, 1983

Dear Mr. Chairman and Members:

Attorney General Stephan wishes to thank the Committee for this opportunity to comment on 1983 Senate Bill No. 296, a bill requiring the use of restitution in municipal courts.

As the Committee is no doubt aware, the Kansas legislature has already begun to recognize the rights and interests of crime victims. In 1978 the legislature authorized the use of victim restitution by the district courts when granting probation or suspending sentence. L. 1978, ch. 120 §5. A nearly identical provision was enacted for the Kansas Adult Authority when granting parole. L. 1978, ch. 120 §13. That same year, a crime victims reparations program was created, empowering a state board to award monetary reparations to victims of violent crime whose actual losses were not otherwise covered by insurance. L. 1978, ch. 130.

Atch. 7

In 1981, restitution and reparations became mandatory in probation and parole. L. 1981, chs. 147 and 156. And last year, use of restitution and reparations was required in the disposition of juvenile offenders. L. 1982, ch. 182 §102(h).

We think it appropriate to provide the same requirement for restitution and reparations in the sentencing practices of Kansas municipal courts. Senate Bill 296 accomplishes this in nearly identical terms as those used in the probation and parole provisions for adult and juvenile offenders.

In the Spring of 1982 we conducted a survey of fifty municipal judges for the purposes of determining the extent to which restitution is used in Kansas municipal courts. The results of our survey were published in an article on the subject in the Kansas Government Journal. A copy of the entire article is attached to this statement.

The survey indicates that most municipal judges believed restitution was an available alternative to fine or jail and in fact utilize it in sentencing. Judges were reluctant to use restitution in traffic cases because of the general availability of insurance. Our article discusses the use of restitution in traffic cases and concludes that it can be useful and ought to be used in some cases.

Senate Bill No. 296 will encourage greater use of restitution in sentencing in our city courts. It will make our state policy favoring restitution consistent throughout our judicial system. And as municipalities expand the use of the

ordinance to declare and restrain criminal conduct, even duplicating state statutes, the importance of criminal sentencing alternatives is magnified.

Attorney General Stephan emphatically endorses Senate Bill No. 296. It is an appropriate and logical step in aiding crime victims and I hope the committee will agree.

#7

Use of Restitution in Kansas Municipal Courts: A Survey of Law and Practice

EDITOR'S NOTE, The following article was written by Brad Smoot, Chief of the Civil Division in the Office of Kansas Attorney General Robert T. Stephan. The author is a 1976 graduate of the University of Kansas School of Law. Assisting in the research of this article was Jon Craig, a 1982 graduate of Washburn Law School.

"The municipal courts are a vital part of our criminal justice system"[1] hence, the decisions of our municipal judges are matters of considerable public interest. And in "the realm of criminal jurisprudence, imposition of punishment is perhaps the most weighty action taken by a judge."[2] Furthermore, as municipalities expand the use of the ordinance to declare and restrain criminal conduct, even duplicating state statutes, the importance of local criminal sentencing alternatives and practices is magnified. Yet, sentencing decisions are only as responsive and effective as the variety of sanctions available by law to the court. One such criminal sanction is restitution. Although seldom used in the last few decades, restitution has historic precedent and is currently staging a nationwide resurgence.[3]

Restitution is variously defined by statute and judicial pronouncement.[4] Generally, however, the term, as used in criminal prosecutions, means the payment of compensation to a victim of crime by the person convicted of the crime for loss or damage caused by the criminal conduct. Restitution is normally employed by a sentencing court as a condition of probation upon conviction or by a parole authority as a condition of parole following imprisonment. In addition it may be utilized by prosecutors in diversion programs (delayed or suspended prosecution) and by governors in granting clemency.[5]

Kansas district courts have had specific statutory authority to impose restitution as a condition of probation since 1969.[6] In 1981, Attorney General Robert T. Stephan proposed and the Kansas legislature enacted, legislation to require the district courts to impose restitution or reparations to the victim of the defendant's crime as a condition of probation, except where "compelling circumstances" would render such condition "unworkable."[7] A similar mandatory requirement was placed on the Kansas Adult Authority whenever parole is granted.[8] A provision, much the same as those enacted for adult offenders, is currently being considered by the legislature for juvenile offenders.[9] District courts around the state are reporting success in returning compensation to crime victims. The Third Judicial District (Shawnee county), for example, reported returning $180,230 to victims in 1981 - a local record.[10] This experience has also made possible the preparation of a comprehensive set of guidelines for the administration of a court-ordered restitution program including the use of a crime victim impact statement proposed by the Attorney General.

