Approved February 15, 1988
Date

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY.

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

3:30 ~~a.m.~~/p.m. on February 8, 1988 in room 313-S of the Capitol.

All members were present except:
Representative Peterson, who was excused.

Committee staff present:
Jerry Donaldson, Legislative Research Department
Mike Heim, Legislative Research Department
Jill Wolters, Revisor of Statutes Office
Mary Jane Holt, Committee Secretary

Conferees appearing before the committee:
Theresa Van Becelaere, Pittsburg
Jerry Slaughter, Kansas Medical Society
Dr. Ernie Chaney, Associate Professor of Family & Community Medicine, University of Kansas School of Medicine and Director of the St. Joseph Family Practice Residency Training Program, Wichita
Wayne Stratton, General Counsel, Kansas Medical Society

Hearings for proponents on H.B. 2690 - Periodic payments of personal injury judgments act
H.B. 2691 - Actions where exemplary or punitive damages recoverable
H.B. 2692 - Damages for noneconomic loss in personal injury action limited to $250,000
H.B. 2693 - Collateral source benefits admissible
H.B. 2730 - Civil procedure; relating to damages for pain and suffering in personal injury actions
H.B. 2731 - Civil procedure; relating to exemplary damages in civil actions
S.B. 258 - Periodic payment of judgments act

Theresa Van Becelaere informed the Committee many Kansans are unaware that the recent proposed increases in medical malpractice insurance will affect the availability and affordability of health care to the people of Kansas. Doctors are choosing to cease practicing medicine entirely or to eliminate obstetrical care from their practice rather than pass the increase on to their patients. Mariann Blancho and Melba Ellis, along with Theresa Van Becelaere were representing 6,000 Kansans who signed a petition in favor of limits being set on liabilities, thereby keeping insurance premiums down, (see Attachment I.

Jerry Slaughter testified the Kansas Medical Society has a membership of 3,500 physicians across the state of Kansas. He submitted a complete record of the hearing, meetings, and deliberations from 1985 and 1986 which led the legislature to enact overwhelmingly the reforms which now, for all practical purposes, have been struck down. For the summary, (see Attachment II. The supporting documents are available for examination.* He stated after two years the only part which remains in effect is the commitment physicians and hospitals made to peer review and quality assurance activities. In the wake of the Farley decision and the Bell case, he estimated most physicians in 1988 will pay premiums 70% higher then they paid in 1987. He also stated the H.C.S.F. surcharge will have to be increased to an estimated 155% this July. H.B. 2690, H.B. 2691, H.B. 2692 and H.B. 2693 do not limit economic damages. They limit noneconomic damages, changes in punitive damages and periodic payment of awards. He recommended a constitutional amendment accompany these bills, and it is his intent to request that the Committee introduce a constitutional amendment in order that the issue will have a chance to be thoroughly discussed. He urged the Committee to act favorably on the four bills and to reject any attempt to weaken their impact, (see Attachment III). He also submitted a position statement, (see Attachment IV), Kansas Malpractice Victims Coalition, et al. vs Fletcher Bell, (see Attachment V), charts on malpractice claims filed and paid, (see Attachment VI), and a comparison of Medical Malpractice Liability Insurance Premium Rates, (see Attachment VII).

*filed next to original copy of minutes in 519-S storeroom.

Dr. Chaney testified the greatest impact on the current problem will be on the reproductive age females who will find it very difficult to find medical care in their local rural communities. The problem will also impact on rural hospitals as they find decreasing census, decreasing income, and lack of physicians to support the institutions and eventual closures. He predicted a decreased emphasis on training in obstetrics. Physicians will enter the practice of medicine without the skills necessary to deliver obstetrical care to the citizens of Kansas. He included a survey of family physicians regarding their practices and anticipated changes that may occur with the increasing medical liability insurance premiums, (see Attachment VIII).

Wayne Stratton stated H.B. 2693 repeals K.S.A. 60-3403, the abolition of the collateral source rule in medical malpractice actions passed by the legislature in 1986. The Kansas Supreme Court held that law unconstitutional in Farley v Engelken, 241 Kan. 663 (1987). Under this act evidence of collateral source benefits will be admissible in all personal injury trials after July 1, 1988, (see Attachment IX). H.B. 2691, the new Kansas Punitive Damages bill, amends and consolidates the two previous punitive damage laws, (see Attachment X). H.B. 2692 is designed to consolidate all of the present laws limiting non-economic damages into one law and provides a limitation of $250,000 on non-economic losses in causes of action occurring after its effective date of July 1, 1988, (see Attachment XI). H.B. 2690 is designed to assure that damage payments in personal injury actions are made as the claimant needs them, (see Attachment XII). He submitted a Comparison of S.B. 258 and The Kansas Periodic Payment of Personal Injury Judgments Act, (see Attachment XIII). S.B. 258 follows the Uniform Law Commissioner's Model Periodic Payment of Judgments Act. It requires itemization of verdicts by a jury and provides that upon the death of the plaintiff, the obligation to pay installments for medical or other costs of health care or non-economic loss shall terminate.

Mr. Stratton distributed amendments to H.B. 2690. The first amendment on page 2 is a consolidation of New Sec 3 and New Sec 4 into Section 3. The amendment on pages 9 and 10 concerns itemizing of past damages and future damages, (see Attachment XIV).

The Committee meeting was adjourned at 5:10 p.m.

The next meeting will be Tuesday, February 9, 1988 at 3:30 p.m. in room 313-S.

GUEST REGISTER

DATE Feb. 8, 1988

HOUSE JUDICIARY

NAME	ORGANIZATION	ADDRESS
Marianne Blanano	Petition Supporting	413 W 9 Pitts, KS
Melba Eli	Tort Reform and Womens	Bx 209 McCune KS
[illegible] Van Becelaere	Health Care in Kansas	Pittsburg, KS
GERHARD METZ	KCCI	Topeka
[illegible]	Ks Consulting Engrs.	Topeka
Lori Callahan	Am. Ins. Association	Topeka
LARRY MAGILL	INDEP. INS. AGENTS OF KS	"
Lee WRIGHT	Farmers Ins Group	Overland Park
Chip Wheelen	Ks Medical Society	Topeka

ELECTED OFFICIALS OF THE STATE OF KANSAS:

We are here in representation of the 6,000 Kansans who signed a petition in favor of limits being set on liabilities. Still many Kansans are unaware of the threat that recent proposed increases in medical malpractice premiums have brought to our state. This threat pertains to the availability and affordability of health care to the people of Kansas. At risk is the availability of health care in our rural areas, and of obstetrical care throughout the state. Doctors are choosing to cease practicing medicine entirely or to eliminate obstetrical care from their practice rather than pass the increase on to patients.

Who replaces these doctors when they decide to leave medicine or to stop delivering babies? Few, if any! Young physicians entering practice are leaving Kansas to practice in states where the problems facing them are not ones of high insurance rates and the fear of being sued. Most are choosing not to enter obstetrics at all.

We are here (in Topeka) to try to prevent the endangered branch of health care called obstetrics from becoming obsolete for women in Kansas. The doctor who has delivered their babies for years, and with whom they have built a lasting rapport and trust, is now telling them, "You must find someone else to deliver your next child." For some women this may be extremely difficult if they are considered "high risk", meaning they may have had gestational complications in past pregnancies. Obstetricians are screening their clients carefully to save themselves from what they might deem a possible lawsuit. Even if a woman's labor and delivery risks are not great she may still be turned away only because a doctor must limit his practice and schedule to no more than 15 to 20 deliveries per month. Women are being forced to seek doctors in neighboring cities or even states. Women living close enough to the state line choose to deliver their babies in other states and many do so. With these patients goes a great deal of revenue. Approximately $3,500 to $6,500 is lost to Kansas each time a woman goes out of state to deliver her baby.

Our state is clearly in a "malpractice crisis", malpractice insurance and increased premiums are pressuring our physicians to protect themselves and practice "defensive medicine." We, the people seeking health care, are the loosers.

Please reconsider striking down bills that protect so few (individuals filing lawsuits) and yet effect so many. Tort reforms protect so many more individuals from the increase in health care cost by limiting liabilities and thus keeping insurance premiums down. On behalf of the 6,000 Kansans who signed in favor of limiting liabilities, give tort reform a chance to work.

Petition Co-ordinators:

Mariann Blancho
413 W. 9th
Pittsburg, KS 66762

Melba Ellis
Box 269
Mc Cune, KS 66753

Theresa Van Becelaere
1711 N. Grand
Pittsburg, KS 66762

Attachment I

HOW LIABILITY AND MALPRACTICE CAN AFFECT A COMMUNITY

FACT: Most legislators deny the existence of a medical crisis. Perhaps the figures below will convince them that there is, at least, a revenue crisis.

