Approved March 7, 1985
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 27, 1985 in room 526-S of the Capitol.

All members were present except:
Representatives Douville, Duncan, Fuller, Luzzati, Shriver, Teagarden and Whiteman were excused.

Committee staff present:
Jerry Donaldson, Legislative Research Department
Mike Heim, Legislative Research Department
Mary Ann Torrence, Revisor of Statutes Office
Becca Conrad, Secretary

Conferees appearing before the committee:

Ron Smith, Kansas Bar Association
Jolene Miller, Kansas Legal Assistants Society
Jim Ward, Kansas Trial Lawyers
Bev Bradley, Kansas Association of Counties
Jim Kaup, League of Municipalities
Chuck Simmons, Department of Corrections
Fred Stewart

HB 2216 - Concerning civil procedure; relating to depositions.

Representative O'Neal said that K.S.A. 60-230 of this bill would match the Federal Rules. He said in the Federal Rules, there is no subsection 8 which appears on page 6 of HB 2216. He said this is a rather limited rule concerning the parties who can be present at depositions and the Federal Rule simply omits subsection h altogether and leaves that area wide open. Representative O'Neal said the problem they are having in the profession of law is that they use legal assistants in all areas of the trial process, particularly during discovery, and it is helpful and beneficial to have legal assistants present in the depositions with them giving assistance. He said they have encountered some resistance by counsel who do not have that support staff with them. When asked why they objected to this, they said because the statute doesn't allow it.

Ron Smith, Kansas Bar Association, said they were opposed to just adopting the Federal Rules of Civil Procedure as our own. Concerning HB 2216, their Executive Council is opposed to the way it is drafted because it allows a wide open and uncontrolled system about who can attend depositions. He said they would like to add the language "a bonafide employee of respective counsel". He said they also decided a person running a video tape machine at the request of an attorney who has requested the deposition is a bonafide employee. He would not be able to bring his legal assistant to that deposition because you can only have one, so he would have to make a choice. Kansas Bar Association's amendment to this bill is shown in Attachment No. 1.

Jolene Miller, Kansas Legal Assistants Society, testified in favor of HB 2216 as shown in Attachment No. 2. She said they were not in favor of the Kansas Bar Association's amendment because it forces the attorney to make a decision about which bonafide employee to have at a deposition. She said that legal assistants perform distinct and separate functions at depositions other than technical video tapes. She thinks it penalizes lawyers who choose to use legal assistants at depositions.

HB 2215 - Concerning civil procedure; relating to comparative negligence.

Representative O'Neal gave some background and explanation of this bill, and presented Attachments No. 3, 4 and 5 for further information. He said they need to address what the Supreme Court has done and he does that in HB 2215 - that in order to follow a mandate of our particular comparative negligence statute, it is incumbant upon us to make it clear to the court that the jury is not to be told the consequences of the verdict.

Jim Ward, Kansas Trial Lawyers, said they were opposed to HB 2215 and introduced Fred Stewart to testify. Mr. Stewart said what this bill deals with is whether you want to inform the jury or not. He said you can philosophically argue that the more informed the jury is, the better decision they can reach.

HB 2381 - Amending the Kansas tort claims act; excluding certain persons from the definition of employee.

Bev Bradley, Kansas Association of Counties, spoke in favor of this bill. Her testimony is Attachment No. 6.

Jim Kaup, League of Municipalities, supports this bill. He said as far as the counties' perspectives, they have the same problem as the cities. He said between the two, the court liability and the Kansas tort claim act and workman compensation laws, there is no incentive for most cities to offer a service program. He said the threat of liability is too severe.

Chuck Simmons, Department of Corrections, said they don't deal with community service work, and so don't take a position on that amendment. He said the other portion, which excludes people who are engaged to work may be too broad particularly when those people are placed in a Department of Correction's program. He said if the purpose of the bill is to say that those people are not employees under the tort claims law, because of inflation of these programs, they agree with that. However, he said if they go to work for a governmental unit that is covered in the tort claims act which has the authority to hire them or not hire them, and once they are hired are considered and paid the same of another employee, they think it is too broad and contrary to the work release statutes and philosophies.

Concerning the amendment to K.S.A. 75-6102, he asked the committee to consider the proposed amendment of Senate Bill 277, lines 39 through 42. See Attachment No. 7.

The Chairman announced that he would like to take some final action as we go along even though the date is not necessarily set.

A motion was made by Representative Buehler and seconded by Representative Walker that HB 2048 be tabled. Representative Buehler said the purpose of his motion was because he thinks there's something to consider on both sides, and rather than to assume that we don't want this, he would rather table it. Representative Wagnon said she understood the policy had changed, and she did not understand why they are continuing to have a problem. She said in reading over the testimony on this bill, it appears that they are referring to problems of long-standing. She said she would sure like to check this out next year and find out whether or not what they were told is in fact happening. She said she thinks it is very clear that people believe that permancy planning is very important and those kids should not be held in limbo and she does not want to overlook that. She said she supported tabling this bill. The motion carried upon vote.

Representative Snowbarger made a motion to approve HB 2452 favorably and it was seconded by Representative Bideau. The motion carried.

Representative Cloud made a motion to approve the minutes of February 7 and 12, 1985, and it was seconded by Representative Snowbarger. The motion carried.

The meeting was adjourned at 5:10 p.m.

RON SMITH
Legislative Counsel

KANSAS BAR ASSOCIATION

HB 2216
House Judiciary Committee
February 27, 1985

Mr. Chairman, Members of the Judiciary Committee. I am Ron Smith, Legislative Counsel for the Kansas Bar Association.

Our Legislative policy is determined by the Executive Council of KBA, which on February 8th looked at this legislation. While it might be argued that the amendment makes this statute similar to the procedure adopted in federal courts, our Executive Council opposes a wide-open and uncontrolled system as to who can attend depositions.

I understand that the amendment is drawn so as to allow paralegals or legal assistants to attend depositions. KBA supports allowing such personnel, who are hired by and work at the direction of lawyers, to attend such depositions when their employer is counsel for one of the parties.

However, we suggest this can be done by merely amending existing language as per the attached balloon amendment. We suggest that <u>one</u> bonafide employee be allowed to attend per attorney. Rather than worry about the definition of a legal assistant, as a matter of right, every employee working for a lawyer takes on the cloak of a being a legal assistant. The confidences of the client are the employee's confidences, too.

If there is abuse, the court can discipline the <u>attorney</u>.

There have been instances in the past where an attorney brings in a psychologist on the pretext that the psychologist is there to help calm the plaintiff during the defendant's deposition, but in reality is there to gather evidence of the defendant's demeanor for purposes of submitting an expert witness report. That is improper under currently law without a judge's approval. With the stricken language in there, this could happen frequently. With the recommended amended language, attached, it would still require a court order, since a psychologist or other expert witness is not a "bonafide employee of counsel." An expert is an independent contractor, and doesn't fall into the new definition.

With our amendment, KBA supports HB 2216.

Attachment No. 1
House Judiciary
February 27, 1985

(A) offer copies to be marked for identification and annexed to the deposition and to serve as originals, if the person affords to all parties an opportunity to verify the copies by comparison with the originals or (B) offer the originals to be marked for identification, after giving to each party an opportunity to inspect and copy them, in which event the materials may then be used in the same manner as if annexed to and returned with the deposition. Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case.

(2) Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition to any party or to the deponent.

(g) *Failure to attend or to serve subpoena; expenses.* (1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by that party and attorney in so attending, including reasonable attorney's fees.

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon the witness and because of such failure the witness does not attend, and if another party attends in person or by attorney because the party expects the deposition of that witness to be taken, the court may order the party giving the notice to pay the reasonable expenses and attorney fees of the party and the party's attorney in attending the taking of the deposition.

~~(h) *Persons to be present.* Unless otherwise ordered by the judge or stipulated by counsel no person shall be present while a deposition is being taken except the officer before whom it is being taken, the reporter or stenographer recording the deposition, the parties to the action, their respective counsel and the deponent.~~

Sec. 2. K.S.A. 60-230 is hereby repealed.

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

Reinsert stricken language:

(h) Persons to be present. Unless otherwise ordered by the judge or stipulated by counsel no person shall be present while a deposition is being taken except the officer before whom it is being taken, the reporter or stenographer recording the deposition, the parties to the action, their respective counsel, a bonafide employee of respective counsel, and the deponent.

KANSAS LEGAL ASSISTANTS SOCIETY

Chairman Knopp, Ladies and Gentlemen of the Committee, good afternoon:

My name is Jolene Miller and I am here to testify on behalf of Kansas Legal Assistants Society in favor of HB 2216.

By way of introduction, Kansas Legal Assistants Society incorporated in June 1977 and is the first statewide professional organization to represent legal assistants in Kansas.

