Approved 2/28/85
Date

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY.

The meeting was called to order by REPRESENTATIVE JOE KNOPP at
Chairperson

3:30 ~~xxxx~~a.m./p.m. on February 13, 1985 in room 526-S of the Capitol.

All members were present except:

Representatives Duncan, Teagarden and Whiteman were excused.

Committee staff present:

Jerry Donaldson, Legislative Research Department
Mike Heim, Legislative Research Department
Mary Ann Torrence, Revisor of Statute's Office
Becca Conrad, Secretary
Conferees appearing before the committee:

Representative Douville
Ron Smith, Legislative Counsel for the Kansas Bar Association

HB 2083 - Prohibiting an unemancipated minor child from maintaining an action in tort against the parent or parents of such minor child to recover damages for personal injuries caused by the negligence of the parent or parents.

Representative Douville stated that he felt very strongly that a child should not be able to sue his/her parents for ordinary negligence. He referred to a book called "All Our Children" by Kenneth Kennison which has a theme of "If we really want to do the best for our children, if we want to insure their happiness, if we want to insure their health, if we want to insure their future well-being, we have to maintain the family structure; because in the long run, it is the family structure that is the best guide for the child". He said the book indicates that if we really want to help the child, let's do what we can for the parents to make sure that the children have good parents in the sense that the parents have a job so that the family cannot be accused of neglect.

Representative Douville said things have changed today with families. They used to be well-knit structures who all worked together and relied upon each other. Television, automobiles, etc., are breaking down the structure of the family so we need to look for ways to keep the structure of the family together. He said the present law is a tool which helps break down the family. Representative Douville then referred to Judge Schroeder's opinion in the Nocktonick v. Nocktonick case as shown in Attachment No. 1, pages 770,771, 772, 773 and 779 as marked.

Ron Smith, Legislative Counsel for the Kansas Bar Association, opposed HB 2083 as shown in Attachment No. 2. He said there could be a sex discrimination problem, a problem with an older mentally retarded child who is not emancipated and not a minor, and if it is required to carry automobile insurance in order to drive an automobile, the people on low incomes having to carry only the automobile insurance instead of health insurance which could put a great burden on the family in case of an accident with large medical bills that would very quickly get to the roots of the family unit.

The meeting was adjourned at 4:30 p.m.

carelessly ignored by the do-it-yourself father; a teakettle or pot of boiling water unthinkingly left within the reach of a toddler, all become the elements of a suit by the infant child against his parents. It takes but little imagination to conceive of almost unlimited examples. Liability lurks in every corner of the household. And when tragedy strikes through the inadvertent, but nevertheless tortious, hand of the child's parent (let us say the father), that same parent must decide—or at least participate in a family decision—whether or not suit should be instituted for the benefit of the child. The father must decide whether his duties as a father compel him to pass upon the possibility of a recovery against himself for accidental injuries to his child of tender years and take the child to some one to act as guardian ad litem to bring the suit against himself. The father must then assume the role of the defendant, and, presumably, assist in good faith in the defense of the suit in accordance with the terms of the 'cooperation clause' of his insurance policy."