FACT: Just six years ago, Pittsburg, Kansas, a city with a population of 19,000 had six family practice physicians providing obstetrical care. Since then, five have discontinued this service, and the last is hanging on another year hoping for tort reform legislation.

FACT: There are only two OB-GYN specialists available in Pittsburg, and all hopes of recruiting more are vanishing. One physician approached recently laughed and asked, "Haven't you heard? You don't go into practice in Kansas or Florida."

FACT: Joplin, Missouri, has only two hospitals delivering babies. Only one could release the statistical information requested, and those statistics were alarming. In that one hospital alone, 214 Kansas patients delivered babies, 41 of which were Pittsburg residents. These are people paying an average of $5,000 per delivery, meaning that our State lost, in the southeast region alone, approximately $1,070,000 in revenue. This figure represents medical care only, another $50,000 annually is lost on food, gifts, and other incidentals purchased out of state. Remember that these figures were only one hospital, and for obstetrical care only.

FACT: At the time of birth, a pediatrician is needed to attend the infant, so at $150 per patient, another $32,100 is lost. Next, add the charge for hospital nursery care at $1,500 per patient, and another $321,000 in revenue that should have stayed in Kansas is gone. Many patients then decide to continue with the out of state physician, withdrawing even more revenue. (Based on the 214 patient figure.)

FACT: The above figures represent normal and casarean births. Infants born out of state with serious medical problems are shipped to special centeres within that state equipped to handle crisis births. Many times the amount for their care represents as much as $100,000 per child.

FACT: Legislators consider this a battle of the triangle--physicians, attorneys, and insurance companies. The voice of the people must make them put a fourth corner on that triangle and make it a square. We are an important consideration in this battle. All across the State 6,000 people have signed a petition stating their support of tort reform. Signatures are continuing to come in daily.

FACT: Physicians do not pay malpractice premiums, patients do. Either by higher costs of service rendered or lack of available health care.

Please remember that the above revenue figures were representative of only a very small portion of Kansas. A more complete representation would need to account for the thousands of patients in other areas of our State who must seek obstetrical care elsewhere. When these are considered, the revenue dollars lost to bordering states is truly a staggering amount.

Petition coordinators:

Mariann Blancho
413 West 9th
Pittsburg, KS 66762

Melba Ellis
P. O. Box 269
McCune, KS 66753

Theresa VanBecelaere
1711 North Grand
Pittsburg, KS 66762

SPECIAL COMMITTEE ON MEDICAL MALPRACTICE

July 1 and 2, 1985

July 1

Melinda Hanson
- KLRD Glossary of Terms

Emalene Correll
- KLRD
- Review of Malpractice Laws

Mike Heim
- KLRD
- Review of Kansas Law on Malpractice Actions from 1985, ch. 267
- Tort Reform Measures in effect nationwide in 1984
  - Kansas was 2nd nationally in tort reform measures

Kathleen Sebelius
- KTLA
- Discussed previous Collateral Source Rule, which was struck down in 1976.
- Concerned with questions about Sub. for Senate Bill 110, in regard to Collateral Source.

Emalene Correll
- Reviewed provisions of the Health Care Provider Insurance Availability Act.
- Liability coverage minimums were higher.
- Discussed joining underwriting association (JUA) plan (assigned risk pool).
- Stated the traditional function of regulatory agencies is not peer review, but rather is regulating practitioner's licences (Board of Healing Arts is an example of a regulatory agency).
- Stated peer review is often confused with regulatory agencies.
- Defined "peer review" as when a health care provider is reviewed by his or her peers.
- Most common is when a hospital medical staff reviews the care provided by its other members.
- The Joint Commissioners of Accreditation of Hospitals requires its hospitals to use peer review.

Ron Todd
- Kansas Insurance Dept.
- Stated KID does not have authority to set premium rates for insurance companies.
- Kansas Statutes require premium rates reasonable, adequate and non-discriminatory.
- Statute does not require investment income to be

Attachment II

considered in rate making procedures.
- Some insurance companies do use investment income.
- In the past, Insurance Commissioner supported the idea of using investment income in rate process.
- Explaining the "right of underwriting" as related to the assigned risk plan.
- Insurance Department reviews all rate filing.
- Medical Protective Company and St. Paul Fire and marine write 85% of malpractice insurance in Kansas.

Don Strole
- Board of Healing Arts.
- Explained make-up of Board.
- Board's main function is the licensing and disciplining of physicians.
- Complaints are categorized into four areas:
  1) impaired physicians
  2) physicians who excessively prescribe or misprescribe drugs
  3) physicians who commit ethical violations
  4) incompetent physicians.
- Supports vigorous peer reviews and making incompetent doctor attend classes.
- Complained that the Board does not receive records and reports from H. C. Stabilization Fund quick enough.
- All information received by the Board is confidential.
- 90% of all claims have no basis.
- Attorney/client privilege should not apply in cases where malpractice has occurred.

Ron Green
- Legislative Post Audit
- Reviewed status of the current audit (July 1985) of the Board of Healing Arts.
- Audit addresses two major questions:
  1) Are current procedures for reporting incompetent practitioners to the Board adequate?
  2) How effective is the Board in preventing unqualified practice?

Jerry Slaughter
- KMS
- Stated the Fund is functionally broke.
- Substantially more claims are being filed with larger settlements which result in increased premiums.
- Increased premiums are causing physicians to restrict their practices.
- KMS proposes itemization of awards, limiting actual damage recoveries, limiting nonpecuniary losses, restricting Kansas screening panel under the Indiana or Nevada approach, requiring structured payments out of the H.C.S. Fund, and limiting attorney contingent fees.
- Discussed new insurance companies.
- Blamed current malpractice problem on social climate,

urbanization and claim frequency.
- Feels screening panel of three would allow for quicker settlement.
- Some states have found screening panels constitutional, some haven't.
- Average national jury verdict is about $1 million.
- KMS could do more to police its own members.
- Nationally, doctors are found not negligent in 70% of the cases.
- Rand Corp. study shows awards in malpractice are four times higher than automobile accident suits.
- Discussed the range of Kansas premiums.
- St. Paul Fire and Marine had reduced its premium increase from 27% to 23% due to 1985 Senate Bill 110.

Richard Hite
- KBA
- Stressed extreme care should be used before drastic changes in the tort system are made.
- The cause of the higher premiums was due to physicians deviating from the standard of care.
- Supported screening panels in cases involving inexperienced counsel.
- Does not support lowering the standard of care.
- Supporting leaving P.I.K. instructions general.

Mike Mullen
- Medical Protective Company
- In five years the insurance problems in Kansas will force his company to consider leaving the state.
- M.P.C.'s rate-making procedure involves its experience in Kansas and countrywide trend factors.
- Recommends mandatory screening panels and using them for evidence in trials.
- Recommended $500,000 awards cap, such as Indiana.
- Said plaintiff's bar supports a cap.
- M.P.C. has not made a profit in Kansas in two years.
- A surcharge based on malpractice experience would alienate the doctor.
- Screening panels allow plaintiffs to get a free look at his case, encouraging him to explore.
- Would not oppose a statutory requirement for insurers to report incidents of malpractice to the Board if immunity is provided.

Tom Bell
- KHA
- Recommends structured settlements and awards, mandatory screening panels, and reasonable limitations on awards and attorney's fees.
- Hospitals should take a lead role in peer review.
- Hospitals with over sixty beds have standardized peer review.

Harold Riehm
- K.A.O.M.
- Supports screening panels, structured settlements and limits on attorneys' fees and damage awards.
- Suggests review of M.P.C. policy of only insuring osteopaths in groups of five or more.

Sherman Parks
- K.C.A.
- Recommended limiting awards.
- Recommended Indiana screening panel system.
- Recommended structured awards and limiting attorneys' fees.

Homer Cowan
- Western Insurance Company
- Recommended abolishing punitive damages, a $500,000 cap on nonpecuniary damages, no cap on pecuniary awards or actual damages.
- Suggested attorney fees be at a contract price, tightening jury instructions, disclosing witness fees to the jury, and restricting expert witnesses.
- Recommended approach and reviewing Oklahoma jury instructions.
- The Fund needed ability to become involved more quickly in cases where it may be liable.

Kathleen Sebelius
- KTLA
- Proposed higher rate premium for repeated malpractice.
- Support discovery rules of the Kansas Supreme Court.
- Oppose excessive attorney fees, propose rebates for unjustified premiums, support qualified immunity for testifying physicians in hospital hearings or Board hearings.
- Support automatic review of settlements or verdicts over $100,000, and of any doctor with two or more malpractice claims against him in a 2-year period.
- Against any drastic changes in the system.
- High jury awards reflect the high costs of medical care.