Legal assistants are a distinguishable group of persons who assist lawyers in the delivery of legal services. Through formal education, training and experience, legal assistants have knowledge and expertise regarding the legal system and substantive and procedural law which qualify them to assist in the delivery of legal services under the supervision of a licensed attorney. It's the direct supervision of the employing lawyer that constitutes the legal assistant's authority to exercise their skill and expertise in serving client needs.

Legal assistants can render valuable support to counsel at depositions by performing several tasks.

Attachment #2
House Judiciary Committee
February 27, 1985

First, taking notes gives legal assistants and counsel the opportunity to follow-up on testimony elicited at the deposition prior to receiving an actual copy of the deposition from the court reporter--thereby expediting the legal process and providing better service to the client.

Second, the documents necessary for the taking of a deposition are sometimes voluminous and their organization is usually a task assigned to the legal assistant. Because of the legal assistant's familiarity with those documents, she is able to efficiently, and with little effort, make those documents readily available to both parties during the deposition without having to waste valuable time searching for them.

Third, a person's first experience with the legal process can be quite intimidating. It is not altogether uncommon for legal assistants to establish a close, working relationship with the client and help ease their apprehensions. The presence of the legal assistant at depositions lends moral support to the client in a situation where he is, at best, uncomfortable.

Fourth, because the legal assistant has established rapport with those involved, including preparing the witness for the deposition, counsel relies on the presence of the legal assistant at the deposition.

K.S.A. 60-234, in its present form, technically excludes the presence of legal assistants at the taking of depositions and has no paralell in the Federal Rules of Civil Procedure. This statute, in its present form, is an unnecessary restriction upon those attorneys who wish to utilize legal assistants at the taking of depositions.

Consequently, for the reasons I've enumerated, I urge the passage of HB 2216.

Thank you

The Kansas Comparative Negligence Statute

INFORMING THE JURY OF THE LEGAL EFFECT OF ITS ANSWERS TO SPECIAL VERDICT QUESTIONS

By JOEL GOLDMAN

"The author wishes to acknowledge the assistance of Michael Moore, Associate Professor of Law, University of Kansas, in the preparation of this article."

The 1974 Kansas Legislature enacted K.S.A. 60-258a 1974 Supp. adding Kansas to the growing list of states employing comparative negligence as an alternative to contributory negligence.[1] The statute establishes that "the contributory negligence of any party in a civil action shall not bar such party . . . from recovering damages for negligence . . . " The statute further provides that damages may be recovered

> *if such party's negligence was less than the causal negligence of the party or parties against whom claim for recovery is made, but the award of damages to any party in such action shall be diminished in proportion to the amount of negligence attributed to such party.*

Subsection (b) requires the use of special verdicts in negligence cases where comparative negligence is an issue. The sole function of the jury shall be to determine "the percentage of negligence attributal to each of the parties, and the total amount of damages sustained by each of the claimants."

In response to this legislation, the Committee on Pattern Instructions for Kansas (PIK) promulgated PIK 20.01 Comparative Negligence—Theory and Effect. The instruction, in relevant portion reads:

> *It will be necessary for you to determine the percentage of fault of the parties. It also will be necessary for you to determine the amount of damages sustained by any party claiming damages . . .*
>
> *A party will be entitled to recover damages if his fault is less*

1. Ark. Stat. Ann. § 27-1763 (1955); Colo. Rev. Stat. Ann. 1963 § 41-2-14 (1971); Conn. Public Act. No. 73-622 § 1 (1973); Fla., *Hoffman v. Jones*, 280 So.2d 431 (1973); Ga. Code Ann. §§ 94-703, 105-603 (1855); Hawaii Rev. Stat. 1968 § 663-31 (1969); Idaho Code Ann. §§ 6-801 (1971); Me. Rev. Stat. Ann. 1964 Tit. 14, § 156 (1965); Mass. Gen. Laws Ann. ch. 231, § 85 (1969); Minn. Stat. Ann. § 604.01 (1969); Miss. Code Ann. 1972 § 11-7-15 (1919); Neb. Rev. Stat. 1943 § 25-1151 (1913); Nev. Laws 1973 ch. 787, § 1 (1973); N.H. Rev. Stat. Ann. § 507: 7-a (1969); N.J. Stat. Ann. §§ 2A:15:-5.1 (1973); N.D. Cent. Code § 9-10-07 (1973); Okla. Stat. Ann. Tit. 23, §§ 11, 12 (1973); Ore. Rev. Stat. § 18.470 (1971); R.I. Gen. Laws Ann. 1956 §§ 9-20-4.1 (1971); S.D. Comp. Laws 1967 § 20-9-2 (1941); Tx. Vernon's Civ. Stat. Art. 2212a, §§ 1, 2 (1973); Utah Code Ann. 1953 § 78-27-37 (1973); Vt. Stat. Ann. 1959 Tit. 12 § 1036 (1970); Wash. Laws 1973 (1st Ex. Sess.) ch. 138, § 1 (1973); Wis. Stat. Ann. §§ 895.045 (1931); Wyo. Stat. Ann. 1957 § 1-7.2 (1973).

JOEL GOLDMAN graduated with degrees in Economics and Speech Communications from the University of Kansas in 1974. He is presently a third-year law student at KU where he has been a member of the International and National Moot Court Teams and a member of the Moot Court Council. He is presently employed as a Law Clerk for the 10th Judicial District of Kansas, Johnson County District Court.

than 50% of the total fault of all parties. A party will not be entitled to recover damages, however, if his fault is 50% or more.

The obvious result of giving the last paragraph of this instruction is that a jury will be informed of the effect of its answers to the special verdict questions. Such a result is contradictory to the policies embodied both in comparative negligence and in the use of special verdicts.

A. The Development of Comparative Negligence

The Old Rule—Contributory Negligence

Contributory negligence was first applied in *Butterfield v. Forrester*,[2] wherein the defendant had left a pole projecting across the road, and the plaintiff, riding home in the dusk, did not see the obstruction, rode into it and was injured. Lord Ellenborough denied the plaintiff recovery on the ground that "A party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he did not himself use common and ordinary caution to be in the right."[3]

Although a number of reasons for the adoption of such a rule were subsequently offered,[4] it has fallen into general disrepute because of the harsh results it brings about.[5] This is readily apparent in the case of the plaintiff who, although only 10% negligent, is denied recovery while the 90% negligent tortfeasor escapes liability. The chief objection to the doctrine is that a plaintiff, whose negligence is less than that of the defendant, should not be made to suffer his entire loss by virtue of his contributory negligence.[6]

Comparative Negligence as an Alternative

To prevent such inequitable results, a system of proportioning damages based on fault developed. Two types of comparative negligence systems have been instituted—pure and modified.[7]

The full or pure type, as in the Federal Employers Liability Act (FELA),[8] Jones Act,[9] Mississippi,[10] Rhode Island,[11] Florida,[12] and Washington[13] all apportion damages according to fault without regard to whether the plaintiff or the defendant is most at fault. Thus, a very negligent plaintiff may recover, but in an amount diminished by his negligence. For example, a plaintiff suffering

2. 11 East 60, 103 Eng. Rep. 926 (1809).
3. *Id.* at 61.
4. Among these are the notion that the plaintiff's negligence is an intervening, insulating cause between the defendant's negligence and the injury; that the defense has a penal basis and is designed to punish the negligent plaintiff; that the courts will not aid one without clean hands; and finally that the defense will act as a deterrent to accidents. See Prosser, "Comparative Negligence," 51 Mich. L. Rev. 468 (1953). Some commentators have suggested that the doctrine was a product of the industrial revolution and was designed to limit the liabilities of rapidly growing industry. See Malone, "The Formative Era of Comparative Negligence," 41 Ill. L. Rev. 151 (1946); Bohlen, "Contributory Negligence," 21 Harv. L. Rev. 233 (1908); Lowndes, "Contributory Negligence," 22 Georgetown L.J. 674 (1934); Green, "Contributory Negligence and Proximate Cause," 6 N.C. L. Rev. 3 (1927).
5. Flynn, "Comparative Negligence—Which Form?" N.Y. St. Bar J. 525 (Dec. 1972).
6. Prosser, *supra* note 5, at 469.
7. There are some more rarefied versions of comparative negligence, but the pure, 50% and 49% systems are the ones most commonly adopted. V. Schwartz, *Comparative Negligence* 43 (1974).
8. 45 U.S.C. § 53 (1908).
9. 46 U.S.C. § 688 (1920).
10. Miss. Code Ann. 1972 § 11-7-15 (1919).
11. R.I. Gen. Laws Ann. 1956 §§ 9-20-4, 9-20-4.1 (1971).
12. *Hoffman v. Jones*, 280 So.2d 431 (1973).
13. Wash. Laws 1973 (1st Ex. Sess.) ch. 138, § 1 (1973).

