Approved January 23, 1986
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY.

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

10:00 a.m./~~p.m.~~ on January 21, 1986 in room 514-S of the Capitol.

~~All~~ members ~~were~~ present ~~except~~ were: Senators Frey, Hoferer, Burke, Feleciano, Langworthy, Parrish, Steineger, Talkington, and Winter.

Committee staff present:

Mike Heim, Research Department
Jerry Donaldson, Research Department
Mary Hack, Revisor of Statutes

Conferees appearing before the committee:

Ron Smith, Kansas Bar Association
Bill Sneed, Kansas Association of Defense Counsel
Dudley Smith, Kansas Bar Association

Ron Smith, Kansas Bar Association, presented a request for a committee bill to establish the citizens' commission on judicial compensation (See Attachment I). Following his explanation of the proposal, Senator Feleciano moved that the bill be introduced. Senator Burke seconded the motion. The motion carried.

Ron Smith presented a request for a committee bill concerning the definition of unauthorized practice of law. He stated the Wichita Bar Association had requested the legislation. Following committee discussion, the consensus of the committee was a copy of the proposal be made available to them for consideration.

Ron Smith presented a request for a committee bill concerning the Kansas Consumers Protection Act, which was requested by the Wichita Bar Association. Following committee discussion, the consensus of the committee was a copy of the proposal be made available to them for consideration.

Staff then presented background information on Proposals No. 35 and No. 36.

Senate Bill 414 - Civil procedure; joinder of parties and comparative indemnity.

Bill Sneed, Kansas Association of Defense Counsel, stated his association will prepare a position paper and make it available to committee members. He stated the association is opposed to the bill for three reasons. They are concerned with some of the language of the bill; they believe the implied indemnity law is relatively set; and they believe this bill will expand litigation.

Ron Smith, Kansas Bar Association, passed out copies of a position paper concerning the bill (See Attachment II). He stated the KBA is opposed to the bill. He then introduced Dudley Smith who presented the reasons the Kansas Bar Association is in opposition to the bill.

The chairman announced Senate Bills 414 and 415 will be rescheduled to allow sufficient time for everyone to testify.

The meeting adjourned.

A copy of the guest list is attached (See Attachment III).

GUEST LIST

COMMITTEE: SENATE JUDICIARY COMMITTEE DATE: 1-21-86

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
PATRICIA HENSHALL	TOPEKA	OJA
Richard Harmon	Topeka	Domestic Insurance Cos
Lee WRIGHT	MISSION	Farmers Ins. Group
TERRY STEVENS	TOPEKA	TOPEKA POLICE DEPT.
Shawn Stockman	Lawrence	Sen. Richard Gannon
EARL NEHRING	LAWRENCE	COMMON CAUSE/KANSAS
Kelle Roesch	Lawrence	KS Trial Lawyers Assoc.
Ken Coles	Topeka	KS-NEA
Matt Lynch	"	Jud. Council
George Barbee	Topeka	Ks Consulting Engrs
Jo Jenkins	Topeka	KS Corp. Comm.
Bill SNEED	Topeka	Ks Assoc of Defense
Phil Hodges	Topeka	KCCI
DUDLEY SMITH	TOPEKA	KAN BAR ASSN
Ron Smith	"	" " "
Mark Jennett	"	Ins Assoc
Ed Schaub	"	S.W.B.T.
Hanns Zademan	Lawrence	City of Lawrence
Ron Smith	Topeka	ICBA

Attach. III

PROPOSED BILL NO. _____

By

AN ACT establishing the citizens' commission on judicial compensation; providing for the powers, duties and functions of the commission.

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

Section 1. (a) There is hereby established the citizens' commission on judicial compensation. The commission shall be composed of five members appointed by the governor, subject to confirmation by the senate as provided by K.S.A. 75-4315b and amendments thereto.

(b) Members shall be appointed from the general public. No person who is an attorney or a member of the legislature may serve as a member of the commission. Not more than three members of the commission may be members of the same political party.

(c) Of the members initially appointed, the governor shall appoint one member for a term of four years, one member for a term of three years, one member for a term of two years and two members for terms of one year. Subsequent appointments shall be for terms of four years, except for vacancies occurring other than by expiration of a term which shall be filled by appointment for the remainder of the unexpired term. Members shall serve until their successors are appointed and qualified.

Sec. 2. (a) The governor shall call the first meeting of the citizens' commission on judicial compensation for the purpose of organization. At this meeting and annually thereafter, the commission shall organize by electing a chairperson and vice-chairperson from its membership to serve for terms of one year.

(b) After its first meeting, the commission shall meet at least annually and more often if necessary to fulfill its duties.

S. Judiciary
1/21/86
Attach. I

The commission shall meet upon call of the chairperson. Three members shall constitute a quorum. The vice-chairperson shall exercise all of the powers of the chairperson in the absence of the chairperson.

(c) Members of the citizens' commission on judicial compensation attending meetings of the commission, or attending a subcommittee meeting of the commission authorized by the commission, shall be paid amounts provided in subsection (e) of K.S.A. 75-3223 and amendments thereto.