SUMMARY OF EXHIBITS

July 1-2, 1985

I Glossary of Terms (K.L.R.A.)

II "Kansas Law Relating to Medical Malpractice Actions" (K.L.R.A.)

III State Policy Report "Medical Malpractice"

IV Provisions of the Health Care Provider Insurance Availability Act (K.L.R.A.)

V Proposed Rate Filings (K.I.D.)

VI Committee Information on Health Care Stabilization Fund (K.I.D.)

VII Health Care Provider Insurance Availability Plan (K.I.D.)

VIII Summary of Kansas Citizens Comm. Activities to July 1985

IX Don Strole testimony before the Legislative Interim Comm. on Malpractice

X Scope Statement on the Board of Healing Arts and the Health Care Stabilization Fund

XI K.B.A. Suggestions to the Committee on Medical Malpractice

XII H.C.S.F. model surcharges v. actual H.C.S.F. surcharges

XIII Testimony of the K.H.A. before the Special Committee on Medical Malpractice

XIV Testimony of the K.A.O.M.

XV Testimony of the K.C.A.

XVI Testimony of Western Insurance Companies

XVII K.T.L.A. Proposals to the Committee

SPECIAL COMMITTEE ON MEDICAL MALPRACTICE

July 18-19, 1985

July 18

Mike Mullen
- M.P.C.
- Reported underwriting gains and losses over the past 10 years.
- Stated investment income was not as significant a factor due to claims-made type policies.
- Explained the claims-made reserve that is set up for payments.
- Presented M.P.C.'s figures regarding the number of doctors covered, payments, claims, etc.
- Explained M.P.C.'s defense policies.
- Opposed to "trip insurance".
- Opposed to state-set rates.
- Compared Kansas to the Indiana Plan
- Disagreed with Nye Report that asserted a 40% savings could be realized thru more effective risk management.
- If Indiana Plan adopted their proposal to limit, experts wouldn't be necessary.
- Recommended a $500,000 cap on awards, a 15% cap on attorney's fees after $200,000; these would eventually stabilize insurance rates.

Ralph Gundelfinger
- Providers Insurance Company
- Stated reason few companies insure medical malpractice is low dollar income and high claims exposure.
- H.S.C. Fund had narrowed the base in Kansas by taking away the market for excess insurance.
- Said risk management procedures at K.U.M.C. caused a downturn in claims made and better working relationships.
- Screening Panels had worked very well in Missouri, reducing average legal fees from $15,000 to $1,200; but they were declared unconstitutional.
- Other states have declared Screening Panels constitutional; Supreme Court did not.
- Recommended not legislating structured settlements, but let private industry handle it.

Bob Trunzo
- St. Paul Fire and Marine Insurance Company
- St. Paul was a pioneer in risk management.
- Recommended $100,000 cap on pain and suffering awards.
- Territorial pricing would not work in Kansas because problems are from all over.
- Does not endorse the Indiana Plan.
- Opposed to caps on medical expenses disability payments.

- Recommends a noneconomic cap and the option of making structured settlements.
- Screening Panels could add to costs.

July 19

Ron Todd
- K.I.D.
- Reviewed the history of the H.C.S. Fund and its Board of Governors.
- Number of cases and amounts paid have increased dramatically.

Derenda Mitchell
- K.I.D.
- Rejected the statement that cases going to trial are hitting it big, since the Fund has only paid 12 jury awards and won 2/3 of the trials.
- The K.I.D. is capable of handling its responsibilities.
- K.I.D. sends hammer letters to carriers encouraging settlements.

Homer Cowan
- Western Insurance Company
- W.I.C. is the servicing carrier for the J.U.A.
- If J.U.A. didn't exist, this would encourage other insurance companies to come into the state.
- If there were more companies in the private market, doctors would not have a problem getting malpractice insurance.
- A loss surcharge would not work because it would cause bad relationships between insurance companies and physicians.
- If J.U.A. did not exist, this would encourage other insurance companies to come into the state.
- If M.P.C. and St. Paul retreat from the market, more providers would seek coverage under J.U.A.
- Aetna might come into the state if J.U.A. didn't exist, since Aetna won't compete with a state-run insurance company.
- By law, doctors have to be accepted by the J.U.A.
- If the Fund is out of money, the entire insurance industry not just malpractice providers, would be assessed.
- Supports a cap on the percent of surcharges for the J.U.A. Plan.

Ron Todd
- K.I.D.
- There is a grievance procedure for the insured under J.U.A.
- Plan provides basic coverage, which is all that is necessary for a physician to retain his license.
- In order for physician to be removed from the Fund, material significant risk to future liability of

the Fund has to be established as a result of a hearing before the Funds' Board of Governors, which is composed of health care providers.
- In explaining remark that the Fund is functionally broke, stated that Fund is in same position as a bank would be if all its depositors withdrew all of their money.
- Supports seminars on risk management.

Wayne Stratton
- Discussed insurance payments and attorney payments.

Jerry Slaughter
- K.M.S.
- Fund is not popular with physicians and hospitals, but no other company offers excess coverage.

Lynn Johnson
- K.T.L.A.
- Recommended risk management and good peer review.
- Suggested the Fund's exposure should be reduced.

SUMMARY OF EXHIBITS

July 18-19, 1985

I Glossary of Terms (K.L.R.A.)

II "Professional Liability in the 80's" (A.M.A. Task Force in Professional Liability and Insurance)

III "Medical Malpractice in Pennsylvania" (Management Analysis Center, Inc.)

IV "Recommendation to Improve Boards' Ability to Deal with Malpractice" (Kansas Board of Healing Arts)

V Understanding Gains and Losses

VI

VII "A Model Act (The Indiana Plan)"

VIII Insurance Stock Industry Projections

IX Major Reinsurer's Results

X Providers Insurance Company (MO) Underwriting Gains and Losses

XI List of Health Care Stabilization Fund Board of Governors and Minutes

XII List of Kansas Health Care Provider Insurance Availability Plan Board of Governors and Minutes

XIII Health Care Stabilization Fund Defense Costs

XIV Guidelines for Defense of the Health Care Stabilization Fund

XV Surcharge Strategies (Citizens Advisory Comm.)

XVI Kansas Closed Claims statistics

XVII Kansas Auto Liability v. Medical Malpractice

SPECIAL COMMITTEE ON MEDICAL MALPRACTICE

August 15 and 16, 1985

August 15

Judge Marion Chipman
- Methods of Settlement

Judge Donald Allegrucci
- Methods of Settlement
- Testified against Senate Bill 110.

Judge Michael Carrigan
- Methods of Settlement
- Supports Jury - determined awards.

All three judges then answered questions regarding the Health Care Stabilization Fund's involvement in malpractice cases, expert witnesses and awards.

Judge Wayne Phillips (written testimony)
- Methods of Settlement
- Feels public outcry over medical negligence will pass as a trend.
- Doesn't think award caps are necessary.

Richard Von Ende - Ex. Sec. of KU
- Senate Bill 362 (K.U. Med. Center Resident Insurance)

Derenda Mitchell - Kansas Insurance Department
- Resident Insurance
- Short term occurrence policies.

Dr. D. Kay Clarvson - U.M.K.C.
- U.M.K.C. Insurance Premiums
- Moonlighting

Dr. Jane Corboy - U.M.K.C.
- Moonlighting
- Resident Insurance

Mike Mullen - Medical Protective Company
- Occurrence policies and rates.

Judge Patrick Kelly (written comments)
- Settlement Conference Program
- Contingency Fees (too high sometimes)
- Arbitration and mediation
- Supported jury-determined awards.
- Has reservations about Senate Bill 110.

August 16

Ron Green - Legislative Division
- (Performance Audit of the Board of Healing Arts.)
- Procedures of the Board are not always adequate in areas of reporting, record-keeping, disciplinary actions, investigations and insurance coverage.
- H.C. Stabilization Fund, and its relation to the Board; H.C.S.F. would benefit if Board would more closely scrutinize its doctors.
- Made recommendations to Board.

Donald Strole - Board of Healing Arts
- Humana Case; why the Board is sometimes unable to take quick action.
- Agrees with Legislative Audit's recommendations about the Board.
- Peer Review
- Board budget
- No statute or regulation requiring a peer review committee.
- Peer Review conducted on random basis.
- Need large budget for personnel to look at petitions, complaints and depositions.
  - Have money but need approval to spend.
- License revocation process; hearing and appeal process is too long.
- Supports law change requiring hospitals to report to the Board about physician resignations.

Jerry Slaughter - K.M.S.
- Explained national standardized peer review process.
- Hospital must meet these standards or lose their certification.

