

Approved February 18, 1987  
Date

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY

The meeting was called to order by Representative Robert S. Wunsch at  
Chairperson

3:30 ~~xxxx~~ p.m. on February 4, 1987 in room 313-S of the Capitol.

All members were present except: Representatives Duncan, Peterson and Snowbarger who were excused.

Committee staff present:

Jerry Donaldson, Legislative Research Department  
Mike Heim, Legislative Research Department  
Mary Ann Torrence, Revisor of Statutes Office  
Mary Jane Holt, Secretary

Conferees appearing before the committee:

Ron Smith, Kansas Bar Association  
Amy Lemley, Attorney, Wichita  
Bill Sneed, Kansas Association of Defense Counsel  
Arden J. Bradshaw, Attorney, Kansas Trial Lawyers Association, Wichita

Hearing on H.B. 2081-Evidence of spouse's remarriage in wrongful death actions

Ron Smith testified in support of H.B. 2081. He stated the Kansas Bar Association has supported allowing evidence of the remarriage of a surviving spouse to be allowed to go to the jury in wrongful death cases for over four years. The Bar Association believes this bill is appropriate tort reform, (see Attachment I).

Amy Lemley testified in support of H.B. 2081. She urged the Committee to view with suspicion the argument that evidence of remarriage is a form of sex discrimination. She also stated juries want to do what is right and they should be given all of the information they need to do their job.

Bill Sneed testified in support of H.B. 2081. He stated evidence arising from remarriage, which reflects upon the party's present situation, financial and otherwise, should not be withheld from the jury, (see Attachment II).

Arden J. Bradshaw stated he was appearing in opposition to H.B. 2081. He informed the Committee the majority of American jurisdictions have the evidence of remarriage of a surviving spouse in a wrongful death action to be inadmissible. He suggest, if the bill is recommended for passage, making all of the circumstances of remarriage admissible to prove either diminution or enhancement of damages, (see Attachment III).

Representative O'Neal announced a subcommittee meeting on H.B. 2024 will be held Thursday, at 10:15 a.m. in room 175-W.

The Committee meeting was adjourned by Vice Chairman Representative Mike O'Neal at 4:40 p.m.

The next meeting will be Thursday, February 5, 1987, at 3:30 p.m. in room 519-S.





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February 4, 1987  
HB 2081  
Evidence of Remarriage  
in Wrongful Death  
Actions

Mr. Chairman. Members of the House Judiciary Committee. I am  
Ron Smith, KBA Legislative Counsel.

For over four years, KBA has supported allowing  
evidence of the remarriage of a surviving spouse to  
be allowed to go to the jury in wrongful death  
cases. We support HB 2081.

#### History of Evidence of Remarriage in Wrongful Death Actions

Wrongful death actions did not exist at "common law." They are  
creatures of the respective fifty legislatures of the United States.  
[KSA 60-1901 et seq.] They occur when a person dies because of someone  
else's negligent act. The heirs of the deceased bring a combined ac-  
tion for loss of the deceased, and any survival action the deceased has  
against the injured party is merged with the action by the heirs.  
While this cause of action by the heirs is universally allowed, each  
state legislature -- because it created the cause of action in the  
first place -- has the right to regulate the rules under which evidence  
is offered, and recovery is made in such actions.

The majority rule in this country is a surviving  
spouse's remarriage, whether ceremonial or common  
law, is not a factor for the jury to consider in  
assessing damages of the surviving spouse.<sup>1/</sup>  
This remarriage rule was based on one branch of the  
collateral source doctrine.<sup>2/</sup>

Attachment I  
House Judiciary 2/4/87

While true we are asking you to adopt a minority rule through statute, KBA believes there is good justification. The collateral source rule is used primarily to insure the wrongdoer causing damages to the plaintiff does not benefit from the plaintiff's foresight to insure himself or herself against loss from medical care, disability, etc. The theory underlying remarriage evidence on the foundation it is a collateral source-type rule, however, is different.<sup>3</sup>

In 1984, the Legislature was asked to increase the pain and suffering limits allowed to heirs in wrongful death actions. KBA supported the increase, but only if the law also corrected the decision in Pape by allowing evidence of remarriage to go to the jury. The increase was adopted, but not the evidence of remarriage provision.

#### Proof of Pain & Suffering in Wrongful Death Cases

Damages in Wrongful Death actions are fixed at the time of death. Pain and suffering (nonpecuniary loss) is allowed, and is accomplished in court by presenting evidence of the disruption of the family structure and the resulting mental condition of the heirs. Under current law, however, the defendant cannot rebut such evidence of disruption by showing remarriage has occurred.

At trial in the 1982 lead case, Pape v. Kansas Power and Light Company,<sup>4</sup> the surviving spouse, Kathleen Pape, testified her deceased husband was a good husband and father, which raised the inference of disruption of family structure. However, she had remarried within 7 months of her husband's death and was married at time of tri-

al. Once this disruption was put into evidence, logic indicates the defendant ought to be able to show Kathleen Pape took action to make that disruption short-lived. In other words, how does the surviving spouse in wrongful death cases mitigate the pain and suffering damage the defendant has caused? They choose to remarry. The Pape jury was not allowed to hear evidence of the remarriage, however.

The jury in the Pape case was left without relevant evidence. They could infer she was left to raise her children without a father figure, or that she would be a widow for life. They awarded damages based on that erroneous presumption.

#### Equities

Pape ignores reality to some extent. Remarriage of surviving spouses is common, and not unusual. Jurors know that from their everyday experience. Indeed, if the surviving spouse is young, handsome or attractive, the jury may speculate on how fast the surviving spouse will remarry. They also know that if a person waits two or three years to remarry, they probably will not think anything of it. If, on the other hand, there is a "quick" remarriage, that would -- and should -- raise a question as to the actual traumatic pain and suffering the spouse felt at the time, and still feels.

A potential for injustice exists with the current rule. For example, in other states, there are cases where the plaintiff's evidence tries to show the surviving spouse has had trouble "adjusting" to the loss of their spouse, the defendant cannot attempt to disprove that

allegation by showing the remarriage has helped that adjustment.<sup>5</sup> Indeed, the plaintiff can testify to a "wonderful loving marriage" when in fact the marriage was flawed with emotional problems, perhaps caused by the surviving spouse's "fling" with the person to whom the surviving spouse later married. With the current evidence of remarriage rule in place, the defendant cannot rebut that evidence.<sup>6</sup>

The courtroom and a jury is a forum for seeking the truth.

