Approved February 11, 1985
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY.

The meeting was called to order by Senator Robert Frey
Chairperson
at

10:00 a.m./~~p~~x~~x~~ on February 1, 1985 in room 514-S of the Capitol.

All members ~~w~~x~~x~~ present ~~e~~x~~c~~e~~p~~t~~x~~ were: Senators Frey, Hoferer, Burke, Feleciano, Gaines, Langworthy, Parrish, Steineger, Talkington, and Yost.

Committee staff present:

Mike Heim, Legislative Research Department
Jerry Donaldson, Legislative Research Department

Conferees appearing before the committee:

Randy Hearrell, Kansas Judicial Council
Professor William Westerbeke, Kansas University School of Law

Senate Bill 35 - Kansas Comparative Fault Act

Randy Hearrell presented background to the bill. He explained the subject matter was studied by the Civil Code Advisory Committee of the Kansas Judicial Council. He then introduced Professor William Westerbeke who served on that committee.

Professor Westerbeke stated this would not have any impact on medical malpractice. It would have impact in products liability cases. The proposed Kansas Comparative Fault Act has two primary purposes. First, it modifies a limited number of substantive and procedural provisions in the current law that produce inequitable distribution of losses in tort actions. Second, it codifies certain substantive and procedural case law developments that are not reflected in the language of the current comparative negligence statute. A copy of Professor Westerbeke's presentation is attached (See Attachment I).

The meeting adjourned.

Copy of the guest list is attached (See Attachment II).

GUEST LIST

COMMITTEE: SENATE JUDICIARY COMMITTEE DATE: 2-1-85

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
ED JOHNSON	City attorney	Topeka
Jerry C. Conrad	Topeka	K G & E
Roy D. Shenkel	Shawnee	KCPL
Bill Ann Daunt	Topeka	Judicial Council
M. Hauver	"	Capital-Journal
KAREN BALL	Topeka	AP
BILL SNEED	Topeka	KADC
L.M. CORNISH	"	Ks Assn P/C Cos
Merle Remsberg	Topeka	AIA
Lee WRIGHT	MISSION, Ks.	FARMERS INS. GROUP.
Rob Hodges	Topeka	KCCI
Joe Furjanic	TOPEKA	KASB
Mike Ekrmann	"	Ks Railroad Association
KOTH A. GATEWOOD	TOPEKA	SFSP
D. WAYNE ZIMMERMAN	TOPEKA	THE ELECTRIC COS ASSOC. OF KS.
Janet Stubbs	"	KBA-K
John Bell	Topeka	Ks. Hosp. Assn.
Jim Kaup	Topeka	League of Municipalities
Ron Smith	Topeka	Ks Bar Assn
Matt Lynch	Topeka	Judicial Council
William Westerbeke	Lawrence	Judicial Council
WALT DARLING	TOPEKA	DIVISION OF BUDGET
Kathleen Sebelius	Topeka	KTLA
Robert Heavell	Topeka	Judicial Council
Larry E. Leadley	KC	State Farm

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GUEST LIST

COMMITTEE: SENATE JUDICIARY COMMITTEE DATE: _____

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
Marjorie J. Van Buren	Topeka	OJA

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2-1-85

REPORT OF THE CIVIL CODE ADVISORY COMMITTEE CONCERNING THE PROPOSED KANSAS COMPARATIVE FAULT ACT

I. INTRODUCTION

The proposed Kansas Comparative Fault Act (KCFA) has two primary purposes. First, it modifies a limited number of substantive and procedural provisions in the current law that produce inequitable distribution of losses in tort actions. Second, it codifies certain substantive and procedural case law developments that are not reflected in the language of the current comparative negligence statute.

The KCFA contains five significant modifications of the current law. First, subsection 3(a) provides for "pure" comparative fault in lieu of the "49% rule" of modified comparative fault in the current law. Second, subsection 5(a) requires "formal" joinder by service of process and petition of additional parties who can be subject to liability in the action. The current law allows "informal joinder" of those parties. Third, subsection 5(b) identifies the limited number of situations in which a party may join an immune or unavailable tortfeasor. The current law permits the joinder of all immune, unavailable and unknown tortfeasors. Fourth, section 7 extends the statute of limitations applicable to additional parties joined under subsection 5(a) so that those additional parties will not become immune simply by the lapse of time necessary to effect the joinder. Fifth, subsection 8(b) identifies a limited number of specific situations in which a limited form of joint and several liability applies to certain parties. The current law retains joint and several liability only in cases in which one or more of the tortfeasors is an intentional wrongdoer.