The majority attacks the historical basis of the doctrine, reciting the absence of citations in the original Mississippi case and the absence of an English common law background. That is the mode of attack consistently used by the opponents of parental immunity. Just as consistently, those attackers downplay the significant fact that a numerical majority of courts have considered the merits of parental immunity and have adopted or retained it. See *Owens v. Auto Mut. Indemnity Co.*, 235 Ala. 9, 177 So. 133 (1937); *Welter v. Curry*, 260 Ark. 287, 539 S.W.2d 264 (1976); *Rambo v. Rambo*, 195 Ark. 832, 114 S.W.2d 468 (1938); *Trévarton v. Trevarton*, 151 Colo. 418, 378 P.2d 640 (1963); *Reaves v. Horton*, 33 Colo. App. 186, 518 P.2d 1380 (1973); *Strahorn v. Sears, Roebuck & Co.*, 50 Del. 50, 123 A.2d 107 (1956); *Orefice v. Albert*, 237 So.2d 142 (Fla. 1970); *Horton v. Unigard Ins. Co.*, 355 So.2d 154 (Fla. App. 1978); *Wisenbaker v. Zeigler*, 140 Ga. App. 90, 230 S.E.2d 97 (1976); *Eschen v. Roney*, 127 Ga. App. 719, 194 S.E.2d 589 (1972); *Vaughan v. Vaughan*, 161 Ind. App. 497, 316 N.E.2d 455 (1974); *Barlow v. Iblings*, 261 Iowa 713, 156 N.W.2d 105 (1968); *Downs v. Poulin*, 216 A.2d 29 (Me. 1966); *Montz v. Mendaloff*, 40 Md. App. 220, 388 A.2d 568 (1978); *McNeal v. Administrator of Estate of McNeal*, 254 So.2d 521 (Miss. 1971); *Bahr v. Bahr*, 478 S.W.2d 400 (Mo. 1972); *State Farm Mutual v. Leary*, 168 Mont. 482, 544 P.2d 444 (1975); *Pullen v. Novak*, 169 Neb. 211, 99 N.W.2d 16 (1959); *Nahas v. Noble*, 77 N.M. 139, 420 P.2d 127 (1966); *Teramano v. Teramano*, 6 Ohio St. 2d 117, 216 N.E.2d 375 (1966); *Chaffin v. Chaffin*, 239 Or. 374, 397 P.2d 771 (1964); *Castellucci v. Castellucci*, 96 R.I. 34, 188 A.2d 467 (1963); *Gunn v. Rollings*, 250 S.C. 302, 157 S.E.2d 590 (1967); *Campbell*

v. Gruttemeyer, 222 Tenn. 133, 432 S.W.2d 894 (1968); *Felderhoff v. Felderhoff,* 473 S.W.2d 928 (Texas 1971); *Stevens v. Murphy,* 69 Wash. 2d 939, 421 P.2d 668 (1966); *Oldman v. Bartshe,* 480 P.2d 99 (Wyo. 1971).

Again, Arizona's Justice McFarland persuasively writes:

"[P]arental immunity became one of the established laws of the land; but not without a severe process of judicial refinement which, over many years and many decisions, struck away the sharp edges of severity spawned by the original trilogy, and honed it into a workable law. The majority opinion views this process as 'evincing hostility for the doctrine.' I consider this continued engraftment of exceptions on the application of any rule to be normal, judicial procedure. Judicial exceptions are equally compatible with the concept of improvement as they are with destruction.

"However, it seems immaterial now whether parental immunity descended from the Common Law, or is a creature of the American judiciary. The doctrine has become firmly imbedded in our jurisprudence over a span of eighty years by virtue of innumerable decisions from almost every State in the Union. I do not believe that courts should slavishly follow precedents. Judges are not eternally shackled to the decisions of their predecessors. On the other hand, I do not believe that precedents can be lightly disregarded. Mr. Justice Jackson aptly describes this in an article in Col. L. Rev. 45:1, at 26:

"'. . . While Judge Cardozo pointed out with great accuracy that the power of the precedent is only "the power of the beaten track," still the mere fact that a path is a beaten one is a persuasive reason for following it. . . .'

"I find it inconceivable that so many courts have walked in error for so many years even up to the present." 106 Ariz. at 94.