There is no duty for a surviving spouse to remarry. If the plaintiff offers the deceased is a kind, loving father/mother, wonderful husband/wife and evidence infers that such stability is no longer present in the plaintiff's household, or readjustment problems persist, then defendant ought to be able to introduce the fact of remarriage -- not to show the defendant caused fewer damages but rather the plaintiff took an affirmative step to mitigate emotional damages.

#### Exceptions to the Kansas Rule

Kansas already has an exception to the rule against remarriage evidence. That exception might be called when "circumstances of the marriage of the deceased tend to show intentional contributory conduct by the deceased in his own death." A Kansas federal court has refused to uphold the Rule in such circumstances.<sup>7</sup> The exception is, of course, narrow in scope, but makes sense.

#### Discrimination

In 1986, opponents argued evidence of remarriage is a form of discrimination against surviving widows that will not be visited upon surviving widowers. We do not believe that argument is correct. Most women's groups believe the jury system is their strongest weapon in the fight for equality. How then can that same jury system be prejudicial?

There is another form of discrimination to consider, however. In situations where the surviving spouse remarries quickly after the deceased's death, and the common law prohibits evidence showing that fact, that is a form of discrimination against defendants. They possibly pay an artificially higher verdict because of the common law remarriage rule.

Is it the opponent's argument that in order to suppress the possibility of discrimination against a few women we must perpetuate a rule that discriminates against many defendants where the plaintiff is male? Or ignore a fairer solution for all?

#### Delay

Another concern in 1986 is whether defendants will procrastinate in hopes plaintiff will remarry so they can introduce the evidence?

Judges have wide latitude to control evidence, and speed cases along. Their best tool is KSA 60-211, which allows imposition of attorney fee and cost sanctions directly against counsel if their action is used for delay. Each side can ask for motions in limine to regulate the manner in which the evidence is offered, and what constitutes

"fair" comment on the evidence by counsel. The judge's instructions can help the jury decide how best to consider such evidence.<sup>8</sup>

#### Fixing Damages at Time of Death

Opponents to this legislation contend you cannot allow evidence of remarriage because such evidence amounts to a post-injury reduction of damages when the law says damages in wrongful death cases are fixed at the time of death.<sup>9</sup>

That argument ignores the reality of our courtrooms.

To prove pain and suffering damages in a wrongful death case, the plaintiff must introduce evidence showing the impact of the death on the family structure, and the extent to which that negative impact persists -- even up to the time of trial.<sup>10</sup> It seems only fair if the plaintiff offers such evidence that transcends the date of death, defendant should be able to offer relevant evidence of remarriage during this time period for purposes of rebuttal.

#### Unfair Use of the Evidence

Opponents argue inappropriate use of remarriage evidence will result from passage of HB 2081, or that plaintiff is unfairly prejudiced by the evidence.

We do not believe this is true. Trial courts can correct errors through additur or remittitur, or motions for new trials. They can caution juries against inappropriate remarks of counsel, and sanction



counsel for continuous flaunting of the judge's instructions. So can appellate courts.

What is truly unfair about not allowing such evidence is the potential exists for the surviving spouse to remarry within weeks of the death to a person the spouse has known for some time prior to the deceased's death, and still recover full nonpecuniary loss. That is unfair to the defendant.

In a few cases, not allowing evidence of remarriage can perpetuate a fraud.

#### Conclusion

KBA believes the Pape rule on determining damages at the time of death is appropriate, but that evidence of remarriage should be allowed to the jury so that such determinations are correct.

There is a great quote in a case which says, "No verdict is right which more than compensates, and none is right which fails to compensate."<sup>11</sup> HB 2081 strikes an equilibrium. The jury can sift through these facts and make the appropriate award. That is their role. We have faith in juries. HB 2081 is an appropriate modification of the collateral source rule.

Footnotes

<sup>1</sup> See "Death Action -- Evidence of Remarriage," 88 A.L.R.3rd 926 for a complete list of cases. About eight states allow evidence of remarriage, some by statute, some by court rule.

<sup>2</sup> The collateral source rule generally states that benefits received by the plaintiff from a source wholly independent of and collateral to the wrongdoer will not diminish the damages otherwise recoverable from the wrongdoer.

<sup>3</sup> The difference between evidence of remarriage and evidence of other insurance for purposes of the collateral source rule is best illustrated with this table:

\* \* \* \* \*

	Collateral source Rule application	
	<u>Ordinary P.I. Cases</u>	<u>Wrongful Death Cases</u>
1. Triggering mechanism to invoke the collateral source rule?	None. Involuntary Application by Statute	Voluntary act of remarriage by surviving spouse
2. When decision made that affects CSR?	Pre-injury when accident insurance is purchased, and claimant has no idea purchasing such ins. will diminish tort recovery.	Post-injury after extent of injury is known
3. CSR diminishes recovery for	Actual economic loss of all claimants	Noneconomic loss of the surviving spouse only.
4. Type of Collateral source:	Claimant's first-party insurance policy for health or accident insurance	No collateral source is used to offset nonpecuniary damages. Evidentiary only.

\* \* \* \* \*

<sup>4</sup> 231 Kan. 441, 647 P.2d 320. Terry Pape worked for a elevator in Fairview, Kansas. He was electrocuted when a pole he was using came in contact with a negligently placed 7,200 volt KP&L line. He fell 20 feet and lived 8 days, but died of mortal head and neck injuries. The elevator was immune from liability under workers compensation laws, but was a statutory codefendant for the apportionment of damages. KP&L sought to introduce evidence of the wife's remarriage,

which was denied by the trial court, and upheld by the Supreme Court. The case is attached.

<sup>5</sup> Giancontieri v. Pan American World Airways, Inc. et al, 767 F.2d 1151 (5th Cir., Louisiana, August, 1985).

<sup>6</sup> Caldarera v. Eastern Airlines, 705 F2d 778 (5th Cir., La., May 1983).

<sup>7</sup> See page 1 and pages 10-12 of Judge Patrick Kelly's pretrial motion in limine in Sisk etal v. National Railroad Passenger Corporation, an appendix hereto.

