Approved March 31, 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 March 6, 19~~8~~6 in room 514-S of the Capitol.

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

Committee staff present: Mary Hack, Revisor of Statutes
Mike Heim, Legislative Research Department

Conferees appearing before the committee:

James Waugh, Kansas Judicial Council
Bob Abbott, Kansas Court of Appeals
Benjamin Wood, Office of State Appellate Defender
Ron Smith, Kansas Bar Association
Kathleen Sebelius, Kansas Trial Lawyers
Robert Martin, Beech Aircraft Corporation
David Litwin, Kansas Chamber of Commerce and Industry
John Reiff, The Coleman Company, Inc.
Larry Sanford, The Coleman Company, Inc.
Arden Bradshaw, Boeing Airplane Company

Senate Bill 476 - Increase in judges on court of appeals.

James Waugh, Kansas Judicial Council, testified the Kansas court system is among the best in the country. The serious problem of the backlog of cases in the Court of Appeals has been studied by a committee which recommended the expansion of the Court of Appeals. On behalf of the Appellate Process Advisory Committee and the Kansas Judicial Council, I ask you to favorably consider Senate Bill 476. A copy of his testimony is attached (See Attachment I).

Bob Abbott, Kansas Court of Appeals, testified he was present to answer any questions the committee might have. He stated a year ago three new judges were requested. You recognized our needs and were kind enough to authorize two positions; unfortunately, the governor vetoed that bill. We brought in a large number of outside judges, and we are in worse shape today than we were a year ago. He said the Supreme Court has presently transferred 100 cases from our docket to their docket. If you give us three judges, we are still going to bring in more judges. It is unreasonable to ask seven judges and staff to carry the present load they are carrying.

Benjamin Wood, Office of State Appellate Defender, expressed their interest and the state's interest in terms of criminal appeals in having additional judges in the Court of Appeals. He reported an increase of 6.6 percent in serious crimes in the state, and an additional number of appeals will be filed from this. They are seeing in their office a number of cases of child molestation cases and will see appeals from these. He said people are seeing the parole board while the case is still pending in the court. It is an unfortunate situation and one that should be avoided in this state. He stated he seconds Judge Abbott's statement that it is very important to have personnel to dispense justice.

Senate Bill 476 continued

Ron Smith, Kansas Bar Association, testified the association looks at this issue as very important. We think this one is just as important as your legal issues you look at.

Katthleen Sebelius, Kansas Trial Lawyers, testified they think it is important that the committee recommend three additional judges into the Court of Appeals. They support the bill.

During committee discussion, James Waugh pointed out they have had health and morale problems in the court.

Senate Bill 668 - Product liability, prohibiting certain evidence.

Senator Bob Talkington encouraged the committee to support a bill which would prohibit the admission into evidence, during court proceedings, of information related to normal advancements or changes in knowledge or techniques of production, design theory, and packaging of products. A copy of his testimony is attached (See Attachment II).

Robert Martin, Beech Aircraft Corporation, stated he has been a practicing lawyer for 37 years, and his firm represents Beech Aircraft Corporation, and he is director of the company. He has had as extensive experience in product liability problems as perhaps any lawyers. He stated Cessna agrees with the position that he is going to take today. This industry was hit harder by product liability because aircraft accidents are abhorrent. People who fly are usually business people. Aviation insurance the past ten years, back to 1950, initially was the same decline. He said products are improving. Air safety is improving and weather information is improving and that is why the decline. The three large aircraft companies are Beech, Cessna and Piper; Beech and Cessna are the largest of the three. The dollar volume at present accounts to over 15,000 jobs. In 1985 Beech and Cessna together paid over sixty million dollars for product liability insurance coverage and uninsured losses that they are going to have to pay. Mr. Martin said if you take premiums paid by Beech and Cessna and add the other manufacturers, the total industry last year paid 180 million dollars for product liability losses, and we can't sustain that. In 1979 it was predicted that these costs were going to get out of hand and destroy this industry and it is. Beech has been unable to buy insurance full coverage and any of the layers above that and including insurance above 100 million dollars. United Stated insurers have virtually withdrawn from product liability insurance. He stated a catastrophic accident could wipe out the company. United States is not going to be able to compete with foreign manufacturers. Less than 50 percent of the product is made here.

