Approved 4/12/85
Date

MINUTES OF THE House COMMITTEE ON Judiciary.

The meeting was called to order by Representative Joe Knopp at
Chairperson

3:30 ~~x~~/p.m. on March 28, 1985 in room 526-S of the Capitol.

All members were present except:

All members were present.

Committee staff present:
Jerry Donaldson, Legislative Research Department
Mike Heim, Legislative Research Department
Mary Ann Torrence, Revisor of Statutes Office
Mary Hack, Revisor of Statutes Office
Becca Conrad, Secretary
Conferees appearing before the committee:

Former Governor John Anderson
Former Judge Calvert from Wichita
Judge Donald Allegrucci from Pittsburg
Judge Joseph Pierron from Johnson County

SB 110 - Concerning medical malpractice liability actions; relating to procedures for assessment of exemplary or punitive damages and consideration of collateral sources of indemnification in certain actions; limiting recovery of certain damages.

The Chairman introduced former Governor John Anderson who presented some possibilities for solutions. He said he is convinced that if it is passed the way it stands or if it's modified, it is not going to bring about complete relief. His testimony, Attachment No. 1, was typed from a recording of the meeting.

There was discussion on whether a special committee appointed with broad subpoena powers should be organized to gather all the facts, if it is a problem of cost, and whether his charge includes looking into action of the Board of Healing Arts.

Former Judge Calvert from Wichita said he has tried medical product liability cases and medical malpractice for the last three years. He believes in the jury system and said it works -- alterations to the jury system are done at great risk. He said there are checks and balances within the judicial system. He said this bill is similar to legalizing "cocaine" to solve the problem. He does not see this bill as anything that will help the people. There are insurance liens that are actions of the law which seem to work well.

Judge Donald Allegrucci from Pittsburg handled two malpractice cases in the past couple of years. When he read SB 110, he was surprised it does not address the problem. He said the problem is that there is medical malpractice. To try to alleviate the problem, you must go after the cost. He said you have got to look into the administration of the fund. He said the fund should be involved from the very beginning.

Judge Allegrucci had read that a proponent said that the judicial system should not dictate how a doctor should practice medicine. He said the judicial system does not dictate that. He presented jury instructions which were used in his malpractice cases (Attachment No. 2) and said that the way standard of care is determined is based upon the opinions of other doctors who are expert witnesses.

Judge Joseph Pierron from Johnson County also agreed that the jury system does work. He said one problem is that there is not enough money in the fund. Judge Pierron said he had no opinion as to whether this piece of legislation would get at the problem. He said he agreed with Governor Anderson that the amount of information which they have to act on at this time is not enough for them to know if it will solve the problems. He said you can't just look at an isolated problem -- you need to look at the whole problem in order to try to do something about the delivery of health care in the State of Kansas.

There were questions and discussion on the administration of funds, medical malpractice cases awarding about four times as much as automobile accident cases, juries making decisions according to sympathy rather than facts of evidence, ability to pay on awards, whether standard of care is created in terms of gross negligence, the cause of high verdicts, the break-down in numbers of the different types of health care providers covered by the Health Care Stabilization Fund, whether there should be a provision in the bill for the court or jury to pull the license of a doctor, and appropriate consideration of limited collateral source.

Attachment No. 3 was distributed to committee members listing questions they need to be considering. There was discussion concerning punitive damages and taking "gross negligence" out.

The Chairman pointed out that a jury has a lot of ranges on what it can consider to be a reasonable award. He said in determining the award amount, the jury starts out with a range of reasonable injury, then attaches to that a range of inflation rates, and the jury ends up with a long disparity in how much that person is entitled to. He said the one argument is that if we allow this to go into the jury, and you think juries are overcome by emotion, this will counteract that emotion and you might get them to reduce that reasonable figure considerably more than the actual expenses. He said by going to a jury you offset the sympathy that they may have for that poor injured person by the information they have.

The other argument is that if the jury chooses to disregard that and they say they are going to award $700,000, then you have no way of getting a chance to bring the award down. You have to then make the decision whether you trust the judges or not, to knock down the amount the person is going to get from Blue Cross Blue Shield. The Chairman said there is a valid argument both ways -- the Medical Society feels very strongly that it ought to be a jury decision and they ought to have the right to present that evidence to a jury. On the one hand, they're arguing that they are getting confused and running away with verdicts and that giving them this information will not further confuse them.

The Chairman said the trial lawyers tend to have more confidence in the judges and therefore want to have the judges make the decisions and hope the judge will remember what it was like when he was a lawyer and not reduce the amount.

There was further discussion on the Collateral Source Rule, comparative negligence, and reducing the award amount by an amount which the insurance paid for medical expenses.

Representative Douville made a motion to make it a jury decision on collateral source. It was seconded by Representative Harper.

Representative Wunsch said that if collateral source is not simple, he might not want the jury to do it. He said they would be asking them to decide who is to make the decision before they know what they are going to do.

The Chairman decided to take the collateral source issue first instead of deciding whether the judge or jury should make a decision on collateral source.

There was reference to the language in Attachment No. 4, the renumbered Section 3, and Attachment No. 5, Section 3(b).

Representative Wagnon said she felt the health insurance should be used as admissible collateral source to reduce the award but not anything else.

The Chairman said concerning the extent that the jury is going to be giving awards for lost income in the future, it would be inconsistent to say you can consider one collateral source for health care benefits and you shall not consider the collateral sources of unemployment compensation or disability income that they have provided.

It was pointed out that the motion now on the floor made by Representative Douville is that the committee adopt the medical and hospital expenses as sole collateral sources. It was seconded by Representative Harper and upon vote, carried thirteen to six.

Representative Wunsch made a motion that any expense incurred by the plaintiff to provide that insurance, either through himself or his employer, is likewise entitled to be informed either through the judge or the jury with their consideration. It was seconded by Representative Bideau.

Representative Solbach made a substitute motion that the judge may reduce the amount of the award by the full amount of any medical expenses as Representative Douville's amendment provided, up to that amount, in order to avoid double recovery or unjust enrichment of the injured party, and in making that determination the judge should consider the size of the award, the investment the injured party has in the collateral source, payments, cost of litigation, and other relative factors and the allowance of evidence of the cost of production of the insurance. It was seconded by Representative Duncan and upon vote, the motion did not carry.

Representative Wunsch made a motion to include in Representative Douville's amendment, lines 68-71 on page 2 of Attachment No. 4. It was seconded by Representative Solbach and did not carry.

Representative Bideau made a motion that the judge, rather than the jury, decide the issue. It was seconded by Representative O'Neal and it carried.

