Approved April 2, 1987
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 April 1, 1987 in room 514-S of the Capitol.

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

Committee staff present:

Mike Heim, Legislative Research Department
Jerry Donaldson, Legislative Research Department
Gordon Self, Office of Revisor of Statues

Conferees appearing before the committee:

David Litwin, Kansas Chamber of Commerce and Industry
Paul Fleener, Kansas Farm Bureau
Ted Fay, Kansas Insurance Department
L. M. Cornish, Kansas Association of Property and Casualty Insurance Companies
Ron Smith, Kansas Bar Association
Jerry Palmer, Kansas Trial Lawyers

Senate Bill 391 - Consideration of payments from collateral sources in certain liability actions.

David Litwin, Kansas Chamber of Commerce and Industry, appeared in support of the bill. He testified, we are not committed to any particular form of limitation of the collateral source rule. Some concern has been voiced about the provision in section 5 of the bill that requires a jury to be instructed not to award any damages paid by collateral sources. We would have no problem with eliminating this provision, and simply letting the jury have the facts and do what is just on a case-by-case basis, as is currently the law in medical malpractice cases. A copy of his testimony is attached (See Attachment I). Committee discussion with him followed.

Paul Fleener, Kansas Farm Bureau, appeared in support of the bill. He testified the indiscriminate filing of tort liability claims through lawsuits, and the sometimes excessive judgments that are rendered, is a phenomenon that is costing Farm Bureau members, and others, much money. Individuals and consumers bear the cost of liability insurance. The biggest cost of all liability is the situation it is undermining competitiveness of our business. We believe juries should not be kept in the dark when they decide damages in the award. We believe everyone should be reimbursed for their damages. He said he would like to echo the remarks of Mr. Litwin before him. A copy of his handout is attached (See Attachment II). Committee discussion with him followed.

Ted Fay, Kansas Insurance Department, stated there is a serious problem with insurance because many risks have not been written for insurance companies. The problem is not new and it has been brewing for some time. To address this problem Fletcher Bell, The Kansas Insurance Commissioner, appointed a citizens committee to review legal liability problems in Kansas as they affect insurance. A list of the names of committee members is attached (See Attachment III). He stated the citizens committee was not only concerned with increasing insurance premiums in difficult liability areas, but equally concerned with the softness of insurance capacity which has forced numerous commercial risks into self-insurance or self-insurance pools. The

Senate Bill 391 continued

citizens committee wished to be consistent with the medical malpractice bill. The committee also felt a jury should have the opportunity to disregard collateral sources in those cases where an automatic deduction for collateral sources would create an injustice. A copy of his testimony is attached (See Attachment IV). Committee discussion with him followed.

L. M. Cornish, Kansas Association of Property and Casualty Insurance Companies, testified they support tort reform and support the bill. He said please don't enact this law to benefit the insurance industry. We hope it will be beneficial to the insurance consumer. They have the advantage, and if experience shows them the premium is not adequate, we seek the higher premium. If we don't make a profit, we don't write that line of business. He said they are interested in price because that is of interest to our customer. He urged the committee to approve the bill because of its fairness. The juries should be informed as to what it cost him. Let the system work. Mr. Cornish presented two proposed amendments. Lines 70 to 75 in Section 5 be deleted. On page 1, in line 31, he suggested amending the bill to change the language to "life or individual disability insurance".

Ron Smith, Kansas Bar Association, stated he also attended Fletcher Bell's Citizens Committee. He said he heard businessmen who had insurance problems thrash the insurance industry solidly, expecially the day care centers. He said, I buy my own policy of disability insurance, and it is a group for lawyers plan, but it is paid for by me. I don't see how this change would affect my insurance premiums. The purpose is to cut liability insurance costs. You have to have a rational basis for making this change. This bill applies to all personal injury accidents. Is insurance for your professionals going to be collateral rules change? Is this going to affect premiums? Your remedy has to fit the problem. Compensation is not the sole purpose of the tort system. There are already limits on the collateral source rule. It may affect state's own delivery on service and budget impact. The plaintiffs have to look at their own costs of litigation then maybe they won't file. He said there will be fiscal consequences to the State of Kansas.