<sup>8</sup> When relevant evidence is offered to the jury, the judge's instruction to counsel prior to the case will govern how they use the evidence, and under what circumstances counsel can comment on the evidence of remarriage. Further, judges in their instructions can place appropriate limits on what purposes the jury is to view the evidence. The evidence would not be "shotgunned" into the jury and them be able to use it indiscriminately.

<sup>9</sup> Pape, supra, at 647 P.2d 320, at 325.

<sup>10</sup> In Pape, there was at least the inference that such disruption and mental condition continued from the date of death to the date of trial. An intervening event -- the remarriage of the spouse -- could not be offered to mitigate these nonpecuniary damages.

<sup>11</sup> Domann v. Pence, 183 Kan. 135, at 141 (1958).

231 Kan. 441

Michelle PAPE, a minor, by Kathleen Pape Johansen, Guardian and Conservator, and Kathleen Pape Johansen, individually and as Executrix of the Estate of Terry Dwayne Pape, Deceased, Appellees,

v.

The KANSAS POWER AND LIGHT COMPANY, Appellant,

and

Michael Pape, a minor, by Pamela Pape, Conservator, Intervenor-Appellee.

No. 53346.

Supreme Court of Kansas.

June 11, 1982.

Widow and children of deceased worker who suffered fatal injuries when metal pole he was using came in contact with uninsulated power line brought wrongful death and survivorship actions against power company, and power company brought in as a party decedent's employer. The Wyandotte District Court, William M. Cook, Jr., J., entered judgment for plaintiffs, and defendant appealed. The Supreme Court, Prager, J., held that: (1) trial court did not err in giving instruction on presumption of due care exercised by deceased person; (2) trial court did not err in admitting defendant's official accident investigation report; (3) trial court did not err in allowing plaintiffs' expert witnesses to express their opinions that the power line installation was a hazard; (4) trial court did not err in excluding evidence that decedent's widow had remarried in less than seven months after decedent's death; (5) evidence sustained award of \$2,000 for conscious pain and suffering of decedent prior to his death; and (6) plaintiffs could recover damages where decedent's negligence was less than combined causal negligence of all persons found by trier of fact to have been causally at fault.

Affirmed.

1. Death  $\Leftarrow$ 104(2)

In wrongful death action, in which there were no eyewitnesses and which was based on circumstantial evidence, trial court did not abuse its discretion in instructing jury that it was presumed that decedent, at the time of his injury, was exercising due care to avoid injury, but that the presumption was rebuttable.

2. Evidence  $\Leftarrow$ 215(1)Witnesses  $\Leftarrow$ 392(1)

In wrongful death action brought by widow and children of deceased worker who suffered fatal injuries when metal pole he was using came in contact with defendant power company's uninsulated power line, trial court did not err in admitting power company's official accident investigation report which identified the date and circumstances of workers' injuries and declared that power line's clearance above catwalk was eight feet, since, at time of trial, defendant contended the clearance was ten feet, and the report was thus admissible as an admission and to test credibility of defendant's witnesses.

3. Electricity  $\Leftarrow$ 19(4)

In wrongful death action brought by widow and children of deceased worker who suffered fatal injuries when metal pole he was using came in contact with defendant power company's uninsulated power line, evidence of previous power company accidents involving contact between metal poles and electrical lines was admissible on the issue of foreseeability.

4. Evidence  $\Leftarrow$ 506

Opinion testimony of expert witness on an ultimate issue in a case is admissible if it will be of special help to jury on technical subjects as to which the jury is not familiar if it will assist the jury in arriving at a reasonable factual conclusion from the evidence.

5. Evidence  $\Leftarrow$ 506

In wrongful death action brought by widow and children of deceased worker who suffered fatal injuries when metal pole he

Cite as, Kan., 647 P.2d 320

was using came in contact with defendant power company's uninsulated power line, trial court did not err in permitting plaintiffs' expert witnesses to express their opinions that the power line installation at issue was a hazard, that defendant's employee should have recognized and corrected the hazard, and that defendant failed to comply with requirements pertaining to minimum clearance, warning signs, and mandatory inspections.

6. Damages  $\Leftarrow$ 59

The collateral source rule provides that benefits received by plaintiff from a source wholly independent of and collateral to the wrongdoer will not diminish the damages otherwise recoverable from wrongdoer.

7. Death  $\Leftarrow$ 104(1)

In wrongful death action brought by widow and children of deceased worker who suffered fatal injuries when metal pole he was using came in contact with defendant power company's uninsulated power line, trial court did not err in excluding evidence that decedent's widow had remarried less than seven months after decedent's death.

8. Marriage  $\Leftarrow$ 42

In wrongful death action brought by widow and children of deceased worker who suffered fatal injuries when metal pole he was using came in contact with defendant power company's insulated power lines, trial court did not err in excluding defendant's proffered evidence as to purported common-law marriage of decedent which allegedly occurred prior to decedent's marriage with plaintiff, since there was no evidence to support the claim of common-law marriage.

9. Death  $\Leftarrow$ 99(2)

In consolidated wrongful death and survivorship actions brought by widow and children of deceased worker who suffered fatal injuries when metal pole he was using came in contact with defendant power company's uninsulated power line, evidence was sufficient to support award of \$2,000 for decedent's pain and suffering between the time of the accident and his death.

10. Negligence  $\Leftarrow$ 98

For purposes of statute which permits recovery only if decedent's negligence was less than the causal negligence of the party or parties against whom claim for recovery is made, "parties against whom a claim for recovery is made" include all persons whose claimed causal negligence is submitted for determination to the trier of fact; therefore, plaintiff in wrongful death action could recover damages, because decedent's negligence was less than the combined causal negligence of all persons found by trier of fact to have been causally at fault. Rules Civ.Proc., K.S.A. 60-258a(a).

*Syllabus by the Court*

1. In a wrongful death action where there are no eyewitnesses and plaintiff's action is based on circumstantial evidence, a trial court may submit an instruction on the presumption of due care of a decedent.

2. Expert opinion testimony is admissible if it will be of special help to the jury on technical subjects as to which the jury is not familiar, if such testimony will assist the jury in arriving at a reasonable factual conclusion from the evidence.

3. Damages for wrongful death are determined as of the date of death, and the fact that the surviving spouse has remarried is not a factor for the jury to consider in assessing the damages suffered by the surviving spouse.