The validity and significance of the original reasons for adopting the parental immunity doctrine have not waned. Domestic tranquility, proper parental discipline and control, family unity, and social responsibility are integral elements of America's success as a nation and culture. In our free society, at a time when government and institutions are daily encroaching on the sanctity of the nuclear family, *it is crucial to reaffirm our dependence on the family unit.* The parent-child relation is the fertile basis for the care, education, moral and spiritual training of our children. The words of the majority in *Small v. Morrison,* 185 N.C. 577, 584-85, 118 S.E. 12 (1923), ring true today:

"We think this argument, however, is more than overcome by practical considerations of public policy, which discourage causes of actions that tend to destroy parental authority and to undermine the security of the home. No greater disservice could be rendered to any child than to teach its feet to stray from the path of rectitude, or to suffer its mind to be poisoned by ideas of disloyalty and dishonor. The policy heretofore established in this state with respect to the maintenance of the family as the social unit is diametrically opposed to the communistic theory

which Russia has unsuccessfully sought to put into practice. From the very beginning the family in its integrity has been the foundation of American institutions, and we are not now disposed to depart from this basic principle. Freedom in this country is the self-enforcement of self-enacted laws; and liberty with us is the right to go and do as you please under the law, or so long as you please to do right. Hence, in a democracy or a polity like ours, the government of a well-ordered home is one of the surest bulwarks against the forces that make for social disorder and civic decay. It is the very cradle of civilization, with the future welfare of the commonwealth dependent, in a large measure, upon the efficacy and success of its administration. Under these conditions, the state will not and should not permit the management of the home to be destroyed by the individual members thereof, unless and until the interests of society itself are threatened. Whenever this occurs, adequate provision for the protection of the community, as well as the members of the family involved, has been supplied in the form of juvenile courts, welfare officers, etc. To say that a minor child, while living in the household of its parents, must be given the right to sue the latter for a tort committed, or else be declared an 'outlaw,' is simply begging the question and overlooking entirely the consequences that such a proceeding would have upon the household of which said child is an important member and component part. In this society of ours, complex as it is, all rights are relative; and the courts, as well as the Legislature, must look to the larger good and not merely to the smaller hope. They are not to be 'penny wise and pound foolish.'"

Following a similar rationale, the Washington Supreme Court in *Borst v. Borst,* 41 Wash. 2d 642, 656, 251 P.2d 149 (1952) stated:

"Parenthood places a grave responsibility upon the father and mother. It is their duty to rear and discipline the child. In rearing the child, the parents must provide a home and perform tasks around the home and on the premises. In most cases, it is necessary or convenient to provide a car for family transportation. In all the family activities, the parents and children are living and working together in close relationship, with neither the possibility of dealing with each other at arm's length, as one stranger to another, nor the desire to so deal. The duty to discipline the child carries with it the right to chastise and to prescribe a course of conduct designed for the child's development and welfare. This in turn demands that the parents be given a wide sphere of discretion.

"In order that these parental duties may adequately be performed, it is necessary that the parents be not subject to the risk of suit at the hands of their children. If such suits were common-place, or even possible, the freedom and willingness of the father and mother to provide for the needs, comforts and pleasures of the family would be seriously impaired. Public policy therefore demands that parents be given immunity from such suits while in the discharge of parental duties."

The appellant and the majority contend that public policy has changed markedly since the early decisions like *Small v. Morrison,* 185 N.C. 577. The majority states that "our task is to decide which rule best serves the needs of justice in Kansas in the

closing years of the twentieth century." *Ante* at 766. Yet, a cursory reading of the majority opinion reveals *the primary force behind the move to abolish parental immunity is the existence of liability insurance,* not a desire to serve the needs of justice. Specifically, we are reminded that *Kansas statutorily compels liability insurance for motor vehicles* (K.S.A. 1979 Supp. 40-3104). It is argued that liability insurance eliminates the threat of disrupting family harmony and subverting parental discipline. The argument is not convincing. The existence of liability insurance does not remove the inherent danger of the destruction of the parent-child relationship. See *Stevens v. Murphy,* 69 Wash. 2d at 948.