Sec. 3. (a) The citizens' commission on judicial compensation shall make a continuing study of the duties and salaries and other compensation, including pensions and other retirement benefits, of the justices of the supreme court and the judges of the court of appeals and the district courts of this state and shall prepare recommendations for appropriate levels of such salaries and other compensation.

(b) The commission shall report its findings and recommendations to the legislative coordinating council, the governor and the chief justice of the supreme court on or before December 15 of each year. The report shall be made available to the other members of the legislature in the manner provided by K.S.A. 46-1212c and amendments thereto for other reports to the legislature.

(c) Within the limits of appropriations, the commission may contract for consulting and other professional services for surveys and other research or analytic services relating to the duties of the commission.

(d) The staff of the office of revisor of statutes, the legislative research department and the division of legislative administrative services shall provide such assistance as requested by the commission and authorized by the legislative coordinating council.

Sec. 4. This act shall take effect and be in force from and after its publication in the statute book.

KANSAS BAR ASSOCIATION

OFFICERS
PRESIDENT
Gerald L. Goodell
215 E. 8th
Topeka, KS 66603 (913) 233-0593
PRESIDENT-ELECT
Jack R. Euler
P. O. Box 326
Troy, KS 66087 (913) 985-2322
VICE-PRESIDENT
Christel Marquardt
1100 1st Nat'l Bank Tower
Topeka, KS 66603 (913) 235-9511
SECRETARY-TREASURER
Dennis L. Gillen
621 1st Nat'l Bank Bldg.
Wichita, KS 67202 (316) 265-9621

EXECUTIVE COUNCIL
DISTRICT 1
John J. Jurcyk
P.O. Box 1398
4th Floor, 707 Minnesota Ave.
Kansas City, KS 66101 (913) 371-3838
DISTRICT 2
Fred N. Six
Massachusetts at South Park
P. O. Box 666
Lawrence, KS 66044 (913) 843-6600
DISTRICT 3
Leigh Hudson
200 Citizens Nat'l. Bank
200 S. Main
Fort Scott, KS 66701 (316) 223-2900
DISTRICT 4
Warren D. Andreas
303 State Bank Bldg.
Winfield, KS 67156 (316) 221-1610
DISTRICT 5
Edward L. Bailey
1100 1st Nat'l. Bank Tower
Topeka, KS 66603 (913) 235-9511
DISTRICT 6
Robert W. Wise
P.O. Box 1143
McPherson, KS 67460 (316) 241-0554
DISTRICT 7
A. J. "Jack" Focht
807 N. Waco
Suite 300, Brooker Plaza
Wichita, KS 67203 (316) 269-9055
DISTRICT 8
William B. Swearer
Box 1907
Hutchinson, KS 67504-1907
(316) 662-3331
DISTRICT 9
Lelyn J. Braun
1505 E. Fulton Terrace
Garden City, KS 67846 (316) 275-4146
DISTRICT 10
Edward Larson
P.O. Box 128
Hays, KS 67601 (913) 628-8226
PAST PRESIDENT
Darrell D. Kellogg
200 W. Douglas, #630
Wichita, KS 67202 (316) 265-7761
YOUNG LAWYERS PRESIDENT
Danton C. Hejtmanek
P.O. Box 2667
Topeka, KS 66601 (913) 357-0333
ASSOCIATION ABA DELEGATES
John Elliott Shamberg
860 New Brotherhood Bldg.
Kansas City, KS 66101 (913) 281-1900
Glee S. Smith, Jr.
P.O. Box 360
Larned, KS 67550 (316) 285-3157
STATE ABA DELEGATE
William C. Farmer
200 W. Douglas, #830
Wichita, KS 67202 (316) 267-5293
KDJA REPRESENTATIVE
Hon. Michael Corrigan
525 N. Main — Courthouse
Wichita, KS 67203 (316) 268-7661
EXECUTIVE DIRECTOR
Marcia Poell
P.O. Box 1037
Topeka, KS 66601 (913) 234-5696

Presentation Concerning

SB 414

Senate Judiciary Committee

January 21, 1986

1200 Harrison • P.O. Box 1037 • Topeka, Kansas 66601 • (913) 234-5696

S. Judiciary
1/21/86
Attch. II

SB 414

Mr. Chairman. Members of the Senate Judiciary Committee. My name is Ron Smith, and I am Legislative Counsel for the Kansas Bar Association. KBA is grateful for the opportunity to address the issues presented in this legislation.

While the issue of Pure Comparative Fault was studied this summer by an interim committee, the summer's testimony basically concerned SB 35, not as it was amended by SB 414. Unfortunately, neither proponents and opponents had the opportunity to address formally the provisions of this bill. SB was in effect the work product of the interim committee's working sessions. Today is our first opportunity to share with you our concerns about their product.

KBA opposes SB 414 for the several reasons:

I.