David Litwin, Kansas Chamber of Commerce and Industry, appeared in support of the bill. A copy of his testimony is attached (See Attachment III). He then introduced John Reiff, The Coleman Company, Inc.

Mr. Reiff testified in support of the bill. He stated because of the change in self insurance amounts, and more importantly, the change to claims made forms, we have about 5 percent of the coverage we had in 1985 for a premium increase of 125 percent. A copy of his testimony is attached (See Attachment IV).

Larry Sanford, The Coleman Company, Inc., testified it is not only fundamentally unfair to allow a manufacturer's efforts in improving the safety of its products to be used against it in trials involving earlier products, it is also extremely bad from a public policy standpoint as it discourages safety advances. A copy of his testimony is attached (See Attachment V). Committee discussion with him followed.

CONTINUATION SHEET

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY,

room 514-S, Statehouse, at 10:00 a.m./~~p.m.~~ on March 6, 1986

Senate Bill 668 continued

Kathleen Sebelius, Kansas Trial Lawyers, was recognized to introduce Arden Bradshaw, Boeing Airplane Company.

Mr. Bradshaw testified in opposition to the bill. He testified in many ways he agrees with speakers before him regarding product liability we are experiencing. He said he flies a Cessna and he knows what the problems are. He discussed evidentiary rule. He said he can show the product is defective,and this evidence is not admissible. He pointed out there is a difference between the federal rule and the Kansas Statute (See Attachments VI). He said he didn't think it is fair to make judgment about an issue based on whether average industry is losing money on aircraft. Mr. Bradshaw testified safety standards in general have changed, and production costs are up. This is a very unfair piece of legislation. During committee discussion, a committee member inquired under this rule, you can't introduce remedial measures to show negligence? Do you think remedial measures should be allowed to show negligence? Mr. Brashaw replied, no, I think the evidence should be admissible. Discussion was held concerning feasible exceptions. Copies of the federal rule and the Kansas statute are attached (See Attachments VI).

The meeting adjourned.

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

GUEST LIST

COMMITTEE: SENATE JUDICIARY COMMITTEE DATE: 3-6-86

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
CHARLES BELT	WICHITA	CHAMB. OF COMMERCE
Kelli Roesch	Lawrence	KTLA
Bob Arbuthnot	Topeka	KTLA
Randy Hearrell	TOPEKA	Ks Jud Council
William Gaunt	↓	↓
James Allen	TOPEKA	Ks JUDICIAL COUNCIL
Bob Abbott	Topeka	Ks Court of Appeals
Jill Hallmeath	—	Senator Burke
Marjorie Van Buren	"	OJA
John Reiff	Wichita	Coleman
Larry Sanford	Wichita	Coleman
ROBERT MARTIN	WICHITA	BEECH AIRCRAFT
Benjamin C. Wood	Topeka	State Appellate Defender (INDIGENT DEF. SERVICES)
Kelly Harlan	Topeka	KCCI
Thomas Thom	Lawrence	State Senate
[illegible]	Topeka	KCCI
Blake Post	434 S. Topeka	KTLA
Arden Bradshaw	Wichita	KTLA
Lori Callahan	Topeka	Am. Ins. Assn
Ron Nile	Topeka	Bd of Tr. Def
Janet Stubbs	"	KBAK
Bud Corwin	TOPEKA	KCCI
Larry Hanna	Leawood Ks	

3-6-86

KANSAS JUDICIAL COUNCIL
KANSAS JUDICIAL CENTER
301 West Tenth Street
Topeka, Kansas 66612-1507

TESTIMONY ON SENATE BILL 476

My name is James D. Waugh of Topeka. I am a practicing lawyer, secretary of the Kansas Judicial Council and I served as chairman of the Judicial Council Appellate Process Advisory Committee which has studied and reported on the caseload and backlog of cases of the Kansas Court of Appeals.

In 1983, Governor Carlin requested the Kansas Judicial Council to undertake a study of the case processing methods and needs of the Court of Appeals. The Committee was specifically requested to study alternatives that would reduce the number of filed and pending cases.