Premise

The resurrection of public interest in crime victims in America has prompted lawmakers to rethink contemporary criminal justice methods. The awakening no doubt has many causes, not the least of which would include an increase in crime itself. However, general dissatisfaction with courts and penal systems which, to many, appear to neither restrain nor rehabilitate offenders, but merely recycle the criminal element, inspires the new retribution, restitution and reparation policy. Simply stated, restitution appeals to our sense of fairness. It is a sanction that attempts to return to the victim that which was taken from him or to replace what was damaged. It is a rational remedy in which the punishment fits the crime.[11] Moreover, restitution returns the innocent victim to a significant place in our criminal justice system.[12]

Several other factors encourage the increased use of restitution in criminal cases, namely, prison overcrowding and increasing costs of lengthy incarceration,[13] "the failure of civil tribunals to provide accessible and enforceable remedies for crime victims,"[14] and recent evidence that imposition of a restitution requirement has a significant and positive rehabilitory impact on the offender.[15] As a result of its potential for success, offender restitution has received the endorsement of the American Bar Association, the National Advisory Commission on Criminal Justice Standards and Goals, and the American Law Institute, among others.[16]

Statutory Authority

Kansas municipal courts act pursuant to the Kansas Code of Procedure for Municipal Courts (hereinafter "Code").[17] The Code extends municipal court jurisdiction to cases involving violations of city ordinances,[18] and grants authority to municipal judges to sentence, fine, imprison, parole and discharge those found guilty by the court of violating city ordinances.[19] Authority to impose conditions of probation is derived from K.S.A. 1980 Supp. 12-4509, which provides in pertinent part: "Whenever an accused person is found guilty of the violation of an ordinance, the municipal judge may: . . . "Release the accused person on probation after the imposition of sentence, without imprisonment or the payment of a fine or a portion thereof, subject to conditions imposed by the court."

Municipal courts are granted similar powers regarding conditions of parole.[20] Because specific conditions of probation or parole are not enumerated, it is reasonable to assume that any otherwise lawful condition is within the contemplation of these statutes. Authority to order restitution has been found in other jurisdictions under statutory references similar to those found in the Kansas Code.[21]

It may also be within the home rule power of a Kansas city to modify the power of its municipal court regarding conditions of probation or parole. In *City of Junction City v. Griffin*[22] the Kansas Supreme Court declared that the Kansas Code of Procedure for Municipal Courts was non-uniform in application and thus within the scope of a city's constitutional home rule power[23] to exempt itself from the terms of the Code. Hence, city governing bodies may modify and expand a municipal court's power to impose restitution within constitutional limits.

Current Practice

Fifty Kansas municipal judges were recently telephoned by the Kansas Attorney General's Office for the purpose of

determining the extent to which restitution is used in Kansas municipal courts. Each judge was asked whether he used restitution, and if so, in what situations. Also discussed was the source of authority for restitution in municipal courts and use of restitution for traffic offenders. The pool of judges surveyed included municipal judges from most Kansas cities of the first class and 27 randomly selected cities of the second class.

The results of this survey indicate that restitution is common in Kansas municipal courts. Eighty-eight percent of the judges believed that restitution was available to them as an alternative, and 76 percent use restitution. Our survey indicates that the use of restitution is more prevalent in cities of the first class. Ninety-six percent of those judges believed that restitution was available and 87 percent use restitution. Judges in cities of the second class were less likely to use restitution, only 81 percent believed that restitution was available and only 67 percent use restitution. Judges in cities of both types agreed that restitution probably was not available in traffic situations. Interestingly, only 30 percent of the judges of cities of the first class believed restitution was available in traffic situations, compared with 33 percent of the judges in cities of the second class.

The situations where most municipal judges use restitution usually involve theft or criminal property damage including traffic law violations such as careless driving, accidents while eluding arrest and "lawn farming." Most judges felt reluctant to use restitution in traffic situations because they felt that their jurisdiction did not extend to civil matters and that their court should not be used as a collection agency for insurance companies. In addition many judges expressed concern over whether execution of the sentence was proper when restitution was not completed by the convicted defendant. Many expressed the belief they lacked power to enforce restitution once imposed. Such concerns appear to be based on common, but unfortunate, misconceptions about the constitutional parameters of restitution. For these reasons the remainder of this article is dedicated to exploring the constitutional scope of restitution, as well as the practical and legal guidelines for using restitution.