Judge Charles E. Warden
- Testified legislature should not put limits on doctors' liability or responsibility to their patients.
- Supports the peoples' right to redress.
- Does not support screening panels due to time constraints, lack of authority in their opinions, lack of available conflicting economic interests.
- Supports right to jury determination.
- Doubted malpractice premiums would amount to 10% of doctor's net income.
- He cooperates with Judge Steven Flood in running each other's settlement conferences.
- Said malpractice awards have not been higher than personal injury awards.
- Awards tend to be smaller in rural areas since juries protect their doctors.
- Experts cancel each other's effectiveness.

Lynn Johnson - attorney

- Described role of plaintiff's attorney in malpractice cases.
- Expenses by plaintiff's attorneys.
- Stated juries are not swayed by sympathy.
- Supports screening panels.
- Said attorneys on both sides should move quicker.

Wayne Stratton - attorney

- Described the role of defendant's attorney in malpractice cases.
- Cases are tried on the characterization of what occurred and they become a confrontation of the expert witnesses.
- For screening panels to be effective, there should be a cap on awards.
- Rand Corporation study found that average medical malpractice claim is four times higher than claims in automobile cases.
- Supports a cap on pain and suffering.
- Feels Collateral Source rule would prove to be an assistance.
- Stated there are no economic restraints in medical malpractice cases, and didn't feel society could afford this method of compensating parties.

Ron Smith - K.B.A.

- Cautioned against legislating changes in the tort law system.
- Stated the KBA supports repealing the 15% post-judgment interest rate and proposed the rate be tied to the current T-Bill rate.
- KBA feels that requiring proof of present value of future damages will not increase verdicts, and may lower actual overall verdict costs, which should have a positive effect on malpractice premiums.
- Against periodic payment of judgments.
- Supports Supreme Court guidelines for determining reasonableness of fees.
- Supports no restraints on expert witnesses.

SUMMARY OF EXHIBITS

August 15-16, 1985

I Testimony of Judge Wayne H. Phillips

II Senate Bill No. 362

III Attorney General's Opinion No. 85-73 Re: Insurance

IV O'Gilvie v. Playtex Brief

V Crowe v. Wigglesworth Brief

VI Performance Audit Report on the Board of the Healing Arts (Leg. Div. of Post Audit)

VII Testimony presented by Donald G. Strole.

VIII "Professional Regulation and the State Medical Boards" (The New England Journal of Medicine)

IX Topics for Discussion by the Committee

X Testimony of Ron Smith of the K.B.A.

SPECIAL COMMITTEE ON MEDICAL MALPRACTICE

September 12 and 13, 1985

September 12

Jerry Slaughter
- K.M.S.
- Recommends (1) cap on awards, (2) mandatory screening panels, (3) peer review and reporting law changes suggested by the Kansas Healing Arts Board, (4) a uniform method of calculating future damages, (5) requiring expert witnesses to devote at least 75% of the professional time to clinical practice, (6) deletion of the "sunset" provision of Senate Bill 110, (7) setting fixed standard for post-judgment interest rates, and (8) mandatory settlement conferences.

Dr. Larry Anderson
- Kansas Academy of Family Physicians
- Insurance premiums must be controlled as rural medicine will suffer.
- Premiums in states surrounding Kansas are dramatically
- A system is needed to adequately compensate a damaged individual and identify, reprimand, educate, or rehabilitate the physician involved.

Dr. James Rider
- testifying for K.A.O.M.
- K.A.O.M. recently adopted procedures for peer review.
- Supports the Indiana Plan.
- Only St. Paul writes malpractice insurance for osteopathic medicine.
- Urged legislature to give Insurance dept. the authority to correct rate inadequacies.
- The Fund should eventually be phased out entirely.

Dr. Mike McClintick
- Osteopathic physician.
- Discussed insurance premiums.

Anita Jacoby
- R.N.
- Testified extremely high insurance premiums, along with fixed insurance income, might cause two Wamego physicians to quit their practice.

Dr. Samuel T. Jones
- Testified in favor of tort reform.
- Addressed problem of child psychological stress in hospitals.

Dr. Steve Myrick
- Suggested revamping legal treatment of medical injuries much like Workman's Comp.
- Supported awards like in the Indiana Plan.
- Either abolish or restructure the H.C.S. Fund.

Dr. Stanley Skaer
- Concerning with the number of physicians in obstetrics who have stopped practicing.
- Recommended structured settlements and restrictions on out-of-state experts.
- Limiting awards and denying punitive awards.

Mr. Richard Clasen - Eureka Herald
- Recommended tort reform, with a med/mal cap of $500,000; mandatory screening by panels; taking action against repeated health care providers involved in litigation; letting health care providers pay into the Fund monthly, instead of in advance.

Ann Rogers
- K.A.N.A.
- Job-security of anesthetists is in danger due to high insurance premiums.

Tom Bell
- K.H.A.
- K.H.A. supports the recommendation made by the K.M.S.

Dr. Lauren A. Welch
- Cited inequalities encountered in obtaining insurance, such as being assigned to certain risk groups and no merit ratings.
- Recommended tort system in medical malpractice be abolished.

Martha Carr
- C.C.W.
- Recommended a flat fee for lawyers in med/mal cases, and a cap on awards and settlements; she favored structured settlements.
- Did not support "lay" juries determining med/mal awards.

Ralph Gundlefinger
- Providers Insurance Company
- Supports Indiana Plan, with the exception of the medical review panel. Such panel should be held after the suit is filed, so the evidence would be admissable in court.

Mike Mullen
- M.P.C.
- Stressed caps and structured settlements and awards.
- Suggested a $500,000 cap.

Bob Olsen
- Father of Brent Olsen ($15 mil award)
- Stated a cap could not take care of cases like his son's.
- Advocated settlements of cases, and judges should take a more active role in settlement.

Bobbi Steinbacher
- Said it was wrong to further victimize victims by establishing caps.
- Doctors should police their own ranks by revoking the licenses of repeat offenders.
- Malpractice cases are no different than other civil cases, and they should be judged on the merit by their peers.

Dr. Dan Roberts
- OB/BYN Chairman of Wesley Center
- Testified on risk management in a changing liability environment.
- The purpose is to eliminate bad practices that may be going on and to replace them with up-to-date practices.
- Desired a regional reporting system for the State.
- There should be reasonable caps on injuries.
- Structured settlements were reasonable.

Ron Smith
- K.B.A.
- Kansas was 9% above the national average for jury verdicts on all lines of personal injury cases.
- Recommended the repeal of the excessive post-judgment interest rate; should be tied to the T-Bill rate.
- Recommended special verdicts for present value of future damages and restructuring screening panels.

Kathleen Sebelius
- K.T.L.A.
- Olsen malpractice case has been the only punitive damage award case in Kansas.
- Recommended requiring claimant's attorney file an affidavit, with medical expert reviewing the claim and stating that it is meritorious; if no affidavit filed, claimant would have to go through screening panel.
- Judges should educate attorneys on the use of the current frivolous lawsuit statute.
- Recommended the liability of the Fund be limited to $1 million.
- Suggested a rating experience factor should be added to the surcharge.
- K.T.L.A. recommendations for preventing medical negligence were to toughen reporting requirements and repeal the confidentiality of peer review.

- K.T.L.A. does not recommend that all judgments and settlements over a certain amount be mandatorily structured.
- Recommends the consideration of itemized jury verdicts as long as the basic issue of liability was not reopened and that consideration be given to structuring payments for future medical care.