The other members of the advisory committee were:

Bill Bunten, Topeka, businessman and member of the House of Representatives;

Jerry G. Elliott, Wichita, practicing lawyer;

Robert G. Frey, Liberal, practicing lawyer and member of the Kansas Senate;

Jerome Harman, retired chief judge of the Kansas Court of Appeals;

Patrick J. Hurley, Topeka lawyer, then Secretary of Administration;

Phillip H. Lewis, Topeka, practicing lawyer;

Larry McClain, Olathe, then assistant district attorney for Johnson County (now judge of the district court);

Harry G. Miller, Kansas City, retired administrative judge of the 29th Judicial District;

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Robert H. Miller, Topeka, justice of the Kansas Supreme Court;

Jerry Palmer, Topeka, practicing lawyer, and

Robert V. Talkington, Iola, practicing lawyer and President of the Kansas Senate.

I do not intend to go into detail about the report or the positions the Committee took on various issues, I will leave the details and the answering of specific questions to Chief Judge Abbott of the Kansas Court of Appeals.

The Kansas court system is among the best in the country. The most serious problem that needs to be solved is the backlog of cases in the Court of Appeals. The problem has been studied by an intelligent and diverse Committee which recommended expansion of the Court of Appeals. The Judicial Council reviewed and approved the report on one occasion. The proposal of the Judicial Council to expand the Court of Appeals passed both Houses of the Legislature.

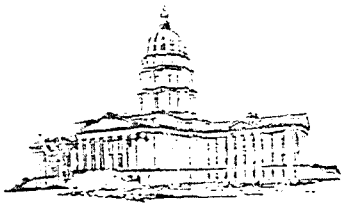
On behalf of the Appellate Process Advisory Committee and the Kansas Judicial Council I ask you to favorably consider Senate Bill 476.

3-6-86

KANSAS SENATE

ROBERT V. TALKINGTON
SENATE PRESIDENT

P.O. BOX 725
IOLA, KANSAS 66749-0725



CHAIRMAN:
LEGISLATIVE COORDINATING COUNCIL

CHAIRMAN:
ORGANIZATION, CALENDAR AND RULES

MEMBER:
INTERSTATE COOPERATION
JUDICIARY
WAYS AND MEANS

OFFICE OF THE PRESIDENT

STATE CAPITOL
TOPEKA, KANSAS 66612-1565
913-296-2419

MARCH 6, 1986

STATEMENT OF SUPPORT - SB 668 - PRODUCT LIABILITY

MR. CHAIRMAN, MEMBERS OF THE COMMITTEE, I RISE TO SUPPORT SB 668 CONCERNING PRODUCT LIABILITY TORT REFORM.

IN A YEAR IN WHICH MOST LEGISLATORS, THE GOVERNOR, EDITORIAL WRITERS, EDUCATORS, AND THE KANSAS PUBLIC ARE CALLING FOR THE STATE TO ADDRESS ECONOMIC DEVELOPMENT ISSUES, A MAJOR AREA WHICH HAS RECEIVED LITTLE ATTENTION CONCERNS PRODUCT LIABILITY LEGISLATION. WE HAVE THE OPPORTUNITY TO CONTINUE PROTECTING THE PUBLIC FROM POTENTIALLY HAZARDOUS PRODUCTS WHILE PROVIDING INCENTIVES TO BUSINESSES TO LOCATE AND EXPAND IN KANSAS.

I ENCOURAGE THE COMMITTEE TO SUPPORT A BILL WHICH WOULD PROHIBIT THE ADMISSION INTO EVIDENCE, DURING COURT PROCEEDINGS, OF INFORMATION RELATED TO NORMAL ADVANCEMENTS OR CHANGES IN KNOWLEDGE OR TECHNIQUES OF PRODUCTION, DESIGN THEORY, AND PACKAGING OF PRODUCTS.

NORMAL PRODUCT CHANGES ARE A RESULT OF THE GROWTH OF

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KNOWLEDGE AND NOT A DESIRE TO "COVER-UP" DESIGN INADEQUACIES. PASSAGE OF THIS MEASURE WOULD NOT MEAN VICTIMS OF POORLY DESIGNED PRODUCTS WOULD BE UNABLE TO SEEK AND ACHIEVE COMPENSATION FOR INJURIES SUSTAINED FROM PROPER USE OF SUCH PRODUCTS. WHAT SB 668 WOULD DO IS PREVENT THE MERE CHANGE OF A PRODUCT OR PRODUCT PACKAGE BEING CONSTRUED IN COURT AS AN IMPLICIT ACKNOWLEDGEMENT THAT THE "ORIGINAL" DESIGN WAS DEFECTIVE.