Constitutionality

The constitutionality of a restitution requirement as a condition of probation in a criminal case has been considered many times. Although the Kansas appellate courts have not had an opportunity to decide a question involving the legality of restitution, where the issue has been presented, restitution has generally been upheld. Constitutional challenges usually involve claims that the imposition of a restitution requirement violates a state constitutional prohibition against imprisonment for a debt, or that the requirement violates constitutional guarantees of equal protection and due process.[24]

The theory behind challenges based on the "debtor's prison" prohibition is that revocation of probation or parole and execution of the original sentence because of failure to pay restitution amounts to imprisonment for a debt. And where this failure to make restitution and resulting imprisonment is based on indigency, the claim is that the class of indigents is denied equal protection of the laws.

Section 16 of the Bill of Rights of the Kansas Constitution provides: "No person shall be imprisoned for debt, except in cases of fraud."[25] Where similar language has been interpreted in other states, it has been construed as permitting the use of restitution in appropriate cases. The North Carolina case of *State v. Simmington,*[26] involving the imposition of restitution on a traffic offender, is most illustrative. The court, noting that the defendant exercised an option to accept the terms of probation, reasoned that the revocation of the probation and execution of the defendant's sentence were based on his "breach of the criminal law and not for the failure to pay damages."[27] Federal law is generally in accord.[28]

This is not to say that restitution is never improper.[29] However, an analysis of the cases discussing restitution and imprisonment for debt indicates that restitution as a condition of probation and execution of sentence when the condition is violated will generally be proper if conducted within certain limitations. These limitations include: (1) The restitutionary measure must be viewed as a condition for the suspension of the defendant's sentence; (2) the condition itself must not be enforceable by the criminal court; however, the criminal court may invoke the original sentence when the condition for suspending the sentence is not met; and (3) the condition placed on the suspension of sentence must be for an obligation arising out of the criminal act for which defendant was sentenced.

Hence, as a rule, courts may revoke probation for failure to make the agreed restitution without running afoul of the "debtor's prison" concept. Moreover, so long as the restitution order is reasonable in amount and terms of repayment, the equal protection guarantees of the probationer are not infringed.[30]

Restitution has also been challenged as being violative of the defendant's constitutional due process rights on the theory that the defendant is deprived of property by the imposition of restitution without the normal safeguards afforded in a civil case. Specific restitution procedures have also been attacked on due process grounds for procedural deficiencies. A commonly cited discussion of restitution and due process rights regarding either challenge may be found in *People v. Good.*[31] There, defendant was granted probation on the ground that he pay restitution after his conviction for negligent homicide. The Michigan Supreme Court upheld the restitution condition where no hearing had been conducted to determine the amount of restitution. The court, in noting that the defendant was given an alternative to the sentence imposed, observed that "damages" are not assessed in such cases and could not be collected. Only the original sentence may be imposed where agreed conditions are not met.[32]

The theory that constitutional due process standards do not apply to restitution as a condition of probation or parole is by no means the only view advanced in the available case law. The Florida Supreme Court determined in *Fresneda v. State*[33] that due process rights of the defendant include the right to a hearing to determine the amount of restitution to be made pursuant to the Florida statute authorizing restitution "for the damage or loss caused by his (the defendant's) offense."[34] Because restitution is limited in Kansas and many jurisdictions to the amount of damage which defendant's offense caused[35] it may be necessary to have some process by which the amount of damages is determined in order to protect the defendant's due process rights.

Relationship to Civil Actions

One of the factors complicating the use of restitution is the widely held opinion of judges and lay persons that restitution is unavailable in most criminal situations as it is an adjudication of civil damages. This opinion is apparently the result of the similarity between civil relief and restitution, and the mistaken believe that criminal courts imposing restitution are adjudicating civil liability. Judicial authority suggests that this view is without merit.