The well established legislative intent of the current comparative negligence statute is the promotion of loss allocation among all parties to the occurrence in proportion to the parties' proportionate fault. The KFCA advances rather than contradicts that legislative intent. "Pure" comparative fault more fully promotes that intent because it enables the allocation of all losses between plaintiff and defendant on the basis of their proportionate fault. The "49% rule" in the current law is inconsistent with that intent because it imposes a disproportionate and discriminatory share of the loss on a plaintiff who is 50% or more at fault. Similarly, section 7 promotes the legislative intent by preventing an unsound immunity that results solely from delays inherent in the joinder procedures. Without that unsound immunity it is more likely that loss will be borne by all responsible parties in proportion to their fault rather than shifting a disproportionate and inequitable share of the loss to the injured party. The requirement of formal joinder with service of summons and petition under

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subsection 5(a) will further reduce the likelihood of this unsound immunity and the resulting shift of a disproportionate share of the loss to the injured party.

The remaining two modifications in the KCFA address a related problem, i.e., the equitable distribution of loss when one or more parties are not available as a source of compensation for the share of the loss attributable to his culpable conduct. In these situations loss allocation among all parties in proportion to fault is not possible. The current law imposes on the injured claimant virtually all losses attributable to insolvent, immune, unavailable and unknown parties. In some situations this approach is equitable; in others it is not. Subsection 5(b) imposes on the injured claimant the entire burden of loss attributable to an immune party in those situations in which the claimant-immune party relationship or other considerations justify that result. In other situations the immune, unavailable or unknown party cannot be joined, and his share of the loss will in essence be divided among the remaining parties in proportion to their fault. Subsection 8(a) retains the rule in the current law that tortfeasors are not jointly and severally liable, but rather are liable only for their individual proportionate fault shares of the total liability. This rule places the risk of one tortfeasor's insolvency on the injured claimant rather than on the other tortfeasor(s). Subsection 8(b), however, provides for a limited form of joint and several liability in certain situations in which the relationship between the tortfeasors or other considerations make joint and several liability the more equitable approach to loss distribution.

The remaining provisions of the KCFA either restate the provisions of the current comparative negligence statute or codify the case law developments under that statute. For example, section 4 restates the current provision requiring special verdicts rather than general verdicts. Subsection 8(a) restates the current provision that abolishes joint and several liability in favor of individual proportionate fault judgments in cases involving two or more tortfeasors. Similarly, the use of "fault" instead of "negligence" throughout the KCFA reflects the case law developments extending the principles of comparative fault to all nonintentional forms of tort liability. Subsection 9(b) reflects the judicially developed doctrine of comparative implied indemnity that applied the principles underlying the comparative negligence statute to situations not covered in that statute in order to promote the public policy of encouraging settlements. Many of these judicial developments involve a mixture of substantive and procedural rules. The Committee is of the opinion that procedural rules in particular should be set forth in statutory form.

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II. SECTION-BY-SECTION ANALYSIS

Section 1: General Purpose of the KCFA

This section provides that the purpose of the KCFA is to promote "equitable distribution of damages" in tort actions. This purpose encompasses the broad principle of distributing damages on the basis of proportionate fault and also allows for flexibility in cases in which one or more of the parties for reasons of immunity, unavailability or insolvency will not be a source of compensation. It also provides justification for procedural rules designed to bring all responsible parties into the action or to provide for comparative implied indemnity.

The second sentence in this section emphasizes the limitation of the KCFA to loss distribution issues. The KCFA does not attempt to define, except in two narrow situations in subsection 3(a), when a party is at fault for purposes of liability or defense. Those determinations remain within the control of the courts. Rather, the KCFA simply addresses issues of how to distribute damages whenever two or more parties are at fault in a tort action.

Section 2: Definitions

Section 2(a): The word "claimant" refers to any party in a tort action who maintains a claim against any other party without regard to the traditional nomenclature. It covers claims, counterclaims, cross claims and third party claims. This broad approach reflects the reality that in tort actions there are often multiple claims between or among the parties. It also reflects the policy in favor of deciding all such claims in one action.

Section 2(b): The word "fault" is defined to include all forms of tortious conduct and not merely negligence. The current comparative negligence statute refers only to negligence actions, but the courts have applied it to a wide range of tort actions, such as statutory liability and strict products liability. The use of "fault" instead of "negligence" in the KCFA merely reflects these sound case law developments.

Section 2(c): The term "nonintentional fault" includes all forms of fault other than intentional wrongdoing. This distinction is necessary because intentional wrongdoing is generally the most culpable form of fault and therefore the KCFA excludes intentional wrongdoers from the benefits of the loss distribution provisions in the KCFA. See subsections 3(b), 8(b)(1), and 9(a) & (b).

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The term "nonintentional fault" includes recklessness, a form of fault generally considered to be between negligence and intent in terms of culpability. Accordingly, one could argue that recklessness should receive the same severe treatment that is afforded intentional wrongdoing under the KCFA. The Committee chose not to do so primarily because courts have experienced great difficulty in distinguishing between ordinary negligence and recklessness, and therefore such a distinction might lead to considerable additional litigation. Courts have experienced little difficulty in distinguishing between intentional wrongdoing and lesser forms of fault.

Section 2(d): The term "share of liability" refers to a party's proportionate fault share of the total damages. This is the basic loss distribution concept used throughout the KCFA.