I URGE THE COMMITTEE TO SUPPORT THIS BILL TO PROVIDE AN ADDITIONAL ELEMENT OF FAIRNESS IN OUR JUDICIAL PROCESS AND ENCOURAGE ECONOMIC DEVELOPMENT AND GROWTH IN KANSAS.

THANK YOU MR. CHAIRMAN, I WILL RESPOND TO QUESTIONS.

3-6-86

LEGISLATIVE TESTIMONY

Kansas Chamber of Commerce and Industry

500 First National Tower One Townsite Plaza Topeka, KS 66603-3460 (913) 357-6321

A consolidation of the Kansas State Chamber of Commerce, Associated Industries of Kansas, Kansas Retail Council

SB 668

March 6, 1986

KANSAS CHAMBER OF COMMERCE AND INDUSTRY

Testimony Before the

Senate Judiciary Committee

by

David S. Litwin

Mr. Chairman, members of the committee. I am David Litwin, representing the Kansas Chamber of Commerce and Industry. We appreciate the opportunity to testify today in support of SB 668.

The Kansas Chamber of Commerce and Industry (KCCI) is a statewide organization dedicated to the promotion of economic growth and job creation within Kansas, and to the protection and support of the private competitive enterprise system.

KCCI is comprised of more than 3,000 businesses which includes 200 local and regional chambers of commerce and trade organizations which represent over 161,000 business men and women. The organization represents both large and small employers in Kansas, with 55% of KCCI's members having less than 25 employees, and 86% having less than 100 employees. KCCI receives no government funding.

The KCCI Board of Directors establishes policies through the work of hundreds of the organization's members who make up its various committees. These policies are the guiding principles of the organization and translate into views such as those expressed here.

This committee is well aware of the crisis that is brewing in our liability insurance industry in terms of cost and availability of coverage in many lines of

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insurance, and in our civil justice system. Defense costs in tort cases have been spiraling upward for quite a few years, as the courts have fashioned new bases for liability and stripped away historic defenses to many kinds of claims.

One of the first areas to be severely impacted was that of product liability. Developed for the salutary purpose of compensating people injured by faulty products, the "spreading of the risk" concept has tended to be taken to extremes by the courts with insufficient thought given to the ability of manufacturers and insurers to bear the costs. Compounding the problem has been the simultaneous tendency to give large awards for punitive damages in many products cases.

KCCI responded by adopting a policy urging certain reforms. First adopted in 1976, it reads:

> "KCCI recognizes the concern of all business and industry in the total area of product liability and product liability insurance coverage. The Chamber strongly supports state and federal laws and amendments thereto that will bring about a more logical approach to strict liability in tort through such measures as: a fair statute of limitations on the filing of claims; 'state of the art' as a defense; relief from responsibility in cases of injury resulting from alteration and modification; and, other legislative features to insure availability of insurance and protection against the current trend of excessive liability litigation."

In 1981 this legislature addressed the problem and passed the Kansas Product Liability Act, which created a period of repose against stale claims arising from products that were put into the stream of commerce many years earlier. Another section of this enactment, KSA 60-3304, provides, in substance, that where the injury-causing aspect of a product was in compliance with legislative and administrative standards regarding design, performance, and warnings or instructions at the time of manufacture, the product shall not be deemed defective by reason of failure of design, performance or warnings. This is a limited version of the so-called "state-of-the-art" defense, which holds that it is simply grossly unfair, for "risk-spreading" or any other purpose, to hold manufacturers accountable for failures to meet regulatory standards that were not in effect at the time of manufacture. It also recognizes that to hold manufacturers or others liable for failure to anticipate future advances

destroys the predictability that is necessary for a viable insurance system.

SB 668 would complement this provision and essentially simply extend it to apply to advances in knowledge or theory, or in applications such as designing or manufacturing, that are not reflected in regulations of any governmental body by excluding evidence of such later advances. Again, the premise is one of fundamental fairness, that it simply violates basic ideas of equity to hold a manufacturer or supplier responsible for not having been brilliant enough to anticipate technical advances that had not been made at the time of manufacture, and makes insurance almost impossible to write.