Evidence that a tort-feasor possesses liability insurance coverage is inadmissible in Kansas courts. K.S.A. 60-454. In *Alcaraz v. Welch,* 205 Kan. 163, 166, 468 P.2d 185 (1970), we stated:

"[T]he question of insurance coverage is not an issue in this case. By statute, evidence of insurance is specifically inadmissible as having probative value on an issue of negligence or liability. (K.S.A. 60-454.) Moreover, it is established law in this state that the knowing injection of liability insurance coverage by the plaintiff into a negligence lawsuit is inherently prejudicial and grounds for mistrial. (*McGuire v. McGuire,* 152 Kan. 237, 240, 103 P.2d 884; and *Coffman v. Shearer,* 140 Kan. 176, 34 P.2d 97.)"

Our well established policy on the inadmissibility of evidence of liability insurance coverage is in accord with the decisions of most states. *The fact that the particular defendant-parent is protected by insurance against legal liability does not enable the minor to maintain the action if he could not otherwise have done so.* 59 Am. Jur. 2d, Parent and Child § 156, p. 255. *The prevalence of liability insurance should not be used as a subterfuge to create a cause of action against the insured parent.*

I agree with Justice Cochran of the Virginia Supreme Court, who dissented in *Smith v. Kauffman,* 212 Va. 181, 189, 183 S.E.2d 190 (1971), stating:

"I also disagree in principle with the majority opinion. It is based on a fallacious rationalization that, since most Virginia drivers are insured against the consequences of their negligence, family harmony and family finances will not suffer from the elimination in automobile accident cases of the parental immunity doctrine heretofore applied to unemancipated minor children. This reasoning overlooks one important fact. Personal injury suits are not always settled out of court and litigation, even between members of the same family, is still an adversary proceeding.

"In a contested case between parent and child there may be either collusion on

the one hand or direct contradiction of testimony on the other. In either event by this decision we will have contributed to the deterioration of the moral fibre of our children or promoted distrust, disrespect and dissension in the home."

The majority has given birth to more than one cause of action. We have twins, or perhaps triplets. For with each suit between parent and child, we can expect numerous allegations and potential lawsuits *for either lack of cooperation or collusion.*

If the majority's arguments about liability insurance are accepted at face value, there are still going to be problems. Although liability insurance is statutorily required, there is a minimum requirement of only $15,000 bodily injury coverage. In addition, there are always uninsured motorists evading the legal requirements. Even Professor Prosser recognizes *the cost of premiums will be taken from the family's purse.* See Prosser, Law of Torts § 123 at 868 (4th ed. 1971); see also *Streenz v. Streenz,* 106 Ariz. at 92.

In a contested suit by an unemancipated child against a parent, the child's attorney as guardian *ad litem,* or in some cases where the guardian *ad litem* is not a member of the Bar, the attorney employed by the guardian *ad litem* for the child will be paid attorney fees totaling up to half of the child's recovery. Another winner will be the insurance companies—they use actuarial information to calculate premiums to make a profit, insuring carefully calculated risks. See *Streenz v. Streenz,* 106 Ariz. at 92.

Although interspousal immunity is rooted in a distinctly different common law background, it nevertheless reflects the same basic public policy as parent-child immunity. In *Sink v. Sink,* 172 Kan. 217, 219, 239 P.2d 933 (1952), we recognized the sound reasoning that interspousal litigation would disrupt family harmony. We have repeatedly affirmed that policy decision in *O'Grady v. Potts,* 193 Kan. 644, 396 P.2d 285 (1964); *Fisher v. Toler,* 194 Kan. 701, 401 P.2d 1012 (1965); and *Miles v. West,* 224 Kan. 284, 580 P.2d 876 (1978). We have not accepted the argument that liability insurance eliminates the need for interspousal immunity. We should not accept that argument now leveled against parent-child immunity.