Section 3: Claimant's Contributory Fault

Section 3(a): This section provides that a claimant's nonintentional contributory fault does not bar his claim, but rather effects a proportionate fault reduction of his damages. Two points are significant. First, this provision abolishes the "49% rule" in the current statute and adopts "pure" comparative fault. Second, it applies to all tort claims and all forms of claimant's contributory fault, even those forms of contributory fault that were not defenses prior to the adoption of comparative negligence in Kansas.

The adoption of "pure" comparative fault is more equitable than the current "49% rule" for three reasons. First, the "49% rule" is incompatible with the principle of distribution of damages in proportion of loss. If a claimant is 40% at fault in an accident, he can recover 60% of his damages and he must bear 40% of the loss himself. If he is 60% at fault, however, the "49% rule" imposes on him 100% of the loss and the 40% at fault tortfeasor pays nothing. Under pure comparafault, a 60% at fault claimant would recover 40% of his damages, a result that is fully compatible with the primary principle of equitable loss distribution used throughout the KCFA.

Second, the current "49% rule" is discriminatory. It imposes on a claimant who is 50% or more at fault 100% of the loss, whereas the tortfeasor who is more than 50% at fault pays only a proportionate fault share of the damages. In reality, the "49% rule" is a vestige of the harsh contributory negligence rule in the former "all or nothing" system. The KCFA eliminates such vestiges of the "all or nothing" system both for claimants and other tortfeasors. It does so for claimants by abolishing the "49% rule" and it does so for tortfeasors by abolishing the "last clear chance" doctrine. See subsection 3(c).

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It should be noted that the harsh and discriminatory nature of the "49% rule" probably produces distortions of the allocation of fault in many cases. Under current practice the jury is instructed about the legal effect of the "49% rule", i.e., that if the claimant is found to be 50% or more at fault, he shall recover nothing. It is suspected that juries will frequently distort their fault allocations in order to ensure that the claimant receive some compensation for his injuries. For example, in an action in which the jury might believe that the claimant was in fact 60% at fault, the jury might nevertheless return a finding of only 49% fault so that the claimant will have a recovery. Ironically, this result imposes a disproportionately high share of the damages on the tortfeasor, and the adoption of "pure" comparative fault should lower the damahes paid by the tortfeasor in such a case.

Third, the current "49% rule" wholly prevents equitable results in two party accidents in which both parties suffer injury. At least one of the parties will be 50% or more at fault. If the jury apportions fault on a 60%-40% basis, the 60% at fault party will pay 60% of the other party's damages and will bear 100% of his own loss. If the jury apportions fault on a 50%-50% basis, neither party will be able to recover any damages. Automobile accidents undoubtedly constitute the most significant category of two party - two injury cases. Kansas requires drivers to have liability insurance so that victims of automobile accidents will receive compensation for their injuries. The "49% rule" thwarts that policy. In addition, in such two party accidents the harsh effect of the "49% rule" simply encourages the parties to join a third party on a strained theory of liability so that the jury can find every party less than 50% at fault, and this approach increases the amount and complexity of litigation.

Finally, it should be noted that the traditional argument against "pure" comparative fault is that it is somehow wrong to allow a 90% at fault claimant to sue for 10% of his damages. Two points are important. First, if such a case is "wrong", then why is it "right" to allow a 90% at fault tortfeasor to assert the claimant's 10% fault in order to diminish his damages? In other words, the argument is discriminatory in its failure to apply equally to claimants and tortfeasors. Second, the "90% at fault claimant" argument is not the typical example that should govern analysis of the "49% rule". The number of such "90% at fault claimant" cases is quite rare, probably because the prospective recovery is so small that such cases are not economically profitable to maintain. The more typical case is one in which the fault of the parties is roughly the same and juries could as easily apportion it on a 60%-40% basis as on a 40%-60% basis. Fault allocation is not a precise process; it is more akin to "Kentucky windage" approximation. Thus, the practical effect of the "49% rule" is the arbitrary division of these "close" cases into two groups -- one in which the

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claimants receive a significant recovery and one in which very similar claimants receive nothing.

The second significant feature of section 3(a) is that it provides for proportionate fault reduction of claimant's recovery even in situations in which contributory negligence was not a defense under the former "all or nothing" system. This approach is another application of the primary principle that damages should be apportioned in proportion to fault. Under the former "all or nothing" system numerous rules imposed 100% of a loss on a tortfeasor despite the existence of some fault by the claimant. For example, a claimant's mere contributory negligence was not a defense when the tortfeasor was reckless, had the last clear chance, or violated a safety statute designed to protect the claimant from his own relative inability to protect himself. A claimant's contributory negligence not rising to the level of assumption of risk was not a defense to an action in strict products liability. The impact of comparative fault on these rules has not been fully resolved under the current comparative negligence statute. Under the KFCA these vestiges of the former "all or nothing" system will be abolished, and the claimant's nonintentional fault will reduce his recovery in all cases except those in which the tortfeasor is an intentional wrongdoer.