$100,000 in damages, but 70% negligent, would recover $30,000 or 30% of his total damages. The defendant in such a case would pay 30% of plaintiff's damages.[14]

There are two types of modified comparative negligence systems. The one adopted by most states choosing a comparative negligence system and also adopted by Kansas provides that a plaintiff shall recover if his negligence was not as great as the defendant's.[15] Thus, a 50% negligent plaintiff would not recover any damages. This is known as the 49% system because that is the most negligent a plaintiff can be and still recover anything. Where recovery is allowed, plaintiff's damages are reduced proportionately by the amount of his negligence.[16]

Several states have chosen a so-called 50% system whereby plaintiff is allowed recovery if his negligence is not greater than the defendant's.[17] In such a jurisdiction a 50% negligent plaintiff would recover 50% of his damages and a 51% negligent plaintiff still recovers nothing.[18]

Rationale for the Kansas Statute

Both the pure and modified forms of comparative negligence rest on the notion that the negligence of a plaintiff should diminish rather than defeat recovery.[19] The latter form, however, retains some vestiges of contributory negligence in the form of its various "cut-off" points.

While at first blush, the modified forms may appear to only partially mitigate the harshness of contributory negligence, they may actually provide the best of both worlds. The harshness of contributory negligence is apparent when the negligence of the plaintiff is slight in comparison to that of the defendant. A modified system of comparative negligence resolves that inequity while maintaining a fundamental principle of the fault system. That is, when a party is not himself mostly at fault in bringing about his own damages, he is allowed to recover despite some contributory negligence on his part, however, when that party is equally or more at fault in bringing about his own harm, the principle that holds that losses will not be shifted except on the basis of moral fault requires an outright denial of recovery.

It was this kind of compromise with the harshness of contributory negligence that was dealt with in Kansas in its experiment with the slight/gross system briefly adopted in the Nineteenth Century.[20] That approach was based on a judgment that recovery should be allowed when it was clear that the negligence was gross, but not otherwise when the plaintiff was contributorily negligent.

The original version of the Kansas statute was of the 50% variety but was amended in committee to the 49% version.[21] The Special Legislative Committee report to the 1974 Kansas Legislature explained the change on the grounds that no recovery should be allowed when the parties are equally at fault.[22] This act of the legislature may have been a recognition of

14. Flynn, *supra* note 6, at 525.
15. Ark. Stat. Ann. §§ 27-1763 to 27-1765 (1955); Colo. Rev. Stat. Ann. 1963 § 41-2-14 (1971); Hawaii Rev. Stat. 1968 § 663-31 (1969); Idaho Code Ann. §§ 6-801 to 6-805 (1971); Maine Rev. Stat. Ann. 1964 Tit. 14, § 156 (1965); Mass. Gen. Laws Ann. ch. 231 § 85 (1969); Minn. Stat. Ann. § 604.01 (1969); N.D. Cent. Code § 9-10-07 (1973); Ore. Rev. Stat. § 18.470 (1971); Okla. Stat. Ann. Tit. 23, §§ 11, 12 (1973); Utah Code Ann. 1953 §§ 78-27-37 to 78-27-43 (1973); and Wyo. Stat. Ann. 1957 § 1-7.2 (1973).
16. K.S.A. 1974 Supp. § 60-258a(1).
17. Conn. Public Act. No. 73-622 § 1 (1973); Nev. Laws 1973 ch. 787 § 1 (1973); N.H. Rev. Stat. Ann. § 507:7-a (1969); N.J. Stat. Ann. §§ 2A:15-5.1 to 2A:15-5.3 (1973); Texas Vernon's Civ. Stat. Art. 2212a, §§ 1, 2 (1973); Vt. Stat. Ann. 1959 Tit. 13, § 1036 (1970); Wis. Stat. Ann. § 895.045 (1931).
18. Flynn, *supra* note 5, at 525.
19. Wm. Prosser, *Law of Torts* 436 (4th Ed. 1971.)
20. *Sawyer v. Sauer*, 10 Kan. 466 (1872); *Pacific R. Co. v. Houts*, 12 Kan. 328 (1873); *Union Pac. R. Co. v. Henry*, 36 Kan. 565, 14 P.1 (1883); *Wichita & W.R. Co. v. Davis*, 37 Kan. 743, 16 P.78 (1887).
21. See, *Report on Kansas Legislative Interim Studies to the 1974 Legislature*, Part II, 84-2 (Nov. 1973).
22. *Id.*

the difficult cases where the parties are equally at fault. The implication of the 49% system is that recovery is not desirable when it is difficult to determine which party was the more negligent. Indeed, in such cases, juries have been known to resolve the difficulty by apportioning the fault equally.[23] By not allowing recovery under these conditions, the statute would catch a lot of the cases where inexact determinations might occur.

The choice between a 50% and a 49% system itself is only partially determinative of the issue of informing the jury of the effect of their answers to special verdicts. The important distinction is between the pure and modified systems. The former allow recovery for an admittedly grossly negligent plaintiff. The modified systems, on the other hand, reject this notion entirely and affirm the fault system that prohibits recovery when the plaintiff's negligence was as great or greater than the defendant's.

Kansas, as well as most states adopting comparative negligence, has chosen the 49% system on the grounds that a party equally or more at fault should not be allowed to recover.[24] If a rule allowing the jury to be informed of the effect of their answers results in plaintiffs who are truly 50% or more at fault recovering damages, then such a rule flouts this established legislative policy against such recovery. It is the thesis of this paper that that is precisely the effect of the rule as embodied in the PIK instructions. This of course involves consideration of the functions of the jury and special verdicts, which is the next topic for discussion.

23. See dissent in *Vincent v. Pabst Brewing Co.*, 177 N.W.2d 513, 517, 520 (1970).

24. *Report on Kansas Legislative Interim Studies to the 1974 Legislature*, *supra* note 21.

B. Purpose of the Special Verdict in Comparative Negligence

Special verdicts were developed as a means of avoiding appeals to jury bias' and as a means of exercising control over the jury.[25]

Appeals to Bias and Prejudice

"The general verdict enhances, to the maximum, the power of appeals to the biases and prejudices of the jurors."[26] The special verdict is intended to minimize the effectiveness of such appeals by focusing the attention of the jury on determinations of fact with no regard as to which side will prevail. As the Kansas Supreme Court has said on numerous occasions, "the design of the special verdict procedure is to obtain answers to questions of fact with the knowledge of the jury limited as to whether its findings will favor one side or the other."[27] Historically, the Kansas Court has held that reversible error occurs when the jury is informed of

25. *Skidmore v. Baltimore & O.R. Co.*, 167 F.2d 54 (2nd Cir. 1948); see also Wright, "The Use of Special Verdicts in Federal Court," 38 F.R.D. 199, 201 (1965).

26. *Skidmore v. Baltimore & O.R. Co.*, *supra* at 61.

27. *Rohr v. Henderson*, 207 Kan. 123, 127, 483 P.2d 1089 (1971); see also *Hubbard v. Havlik*, 213 Kan. 594, 518 P.2d 352 (1974); *Lutz v. Peine*, 209 Kan. 553, 498 P.2d 60 (1972); *Collett v. Estate of Schnell*, 194 Kan. 75, 397 P.2d 402 (1964).

the effect of their answers to special questions.[28]

CONTROL OVER THE JURY

The second function of the special verdict is to control the jury by insuring that it does not ignore the court's instructions as to the law.[29] This is indeed a critical function in light of the dangers associated with jury nullification. The general verdict provides no way of knowing on what basis the jury reached its decision or whether they even attempted to apply the judge's instructions. When the jury substitutes their own perceptions of justice for what the statutes provide, the result is a subversion of legislative intent.[30] On a theoretical basis this is objectionable as an erosion of the separation of the legislative and judicial branches of government.[31] However, on a more tangible level, it is unacceptable because of its uncertainty. The jury is just as likely to create a result that many will view as just as unjust.[32] Finally, and most importantly, jury nullification can actually prevent desired changes by postponing legislative action in favor of inconsistent judicial outcomes.[33] The legislature may be less inclined to change a controversial law when its effect is periodically tempered by a particularly wise jury. Such occasional results undoubtedly relieve some of the pressure for change. In fact, it is plausible to suggest that this practice has prolonged the emergence of comparative negligence. It is well known that juries often apportion damages on their own in cases involving contributory negligence rather than deny plaintiff any recovery.[34] This clearly benefited the fortunate plaintiff but can scarcely be considered just for the unlucky party who was 10% negligent and denied recovery by a jury that followed the court's instructions. It is contradictory to our system of equal justice to perpetuate such inconsistencies, yet the momentum to discard contributory negli-

28. *Supra* note 27; see also *Southwestern Mineral R. Co. v. Kennedy*, 8 Kan. App. 490, 55 P. 516 (1898); *Coffeyville Vitrified B. Co. v. Zimmerman*, 61 Kan. 750, 60 P. 1064 (1900); *St. Louis & S.F.R. Co. v. Burrows*, 62 Kan. 89, 61 P. 439 (1900); *Thornton v. Franse*, 135 Kan. 782, 12 P.2d 728 (1932).