Considerable time, expense and effort as well as political compromise went into the 1974 change from contributory negligence concepts to the current 49% comparative negligence law. The Kansas Supreme Court has announced more than 50 cases which help attorneys understand the law. Each case builds on the law made previously. By and large, Kansas attorneys (and insurance companies trying to determine risk in this state) are able to use the case law to deter-

mine current judicial construction. Enactment of SB 414 would jeopardize the ability of attorneys to understand how the Court might rule on various issues because these 50-plus cases would not be much help construing SB 414. It would take several years before new litigation would give lawyers and insurance companies that degree of predictability for their clients. While this is true with all new substantive statutes affecting the rights of litigants, any unpredictability is almost certain to adversely affect liability insurance rates in Kansas. Such unpredictability makes the legal system subject to more criticism, especially of the unfair kind Professor Arthur Miller has called the "cosmic anecdote."[1]

II.

Sections 1 and 2 do not just codify existing case law. Sections 1 and 2 restrict the use of phantom parties by enumerating in the statute only six types of phantom parties that can be joined in a comparative negligence action. All other phantom defendants cannot be joined for purposes of determining degree of fault.

The practical impact of Sections 1 and 2 is that for those litigants who know that an unknown defendant exists and caused part of the plaintiff's damage, but the phantom doesn't fit one of the listed six categories, remaining defendants are precluded from the obvious legislative intent of the comparative negligence statute--that a person be responsible only for his degree of fault.

The simplest example is the hit and run driver, who collides with a Good Samaritan Defendant. Together, their negligence causes the plaintiff's damages. Under SB 414, the Good Samaritan driver

will pay the whole verdict. For this limited group, Sections 1 and 2 reimpose unilateral joint and several liability on the Good Samaritan defendants--liability over and above that defendant's degree of fault.

Another example is the immune governmental agency who is a codefendant with an identifiable defendant. For example, a city's park service is immune from liability unless gross and wanton negligence is shown (KSA 75-6104(n)). A kindergarten teacher takes her class to a playground. Not inspecting the slide, she lets the children use a slide, and a nail rips a child's leg to the bone, causing disfigurement, infection, etc. Under SB 414, the teacher's negligence may be 5%, and the city's ordinary negligence may by 95%, but the teacher will be subject to the entire verdict if no gross negligence can be shown on the city's part.

It can be argued in these examples that plaintiffs should not bear the risk of insolvent, immune or phantom defendants. But the comparative negligence compromise of 1974, and subsequent case law, make it clear that ordinary defendants should be responsible only for their degree of negligence. Section 1 and 2 are contrary to that compromise.

Joint liability was discarded as part of the 1974 legislative compromise. While certainly there is disagreement within the Bar as to the virtues of joint liability, our governing structure doesn't believe it is time to discard the compromise and reimplement Joint Liability, even through these limited and indirect means.

Kansas already has joint liability in some very limited instances[2] and we don't believe those instances--which are adequately defined in case law--are in need of statutory expansion.

III.

Professor Westerbeke indicated last summer the cause of action of implied comparative indemnity already exists in our case law.[3] This is true but in a limited sense. Case law makes a distinction, however, between lawsuits for post-judgment contribution (which is not recognized by the Kansas Supreme Court) and limited implied comparative indemnity (which is recognized).[4] SB 414 expands the court-made comparative indemnity action and in the process creates the potential for more litigation, some of it the type which some legislators disfavor.[5]

New Section 4(b)'s use of the phrase "liability of one or more designated other persons" (lines 81-82) raises the broad policy question of whether Section 4(b) is allowing the new cause of action of "comparative contribution" in addition to expanding the concept known as "comparative indemnity."

Additionally, careful reading of New Sec. 4(a) appears to allow comparative indemnity actions to seek whatever amount the settling party pays on behalf of the nonsettling party--even if the amount negotiated for the original plaintiff was excessive. In other words, the subsection appears to allow a 50% at fault codefendant to seek indemnification for 75% of the settlement amount. All the settling codefendant has to do is allege in a comparative indemnity

action that as between the codefendants, the nonsettling codefendant was 75% at fault.[6]

There is also the unclear policy question of whether a settling codefendant whose causal negligence is more than the combined causal negligence of other codefendants and the original plaintiff ought to be able to recover anything in an action? The sole difference is the settling defendant's theory is implied comparative indemnity rather than comparative negligence. To do so reopens the debate on the virtues (or lack thereof) of Pure Comparative Fault.

Case law does not appear to resolve this question. SB 414 itself does not prohibit maintenance of such actions. This, of course, creates additional uncertainties in our current liability insurance system.

We just think a balancing look at this legislation shows a few plaintiffs will get benefit of joint liability that wasn't there before, but the public in general will not benefit from a liability insurance system that just gets a little more unpredictable because of this bill.

For all the foregoing, KBA recommends SB 414 be reported adversely.