4. In applying K.S.A. 60-258a(a), the plaintiff's individual negligence should be compared with the collective causal negligence of all persons found by the trier of fact to have been causally negligent.

Robert D. Ochs of Fisher, Ochs & Heck, P. A., Topeka, argued the cause, and Frederick K. Starrett and Gregory A. Whittmore, Topeka, were on the brief for appellant.

Donald W. Vasos of Vasos, Kugler & Dickerson, Kansas City, argued the cause and was on the brief for appellees.

**Issue:** Allowing evidence of Remarriage in Wrongful Death Actions.

**KBA Position:** KBA supports legislation allowing the jury to be aware the claimant in wrongful death actions has had a ceremonial remarriage.

**Rationale:** KBA's support for the 1984 increase in the pain and suffering limit for wrongful death actions from \$25,000 to \$100,000 was contingent upon the legislature also allowing evidence of remarriage to be considered by the Jury. While the limit increase passed, the section allowing remarriage evidence was deleted. Allowing such evidence would be a slight modification of the collateral source rule in wrongful death cases, a modification KBA believes is justified. The change would partially reverse *Pape v. Kansas Power and Light Company*, 231 Kan. 441 (1982).

Wrongful death lawsuits are statutory actions. Damages are sought by presenting evidence of the **disruption of the family structure**, and the resulting **mental condition of the heirs**. If such evidence is relevant for the plaintiff's case, then evidence of the conscious, voluntary mitigation of that disruption or mental condition of the spouse — through remarriage — appears to be relevant.

There is no **duty** for a surviving spouse to remarry. It is a voluntary act. Evidence of such act has been kept from jurors because of the collateral source rule. *Pape* rests on the inappropriate legal foundation that to do justice in wrongful death actions, a jury must speculate or be kept ignorant of the claimant's new family situation. This view ignores reality and is illogical in the 1980s, where remarriage is common. Evidence of remarriage is not used to show the defendant was less negligent, but that the plaintiff took an affirmative step to mitigate noneconomic damages.

The two primary arguments **against** remarriage evidence are: (1) the defendant will procrastinate, hoping for a remarriage and thus mitigation of damages, and (2) the legislation discriminates against women.

Both arguments are without merit. The surviving spouse's attorney can discuss any delay problems with the judge, who possesses a variety of methods to speed the case along. Women's groups believe strongly in the jury system. How, then, can they be prejudiced by it?

KBA believes in our jury system. We think the jury's common sense will listen to this evidence and make the appropriate verdict.

Dan Dykstra of Dykstra & Grill, Kansas City, Mo., and Robert W. Harris of Harris & Harris, Kansas City, were on the brief for intervenor-appellee.

PRAGER, Justice:

This is an action brought by the widow and children of Terry Pape against the defendant, Kansas Power and Light Company (KP&L), to recover damages for his wrongful death. Pape suffered fatal injuries on February 10, 1978, when a metal pole which he was using came in contact with KP&L's uninsulated 7200 volt power line at the Fairview Elevator, Fairview, Kansas. Pape's employer, Brockhoff Feed Yards, Inc., paid workmen's compensation to the plaintiffs. Terry Pape died on February 20, 1978. Kathleen Pape, as executrix of the estate of Terry Pape, brought a survivorship action for the damages which occurred prior to Pape's death. It was consolidated with the wrongful death action in plaintiffs' petition.

Most of the essential facts in the case were undisputed and are as follows: In October of 1957, KP&L installed a pole, transformer and three strands of uninsulated wire carrying 7200 volts of electricity on the premises of the Fairview Elevator. In 1972, the owner of Fairview Elevator installed six 8-ton Butler bulk feed bins, and a metal access ladder was bolted to the side of a bin and welded at the top. On February 10, 1978, Terry Pape, an employee of Fairview Elevator, was standing on the catwalk cleaning out one of the bins with a 20-foot metal pole. The pole somehow came in contact with the 7200 volt uninsulated wire. Pape fell to the ground approximately 20 feet below the bins, causing fatal head and neck injuries.

After the case was filed, Brockhoff Feed Yards, Inc., Pape's employer, was brought in as a party by KP&L to establish its percentage of causal negligence along with that of Pape and KP&L. The jury returned the following special verdicts:

**"FAULT**

Terry Pape, deceased	36%
Kansas Power & Light	35%
Brockhoff Feed Yards, Inc.	27%

**"DAMAGES**

Survivorship:	
Pain and Suffering	\$2,000.00
Loss of Time	450.00
Medical & Hospital	8,700.00
	<u>\$11,150.00</u>
Wrongful death:	
Pecuniary Loss	\$320,000.00
Nonpecuniary Loss	30,000.00
Funeral Expenses	3,704.75
	<u>\$353,704.75"</u>

The court entered judgment in the survivorship against KP&L and for Kathleen Pape, executrix, in the amount of \$4,037.39. The court entered judgment in favor of the widow and children for damages in the wrongful death action in the amount of \$126,152.33. Defendant's post-trial motions were overruled, and defendant appealed to this court.

It would serve no useful purpose to set forth in detail all of the evidence presented by the parties in the case. Suffice it to say, the case was well tried by able counsel and the issues of both liability and damages were hotly contested. On the issue of liability, the plaintiffs' evidence disclosed that the manager of Fairview Elevator talked to defendant's foreman on three or four occasions before Pape's fatal injury and requested that the line be raised or rerouted and the pole cleaned up. According to this witness, KP&L's foreman also thought something should be done, but nothing was done. A number of employees of KP&L testified that it is foreseeable and known in the industry that persons using metal poles make contact with 7200 volt power lines. KP&L's division manager and division supervisor in Hiawatha testified that they were aware of the proximity of the grain bins to the electrical line before Pape was injured. They knew that the wires carried 7200 volts of electricity and had a potential of causing severe injury or death. They admitted it was feasible to raise or relocate the line. No warning sign was placed on the wire, bins, or pole either before or after Pape's injuries.