Jerry Palmer, Kansas Trial Lawyers, stated the collateral source rule is a judge made law. He stated on behalf of all victims in the future we have seven minutes to convince you this legislation shouldn't be passed. Serious questions are raised as to various degrees of equal protection. You are impacting upon the hideously injured. You have to provide the need. At this point in time with supreme court still out why enact another law that will have substantial impact on a few people. This is bad timing and not good policy. They are opposed to the bill.

The meeting adjourned.

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

GUEST LIST

COMMITTEE: SENATE JUDICIARY COMMITTEE DATE: 4-1-87

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
Jerry Palmer	TOPEKA	K.T.L.A.
Kevin B. Wickliffe	Lawrence	Senator Morris
Theresa Shively	Topeka	Kansas NARAL
Marta Fisher Linenberger	Topeka	KMS
Jim Edwards	"	KCCI
Ron Gaches	Wichita	BMAC
Jud Jay	Topeka	KID
Ron Smith	"	KBA
Dale Slater	"	KCCI
Ken Robertson	"	K-Consulting Eng.
George Barbee	"	K's Consulting Engr
Jon Vossland	Wichita	Wichita Chamber
Anne Moriarty	Topeka	KS Trial Lawyers
Paul E. Fleenes	Manhattan	Kansas Farm Bureau
L McCORNISH	Topeka	Ko Assn P/C Cos
Bob Ashworth	Topeka	KTLA
Ron Calgbert	NEWTON	U.I.U.
Richard Nelson	Topeka	KTLA
Glenn Coswell	Topeka	Alliance of Am. Ins.
Kai Callahan	Topeka	Am. Ins. Assoc.
Tom Bell	Topeka	KHA
Dick Scott	O.P.	State Farm
Lee Wright	Mission	Farmers Ins. Group

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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 391

April 1, 1987

KANSAS CHAMBER OF COMMERCE AND INDUSTRY
Testimony Before the
Senate Judiciary Committee
by
David Litwin

Mr. Chairman, members of the committee. My name is David Litwin, and I appear on behalf of the Kansas Coalition for Tort Reform and the Kansas Chamber of Commerce and Industry. We appreciate the opportunity to testify in support of SB 391.

The Kansas Coalition for Tort Reform is a federation of diverse groups that share the view that certain changes in our civil justice system are needed for two general purposes: 1) to make that system more efficient, more just, and less costly, and 2) to provide, over the long term, a more stable environment that would permit the writing of high quality liability insurance at affordable rates.

The Coalition's membership includes the following: Kansas Chamber of Commerce and Industry; Kansas Farm Bureau; Kansas Contractors Association; Independent Insurance Agents of Kansas; Kansas Railroad Association; Wichita Area Chamber of Commerce; Kansas Motor Carriers Association; Kansas Society of Architects; Kansas Medical Society; Kansas Hospital Association; Associated General Contractors of Kansas; Kansas Association of Broadcasters; Kansas Grain and Feed Dealers Association; Kansas Association of Property and Casualty Insurance Cos., Inc.; Kansas Consulting Engineers; Kansas Engineering Society; Kansas Motor Car Dealers Association; Kansas Lodging Association; Kansas Petroleum Council; Kansas Independent Oil and Gas Association; American Insurance Association; Kansas League of Savings Institutions; Wichita Independent Business Association; Western Retail Implement and Hardware Association; Alliance of American Insurers; Kansas Telecommunications Association; National Federation of Independent Business/Kansas; Merrell Dow Pharmaceuticals, Inc., Overland Park; Hutchinson Division, Lear Siegler, Inc., Clay Center; Becker Corporation, El Dorado; The Coleman Co., Inc., Wichita; FMC Corporation, Lawrence; Puritan-Bennett Corp., Overland Park; and Seaton Media Group, Manhattan.

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Significant limitation of the collateral source rule is one of the highest priorities of the Kansas Coalition for Tort Reform, along with a cap on noneconomic loss and restrictions on the award of punitive damages. These three proposals together represent the essence of the generic tort reform package, and the proposals that would do the most to moderate and improve our civil justice system and ultimately help create the stability and predictability needed to write high-quality liability coverage at stable prices.

We support enactment of SB 391, or any other version of collateral source reform that will reduce double recoveries while at the same time protecting the legitimate interests of injured people.