29. *Skidmore v. Baltimore & O.R. Co.*, *supra* note 25, at 57.

30. *Id.* at 58; see also Frank, "Words and Music: Some Remarks on Statutory Interpretation," 47 Cal. L. Rev. 1259 (1947).

31. Broeder, "The Functions of the Jury," 21 Univ. Chi. L. Rev. 366, 413 (1954).

32. "Where the prejudices of the community are shrouded in the verdict's mystery to carve out an exception from a rule whose normal operation would permit the defendant to go free, law-dispensing becomes less palatable. The bona-fide white male conviction of a Negro for leering at a white girl at a distance of over sixty feet is a Southern exception to the ordinary assault rule. Other examples must be legion; the whitewashing of lynchers is also law-dispensing." Broeder, *id.* at 412. (Author's note: the offensive statute is no longer in force.)

33. Broeder, *supra* note 31, at 413.

34. "We but blind our eyes to obvious reality to the extent that we ignore the fact that in many cases juries apply it [apportionment] in spite of us." Holt, J., in *Haeg v. Sprague, Warner & Co.*, 202 Minn. 425, 430, 281 N.W. 261 (1938); see also Ulman, *A Judge Takes the Stand* 30-34 (1933).

gence may well have been slowed by those who preferred to have the jury legislate on a case by case basis.

IMPORTANCE OF THE SPECIAL VERDICT FOR COMPARATIVE NEGLIGENCE

If the basis of comparative negligence is the apportionment of damages according to fault, the special verdict is the cornerstone of the system.[35] Eleven of the states employing comparative negligence specifically provide for the use of special verdicts.[36] Nine of these states also employ the "49%" system.[37] Only through the use of the special verdict can the court insure that the jury limits itself to fact-finding and avoids the influence of appeals to prejudice and the dangers of jury nullification.

C. Impact of Informing the Jury of the Effect of Their Answers to Special Verdict Questions on the Policies Embodied in Comparative Negligence and the Use of Special Verdicts

A rule that allows the jury to be informed of the effect of their answers to special verdict questions seriously undermines the purpose of comparative negligence and special verdicts and simultaneously fosters a system of inconsistent justice. As the Kansas Supreme Court said in *Collett v. Estate of Schnell*[38]:

> *It is the sole duty of the jury to find the facts according to the evidence and to answer the special questions truthfully without reference to the effect on the general verdict. Any effort on the part of the trial court to influence the jury in this regard destroys the entire purpose of special questions.*[39]

The Court in that case indicated the result of informing the jury:

> *We have in this case a good illustration of the unfortunate results that follow such a practice. When the jury first returned it stated that there were tire marks laid down by appellee's car just before the collision and that the tracks were fourteen inches over the left center of the road. After the trial court stated that it found that the "verdict and answers to special questions are inconsistent" and instructed the jury to retire and reconsider the instructions and its decision, the jury returned with findings contrary to what it had originally found. When the jury returned the second time it stated that "no visible marks were proved to the jury," and that it did not know where such tracks were from the center of the road. It would be difficult to reach any conclusion other than that the trial court influenced the jury in its second set of answers to the special questions.*[40]

A similar situation arose in a Minnesota case wherein the Minnesota Supreme Court held it was reversible error to inform the jury of the effect of its answers to the special verdict questions.[41] There the court found reversible error due to the prejudice resulting from the erroneous instruction:

> *We cannot ignore the fact that the verdict was so excessive as to indicate that it was rendered under the influence of passion and prejudice, was returned by the jury pursuant to an instruction which breached a*

35. Heft & Heft, *Comparative Negligence Manual*, § 8.1 (1971); V. Schwartz, *Comparative Negligence* 289 (1974).
36. Colo. Rev. Stat. Ann. 1963 § 42-2-14(2) (1971); Haw. Rev. Stat. 1968 § 663-31(6) (1969); Idaho Code Ann. § 6-802 (1971); Kan. Stat. Ann. 1974 Supp. § 60-258a(b) (1974); Mass. Gen. Laws Ann. ch. 231, § 85 (1969); Minn. Stat. Ann. § 604.01, subd. 1 (1969); Nev. Laws 1973 ch. 787, § 1, subd. 2 (1973); N.J. Stat. Ann. § 2A:15-5.2 (1973); N. Dak. Cent. Code § 9-10-07 (1973); Utah Code Ann. 1953 § 78-27-38 (1973); Wyo. Stat. 1957 § 1-7.2(b) (1973).
37. *Supra* note 15.
38. 194 Kan. 75, 397 P.2d 402 (1964).
39. *Id.* at 77.
40. *Collett v. Estate of Schnell, supra* note 38, at 77, 78.
41. *McCourtie v. United States Steel Corporation*, 93 N.W.2d 552 (1958).

rule designed to prevent the play of passion and prejudice.[42]

The purpose of comparative negligence is to apportion damages according to fault. The function of the special verdict is to allow the jury to make that determination free of undue influences. Informing the jury of the effect of its answers to special verdict questions would allow it to apportion on other than a factual basis. The necessary result of such a system is a serious subversion of both comparative negligence and special verdicts.

This was the conclusion of the Colorado Supreme Court when it found reversible error based on informing the jury of the effect of their answers to special verdict questions. The Colorado statute is similar to the Kansas statute in that it is a 49% system with the same special verdict provisions:[43]

We are convinced that the legislature, when it enacted the comparative negligence statute, intended to establish a system in negligence cases which divides the responsibility for a fair and good result between the jury and the judge. Such a system enhances the chance of a pure verdict on material facts alone. It mandates in precise language that the jury is the finder of facts and as such simply answers questions posed to it in the special verdict form. . . . It is not the jury's function to attempt to control the effect of the law of comparative negligence in their special findings. . . . The only law which the jury members need to understand is the law which enables them to answer the specific questions asked of them in the special verdict form. Under this system, it is unnecessary for the jury to concern itself with how much the plaintiff receives or whether the plaintiff receives anything.[44]

42. *Id.* at 563.
43. Colo. Rev. Stat. 1963, 1971 Perm. Supp. § 41-2-14(2) (1971).

THE PIK RATIONALES

One of the members of the PIK committee outlined the basis of the PIK instruction in materials prepared for newly appointed judges.[45] The rationales are that:

1–*Blinders on the jury derogates both the intelligence and integrity of the jury system.*

2–*The present law of Kansas permits the jury to know the effect of the application of the doctrine of contributory negligence.*

3–*The jury could be confused as to the intent of their answers and return a special verdict that is completely inconsistent with their findings.*[46]

OBJECTIONS TO THE PIK RATIONALES

The essence of the first reason for the new instruction is a recognition of the trust that the judicial system places in the jury. However, whether the jury should be informed of the effects of their answers to special verdicts is a question that focuses not on whether the jury should be trusted but rather on the proper function of

44. *Avery v. Wadlington*, 526 P.2d 295, 297 (1974).
45. Walton, J., "Comparative Negligence in Kansas—A Look at the New Statute" (1975).
46. *Id.* at 5.

the jury. If the sole function of the jury, as laid out by the statute, is to determine factual questions, there is no need for them to know the effect of their answers. As noted earlier, this has long been the position of the Kansas Supreme Court with regard to special verdicts and interrogatories.[47] In cases involving comparative negligence and special verdicts, most courts have reached a similar conclusion.[48] The Colorado Supreme Court drew this distinction between trusting the jury and the function of the jury in a recent case:

> *Any suggestion that a holding which refuses to permit comment or explanation of the judge's function involves a matter of distrust of jurors is uncalled for. The issue here is not one of trust under any circumstances. The problem is that the jury does not need to know and is particularly less suited to try to understand and then attempt to apply the comparative negligence statute.*[49]

The second rationale—that present law permits the jury to be told the effect of the application of the doctrine of contributory negligence—is based on an improper analogy. In those cases, the jury had to know the effect of a finding of contributory negligence because it was an integral part of the verdict and their general finding. The jury had to find either for plaintiff or defendant. If the jury did not know the effect of contributory negligence, the verdict would be meaningless. However, under the special verdict procedure, the jury is not charged with making the final determination of recovery and hence the analogy is faulty.

Further, the effect of informing the jury on contributory negligence is mixed. In some cases, the jury has followed the court's instruction. In others, the jury has engaged in nullification and applied its own system of apportionment.[50] This has led to unequal treatment under the law and that is an intolerable result.

The third reason for informing the jury—that the jury could be confused and return a special verdict inconsistent with their findings—is also found wanting upon close scrutiny. This argument is based on the assumption that in close cases, the jury will split the negligence of the parties equally upon the assumption that the plaintiff will still recover. If that is true, and there is some indication that the jury may indeed determine negligence in close cases in this fashion,[51] there are implicit in the argument two additional premises that already have been discredited.