SPECIAL COMMITTEE ON MEDICAL MALPRACTICE
November 7-8, 1985

November 7

Jerry Slaughter
- presented KMS recommendations on award limitations and screening panels

Motion by Rep. O'Neal to require attorney fees be approved by the judge after an evidentiary hearing and prior to final disposition

Ron Smith
- KBA suggestion that the T-bill rate on the date of judgment be the post-judgment interest rate for the duration of the judgment

Motion by Senator Gaines to accept mandating settlement conferences by statute

Motion by Rep. Sprague that settlement conference be held within 30 days following discovery deadline (but prior to court ruling upon a motion for summary judgment)

Motion by Senator Yost that settlement conferences be conducted by judge other than trial judge

Motion by Rep. Snowbarger to prohibit expert witnesses from testifying on a contingent fee basis

Motion by Rep. Barkis to qualify an expert witness as someone giving 50 percent of such person's professional time to actual clinical practice within a two-year period

Motion by Senator Steineger that imposing penalties, revocation or suspension for late reports should be under Insurance Commissioner's jurisdiction

Motion by Rep. Walker to include, as grounds for revocation, suspension or limitation, the failure to maintain liability insurance

November 8

Motion by Senator Gaines proposing a $500,000 lid on current economic and medical expenses and a $500,000 lid on future medical expenses and custodial care costs

Motion by Senator Talkington that if the jury awards over 25 percent above what the fund offered, the fund would be liable for attorney fees

Motion by Senator Steineger to reduce limits of the fund to $1,000,000 per occurrence, and to place an aggregate limit per year on the fund of $3,000,000

Derenda Mitchell
- explained the function of the Fund Board of Governors

Motion by Senator Steineger that the Fund Board of Governors review and approve a rating plan for physicians paying into the fund; also recommended allowing Fund Board to terminate certain health care providers from coverage by the fund due to significant risk

Jerry Slaughter
- KMS recommended all claims be reviewed by a screening panel and the panel opinion be admissible as evidence

Ron Smith
- KBA stated that if expert witness testifies there is negligence, there is no need for a screening panel

Motion by Senator Talkington to leave the screening panel law as is

Motion by Rep. Solbach that the costs of the screening panel be paid by the winner, and that the panel expenses be as recommended by the KMS, a total of $150 plus travel expenses, with the Chairman getting $250

Jerry Slaughter
- KMS proposes allowing insurance companies to sell a corporate policy covering acts of nurses and other employees

- KMS proposes that before physicians can receive tail coverage, they must pay into fund for 3 consecutive years

Motion by Rep. O'Neal to prepare bill draft to cover the fund against penalties where primary carrier did not properly attempt to settle claim

SUMMARY OF EXHIBITS
November 7-8, 1985

I KMS Recommendations on Award Limitations and Screening Panels

II National Law Journal article "Constitutionality of Malpractice Cap is Upheld", October 28, 1985

III Staff review of Settlement Conference wording - alternatives

SPECIAL COMMITTEE ON MEDICAL MALPRACTICE
November 20-21, 1985

November 20

Jerry Slaughter
- informed committee that the Board of Healing Arts had recommended additional disciplinary powers be made available to the Board

Motion by Senator Parrish to provide a section preventing retaliation against persons who report deficiencies

Motion by Senator Gaines stating no person shall qualify as an expert witness if his fee is based on the outcome of the case

Motion by Rep. Solbach providing no vicarious liability for health care provider qualified under the fund for any actions of other providers under the fund

November 21

Motion by Senator Winter that economic losses will be paid up front, and non-economic losses will be structured

Motion by Rep. Sprague that future structured settlement be exempt from legal process

Motion by Rep. O'Neal to cap pain and suffering and that it be paid immediately and not be structured

Dr. John Heibert
- member of Board of Healing Arts

- cited health insurance, medicare, HMO's and DRG's as restraints on health care costs

- stated it was impossible to enforce a standard of care since medical technology changes so rapidly

- recommended quality assurance be determined by health care providers; implementation of computer-profiling of controlled substances; abandonment of C.M.E. requirements

Bob Coldsnow
- Legislative Counsel

- stated the principles in earlier cases interpreting Art. 2, Sec. 15 still control

SUMMARY OF EXHIBITS
November 20-21, 1985

I Kansas Dept. of Health and Environment letter re: hospital inspections

II Actuarial Evaluation of Proposed Legislative Changes to HCPIAA

HOUSE JUDICIARY COMMITTEE

H.B. 2661

January 13, 1986

Mike Heim
- Legislative Research Department.
- Discussed activities and conclusions of the interim committee.

SUMMARY OF ATTACHMENTS

January 13, 1986

I. Recommendations and minority report of interim committee.

HOUSE JUDICIARY COMMITTEE

H.B. 2661

January 21, 1986

Ron Todd

- Assistant Commissioner of Insurance.
- Reviewed history of liability insurance industry.
- 1976 enactment was valid for that time.
- Current situation causing early physician retirement and withdrawal from high-risk specialities and physicians leaving Kansas.
- Citizens committee appointed in January, 1985 had findings similar to interim committee.
- Unique problems should be addressed separately from other insurance issues:
  1) Cap on awards.
  2) Screening panels.
  3) Procedures to eliminate malpractice.
- Needs package of proposals.
- Governor Carlin cannot support bill with cap.
- Committee recommends cap, based on stabilization of rates in Indiana and Nebraska.
- Reviewed structured settlements (not an option to juries at present).
- Cap will not be enough to lower premiums. Will also need structured settlements and better control of negligent practitioners.
- Commissioner Bell more comfortable with $1 million cap than $500,000.
- $1 million cap could lower premiums 21%.
- Issue must be addressed now.

Mike Mullins

- President, Medical Protective.
- Company covers 40% of Kansas physicians.
- Company has recently withdrawn from Michigan and Illinois because legislation not in harmony with company philosophy.
- Frequency of claims in Kansas has not drastically increased, but severity has.
- Due partly to more money being available.
- Special interest groups have caused premiums to increase:
  1) 40% of judgment goes to plaintiff's attorney.
  2) Amount equal to 1/3 goes to defense counsel.
- Eliminating all provider incompetence would not decrease rates considerably.
- Public now has "lottery mentality".
- Claims made policies don't allow time for investment income to be a factor.
- Anticipates H.B. 2661 would stabilize rates in 2-3 years.
- Company would keep rates at current level for 2 years.

SUMMARY OF ATTACHMENTS

January 21, 1986

I. Presentation on Medical Malpractice by Kansas Insurance Department.

HOUSE JUDICIARY COMMITTEE

H.B. 2661

January 22, 1986

Homer Cowan
- The Western Companies of Fort Scott.
- Present issues on medical malpractice have existed since 1974.
- Frequency and severity of claims have made predictability impossible, hence they are unable to price product.
- Industry lost $2.8 billion last year.
- Only 3 companies now write medical liability insurance in Kansas.
- St. Paul has put a hold on new policies.
- Explained Health Care Stabilization Fund, which his company administers.
- Injured parties only get 30% of award.

Bob Trunze
- St. Paul Fire and Marine.
- Company has nationwide moratorium on writing new policies.
- Kansas' frequency level is below the national average, but rising rapidly.
- It is above the average in severity, and continues to rise.
- Company may lift moratorium if H.B. 2661 passed.
- Cap will have effect in multiple defendant cases (which is most of those filed).
- Would also lessen conflict between fund and primary carrier.

Kathy Pinkham
- Medical Defense Insurance Company.
- Company insures 500 doctors in Kansas, is doctor-owned.
- Losses for 3 years in Kansas.
- Would like to see a decrease in fund surcharge.

SUMMARY OF ATTACHMENTS

January 22, 1986

I. "The Insurance Crisis 1986," The Western Insurance Company.

II. Letter reflecting testimony of Robert Trunze.

HOUSE JUDICIARY COMMITTEE

H.B. 2661

January 23, 1986

Ralph Gundelfinger
- Providers Insurance Company.
- Company insures 27 hospitals in Kansas.
- Supports all provisions of H.B. 2661.
- Cap would stabilize rates and increase competition.
- Screening panels would clear court dockets.
- Screening panels would be most closely scrutinized by courts, brought rates down dramatically in Missouri before declared unconstitutional.

January 27, 1986

Mike Heim
- Legislative Research Department.
- Summarized provisions of H.B. 2661 pertaining to Board of Healing Arts.

Ron Green
- Legislative Division of Post Audit.
- His office audited Board of Healing Arts.
- All recommendations in report included in H.B. 2661 except requiring other state agencies and law enforcement agencies to file reports with the board.

Don Strole
- General counsel for Kansas Board of Healing Arts.
- Responded to performance audit.
- Board supports most of H.B. 2661, but recommends 2 amendments:
  1) Giving the Board subpoena power to obtain records.
  2) Concerning a physician prescribing for himself or a family member.

SUMMARY OF ATTACHMENTS

January 27, 1986

I. Performance Audit Report - Board of Healing Arts.

II. Letter concerning presentation of Performance Audit.

III. Testimony of Donald Strole.

HOUSE JUDICIARY COMMITTEE
H.B. 2661

January 28, 1986

Jerry Slaughter
- KMS.
- Medical Society supports all 26 provisions of H.B. 2661 relating to peer review and risk management.
- Doctors do police themselves, but responsibility must come from Board of Healing Arts.
- Getting rid of bad doctors won't solve problem.
- The claims against 115 most-claimed-against doctors totaled 16% of payments made from fund.
- 75% of all claims result in no indemnity payment.
- Bill provides first link between Board of Healing Arts and Medical Society review committees.
- KMS generally supports the Governor's position, but the Governor's position is silent on tort reform.