I find indefensible the argument of the court that a happy, crippled child whose parents are worthy of affection will be unwilling to sue the negligent parent, and will have no need or thought to sue. To be intelligently informed the child will need

competent independent legal advice concerning his or her *legal rights*. Lacking this, the threat of suit hangs over the parents until some time after emancipation of the child when the statute of limitations has run. (K.S.A. 60-515.) The court notes Judge Fuld's dissent in *Badigian v. Badigian,* 9 N.Y.2d 472, 478, 215 N.Y.S.2d 35, 174 N.E.2d 718 (1961), and cites *Sorensen v. Sorensen,* 369 Mass. 350, 339 N.E.2d 907 (1975). The threat of suit will be particularly disturbing to parents in our *litigious society* in the "closing years of the twentieth century."

The unsupported statement of the court, that states which have followed the rule of law adopted today have apparently had "no significant disruption in family relationships as grimly predicted by the prophets of doom," bears analysis. The assertion challenges a review of recent activity and editorial comment on the national scene.

At the Second National Conference on the Judiciary held in Williamsburg, Virginia, March 19-22, 1978, U.S. Justice Department officials, judges, lawyers, legislators, government officials, professors and influential citizens from across the United States, and judges from common law countries, were assembled by the National Center for State Courts.

The keynote speaker, Fred W. Friendly, Edward R. Murrow, Professor of Journalism, Columbia University Graduate School of Journalism, addressed the assembly "On Judging the Judges." His opening remarks were:

> "Scapegoat or 'the weakest link in our society'? Judges have some explaining to do. It is now open season on the courts." State Courts: A Blueprint for the Future, National Center for State Courts (Fetter ed. 1978).

Unveiled at the conference, and the subject of the conference discussion, was "The Public Image of Courts." The National Center for State Courts had commissioned a survey of more than 3,000 citizens, community leaders, lawyers and judges by Yankelovich, Skelly and White. The results were published at the conference. The bottom line of the whole conference was that the public image of the courts, particularly state courts, was bad.

Following the Williamsburg II conference, in the December 4, 1978, issue of *U.S. News and World Report,* the banner headline on the cover of the weekly magazine bore the words: "Why Everybody is Suing Everybody." This was the subject of a special report, beginning at page 50, by the associate editor David F. Pike. The first three paragraphs in the editorial read:

"Americans in all walks of life are being buried under an avalanche of lawsuits.

"Doctors are being sued by patients. Lawyers are being sued by clients. Teachers are being sued by students. Merchants, manufacturers and all levels of government—from Washington, D.C., down to local sewer boards—are being sued by people of all sorts.

"The 'epidemic of hair-trigger suing,' as one jurist calls it, even has infected the family. Children haul their parents into court, while husbands and wives sue each other, brothers sue brothers, and friends sue friends."

At the beginning of the editorial is a cartoon depicting a defiant child sitting at the breakfast table with his parents. The punch line is a remark by the father to the son: "If I make you drink your milk, you'll SUE me?" While *U.S. News and World Report* is not persuasive as precedent in a legal opinion, the subject of the article and its contents represent fair editorial comment under the United States constitutional protection of free speech and freedom of the press. Following the Williamsburg II Conference and the release of the poll conducted by Yankelovich, Skelly and White, it may fairly be said the editorial discloses *public disenchantment with the litigious state of affairs* "in the closing years of the twentieth century."

The November 13, 1978, issue of *U.S. News and World Report* carried an editorial entitled "Our Hungry Lawyers." This triggered a flood of letters to the editor, and in the December 4, 1978, issue of the same magazine, at page 55, a sampling of the lawyers' comments was published.

What is the reaction in Kansas to *the litigious state of affairs* "in the closing years of the twentieth century?"