Some conferees may tell this committee that it would be wasting its time since only a federal response can completely resolve the product liability dilemma due to the fact that products circulate freely in commerce throughout the United States, and that a Kansas enactment cannot be of any help to a Kansas manufacturer or wholesaler if a claim arises elsewhere. I don't quarrel with that, but there is no guarantee that federal relief is forthcoming. Moreover, progressive state legislation might well set an example for Congress to follow, and by passing appropriate reform measures the legislature will have discharged its responsibility by doing all it can to alleviate the problem. In any event, reforms would govern products cases in our state courts.

We urge your approval of this bill. If there are any questions, I will be happy to try to answer them.

3-6-86

The COLEMAN COMPANY, INC.
General Offices
P.O. BOX 1762
WICHITA, KANSAS 67201
AREA CODE 316 261-3211
250 N. ST. FRANCIS
WICHITA, KANSAS 67202

JOHN M. REIFF, Senior Vice President - Law & Personnel, 261-3230
LARRY E. SANFORD, Director - Legal Department, 261-3526
HAROLD J. PFOUNTZ, Corporate Attorney & Assistant Secretary, 261-3197
KENNETH R. BELL, Corporate Attorney, 261-3522

March 5, 1986

Senate Judiciary Committee
State Office Building
Topeka, Kansas

Let me briefly add to what I am sure is a great number of liability cost increases that have been related to you.

Coleman has been essentially self insured since 1977 with umbrella excess insurance protection against catastrophic loss.

During 1985, we self insured for $1 million per accident and $3 million in the aggregate for the year. There is $50 million in umbrella insurance over those self insured amounts. Our 1985 premium was $668,000.

For 1986, our self insured levels are $3 million per accident and $6 million in the aggregate. In addition, we are co-insuring significant pieces of the $50 million umbrella. All of the policies have been changed to claims made forms. The premium is $1.5 million. Because of the change in self insurance amounts, and, more importantly, the change to claims made forms, we have about 5% of the coverage we had in 1985 for a premium increase of 125%.

We urge the adoption of S.B. 668.

John Reiff
Senior Vice President - Law & Personnel

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Senate Committee on Judiciary
State Capital Building
Topeka, Kansas 66612

RE: Senate Bill No. 668

Mr. Chairman, Members of the Committee, I am Larry Sanford, and I am the Director of the Legal Department at The Coleman Company, Inc.

The subject of Products Liability is certainly not a new one to this Legislature. I know there are those who hoped that when the Legislature passed the Kansas Products Liability Act in 1981 that whatever problems existed had been resolved and that this was not a matter which would require further Legislative consideration. Unfortunately, the problems in the area of products liability continue, not only nationally, but also in Kansas. Kansas companies face today, as they did in 1981, not only increasingly heavy expenses for products liability insurance, but also in many instances uninsured exposures to extremely large liability awards because of fundamentally unfair aspects of product liability law.

Senate Bill No. 668 offers a solution in two areas in which product liability law seems especially unfair. Section 1(a) would require that in a products liability case the product involved would have to be judged based on the knowledge and general practices existing at the time the product was manufactured and sold and not on knowledge or techniques which were not practically available to the manufacturer until some later time. Section 1 (b) covers a slightly different but similar area of concern relating to changes a manufacturer might make in its subsequent products. It would again require a product be judged based on the facts which existed at the time it was designed and sold instead of allowing evidence that the manufacturer subsequently changed the design.

The issues covered by S.B. 668 are really very simple. The first is whether or not a manufacturer should be liable when the technology or other information relative to the design of a product changes. When this kind of evidence is admissible before a jury it is particularly prejudicial to manufacturers of long lasting products. It is inevitable that as the information and knowledge available in our society increases, processes and practices change and hopefully products are improved. That is a beneficial, socially desirable effect, and one that should be encouraged. The problem with the law as it currently exists is that evidence of these changes ends up being used to impose liability on products that were designed and manufactured many years earlier. There isn't anyone in this room who has not seen the changes in packaging, labeling, and safety warnings which have been incorporated on products sold in this country. These changes are good, but it is patently unfair to say that a product sold in 1950 is defective because it does not have the same warnings, instructions and labeling that would be incorporated in that product if it were built today.