Concerning punitive damages, Representative Douville made a motion to adopt the language on page 1, section (c) of Attachment No. 4.

Representative Vancrum made a substitute motion to not include "reckless" and leave the issue at "willful and wanton". The language referred to here is on page 1 of Attachment No. 6. Representative Wunsch seconded this motion.

There was discussion on the PIK instructions that would be given to a jury if the judge found there was enough evidence if believed to substantiate wanton disregard for the consequences. An example, explanation, and definition of wanton conduct were given so the committee could further understand it.

Representative Vancrum decided to withdraw his substitute motion and Representative Wunsch agreed with this withdrawal.

Representative Douville made a friendly amendment to include to his previous motion the language "or wanton disregard of consequences to the plaintiff or plantiffs" in the balloon amendment, page 1, section (c), after words "toward the plaintiff with willful conduct". This motion also includes a new subsection (f) of Section 1 and the definition of "wanton conduct" which is found in the statutes. Also, this definition of "wanton conduct" should be inserted in subsection (c). This motion carried and was approved by the second of the motion, Representative Harper.

The next issue to be decided was on "burden of proof". Representative Douville made a motion that the standard be by "clear and convincing evidence". It was seconded by Representative Bideau. After discussion on punitive damages, the motion carried by a vote of eleven to eight.

Representative Douville made a motion to delete the last sentence of Section 1(c), Attachment No. 4, starting with the words "Presumptions shall not". The motion was seconded by Representative Duncan and it carried.

Representative Douville made a motion to adopt the box (e) on page 2 of Attachment No. 4 and Representative Vancrum seconded this motion. Professional Corporations, individual doctors and how they relate to this amendment were discussed. There was concern over (3) of (e) and the qeustion was divided to vote on (e) (1) and (e) (2) and (e) (3) separately. Upon vote of (e) (1) and (e) (2), the motion carried.

The motion to include (e) (3) was voted on and did not carry by a vote on seven to twelve. This deletes (e) (3) from the box amendment on page 2 of Attachment No. 4.

Representative O'Neal made a motion to substitute instead of 25% of gross income, 10% of net worth. It was seconded by Representative Duncan and did not carry by a vote of eleven to eight.

Representative O'Neal made a motion that 25% of the punitive damages recovered go to the plaintiff and 75% should go to the Health Care Stabilization Fund. It was seconded by Representative Snowbarger. The motion carried.

Representative Wunsch made a motion to remove the word "expressly" which is in the boxed (e) (1), page 2 of Attachment No. 4. The reason for this is to prevent arguing about whether it is expressed or implied. It was seconded by Representative Whiteman and the motion did not carry.

The next issue was concerning a cap on "pain and suffering". Representative Douville made a motion that references to a cap on nonpecuniary pain and suffering be eliminated from SB 110. It was seconded by Representative Wunsch.

Several committee members expressed the opinion that they did not believe a dollar amount could be put on personal tragedy and the effects it has on family members. The Chairman explained and gave examples of nonpecuniary damages and what types of injuries this amendment would cover.

Representative Shriver made a substitute motion to put a cap of $500,000 on pain and suffering. He then amended his motion to $250,000 and to adopt the language on page 2, renumbered section 4 of Attachment No. 4 and to adopt all the language on page 3. It was seconded by Representative Duncan.

Upon request, the Chairman divided the issue. The first issue was whether the language should be changed from "pain and suffering" to "nonpecuniary loss" on page 2, lines 79 and 80 of Attachment No. 4. The motion failed upon vote so the language remains as "pain and suffering".

The second part of the issue was to raise punitive damages from $250,000 to $350,000. Representative Vancrum discussed Attachment No. 7 concerning the Health Care Stabilization Fund. Upon vote, the motion did not carry by a vote of ten to nine with the Chairman's vote breaking the tie.

Representaive Bideau made a motion to raise the cap from $350,000 to $500,000 and it was seconded by Representaive Wagnon. The motion carried eleven to ten with the Chairman's vote breaking the tie.

There was discussion that subsection (b) of page 3 was not necessary. Representative Shriver said that since they are on his substitute motion, he would accept the deletion of subsection (b), page 3, as part of his motion.

The next vote was the inclusion of paragraphs (c) and (d), page 3, Attachment No. 4. This amendment carried upon a vote.

Representative Cloud pointed out that there had been some discussion on putting a four year sunset on this bill. He made a substitute motion that this bill would automatically sunset in four years which would be on July 1, 1989. Representative Buehler seconded the motion. After discussion of this, the motion carried by a vote of ten to eight.

Representative Vancrum referred to paragraph 1, page 3, of Attachment No. 7. He made a motion to put a per-occurrence lid on the liability of the fund. The Chairman said that to take all the different issues of this bill, such as the fund, and the Board of Healing Arts, the management and handling of the fund, and a limit on attorney's fees, is making it difficult at this late time.

Representative Solbach made a motion that the committee introduce legislation for call of a special committee to be appointed with broad subpoena powers to try to get at the facts of the medical malpractice crisis where they can know what the real problem is and find out what the solution is. He wanted to do something substantive about too high medical malpractice awards.

CONTINUATION SHEET

MINUTES OF THE House COMMITTEE ON Judiciary,

room 526-S, Statehouse, at 3:30 ~~a.m.~~/p.m. on March 28, 1985

Representative Vancrum decided to withdraw his motion and said he would second Representative Solbach's motion. This motion carried.

Representative Harper made a motion to pass SB 110 favorably as amended. It was seconded by Representative Shriver and carried.

The meeting adjourned at 7:40 p.m.

Testimony of Former Governor John Anderson before the House Judiciary Committee

Thank you very much Mr. Chairman and distinguished members of the Judiciary Committee. As your Chairman told you, I appeared here on his request. You may or may not know that I was asked by Commissioner Fletcher Bell to serve on and to Chair a committee that he has brought together which was charged with the work of gathering data and information related to the growing problem in the health care provider field in Kansas, and that of course, is the reason you now have this senate bill pending before this committee. First I want to say that I am not here speaking today for the commission for I am not authorized to do that, and I am not hear speaking for Commissioner Fletcher Bell for I am not authorized to do that, so I will make a few remarks as an individual who happens to have been asked to serve on that committee.