Footnotes

1. Professor Arthur R. Miller, Harvard Law School, August, 1983, amendments to the Federal Rules of Civil Procedure, 11-12, (Fed Judicial Center 1984), wherein the author said about federal court practice: "There is a wide spread feeling that there is lot of frivolous conduct on the part of lawyers out there, a lot of vexatious conduct, a lot of inefficient conduct, . . . (But) we may be the victims of the phenomenon known as the 'cosmic anecdote': somebody tells a war story at one bar association meeting, and it is picked up by 10 other lawyers; who then tell the same anecdote at

ten other bar association meetings, and before you know it, people are rioting in the streets."

2. An attempt was made by Prof. Westerbeke to codify these instances of judicial joint liability. See 1985 SB 35, Sections 8(b)(1), 8(b)(3), 8(b)(4), 8(b)(5) and 8(b)(6) and the discussion of Section 8 by Professor Westerbeke.

3. See Teepak, Inc. v. Learned , 237 Kan 320, which was handed down May 10, 1985 -- after the 1985 legislative hearings on SB 35, but before the summer interim hearings on the same bill. Teepak reaffirms the court's limited form of allowable implied comparative indemnity and outlines the development of the doctrine. A copy of the case is attached.

4. Teepak , infra. Syllabus 4 states: "A named defendant in a comparative negligence action cannot settle a claim on behalf of a party or parties against whom the plaintiff has not sought recovery and then seek contribution from those parties in proportion to the percentage of causal negligence attributable to those parties. Such an action seeks post-judgment contribution, rather than 'comparative indemnity'. Kennedy v. City of Sawyer , 228 Kan. 439, 618 P.2d 788 (1980), distinguished." For the elements of the limited comparative indemnity action allowed by Kansas courts, see footnote 6.

5. In Teepak , infra, Teepak Inc. was a food processing defendant in an original products liability action in Federal District court in Missouri. Defendant Learned was a doctor living in Lawrence. The original plaintiff, Carl Baise, had an intestinal blockage allegedly caused by the negligent manufacturing of a brand of sausage made by Teepak, Inc. Teepak alleged Doctor Learned compounded the products liability injury to Baise through medical malpractice during surgery. Baise did not elect to sue the doctor as a party defendant; Teepak settled with Baise, then in effect brought a medical malpractice action against Learned under the implied comparative indemnity theory.

6. By definition, implied comparative indemnity actions grow from a willingness by one defendant to settle all claims the plaintiff may have in the action against any potential defendant, then seek proportionate indemnification from those other defendants who owe a portion. There are prerequisites to the current court-made cause of action: (1) the defendant(s) in comparative implied indemnity actions are made parties to the original action and claim is asserted by the settling codefendant before the applicable statute of limitation has run, (2) the other codefendant(s) negligence partially caused or contributed to the injury and damage (i.e. their negligence was "active" rather than "passive"), (3) the settling codefendant has some causal negligence of his own, and (4) the original plaintiff's causal negligence was less than 50% of the total causal negligence. (Syl. 4, Gaulden v. Burlington Northern Inc., etal, and Jack James , 232 Kan. 205, 654 P.2d 383 (1982).) Determination of the extent to which the settling codefendant and the other

codefendants are (or would have been) negligent towards the original plaintiff is left up to subsequent negotiation or, in some cases, a jury verdict. About all that is fairly certain about New Sec. 4 liability is that the amount of a second codefendant's liability cannot exceed the amount of money the settling codefendant paid the original plaintiff.

TEEPAK, INCORPORATED, Appellee, v. GEORGE R. LEARNED, Appellant

No. 57,149

SUPREME COURT OF KANSAS

237 Kan. 320; 699 P.2d 35

May 10, 1985

SYLLABUS:
SYLLABUS BY THE COURT

1. Under the provisions of K.S.A. 60-258a, the concept of joint and several liability between joint tortfeasors previously existing in this state no longer applies in comparative negligence actions. The individual liability of each defendant for payment of damages will be based on proportionate fault, and contribution among joing judgment debtors is no longer required in such cases.

2. The intent and purpose of the legislature in adopting K.S.A. 60-258a was to impose individual liability for damages based on the proportionate fault of all parties to the occurrence which gave rise to the injuries and damages even though one or more parties cannot be joined formally as a litigant or be held legally responsible for his or her proportionate fault.

3. A named defendant in a comparative negligence action cannot settle a claim on behalf of a party or parties against whom the plaintiff has not sought recovery and then seek contribution from those parties in proportion to the percentage of causal negligence attributable to those parties. Such an action seeks post-judgment contribution rather than "comparative indemnity." Kennedy v. City of Sawyer, 228 Kan. 439, 618 P.2d 788 (1980), distinguished.

4. In an action by a tortfeasor who has settled the injured party's claim and who seeks, in a separate action, to recover all or part of the settlement from a physician who the tortfeasor contends added to the injured party's damages by medical malpractice, although no claim was ever asserted by the injured party against the physician, the record is examined and it is held: (1) such action is predicated upon the legal principles of contribution rather than indemnification; and (2) no valid cause of action exists for post-settlement contribution under such circumstances.