The fiscal year 1981 budget of the Judicial Branch of Kansas Government was first studied in the 1980 legislative session by a Ways and Means Subcommittee of the Kansas House of Representatives. The subcommittee consisted of five members of the Ways and Means Committee, two of them being lawyers. In the subcommittee's report concerning House Bill No. 2828, sec. 5, the following is stated:

"The Subcommittee expresses concern regarding the proliferation of litigation in the judicial system and the increased costs associated with this litigation and with the appeals process. The Subcommittee suggests that the Legislature must recognize this problem as well as recognize that the alternative to reducing or minimizing this increase in litigation is to build an immense bureaucracy to accommodate the increased burden placed on the courts. The Subcommittee recommends that the Judicial Council appoint an advisory committee and that the

advisory committee be composed of attorneys, judges, and lay persons. It is suggested that the advisory committee be directed to recommend to the Supreme Court and to the Legislature alternative methods by which this increasing workload might either be reduced or more effectively administered."

The instant case is not the first bout the Kansas Supreme Court has had with the abrogation of judicially created immunities from suit. In *Carroll v. Kittle,* 203 Kan. 841, 457 P.2d 21 (1969), this court abolished the governmental immunity doctrine for torts, when the state or its governmental agencies were engaged in proprietary activities. The doctrine abrogated was of judicial origin. The legislature at its next session enacted K.S.A. 46-901 *et seq.,* (L. 1970, ch. 200, §§ 1-13) and reimposed *legislatively* the governmental immunity which the court in *Carroll v. Kittle* abolished.

Later, the doctrine of governmental immunity *legislatively declared* in K.S.A. 46-901 *et seq.,* was attacked and held to be unconstitutional and void in *Brown v. Wichita State University,* 217 Kan. 279, 540 P.2d 66 (1975) (*Brown I*), by a divided court; but on rehearing the court reversed that decision in *Brown v. Wichita State University,* 219 Kan. 2, 547 P.2d 1015 (1976) (*Brown II*). In the period between *Brown I,* handed down by the court on June 9, 1975, and the court's reversal of its decision in *Brown II* on March 6, 1976, total damages of many millions of dollars were sought by various plaintiffs who filed lawsuits against the state as a result of the abrogation of immunity in *Brown I.*

The primary function of the law as applied through the court system is to provide a means for peaceful resolution of legal disputes. In my opinion, the court by its decision herein has gone over dead center, created legal rights where none heretofore existed, and has put in motion a device to crack *the fundamental unit in our free civilized society—the family unit;* just as scientists have created the mechanism by which to crack the fundamental unit of all matter in nature—the atom—thereby making it possible to unleash in the atom bomb a horrendous instrument of destruction for mankind.

It is respectfully submitted the judgment of the learned trial judge should be affirmed.

McFARLAND, J., dissenting: The majority opinion adopts the rule that henceforth a child may sue its parent for injuries re-

ceived through the parent's operation of a motor vehicle, and thereby creates a new cause of action. Major public policy considerations are inherent therein, including:

1. Is there a need for such a cause of action?
2. If the need exists, should it be limited to situations where insurance is present? (Within this question is the legal determination of whether this is a legitimate basis of limitation.)
3. What has been the experience of other states abolishing parental immunity, either in whole or in part?
4. Will insurance rates rise for parents of minor children and, if so, will such rise be in direct proportion to the number of minor children in the family?
5. If the increased risk is to be spread across all automobile insurance policies, regardless of whether or not the owner of the vehicle has minor children, then how much raise will be involved?
6. How great is the danger of collusion?
7. What will be the effect on family unity?
8. On balance, do the benefits of the change outweigh its cost, both financially and socially?

These questions can only be answered by full legislative inquiry. If a change is to be made in the existing law, the change should come through the legislature—not the courts.

If the existing law is to be judicially changed, then I would:

1. Exclude ordinary negligence as a cause of action except when arising out of the parent's business; and
2. Limit the cause of action to intentional torts and acts of gross or wanton negligence.

RON SMITH
Legislative Counsel

KANSAS BAR ASSOCIATION

HB 2083
House Judiciary Committee
February 13, 1985

Mr. Chairman. Members of the committee. My name is Ron Smith. I am Legislative Counsel for the Kansas Bar Association.