Section 3(b): This subsection provides that a claimant's nonintentional contributory fault shall not reduce his recovery from an intentional wrongdoer. This rule is followed in all comparative fault jurisdictions. The rationale for the rule is that an intentional wrongdoer is not entitled to the equitable relief provided to a tortfeasor in subsection 3(a) of the KCFA.

Section 3(c): This section abolishes the common law doctrines of last clear chance and noncontractual assumption of risk. The overwhelming majority of comparative fault jurisdictions have abolished these two doctrines. Last clear chance is a loss allocation doctrine created in response to the harshness of the contributory negligence rule under the former "all or nothing" system. It serves no useful purpose and has no justification in a comparative fault system. Noncontractual assumption of risk is widely recognized as a form of contributory negligence. If the doctrine is abolished, a claimant's fault formerly treated as assumption of risk would now be considered simply as contributory negligence. Contracts that allocate risks to a particular party are not affected by this subsection. The determination of whether an assumption of risk doctrine in any particular situation is contractual or noncontractual in nature remains a matter for judicial determination.

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Section 4: Special Verdict Procedure

This section is virtually identical to the current provision for special verdicts in the comparative negligence statute. No substantive or procedural changes in the current law are intended by section 4.

Section 5: Joinder of Additional Parties

Section 5(a): This subsection provides the procedural requirements for joinder of those additional parties in tort actions who may be subject to liability and thus may be required to pay damages to the claimant. Under the current comparative negligence statute the courts have permitted the joinder of both additional parties who may be subject to liability and immune, unavailable or unknown parties (often referred to as "phantom" parties). In recognition of the fact that some "phantom" parties may not be available for service of a summons and petition, the courts allowed a so-called "informal" joinder procedure to be followed as to all additional parties. This "informal joinder" is in reality not a joinder at all, but merely a notice concept. Thus, an additional party could be joined without being subjected to liability unless the claimant thereafter amended his petition to effect a "formal joinder" by service of a summons and petition. This procedure was both cumbersome and undly expensive and caused delays in effecting joinder that could render the additional party immune by reason of the running of the statute of limitations. The end result was a distortion of the objective of equitable distribution of damages.

Section 5(a) remedies these problems with respect to parties who are subject to liability and may be required to pay damages to the claimant. It requires that such an additional party be joined by service of a summons and petition, and it sets forth the requirements for a petition of joinder. This is the first step in a process of making the joined party a party to all claims in the action. This procedure avoids the cumbersome and expensive procedures that developed under the current statute, and it should reduce the number of additional parties who are not joined until the expiration of the statute of limitations.

Section 5(b): This subsection provides for the joinder of certain designated immune or unavailable parties and sets forth alternative procedures for effecting such joinder.

The practical effect of the joinder of an immune or unavailable party is that the proportionate fault share of the damages assigned to such a party will not be recovered

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by the claimant and thus that proportionate fault share of the damages is borne by the claimant. From the perspective of an injured claimant in need of compensation, the joinder of immune, unavailable or unknown parties produces a harsh result. Indeed, Kansas is the only state in the country that permits unrestricted joinder of such "phantom" parties. At the same time, the existence of any tortfeasor who is not available as a source of compensation for his proportionate fault share of the damages necessitates a less than fully equitable distribution of damages. Therefore, the question is really one of determining the least inequitable distribution of damages in a particular situation. There are three options. First, the unavailable share of the damages can be shifted to the claimant. This option is followed in the seven ennumerated categories of cases in subsection 5(b). Second, the unavailable share of the damages can be shifted to one or more of the other tortfeasors by the use of joint and several liability. This option is followed in the six ennumerated categories of cases in subsection 8(b). Third, the unavailable share of the damages can be apportioned between the claimant and remaining tortfeasors in proportion to their fault. This option is followed with respect to those immune, unavailable or unknown parties who cannot be joined under subsection 5(b).

With respect to the six categories of cases in subsection 5(b), each category involves some characteristic that the Committee considered sufficient justification for shifting the entire burden of loss to the claimant. The rationale for the joinder of the immune parties in subsections 5(b)(1), (2), (3) and (7) is that the claimant has a beneficial relationship with the immune party that both constitutes the basis for the immunity and provides the claimant with a benefit capable of being viewed as a legal substitute for the immune party's proportionate fault share of the damages. For example, a settlement payment under subsection 5(b)(1) or the payment of worker's compensation benefits under subsection 5(b)(3) are actual monetary payments in substitution for the immune party's share of common law liability. Similarly, family immunity is premised on the rationale that the "benefits" of a harmonious family relationship justify the immunity. Subsection 5(b)(7) is a catch-all provision for the joinder of any other immune party whose immunity is based on a similar beneficial relationship with the claimant.