McFARLAND, J.: This is an action wherein plaintiff **Teepak**, Inc., seeks recovery from defendant George R. Learned for moneys paid by **Teepak** to Carl and Violet Baise in settlement of an action brought by the Baises against **Teepak** in the United States District Court for the Western District of Missouri. Learned filed motions to dismiss the action and for summary judgment predicated upon two grounds--that the statute of limitations had run, and that, as a matter of law, **Teepak** had failed to state a valid cause of action against him. The district court denied both motions, and the matter is before us on Learned's interlocutory appeal therefrom.

The pertinent facts may be summarized as follows. On November 30, 1979, Carl Baise, a resident of Lawrence, purchased a package of Alewel's Summer Sausage. The following day Mr. Baise ate some of the sausage and subsequently became ill as the result of a sausage casing obstructing his small intestine.Ultimately, Dr. George Learned performed surgery upon Baise, excising two-thirds of the patient's small intestine. Dr. Learned's treatment of Baise ended in January, 1980.

The sausage had been made by Alawel's Incorporated, a Missouri corporation. The casing for the sausage had been made by **Teepak**, Inc., and Illinois corporation. In September of 1981 Baise and his wife filed an action against both corporations seeking recovery for his injuries and medical treatment. The action was filed in the United States District Court for the Western District of Missouri. Federal jurisdiction was invoked on the basis of diversity of citizenship. The Baises at no time ever asserted a cause of action against Learned.

On July 29, 1983, **Teepak** filed a third-party complaint against Learned in the federal case seeking "indemnity or subrogation" for sums **Teepak** might have to pay the Baises. On October 6, 1983, **Teepak** filed this action in the Douglas County District Court seeking indemnification from Learned for any of **Teepak's** liability to the Baises which "is chargeable and attributable to

the negligence of Dr. Learned."

Teepak and Alewel's (as well as their respective insurance carriers) entered into a structured settlement agreement with the Baises. The settlement was agreed upon on or about November 1, 1983, and subsequently executed by the parties thereto in December of 1983 and January of 1984. The total settlement was approximately $375,000.00. The federal case was dismissed by stipulation on January 27, 1984. At the time of the dismissal, Learned had been served with the third-party complaint but had not filed an answer. The third-party complaint was dismissed without prejudice at the time the plaintiff's petition was dismissed.

Teepak, after the Baise settlement, proceeded with its Kansas action against Learned. Learned filed motions seeking dismissal and summary judgment on the grounds the action was barred by virtue of: (1) the statute of limitations having expired on any action by the Baises against him predicated upon medical malpratice prior to assertion of any claim against him by **Teepak**; and (2) the failure of **Teepak** to assert a valid claim against him under Kansas law. The district court denied both motions and the matter is before us on Learned's interlocutory appeal therefrom.

237 Kan. 320; 699 P.2d 35

The basic question before us may be stated in general terms as follows: Whether or not, under the principles of comparative negligence, a defendant tortfeasor causing the initial injury to the plaintiff may settle with the injured plaintiff and then seek indemnification, or contribution, in a separate action, from another person whom the tortfeasor contends is a "subsequent" tortfeasor causing part of the injured party's damages even though the injured party never asserted a claim against the "subsequent" tortfeasor.

In specific terms the question may be stated as follows: Whether or not the Kansas law of comparative negligence permits a tortfeasor causing physical injury to a person to settle with the injured person and then proceed against a physician whom the tortfeasor (but not the injured party) claims added to the injured party's damages through negligent treatment of the injured party. If this question is answered affirmatively, then a second question arises. Is the cause of action barred if the tortfeasor does not bring the action against the physician until after the statute of limitations has expired which governs the period the injured party could have brought a malparactice action against the physician?

In 1974 the legislature enacted K.S.A. 60-258a, which made the concept of comparative negligence the law of Kansas. The statute provides:

237 Kan. 320; 699 P.2d 35

"(a) The contributory negligence of any party in a civil action shall not bar such party or said party's legal representative from recovering damages for negligence resulting in death, personal injury or property damage, if such party's negligence was less than the causal negligence of the party or parties against whom claim for recovery is made, but the award of damages to any party in such action shall be diminished in proportion to the amount of negligence attributed to such party. If any such party is claiming damages for a decedent's wrongful death, the negligence of the decedent, if any, shall be imputed to such party.

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

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

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

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

Since 1974 Kansas appellate courts have been repeatedly called upon to determine the purpose and intent of K.S.A. 60-258a and the effect of the statute's enactment upon existing Kansas case law. The evolution of the law of comparative negligence in Kansas is the result of each case utilizing prior case law as the foundation upon which determination of the issues presented must rest. This same approach will be followed herein.

We shall first consider whether or not a cause of action based upon contribution exists herein. Brown v. Keill, 224 Kan. 195, Syl. PP5, 6, 580 P.2d 867 (1978), is particularly significant on this aspect of the issue before us and must be cited at some length. Preliminarily, the following observation

237 Kan. 320; 699 P.2d 35

made in Brown needs to be noted:

"This statute [K.S.A. 60-258a] is more detailed than most comparative negligence statutes in other states and after reviewing the court decisions in other states we find they are of limited assistance. Although some subsections of the Kansas statute have direct counterparts in other states, no other state has the exact combination of provisions as does Kansas. So far as our research has disclosed no state has the provision for joining additional parties on motion of any party against whom a claim is asserted for negligence. See subsection (c)." 224 Kan. at 199.