Courts have justified the collateral source rule by reasoning that a wrongdoer should not benefit from the happenstance that a claimant has prudently insured him or herself, and conversely that the rule is an inducement to people to insure themselves. This was sound doctrine when we did not have a vast array of benefits supplied by government, employers and others, and when the doctrine of contributory negligence barred liability where a plaintiff contributed to an accident.

Today, however, with comparative negligence the rule, with most people enjoying a wide array of medical and other benefits often requiring no initiative and no payment by the beneficiaries, and with jury verdicts higher than ever before, the traditional rationale for the collateral source rule has been severely undermined and we can no longer afford the luxury of double recoveries and overcompensation. In the words of the federal government's Tort Policy Working Group's 1986 Report:

> "In an era when collateral sources of income were financed largely by the plaintiff himself, the collateral source rule may have been sensible. Today, however, when many collateral sources are provided or subsidized by the government or by third parties (such as employees, who often are required by law to provide certain collateral benefits), the traditional justification is called into question. Increasingly, the collateral source rule simply permits a windfall recovery by the plaintiff." Report at p. 71.

Last year, a broadly representative committee was appointed by Insurance Commissioner Bell to study the insurance crisis, determine its causes, and recommend solutions. The committee held extensive hearings over a period of many months. One

Attach. I

one recommendations in the 86-page final Report of the Kansas Citizens Committee to Review Legal Liability Problems in Kansas was:

> "That evidence of collateral sources be provided to the jury for their consideration in setting damages for personal injury and wrongful death actions." Report at p. 58.

The Report then contains a fairly extensive discussion of the rule and its underpinnings, noting that "scholarly analysis of the rule in recent years has generally been critical of it" and that the Kansas legislature has already sharply limited the rule for medical malpractice cases. The Committee states:

> "One hundred years ago, an accident victim was seldom able to draw on outside sources to compensate him or her for expenses incurred and earnings lost during disability. Generally, an injured person's only recourse was the tort system. Courts felt it inappropriate to penalize the minority of prudent people who, at their own expense, purchased insurance that paid benefits upon an injury. ... The primary reason for the rule cited by the courts of one hundred years ago, that few people had outside sources to draw on after an injury, has little validity in today's society. Now there is worker's compensation and many forms of insurance which come into play when an injury occurs. Often times an injured person has little or no out-of-pocket expenses as the result of an injury. Common sense suggests that an injured person who has been fully compensated is less likely to sue if the eventual recovery will be reduced by the amount already recovered. Presence of the collateral source rule actually encourages litigation..." Report at 58, 59.

Thus, with the traditional public policy underpinnings of the collateral source rule compromised, and with the certainty that this rule does allow double, windfall recoveries, public policy considerations strongly suggest modification or repeal of the rule.

As for insurance considerations, the insurance crisis has shown vividly that while social burdens can continue to be imposed on the liability insurance base, there is a cost which must sooner or later be paid. Clearly, to the extent that collateral source benefits are withheld from the knowledge of juries, awards are needlessly increased, and insurance premiums are inexorably impacted upward. The choice we face seems clear.

The Kansas legislature itself was evidently convinced that these public policy arguments and insurance considerations were persuasive, since in 1985 it sharply limited the collateral source rule for medical malpractice claims, along lines very similar to those contained in SB 391. The fact that we now have this legislation for

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medical malpractice cases, but not for other personal injury actions, results in strange anomalies.

Imagine if you will, two courtrooms located side-by-side in County X's courthouse. In each case, an injured person - let's say he or she suffers from chronic back pain resulting from trauma - is seeking damages. Each plaintiff has already received $25,000 in various insurance and other benefits, and each plaintiff hurts about the same as the other. In courtroom A, however, the damage was caused by medical malpractice, while in courtroom B, the injury resulted from some other kind of negligence. Under current law, the jury sitting in courtroom A will be informed that plaintiff has already collected $25,000 in benefits, but in courtroom B the jury will be required to be left totally in the dark. Does this make any sense? I respectfully suggest not, and that if limiting the collateral source rule is good policy in medical torts, then it's equally good policy in other kinds of personal injury cases as well.

We are not committed to any particular form of limitation of the collateral source rule. Some concern has been voiced about the provision in section 5 of the bill that requires a jury to be instructed not to award any damages paid by collateral sources. We would have no problem with eliminating this provision, and simply letting the jury have the facts and do what is just on a case-by-case basis, as is currently the law in medical malpractice cases.