Dr. Norman Miller
- University of Kansas Medical Center.
- Introduced by Don Strole of Board of Healing Arts.
- 20-40% of practicing physicians impaired in one of four categories: alcohol, drugs, dementia, mental illness.
- Board of Healing Arts tries to protect physician and public.
- Present law makes action difficult, need change in confidentiality.

Kathleen Sebelius
- KTLA.
- Everyone makes mistakes, provider should be liable.
- One suit doesn't indicate incompetence, but repeated suits do.
- 95 doctors with 3 or more claims (0.6% of physicians) accounted for 50% of claims.
- Criteria for suspending license not known to public.
- She is concerned by Board testimony that malpractice is not as big a problem as the public thinks.
- She does not feel Board will be able to handle increased reports, suggests decentralized system like disciplinary complaints of bar association.
- KTLA feels tort reform portions of K.B. 2661 will not compensate victims adequately and act as a deterrent.

Ron Smith
- KBA.
- Bad doctors have considerable impact.
- Bar association supports peer review and risk management, but feel they should be in a separate bill.
- Challenge to Board will be physician resistance.
- Nurses should not be listed as health care providers.

- Concerning new definitions of professional incompetence and unprofessional conduct, Board will set standard of care, then decide whether it was met.

SUMMARY OF ATTACHMENTS

January 28, 1986

I. Testimony of Kansas Medical Society on peer review.

II. Same.

III. Newspaper articles on impaired physicians.

IV. Testimony of Ron Smith, Legislative Counsel for KBA, on peer review.

HOUSE JUDICIARY COMMITTEE

H.B. 2661

February 3, 1986

Ron Todd
- Assistant Commissioner of Insurance.
- Insurance Department supports concept of entire bill.
- Has some problems with implementation.
- Not enough time to have all provisions go into effect by July, 1986.
- Discussed coverage provided by fund.
- Has $19 million cash balance, but $47 million unfunded liability.
- Actuarial prediction that H.B. 2661 would decrease surcharge by 5-10% first year, 25026% in 5-7 years.
- Discussed experience rating, could be implemented by July.
- Presented findings and recommendations of Board of Governors HCSF.

Jerry Slaughter
- KMS.
- Distributed proposed amendments (mostly technical).
- Nothing will help rates this year.
- Companies have already requested 30% increases.
- Selection already exists in insurance market (those not selected by Medical Protective of St. Paul go to JUA, which has rated premiums).
- Therefore opposes level surcharge.

Bob Arbuthnot
- KTLA.
- Discussed associations position (would only have 3 categories of doctors for rating purposes).

SUMMARY OF ATTACHMENTS

February 3, 1986

I. Proposed amendments of KMS and Healing Arts Board.

II. Testimony of Bob Arbuthnot.

HOUSE JUDICIARY COMMITTEE

H.B. 2661

February 4, 1986

Gary McCallister
- Kansas Bar Association.
- Supports H.B. 2661, particularly parts dealing with Health Care Stabilization Fund.
- There is excess insurance available to providers for amounts above Fund coverage.
- Limiting liability of Fund could create a better market for availability of excess insurance.
- Bar supports experience rating and averaging required by Section 25.

Harold Riehm
- Kansas Association of Osteopathic Medicine.
- Supports averaging surcharge within each class.
- Pointed out inequities of present system.

SUMMARY OF ATTACHMENTS

February 4, 1986

I. Testimony of Gary McCallister.

II. Letter from Robert Laing, CLU, JD, concerning use and tax consequences of annuities and structured settlements.

III. Testimony of Harold Riehm.

HOUSE JUDICIARY COMMITTEE

H.B. 2661

February 10, 1986

Morton Ewing
- American Association of Retired Persons.
- No formal position on caps, but believes victims should be fully compensated.

Kathleen Sebelius
- KTLA.
- Discussed peer review and the insurance industry.
- Explained what the Victims Coalition is.
- Presented correspondence from members of the Victims Coalition and a list of membership.

Charlotte Gregory, Patricia Renfro and Amy Morris
- Members of Victims Coalition.
- Discussed their experiences and claims.
- Urged committee not to adopt caps.

David Litwin
- Kansas Chamber of Commerce and Industry.
- Supports all provisions of H.B. 2661 except inclusion of medical and out-of-pocket expenses in the $1 million cap.
- KCCI supports limitation on attorney fees.

Dr. Jimmy Browning
- Introduced by Jerry Slaughter of KMS.
- Considering leaving family practice in Chase County because of $6300 malpractice premium.
- Patients cannot afford increased fees.
- Only other physician in that area will retire in June, partly due to high premiums.
- Rural and solo practitioners will leave Kansas if H.B. 2661 is not passed.

SUMMARY OF ATTACHMENTS

February 10, 1986

I. Position of AARP and 15 points adopted by Kansas legislative committee of AARP to be supported in Kansas this year.

II. Position of KTLA on peer review for "bad doctors" with newspaper clippings and discussion of insurance industry's role.

III. Letters from members of Victims Coalition
- Helen Forbes, had blood clot removed from brain, had been misdiagnosed as a back injury. Had blood clots in leg and lung when transferred to Kansas City rehabilitation center. Opposes cap.

- Velva Jane Klamm, had bladder surgery despite osteomyelitis of pelvis.

- Steve Trainor, family may not get day in court because of cap.

- Jesse Burtzloff, bad result of breast surgery by Dr. Sifers.

List of members of Kansas Victims Coalition (179 individuals and families).

IV. Testimony of David Litwin and position of KCCI.

HOUSE JUDICIARY COMMITTEE

H.B. 2661

February 11, 1986

Harold Riehm
- Kansas Association of Osteopathic Medicine.
- Requests by KAOM for amendments.
- Pointed out that many osteopaths are in the JUA only because Medical Protective and St. Paul will not cover osteopaths who do obstetrics.
- JUA rate works a penalty.

Dick Hite
- Chairman of KBA legislative committee.
- Introduced by Ron Smith of KBA.
- KBA believes high premiums are a symptom of a medical malpractice problem.
- Tort system needs improvements.
- But cap on awards would be overreaction.
- Section 18 of Kansas Constitution protects right to recover for damages.
- Absence of merit rating resulted in no distribution of economic penalties.
- History of insurance companies shows underwriting cycles, we are now in the middle of one.
- KBA favors recommendations of Board of Healing Arts. Medical profession should put its house in order.
- KBA supports merit rating.
- KBA supports itemized jury verdicts, with proof of present value of future damages and revision of post-judgment interest to reflect current market rates.
- KBA supports increased use of screening panels, but panels should not be mandatory.
- Attorneys should certify they have proper medical testimony.
- KBA favors sanctions against attorneys bringing frivolous suits.
- KBA suggests a survey of the jury system in Kansas, fewer people should be automatically excused.
- Cap on damages would defeat the sound principles of the tort system and be unfair.
- No need for caps has been demonstrated, there has been no pattern of awards being too high.
- KBA supports penalties for unreasonable attitudes toward settlement.

Lynn Johnson
- KTLA.
- Introduced by Bob Arbuthnot of KTLA.
- Caps are arbitrary, would have little affect on premiums.
- Should have 3 bills for the 3 problems:
  1) Medical malpractice.

2) Medical malpractice litigation.
3) Medical malpractice liability insurance.

- If package passes and works, cap will get all the credit.
- Bill would increase costs (screening panels and annuities).

The Chairman proposed a pinhole.

SUMMARY OF ATTACHMENTS

February 11, 1986

I. Testimony of Harold Riehm with requests for changes by osteopathic physicians.

II. Testimony of Richard Hite.

III. Testimony of Lynn Johnson and article on investigating obstetric malpractice.

HOUSE JUDICIARY COMMITTEE
H.B. 2661

February 12, 1986

Members provided with position paper from Kansas Farm Bureau and balloon of H.B. 2661 relating to pinhole.

John Myers
- Executive Assistant to the Governor.
- Presented Governor's position on H.B. 2661.
- Tort reform and cap too simplistic and irresponsible, will not benefit premiums.
- Insurance industry needs further investigation relative to limiting liability when only responsible for base coverage.
- Concerned about constitutionality of H.B. 2661, addresses over 20 issues.
- Governor has proposed pertinent measures in H.B. 2876, 2879 through 2883.
- The Governor's is open to negotiation on caps.
- The Governor's office has received no complaints regarding proposed appointments to the Board of Healing Arts.

J. Robert Hunter
- President of National Insurance Consumer Organization.
- Introduced by John Myers.
- Current "crisis" has been manufactured to increase insurance company profits.
- Insurance industry has cycles.
- Even admitting a premium shortfall, the net worth of the companies assures their continuation.
- Statistics do not justify increasing premiums and red lining physicians.
- Need federal and state reforms.
- Tort reform is necessary, but only along with insurance reform.
- Data does not justify caps.
- Canada has "wish list" of provisions, but insurance system in Canada is in crisis.
- Attorney fees on both sides too high.
- Experience rating should be used more.
- Should consider self-insurance and state reinsurance.
- Cost of insurance less than 1% cost of medical care, but allocation of costs not fair.
- If insurance companies pull out of Kansas, JUA could take over.