In discussing the prior law relative to contribution among tortfeasors, this court in Brown stated:

"[U]nder the Kansas law as it existed prior to statutory comparative negligence a plaintiff could choose his tortfeasor and a defendant had no right to bring in another joint torteasor to plaintiff's action. However, if plaintiff sued and recovered a judgment against two tortfeasors plaintiff could proceed to collect the judgment from either judgment debtor. When one judgment debtor had satisfied the entire judgment he could then recover one-half of the amount paid from the other judgment debtor. The effect of these prior holdings was to make each defendant jointly and severally liable for all of plaintiff's

237 Kan. 320; 699 P.2d 35

damage regardless of whether others contributed to cause such injuries. The right of contribution between judgment debtors in such case was on a fifty-fifty basis. Plaintiff controlled his own lawsuit and could collect a judgment from any judgment debtor he chose. The inability of any judgment debtor to pay his half of the judgment would concern only the judgment debtor who satisfied the judgment and then sought contribution." 224 Kan. at 198.

In determining the legislative intent in the adoption of K.S.A. 60-258a, this court in Brown stated:

"The perceived purpose in adopting K.S.A. 60-258a is fairly clear. The legislature intended to equate recovery and duty to pay to degree of fault. Of necessity, this involved a change of both the doctrine of contributory negligence and of joint and several liability. There is nothing inherently fair about a defendant who is 10% at fault paying 100% of the loss, and there is no social policy that should compel defendants to pay more than their fair share of the loss. Plaintiffs now take the parties as they find them. If one of the parties at fault happens to be a spouse or a governmental agency and if by reason of some competing social policy the plaintiff cannot receive payment for his injuries from the spouse or agency, there is no compelling social policy which requires the codefendant to pay more than his fair share of the loss. The same is true if one of the defendants is wealthy and the other is not.

Previously, when the plaintiff had to be totally without negligence to recover and the defendants had to be merely negligent to incur an obligation to pay, an argument could be made which justified putting the burden of seeking contribution on the defendants. Such an argument is no longer compelling because of the purpose and intent behind the adoption of the comparative negligence statute.

"It appears more reasonable for the legislature to have intended to relate duty to pay to the degree of fault. Any other interpretation of K.S.A. 60-258a(d) destroys the fundamental conceptual basis for the abandonment of the contributory negligence rule and makes meaningless the enactment of subsection (d). If it were not the intention of the legislature to abolish joint and several liability by adopting subsection (d) that subsection would have little or no purpose, because the first two sections of the statute standing alone could have accomplished the legislative purpose urged by the appellant.

"Numerous examples of unfairness have been cited by both parties in this case to support their respective positions. The law governing tort liability will never be a panacea. There have been occasions in the past when the bar of contributory 3egligence and the concept of joint and several liability resulted in inequities. There will continue to be occasions under the present comparative negligence statute where unfairness will result. Having

237 Kan. 320; 699 P.2d 35

considered the arguments in light of the statute, we hold under the provisions of K.S.A. 63-258a the concept of joint and several liability between joint tortfeasors previously existing in this state no longer applies in comparative negligence actions. The individual liability of each defendant for payment of damages will be based on proportionate fault, and contribution among joint judgment debtors is no longer required in such cases." 224 Kan. at 203-04. (Emphasis supplied.)

This court in Brown further held:

"[W]e conclude the intent and purpose of the legislature in adopting K.S.A. 60-258a was to impose individual liability for damages based on the proportionate fault of all parties to the occurrence which gave rise to the injuries and damages even though one or more parties cannot be joined formally as a litigant or be held legally responsible for his or her proportionate fault." 224 Kan. at 207.

Teepak argues that the abolition of both joint and several liability and the right of contribution among tortfeasors as determined in Brown is limited to joint tortfeasors and does not apply to successive tortfeasors as in the case before us. In support thereof, **Teepak** shows that existing Kansas case law imposes liability on the tortfeasor causing the initial injury for any

237 Kan. 320; 699 P.2d 35

additional injury to the injured party arising from medical malpractice occurring in the treatment of the original injury. Fieser v. St. Francis Hospital & School of Nursing, Inc., 212 Kan. 35, 510 P.2d 145 (1973), is a case wherein this principle is extensively discussed and applied.

We see no valid reason for limiting the holding in Brown solely to the joint tortfeasor situation. The concept of contribution among tortfeasors arises from equitable origins--a person partially causing injury to another but paying for all of the injury should be entitled to contribution thereon from another person causing part of the injury. The equitable need for contribution vanishes when one tortfeasor has the statutory right to bring other tortfeasors into the action as defendants and have fault (and liability) proportionally determined. The injured person herein, Carl Baise, sued **Teepak** and Alewel's seeking recovery for the injuries received from eating the sausage. **Teepak** claims part of those injuries arose from medical malpractice. **Teepak** could have brought Dr. Learned into the action as a party whose negligence should be compared with that of **Teepak** and Alewel's. Instead, **Teepak** brought Learned in under third-party practice, an indemnification procedure.