The Kansas Bar Association represents 4,200 of the state's 5,800 attorneys. Our attorney-members are in every county, practice all types of law, represent both plaintiffs and defendants, and include some of the finest attorneys in the country.

Our legislative policies are considered by the Legislative Committee of the KBA, which makes recommendations to the Executive Council. When appropriate, the Legislative Committee or the Executive Council can ask for input from various Sections of the Bar, which have specialized interests, such as Litigation, Tax, Probate and Real Estate, Criminal Law, Family Law, and other sections.

Our legislative policy is established by the KBA's Executive Council, a group of 21 lawyers from across the state. Ten members are elected by geographic districts. Many are from small towns; others are part of the largest firms in the largest cities of our state. Our Executive Council includes members of the Judiciary.

We believe our Legislative Positions constitute a considered, rational and even-handed approach to the important issues facing the Kansas Legislature.

HB 2083 represents a public policy decision. Should children be allowed to sue for the negligence of their parents?

On its face, the bill says "no" to the policy decision. But when you look deeper into the practical realities surrounding it, problems of fairness and Equal Protection of our laws develop.

When I look at major public policy legislation, I try to be guided by some simple considerations:

(1) What problem caused the need for the bill?

(2) How does the bill solve the problem?

(3) Are there alternatives to the bill's approach to problem-solving? If so, what are they and what is their impact?

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(4) Do the alternatives speak to the problem in a less restrictive manner than the bill?

(5) Do the positive public policy considerations outweigh the negative considerations?

The Problem.

The foundation of this bill is the family. That is clear from lines 21 through 35. And no one quarrels with it's foundation. It attempts to speak to the situation where parents and children might be tempted to defraud an insurance company by faking an injury to the child.

All human endeavors which lend themselves to insurability contain the possibility of fraud. Courts, through the cross-examination of witnesses, imposition of criminal penalties, and various discovery techniques, are, in my opinion, better equipped to protect against potential fraud than is this statute.

This statute assumes all parent-child negligence is fraudulent. Our court system assumes that such cases are meritorious until the system weeds out the offending lawsuits. Overall, I think the second system is better that statutory prohibitions.

The Solution in this Bill

Last year, this legislature deleted the statutory authorization contained in our law which allowed insurance companies to automatically exclude:

> "...any bodily injury to any insured or any family member of an insured residing in the insured's household." (Chapter 167, 1984 Session laws)

The 1984 amendment was offered to a recent court case which held that a negligent father's auto insurance policy could reimburse the costs of injury for the playmates of this father's child who also were injured, but not pay for injuries to the parent's own child--even though the parent was negligent towards all the passengers in the car.

There was a strong dissent in that case. HB 2083 essentially adopts the minority opinion in that case, and attempts to overrule the majority opinion. The solution in HB 2083 is to prohibit ALL lawsuits brought by children based on negligence of the parent, except those brought by "emancipated" children.

We believe this goes further than is necessary to police our identified problem. Let me demonstrate why the bill is unfair.

First, the concept of negligence can be assigned "degrees," but only in broad categories. Ordinarily there is "ordinary" or sometimes known as "simple" negligence. Ordinary negligence is compensible with actual damages. The second broad category of negligence is "gross or wanton" negligence. The latter form of negligence allows punitive damages to be imposed.

What this bill essentially does is create degrees within the single type of "ordinary" negligence. These degrees of negligence are not based on the activities of the negligent parent towards the injured child. Rather, the distinction is made solely on the fact that the potential claimant is the child of the person who is negligent.

While the law has been known to split hairs, to do so on this basis appears to deny Equal Protection of the Law guaranteed in our state and federal constitutions.

Second, let's discuss the concept of "emancipation." Webster's Dictionary defines "emancipation" as:

> "(1) ...to release from paternal care and responsibility and make sui juris, or (2) to free from any controlling influence (as traditional mores or beliefs).