Jerry Slaughter
- KMS.
- Doesn't believe crisis is an insurance company rip off.
- Health Care Stabilization Fund is a state-administered insurance company, and it is broke ($19 million to cover

$47 million of claims in the pipeline).
- JUA has lost $7 million and is broke.
- Bad doctor theory doesn't hold up.
- Supports retaining Section 16 (expert testimony).
- Important to keep bill intact.

Dr. Anne Wigglesworth
- Wamego obstetrician.
- Much of her work is defensive, which raises costs.
- Relation with patients has changed, has to view each one as a potential adversary.
- 25% of physicians in Wamego have left or retired because of malpractice premiums.
- Will have to move her hospital practice to Manhattan to protect against lawsuits, this means Wamego hospital will have to lay off personnel.

Dotson Bradbury
- Administrator Greenwood County Hospital.
- Of 3 GP's, one has discontinued OB and the other 2 are considering it next year.
- The citizens of that area stand to suffer a great deal if that happens.

SUMMARY OF ATTACHMENTS

February 12, 1986

I. Policy position from the Kansas Farm Bureau (feels there is a crisis, supports H.B. 2661).

II. Testimony of John Myers.
Introduction of J. Robert Hunter.

III. Current insurance crisis in Canada.

IV. Comparison of proposed "tort reforms" and existing law of Ontario, Canada.

V. Testimony of J. Robert Hunter.

VI. Testimony of Jerry Slaughter.
Position Statement of KMS on Medical Malpractice.

HOUSE JUDICIARY COMMITTEE

H.B. 2661

February 13, 1986

Committee took final action on adoption of amendments to new Sections 1-9, 11-12, and 24-25.

February 17, 1986

Final action of committee continued with adoption of amendments to new Sections 13-14, 16-18, 20-25, 29-30, 32-35, 40, 42. Adopted pin hole balloon amendment. Placed 7 year sunset on pain and suffering cap and $1 million cap with the condition that the legislature can extend the caps if it sees premium relief. Language of Insurance Department regarding annuities adopted.

Committee reported H.B. 2661 favorably.

SUMMARY OF ATTACHMENTS

February 17, 1986

I. Letter clarifying actuarial evaluation of H.B. 2661 by DANI Associates, Inc.

II. Letter from Sedgwick County Health Care Cost Containment Roundtable.
- Generally supports H.B. 2661.
- Feels that attorney fees and expenses should be in addition to $1 million cap to maintain full recovery by injured Kansans.
- Would limit plaintiff's (and possibly defendant's attorney's fees to $200,000).
- Would also include mandatory jury instruction that medicine is by nature risky.

House Bill 2573 (Board of Healing Arts)

House Bill 2661 (Medical Liability and Insurance Coverage) with amendments.

SENATE JUDICIARY COMMITTEE
H.B. 2661 re. Proposal 47

March 25, 1986

Joe Knopp
- House of Representatives.
- He served on interim committee and favors caps.
- Discussed bill with committee.

Jerry Slaughter
- KMS.
- Supports interim committee.
- Malpractice problem is complex and comprehensive solution is needed.
- Three main concepts must remain in bill:
  1) Peer review and risk management.
  2) Insurance system refinements.
  3) Tort reform issues.
- 75% of public thinks something should be done.
- Medical society feels people will be adequately compensated, opposes watering down bill.
- Laws currently in Indiana, Nebraska, Louisiana and bill on governor's desk in South Dakota.

Paul Fleener
- Kansas Farm Bureau.
- Supports bill.
- Malpractice problem poses dire consequences to rural communities.

Harold Riehm
- Kansas Association of Osteopathic Medicine.
- Supports most of bill.
- Problems of both cost and availability.
- In four states osteopaths can't be insured.

Morton Ewing
- American Association of Retired Persons.
- Consumer's voice has not yet been heard.
- Must address three basic parts
  1) Medical negligence.
  2) Liability insurance.
  3) tort system.

David Litwin
- Kansas Chamber of Commerce and Industry.
- Fully endorses bill.
- Endorses overall cap but would not include medical and out of pocket expenses.
- "Pin-hole" satisfies concern to considerable extent.

Wayne Probasco
- Kansas Podiatry Association.
- Favors bill.
- Hopes premiums will go down.

SUMMARY OF ATTACHMENTS

March 25, 1986

I. Joe Knopp's testimony, handouts and balloon version of bill.

II. Jerry Slaughter's testimony. Graphs of increase in number and size of claims.

III. Paul Fleener's testimony.

IV. Harold Riehm's testimony. Cost of malpractice insurance for general practitioner.

V. Position of AARP.

VI. Testimony of David Litwin. Tort reform position of Kansas Chamber of Commerce and Industry.

VII. Testimony of Wayne Probasco.

VIII. Testimony of Kansas Nurses Association.

SENATE JUDICIARY COMMITTEE
H.B. 2661 re. Proposal 47

March 26, 1986

John Meyers
- Office of the Governor.
- Urges substitution of cap on pain and suffering for overall cap.

Richard Hite
- Trial attorney and legislative chairman KBA.
- Introduced by Ron Smith of KBA.
- Bar not satisfied with bill.
- Overall cap on awards most objectionable.
- Cap not supported by Reagan administration, AMA, St. Paul Fire & Marine, KCCI and 48 states.
- Cap not justified.
- Major cause of problem is actuarially unsound 1976 Act which created Health Care Stabilization Fund.
- Too much malpractice by bad doctors, need to tighten disciplinary procedures.
- Too many claims filed have no merit.
- Bar supports screening panels to be admissable as evidence.

John Anderson
- Former Governor.
- 26 member committee studied malpractice insurance problem at the request of Fletcher Bell.
- Cap is wrong. Takes away from injured person.
- Proposed telling jury about insurance.

Charlotte Gregory
- Respiratory therapist in Wichita.
- Introduced by Kathy Sebelius, KTLA.
- Related two cases of brain damage where medical bills could exceed $1,000,000.

Lynn Johnson
- KTLA.
- Price of malpractice insurance has risen dramatically for doctors.
- Little evidence cap would decrease insurance gouging.
- KTLA supports 2661's peer review provisions.
- Supports $1,000,000 cap in liability of the fund.
- Endorse surcharge averaging.
- Endorses itemized jury verdict and mandatory settlement conferences.
- Opposes $1,000,000 cap on all damages.

SUMMARY OF ATTACHMENTS

March 26, 1986

I. John Meyer's testimony and copy of newspaper article by Governor Carlin.

II. Testimony of Richard Hite.

III. Minority Report of Kansas Citizen's Commission (odd pages only?).

IV. Testimony of Lynn Johnson.

V. Presentation on Medical Malpractice by Kansas Insurance Department.

VI. KTLA handouts.

SENATE JUDICIARY COMMITTEE
H.B. 2661 re. Proposal 47

March 27, 1986

James Francisco
- Senator.
- Presented 3 proposed amendments
  1) Establish experience rating scale.
  2) Any fund contributor entitled to information.
  3) A certified nurse anesthetist should be added to the Board of Governors.

David Litwin
- Kansas Chamber of Commerce and Industry.
- Two conferees had identified KCCI as being opposed to $1 million cap, and this is not the case.

Motion by Senator Talkington to change makeup of review committee failed for lack of a second.

Motion by Senator Talkington passed that claimant be allowed to go back to show amount awarded has been or will be exhausted.

March 28, 1986

Senator Talkington clarified yesterday's motion: Board of Governors sets pin hole in motion, can't exceed $3 million.

SUMMARY OF ATTACHMENTS

March 27, 1986

I. Proposal of Senator James Francisco with balloon copy of bill.

II. Explanation of David Litwin.

III. Guest list.

March 28, 1986

I. Clarification of Senator Talkington's amendment (March 27).

SENATE JUDICIARY COMMITTEE
H.B. 2661 re. Proposal 47

March 31, 1986

Motion by Senator Steineger failed which would have imposed cap of $350,000 only on pain and suffering.

Motion by Senator Talkington passed to adopt all of amendments proposed by Representative Knopp and the technical amendments.

SUMMARY OF ATTACHMENTS

March 31, 1986

I. Copy of balloon version of bill indicating amendments proposed by Representative Knopp.

SENATE JUDICIARY COMMITTEE
H.B. 2661 re. Proposal 47

April 1, 1986

Motion carried to establish experience rating scale.