Ellis v Union Pacific R.R. Co., 231 Kan. 182, 643 P.2d 158 aff'd on rehearing 232 Kan. 194, 653 P.2d 816 (1982), is another case of special significance to this issue. Ellis arose from an automobile-train collision wherein three

occupants of the automobile were killed and the driver was injured. Suit was filed against Union Pacific and the railroad brought in other parties for comparison of fault purposes. The plaintiffs never asserted a claim against these other parties. Union Pacific settled the entire claim and then sought contribution from the other parties it had brought into the action for comparison of fault purposes. In Ellis we held:

"The settling defendant cannot, however, create liability where there is none. One defendant in a comparative negligence action cannot settle a claim on behalf of a party against whom the plaintiff could not recover and then seek contribution from that party in proportion to the percentage of causal negligence attributable to that party. The plaintiff may choose to forego any recovery from other tortfeasors. In that event, a settling defendant has no claim to settle but his own." 231 Kan. at 192.

The corresponding syllabus in Ellis states:

"A named defendant in a comparative negligence action cannot settle a claim on behalf of a party or parties against whom the plaintiff has not sought recovery and then seek contribution from those parties in proportion to the percentage of causal negligence attributable to those parties." 231 Kan. 182, Syl. P3.

We conclude **Teepak** has no cause of action against Learned predicated upon contribution.

We turn now to whether **Teepak** has stated a cause of action against Learned based upon indemnification.

The starting point for the consideration of this question must be the rather controversial case of Kennedy v. City of Sawyer, 228 Kan. 439, 618 P.2d 788 (1980). Kennedy, in the posture the case came before us, was a dispute among various entities in the chain of distribution of a herbicide which caused injury to property of the plaintiffs. The plaintiffs sued the City and its employee who applied the herbicide. The City, through third-party practice procedure, sought indemnification from its supplier, and ultimately other parties in the chain of distribution were likewise brought in for indemnification purposes. The trial court dismissed the third-party petitions and an appeal was taken. While the appeal was pending the defendant City settled with the plaintiffs.

To aid in understanding the holding of Kennedy, all syllabi are reproduced as follows:

"Under the doctrine of strict liability the liability of a manufacturer and those in the chain of distribution extends to those individuals to whom injury

from a defective product may reasonably be foreseen, and then only in those situations where the product is being used for the purpose for which it was intended or for which it is reasonably foreseeable it may be used." Syl. P1.

"A trial court is given broad discretionary power under K.S.A. 60-215 to allow amendment of pleadings, and amendments should be permitted in the interest of justice." Syl. P2.

"The concept of joint and several liability between joint tortfeasors which previously existed in this state no longer applies in comparative negligence actions. The individual liability of each defendant for payment of damages is to be based on proportionate fault, and contribution among joint judgment debtors is no longer needed in such cases because separate individual judgments are to be rendered. Brown v. Keill, 224 Kan. 195, 580 P.2d 867 (1978)." Syl. P3.

"The doctrine of comparative fault or comparative causation should be and is applicable to both strict liability claims and to those claims based on implied warranty in products liability cases." Syl. P4.

"The statutory adoption of comparative negligence in Kansas has the effect of abrogating the concept of indemnification based on the dichotomy of

active/passive negligence as conceptualized in Russell v. Community Hospital Association, Inc., 199 Kan. 251, 428 P.2d 783 (1967)." Syl. P5.

"In actions where comparative negligence is in issue the court deals in percentages of causal responsibility, and distinctions between primary, secondary, active and passive negligence lose their previous identities. The nature of misconduct in such cases is to be expressed on the basis of degrees of comparative fault or causation, and the 'all or nothing' concepts are swept aside." Syl. P6.

"Courts have always taken the position that compromise and settlement of disputes between parties should be favored in the law in the absence of fraud or bad faith." Syl. P7.

"There is no reason in a comparative liability jurisdiction to hold a defendant, the proposed indemnitor, liable for damages in disproportion to his causal fault. Similarly, there is no reason to deny another defendant, the proposed indemnitee, a right of liability reduction when his fault, although minimal in terms of causal involvement, may nevertheless be characterized as 'active.'" Syl. P8.

237 Kan. 320; 699 P.2d 35

"We conclude that now is the proper time under the facts of this case to adopt a form of comparative implied indemnity between joint tortfeasors. When, as here, a settlement for plaintiffs' entire injuries or damages has been made by one tortfeasor during the pendency of a comparative negligence action and a release of all liability has been given by plaintiffs to all who may have contributed to said damages, apportionment of responsibility can then be pursued in the action among the tortfeasors." Syl. P9.

"In any action where apportionment of responsibility is sought by a settling tortfeasor, he or she will be required to establish the reasonableness of the amount of the settlement and that he or she had an actual legal liability for the injuries and damage which he or she should not be expected to successfully resist." Syl. P10.