In *Commonwealth v. Fuqua*[36] the Superior Court of Pennsylvania, noting that restitution is a rehabilitative measure and a constructive tool in criminal jurisprudence, observed that "[a]s a sentence, or a condition of sentence, imposed following a criminal conviction, an order of restitution is not an award of damages."[37] The California Supreme Court has stated that "[d]isposing of civil liability cannot be a function of restitution in a criminal case."[38] Other jurisdictions are in accord.[39]

Moreover, since restitution does not determine civil liability, it is also necessary to consider the effect of restitution on a later civil recovery. The United States District Court for Kansas determined in *Rosenberger v. Northwestern Mutual Life Insurance Co.*[40] that a criminal prosecution does not bar a subsequent civil remedy. However, as previously noted, the actual amount awarded as restitution

is generally limited to the amount of damage or loss actually caused by the defendant's crime. Because restitution is thus limited, it cannot be viewed as a complete substitute for civil relief. In Pennsylvania there is a specific statutory authority for reducing a civil award by the amount paid as crime victim restitution.[41] In Kansas, the code of civil procedure allows previous "payment" as an affirmative defense,[42] so money paid as restitution is likely to reduce any civil award.

Traffic Offenses

A separate section of this article is devoted to restitution where damage is caused by traffic crimes because of the confusion which exists in this area. Our survey of Kansas municipal judges indicated that many judges were reluctant to use restitution in any type of traffic situation. This reluctance is an important factor in the popularity of restitution since a significant number of municipal court cases involve traffic violations of one type or another. This attitute can probably be attributed, at least in part, to the fact that insurance pays for most property damage and personal injury caused by violations of traffic laws.

Restitution is available, however, for traffic offenders where damage to a third party occurs. Since traffic violations of state law are considered misdemeanors in Kansas, the district court may determine that a jail sentence or fine is in order and grant probation when it desires.[43] Municipal courts may act similarly where violations of municipal traffic ordinances constitute misdemeanors.[44] Parole by a municipal court may include a condition that restitution be made. This condition may be applied regardless of insurance consequences and without extinguishing civil liability. Restitution will actually be the best solution in many traffic situations because of a need to make the victim whole and limited desirability of imprisonment for minor infractions. Other jurisdictions are in accord with the view that restitution is available in traffic situations.[45]

Guidelines and Considerations

Having discovered restitution to be desirable, authorized, constitutional and frequently used, we turn briefly to consider when and how restitution should be employed by municipal courts. However, it is to be remembered at the outset that restitution is not a panacea for criminal sentencing problems and unfortunately has only limited utility. To begin with, most perpetrators of crime are never apprehended. Of those that are caught, many are not convicted. And of those convicted, the seriousness of the crime, the nature of the offense (often victimless) or the character and criminal history of the offender may make restitution inappropriate.[46]

The following considerations and suggestions should aid the court in deciding whether, and under what conditions, restitution should be ordered. These guidelines are derived from fundamental legal requirements previously discussed and certain practical aspects noted by various commentators.

- The first problem is determining whether the case before a prosecutor or judge is appropriate for probation and, if so, whether restitution is in order. Such factors as the severity of the crime, the damage or loss to a particular victim and the identity of the defendant will be important. Less severe offenses such as traffic cases are ideal for restitution. However, in many crimes, including traffic offenses, there is no damage or loss to a particular individual. In others, there may be losses to a number of persons. Furthermore, the criminal records of the accused may require that more severe sanctions be used or the defendant's attitude or financial condition may suggest that restitution would not be rehabilitative.
- Next, it must be determined at what stages in the criminal justice system the restitutution program is to be imple-

ited. As previously noted, prosecutors may utilize diversion prior to filing charges and courts may grant probation. Municipal courts might also suspend or modify a fine or imprisonment sentence, granting probation or parole to the offender on the condition of restitution.