We have worked now. We have had two formal meetings. We have heard presentations of information from various segments of the health care provider field. We have heard people from the insurance industry, from the legal profession, both plaintiffs trail lawyers and defendants attorneys, and representatives of the American Medical Association and from the medical field. I am satisfied and I am sure you know that there is a lot of interest in the problem and there are many people concerned and indeed the doctors throughout the state are very concerned with the increasing premiums on medical malpractice insurance and they want immediate relief. That's the word we get. They claim that the impact of the problem will cause doctors because of high premiums, to withdraw from the practice and maybe some would do just that. That in turn would harm the public. The relief they seek, and the manner in which they seek that relief with impact on the adversary system, legal jurisprudence and it would change the tort law as we know it now, and as it has come down to us through the development of the common law, and this brings opposition from the legal profession and that opposition drastic change in the tort law field has been expressed in the committee.

I remember reading a case some years ago where Justice Hamm, the eminent juris from New York said in substance and I didn't look it up, and I am not quoting it word for word, but he said in substance, there is one person cannot obtain additional rights and benefits in a given situation, without taking away the rights from some other person. I think that is true in this case. So the problem of what to do is not an easy one for this committee, and is not an easy problem for our committee either.

We have quick opinions presented to us. Some would recommend that we abolish contingent fees for instance for lawyers because they see where a lawyer has represented an injured person in a lawsuit, get a large verdict with contingent fees and the big fee to the lawyer, but that is not an easy fix either, for to do away with the contingent fee is going to bring another problem and it may take away and prevent entirely the possibility of indigent people or poor people from being able to retain legal help, and they would be completely deprived of their rights to have their case heard and have their day in court and to have relief from very grevious injury and injuries that there are in malpractice as the doctors and observers are quick to admit, so just making a change on the legal fees is maybe not a solution to the problem, though it reminds me a little bit that there is no such thing under the sun as Shakespear wrote in one of his plays, he observed that the first thing you do is kill off all lawyers, but that won't solve this problem.

Attachment No. 1
House Judiciary
March 28, 1985

Some would go so far as to recommend that these are serious recommendations that we just change the tort system and set up administrative system for providing payment for injury without really finding fault, just finding injury, as is done in workmens compensation cases. That would be a radical change, certainly, and I am sure that we are not going to come to such a radical change as that immediately or without considerable study and thought given to it.

Now this morning, I knew I was coming up here today anyway and I had an invitation to set in on a seminar that was conducted by the Shawnee Medical Society here in town. I sat in on it all morning and it was entitled Malpractice 1985 Issues and Answers. They had discussions that covered the waterfront, and they had very, very able people make presentations. They talked about the matters that our committee has heard about already to some extent, and will be hearing about at least the limit for noneconomic loss or for pain and suffering which is in your bill, a cap on total recovery, modified the collaterial source rule, change the punitive damage law as we now know it, change the continguent fees for attorneys, fix a percentage of the total recovery beyond which attorneys should not exceed, discussion of total cost of health care, and the percentage of that that goes for expenses in malpractice. I was very surprised to learn of the evidence as all set out in the American Medical Association books and records that health care costs in the United States runs into the millions as we know, but the total expense for malpractice, attorneys fees and court expense is less than 1% of the entire total of those millions so really all things being relative, you have to look at the complete picture before you can identify the problem or the solution to it. Problems of abolishing the tort system as we now know it, problems that are relating to the fund under the law adopted here by the legislature in the 70s and being administered by the Insurance Commissioner and the commissioner will look into the problem of the fund as they have continued to grow, and problems with respect to the premiums. You know Kansas set up the funds. Many other states with problems in the health care provider field handled their problem of rising insurance rates in a somewhat different way and doctors themselves by association at the state level and the assistance in many states of the American Medical Association set up insurance companies that were chartered and were operating and provided for the excess over that which is provided by the primary insurance coverage that doctors take through the regular company such as St. Paul and the rest, and of course, there are other suggestions such as the periodic payment of for losses and for future medical to be paid under controlled accordance. Those are but some of the areas that this committee has heard the information on, and will look into and attempt to make a gathering of information on which a recommendation will be made if there is suggestion in need of change.

This committee was put together by the Insurance Commissioner. He put it together. There isn't any question about that. I knew a number of people, my wife says I know too many people throughout the state. I know a number of them, and I have become acquainted with a number of the others on there, but I am pleased to tell that there are some very, very able people serving on this committee that have been chosen from various fields of endeavor throughout this state representating the interests of the medical field, physicians and from the University Medical Center, from insurance companies, from lawyers, both the plaintiffs bar and the defense bar in the state. We have people from the education field. We have people from labor

and we have a number of what you would call interested persons from the general public. I will be the first to admit that it is not going to be easy. As a matter of fact, I would project there is a strong possibility that it may be impossible to get a concensus and a report from which all members will join because we have people on there who have mixed opinions in their various fields and those come together like that, so there may well be a majority and a minority report, but there need be no harm from that if the majority and minority reports are submitted together and they are both helpful. It is your job to sort it out anyway. We don't propose to be able to do that. Now, I think it goes without saying that the recommendations of this committee are not going to be here in time for this session. They will, however, be completed within the next year for another session of the legislature. I was not to presume for a minute to think that this committee is going to interfere with the prerogatives of your committee or the legislature, for I know that the legislature will do what it must do.

One of the speakers there today at this seminar, a gentleman from California, who is obviously an expert in this field of malpractice. His background was a professor of medicine at the University of Southern California. He is a graduate lawyer, and he is now serving as a consultant in the field of malpractice throughout the country, and he had gone thorugh the problems of malpractice insurance and medical problems in California and from what he said they are a jump or two ahead of us, and we are not surprised at that either. He said that it takes about four years for genuine relief to work itself after change has been brought about by legislation for that relief to go through the pipeline so we are not talking about immediate relief whether you do something with this bill tomorrow or whether we get a recommendation in six months. If it is the desire of the legislature to pass the bill you have before you, I am sure you are going to do it. I suppose our committee will continue Mr. Chairman, to do its work. I have read the bill. I am convinced that if it is passed the way it stands or if it's modified, it is not going to bring about complete relief. It's more patchwork to a problem deemed to me an immediate crisis than it is a thought out solution to the number of problems that exist in this field, and this is my opinion. But if you pass it, you do, and if you send this committee home, I suppose I will feel a little bit like the girl left at the alter, but I am not going to cry. I'll be glad to answer any questions that any of you have if I can.

NO. 7

In determining whether a physician used the learning, skill, and conduct required of him, you are not permitted to arbitrarily set a standard of your own or determine this question from your personal knowledge. On questions of medical or scientific nature concerning the standard of care of a physician, only those qualified as experts are permitted to testify. The standard of care is established by members of the same profession in the same or similar communities under like circumstances. It follows, therefore, that the only way you may properly find that standard is through evidence presented by physicians called as expert witnesses.