First, there is the assumption that the jury should decide which party is to recover. The statute speaks clearly to that and in the negative. Secondly, there is the premise that a 50% negligent plaintiff should recover. Again the statute is designed to prevent just such a result.

Moreover, informing the jury of the effect of their answers could lead to cases of jury gerrymandering of facts in order to create the result that they want; e.g., the jury may believe that a plaintiff was 50% negligent and nevertheless want him to recover.

47. *Supra* notes 27, 28.

48. *Mutual Auto Ins. Co. v. State Farm Mut. Auto Ins. Co.*, 66 N.W.2d 697 (1954); *Degroot v. Van Akkeren*, 273 N.W. 725 (1937); *Kennard v. Housing Associates, Inc.*, 209 N.Y.S.2d 479 (1961); *Harbison v. Briggs Bros. Paint Mfg. Co.*, 354 S.W.2d 464 (1962). "On occasion it has been held that the error in an instruction informing the jury of the effect of an answer upon ultimate liability was harmless or nonprejudicial. These rulings . . . are all from jurisdictions which usually adopt the view that error in informing the jury of the effect of their answers to special issues is reversible. How far they should be construed as representing a considered minority doctrine, and how far they should be considered as isolated rulings governed by particular factual situations, *quaere*." Annot., 90 A.L.R.2d 1041, 1054 (1963); see also *Koch Dry Goods v. Kahn*, 53 Kan. 274, 36 P. 327 (1894); *Ellis v. Ashton & St. A Power Co.*, 238 P. 517 (1925); *Texarkana & Ft. S.R. Co. v. Casey*, 172 S.W. 729 (1914).

49. *Avery v. Wadlington*, *supra* note 44, at 297.

50. *Haeg v. Sprague, Warner & Co.*, *supra* note 34.

51. See dissent in *Vincent v. Pabst Brewing Co.*, 177 N.W.2d 513, 517, 520 (1970); see also *Moses v. Scott Paper Co.*, 280 F. Supp. (D. Maine, 1968).

Knowing that such a finding would prevent recovery, the jury may alter their findings to reflect their intention. Not only does this have the effect of undermining the statute, but it also suffers from the dangers of jury nullification previously alluded to.

In response, it has been suggested that the jury will know the effect of their answers anyway and, if not, will speculate and such knowledge or speculation cannot be divorced from their considerations.[52] Informing the jury, however, contains no guarantee that they will properly perform their duty. In fact, previous experience surrounding the rule of not informing the jury is suggestive of a greater likelihood of jury nullification when informed than when not informed. This prospect further adds to the potential for inconsistent and unequal treatment.

More serious perhaps is the case of the multiple defendants. Under the Kansas law, the comparison of negligence is to be made between the plaintiff's negligence and the aggregate negligence of the defendants.[53] In a case where the jury finds that the plaintiff was 40% negligent and each of the two defendants was 30% negligent, it is not inconceivable that the jury might gerrymander their findings because of a belief that plaintiff will not recover because his negligence is greater than each of the defendants' own negligence. However, it is equally possible that a jury may not wish to see a plaintiff recover even though his negligence was only 40% of the total.[54] To insure that result, they may adjust their findings to attribute 50% of the negligence to the plaintiff and 25% to each of the defendants.

The difficulty with all of these hypothetical cases of jury gerrymandering is that they are hypothetical and can cut both ways. If the jury is informed, it may adjust either to the benefit or the detriment of the plaintiff, depending on its prejudices. The uncertain and speculative fears of those who would inform the jury must then be weighed against the announced policies of comparative negligence and special verdicts.

D. The Better Rule Would Be Not to Inform the Jury of the Effect of Its Answers to Special Verdict Questions

Informing the jury of the effect of its answers to special verdict questions would allow the biases and prejudices of the jurors to operate to the detriment of the statute. If jurors are not informed of the effect of their answers, and it is true that in close cases they will make a finding of equal negligence, then the intent of the legislature will be served. To the extent that such a result is harsh or otherwise undesirable, it is not the function of the jury to alter it.[55] Any other approach will institutionalize inconsistent results.

Likewise a rule allowing the jury to be informed of the effect of the answers would emasculate the special verdict procedure by distracting the jury from its fact-finding. Any dangers of the jury acting upon mistaken beliefs as to the effect of their answers is offset by the dangers of

52. Smith, "Comparative Negligence Problems with the Special Verdict: Informing the Jury of the Legal Effects of Their Answers," 10 Land and Water L. Rev. 208 (1975); see also Brown, "Federal Special Verdicts: The Doubt Eliminator," 44 F.R.D. 338 (1968); Green, "Blindfolding the Jury," 33 Texas L. Rev. 275 (1955).

53. K.S.A. 1974 Supp. § 60-258a(a), "The contributory negligence of any party in a civil action shall not bar such party . . . from recovering damages . . . if such party's negligence was less than the casual negligence of the party or parties against whom claim for recovery is made . . . "

54. Broeder, *supra* note 31, at 413.

55. *Skidmore v. Baltimore & O.R. Co.*, *supra* note 25, at 58.

nullification and gerrymandering that exist if they are informed.

It is important to realize that this is not a question of trusting the jury, but rather a question of implementing the intent of the legislature to establish a workable system of comparative negligence for Kansas. The jury's function is specifically limited to fact-finding, any other considerations are not properly within the province of the jury.

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(b) Where the comparative negligence of the parties in any such action is an issue, the jury shall return special verdicts, or in the absence of a jury, the court shall make special findings, determining the percentage of negligence attributable to each of the parties, and determining the total amount of damages sustained by each of the claimants, and the entry of judgment shall be made by the court. No general verdict shall be returned by the jury.

(c) On motion of any party against whom a claim is asserted for negligence resulting in death, personal injury or property damage, any other person whose causal negligence is claimed to have contributed to such death, personal injury or property damage shall be joined as an additional party to the action.

(d) Where the comparative negligence of the parties in any action is an issue and

recovery is allowed against more than one party, each such party shall be liable for that portion of the total dollar amount awarded as damages to any claimant in the proportion that the amount of his or her causal negligence bears to the amount of the causal negligence attributed to all parties against whom such recovery is allowed.

(e) The provisions of this section shall be applicable to actions pursuant to this chapter and to actions commenced pursuant to the code of civil procedure for limited actions.

History: L. 1974, ch. 239, § 1; L. 1976, ch. 251, § 4; Jan. 10, 1977.

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3. Cited; settlement by insurer and third party without insured's consent not bar to action by insured against third person. Lohman v. Woodruff, 224 K. 51, 52, 578 P.2d 251.

4. Construed: in a wrongful death action the jury will not be instructed about the $50,000 limitation on plaintiff's recovery as required in 60-1903. Benton v. Union Pac. R.R. Co., 430 F.Supp. 1380, 1386.

5. Section construed in products liability case; formula for determining percentage of damages defendant must pay when non-parties are found contributorily negligent. Greenwood v. McDonough Power Equipment, Inc., 437 F.Supp. 707, 710, 711.

KANSAS DISTRICT JUDGES' ASSOCIATION

COMMITTEE ON PATTERN JURY INSTRUCTIONS

Serving as
Advisory Committee on Jury Instructions
Kansas Judicial Council

Hon. Don Musser, Pittsburg, Chairman
Hon. Michael A. Barbara, Topeka, Member
Hon. B. Mack Bryant, Wichita, Member
Hon. Ronald D. Innes, Manhattan, Member
Hon. David Prager, Topeka, Member
Hon. Herbert W. Walton, Olathe, Member
Hon. Frederick Woleslagel, Lyons, Member
Professor Earl B. Shurtz, Lawrence, Member

Attachment No. 5
House Judiciary
February 27, 1985

PREFACE

Throughout our history, the jury system has been an integral part of our system of justice. In addition to its primary function, it has had a profound educational impact in our communities in familiarizing the people with our court system and with our judicial process. Although it has served us well as a fact-finding instrumentality, judges, lawyers, and jurors have long recognized a need for improvement in the way we inform our jurors of the law and of their duties with respect to it. They often have said, justly, that jury instructions are too technical, too lengthy, too complicated, and too often designed to satisfy appellate courts rather than to inform juries.

In response to this need, the Kansas District Judges' Association, at its 1963 Judicial Seminar, appointed a Committee on Jury Instructions, hereafter referred to as the "Committee," to deal with the problem. The judges expressed a desire for instructions that were brief and simple in construction, understandable to laymen, accurate and unslanted in coverage, and capable of promoting uniformity in jury instructions.

In preparing the material for this publication, the Committee discussed and agreed upon those basic principles that were to serve as guides for its project, and it attempted to draft its instructions in accordance with them. The first of those principles was that the instructions should be impartial, accurate statements of the law. The second was that they should be stated in brief, simple language, language that would be clear and understandable to laymen. The third was that they should be general instructions, instructions adaptable to varying circumstances.