Subsection 5(b)(4) allows the joinder of parties who are immune by reason of pending bankruptcy proceedings. The beneficial relationship is not as clear in this situation, but liberalized bankruptcy proceedings under reform legislation in recent years will probably mean an increase in the number of parties who will make some ultimate payment on their obligations after the termination of the bankruptcy proceedings. In addition, this situation is perhaps too similar to the case of the insolvent tortfeasor who is not able to pay his proportionate fault of the damages even though he is a real

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party in the comparative fault action. Under subsection 8(a), the claimant would bear that portion of the damages as a practical matter. It should be noted that this provision will not have an impact on many cases. If a party had insurance prior to filing bankruptcy, the comparative fault action can still proceed against the bankrupt party to the extent of his insurance coverage. Payments by a bankrupt's insurance carrier are not stayed by bankruptcy proceedings.

Subsection 5(b)(5) permits the joinder of an unavailable party who is identifiable by name, who could be subject to liability, but who is unavailable because personal jurisdiction over the person cannot be obtained in Kansas. Such an unavailable party is theoretically a source of compensation, but only if one of the parties in the Kansas action pursues him in a second action in another state. The Committee chose to place the burden of bringing the second action in another state simply because it is more likely that a claimant would be allowed to do so under the laws of other states. If the burden were put on a defendant in the Kansas action, the second action outside of Kansas would have to be based on a theory of contribution or indemnity, and some states still do not allow such actions. Therefore, the rationale for this provision is that ideal distribution of damages is somewhat more likely if the burden of bringing a second action is imposed on the claimant.

Subsection 5(b)(6) permits the joinder of a party who is immune because the statute of limitations has expired. There is no particularly strong reason for imposing this burden on the claimant, but the policy of equitable distribution of damages supports a process whereby increased incentive to join parties prior to the running of the statute of limitations exists. The claimant, as the party seeking recovery of his damages, is the party with the greatest interest in joinder of these parties. Moreover, the liberalization of the statute of limitations in Section 7 should eliminate the overwhelming majority of situations in which this particular immunity will arise.

Subsection 5(b) provides for alternative procedures for effecting the joinder of immune or unavailable parties in the six categories in this subsection. Joinder may be by service of summons and petition in the manner provided for in subsection 5(a). Joinder may also be by mere written notice filed with the court and served on all parties already in the action. This notice alternative is necessary because in some instances the immune or unavailable party will not be available for service of a summons and petition. Section 6 of the KCFA sets forth the legal effect of each type of joinder in subsections 5(a) and 5(b).

All other immune, unavailable or unknown "phantom" parties are not subject to joinder. In some instances the rationale

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is that distribution of the immune party's proportionate fault share of the damages will be more equitable if it is allocated between the claimant and the remaining tortfeasor(s) on the basis of their proportionate fault without regard to the fault of the immune party. For example, consider the situation in which claimant driver was injured in a two car collision that was caused by the negligence of claimant, the other driver and a governmental entity responsible for the condition of the road at the location of the accident. If the governmental entity is immune and the fault is apportioned 20% to claimant, 30% to the other driver and 50% to the governmental entity, then nonjoinder of the governmental entity would result in an allocation of damages 60% to the other driver and 40% to be borne by the claimant. Since government has the same relationship with both drivers, i.e., the government-citizen relationship, no sound reason would support joinder and the resulting harsher distribution of damages whereby the claimant would recover 30% of the damages and bear 70% of the loss himself.

Other exclusions from subsection 5(b) are justified by the policy of avoiding unnecessarily fraudulent, frivolous or speculative claims. For example, when a negligent party seeks to reduce his liability by the joinder of ten unknown owners of cars parked near the scene of the accident in an attempt to shift some fault to those phantom parties, an undesirable level of speculation enters into the litigation. Any attempt to create categories of cases will produce some arguably unfair results, and this may be true of the exclusion of these "phantom" parties, but the Committee is of the view that fewer unfair results will occur if these "phantom" parties are not joined.

Section 6: The Legal Effect of Joinder

Section 6(a): Under this subsection a party joined under the summons and petition procedure in subsection 5(a) will be a party defendant to all claims then on file. An immune or unavailable party joined under the summons and petition procedure, as authorized by subsection 5(b), will be a party for the limited purposes of discovery and determination of his percentage of fault. The Code of Civil Procedure distinguishes between parties and nonparties with respect to discovery, and more liberal discovery is allowed against a party. Even though all immune or unavailable parties joined under subsection 5(b) are called "parties" in the KCFA, the Committee was of the view that only those parties served with summons and petition should be put to the slightly greater burdens of discovery imposed on parties in the Code of Civil Procedure. Finally, an immune or unavailable party joined under the notice procedure in subsection 5(b) will be a party only for the purpose of determining his percentage of fault.

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In addition, subsection 6(a) allows any party joined under subsection 5(b) to intervene in the action. The purpose of this provision is to allow such parties to actively defend themselves from charges of tortious conduct, if they so desire. Although most immune or unavailable parties will choose not to participate because they have no pecuniary interest in the action, tort actions may affect a party's reputation and they should have the right to participate.

Section 6(b): This subsection requires a party joined by service of summons and petition under section 5(a) to respond to all claims in the action in the same manner as they would be required to respond to any other petition. This provision completes the process of joining the issues in the action with the minimum number of pleadings.