Thank you. If there are any questions, I will try to answer them.

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sas Farm Bureau

PUBLIC POLICY STATEMENT

Tort Liability Reform

The indiscriminate filing of tort liability claims through lawsuits, and the sometimes excessive judgments that are rendered, is a phenomenon that is costing Farm Bureau members, and others, much money. It is not uncommon for plaintiffs in such cases to be awarded multi-million dollar judgments.

To alleviate the tremendous economic pressure that this places on Farm Bureau members, local governments, and others, we support adoption of the following comprehensive tort reform measures:

* Mandate structured settlements for large monetary judgments;
* Cap non-economic damages;
* Reform court procedures and/or jury instructions to:
  - — Inform the jury that judgments are non-taxable,
  - — Perform calculations that reduce future damages to present value,
  - — Review contingency fee arrangements,
  - — Reform the collateral source rule to mandate revealing other sources of compensation for damages available to the plaintiff;
* Enact a maximum seven-year statute of limitations on liability claims;
* Prohibit the filing of liability claims in circuits other than those whose jurisdiction includes the location of the event from which the liability claim arises, or the plaintiff's home address; and
* Prohibit any person from filing a liability claim if the person is trespassing or breaking a law at the time of an injury.

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Members of 1986 Kansas Citizens Committee

Appointed by Fletcher Bell
Kansas Insurance Commissioner

1. Dr. Sajjad A. Hashmi, Dean, School of Business, Emporia State University, Emporia, Kansas.
2. Joel Jacobs, FMC Corporation, Lawrence, Kansas.
*3. James S. Walsh, President, Beech Aircraft, Wichita, Kansas.
4. Bill Curtis, Ass't Executive Director, Kansas Association of School Boards, Topeka, Kansas.
5. Dick Heydinger, Risk Management Director, Hallmark Cards, Kansas City, Missouri.
6. R.D. (Dick) Randall, Vice-President & General Counsel, Petroleum, Inc., Wichita, Kansas.
7. Fred Lamar, Farmland Industries, Inc., Kansas City, Missouri.
8. Bill Clarkson and Ed DeMoss, Heavy Equipment Contractors, Kansas City, Missouri,
**9. Carolyn Schmitt, President, and Mary Lou Maritt, Director of Membership/ Insurance/Special Services, KNEA, Topeka, Kansas.
***10. Sue Stinett, City Clerk, Bonner Springs, Kansas.
11. Harold Stones, Executive Vice-President, Kansas Bankers Association, Topeka, Kansas.
12. Pat Lacey, Dickinson County Day Care Center, Abilene, Kansas.
13. T.C. Anderson, Executive Director, Kansas Society of CPA's, Topeka, Kansas.
14. Larry Heeb, Lawrence, Kansas.
15. Bill Henry, Executive Vice-President, Kansas Engineering Society, Topeka, Kansas.
16. Richard Hrdlicka, Hesston Corporation, Hesston, Kansas.
17. Larry Williams, President, and/or Robert G. Hull, Vice-President, Finance, National Cooperative Refinery Association, McPherson, Kansas.
18. John D. Jones, McNally Pittsburg, Inc., Pittsburg, Kansas.
19. John M. Reiff, Senior Vice-President/Law and Personnel, Coleman Company, Inc., Wichita, Kansas.
****20. Edward Seaton, Publisher and Editor in Chief, The Manhattan Mercury, Manhattan, Kansas.
21. Ray Ligget, Assistant Treasurer, Puritan-Bennett Corporation, Overland Park, Kansas.

Ex Officio Advisory Members

22. Chief Justice Harold R. Fatzer, Ret., Topeka, Kansas.
23. Justice Robert H. Kaul, Ret., Topeka, Kansas

Advisors

24. Gerald Goodell, Kansas Bar Association, Topeka, Kansas.
25. Mark L. Bennett, Sr., Topeka, Kansas.

Attorney For Committee

26. Ted F. Fay, Attorney, Kansas Insurance Department

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*Robert Martin, General Counsel, Beech Aircraft, participated in meetings on behalf of Mr. Walsh, the President of Beech Aircraft.