Black's Law Dictionary describes "emancipation" as follows:

> "The emancipation may be express, as by a voluntary agreement of parent and child, or implied from such acts and conduct and import consent, and it may be conditional or absolute, complete or partial."

In this bill, the only thing the word "unemancipated" does is create another element of proof as a prerequisite for a lawsuit. All it takes is proof of some degree of self-control by the emancipated child.

Further, sex-based discrimination may result. If potential emancipated children begin showing that it is easier for a 16-year-old boy to show "emancipation" than a 16-year-old girl, the right to seek compensation for the negligence of another is eroded solely on the basis of sex.

HB 2083 doesn't prohibit a child from suing a parent; it only creates another element of proof. But the phrase can have improper consequences on a family.

Assume a father and his 6-year-old son drive over to a 17-year-old son's apartment and picks up the 17-year-old to go fishing, and while

enroute are involved in an accident which is due to the father's negligence. If both of the children have medical injuries of more than $500, under this law the 17-year-old could sue the father for all his injuries, including pain and suffering, but the 6-year-old could not. The 6-year-old would be limited to the PIP coverage under our no-fault laws even though his injuries exceed the $500 tort threshold.

The irony of this situation is that obviously, the 17-year-old in this example might have the greater ability to "conspire" with Dad to bring the lawsuit, but the 6-year-old, for whom conspiracy is difficult, cannot bring a lawsuit. The older child is compensated while the younger one is not.

While the intent of this law is to keep the family unit together, HB 2083 may have an unintended consequence. In order to allow a person to be made whole through insurance, the family must create legal fictions about emancipation.

Let's change the facts somewhat. If a 17-year-old brother driving the family car is negligent, and the 6-year-old brother is injured, HB 2083 does not prohibit a lawsuit. The same insurance policy on the car purchased by the parent(s) will pay for the injuries to the 6-year-old.

Why should the public policy of this state assume there is a greater likelihood of collusion between parents and their children than between minor siblings of the same parents?

Finally, the bill may do more to burden the family unit than does current law. Assume this law is in effect, and a parent has pre-paid auto insurance but no health insurance. If a child is injured, the medical bills for healing that child may be great and will leave a financial burden on the family that may tear at the very roots of the family unit. This law does not help that situation; rather it magnifies the problem because it allows insurance companies to avoid reimbursement of the injured child—even though a premium has been paid for such insurance.

Alternatives

It seems to me the best way to keep a family together is to keep them safe and fiscally whole. Insurance can provide that mechanism. That is the purpose of insurance.

In the ordinary auto policy, the premium that is collected assumes the worst; it must if it is to collect enough money to pay the costs of injury.

The ordinary auto policy insurance premium cannot predict who the passengers will be. Because of this, the company must assume that all passengers in an auto where the driver is negligent will be non-family members, and be prepared to compensate them to the limits of the policy. Most insurance policies have upper limits in this regard, usually expressed in the "policy limit" notation, where the second figure is the total limit

allowed arising from one incident. (i.e. $100,000/$300,000 limits)

Because of these assumptions which must be made, it is doubtful that HB 2083 will reduce auto or other negligence insurance premiums. Conversely, since coverage for a parent's child is already assumed in the premium paid, I don't think the current law is going to force premiums up, either. Thus, in this instance, current auto insurance policies making these assumptions appear to be the best alternative to this legislation.

Public Policy Considerations

We live in a society where it is possible to insure almost any legitimate contingency. In a few years, insurance companies may be able to demonstrate that there are great numbers of these child-parent lawsuits, that many of their are not meritorious, or the grounds for suit are spurious. If they can do this, at that time public policy can be reexaminated. But to shut off this avenue of our tort litigation system without examination of any data base appears to the Kansas Bar Association to be premature.

The KBA is willing to reexamine this area of injury compensation in the future and, if data justifies, change our position. But at this point, based on current data, we think the policy behind HB 2083 is unwise.

For these reasons, KBA does not support HB 2083.