- The court or prosecutor must then determine what type of restitution would be most useful. Restitution may take the form of the return of a particular object or a specific dollar amount. It may also include community service calculated to repay the public for its loss or individual service to the victim in lieu of monetary payments depending on the best interests of the defendant and the public.
- Next, the problem of how to measure the loss or damage must be settled. Two methods are available. Either the court may make a determination based on information provided by the victim, the offender, the police and insurance companies, or the court may encourage the victim and offender to negotiate an amount acceptable to both and adopt this amount in the order of probation.
- The amount as established by the sentencing court must be definite and the terms of repayment reasonable based on the circumstances of the offender. If the offender is unemployed, job placement and community service projects may be necessary before restitution can be workable.
- The restitution should bear a direct relationship to the offense for which the defendant is convicted. It should be limited to measurable losses or damages and must not be speculative. Awarding restitution for pain and suffering may be lawful but more likely open to challenge under a due process theory.
- Restitution may be total or partial. Full restitution is recommended where possible as it tends to satisfy the victim and enables the offender to see the true cost of his crime.
- Restitution may be used in connection with other sanctions and conditions otherwise authorized by law, such as fines and incarceration.
- The court should consider the victim in determining the type of restitution to be utilized and the extent of contact between victims and offenders which will or should be created by the probation order. Some states allow the victim to exercise veto power over the restitution condition, although such seems inappropriate in the absence of specific statutory authority. At least, the crime victim impact statement could be employed.
- The court must also decide which parties are to receive the payments of restitution. In other words, are dependents of an injured victim eligible as well as the victim himself? Are insurance companies that have made payments for property loss or health care costs entitled to receive payments?
- Finally, courts and prosecutors must be prepared to enforce the order of probation or parole and its conditions. Failure to make restitution would be grounds for probation or parole revocation and imposition of the original sentence, whether fine or incarceration. If such revocation is considered, the defendant should be given an opportunity to be heard on the reasons for his non-compliance with the conditions. Also, after such hearing, courts would be free to impose the sentence or amend the conditions of probation or parole in the interests of the offender and to increase the chances that the victim is ultimately repaid.

Conclusion

Restitution is not the answer to crime in America. It does, however, have a significant place in the sentencing alternatives available to Kansas courts. When it is viewed as a positive rehabilitative measure for the benefit of the defendant, the victim, and society as a whole, there is little reason for limiting its use. Public costs decrease when criminals are made to pay for their misconduct. Victims are made whole. And criminals are forced to realize the consequences of their actions while taking positive steps to right their wrongs.

Our research suggests that use of restitution in Kansas is widespread, and it shows further that some of the traditional reasons for limiting its use are not supported by legal principles or practical constraints. In short, restitution can be used more often and with greater effect if it is thoroughly understood and properly applied. Although the Kansas legislature has endorsed the use of restitution and may further extend its application, municipal courts are in a unique position to futher employ restitution without statutory change. No other tribunal has a greater opportunity to make use of restitution while advancing the cause of justice in Kansas.