Moving on to the second part of Senate Bill No. 668, which deals with subsequent conduct, we are once again presented with an issue of what is fair and what is good for our society. I'm certain that someone will tell this committee that Section 1(b) of S. B. 668 is not needed because we already have a statute on subsequent remedial conduct. There is such a statute, it is K.S.A. 60-451. The problem with it is that it does not accomplish its intended purpose. The reason for keeping evidence of remedial conduct out of trials is to be certain that product designers and product sellers are uninhibited in

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making safety advances in products and that this can be done in an environment free of concern about the effect of product changes on liability exposures for products already manufactured and sold. Unfortunately, the Kansas statute covering remedial conduct and those of a similar nature in other states have been "excepted" virtually out of existence and are ineffectual for their intended purpose. The argument a defendant in a products liability case always faces is that "we are not offering this evidence to prove negligence or culpable conduct, it is being offered to show "that the change was feasible" or that the defendant "had the ability to make the change" or some other similar item.

I am never certain how helpful it is to this Committee to hear the so called "horror stories" which have frequently been a part of testimony in the products liability area. I can tell you that before I joined Coleman I worked as a corporate attorney for Hesston Corporation (also a Kansas company) and that during that time we tried two cases in Kansas in which a change in product warning became a key issue in the trial. The warning in question was a "graphic" type warning showing a picture of improper activity with a circle with a slash imposed over the top of it. Hesston's use of that warning represented the first time such a warning had been used for any application in the farm equipment business. The two trials I mentioned both involved individuals who had been injured in items of equipment built prior to the implementation of the new decal. In both instances Hesston vigorously opposed the introduction of the subsequent warning into evidence. Both times it was unsuccessful and in both instances the jury returned a substantial verdict against the company. There were of course other factors involved and I am not going to tell you that the introduction of the new warning was solely responsible for the verdict returned. I can tell you it certainly did not help.

It is not only fundamentally unfair to allow a manufacturer's efforts in improving the safety of its products to be used against it in trials involving earlier products, it is also extremely bad from a public policy standpoint as it discourages safety advances. All of us are consumers of products. Isn't it better to have the designers of those products looking for way to improve them without being worried about the effect those improvements will have on some trial resulting from an accident involving an earlier designed product.

I appreciate your time, and thank you for the opportunity to appear before this committee to again express my concern about the subject of Products Liability. We would appreciate your support for Senate Bill No. 668 and the concepts incorporated therein. I would be glad to respond to any questions. I would also suggest that the committee consider whether this Bill should be modified to incorporate it into the Kansas Product Liability Act to take advantage of the definitions provided in that Act.

Larry E. Sanford
Director
Legal Department
The Coleman Company, Inc.

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4. Admission of evidence of deceased's good character during state's case in chief and before attack thereon error; new trial ordered. State v. Bradley, 223 K. 710, 712, 576 P.2d 647.

60-450. Opinion and specific instances of behavior to prove habit or custom. Testimony in the form of opinion is admissible on the issue of habit or custom. Evidence of specific instances of behavior is admissible to prove habit or custom if the evidence is of a sufficient number of such instances to warrant a finding of such habit or custom.

History: L. 1963, ch. 303, 60-450; Jan. 1, 1964.

Research and Practice Aids:

Customs and Usages⇨19(2); Evidence⇨482.
C.J.S. Customs and Usages § 33; Evidence § 483.
Gard's Kansas C.C.P. 60-450.
Vernon's Kansas C.C.P.—Fowks, Harvey & Thomas, 60-450.

Law Review and Bar Journal References:

Discussing enforcement of antidiscrimination laws, Richard B. Dyson and Elizabeth D. Dyson, 14 K.L.R. 29 (1965).
"Other Vices, Other Crimes: An Evidentiary Dilemma," M. C. Slough, 20 K.L.R. 411, 413 (1972).
"The Entrapment Defense in Drug Cases," Richard H. Seaton, 41 J.B.A.K. 217, 239 (1972).

CASE ANNOTATIONS

1. Individual practices of two persons not sufficient to establish a standard of general practice or usage. Trimble, Administrator v. Coleman Co., Inc., 200 K. 350, 354, 437 P.2d 219.
2. Evidence of specific instances of behavior admissible to prove habit or custom if number of instances is sufficient to warrant such finding. Williams v. Union Pacific Railroad Co., 204 K. 772, 780, 465 P.2d 975.
3. Evidence of habit or custom is relevant to behavior on specific occasion. Frase v. Henry, 444 F.2d 1228, 1232.
4. Admission of evidence of deceased's good character during state's case in chief and before attack thereon error; new trial ordered. State v. Bradley, 223 K. 710, 712, 576 P.2d 647.