There was evidence from KP&L's general foreman that, on the date of Pape's injury, the electrical line did not meet the vertical clearance from the bins required by the National Electrical Safety Code. KP&L's construction manual required a vertical clearance of 15 feet between 7200 volt lines and balconies, roofs, and areas accessible to pedestrians. The evidence in the case was that the line was in fact from 8 to 10 feet from the top of the grain bins. Other KP&L employees, who came upon the premises periodically to read the meter, observed the bins and knew the catwalk had been installed thereon. Other testimony showed that KP&L supervisors knew of numerous incidents involving lengths of metal pipes contacting KP&L's uninsulated power lines which resulted in serious injury or death. Plaintiffs presented the testimony of experts in the electrical distribution field who inspected the premises in question after the fatal accident. They testified that the close proximity of the power line to the catwalk presented an extremely hazardous situation and that KP&L had failed to comply with the safety standards prescribed by the National Electrical Safety Code. Based upon this testimony, the jury brought in the verdicts favorable to the plaintiffs as set forth above.

[1] The defendant's first point is that the trial court erred in giving an instruction on the presumption of due care exercised by a deceased person. This is the so-called "love of life" instruction. This instruction, in substance, advised the jury that it is presumed that Terry Pape at the time of contact with KP&L's line was exercising due care to avoid injury but that the presumption was rebuttable. Defendant complains that the instruction was improper, because the instruction was given in spite of the fact that the trial court had previously found Pape guilty of contributory negligence as a matter of law. We find no merit to this contention. We note from the record that, despite defendant's repeated requests, the court refused to hold as a matter of law that Terry Pape was negligent, although the court opined outside the jury's presence that the jury most likely would

find him guilty of some negligence. The submission of the instruction in this case was proper, since there were no eyewitnesses to the incident and plaintiffs' case was necessarily based on circumstantial evidence. The rule in Kansas is that, in a wrongful death action where there are no known eyewitnesses and plaintiff's action is based on circumstantial evidence, a trial court may in its discretion submit an instruction on the presumption of due care of a decedent. See *Akin v. Estate of Hill*, 201 Kan. 806, 309, 440 P.2d 585 (1968); *PIK Civil 2d 2.70* (1977). Furthermore, in the special verdict in this case, the jury found Terry Pape to be 36% negligent. The jury could not have been misled by the instruction, since the jury chose to follow the language in the court's instruction that the presumption of due care is overcome if the jury is persuaded by the evidence that the contrary is true. We find no error in the giving of the "love of life" instruction.

[2] The defendant raises several points concerning the admission of evidence. Defendant complains that the trial court erred in admitting, over objection, defendant's official accident investigation report which identified the date, hour, and circumstances at the time of Pape's injury and declared the power line's clearance above the catwalk to be 8 feet. At the time of the trial, the defendant contended that the clearance was 10 feet. The report was admissible under K.S.A. 60-460(g) as an admission and also to test the credibility of defendant's witnesses.

[3] Defendant contends that the trial court erred in admitting evidence of previous KP&L accidents involving contact between metal poles and its electrical lines. This evidence was admissible on the issue of the foreseeability of the accident which is present in many negligence situations. The defendant further complains because the trial court allowed plaintiffs' expert witnesses to express their opinions that the power line installation at the Fairview Elevator was a hazard, that defendant's employees should have recognized and correct-

ed the hazard, and that the defendant had failed to comply with requirements pertaining to minimum clearance, warning signs, and mandatory inspections set forth in the National Electrical Safety Code. One of the plaintiffs' experts testified that the hazard could easily have been eliminated by relocating the line. We have no hesitancy in holding that this evidence was properly admissible.

[4, 5] K.S.A. 60-456 provides the authority for asking an expert witness for his opinion on an ultimate issue in the case. That statute provides in pertinent part as follows:

"(d) Testimony in the form of opinions or inferences otherwise admissible under this article is not objectionable because it embraces the ultimate issue or issues to be decided by the trier of the fact."

Such opinion testimony is admissible if it will be of special help to the jury on technical subjects as to which the jury is not familiar if it will assist the jury in arriving at a reasonable factual conclusion from the evidence. In this regard see *Plains Transp. of Kan. Inc. v. King*, 227 Kan. 17, 578 P.2d 1095 (1978); *Gard's Kansas C.Civ.Proc.2d* Annot. § 60-456, pp. 205-06 (1979). Under the circumstances in this case, the testimony of expert witnesses in the field of design and construction of electrical distribution systems would be of great assistance to the jury, since that area is not one within the typical juror's common knowledge. Hence, the testimony of plaintiffs' experts on those subjects was admissible.

[6] The defendant next maintains that the trial court erred in not allowing defendant to introduce evidence that the decedent's widow, Kathleen Pape, had remarried in less than seven months after the death of Terry Pape. Defendant argues that, under the Kansas Wrongful Death Act (K.S.A. 60-1901 *et seq.*), evidence of a widow's remarriage is admissible on the question of mitigation of her damages. On this point, we have concluded that the trial court properly excluded evidence of the surviving spouse's remarriage. The overwhelming majority rule throughout the

United States is that damages for wrongful death are determined as of the date of death, and the fact that the surviving spouse has remarried is not a factor for the jury to consider in assessing either pecuniary or nonpecuniary damages of the surviving spouse. This subject is thoroughly discussed in an annotation entitled "Death Action—Evidence of Remarriage" in 88 A.L.R.3d 926, where many cases are cited on the subject. The rule which excludes such evidence is simply an application of the collateral source rule which is generally recognized. Simply stated, the collateral source rule is that benefits received by the plaintiff from a source wholly independent of and collateral to the wrongdoer will not diminish the damages otherwise recoverable from the wrongdoer. The rule, which excludes evidence of remarriage of the surviving spouse in a wrongful death action, is mentioned in *Gard's Kansas C.Civ.Proc.2d* Annot. § 60-471, p. 301 (1979).

[7] In Kansas, we have no cases exactly on point on the issue of whether evidence of the remarriage of a surviving spouse in a wrongful death action is admissible in mitigation of her damages. Kansas has, however, long recognized the collateral source rule. In *Berry v. Dewey*, 102 Kan. 593, 172 P. 27 (1918), the plaintiff, a mother, brought an action for the wrongful death of her son. The defendant contended that the plaintiff, who was the sole heir of the decedent, received a substantial financial benefit as a result of the death of her son and that the benefit should have been deducted from the amount of the verdict. This court, in the opinion, stated that the proposition was untenable and, although it appears to have standing in the courts of some of the states, the proposition does not address itself to the judgment of this court as being sound, legal, equitable, or fair, and it cannot be permitted to reduce the amount of recovery in any way.

