Approved March 21, 1984
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY.

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

10:00 a.m./p.m. on March 1, 1984 in room 514-S of the Capitol.

All members were present except were: Senators Pomeroy, Winter, Burke, Feleciano, Gaar, Gaines, Hein, Mulich, Steineger and Werts.

Committee staff present: Mike Heim, Legislative Research Department
Jerry Donaldson, Legislative Research Department

Conferees appearing before the committee:

Jim Wright, Kansas Association of Defense Counsel
Wayne Stratton, Kansas Medical Society, Kansas Hospital Association
Mike Dutton, Kansas Insurance Department
L. M. Cornish, Kansas Association of Property & Casualty Insurance Companies
John Brookins, Kansas Bar Association
Dudley Smith, Kansas Bar Association
Gary McCollister, Kansas Trial Lawyers Association

Senate Bill 758 - Admission of evidence of reimbursement by collateral source.
Senate Bill 760 - Admissibility of evidence of settlement in action for damages.

Jim Wright testified in support of S.B. 758. He stated the jury should be able to sort out whether they want payment for these injuries. The jury should make that decision and be informed fully of the facts of the case.

Jim Wright testified, concerning Senate Bill 760, that the plaintiff has made a settlement with others. In medical malpractice and product liability plaintiffs often settle out of court. The plaintiff is then allowed to go to court against remaining defendants after having settled for substantial sums. A misleading impression is left on the jury in this situation. Justice would be better served if the jury is informed that plaintiff had made settlement with these other parties. The jury has the facts before them to make the decision, and a misleading impression is not left. Committee discussion with him followed.

Wayne Stratton testified in support of both Senate Bill 758 and Senate Bill 760. He stated health care providers are deeply concerned about the trend of awards against defendants in Kansas and elsewhere. A copy of his remarks is attached (See Attachment No. 1).

Mike Dutton testified in support of Senate Bill 758 and Senate Bill 760. He stated, allowing this information would be more fair and equitable. It will allow the jury to do what they want. The current law should be changed because of duplications of payment. He said the jury should be apprised of the information, because it will be in the best interests of the public. It will stabilize health care costs, and it will reduce overcompensation of cases. Mr. Dutton reported they paid out more this year than was paid in all the preceding years; funds have duplicated. He stated more claims are filed against them than they have ever had, and claims are increasing and so is the size of the claims. The department favors anything that can be done to hold down damages. They don't agree with the argument of the tort system the injured victim may not be fully compensated. The argument the plaintiff shouldn't be penalized for buying insurance; but we don't think he should be paid again. They think it is better the jury have that information.

Bud Cornish testified his organization supports the bills. He felt what he would say would be repetitive.

Committee discussion was held with the conferees.

Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY,

room 514-S, Statehouse, at 10:00 a.m./pxxx on March 1, 1984

Senate Bills 758 and 760 continued

John Brookens testified it is the unanimous opinion of four officers of the Kansas Bar Association that these matters should be presented to their entire Executive Council for consideration, and they cannot and should not take a position on either bill without full debate and consideration. The bar feels these questions should not be determined in a one hour hearing. A copy of his remarks is attached (See Attachment No. 2).

Dudley Smith testified, we are discussing the question of evidence, which used to be policy questions. As to what the jury should and should not hear, these cannot be crossed over in a one hour hearing. The bar would like time to study this. Maybe we should allow insurance companies to subrogate. What is fair in a trial with regard to information of what the jury should have of the plaintiff's loss?

Kathleen Sebelius introduced Gary McCollister.

Mr. McCollister testified in opposition to the bills. He stated this is a major implication of tort reform, and he thinks this needs to be studied. It is important to look at the comparative fault system. The plaintiff's information is available, but so should the defendant's report. Comparative fault is determined as a separate issue. The effects in the manner the evidence is presented has to be evaluated here. They would like time to respond to these bills.

During committee discussion with the conferees, a committee member requested the insurance commissioner's office respond in writing regarding the authority their office has to implement Regulation 40-1-20. Mr. Dutton replied, he would convey this request to the commissioner and staff and get back with them.

John Brookens stated, in response to a question from committee, he thinks this subject should be debated on both sides. His organization is not ready to take a position on it. He said this has far reaching ramifications.

The chairman inquired of Jim Wright if his organization would like an interim study. Mr. Wright replied, his organization would not object to any study, because it would give everybody a chance to hear their positions.

Senate Bill 795 - Judicial council recommendations relating to court of appeals.

The chairman explained in the final conference committee action last year on House Bill 2114, relating to phasing out associate district judges, the phase-out would not be until 1987. It was the unanimous consent of the committee to place the associate district judges two thousand dollars less than the district judges.