Together with the foregoing principles, the Committee attempted to follow a consistent line with respect to the elimination of certain instructions. It tried to avoid, for example, instructions that would tell a jury not to do something, and it tried to avoid instructions that were slanted, argumentative, or formulated to particularize one aspect of a case. Moreover, it tried to eliminate repetitious, verbose, and superfluous words and sentences, and it sought to eliminate or restrict instructions that would single out bits of evidence. Further, the Committee felt that appellate court

clearance did not justify including unnecessary or inappropriate instructions.

The Committee recognizes, of course, that its work is in no way binding upon trial judges and counsel. At the same time, it hopes and believes that it will be of persuasive value. The Committee hopes this work will accomplish the following:

1. Help eliminate many of the criticisms that have been made about the instructions of trial judges,
2. Help secure more just verdicts by helping trial judges instruct as to the duties of jurors and the law of the case,
3. Reduce the amount of time needed by courts and counsel for the preparation and discussion of jury instructions,
4. Encourage uniformity in jury instruction and thereby eliminate a source of friction that can arise between the bench and the bar,
5. Help eliminate many of the inappropriate instructions that are given often, and
6. Help the layman comprehend the law by providing understandable and unslanted statements about the law.

Pattern instructions are intended to take advocacy out of the judiciary and return it to the arena of argument where it more properly belongs. When the judge assumes his proper role in instructing the jury as an impartial presiding officer, he will give instructions which are informative but not argumentative.

The objective of the Committee is to make the law applicable in a given case understandable to jurors. However, a pattern instruction may not be exactly right for the evidence introduced in a particular case. The judge must analyze the issues applicable to the evidence in each case and make appropriate selections and modifications. As a general principle of jury instructions, the Committee recommends that the judge give the minimum number of instructions that a case requires, rather than give all that may be legally permissible.

The chapters in this revised edition are broken down into groups and bound in pamphlet form. The content of the pamphlet was arranged to allow flexibility for change that is not available in pocket parts. The Committee continues to solicit the criticism and comment of lawyers and judges toward the objective of continuing improvement in the administration of justice through the use of these pattern jury instructions.

The Committee wishes to thank the Kansas Judicial Council for

its financial support and the assistance of its excellent reporter, Randy M. Hearrell. I express my personal thanks to the Committee members and their reporters for their cooperation and dedication to this work.

DON MUSSER, *Chairman*,
Committee on Pattern Jury Instructions,
The Kansas Judicial Council

PIK 20.01 COMPARATIVE NEGLIGENCE—THEORY AND EFFECT

This case must be determined on the basis of comparative fault of the parties. In deciding the case you will need to know the meaning of the terms "negligence" and "fault."

Negligence is the lack of ordinary care. It is the failure of a person to do something that an ordinary person would do, or the act of a person in doing something that an ordinary person would not do, measured by all the circumstances then existing.

A party is at fault when he is negligent and his negligence caused or contributed to the event which brought about the injury or damages for which claim is made.

It will be necessary for you to determine the percentage of fault of the parties. It also will be necessary for you to determine the amount of damages sustained by any party claiming damages.

The laws of Kansas applicable to this case require me to reduce the amount of damages you have awarded to any party by the percentage of fault that you find is attributable to that party.

A party will be entitled to recover damages if his fault is less than 50% of the total fault of all parties. A party will not be entitled to recover damages, however, if his fault is 50% or more.

Notes on Use

This instruction should be used in every comparative negligence case.

PIK 20.02 COMPARATIVE NEGLIGENCE—EXPLANATION OF VERDICT

CHANGE Instruction to read:

In interpreting the last instruction, it may help you to keep the following things in mind:

Your first obligation is to determine if any party is at fault.

Next, assign a percentage of fault to each party you find to be at fault.

For a party not at fault, show 0% on your verdict form.

For any part at fault, show 1% to 100%, depending on your finding, on your verdict form.

If any parties are found at fault, the fault of all parties, when added on your verdict form, must total 100%.

Keep in mind that in setting forth damage amounts on your verdict form, you set out the full damage sustained by that party. I will make any reduction attributable to that party's fault, so you should not do so.

The parties to whom you have the discretion to assign fault are:

.....

.....

.....

The parties you may find received damages are:

.....

.....

.....

Notes on Use

ADD:
This instruction must be given following PIK 20.01.

PIK 20.03 COMPARATIVE NEGLIGENCE—VERDICT FORM

CHANGE Instruction, Notes on Use, and Comment to read:

Verdict

We, the jury, present the following answers to the questions submitted by the court:

1. **Do you find any of the parties to be at fault? Answer yes or no: ....**
2. **If you answer question number one yes, then, considering all of the fault at one hunderd percent, what percentage of the total fault is attributable to each of the (parties) (following persons)?**

....(A)....	(0% to 100%) ....%
....(A)....	(0% to 100%) ....%
....(A)....	(0% to 100%) ....%
	TOTAL 100%

Answer question 3 only if you find any of the parties to be at fault.

3. **Without considering the percentage of fault found in question two what total amount of damages do you find was sustained by the following parties?**

....(B)....	$....
....(B)....	$....

[Alternative Question 3 (A)]

3(A). **Answer the following question only if the percentage of ....(B)....'s fault is less than fifty percent of the total fault which caused the (collision) (occurrence).**

Without considering the percentage of fault found in question one, what total amount of damages do you find was sustained by the following party:

....(B)....

.....
Presiding Juror

Notes on Use

All parties to the action whose causal negligence or fault must be determined should be listed in blank "A."

In spaces designated "B," there should be included the names of any parties who assert a claim for damages against any other party and where there is evidence to support the claim.

Use paragraph 3 in those cases in which the court believes a determination of damages should be made irrespective of percentages of fault.

Alternative paragraph 3(A) is provided for use in a case where only the plaintiff is claiming damages and the court believes that the jury should not be required to determine his damages if the jury finds that plaintiff is barred from recovery for the reason that his fault exceeds forty-nine percent of the total fault in the case.

This instruction should be appropriately modified in cases where the negligence of another would be available as a defense to the plaintiff's claim; for example, the negligence of a decedent in a wrongful death action, the negligence of a child in a suit by a parent, or the negligence of an injured spouse in a suit by the other spouse for loss of consortium.

All parties to the action whose causal negligence or fault must be determined should be listed in blank "A" including a "phantom party" or immune tortfeasor.

Comment

The original verdict form contained in PIK 20.03 was revised so that the jury may find there was no party at fault in the case.

**PIK 20.05 CO
WHERE CL
NOT JOINE**

ADD to first paragr
Kennedy v City c
(1980); Brown v Keill

ADD to third para
Geier v Wikel, 4 K

PIK 20.06 COMPARATIVE NEGLIGENCE—BASIS OF COMPARISON

In making the apportionment of percentages of fault you should keep in mind that the percentage of fault attributable to a (party) (person) is not to be measured solely by the number of particulars in which a (party) (person) is found to have been at fault.

[Nor does the fact that both parties are claiming the same acts of negligence against each other necessarily mean that both must be equally at fault.]

You should weigh the respective contributions of the (parties) (persons) to the (occurrence in question) (collision) and considering the conduct of each as a whole, determine whether one made a larger contribution than the other(s), and if so, to what extent it exceeds that of the other(s).

Notes on Use

Ordinarily this instruction need not be given as a part of the initial instructions to the jury. It may be used, however, when made desirable by reason of argument of counsel or where the jury following retirement to the jury room seeks additional guidance as to the manner in which the percentages of fault should be determined.

Comment

The jury is not required to attribute the same percentage of negligence to two participants of a vehicle accident merely because they are each chargeable with the same category of negligence. For example, the jury is not required to equate the negligent lookout of one participant with the negligent lookout of the other. Winkler v State Farm Mut. Auto. Ins. Co., 11 Wis 2d 178, 105 NW2d 302 (1960).

Research References

See Research References under PIK 20.04.

PIK 20.07 COMP FAULT DIREC OR STIPULATE

Under the evi dispute as to [name)] [the co (party's name)] tained by (party my duty to ins the verdict whic

The appropriate phras court directs a verdict or an issue. The appropriate should be answered by th

ERSION—MEA-

or conversion of
and reasonable
converted at the

18.71 and 18.79 when
damages is asserted.

Nelson v Hy-Grade
1 635, 527 P2d 1
265 P2d 842 (1954)
m Jur 2d, BAILMENTS

ges is stated by the
Brown Chev Co., 22
v R. D. Werner Co

CHAPTER 20.00 COMPARATIVE NEGLIGENCE

PIK 20.01 COMPARATIVE NEGLIGENCE-THEORY AND EFFECT

Comment

DELETE all after second paragraph and substitute

Since the publication of the first edition of PIK Civil 2d in 1977, the Kansas appellate courts have had several opportunities to consider the ramifications of the adoption of comparative negligence. These decisions resolve many of the questions suggested in the original comment to PIK 20.01. It would be helpful to discuss them.