In *Southard v. Lira*, 212 Kan. 763, 512 P.2d 409 (1973), a personal injury action, it was held that the trial court properly applied the collateral source rule in excluding evidence of insurance proceeds received by

plaintiff. The court relied on *Rexroad v. Kansas Power & Light Co.*, 192 Kan. 343, 388 P.2d 832 (1964). More recently in *Negley v. Massey Ferguson, Inc.*, 229 Kan. 465, 625 P.2d 472 (1981), it was held that it would not be proper in a wrongful death action to disclose to the jury the fact that the surviving spouse was receiving workmen's compensation payments as the result of the death of her husband. It should also be noted that the United States District Court of the District of Kansas has followed the rule that, in a wrongful death action, evidence that the wife remarried following the wrongful death of the husband should be excluded. See *Nichols v. Marshall*, 486 F.2d 791 (10th Cir. 1973).

In our judgment, the rule which excludes evidence of the remarriage of the surviving spouse in a wrongful death action is sound and in accord with most of the other jurisdictions. The rationale underlying the majority rule is that the cause of action arises at the time of the death and damages are determinable as of that same time. Furthermore, some courts have observed that the rule providing for mitigation of damages because of the surviving spouse's remarriage is highly speculative, because it involves a comparison of the earnings, services, and contributions of the deceased spouse as compared to those predicated from the new spouse. We find no justification to depart from our long recognition of the collateral source rule, as recognized in the cases discussed above.

[8] The defendant next contends that the trial court erred in excluding defendant's proffered evidence as to a purported common-law marriage of decedent, which defendant argues occurred prior to decedent's marriage with the plaintiff, Kathleen Pape Johansen. The record shows that the only evidence proffered by the defendant on this issue was the deposition of Terry Pape's former wife, Pamela Pape. The substance of the deposition was that, following their divorce, Pamela stayed with Terry Pape in his apartment in Missouri during 1974. Pamela Pape's deposition clearly established that there was no holding out of

the couple as husband and wife in Kansas after their divorce and that the living arrangement was merely a tentative trial run "to see if they could make it" and get along. Pamela Pape denied there was ever any agreement by Pamela and Terry that they were married. Terry Pape subsequently married Kathleen, his surviving spouse and one of the plaintiffs here. This proffered evidence affirmatively negated two essential elements to prove a common-law marriage: (1) a holding out as husband and wife in a state recognizing common-law marriage, and (2) a present marriage agreement between the parties. Under these circumstances, the trial court correctly refused to admit the evidence or submit this issue to the jury because there was no evidence to support the claim of common-law marriage.

[9] It is next contended by the defendant that the plaintiffs' evidence was insufficient to show any conscious pain and suffering of the decedent prior to his death. The jury returned a verdict awarding \$2,000 for Terry Pape's pain and suffering between the accident which occurred on February 10, 1978, and Terry Pape's death on February 20, 1978. We have examined the record and concluded that, although not extensive, there was sufficient evidence to justify a finding that Terry Pape suffered conscious pain and suffering from his injuries until his death. When discovered lying at the bottom of the bins, Terry Pape was breathing, had a bloody cut on his head, and was audibly moaning. In response to a request by Kathleen Pape to squeeze her hand if he understood her, Terry Pape squeezed her hand. Notes in the hospital record indicated that Terry Pape was very responsive to pain stimuli. Under the circumstances, we find that there was sufficient evidence to submit to the jury the element of damages of decedent's conscious pain and suffering and to justify an award in the amount of \$2,000.

[10] The only other point raised by the defendant which requires comment is that the trial court erred in entering judgment in favor of the plaintiffs when the causal

negligence of Terry Pape, when compared with the causal negligence of defendant KP&L, actually equaled 50% as compared with 49% causal negligence of the defendant. The basis of this contention is that the trial court erred in considering the negligence of the employer, which the jury found to be 27%, in calculating causal fault of the parties, since the plaintiffs did not make a claim for recovery in the action against Pape's employer, Brockhoff Feed Yards, Inc. Defendant argues that the plaintiffs cannot recover under the provisions of K.S.A. 60-258a(a) which permits recovery only if the decedent's negligence was less than the causal negligence of the party or parties against whom claim for recovery is made. This same issue was raised and determined in *Negley v. Massey Ferguson, Inc.*, 229 Kan. 465, 625 P.2d 472. In *Negley*, the plaintiff's husband, an employee of Orriand, Inc., was electrocuted on the job when a forklift he was operating came in contact with overhead power lines owned and maintained by KP&L. The widow of the workman was paid workmen's compensation benefits for herself and the minor children. The widow then brought a wrongful death action against the manufacturer of the forklift and KP&L. The jury found KP&L to be 10% negligent, the deceased employee to be 22% negligent, and the employer 68% negligent. The plaintiffs did not sue the employer for recovery in the action, since it had paid workmen's compensation for the death of the employee. The defendant, KP&L, contended, as it does in this case, that the plaintiff could not recover from KP&L, the third-party tortfeasor, because its causal negligence was less than that of the decedent. Citing *Brown v. Keill*, 224 Kan. 195, 580 P.2d 867 (1978), and *Langhoffer v. Reiss*, 5 Kan.App.2d 573, 620 P.2d 1173 (1980), the court in *Negley*, held that the defendant's position had no merit and that, in applying K.S.A. 60-258a(a) plaintiff's individual negligence should be compared with the collective causal negligence of all persons found by the trier of fact to have been causally negligent. The same rationale is applicable in this case.

Under the workmen's compensation act the plaintiff was barred from bringing an action against the employer, Brockhoff Feed Yards, Inc. However, the defendant, KP&L, brought in Brockhoff under K.S.A. 60-258a(c). We have held in the past that the negligence of such persons brought in under K.S.A. 60-258a(c) is to be used for comparison purposes, even though these persons may be immune from liability or have previously settled with the plaintiff. *Brown v. Keill*, 224 Kan. 195, Syl. ¶ 6, 580 P.2d 867; *Miles v. West*, 224 Kan. 284, 580 P.2d 876 (1978). We hold that, under K.S.A. 60-258a(a), "parties against whom a claim for recovery is made" include all persons whose claimed causal negligence is submitted for determination to the trier of fact. Thus, the plaintiff can recover damages if his or her negligence is less than the combined causal negligence of all persons found by the trier of fact to have been causally at fault. We have, therefore, concluded that the trial court properly entered judgment in favor of the plaintiffs against defendant KP&L based on the jury's findings of causal negligence, not only as to Pape and KP&L, but also as to Pape's employer.