Attachment No. 2
House Judiciary
March 28, 1985

NO. 8

A physician has the right to expect a patient to follow reasonable advice. The failure of a patient to accept reasonable treatment or follow advice does not relieve the doctor from the results of an earlier malpractice. It only absolves him from liability for any increased injury caused by the patient's failure to accept reasonable treatment and advice.

NO. 9

Where, under the usual practice of the profession of the defendant, [redacted] M.D., different courses of treatment are available which might reasonably be used, the physician has a right to use his best judgment in the selection of the choice of treatment.

However, the selection must be consistent with the skill and care which other physicians practicing in the same field in the same or similar community would use in similar circumstances.

MEMORANDUM

March 28, 1985

TO: House Judiciary Committee

FROM: Kansas Legislative Research Department

RE: Malpractice Policy Issues

A. Punitive Damages

1. Should punitive damages be abolished in malpractice actions?

2. Should there be a cap on punitive damages in medical malpractice liability actions? All tort actions?

3. Should the cap apply only to individual health care providers but not to other entities such as hospitals, drug companies, or corporations involved in the health care field?

4. Should there be a separate proceeding to the court for determination of the amount of punitive damages? Or should the jury decide the issue?

5. Should definitions of the type of conduct which warrants the award of punitive damages be included in the bill? Such as willful conduct, fraud, malice, and wanton conduct?

6. Should a higher burden of proof be applied to the awarding of punitive damages, i.e., clear and convincing evidence?

7. Should certain immunities or exclusions from punitive damages apply to any of the following entities: (1) principals, employers, or professional corporations, unless they authorized or ratified the conduct of the agent or employee, (2) defendants who acted in good faith on the advice of an attorney, government official, or on the basis of a statute or judicial decision?

8. Should a provision for a special verdict by a jury be permitted regarding a recommended amount of punitive damages?

9. Should other punitive damage awards rendered against a defendant be made a factor for a court to consider when considering punitive damages?

10. Should all or a portion of the punitive damage awards go to the state instead of the plaintiff?

Attachment No. 3
House Judiciary
March 28, 1985

B. Collateral Source Rule

1. Should the collateral source rule be abolished or limited in medical malpractice actions? All tort actions?

2. Should there be a listing or definition of what collateral sources are to be considered? For example, should any following collateral sources be considered:

   a. Insurance policies
      1. life insurance
      2. health insurance
      3. accident insurance
      4. other
      5. should the insurance not be considered if there is a right of subrogation?

   b. Employment benefits
      1. sick leave
      2. worker's compensation
      3. Federal Employers' Liability Act
      4. disability benefits
      5. other

   c. Gratuities
      1. cash gifts
      2. free services
      3. other

   d. Social Legislation Benefits
      1. social security payments
      2. welfare payments
      3. pensions under special retirement acts
      4. other

   e. Evidence of Remarriage of a Surviving Spouse

   f. Evidence of the taxability or tax exempt status of the award

3. Who should hear the evidence of collateral sources - the judge or the jury?

4. Should evidence that part of the payment from the collateral source was in payment of the negligent medical treatment be admitted?

5. Should evidence that part of the payment from the collateral source was used to treat the plaintiff due to malpractice of the defendant be admitted?

6. Should a pretrial conference be mandated to sort out collateral source issues and the parties be bound by the pretrial order?

C. Damages

1. Should there be a cap imposed on pain and suffering (nonpecuniary loss) in medical malpractice actions? All actions?

2. Should the cap on pain and suffering be:

   a. $250,000
   b. $350,000
   c. $500,000
   d. other

3. Should the jury not be informed of the cap on pain and suffering, i.e., nonpecuniary loss?

D. Other

1. Should there be a sunset provision added so the bill expires on July 1, 1989, or some other date?

2. Should any amendments adopted be made to apply to all tort actions to lessen the likelihood of a constitutional challenge based on equal protection or some other constitutional ground?

[As Amended by Senate Committee of the Whole]

Session of 1985

Substitute for SENATE BILL No. 110

By Committee on Judiciary

3-7

AN ACT concerning ~~civil procedure~~ *[medical malpractice liability actions]*; relating to procedures for assessment of exemplary or punitive damages; ~~concerning procedures for~~ *[and]* consideration of collateral sources of indemnification in certain actions; limiting recovery of certain damages ~~in certain actions~~; repealing K.S.A. 60-471.

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

~~Section 1.~~ (a) In any *[medical malpractice liability]* action in which exemplary or punitive damages are recoverable, the trier of fact shall determine, concurrent with all other issues presented, whether such damages shall be allowed. If such damages are allowed, a separate proceeding shall be conducted to the court to determine the amount of such damages to be awarded.

(b) At a proceeding to determine the amount of exemplary or punitive damages to be awarded *[under this section]*, the court shall hear evidence of the financial condition of any party against whom such damages have been allowed. Such evidence may include the party's gross income earned from ~~the activity from which liability for exemplary or punitive damages arises~~ *[professional services as a health care provider]* but shall not include any such income for more than five years immediately before the act for which such damages are awarded. At the conclusion of the proceeding, the court shall determine the amount of exemplary or punitive damages to be awarded, but not exceeding the amount provided by subsection ~~(c)~~, and shall enter judgment for that amount.

~~(c)~~ No award of exemplary or punitive damages *[under this section]* shall exceed the lesser of: (1) Twenty-five percent of the annual gross income earned by the party against whom the

Section 1. As used in this act:

(a) "Health care provider" has the meaning provided by K.S.A. 40-3401 and amendments thereto.

(b) "Medical malpractice liability action" means any action for damages for personal injury or death arising out of the rendering of or failure to render professional services by a health care provider.

(c) "Willful conduct" means an act performed with a designed purpose or intent on the part of a person to do wrong or to cause injury to another.

(d) "Fraud" means an intentional misrepresentation, deceipt or concealment of material fact known to the defendant to deprive a person of property or legal rights or otherwise causing injury.

(e) "Malice" means a state of mind characterized by an intent to do a harmful act without a reasonable justification or excuse.

Sec. 2.

(d)

(c) In any medical malpractice liability action where claims for punitive damages are included, the plaintiff shall have the burden of proving by clear and convincing evidence in the initial phase of the trial, that the defendant acted toward the plaintiff with willful conduct, fraud or malice. Presumptions shall not be used to shift the burden of proof to the defendant.

(d)

damages are awarded from ~~the activity from which liability for such damages arises~~ *[professional services as a health care provider]*, as determined by the court based upon the party's highest gross annual income earned from such ~~activity~~ *[services]* for any one of the five years immediately before the act for which such damages are awarded; or (2) three million dollars.