49 Percent Rule-Equal Fault Bars Recovery

Prior to 1974, we had some experience in Kansas with comparative negligence cases involving Federal Employers Liability Act. See PIK 16.20, Contributory Negligence as a Question of Fact. It should be kept in mind, however, that FELA is based on the pure comparative negligence theory. This allows a party to recover regardless of the extent of his contributory negligence. The Kansas comparative negligence system is based on the "less than" or the "49 percent" rule. The injured party may recover only where his negligence was less than the causal negligence of the party or parties against whom claim for recovery is made. If the plaintiff and defendant are equally at fault, there can be no recovery. Negley v Massey Ferguson, Inc., 229 Kan 465, 625 P2d 472 (1981); Brown v Keill, 224 Kan 195, 205, 580 P2d 867 (1978).

A party suffering damages as the result of the negligence of multiple tortfeasors may recover from any one of the tortfeasors the amount of damages corresponding to that tortfeasor's individual liability if the *aggregate* amount of liability attributable to the multiple tortfeasors exceeds that of the claimant. For example, if plaintiff is found to be 40% negligent, defendant A is 30% negligent, and defendant B is also 30% negligent, plaintiff may recover from each defendant 30% of the total amount of damages sustained. The Supreme Court specifically held in Negley v Mas-

sey Ferguson, Inc., supra, that a plaintiff may recover a percentage of his damage from a third-party tortfeasor whose causal negligence is less than that of plaintiff. In Negley, plaintiffs' decedents were electrocuted during their employment when the forklift they were operating came into contact with a power line. One of the employees was determined to be 22% negligent, the employer 68% negligent, and Kansas Power & Light Co. 10% negligent. Plaintiff was allowed to recover from KP&L 10% of the amount of total damages. In reaching this conclusion, the Court relied upon language found in Langhofer v Reiss, 5 Kan App 2d 573, Syl. ¶¶ 1 and 2, 620 P2d 1173 (1980): "In civil litigation where the doctrine of comparative negligence, as provided in K.S.A. 60-258a, is applicable, a plaintiff's individual negligence will be compared with the collective negligence of multiple defendants as found by the court or jury for the purpose of computing damages. . . . The negligence of a party seeking damages . . . does not bar recovery of damages so long as the party's negligence is less than the combined causal negligence of all parties against whom recovery is sought." In Langhofer, the 40% negligent plaintiff was allowed to recover from a 40% negligent defendant, when the codefendants' aggregate negligence was 60%.

Applicability to Non-Negligence Cases

The comparative negligence statute has been held to apply to claims based on liability theories other than common-law negligence. For example, in Kennedy v City of Sawyer, 228 Kan 439, 450, 618 P2d 788 (1980), the comparative negligence statute was held applicable to claims based on strict liability or on breach of implied warranty in products liability cases. In Wilson v Probst, 224 Kan 459, 581 P2d 380 (1978), it was held that the state's breach of its statutory duty to repair highways had to be considered in determining the comparative fault of the defendant's driver and the Department of Transportation in a claim for damages arising out of an automobile accident. See also Thomas v Board of Trustees of Salem Township, 224 Kan 539, 582 P2d 271 (1978). Likewise, in Arrendondo v Duckwall Stores, Inc., 227 Kan 842, 610 P2d 1107 (1980), comparative fault was held properly applied in an action by a negligent minor to recover from a defendant who sold explosives to the minor in contravention of a statutory prohibition. In Sandifer Motors, Inc. v City of Roeland Park, 6 Kan App 2d 308, 628 P2d 239 (1981), it is stated that in

any situation where contributory negligence would have been a defense, comparative negligence now applies. There, comparative fault principles were applied where a nuisance had its origin in negligence.

The Kansas appellate courts have not considered the applicability of comparative fault to actions based on intentional torts or on wanton misconduct. Presumably, the application of the Kansas statute should be limited to those kinds of actions where contributory negligence has traditionally been a bar to recovery. This would not include actions based upon a theory of intentional or wanton misconduct. The statute does not abrogate the rule that contributory negligence is not a defense to wanton or reckless misconduct. Byers v Hesston Appliance, Inc., 212 Kan 125, 509 P2d 1151 (1973). In the past, contributory wilful or wanton conduct of a plaintiff has been a complete defense to the defendant's wantonness. Bogle v Conway, 198 Kan 166, 422 P2d 971 (1967). In Kansas, wantonness is distinct from negligence and differs in kind. Kniffen v Hercules Powder Co., 164 Kan 196, 188 P2d 980 (1948).

Wantonness is not a wilful act. The PIK committee recommends that comparative fault principles be applied in wantonness cases but not in cases involving intentional injuries.

Special Verdicts with No General Verdict

The statute declares categorically that no general verdict shall be returned by the jury. The jury is directed to return special verdicts determining the percentage of negligence attributable to each of the parties and determining the total amount of damages sustained by each of the claimants. After the special verdicts are received, the trial court will apply the statutory formula and enter judgment as required under the law. In Scales v St. Louis-San Francisco Ry. Co., 2 Kan App 2d 491, 500, 582 P2d 300 (1978), an instruction advising the jury that the plaintiff's award of damages would be reduced by the ratio which his percentage of negligence bore to the total amount of negligence allocated among the plaintiff and defendants was approved. In Thomas v Board of Trustees of Salem Township, supra, at 547, the Court approved the use of this instruction. The last two paragraphs were challenged as prejudicial in that they informed the jury of the results of their verdict. The Court found it preferable to let the judge explain the result rather than to allow the jury to speculate and

possibly render a verdict on an erroneous speculation. If, however, the jury conspired to circumvent the law by increasing the amount of actual damages to a fictitious figure so as to give a negligent plaintiff his entire damages plus attorney fees, the verdict will be set aside. Verren v City of Pittsburg, 227 Kan 259, 607 P2d 36 (1980). Likewise, a quotient verdict used in determining comparative fault will be set aside. Johnson v Haupt, 5 Kan App 2d 682, 623 P2d 537 (1981). In a comparative negligence case tried before the decision date of Thomas v Board of Trustees of Salem Township, supra, it was held not to be reversible error for the trial court to refuse to advise the jury of the legal consequences of its answers to special questions allocating fault. Cook v Doty, 4 Kan App 2d 499, 608 P2d 1028 (1980).

Parties—Actual and Phantom

Subsection (d) provides that, on motion of any party against whom a claim is asserted for negligence, any other person whose causal negligence is claimed to have contributed to the injury shall be joined as an additional party to the action. The statute does not state what happens if a claim for relief is not asserted by anyone against this new party. Formal joinder of some third person is not a prerequisite to consideration of that person's comparative fault. Kennedy v City of Sawyer, supra, at 460; Brown v Keill, supra, at 206. Consideration of fault attributable to any third person claimed to be causally negligent is essential to the determination of the parties' liability, even though that third person cannot be joined formally as a litigant or may be immune or judgment proof. Brown v Keill, supra, at 206; Miles v West, 224 Kan 284, 287, 580 P2d 876 (1978); Scales v St. Louis-San Francisco Ry. Co., supra, at

As noted in Brown, Kansas adheres to the "phantom party" concept, requiring consideration of the proportionate responsibility of any third party claimed to be causally negligent even though that party "cannot be formally joined as a litigant or held legally responsible for his or her proportionate fault."

Joint and Several Liability Abolished

Subsection (d) of the statute provides that where the comparative negligence of the parties is an issue and recovery is allowed against more than one party, each party shall be liable for that portion of a claimant's total damages in proportion to his percent-

KP&L. The jury returned verdicts finding that one of the decedent employees was 22% negligent, Orlan, Inc., the employer, was 68% negligent, and KP&L was 10% negligent. Orlan, Inc. claimed subrogation rights under the provisions of the worker's compensation act, K.S.A. 44-504(b). The court reasoned that the extent and nature of the subrogation rights of an employer under the worker's compensation statute are matters for legislative determination. K.S.A. 44-504 provides for full subrogation and provides no reduction in the amount of the subrogation regardless of the percentage of contributory negligence attributable to the employer. The court recognized the inequities in the result but felt obligated to enforce the clear provisions of the statute. Any changes in this rule will have to be accomplished by the state legislature.

Research References

ALR Annotations:

Choice of law as to application of comparative negligence doctrine. 86 ALR3d 1206.

Modern development of comparative negligence doctrine having applicability to negligence actions generally. 78 ALR3d 339.

Practice Aids:

Pierce, Informing the Jury of the Legal Effect of its Answer to Special Verdict Questions Under Kansas Comparative Negligence Law-A Reply to the Masses: a Case for the Minority View. 16 WLJ 114.

Goldman, The Kansas Comparative Negligence Statute: Informing the Jury of the Legal Effect of Its Answers to Special Verdict Questions. 45 JBAK 91.

Nelson, Employer Liability to Third Parties under the Workmen's Compensation and Comparative Negligence Statutes. 26 KLR 485.