The judgment of the district court is affirmed.





IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS

APPENDIX "C"

KAREN SUE SISK, Wife, Heir-At-Law )  
and Next Kin of Gerald R. Sisk, Jr., )  
Deceased, and CHRISTOPHER A. and )  
MATTHEW R. SISK, Minors, By and )  
Through Karen Sue Sisk, Their Mother, )  
Natural Guardian, and Next Friend, )

Plaintiffs, )

vs. )

No. 85-1744-K

NATIONAL RAILROAD PASSENGER )  
CORPORATION; THE ATCHISON, TOPEKA )  
and SANTA FE RAILWAY COMPANY; and )  
THE CITY OF CIMARRON, KANSAS, )


Defendants. )


MEMORANDUM AND ORDER

This case is before the court on a motion to dismiss by defendant The City of Cimarron, Kansas, and motions in limine by plaintiffs, and by defendants National Railroad Passenger Corporation, and The Atchison, Topeka and Santa Fe Railway Company (Railroad). The court heard arguments on these motions on September 24, 1986. The court ruled on the city's motion to dismiss at that time, but took the motions in limine under advisement. Having now thoroughly reviewed the substance of these motions, the court is prepared to rule.

This case arises from an automobile and train collision which occurred at a crossing in Cimarron, Kansas, on October 10, 1984, resulting in the death of Gerald R. Sisk, Jr. Plaintiffs -- the widow and children of the deceased -- claim the accident

Because the Cimarron speed limit ordinance is void and un-enforceable due to federal preemption, evidence of the ordinance, as well as the train's speed at the time of the accident, will be inadmissible for the purpose of showing the railroad's negligence.

 The plaintiffs have filed a motion in limine to preclude defendants from introducing into evidence or mentioning during voir dire or opening or closing statements the following:

 (1) that plaintiff Karen Sue Sisk, wife of decedent, has remarried; (2) any services being provided Karen Sue Sisk by her new husband; (3) the financial status of Karen Sue Sisk or any money she has received from Social Security; (4) that the decedent's death may have been a suicide. Defendants concede that the collateral source rule precludes introduction of evidence of the widow's financial status or any monies she has received since her husband's death, as her damages are to be ascertained from the date of death. Therefore, the court need address only the admissibility of the widow's remarriage and the defense of suicide.

Under Kansas law, evidence of a widow's remarriage is inadmissible for the purpose of mitigation of damages. Pape v. Kansas Power & Light Co., 231 Kan. 441, 647 P.2d 320 (1982); see also Fudge v. City of Kansas City, 239 Kan. 369, 379, 720 P.2d 1093 (1986). In Fudge, the Kansas Supreme Court held the trial court did not abuse its discretion by precluding voir dire of the jurors about whether any of them knew the widow (by her new name)

or her current husband. See also Nichols v. Marshall, 486 F.2d 791 (10th Cir. 1973).

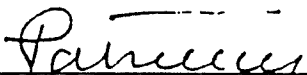
This court has no quarrel with the rule that the remarriage of the widow is inadmissible for mitigation of damages. Clearly, the cause of action for wrongful death arises at the time of death, and damages are to be determinable at that time. Pape, 231 Kan. at 447. This is not to say, however, that the widow's true identity must -- under all circumstances -- be concealed from the jury. In this regard, if and when the widow testifies, she will be accurately and truly identified.

In the case at bar, the defendants contend the proximate cause of Gerald Sisk's death was a deliberate action on his part. The court will deny plaintiffs' motion in limine seeking to bar this defense. In order to prove suicide, defendants must establish a motive. The defendants herein allege decedent was despondent because of his wife's intent to leave him for another man. In the court's view, the widow Sisk's remarriage on the heels of her husband's death to the very person she had allegedly planned to leave decedent for may indeed be probative toward establishing a motive. Accordingly, the fact of her remarriage will be admitted for this limited purpose.

Even if suicide were not at issue herein, the court would not be willing to acquiesce in any "facade", the thrust of which would allow the widow to be sworn in under a name which is no longer her own. Additionally, proper instructions will preclude the jury from considering remarriage per se when assessing damages. Therefore, the court declines to invoke Rule 403 to

exclude all evidence of the widow's remarriage. Accordingly, plaintiffs' motion in limine is denied as to the evidence of remarriage and suicide.

IT IS ACCORDINGLY ORDERED this 12 day of November, 1986, that defendant The City of Cimarron's motion to dismiss is granted in part and denied in part; defendants National Railroad Passenger Corporation and The Atchison, Topeka & Santa Fe Railway Company's motion in limine is granted; and plaintiffs' motion in limine is granted in part and denied in part. It is further ordered that plaintiffs' motion to amend their complaint, adding a count of negligence against the City of Cimarron, is granted.

  
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PATRICK F. KELLY, JUDGE

## EVIDENCE OF REMARRIAGE

### Issue:

Whether to adopt legislation that would permit the admissibility of remarriage of surviving spouses into evidence in a wrongful death action.

### KADC Position:

The Kansas Association of Defense Counsel would support legislative changes in the rules of evidence which would allow the admissibility of remarriage of a surviving spouse.

### Rationale:

Under broader rules in favor of admissibility remarriage would be a proper element for a jury to consider in determining damages in a wrongful death action. It would necessarily follow that where the possibility has become an actuality by the time of trial, the jury should be permitted to consider such facts in assessing damages and should not be limited to considering only the facts that existed at the date of death.

Further, the testimony concerning remarriage could be given to show change in conditions on which the suit was based as against rights of person or persons affected. This would prevent the plaintiff from being addressed by name other than that which he or she is currently using, since it would be offensive to the integrity of judicial process if plaintiff, after taking an oath to be truthful, were permitted to misrepresent his or her marital status to a jury.

Therefore, the KADC believes evidence arising from remarriage, which reflects upon the party's present situation, financial and otherwise, should not be withheld from the jury.