~~*[(d) As used in this section:*~~

~~*[(1) "Health care provider" has the meaning provided by K.S.A. 40-3401 and amendments thereto.*~~

~~*[(2) "Medical malpractice liability action" means any action for damages for personal injury or death arising out of the rendering of or failure to render professional services by a health care provider.]*~~

~~(d) [(e)]~~ This section shall be part of and supplemental to the code of civil procedure.

~~Sec. 2.~~ (a) In determining damages in a medical malpractice liability action, evidence shall be admitted for consideration by the trier of fact to establish that any damages or expenses incurred or reasonably expected to be incurred by the claimant were indemnified or replaced, or may be indemnified or replaced, in part or whole, from any ~~collateral source.~~

(b) When evidence of a claimant's entitlement to collateral source benefits is introduced, the claimant may present evidence of any amounts paid to secure a right to such benefits, or that the right to recovery is subject to a lien or subrogation.

(c) As used in this section, "medical malpractice liability action" means any action for damages for personal injury or death arising out of the rendering of or failure to render professional services by a health care provider as defined in K.S.A. 40-3401 and amendments thereto.

(d) This section shall be part of and supplemental to the code of civil procedure.

~~Sec. 3.~~ (a) The total amount of damages recoverable for ~~pain and suffering~~ by a claimant for personal injury in a medical malpractice liability action shall not exceed ~~$250,000.~~

~~(b) As used in this section, "medical malpractice liability action" means any action for damages for personal injury or~~

(e) In no case shall punitive damages be assessed: (1) against a principal or employer for the acts of an agent or employee unless a person expressly empowered to do so authorized or ratified the questioned conduct; (2) against a professional corporation for the acts of a member of that corporation unless such professional corporation authorized or ratified the questioned conduct; or (3) if the defendant has acted in good faith, on the advice of an attorney, on the advice of any government official, or if the defendant has relied upon a statute or a judicial decision.

(f)

Sec. 3.

of the following collateral sources: (1) Medical, life, disability or other insurance coverage; or (2) workers' compensation, military service benefit plan, employment wage continuation plan, social welfare benefit program or other benefit plan or program provided by law.

Sec. 4.

nonpecuniary loss

$350,000.

~~death arising out of the rendering of or failure to render profes-~~
~~sional services by a health care provider as defined in K.S.A.~~
~~40-3401 and amendments thereto.~~ (e)

~~(c)~~ This section shall be part of and supplemental to the code of civil procedure. Sec. 5.

~~[Sec. 4.~~ *(a) In any medical malpractice liability action, the court, if requested by either party and if the tax laws so provide, shall instruct the jury that any damage award is not subject to state or federal income taxation.*

~~[(b) As used in this section, "medical malpractice liability action" means any action for damages for personal injury or death arising out of the rendering of or failure to render profes-~~
~~sional services by a health care provider as defined in K.S.A.~~
~~40-3401 and amendments thereto.~~

~~[(c)~~ *This section shall be part of and supplemental to the code of civil procedure.]* (b)

Sec. 4 *[5]*. K.S.A. 60-471 is hereby repealed.

Sec. ~~5~~ *[6]*. This act shall take effect and be in force from and after its publication in the statute book.

(b) In any medical malpractice liability action for personal injuries, the court or jury may award such damages as are found to be fair and just under all the facts and circumstances, but the damages, other than pecuniary loss sustained by all parties, cannot exceed in the aggregate the sum of $350,000 and costs against all liable health care providers.

(c) If a medical malpractice liability action is tried to a jury, the court shall not instruct the jury on the limitation imposed by this section. The jury shall separately state the amount of damages awarded for pecuniary loss and for nonpecuniary loss for each party claiming damages. If the jury verdict results in an award of damages which, after deduction of any amounts pursuant to K.S.A. 60-258a and amendments thereto, exceeds the limitation of this section, the court shall enter judgment for damages of $350,000 for nonpecuniary loss and apportion the same among the parties.

(d) The provisions of this section shall not be construed to repeal or modify the limitation in wrongful death actions authorized by K.S.A. 1984 Supp. 60-1903.

Sec. 3. (a) In any action for damages for personal injury or death arising out of the rendering of or the failure to render professional services by any health care provider, evidence of any reimbursement or indemnification received by a party for medical or hospital expenses sustained from such injury or death shall be admissible for consideration by the trier of fact subject to the provisions of subsection (b).

(b) As a condition precedent to presenting evidence of reimbursement or indemnification received by a party for damages sustained from such injury or death or services provided by a health maintenance organization, the party against whom claim is made in any such action shall make disclosure of such evidence at a pretrial conference on such action. Upon such disclosure, the claimant shall be allowed an opportunity to show that an obligation exists to reimburse the person making the initial reimbursement or indemnification or providing the services from any damages awarded in such action. The claimant shall specify in such showing the amount of any such obligation. Upon such showing by the claimant, the court shall include in its order that any evidence of such reimbursement or indemnification or the providing of such services, to the extent that the same is an obligation on the claimant, shall not be admissible into evidence at the trial of the action.

(c) Such evidence as is admissible as provided by subsections (a) and (b) shall be accorded such weight as the trier of fact shall choose to ascribe to that evidence in determining the amount of damages to be awarded to such party.

(d) As used in this section:

(1) "Health care provider" means a person licensed to practice the healing arts or engaged in a postgraduate training program approved by the state board of healing arts, a person who holds a temporary permit to practice any branch of the healing arts, licensed medical care facility, health maintenance organization, licensed dentist, licensed professional nurse,

licensed practical nurse, licensed optometrist, registered podiatrist, registered pharmacist, professional corporation organized pursuant to the professional corporation law of Kansas by persons who are authorized by such law to form such a corporation and who are health care providers as defined by this subsection, registered physical therapist or an officer, employee or agent thereof acting in the course and scope of his or her employment or agency.

(2) "Professional services" means those services which require licensure, registration or certification by agencies of the state for the performance thereof.

Reprint

[As Amended by Senate Committee of the Whole]

Session of 1985

Substitute for SENATE BILL No. 110

By Committee on Judiciary

3-7

AN ACT concerning ~~civil procedure~~ ***[medical malpractice liability actions]***; relating to procedures for assessment of exemplary or punitive damages~~; concerning procedures for~~ ***[and]*** consideration of collateral sources of indemnification in certain actions; limiting recovery of certain damages ~~in certain actions~~; repealing K.S.A. 60-471.

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

Section 1. (a) In any ***[medical malpractice liability]*** action in which exemplary or punitive damages are recoverable, the trier of fact shall determine, concurrent with all other issues presented, whether such damages shall be allowed. If such damages are allowed, a separate proceeding shall be conducted to the court to determine the amount of such damages to be awarded.