**Mary Lou Maritt attended all meetings for the KNEA following the initial meeting.

***Sue Stinnett, City Clerk, Bonner Springs, Kansas, was unable to attend Committee meetings, but she was provided with meeting materials and transcripts and she did participate in Subcommittee work. Also, the Committee did receive substantial input from Ernie Mosher from the League of Municipalities.

****David Litwin of the Kansas Chamber of Commerce attended many meetings on behalf of Edward Seaton, Publisher and Editor in Chief of the Manhattan Mercury.

In addition to the regular Committee members, Commissioner Bell requested Chief Justice Harold R. Fatzer, Retired, and Justice Robert H. Kaul, Retired, both former members of the Kansas Supreme Court, to serve as ex officio advisory members to the Committee.

Attach. III

MR. CHAIRMAN, I AM TED FAY, REPRESENTING THE KANSAS INSURANCE DEPARTMENT. ON FEBRUARY 26, 1986, FLETCHER BELL, THE KANSAS INSURANCE COMMISSIONER, APPOINTED A CITIZENS COMMITTEE TO REVIEW LEGAL LIABILITY PROBLEMS IN KANSAS AS THEY AFFECT INSURANCE. THE COMMITTEE ISSUED ITS REPORT AND RECOMMENDATIONS ON OCTOBER 17, 1986. SAJJAD HASHMI, THE DEAN OF THE SCHOOL OF BUSINESS, EMPORIA STATE UNIVERSITY, SERVED AS CHAIRMAN OF THE CITIZENS COMMITTEE.

THE COMMITTEE WAS MADE UP OF INSURANCE CONSUMERS AND REPRESENTATIVES OF SELF-INSURED GROUPS HAVING CLOSE CONNECTIONS WITH KANSAS. A LIST OF THE NAMES OF COMMITTEE MEMBERS HAS BEEN PROVIDED TO YOU. MEMBERS REPRESENTED COMPANIES SUCH AS HALLMARK CARDS, COLEMAN, INC., BEECH AIRCRAFT, FMC CORPORATION, PETROLEUM, INC., FARMLAND INDUSTRIES, McNALLY PITTSBURG, INC., AND PURITAN-BENNETT CORPORATION. MEMBERS WERE ALSO APPOINTED TO REPRESENT PROFESSIONAL AND BUSINESS GROUPS SUCH AS THE KANSAS ASSOCIATION

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OF SCHOOL BOARDS, HEAVY EQUIPMENT CONTRACTORS, K-NEA, KANSAS BANKERS ASSOCIATION, KANSAS SOCIETY OF CPA's, AND THE KANSAS ENGINEERING SOCIETY. ADDITIONALLY, A MEMBER FROM THE PRESS, A CITY CLERK, A MANAGER OF A DAY DAY CENTER, AND A PUBLIC MEMBER WERE APPOINTED. THESE MEMBERS REPRESENTED A DISTINGUISHED CROSS-SECTION OF THE CONSUMERS WITH INSURANCE AND SELF-INSURANCE DIFFICULTIES.

I SERVED AS THE ATTORNEY FOR THE CITIZENS COMMITTEE AND WILL ATTEMPT TODAY TO GIVE YOU THE OPINIONS AND RECOMMENDATIONS OF THE CITIZENS COMMITTEE ON EXPANSION OF THE COLLATERAL SOURCE RULE AND CAPS ON NON-ECONOMIC DAMAGES, WHICH SUBJECTS THIS COMMITTEE IS PRESENTLY CONSIDERING RESPECTIVELY IN SENATE BILL NO. 391 AND HOUSE BILL NO. 2472.

PRIOR TO DISCUSSING THESE SPECIFIC PROVISIONS, LET ME FIRST POINT OUT THAT THE CITIZENS COMMITTEE WAS NOT ONLY CONCERNED WITH INCREASING INSURANCE PREMIUMS IN DIFFICULT LIABILITY

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AREAS, BUT EQUALLY CONCERNED WITH THE SOFTNESS OF INSURANCE CAPACITY WHICH HAS FORCED NUMEROUS COMMERCIAL RISKS INTO SELF-INSURANCE OR SELF-INSURANCE POOLS.