Section 7: Extension of the Statute of Limitations

This section provides that any statute of limitations applicable to a joined additional party shall not expire sooner than one year after the claimant commenced his action if the statute of limitations applicable to the joined additional party had not expired as of the date on which claimant commenced his action. The first part of this provision gives the claimant and the parties he initially sued one year to discover the identity of any additional parties and to join them before those additional parties can become immune by reason of the running of the statute of limitations. No such provision exists under the current law, and as a result the statute of limitations can easily expire before the additional parties can be joined in the action. When this happens, the result is a distortion of the ideal distribution of damages. Section 7 attempts to avoid this distortion.

The second part of this provision protects the joined party from having his exposure to liability revived once it has already terminated by reason of the expiration of the statute of limitations.

Section 7 is not unfair to additional parties joined pursuant to section 5. The law already recognizes many situations in which the statute of limitations can be extended in order to afford a claimant a fair opportunity to maintain his claim. See, e.g., K.S.A. 60-513(b)(ten year discovery rule). In addition, the joinder provision in section 5 is unique. Prior to comparative negligence such joinder was not allowed, but a third party action for indemnity was allowed. The general rule was that the statute of limitations for indemnity actions did not begin to run until the third party claimant had satisfied the judgment in the original action. Thus, a much longer extension of the statute of limitations was possible under the

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prior law. It was even possible to revive a claim against the third party defendant after the statute of limitations had expired if measured from the date of the accident rather than from the date of satisfaction of judgment. Accordingly, section 7 is in reality more favorable to joined additional parties than the prior law.

Section 8: Distribution of Damages Among Multiple Tortfeasors

Section 8(a): This subsection provides that except as provided in subsection 8(b) each party defendant shall be liable only for his own proportionate fault share of the damages. This provision continues the general "individual judgments" rule contained in the current comparative negligence statute. This general rule in essence abolishes joint and several liability. Admittedly, this rule is harsh because joint and several liability promoted a policy of ensuring that an innocent injured claimant has the best opportunity for recovery of the full amount of his judgment. At the same time, the individual judgment rule is not without rational explanation. With the abolition of the old contributory negligence complete defense, the joint and several liability issue is no longer framed as a question of the interests of two or more tortfeasors compared with the interests of an innocent claimant. Under comparative negligence plaintiff can also be negligent and may even be the most negligent of all the parties. Thus, the individual judgment rule may be viewed simply as an application of the broad principle that each party should bear loss in proportion to his own fault.

Section 8(b): This subsection recognizes that whatever the rationale for the individual judgment rule, there are some situations in which it is less inequitable to impose the risk of one tortfeasor's inability to pay his share of the damages on one or more of the other tortfeasors rather than on the claimant.

Subsection 8(b)(1) provides that an intentional wrongdoer shall be liable for all damages suffered by the claimant even though another party may be liable for some or all of claimant's damages. Two points are important. First, the high degree of culpability associated with intentional wrongdoing justifies the denial of any comparative fault benefits to an intentional wrongdoer. This means (1) no reduction of damages in proportion to any fault by the claimant, (2) no application of the individual judgment rule in subsection 8(a), and (3) no right of comparative implied indemnity under subsections 9(a) and 9(b). This treatment of intentional tortfeasors is consistent with the case law under the current comparative negligence statute and with the statutory and judicial developments in other comparative fault jurisdictions.

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Second, this subsection recognizes that a nonintentional tortfeasor whose fault combines with another party's intentional wrongdoing may take advantage of the individual judgment rule in subsection 8(a) even though the intentional wrongdoer is liable for all damages. This does not mean that the claimant may recover more than 100% of his damages. The traditional "one satisfaction" rule still applies. For example, consider the situation in which the jury finds the intentional wrongdoer 90% at fault and the negligent party 10% at fault. The claimant could recover 100% of the damages from the intentional wrongdoer and then, of course, he could recover nothing from the negligent party. Alternatively, he could recover 10% of the damages from the negligent party and then proceed to recover up to 90% of the damages from the intentional wrongdoer. This approach promotes both the policy of denying intentional wrongdoers the benefits of comparative fault and policy of limiting a negligent party's liability to his proportionate fault share of the damages.

Subsection 8(b)(2) provides that parties acting in concert are jointly liable for all damages attributable to the parties acting in concert. This exception to the individual judgment rule is based on the same relationship rationale used to justify the joinder of certain immune parties under section 5(b). "Acting in concert" is a term of art in tort law that refers to parties engaged in collective activity toward the claimant. This close relationship among the tortfeasors fully justifies imposing on these parties the risk that one or more of them will be unable or unavailable to pay his share of the damages.