The difficulties that have arisen from the Kennedy decision primarily involve some overly broad language utilized therein. Indemnification among those in the chain of distribution arises out of their contractual relationship with each other and Kennedy must be read in the context of its factual situation. The use of the term "joint tortfeasors" in Syl. P9 of Kennedy, an indemnity case, is unfortunate and has led to considerable confusion.

237 Kan. 320; 699 P.2d 35

In Ellis v. Union Pacific R.R. Co., 231 Kan. 182 (the basic facts of the case having been previously stated herein), this court stated:

"Union Pacific appeals from that dismissal, arguing that it has presserved a right to comparative implied indemnity as announced by this court in Kennedy v. City of Sawyer, 228 Kan. 439, 618 P.2d 788 (1980), and asserting that this case involves a question with respect to the procedure to be followed in pursuing a claim for comparative implied indemnity." 231 Kan. at 184.

The court in Ellis then made the significant comment:

"We digress briefly to comment upon the use of the term 'comparative implied indemnity.' In the Kennedy case, the third party petitions filed below sought indemnification against other parties in the manufacturer's chain of distribution and supply. The relief granted by this court, in light of the facts in the Kennedy case and the interplay of principles of comparative negligence, indemnity, and settlement, was termed an action for comparative implied indemnity. We recognize the term is not appropriate to the case at bar in which post-settlement contribution, rather than indemnity, is at issue. However, while proportional contribution is a more appropriate term in the instant case, we have no desire to belabor that distinction and cloud the issue before us which concerns procedural prerequisites to any claim for

post-settlement proportional payment, regardless of the nomenclature used. We leave to future opinions the development of appropriate terminology as well as examination of the scope of causes of action for post-settlement proportional payment." 231 Kan. at 184.

In the case before us, **Teepak** (like the railroad in Ellis) is seeking post-settlement contribution from a party against whom the injured party never sought recovery but whom it claims contributed to the injured party's damages. As we held in Ellis this constitutes an action seeking post-settlement contribution rather than indemnity and the holding of Kennedy relative to "comparative implied indemnity" is inapplicable. We conclude the trial court erred in holding **Teepak** had a valid cause of action against Learned predicated upon indemnification.

Before concluding, it should be noted that the result reached herein is wholly consistent with the philosophy, as expressed in Albertson v. Volkswagenwerk Aktiengesellschaft, 230 Kan. 368, 634 P.2d 1127 (1981), that comparative fault should be determined in one action. It is true Albertson spoke of determining the comparative fault of "all of the parties to the occurrence" in one action and, in the case before us, **Teepak** and Learned were not, strictly speaking, parties to the same occurrence. However, the initial injury caused by **Teepak** required medical attention which **Teepak** contends was done negligently and increased the injured party's damages. The injured party filed suit seeking recovery for all of his damages against the two corporations he contended were responsible therefor. The two corporations settled the entire claim and, under the rule of Ellis, previously cited, cannot attempt to impose liability where is none. A settling party in such circumstances has no claim to settle but his own.

We have previously held that fault based upon such diverse matters as a highway defect (Wilson v. Probst, 224 Kan. 459, 581 P.2d 380 [1978]), and an automobile design defect (Albertson v. Volkswagenwerk Aktiengesellschaft, 230 Kan. 368), must be determined in one action and compared with fault based on such matters as traffic code violations and automobile drivers.It would be wholly inconsistent therefore to permit multiple litigation under the facts of the case herein.

By virtue of the result reached herein on the first issue, the question of whether the action is barred by **Teepak's** failure to institute an action against Learned prior to the running of the statute of limitations relative to medical malpractice is rendered moot.

The orders of the district court denying defendant's motion to dismiss and for summary judgment are reversed and the case is remanded with directions to

237 Kan. 320; 699 P.2d 35

enter judgment in favor of the defendant.

LOCKETT, J., concurring.

Background

The Kansas Bar Association is a voluntary professional association of more than 4,300 Kansas attorneys in all specialities. KBA attorneys represent both plaintiffs and defendants in a wide variety of litigation, as well as traditional office practices.

KBA Legislative Policy is formulated by the Legislative Committee, a 35-member cross-section of the Bar who meet annually to study and make recommendations concerning potential or existing legislation. Final legislative policy is determined by the Executive Council of KBA, which meets approximately 10 times per year, and takes action on Legislative Committee recommendations.

Officers and Staff members of KBA are:

Jerry Goodell, Topeka, President, KBA
Jack Euler, Troy, President-Elect
Christel Marquardt, Topeka, Secretary
Dennis L. Gillen, Wichita, Treasurer
Richard Hite, Wichita, Chairman, Legislative Committee
E. Dudley Smith, Topeka, Vice-Chairman, Legislative Committee

Marcia Poell, Executive Director
Ron Smith, Legislative Counsel
Patti Slider, Public Relations
Dru Toebben, Continuing Legal Education
Art Thompson, IOLTA and Pro Bono Services