Footnotes

1. Buck, *A New Procedure For Municipal Courts*, 24 JBAK 7, 8 (1973).
2. Note, *Creative Punishment: A Study of Effective Sentencing Alternatives*, 14 WLJ 57 (1975).
3. Galaway, *Is Restitution Practical?* 41 Fed. Probation 3 (1977); Harland, *compensating the Victims of Crime*, 14 Crim. L. B. 203, 214 (1978).
4. *See e.g.*, N.C. Gen. Stat. §15A-1343(d) defining restitution as "compensation for damage or loss as could ordinarily be recovered by an aggrieved party in a civil action." See also *People v. Becker*, 349 Mich. 476, 84 N.W.2d 833 (1959). Note: The terms "restitution" and "reparations" are used interchangeably by some courts, statutes, and scholars, yet distinguished by others. However, generally, restitution connotes the return of specific property or amounts lost to theft or property damage while reparation would also include payment for damages for personal injury caused by criminal conduct. The distinction is of little import in Kansas where both sanctions are authorized as conditions for probation or parole. See K.S.A. 21-4610 and K.S.A. 22-3717. In addition, court ordered restitution is to be distinguished from crime victims reparations authorized by the Kansas Crime Victims Reparations Act. K.S.A. 74-7301 *et seq.* The latter is limited to payments to victims made by the State of Kansas rather than the convicted offender. Such reparation payments are awarded by a state agency only to victims of violent crimes against persons and are not available for losses associated with property crimes.
5. In Kansas, the governor has broad powers to set terms and conditions in awarding clemency. *See* K.S.A. 22-3701 *et seq.*
6. L. 1969, Ch. 180.
7. L. 1981, Ch. 147, §1(4), now at K.S.A. 21-4610(4).
8. L. 1981, Ch. 156, §1(4), now at K.S.A. 22-3717(g).
9. As of the date of this writing, 1982 Senate Bill No. 520 is in conference committee.
10. Topeka Daily Capital Journal (Feb. 4, 1982, p. 19).
11. *Harland, supra*, note 4 at 214.
12. Hudson, Galaway and Chesney, *When Criminals Repay Their Victims: A Survey of Restitution Programs*, 60 Judicature 313, 320 (1976).
13. One commentator has noted that imprisonment of offenders effectively penalizes the victim twice: Once for the crime itself and a second time in the payment of taxes to support the incarceration of the criminal. *Galaway, supra*, note 4 at 6.
14. *Harland, Supra*, note 4 at 215.
15. Siegel, *Court Ordered Victim - Restitution: An Overview of Theory and Action*, 5-6 New Eng. J. Prison L. 135, 142 (1978); *Note, supra*, note 3 at 66.
16. Hudson, Galaway and Chesney, *supra*, note 13 at 313.
17. K.S.A. 12-4101 *et seq.*
18. K.S.A. 12-4104.
19. K.S.A. 12-4106.
20. K.S.A. 12-4511.
21. See, *State v. O'Conner*, 77 Wis.2d 261, 252 N.W.2d 671 (Wis. 1976); and *Huegett v. State*, 83 Wis.2d 790, 266 N.W.2d 403 (Wis. 1978). See also, *Commonwealth v. Walton*, 483 Pa. 588, 397 A.2d 1179 (Pa. 1979).
22. 226 Kan. 516, 601 P.2d 684 (1979) rev'd on reh'g. 227 Kan. 332, 607 P.2d 459 (1980).
23. Kan. Const., Art. 12, §5.
24. See generally, Propriety of Condition of Probation Which Requires Defendant Convicted of Crime of Violence To Make Reparation To Injured Victim, 79 A.L.R. 3rd 976 (1977).
25. Kansas has limited the application of this provision to liabilities arising from contract. See, *In re Wheeler*, 34 Kan. 96, 8 P. 276 (1885) and *In re Boyd*, 34 Kan. 570, 9 P. 240 (1886).
26. 255 N.C. 612, 70 S.E.2d 342 (1952). See also, *State v. Whitt*, 117 N.C. 804, 23 S.E. 452 (1895); and *Myers v. Barnhardt*, 202 N.C. 49, 161 S.E. 715 (1931).
27. *Id.* at 614.
28. See *e.g.*, *Basile v. United States*, 38 A.2d 620 (1944).
29. *See State v. Caudle*, 276 N.C. 550, 173 S.E.2d 778 (1970). North Carolina Supreme Court refused use of restitution to collect civil debt beyond amount actually defrauded through unlawful use of bank credit card. *Accord, People v. Richards*, 131 Cal. Rptr. 537, 17 Cal.3d 614 (1976), reversing probatioh condition requiring restitution for losses on count for which defendant was acquitted; and *State v. Bass*, 53 N.C.App. 40, 280 S.E.2d 7 (1981), where defendant convicted of welfare fraud, but acquitted of receiving food stamp overpayments, could not be required to make restitutuion for food stamp overpayment.
30. *White Eagle v. State*, 280 N.W.2d 659 (S.D. 1979).
31. 287 Mich. 110, 282 N.W. 920 (1938). See also *People v. Marks*, 340 Mich. 495, 65 N.W.2d 698 (1954).
32. *Id.* at 115.
33. 347 So.2d 1021 (Fla. 1977).
34. Fla. Stat. §948.03(1)(g).
35. K.S.A. 21-4610(4) requires that defendant make "restitution to the aggrieved party for the damage or loss caused by the defendant's crime, in an amount and manner determined by the court." See also *People v. Petit*, 88 Mich. App. 263, 276 N.W.2d 878 (Mich. App. 1979).
36. 267 Pa.Super.Ct. 504, 407 A.2d 24 (Pa. Super. 1979).
37. *Id.* at 26.
38. *People v. Richards, supra*, Note 30.
39. See generally *People v. Moore*, 43 Mich. App. 693 N.W.2d (1972), *People v. Moesson*, 78 Misc.2d 217, 356 N.Y.S.2d 483, (1974) and *People v. Petit, supra*, note 36.
40. 182 F. Supp. 633 (Kan. 1960)
41. 18 Pa. C.S. §1106(g).
42. K.S.A. 60-208(c).
43. K.S.A. 8-1502 and K.S.A. 214610.
44. K.S.A. 12-4509.
45. See generally *Shenah v. Henderson*, 106 Ariz 399, 476 P.2d 854 (Ariz. 1970) and *Riner v. State*, 389 So.2d 316 (Fla. 1980).
46. Hudson, Galaway and Chesney, *supra*, note 13 at 314.