The meeting adjourned.

3-1-84

GUESTS

SENATE JUDICIARY COMMITTEE

NAME	ADDRESS	ORGANIZATION
[illegible]	Topeka	KBA
Joan Knoll	✓	—
L M CORNISH	✓	Ks Assn of P/C Cos
[illegible]	✓	Kansas Insurance Dept
[illegible]	Topeka	Kansas Hospital Assn / Kansas Med Society
M. Hafner	"	Capital-Journal
David C. Ace	Augusta	
Marjorie Van Buren	Topeka	OJA
Harold Riehm	"	KAOM
Dudley Smith	Topeka	KBA
Lee Wright	Lenexa	FIG
Homer Cowan	Ft Scott	The Western Ins Cos
Kathleen Sebelius	Topeka	KTLA
[illegible] McCallister	Topeka	KTLA
Ed Culbertson	"	Budget Div.
Frank Gentry	"	Ks Hospital Assoc

3-1-84
Attach. #1

STATEMENT REGARDING SENATE BILLS 758 AND 760

My name is Wayne Stratton. I am attorney for the Kansas Medical Society and the Kansas Hospital Association. I have been asked to express the support of both the Society and the Association for Senate Bill 758 and Senate Bill 760.

Health care providers are deeply concerned about the trend of awards against defendants in Kansas and elsewhere. In 1981, there were 8 awards against the Health Care Stabilization Fund totaling $1,773,000; in 1982, 24 awards totaling $3,060,000; in 1983, 25 awards totaling $6,515,000; and in the first six months of fiscal year 1984, there have been 22 awards totaling $7,967,000. During this period of time, the number of claims filed against the Fund have continued to increase on an average of about 25% a year. Kansas has now experienced a verdict for $4.5 million and several verdicts in the one and two million dollar range.

It is obvious that the climate surrounding medical malpractice claims has undergone radical changes in recent years. Kansas law has always recognized that a health care provider is not an insuror and that satisfactory results from health care is, by nature of the human body and physiology, uncertain. Assuming a given number of identical procedures, some will be successful and some will not. Unfortunately, society's expectations in all areas have changed in recent years. We now relate to and individualize the suffering of others, whether it is a downed airman in Lebanon or a baby born with birth defects.

Atch. 1

Persons injured by negligence should be compensated, however, the actual amount of premium dollars charged for medical malpractice which ultimately goes to the injured plaintiff has been variously estimated at between 18-30%. It is questionable whether the present tort insurance system can long continue as a method of compensation of such persons.

A new industry of health care providers who accept substantial fees to review cases and testify has developed. There is no shortage of expert witnesses available, and given a case in which a result is not ideal, it is only a matter of time before plaintiffs' counsel can find someone to criticize some aspect of the medical care. Frequently, in my experience, these people turn out to be former members of prestigious medical universities or researchers who have never received income commensurate with their skills, and they now utilize the prestige acquired over the years to impress local juries with opinions of dereliction by health care providers.

Last week the Senate passed out S.B. 507, which was supported by the Hospital Association and Medical Society. If enacted, this bill will help put the Health Care Stabilization Fund on a more solvent footing. However, health care providers are facing anticipated increases in the premium for basic limits and the Fund surcharge which will probably total 70-80% in the coming years. Moreover, many health care providers will find it necessary to carry excess insurance at an additional cost. While S.B. 507 is needed, it does nothing to remedy the underlying situation causing the problems faced by health care providers.

We believe that Senate Bills 758 and 760 will bring some balance to the present method of compensating plaintiffs.

The collateral source rule, which would be repealed by Senate Bill 758, is a judge-made law, and is a rule of evidence which prohibits a defendant from introducing evidence which shows that the plaintiff's damages are not as great as are claimed. For example, the plaintiff in a personal injury action may have had his hospital and medical expenses paid by some form of insurance; he also may have sustained no actual wage loss due to some formal or informal wage continuation plan sponsored by his employer. In many instances, damages which have been sought are actually paid by Medicaid and Social Security benefits or by special education funds. The collateral source rule bars the defendant from introducing evidence which would inform the jury about those payments.

The theory behind the collateral source rule is that the defendant should not be allowed to "benefit" by taking advantage of the plaintiff's foresight in purchasing insurance protection or making other arrangements for his care, nor "benefit" from the generosities of those who provide services without cost to the person who is injured. We submit that it is inappropriate to talk of "not benefiting" a defendant so as to allow double recovery of damages to the plaintiff, for the purpose of the civil justice system is to indemnify one for the harm actually sustained as a result of the wrongful conduct of another. It is equally inappropriate to talk in terms of "penalizing" a plaintiff through the elimination of the collateral source rule. A person who buys medical and hospital insurance, for example, does

not do so with the idea in mind that someday he might obtain a double recovery of medical and hospital expenses should he be the successful plaintiff in a personal injury action.