LIABILITY PROBLEMS, SOME MEMBERS OF THE COMMITTEE KNEW FROM EXPERIENCE, IMPACT AS SERIOUSLY UPON THESE SELF-INSURANCE MECHANISMS AS UPON INSURANCE PREMIUMS. IN OTHER WORDS, THE CITIZENS COMMITTEE BELIEVED THAT LIABILITY PROBLEMS ARE NOT JUST AN INSURANCE PROBLEM. THEY ARE ALSO A PROBLEM FOR INDIVIDUALS AND BUSINESSES THAT SIMPLY CHOOSE TO BE SELF-INSURED OR WHO CAN NO LONGER OBTAIN INSURANCE AT ACCEPTABLE COST AND ARE FORCED -- OR BELIEVE THEY ARE FORCED -- TO SELF-INSURE.

<u>COLLATERAL SOURCE RULE -- SENATE BILL NO. 391</u>

RECOMMENDATION 6 OF THE CITIZENS COMMITTEE REPORT PROVIDES:

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"RECOMMENDATION 6: THAT EVIDENCE OF COLLATERAL SOURCES BE PROVIDED TO THE JURY FOR THEIR CONSIDERATION IN SETTING DAMAGES IN PERSONAL INJURY AND WRONGFUL DEATH ACTIONS."

THE RATIONALE GIVEN BY THE COMMITTEE FOR THIS RECOMMENDATION NOTED THAT THE COLLATERAL SOURCE RULE IS A COMMON LAW RULE CREATED BY THE COURTS IN THE NINTEENTH CENTURY. THE RULE IS STATED IN THE RESTATEMENT (SECOND) OF TORTS AS FOLLOWS:

"PAYMENTS MADE TO OR BENEFITS CONFERRED ON THE INJURED PARTY FROM OTHER SOURCES ARE NOT CREDITED AGAINST THE TORTFEASOR'S LIABILITY ALTHOUGH THEY COVER ALL OR A PART OF THE HARM FOR WHICH THE TORTFEASOR IS LIABLE."

WHEN CREATED, FEW INDIVIDUALS HAD OUTSIDE SOURCES TO COMPENSATE THEM FOR EXPENSES INCURRED OR EARNINGS LOST DURING A DISABILITY. THERE WERE FEW, IF ANY, GOVERNMENT PROGRAMS, AND

Attach. IV

PRIVATE, FIRST PARTY ACCIDENT AND HEALTH AND DISABILITY PROGRAMS, OR PUBLICLY SPONSORED SOCIAL ASSISTANCE PROGRAMS HAD NOT REACHED THE POPULARITY THEY ENJOY TODAY. GENERALLY, AN INJURED PERSON'S ONLY RECOURSE WAS TO THE TORT SYSTEM. AT THAT TIME, COURTS FELT IT WAS INAPPROPRIATE TO PENALIZE THE MINORITY OF PRUDENT PEOPLE WHO, AT THEIR OWN EXPENSE, PURCHASED INSURANCE THAT PAID BENEFITS UPON AN INJURY. THE RATIONALE SEEMED TO BE THAT IF THERE IS TO BE A WINDFALL, IT IS MORE JUST FOR THE PLAINTIFF TO PROFIT FROM IT THAN FOR A TORTFEASOR TO BE RELIEVED OF HIS OR HER FULL RESPONSIBILITY FOR HIS OR HER WRONGDOING.

THE COMMITTEE POINTED OUT THAT THE ARGUMENTS TO RETAIN OR ABOLISH THE COLLATERAL SOURCE RULE INVOLVE TWO CONFLICTING PRINCIPLES. THE FIRST IS THAT A DEFENDANT SHOULD PAY FOR ALL DAMAGES FLOWING FROM HIS OR HER WRONGFUL ACT. THE SECOND PRINCIPLE IS THAT A PLAINTIFF IS ENTITLED TO FULL COMPENSATION, BUT IS NOT ENTITLED TO A DOUBLE RECOVERY RESULTING IN A

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WINDFALL. THE COMMITTEE FOUND THE SECOND PRINCIPLE THE MORE EQUITABLE ONE.

THE CITIZENS COMMITTEE REPORT POINTS OUT THAT THE ORIGINAL JUSTIFICATION FOR THE COLLATERAL SOURCE RULE HAS LITTLE VALIDITY IN TODAY'S SOCIETY. TODAY, NUMEROUS INSURANCE AND GOVERNMENT PROGRAMS ARE AVAILABLE TO ASSIST AN INJURED PERSON. IN MANY CASES TODAY, AN INJURED PARTY HAS LITTLE OR NO OUT-OF-POCKET EXPENSE.