(b) At a proceeding to determine the amount of exemplary or punitive damages to be awarded ***[under this section]***, the court shall hear evidence of the financial condition of any party against whom such damages have been allowed. Such evidence may include the party's gross income earned from ~~the activity from which liability for exemplary or punitive damages arises~~ ***[professional services as a health care provider]*** but shall not include any such income for more than five years immediately before the act for which such damages are awarded. At the conclusion of the proceeding, the court shall determine the amount of exemplary or punitive damages to be awarded, but not exceeding the amount provided by subsection (c), and shall enter judgment for that amount.

(c) No award of exemplary or punitive damages ***[under this section]*** shall exceed the lesser of: (1) Twenty-five percent of the annual gross income earned by the party against whom the

In any medical malpractice liability action where claims for exemplary or punitive damages are included, the plaintiff shall have the burden of proving that the defendant's (or, if such claims for punitive damages are made against more than one defendant, that each such defendant's) actions or omissions were in willful, reckless or wanton disregard of the consequences to the plaintiff or plaintiffs, and the court shall so instruct the jury in the event it elects to submit the issue of punitive damages to the jury with respect to any of the defendants in the action.

Attachment No. 6
House Judiciary
March 28, 1985

damages are awarded from ~~the activity from which liability for such damages arises~~ ***[professional services as a health care provider]***, as determined by the court based upon the party's highest gross annual income earned from such ~~activity~~ ***[services]*** for any one of the five years immediately before the act for which such damages are awarded; or (2) three million dollars.

[(d) As used in this section:

[(1) "Health care provider" has the meaning provided by K.S.A. 40-3401 and amendments thereto.

[(2) "Medical malpractice liability action" means any action for damages for personal injury or death arising out of the rendering of or failure to render professional services by a health care provider.]

~~(d)~~ ***[(e)]*** This section shall be part of and supplemental to the code of civil procedure.

Sec. 2. (a) In determining damages in a medical malpractice liability action, evidence shall be admitted for consideration by the trier of fact to establish that any damages or expenses incurred or reasonably expected to be incurred by the claimant were indemnified or replaced, or may be indemnified or replaced, in part or whole, from ~~any collateral source.~~

plaintiff's health or hospitalization insurance or by plaintiff's employer, if it self-insures for health or hospitalization insurance expenses of its employees. No other evidence of a collateral source of payment shall be admitted.

(b) When evidence of a claimant's entitlement to collateral source benefits is introduced, the claimant may present evidence of any amounts paid to secure a right to such benefits, or that the right to recovery is subject to a lien or subrogation.

(c) As used in this section, "medical malpractice liability action" means any action for damages for personal injury or death arising out of the rendering of or failure to render professional services by a health care provider as defined in K.S.A. 40-3401 and amendments thereto.

(d) This section shall be part of and supplemental to the code of civil procedure.

Sec. 3. (a) The total amount of damages recoverable for pain and suffering by a claimant for personal injury in a medical malpractice liability action shall not exceed $250,000.

(b) As used in this section, "medical malpractice liability action" means any action for damages for personal injury or

death arising out of the rendering of or failure to render professional services by a health care provider as defined in K.S.A. 40-3401 and amendments thereto.

(c) This section shall be part of and supplemental to the code of civil procedure.

~~*[Sec. 4. (a) In any medical malpractice liability action, the court, if requested by either party and if the tax laws so provide, shall instruct the jury that any damage award is not subject to state or federal income taxation.*~~

Sec. 4. (a) ~~*[(b)*~~ *As used in this section, "medical malpractice liability action" means any action for damages for personal injury or death arising out of the rendering of or failure to render professional services by a health care provider as defined in K.S.A. 40-3401 and amendments thereto.*

(b) ~~*[(c)*~~ *This section shall be part of and supplemental to the code of civil procedure.]*

Sec. 4 *[5]*. K.S.A. 60-471 is hereby repealed.

Sec. 5 *[6]*. This act shall take effect and be in force from and after its publication in the statute book.

ERNEST H. NEIGHBOR, M.D., F.A.C.S.

DIPLOMAT OF AMERICAN BOARD OF ORTHOPAEDIC SURGERY
DIPLOMAT OF AMERICAN BOARD OF LAW IN MEDICINE

1420 S. 42nd Street
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March 25, 1985

Representative Bob Vancrum
Kansas House of Representatives
State Capitol Building
Topeka, Kansas 66612

Dear Representative Vancrum:

I recently sent Senator Winter a paper expressing my views on the medical malpractice issues. I have enclosed a copy of this paper and hope that you will find it of interest. I have also enclosed a copy of my curriculum vitae and an article that I wrote concerning the malpractice problem which recently appeared in the Journal of the Kansas Medical Society.

Sincerely,

Ernest H Neighbor, MD

Ernest H. Neighbor, M.D.

EHN: lt
Enclosures

Attachment No. 7
House Judiciary
March 28, 1985

ERNEST H. NEIGHBOR, M.D., F.A.C.S.

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HEALTH CARE STABILIZATION FUND

While the doctors blame the current malpractice crisis on the lawyers and the juries, and the lawyers blame it on the negligence of doctors, both sides seem unwilling to discuss in public the factor which has contributed most to the current situation. That factor is the Health Care Stabilization Fund and the mismanagement of that fund by the Kansas Insurance Department. Before discussing this in detail, it would be well to review the creation of the Health Care Stabilization Fund. Unknown to everyone except the attorneys, the laws which went into effect in 1976 and included the Health Care Stabilization Fund changed the legal landscape so profoundly that only the current crisis could have resulted.

In 1976 the medical community embraced the Health Care Stabilization Fund because it guaranteed malpractice insurance for all physicians at a low cost. It is understandable why the doctors, naive to the jurisprudence system, would have felt positive to this plan, but it is hard to understand why the legal "experts" that had been consulted did not foresee the potential for disaster which the Health Care Stabilization Fund held.

The first problem was the unlimited coverage provided by the Fund. This created a plaintiff attorney's dream. Theoretically, it made every physician in Kansas a source of potential recovery greater than General Motors. The Fund was doomed to ultimate actuarial unsoundness from the beginning because: 1) there was nothing in the 1976 legislation limiting awards, 2) the maximum amount the Fund could reach was set at 10 million dollars, and 3) it was unrealistic to believe the million dollar verdicts being experienced in other states would not eventually come to Kansas.