Subsection 8(b)(3) provides that any party to whom the fault of another party is imputed under principles of agency or tort shall be liable for his own share of the damages, if any, and also jointly liable with the other party for the share of liability of that party. This provision restates and to some extent clarifies the current case law developments under the comparative negligence statute. If the individual judgment rule were applied to imputed fault situations, then doctrines of imputed fault would be effectively abrogated. For example, consider the situation in which an employer is 10% at fault for failing to adequately supervise an employee, who is 90% at fault in causing claimant's injury. If the individual judgment rule were strictly followed, the employer would pay only 10% of the damages and the well-established rule of respondeat superior would be effectively abolished. In this situation under subsection 8(b)(3) the employer would pay 100% of the claimant's damages and then would have a right of comparative implied indemnity against the employee for 90% of the damages under subsection 9(a).

Subsection 8(b)(4) provides a parallel rule to subsection 8(b)(3) above in situations in which a party breaches a nondelegable duty. The rationale for this exception is essentially the same as the rationale for subsection 8(b)(3) above.

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Subsection 8(b)(5) provides that a party who is at fault in entrusting a dangerous instrumentality to another is liable for his own share of the damages and also jointly liable with the party to whom the instrumentality for that party's share of the damages. The rationale for this exception is based on the relationship between the parties derived from the dominant party's control over the instrumentality that he then entrusts to one incompetent to use it. It should be noted that this situation will most often arise in automobile accident cases in which there is a strong public interest in providing reasonably adequate remedies for persons injured on the highways. It should also be noted that this exception would change current Kansas law. See McCart v. Muir, 230 Kan. 618 (1982) (applying the individual judgment rule to parties involved in the negligent entrustment of an automobile).

Subsection 8(b)(6) provides that any strictly liable seller of a defective product is liable not only for his own share of the damages, but also for the share of damages attributable to every other seller of that same defective product. In essence, this subsection makes all the sellers of a defective product in the chain of supply and distribution jointly and severally liable for all the damages attributable to the parties in the chain of supply and distribution, subject to location of the ultimate loss with the creator of the defect by means of a comparative implied indemnity action. The rationale for this provision is twofold. First, the relationship rationale applies because the prevailing concept in the case law concerning strict products liability is that the parties in the chain of supply and distribution form a single "enterprise" in relation to the user or consumer of the product. Second, the imputed fault rationale applies because if the individual judgment rule were strictly applied any party whose strict liability was without any fault would be 0% at fault and this result would effectively abrogate the doctrine of strict products liability.

Three points are important. First, the parties in the chain of supply and distribution are jointly liable only for their collective share of the damages. They would not be liable for the share of damages attributable to an unrelated third party not in the chain of supply and distribution. Second, only those parties in the chain of supply and distribution who in fact sold the defective product would be jointly liable. Any seller who sold the product or a component part thereof before the product became defective would not be liable at all because the doctrine of strict products liability applies only to sellers of defective products. Third, nothing in this subsection will prevent the dismissal of a nonmanufacturer seller that meets all the requirements of section 6 of the Kansas Product Liability Act, K.S.A. 60-3306. Indeed, that section of the Kansas Product Liability Act, enacted subsequent to the current comparative negligence statute, reaffirms the propriety of this subsection. It recognizes that a nonmanufacturer seller

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of a defective product cannot be dismissed from a strict products liability action unless that seller demonstrates that the manufacturer is capable of satisfying any judgment against it. Such a provision would not exist if the legislature had intended the individual judgment rule to apply to nonculpable sellers of defective products.

Finally, it is important to note that subsection 8(b) is not a dramatic change in the direction of Kansas comparative fault law. Two of the six subsections reflect the current case law developments under the comparative negligence statute. See subsections 8(b)(1) and 8(b)(3). Three of the six subsections are likely to be adopted as extensions of the current case law developments. See subsections 8(b)(2), 8(b)(4) and 8(b)(6). Only subsection 8(b)(5) is a departure from the current case law developments.

Section 9: Comparative Implied Indemnity

Section 9(a): This subsection provides that if any party who was jointly liable with another party for the other party's share of liability did in fact pay the other party's share of the damages pursuant to any of the provisions of subsections 8(b)(2) through 8(b)(6), the paying party is entitled to recover the amount paid on the other party's behalf. This recovery would result in an ultimate distribution of damages on the basis of the proportionate fault of the parties. The purpose of the limited forms of joint liability in subsection 8(b) is to promote the claimant's interest in full satisfaction of his judgment. Once the claimant has his satisfaction, however, no reason exists to prevent the promotion of proportionate fault distribution of damages by allowing this form of comparative implied indemnity. The only exception to this indemnity provision involves the intentional wrongdoer in subsection 8(b)(1). Again, the rationale is that the high degree of culpability justifies a denial of the benefits of comparative fault.

Section 9(b): This subsection creates a right of comparative implied indemnity in favor of a party who settles an entire claim. This indemnity action lies against a party who is subject to liability, but who did not contribute to the settlement. This provision reflects the case law developments under the current comparative negligence statute.

The subsection makes clear that a comparative implied indemnity action may be maintained regardless of the stage in the proceedings when the settlement occurred. It does not matter if the claimant's action had been commenced at the time of the settlement or if some or all of the parties were joined in the action at the time of the settlement. The purpose of this provision is to encourage settlements.