THE COMMITTEE FOUND THAT SCHOLARLY ANALYSIS OF THE COLLATERAL SOURCE RULE IN RECENT YEARS HAS GENERALLY BEEN CRITICAL OF THE RULE. THE COMMITTEE'S REPORT CITED THE FIRST PARAGRAPH OF A LEADING ARTICLE WRITTEN NEARLY TWENTY YEARS AGO BY JOHN G. FLEMING, PROFESSOR OF LAW, UNIVERSITY OF CALIFORNIA, BERKLEY, 54 LAW REVIEW 1478 (1966).

"HIGH RANKING AMONG THE ODDITIES OF AMERICAN ACCIDENT

Attach. IV

LAW IS THE SO-CALLED 'COLLATERAL SOURCE' RULE WHICH ORDAINS THAT, IN COMPUTING DAMAGES AGAINST A TORTFEASOR, NO REDUCTION BE ALLOWED ON ACCOUNT OF BENEFITS RECEIVED BY THE PLAINTIFF FROM OTHER SOURCES, EVEN THOUGH THEY HAVE PARTIALLY OR WHOLLY MITIGATED HIS LOSS. STANDING ALONE, THIS LOOKS PERHAPS UNEXCEPTIONAL ENOUGH. ITS STING LIES IN THE COROLLARY THAT THE PLAINTIFF MAY ORDINARILY KEEP BOTH THE DAMAGES AS WELL AS THE COLLATERAL BENEFIT AND THUS TURN HIS PLIGHT INTO A BANANZA."

PROFESSOR FLEMING WENT ON TO CONCLUDE THE COLLATERAL SOURCE RULE SHOULD BE ABOLISHED.

THE CITIZENS COMMITTEE ALSO REFERRED TO K.S.A. 60-340 WHICH LARGELY ABOLISHED THE COLLATERAL SOURCE RULE IN MEDICAL MALPRACTICE CASES AND QUESTIONED THE REASON THE COLLATERAL SOURCE RULE SHOULD NOT BE ABOLISHED FOR ALL CASES.

Attach. IV

HAVING DECIDED TO RECOMMEND THE ABOLISHMENT OF THE COLLATERAL SOURCE RULE, THE COMMITTEE NEXT CONSIDERED THE APPROPRIATE WAY TO HAVE COLLATERAL SOURCES CONSIDERED. ON AUGUST 5, 1986, JUDGE TERRY L. BULLOCK, DISTRICT JUDGE, SHAWNEE COUNTY DISTRICT COURT, TESTIFIED BEFORE THE COMMITTEE. HIS REMARKS WERE SO WELL RECEIVED AND SO INSIGHTFUL THAT THE CITIZENS COMMITTEE ATTACHED HIS WRITTEN TESTIMONY AS AN EXHIBIT TO THEIR REPORT.

JUDGE BULLOCK FOUND THE COLLATERAL SOURCE RULE TO BE A CLOSE PHILOSOPHICAL QUESTION. HE ASKED, HOWEVER, IF THE RULE WAS ABOLISHED THAT THE COMMITTEE NOT RECOMMEND THAT THE EVIDENCE BE ADMISSIBLE AT TRIAL. JUDGE BULLOCK FEARED THIS EVIDENCE MIGHT CONFUSE AND DELAY THE TRIAL. JUDGE BULLOCK SUGGESTED INSTEAD A MATHEMATICAL SUBTRACTION BY THE JUDGE FROM THE AWARD FOLLOWING THE VERDICT.

THE CITIZENS COMMITTEE UNDERSTOOD JUDGE BULLOCK'S CONCERN,

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BUT VOTED TO RECOMMEND THAT COLLATERAL SOURCES BE GIVEN TO THE JURY AT TRIAL. THE CITIZENS COMMITTEE WISHED TO BE CONSISTENT WITH THE MEDICAL MALPRACTICE BILL. THE COMMITTEE ALSO FELT A JURY SHOULD HAVE THE OPPORTUNITY TO DISREGARD COLLATERAL SOURCES IN THOSE CASES WHERE AN AUTOMATIC DEDUCTION FOR COLLATERAL SOURCES WOULD CREATE AN INJUSTICE.

Coach. IV