One of the methods by which the jurisprudence system functions effectively is by requiring those players who make the decisions on how much a case is worth and for what amount it should be settled, play with their own funds. Because of the contingent fee system, the plaintiff attorney is actually working with his own money when he makes recommendations to his client concerning the acceptance or rejection of a settlement offer. His counterpart on the defense side is the claims manager of the insurance company. He is the one who makes the decision on settlement for the defense. He is

answerable to the company executive and stockholders for his use of the company's money. His job retention is quite literally dependent on his good judgement. The Health Care Stabilization Fund destroyed the incentive on the part of the defense to settle cases. This is the second major problem with the Health Care Stabilization Fund.

Enter the Kansas Insurance Department. Doctors in general are firmly convinced that the private practice of medicine provides a higher quality of medical care at a lower cost than any form of government run medicine. It is astonishing that we felt that government run insurance would be better than private insurance. We took the decision making on malpractice claims out of the hands of the experienced, out of the hands of those whose very jobs were dependent on making good decisions and put it into the hands of government agents who were totally inexperienced in medical negligence litigation and whose jobs were secure no matter how bad their judgement. Let's explore further what happened.

Most actions brought in medical malpractice have damages easily exceeding the 100 thousand dollar exposure of the malpractice insurance company. The majority of the attorneys active on behalf of plaintiffs in medical negligence will not even file a case if the potential for recovery is less than 60 to 80 thousand dollars. With this scenario it is easy to understand why the claims managers became much more willing to "roll the dice". Their 100 thousand dollars is gone whether they settle the case or try it and lose. Therefore, they are more apt to let the case be tried and hope that they get lucky with the jury. When the Health Care Stabilization Fund becomes involved in settlement negotiations, they simply do not have the experience and/or willingness to effectively negotiate. I am sure they are being truthful when they say that they seek outside advice, but I'm equally sure that because the people they consult do not have any money at risk, the consultants are more willing to gamble and thus recommend trying the cases. I have spoken to several experienced plaintiff attorneys who concur that there is usually no dealing with the Health Care Stabilization Fund. They just get ready to try the case.

I have also spoken to members of the Kansas Insurance Department, and I am astonished by their naivete concerning medical malpractice. My impression is that the Kansas Insurance Department believes that physicians can do no wrong. As an example I clearly remember a discussion about two physicians, one in Kansas City and one in Wichita, who have cost the Health Care Stabilization Fund millions of dollars. The official with whom I was speaking said that his department realized when the Fund was created there might be some physicians who were so far "ahead of their time" that their techniques would not be understood and they (and the Fund) would be subjected to repeated suits. I was absolutely stunned because one of the physicians has had his

hospital privileges curtailed, and the other has been investigated by the Board of Healing Arts. I found the notion that they might be "ahead of their times", rather then negligent, repugnant to both common sense and justice.

The results of this system have been disasterous. Cases with obvious merit have gone to the jury with defenses which insulted the intelligence of the jurors. Since the key to big verdicts lies in getting the jury angry at either the defendant or his attorney, this situation was made to order for the experienced plaintiff's attorney.

Another way in which the Health Care Stabilization Fund has worsened the situation is in guaranteeing provision of malpractice insurance to all doctors in the state. The inability to obtain insurance from private sources does not, of course, prove that a physician is incompetent, but it does raise a red flag. To my knowledge physicians applying for insurance through the Health Care Stabilization Fund were not screened by a panel of their peers to determine whether they in fact should be practicing in the state. Applicants were simply provided insurance at a higher rate. In other words, a situation was created where potentially negligent physicians were put in a position of having to perform more unneeded/negligent care in order to pay their increased insurance premiums. Not a very effective way of promoting risk management!

Assuming that the Health Care Stabilization Fund is to be retained, there are several changes that should be made:

1. Writing in the December, 1984, issue of the Journal of the Kansas Medical Society, Homer H. Cowan, Jr., an executive at the Western Insurance Company, pointed out that the physician population base of Kansas can actuarially support a fund of approximately 500 thousand dollars per claim per physician. There are many physicians in the state whose exposure does not approach the 3 million dollar coverage now provided by the Health Care Stabilization Fund. The Fund's coverage should stop at 500 thousand dollars. Those physicians who desire more could purchase it on the open market.

2. The exposure of the private insurance company should continue beyond the current 200 thousand dollars. I would suggest that the insurance company be completely responsible for the first 150 thousand dollars, and from 150 to 300 thousand dollars it should share responsibility with the Fund dollar for dollar. This would keep the claims managers more interested in the cases and promote better cooperation between the private insurance company and the officers of the Health Care Stabilization Fund.

3. Those physicians applying for insurance through the Health Care Stabilization Fund because of being refused insurance by other companies should be more carefully

screened. Each specialty group in the state should appoint three of its members to work with the administrator of the Fund in reviewing applicants for insurance from physicians in that particular specialty. The actions of physicians serving on these advisory panels should be given statutory immunity from lawsuits. Defenses to any suits which might arise from these review panels should be state funded.

4. I am aware that SB 110 provides for the creation of a "board of governors" made up of physicians appointed by the Insurance Commissioner to give "technical assistance with respect to administration of the Fund". I cannot understand of what value this would be. My observations are: 1) if the commissioner needs technical assistance to administer the Fund, the last place he should seek advice is among the doctors--claims managers or lawyers, yes, but doctors, no. 2) deciding on the insurability of any given practitioner is a job which would seem to be best performed by practitioners of the same discipline and specialty, 3) the existence of such a board of governors would provide a scapegoat to blame for further administrative failures of the Fund.

5. An independent actuarial review should be carried out on the Health Care Stabilization Fund. It should be determined how much it will take to pay judgements now pending against the Fund and provide for potential future losses. An amount equal to half of this amount should be transferred to the Fund from general revenues. While it might be argued that the doctors close to the situation in Wichita might be partly responsible for a judgement against a surgeon in Wichita, there is no reason why an orthopedist in Hays or a family practitioner in Colby should have to pay for this judgement out of his own pocket or that of his patients. Also, since part of the problem with the Fund's financial position has occurred not as a result of negligent doctors but as a result of the impropriety of the fund itself (both in its creation and admininstration), it seems appropriate that general revenues assist with the finances. Finally, Kansas needs physicians. The heavy financial burden being placed on Kansas physicians to pay not for current negligent acts but for those of other physicians many years ago acts as a significant deterrent to setting up practice in Kansas.