Senate Bill 758 does not bar the jury from giving a plaintiff recovery even though expenses are paid from the collateral source. It only proposes that the jury be made aware of the fact that all of the losses the plaintiff claims to have sustained were not such as would cause the plaintiff to dip into his assets or incur indebtedness for their payment. Furthermore, it permits a plaintiff to introduce evidence of the cost of such collateral benefits, so in those instances in which there has been an expense, the jury will know the cost to the plaintiff.

In its 1977 report to the American Bar Association, the Commission on Medical Professional Liability stated:

> "One tort change which is likely to have a measurable impact on premium costs is the repeal of the collateral source rule, so that costs now reflected in medical malpractice premiums would be shifted to first-party health and accident insurance and government health insurance programs. There would also be some overall savings due to the elimination of overlapping payments and the greater administrative efficiency of the collateral payers.
>
> "With the help of an experienced consultant, the Commission attempted to estimate the potential savings in malpractice awards in a "typical" state which had broadly repealed the collateral source rule. While the conclusions necessarily reflect certain arbitrarily chosen assumptions, the Commission is reasonably confident that malpractice awards would be reduced by about 10 to 20 percent depending on the tendency of the fact-finder to ignore evidence of collateral sources."

1977 Report of the Commission on Medical Professional Liability 56 (ABA 1977).

A similar finding is contained in the Rand Corporation Report of the Institute for Civil Justice, entitled "The Resolution of Medical Malpractice Claims".

The two health care provider organizations which I represent also support passage of Senate Bill 760. As we understand this statute, it would again bring light to the judicial process and eliminate the implied deception which results when one defendant settles and the jury is not told of the fact that there has been a settlement. When this occurs, the juries are frequently under the misapprehension that they are obligated to award a substantial sum against the nonsettling defendant so as to provide for the plaintiff's care, frequently not realizing that the plaintiff has already received a substantial amount.

3-1-84
Attach. #2

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March 1, 1984

Statement of Kansas Bar Association

to Senate Committee on Judiciary.

Re: SB 758 - Collaterial source rule.
SB 760 - Evidence or releases, settlements, etc.

Mr. Chairman and Members of the Committee:

The Kansas Bar Association believes in the jury system. We believe in openness with the jury. If a jury is to arrive at a correct solution to a problem submitted to it for decision, the jury should be given all relevant facts of the case. Except under certain rare constitutionally mandated exclusionary rules, relevant facts should not be withheld from a jury.

This same concept of telling the jury the full truth--telling the facts as they are--appears in jury instructions given by a trial judge to a jury in comparative negligence cases. In these cases, the jury is required to answer a series of special questions. For a time, lawyers and trial judges debated whether it is better to tell the jury the legal effect of its answer to these special questions--or to hide this from the jury. The Kansas Supreme Court finally settled the questions, coming down on the side of being open and fully truthful with the jury.

In the case of Thomas vs. Board of Trustees, 224 Kan 539, at page 551, the Court discusses this problem, and the philosophical implications. The Court said:

> "Whether to permit the jury to be informed as to the legal effect of its answers in a comparative negligence case is essentially a policy decision. ... We believe the better rule should be one based not on distrust of juries, but rather one which recognizes that jurors collectively represent the conscience of the community and will do their best to follow the law as contained in the instructions of the court. It seems to us that, as a matter of policy, it is better to have the trial judge explain the operation of the law to the jury rather than to permit the jury to speculate as to the effect of its findings... "

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Atch. 2

We agree with this policy statement of the Court. How can a jury be the collective conscience of the community if relevant facts are hidden from its view?

However, the full legal implications in these two bills involve serious, complex, and debatable policy and social questions that should be fully explored. They each would reverse long standing law of Kansas--law that was adopted long before our society ever dreamed of the problems now submitted to courts and juries for solutions.

We respectfully suggest these questions should not be determined in a one hour hearing.

We had no advance knowledge these bills would be introduced. We first received copies of them on February 21, and they were immediately mailed to our governing body. I have been on a telephone conference call with our four officers, and they are of the unanimous opinion these matters should be presented to our entire Executive Council for consideration.

We regret that we are only able at this time to give you our philosophical views and we cannot and should not take a position on either bill without full debate and consideration.

Respectfully submitted,

John W. Brookens
Legislative Counsel
JWB:mj