Carson, Torts: Damage Apportionment Under the Kansas Comparative Negligence Statute—The Unjoined Tortfeasor. 17 WLJ 698.

Meltzer, Brown and Miles: At Last, An End to Ambiguity in the Kansas Law of Comparative Negligence. 27 KLR 111.

Heck, Civil Procedure: Informing Comparative Negligence Juries What Legal Consequences Their Special Verdicts Effect. 18 WLJ 606.

Kansas Association of Counties

Serving Kansas Counties

Suite D, 112 West Seventh Street, Topeka, Kansas 66603 Phone 913 233-2271

February 27, 1985

Chairman Knopp
Members of the House Judiciary Committee

My name is Bev Bradley, from the Kansas Association of Counties I appear today in support of HB 2381

As I served as County Commissioner in Douglas County and as a member of the county corrections committee I was aware of a problem, or at least a perceived problem.

Douglas County employed Terry Van Zant-Travis as our Community Service Work Coordinator. She placed approximately 40 people who performed about 1200 work hours per month and secured approximately 30 agencies for placement. Each time/each day the question arose concerning "liability" and the "Tort Claims Act". Indeed some agencies like the City Library were very much concerned and would not allow a community service worker to do some much needed jobs like to wash windows. What if he fell off the step-ladder? And of course they couldn't paint - there are the fumes and the step ladder again!

In Douglas County in 1984 Terry referred 409 people to work/service projects for a total of 14,770½ hours.

Several non-profit agencies would not take these people because of concern for liability and those that did take them were super cautious. With the passage of HB 2381 more benefit can be derived from this program and other counties that currently have not been involved will be willing to set up such a beneficial program.

Attachment No. 6
House Judiciary
February 27, 1985

Session of 1985

SENATE BILL No. 277

By Committee on Judiciary

2-19

AN ACT amending the Kansas tort claims act; relating to persons covered thereby; amending K.S.A. 75-6102 and repealing the existing section.

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

Section 1. K.S.A. 75-6102 is hereby amended to read as follows: 75-6102. As used in K.S.A. 75-6101 through 75-6118, and amendments thereto, unless the context clearly requires otherwise:

(a) "State" means the state of Kansas and any department or branch of state government, or any agency, authority, institution or other instrumentality thereof.

(b) "Municipality" means any county, township, city, school district or other political or taxing subdivision of the state, or any agency, authority, institution or other instrumentality thereof.

(c) "Governmental entity" means state or municipality.

(d) "Employee" means any officer, employee, servant or member of a board, commission, committee, division, department, branch or council of a governmental entity, including elected or appointed officials and persons acting on behalf or in service of a governmental entity in any official capacity, whether with or without compensation. "Employee" does not include an independent contractor under contract with a governmental entity *but does include a person who is an employee of an independent contractor under contract to provide educational or vocational training to inmates in the custody of the secretary of corrections and who is engaged in providing such services.* "Employee" ~~does include~~ *also includes* former employees for acts and omissions within the scope of their employment during their former employment with the governmental entity.

Attachment No. 7
House Judiciary
February 27, 1985

Sec. 2. K.S.A. 75-6102 is hereby repealed.

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

DEPARTMENT OF CORRECTIONS

TOPIC: REPRESENTATION OF CONTRACT PERSONNEL

ISSUE: Should the Kansas Tort Claims Act be amended to permit the State to provide legal representation in defending a lawsuit filed by an inmate against a teacher or instructor who is under contract with the Department of Corrections to provide that service?

BACKGROUND: Current law, K.S.A. 75-6102(d), excludes independent contractors from coverage under the Kansas Tort Claims Act. This would include teachers and instructors employed by institutions under contract to the Department of Corrections to provide educational and vocational training services. Thus, if one of these individuals was sued by an inmate as a result of an action taken in fulfilling his or her contract duties, the State could not provide legal representation in defending the suit. The cost for such representation would fall upon the school or individual teacher. Such a result seems difficult to justify in a prison setting where the Department asks the teachers and instructors to enforce the rules the same as other employees. In a prison setting, this can prompt an inmate initiated lawsuit against the teacher. It is even more difficult to justify when 90 percent of such lawsuits are frivolous.

RECOMMENDATION: It is recommended that K.S.A. 75-6102(d) be amended to permit the State to provide legal representation to teachers or instructors who are under contract with the Department of Corrections to provide educational or vocational training services.

CES/pa

KANSAS DEPARTMENT OF CORRECTIONS

JOHN CARLIN — GOVERNOR • • MICHAEL A. BARBARA — SECRETARY

JAYHAWK TOWERS • 700 JACKSON • TOPEKA, KANSAS • 66603
• 913-296-3317 •

January 28, 1985

The Honorable Robert Stephan
Attorney General of Kansas
2nd Floor, Judicial Center
Topeka, Kansas 66612

Dear Mr. Stephan:

This letter is to bring to your attention a problem which I believe merits your consideration.

As you know, the Department of Corrections contracts with various colleges and school districts around the state for delivery of educational and vocational training programs. The individuals hired to teach these programs are employees of the respective college or school, not the state. As such, under K.S.A. 75-6102(d), these individuals are not considered state employees and would not be entitled to representation by the state pursuant to K.S.A. 75-6108.

This situation creates a problem in our correctional institutions. All persons who work at correctional institutions are subject to being named a defendant in a lawsuit, probably to a degree higher than those working at any other institution of state government. Almost all of the lawsuits against corrections personnel are filed by inmates and the vast majority of them are of a frivolous nature. When state employees are sued, state attorneys represent them. However, these teachers and educators do not enjoy this protection. Rather, as we understand the law, the state may not provide representation for these individuals.

Such a situation seems difficult to justify in a prison setting where we ask these teachers and instructors to enforce rules and to take necessary and appropriate action against inmates. This, on occasion, will result in the teacher or instructor being sued by the inmate. We have, in recent months, experienced a substantial increase in litigation, with some of the cases involving contract personnel.

Under these circumstances, I am seeking your assistance in working out a procedure whereby the state may represent such contract personnel in the event they are sued as a result of

carrying out this duty to enforce rules, regulations, and policies issued by the Department of Corrections. I am not recommending that the state be responsible for any judgments against these individuals or that the state represent them in situations where a state employee would not be represented. I simply feel that when the state places such a person in a situation where he or she might be sued, particularly a correctional setting where most suits are frivolous, there should be some process short of requiring the person to retain private counsel.

I ask your consideration of this matter. If I or any staff can be of any assistance to you, please let me know.

Sincerely,

MICHAEL A. BARBARA
Secretary of Corrections

MAB:CES/pa

bcc: Herb Maschner

STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
ANTITRUST: 296-5299

February 8, 1985

Mr. Michael Barbara, Secretary
Department of Corrections
700 Jackson
Topeka, Kansas 66603

Dear Secretary Barbara:

I acknowledge your letter of January 28, 1985, and understand the problem outlined in your letter.

I agree that the individual teachers work for an independent contractor and not the State while they are providing educational services to the inmates. In this capacity, the teachers have neither the defenses available to them under the Kansas Tort Claims Act (K.S.A. 75-6101, et seq.) nor the benefits of defense and payment of judgments given to Kansas employees by that act. This office also recognizes the ever-increasing propensity of inmates to litigate every conceivable initiation they may or may not experience while confined.

Two possible solutions come to mind with regard to your problem. First, in your contracts with Kansas City Area Vocational-Technical School, Andrea, Inc., St. Mary College, and other vocational and educational providers, you could require insurance to be purchased by the vendor to fully cover such reasonably predictable inmate lawsuits. Such a course would cause an increase in cost to the State of obtaining such educational services.

My second suggestion would be to request the Legislature to amend K.S.A. 75-6102(d) as follows:

> (d) "Employee" means any officer, employee, servant or member of a board, commission, committee, division, department, branch or council of a governmental entity, including elected or

appointed officials and persons acting on behalf or in service of a governmental entity in any official capacity, whether with or without compensation. "Employee" does not include an independent contractor under contract with a governmental entity, except for independent contractors providing educational programs or services to the Kansas department of corrections who shall be considered an "employee" for the purposes of this act. "Employee" does include former employees for acts and omissions within the scope of their employment during their former employment with the governmental entity.

This office believes such an amendment would provide the teachers working inside a Department of Corrections institution with the defenses and benefits of the Kansas Tort Claims Act and K.S.A. 75-6116. Basically, we believe this would not raise any additional cost to the State, because the defense would be provided by attorneys already employed by your department or my office. As your letter states, most of the lawsuits filed by inmates are frivolous, and, therefore, the odds of a judgment involving expenditure of State funds is small.

This office would be glad to support an amendment to K.S.A. 75-6102(d) as outlined above.

If I may be of further assistance, please contact me.

Very truly yours,

Robert T. Stephan

ROBERT T. STEPHAN
Attorney General

MC