PHYSICIANS AND RISK MANAGEMENT

Attorneys have a phrase: the only problem with malpractice is malpractice. It is the catch phrase which begins and ends all rallies against tort reform. While it is not the whole story, there is more truth in it than most doctors are willing to admit. I have been amazed at how reticent physicians are to use the words "malpractice" and "negligence". They employ phrases like "surgical misadventure"

and "untoward event". In discussing the problem of medical negligence with them, I have come to the conclusion that: 1) physicians do not really understand what malpractice is, and 2) they do not understand that the progress of medical science which has occurred over the last 20 or so years requires a higher level of care than was previously necessary.

While some of the errors being made by today's physicians are the result of a lack of knowledge and training, most of them occur as the result of a temporary lack of attentiveness or diligence. Witness the two erroneous injections with tragic consequences reported in the national news just last week. Acquiring the principles of risk management promises a major opportunity for the physician to improve the medico-legal climate. The December, 1984, Journal of the Kansas Medical Society was totally devoted to the medical negligence problem. In one of the articles the author dismissed the potential for improvement in medical negligence through risk management education in a single paragraph. Since effective risk management programs have been few and far between--never in Kansas--and generally presented on a voluntary basis, I cannot conceive the basis on which the author made his judgement.

The manner in which we practice medicine, the way we interact with our colleagues, the way we handle our complications can make a difference in the malpractice problem. By drawing on common threads and principles which run through many malpractice actions, risk management can not only decrease the medical negligence problem but can lead to better care.

As stated before, risk management courses have until this time been offered on a voluntary basis. Considering the current crisis in medical negligence, it seems only proper that any legislative action which makes changes in the tort system should entail some obligation on the part of the physicians. Kansas currently requires 150 hours of continuing medical education every three years in order to maintain a license. It would be my recommendation that 10% of this requirement be obtained in the area of risk management through courses approved by a committee appointed by the Kansas Medical Society.

TORT REFORM

My comments and recommendations have involved only physicians and the Kansas Insurance Department. The main thrust of the Kansas Medical Society's program involves tort reform. I have previously written on this subject, and a copy of my article from the December, 1984, issue of the Journal of the Kansas Medical Society is enclosed. Tort reform is needed. Before addressing specific reforms, let's consider the reasons why they are needed.

It is true that the specter of malpractice suits causes a significant increase in the cost of medicine. The defensive practice of medicine is a reality. I have ordered tests which I knew were not cost effective. I wanted something else (an x-ray report--lab value) to be a part of the record in case this was the one patient in a thousand or ten thousand that might have a bad result in spite of a negative history and physical exam. This was defensive medicine, pure and simple. It did not come close to being a part of the standard of care to which I might be held.

At the same time I don't feel that tort reform and/or lower malpractice insurance premiums will significantly affect the practice of defensive medicine. It is the fear of being sued which causes us to practice defensive medicine, not the fear of being sued for 1 million or 5 million dollars. I do believe, however, that the frequency of suits, the excessively high verdicts, and the high insurance premiums that go with them are having a much more subtle crippling effect on the practice of medicine.

Consider for a minute the characteristics of the physician you would want to deliver a baby for a close member of your family. You would, of course, want him or her to be well-trained, kind, considerate, etc. I suggest also that you would want him/her to be careful; you would not want him/her to be a "risk taker". Now consider what type of physician is going to be attracted to delivering babies. Physicians in training know that attorneys believe that there is no excuse for a "bad baby", and that parents with a defective child are learning they can go to a lawyer and have a good chance of being made millionaires. Juries are extremely sympathetic to "special children" and their parents. Potential obstetricians and family practitioners also know that they will be paying 25 to 33 percent of their gross incomes for their malpractice insurance and that if punitive damages are assessed, they will have to pay out of their own pockets for the rest of their professional lives. With this scenario what kind of personality will be attracted to the specialty of delivering babies?

I would suggest that only the "risk takers" will be left. The careful physicians will be protecting their futures and practicing dermatology, allergy, or some other specialty which is relatively risk free. Medical negligence will have become a self-fulfilling prophecy. The birth of our future generations will be in the hands of the "risk takers", and the number of C-sections, already known to be too high, will have doubled or tripled.

Although I have singled out obstetrical practice because it is the obvious current example, I believe that the self-fulfilling prophecy will become true for all of the high risk specialties. If society wants the "high-risk" specialties populated by careful physicians, by physicians who will not take chances, then it must send them a clear signal.

Meaningful tort reform is needed to keep careful doctors in high-risk specialties.

While I have generally been opposed on constitutional grounds to a cap on total awards in medical malpractice cases, the Cook County study comparing awards in medical malpractice cases with those in other personal injury cases does suggest that the factors operating in medical malpractice cases create special circumstances which might require special rules in order to assure justice for both sides. In that study the monetary damages awarded for similar injuries arising out of medical negligence were compared with those arising from other types of injuries--such as automobile accidents. It was found that the doctors were assessed damages many times greater than the automobile driver. For instance, the loss of a leg was awarded less than 150 thousand dollars in the car accident cases, but more than 700 thousand dollars in the medical malpractice cases. This data strongly supports a cap on medical malpractice awards in order to provide some measure of justice to the defense.

Even if a cap on total award is not passed, a cap on non-pecuniary loss may serve almost as well to bring some element of justice back into the jury's decision. As I have already covered this subject in my article, I will not dwell on it again. In determining the appropriate upper limit for non-pecuniary loss, consideration should be given for what the limit, wisely invested, would earn on a yearly basis for the injured party. A million dollars could be expected to earn 100 thousand dollars a year--even today an income that can be categorized as upper bracket.

Senate Bill 110 limits "pain and suffering" recovery. Does the phrase "pain and suffering" mean all forms of non-pecuniary loss?

Final awards should be based on a structured settlement after the jury has determined what future needs require. Lump sum payments allow results far beyond the underlying purpose of civil litigation and should be outlawed.

Since 80 to 85 percent of the population is covered by some sort of health care insurance, the continuation of the collateral source rule makes us pay twice for the same injury. It is ludicrous to suggest that this insurance has been provided out of the pocket of the recipient. Most health care insurance is paid by employers, and its cost is reflected in the price of the product. It is not the General Motors' employee who is paying for his health care, it is the purchaser of a General Motors car. Charging the public twice for the same service, once in the price of a car and once in the price of medical care, makes no economic sense and should be eliminated.

DELIVERING BABIES AND MEDICAL MALPRACTICE

Earlier I discussed the precarious legal situation in which those physicians who deliver babies find themselves. The services of these physicians are so critical to the well-being of the people of Kansas that we must monitor their situation and make sure any reform which is passed causes a significant improvement in the legal risk of delivering babies. If it does not, special rules relating specifically to obstetrics may have to be passed to insure the availability of obstetricians and family practitioners to citizens throughout the state.