60-451. Subsequent remedial conduct. When after the occurrence of an event remedial or precautionary measures are taken, which, if taken previously would have tended to make the event less likely to occur, evidence of such subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event.

History: L. 1963, ch. 303, 60-451; Jan. 1, 1964.

Research and Practice Aids:

Negligence⇨131.
C.J.S. Negligence § 225.
Gard's Kansas C.C.P. 60-451.
Vernon's Kansas C.C.P.—Fowks, Harvey & Thomas, 60-451.

Law Review and Bar Journal References:

Note on landlord-tenant implied warranty of habitability, 22 K.L.R. 666, 678 (1974).
Admissibility of Subsequent Design Changes and Recall Letters," Dwight Corrin, 4 J.K.T.L.A. No. 6, 24 (1981).

CASE ANNOTATIONS

1. Mentioned; sustained objections to plaintiff's interrogatories not prejudicial. Powell v. City of Haysville, 203 K. 543, 550, 551, 455 P.2d 528.
2. Evidence of subsequent remedial repair prohibited if offered to prove negligence or culpable conduct. Huxol v. Nickell, 205 K. 718, 722, 723, 473 P.2d 90.
3. Cited; defendant urged error by trial court due to remarks concerning remedial conduct; held, no error. Hampton v. State Highway Commission, 209 K. 565, 581, 498 P.2d 236.
4. Mentioned; defendant's subsequent remedial conduct not admissible to prove negligence in connection with prior event. Thierer v. Board of County Commissioners, 212 K. 571, 575, 512 P.2d 343.
5. Cited; court did not err in failing to instruct jury on remedial measures. Kleibrink v. Missouri-Kansas-Texas Railroad Co., 224 K. 437, 443, 581 P.2d 372.
6. Trial court did not commit error by allowing evidence of when traffic signal equipment was ordered and when installed, was admissible to show control. Schmeck v. City of Shawnee, 232 K. 11, 29, 33, 651 P.2d 585 (1982).
7. Not applicable in products liability cases; evidence of modifications admissible to show feasibility of safer design. Siruta v. Hesston Corp., 232 K. 654, 666, 668, 687, 688, 659 P.2d 799 (1983).

60-452. Offer to compromise and the like, not evidence of liability. Evidence that a person has, in compromise or from humanitarian motives furnished or offered or promised to furnish money, or any other thing, act or service to another who has sustained or claims to have sustained loss or damage, is inadmissible to prove his or her liability for the loss or damage of any part of it. This section shall not affect the admissibility of evidence (a) of partial satisfaction of an asserted claim on demand without questioning its validity, as tending to prove the validity of the claim, or (b) of a debtor's payment or promise to pay all or a part of his or her pre-existing debt as tending to prove the creation of a new duty on his or her part, or a revival of his or her pre-existing duty.

History: L. 1963, ch. 303, 60-452; Jan. 1, 1964.

Research and Practice Aids:

Evidence⇨212 et seq.
Hatcher's Digest, Evidence § 258.
C.J.S. Evidence § 285 et seq.
Gard's Kansas C.C.P. 60-452.
Vernon's Kansas C.C.P.—Fowks, Harvey & Thomas, 60-452.

Law Review and Bar Journal References:

"Evidence of Similar Incidents and Settlements on

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Bradshaw

tionably the uniformity of one's response to habit is far greater than the consistency with which one's conduct conforms to character or disposition. Even though character comes in only exceptionally as evidence of an act, surely any sensible man in investigating whether X did a particular act would be greatly helped in his inquiry by evidence as to whether he was in the habit of doing it."

When disagreement has appeared, its focus has been upon the question what constitutes habit, and the reason for this is readily apparent. The extent to which instances must be multiplied and consistency of behavior maintained in order to rise to the status of habit inevitably gives rise to differences of opinion. Lewan, Rationale of Habit Evidence, 16 Syracuse L.Rev. 39, 49 (1964). While adequacy of sampling and uniformity of response are key factors, precise standards for measuring their sufficiency for evidence purposes cannot be formulated.