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The party against whom the comparative implied indemnity action is brought is protected in two ways. First, he may assert as a defense to the comparative implied indemnity action any defense he could have asserted if the claimant's initial action had been fully litigated. Second, he retains the same statute of limitations protection that he would have had if the claimant's action had been litigated. If the settlement occurred prior to the filing of the claimant's action, the date of the settlement is deemed to be the date on which the claimant would have filed his petition. Finally, the comparative implied indemnity action must be commenced within one year of the date of the settlement. Thus, the indemnity action will be brought within the same time that the settling party would have had to join the nonsettling party if the claimant's action had been filed and fully litigated.

Section 10: Mandatory Claims, Counterclaims and Cross Claims

The first part of this section requires that the parties actually joined in a comparative fault action bring all claims, counterclaims and cross claims that they might have against one another in the comparative fault action or be forever barred. This provision merely restates case law developments under the current comparative fault statute. The purpose of this provision is twofold. First, it promotes judicial efficiency by resolving all claims arising out of the same transaction in a single action. Second, it avoids the confusion that would result from successive actions involving the same transaction. It is unlikely that juries would ever arrive at exactly the same apportionment of fault in successive actions involving the same transaction, and this problem would make separate judgments involving the same transaction extremely complex for the courts to handle. Since counterclaims are already mandatory under the Code of Civil Procedure, the primary impact of this section is on cross claims.

The second part of this subsection provides that a party shall not be forced to join an additional party solely for the purpose of preserving a cross claim against that party. The mandatory cross claim provision applies only to parties in the action.

Sections 11-13: Effective Date of the KCFA

These sections are routine provisions concerning the effective date of the KCFA. Section 13 provides that the effective date of the KCFA is the date of its publication in the statute book. Section 11 provides that the KCFA applies only to causes of action accruing on or after its effective date. The KCFA will not be retroactive. Section 12 repeals the current comparative negligence statute.

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APPENDIX A

PLAINTIFF v. DEFENDANT COMPARATIVE FAULT SYSTEMS

NONE	PURE	50% RULE	49% RULE	SLIGHT
Alabama	Alaska[3]	Connecticut	Arkansas[5]	Nebraska
Arizona[1]	California[3]	Hawaii[4]	Colorado[6]	South Dakota
Delaware	Florida[3]	Indiana	Georgia[3,6]	Tennessee[3,7]
Kentucky[2]	Illinois[3]	Massachusetts[4]	Idaho[6]	
Maryland	Iowa[3]	Minnesota[4]	Kansas	
North Carolina[2]	Louisiana	Montana	Maine	
South Carolina	Michigan[3]	Nevada	North Dakota	
Virginia[2]	Mississippi	New Hampshire	Utah	
	Missouri[3]	New Jersey	West Virginia[3]	
	New Mexico[3]	Ohio	Wyoming	
	New York	Oklahoma[4]		
	Rhode Island	Oregon		
	Washington	Pennsylvania		
		Texas		
		Vermont[6]		
		Wisconsin[4,6]		

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1. Arizona has a limited comparative fault system limited to certain hazardous employments under its workers' compensation system

2. Kentucky, North Carolina and Virginia have limited comparative fault statutes applicable only to railroad employees

3. Comparative fault system was judicially adopted

4. The original comparative fault statute adopted the 49% rule and was subsequently amended to adopt the 50% rule.

5. Arkansas' original comparative fault statute adopted pure comparative fault and was subsequently amended to adopt the 49% rule.

6. Plaintiff's fault is compared separately with the fault of each defendant rather than with the combined fault of all defendants for purposes of applying the 49% or 50% rule.

7. Tennessee still follows the common law "all or nothing" contributory negligence rule except in cases in which plaintiff's fault is deemed to be "remote".

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APPENDIX B

MULTIPLE DEFENDANT COMPARATIVE FAULT SYSTEMS

A. Joint and several liability with comparative fault contribution:

Alaska, Arkansas, California, Colorado, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Maine, Michigan, Minnesota, Missouri, Montana, New Jersey, New Mexico, New York, North Dakota, Pennsylvania, South Dakota, Utah, Washington, Wisconsin, Wyoming.

B. Joint and several liability with pro rata (equal division) contribution:

Georgia, Massachusetts, Mississippi, Nebraska, Rhode Island, Tennessee, West Virginia.

C. Joint and several liability with no contribution:

Connecticut.

D. Joint and several liability with comparative fault contribution, except comparative fault individual judgment only against any defendant less at fault than plaintiff:

Louisiana, Nevada, Oregon, Texas.

E. Joint and several liability with no contribution, except comparative fault individual judgment system whenever plaintiff is contributorily negligent:

Oklahoma.

F. Comparative fault individual judgment system:

New Hampshire, Ohio, Vermont.

G. Comparative fault individual judgment system with unlimited joinder of immune, unavailable and unknown parties:

Kansas.

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