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**TESTIMONY OF ARDEN J. BRADSHAW  
IN OPPOSITION TO HOUSE BILL NO. 2081**

I am appearing on behalf of the Kansas Trial Lawyers Association, and individually, in opposition to House Bill No. 2081, which seeks to make evidence of remarriage of a surviving spouse admissible in a wrongful death action. I am a trial lawyer formally admitted to practice in the states of Kansas and Minnesota, and I have also appeared as trial counsel in other states in this country. I have had the experience of participating in a wrongful death case where evidence of remarriage was held to be admissible, and I have had a chance to view the practical effect of this in the courtroom.

For reasons which are well-articulated in their decisions, the majority of American jurisdictions have held this evidence to be inadmissible. I will briefly discuss the traditional legal rationale in a moment, but I first would like to relate to the committee some "real world" experience, gleaned from the handling of numerous wrongful death cases, as I believe the fallacies in the proposed bill are best understood in this context.

By way of example, imagine yourself in the position of a woman, married for 25 years, whose husband has died in an automobile accident, and who after two years has remarried.

You and your first husband were married during college, and worked hard together to build a life. Out of this experience grew a strong and emotional tie, the kind of loving bond and commitment which is unique to persons who have grown up and struggled together. Your marriage was now beginning to pay dividends, and you knew for certain that you were going to have the remainder of your natural life to enjoy the result. This was all taken in a moment by the carelessness of someone you had never seen before when his car came over the center line and hit your husband "head-on". It was after a period of grieving that you began to realize that you needed a companion, but you soon learned how hard it is to find that right person again at age 45. Finally you met a man who was interested, and you accepted his proposal of marriage. He wasn't nearly as attractive as your first husband, and he had some habits which were peculiar to you, and even annoying at times. You also had no "history" in common with him, so the emotional ties were not there. But you were very lonely, and he was basically a nice man, so you settled for that.

Your case has now been called for trial, and you are advised by your lawyer that H.R. 2081 has become law. And now the defense lawyers want to cross-examine you about your "new" husband in order to show that your losses are not really as great as you claim. In essence they will

want you to compare your deceased husband with your new husband. You discussed with your lawyer whether you should even have the new husband in the courtroom during the trial, but he advised that the jury would think you were hiding something if he stayed away. So he had come to sit in during the trial.

Now imagine yourself on the witness stand, faced with a cruel dilemma. When asked about your losses, do you tell how your deceased, and all that he meant to you, could never be replaced by your second husband. Do you reveal that your second husband is a nice man, but could never measure up to your first husband in any respect, knowing for sure that this will have an adverse effect on your new marriage. Or, do you perjure yourself and state that "all is well", relinquishing your claim to damages, so as to hang on to whatever you may have in the new relationship. Is it fair for anybody to be put in this position? Does the evidence have sufficient probative value to justify this embarrassment.

I mention this scenario because it is what will occur in most of these cases. That is, most people will remarry, and most of them will be less successful the second time. This realization also suggests a potential constitutional problem with the bill. What if our hypothetical surviving spouse has remarried, and the second marriage has turned into a venerable nightmare, complete with verbal abuse,



beatings, and financial disaster. The bill would make evidence of the circumstances of remarriage admissible "to prove mitigation of damages", but to meet the requirements of due process and equal protection shouldn't the same circumstances be admissible for proof of enhancement of damages. The supporters of the bill of course do not have this in mind at all, but the seminal question for the purpose of due process would be: "Is a subsequent disastrous marriage offered by plaintiff any less relevant than a subsequent good marriage offered by defendant. Or if remarriage is admissible, wouldn't it be relevant to prove that she couldn't find a person to marry who measured up to the deceased husband." At the other end of the spectrum, would defendant claim that plaintiff failed to mitigate her damages by not trying hard enough to find a suitable replacement? The bill does not make intention to remarry, or even being formally engaged admissible, nor does it attempt to make it relevant that the surviving spouse is living with a person of the opposite sex. The purpose of this is to illustrate that these matters are so speculative that there is no way to set a logical boundary on admissibility, except to exclude all references to the subject.

One might well ask: "But what about the situation where the first marriage was 'bad' and the subsequent marriage is 'better' or 'very good'?" What we are discussing here

is mitigation of damages. Under the present law all of the evidence concerning how bad the first marriage was would still be discoverable and admissible. The jury would rightfully assume that things would probably get better and little prejudice would result compared with the general mischief worked by the proposed rule in the majority of cases.

These difficulties have long been recognized by the courts of our country. For example, the Minnesota Supreme Court, in holding the evidence inadmissible balanced the competing interests and stated"

[W]e today affirm our adherence to the rule followed in the majority of American jurisdictions that the remarriage of the surviving spouse, much less an intention to do so or the possibility thereof, is not relevant to the issue of damages recoverable for the death by wrongful act of the deceased spouse.

We follow the majority rule because we are persuaded that since the cause of action arises at the time of the decedent's death the measure of damages should be determined according to the circumstances at the time of the death.

The rule allowing mitigation of damages on account of the surviving spouse's remarriage is, we believe, unsound because any comparison of the prospective earnings, services, and contributions of the new spouse is too speculative to be properly ascertainable by a jury. We reject the assumption on which such a rule must necessarily rest that the spouses, like machines, are fungible and hence replaceable. Davis v. Liesenfeld, 240 N.W.2d 548.

The Kansas Supreme Court concurred with this view in Pape v. Kansas Power & Light Co., 231 Kan. 441 (1982), stating:

The rationale underlying the majority rule is that the cause of action arises at the time of the death and damages are determinable as of that same time. Furthermore, some courts have observed that the rule

providing for mitigation of damages because of the surviving spouse's remarriage is highly speculative, because it involves a comparison of the earnings, services, and contributions of the deceased spouse as compared to those predicted from the new spouse.

It is also interesting that the Minnesota court in Davis noted another side-effect of admitting evidence of remarriage, commenting:

The rule urged by defendant, moreover, might well have the unintended effect of dissuading surviving spouses from considering remarriage and thus would conflict with the strong public policy favoring the freedom of all adult persons to marry when and whom they wish. (Davis, at 550)

Since the admissibility question is a "black or white" situation, then any rational decision on the rule of admissibility calls for a balancing of the compelling interests discussed above. If we are going to pass a bill, then let us pass one which is fair and constitutional by making all of the circumstances of remarriage admissible to prove either diminution or enhancement of damages. However, I believe that considerations of the realities of this bill in practice will lead to the conclusion that any positive value of such evidence is far outweighed by its cruel features and the speculation and confusion it invites.