The rule is consistent with prevailing views. Much evidence is excluded simply because of failure to achieve the status of habit. Thus, evidence of intemperate "habits" is generally excluded when offered as proof of drunkenness in accident cases, Annot., 46 A.L.R.2d 103, and evidence of other assaults is inadmissible to prove the instant one in a civil assault action, Annot., 66 A.L.R.2d 806. In *Levin* v. *United States*, 119 U.S.App.D.C. 156, 338 F.2d 265 (1964), testimony as to the religious "habits" of the accused, offered as tending to prove that he was at home observing the Sabbath rather than out obtaining money through larceny by trick, was held properly excluded;

"It seems apparent to us that an individual's religious practices would not be the type of activities which would lend themselves to the characterization of 'invariable regularity.' [1 Wigmore 520.] Certainly the very volitional basis of the activity raises serious questions as to its invariable nature, and hence its probative value." *Id.* at 272.

These rulings are not inconsistent with the trend towards admitting evidence of business transactions between one of the parties and a third person as tending to prove that he made the same bargain or proposal in the litigated situation. Slough, Relevancy Unraveled, 6 Kan.L.Rev. 38–41 (1957). Nor are they inconsistent with such cases as *Whittemore* v. *Lockheed Aircraft Corp.*, 65 Cal.App.2d 737, 151 P.2d 670 (1944), upholding the admission of evidence that plaintiff's intestate had on four other occasions flown planes from defendant's factory for delivery to his employer airline, offered to prove that he was piloting rather than a guest on a plane which crashed and killed all on board while en route for delivery.

A considerable body of authority has required that evidence of the routine practice of an organization be corroborated as a condition precedent to its admission in evidence. Slough, Relevancy Unraveled, 5 Kan.L.Rev. 404, 449 (1957). This requirement is specifically rejected by the rule on the ground that it relates to the sufficiency of the evidence rather than admissibility. A similar position is taken in New Jersey Rule 49. The rule also rejects the requirement of the absence of eyewitnesses, sometimes encountered with respect to admitting habit evidence to prove freedom from contributory negligence in wrongful death cases. For comment critical of the requirements see Frank, J., in *Cereste* v. *New York, N.H. & H.R. Co.*, 231 F.2d 50 (2d Cir. 1956), cert. denied 351 U.S. 951, 76 S.Ct. 848, 100 L.Ed. 1475, 10 Vand.L.Rev. 447 (1957); McCormick § 162, p. 342. The omission of the requirement from the California Evidence Code is said to have effected its elimination. Comment, Cal.Ev.Code § 1105.

Rule 407. Subsequent Remedial Measures

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

The rule incorporates conventional doctrine which excludes evidence of subsequent remedial measures as proof of an admission of fault. The rule rests on two grounds. (1) The conduct is not in fact an admission, since the conduct is equally consistent with injury by mere accident or through contributory negligence. Or, as Baron Bramwell put it, the rule rejects the notion that "because the world gets wiser as it gets older, therefore it was foolish before." *Hart* v. *Lancashire & Yorkshire Ry. Co.*, 21 L.T.R.N.S. 261, 263 (1869). Under a liberal theory of relevancy this ground alone would not support exclusion as the inference is still a possible one. (2) The other, and more impressive, ground for exclusion rests on a social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety. The courts have applied this principle to exclude evidence of subsequent repairs, installation of safety devices, changes in company rules, and discharge of employees, and the language of the present rules is broad enough to encompass all of them. See Falknor, Extrinsic Policies Affecting Admissibility, 10 Rutgers L.Rev. 574, 590 (1956).

The second sentence of the rule directs attention to the limitations of the rule. Exclusion is called for only when the evidence of subsequent remedial measures is offered as proof of negligence or culpable conduct. In effect it rejects the suggested inference that fault is admitted. Other purposes are, however, allowable, including ownership or control, existence of duty, and feasibility of precautionary measures, if controverted, and impeachment. 2 Wigmore § 283; Annot., 64 A.L.R.2d 1296. Two recent federal cases are illustrative. *Boeing Airplane Co.* v. *Brown*, 291 F.2d 310 (9th Cir. 1961), an action against an airplane manufacturer for using an allegedly defectively designed alternator shaft which caused a plane crash, upheld the admission of evidence of subsequent design modification for the purpose of showing that design changes and safeguards were feasible. And *Powers* v. *J. B. Michael & Co.*, 329 F.2d 674 (6th Cir. 1964), an action against a road contractor for negligent failure to put out warning signs, sustained the admission of evidence that defendant subsequently put out signs to show that the

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