Motion carried to make information available to fund contributors.

Motion carried to include certified nurse anesthetists on Board of Governors.

Motion failed to reinsert language of Section 29.

Motion carried to make Section 29 compatible with Section 25.

Motion carried that any award for supplemental benefits shall be paid for HCSF.

Motion carried to support bill favorably as amended.

KANSAS MEDICAL SOCIETY
1300 Topeka Avenue · Topeka, Kansas 66612 · (913) 235-2383

February 8, 1988

TO: House Judiciary Committee

FROM: Jerry Slaughter
Executive Director

SUBJECT: Tort Reform Issues and House Bills 2690, 2691, 2692 and 2693

The Kansas Medical Society appreciates the opportunity to appear today on the subject of tort reform and the medical malpractice liability insurance crisis.

It is not with great pleasure that we are back again in front of this committee. Beginning with the 1985 legislative session, stretching through the subsequent interim study, and culminating in HB 2661 enacted in 1986, this Legislature undertook the most comprehensive study of the medical malpractice liability crisis since the original study in 1976. The long procession of witnesses and conferees, the reams of testimony and the months of deliberation resulted in a unique and comprehensive approach to solving the medical malpractice problem.

Today we are submitting the complete record (and a summary of it from our brief in Bell; Attachment A) of the hearings, meetings and deliberations from 1985 and 1986 which led this Legislature to enact overwhelmingly the reforms which now, for all practical purposes, have been gutted by the courts. This record contains compelling evidence that a crisis truly existed two years ago, and it formed the basis for the Legislature's action. The reasons, or rationale, for the 1985 and 1986 reforms is even more compelling today, as our projections on premium costs, loss of physician services, and a steadily deteriorating liability environment have come true.

A point needs to be made here. During the 1986 study, working with the special interim committee, we developed a comprehensive quality assurance package that was then, and is still today, unprecedented across the country. It requires mandatory inter-professional reporting of incidents of negligence and unprofessional conduct. It also mandated risk management programs at every hospital in the state. It strengthened the Healing Arts Board's power to investigate and discipline physicians. In short, it established a system of reporting, investigation and disciplinary measures that is without equal among other professions in this state, and in this country. It amounted to a sort of

Attachment III

quid pro quo, wherein the Legislature, in essence, asked the profession to accept greater accountability and peer review in matters of competence, in return for tort reform progress. After two years, the only part of the package which remains is the commitment physicians and hospitals made to peer review and quality assurance activities.

It should also be noted that every bit of credible evidence available repeatedly points out that the malpractice claim frequency and severity problems are not related to lack of physician competence. You simply cannot solve the malpractice problem by "getting rid of the bad apples." A majority of physicians in the state have been sued, and those delivering high risk services such as obstetrics are sued frequently.

It is convenient for lawyers to blame the liability crisis on incompetent physicians. However, the truth is that many claims represent unintended, adverse outcomes resulting from difficult clinical decisions made by competent physicians for whom less than perfect conditions and extraordinary circumstances are a fact of life. And, in many cases, what is considered an adverse outcome is judged so by a public whose expectation of perfection by the medical community is unrealistic.

Since 1986, after a brief respite, premiums have gone up substantially in the wake of Farley, and now the Theis decision in the Bell case (testing award limits in HB 2661). We estimate most physicians will pay premiums which are, on average, 70% higher than they were in 1987. Some, like family physicians doing obstetrics, insured by Medical Protective, will face increases in excess of 100%. Since 1984, that same physician has had to absorb an increase in liability costs of over 256%. Where will this end?

The number of claims filed continues to climb also. We estimate 360 new cases will be filed this fiscal year, double the number filed in 1984 (see graphs in Attachment B). Some statistics from the St. Paul company which insures over a third of all Kansas physicians help illustrate a problem in this area. The frequency of claims against Kansas physicians insured by St. Paul rose from 9.8 claims in 1982 to 14.2 claims per 100 doctors in 1986, a 45% increase. For all doctors insured by St. Paul countrywide over the same period, the frequency of claims rose from 13.5 to 17.2 claims per 100 doctors, a 27% increase. Clearly, the frequency of claims filed in Kansas is accelerating much more rapidly than it is nationwide.

Claim severity, the other key determinant in setting rates has also risen from $38,000 per claim in 1984, to $108,000 in 1986, a 184% increase. Again, data from St. Paul shows that for the period 1982-86, claim severity in Kansas rose 78%, compared to a 25% increase countrywide. In fact, for St. Paul-insured physicians, claim severity in Kansas is significantly higher than the national average. Nationally, malpractice claim severity has risen roughly twice as fast as the Consumer Price Index. This trend can be explained only partially by the fact that medical care prices have risen more rapidly than consumer prices in general, because medical expenses typically account for only about one-quarter of reported economic loss in malpractice cases closed with payment (P. Danzon; 1986 Report on Frequency and Severity of Medical Malpractice Claims).

The continuing spiral of premiums, driven by the combined effect of increased frequency and severity of claims, has accelerated the loss of physician services, especially in our rural areas. A look at the 1986 Kansas Medically Underserved Areas Report which tracks physician manpower trends, emphasizes the point that access to care is becoming a problem. For the second straight year the number of full-time equivalent practicing physicians in Kansas has decreased. Our files and the newspapers are replete with examples of physicians dropping high risk services such as obstetrics, or leaving our state altogether, in order to lower their liability costs. The fact is, a Kansas physician could move to any of three of our bordering states, or many others for that matter, and obtain the same level of coverage at a much lower premium (see Attachment C). We are also driving the young physicians training at our medical school to other states, where their premiums are considerably less.

Clearly, the liability crisis is causing serious dislocations of basic health care services. All the rhetoric about trampling individual rights and tampering with the "sacred" tort system, will be scant comfort to an expectant mother in rural Kansas when she can't find a physician to deliver her baby.

Before I comment on the need for the specific legislation in front of you, I would like to touch on the widely quoted "study" done by the Office of Judicial Administration on jury verdicts in tort cases. That report concluded "jury verdicts in the overwhelming majority of cases in the state are quite modest. ..."

First, it is folly to base any conclusions about jury awards in Kansas on the strength of this report, which covers essentially only one year of data. Significantly, only state courts are included, as the report does not cover the sizable number of tort cases which are tried in the federal courts in Kansas.

A closer look at the report does provide some useful information, however. The median verdict reported of $15,750 for all tort cases greatly undervalues the significance of large verdicts, especially in the area of medical malpractice, which had a median award of $210,000. The report only mentioned in passing the average (mean) award of $96,458 for all tort cases, compared to the average for medical malpractice awards of $398,572. Using the average, or mean, is more useful in assessing the significance of large awards, which by their nature will always be relatively few in number. This is because awards drive settlement levels, and the specter of the occasional multi-million dollar award keeps many claims from ever going to a jury trial.

Consequently, to get a true picture of the effect of jury awards on the system, one must not only have more than one year's data on hand, but settlements must also be studied. For example, in FY 1987, HCSF data show that 50 medical malpractice cases were settled at a total cost of $11.9 million, the largest being $2.5 million.

In summary, the judicial administrator's study vastly underestimates the problem in the area of medical malpractice litigation. Any conclusions drawn from the report are speculative at best, and in truth, probably meaningless because of the narrow focus and limited information presented.

Why are we asking you to re-enact tort reform, this time across the board? Quite simply, from your discussions last week you know the Supreme Court in Farley indicated that constitutional objections to abolishing the collateral source rule could be overcome by applying the legislation to all personal injury claims. We have taken that concept and extended it to a limit on non-economic damages, changes in punitive damages, and periodic payment of awards.

It should be noted that the concepts in the bills before you are not new. We are not breaking new ground. In fact, these concepts were overwhelmingly adopted by the Legislature in 1985 and 1986. Of significance is the fact that we are not proposing any limits on economic damages, even though that was the cornerstone of HB 2661 in 1986. While some may be reluctant to apply these reforms across the board, it apparently must be done if you want to address the medical malpractice crisis with tort law changes.

The debate over whether the various tort reforms should be tied to a promise of lower premiums seems to us to be a diversion at this point. Our own example in Kansas is a good case in point. Our opponents point to higher premiums even after the 1985 and 1986 reforms were adopted, and conclude that tort reform doesn't work. However, given the fact that the reforms have been tied up in the litigation process, and have not been applied to any cases "in the pipeline," it is not surprising that premiums continue to rise. In fact, the surcharge collected by the Health Care Stabilization Fund was actually held down by about 20% for the last two years, in anticipation of claims savings as a result of the reforms enacted in 1985 and 1986. Obviously, now that the Court has retroactively invalidated those reforms, the surcharge will have to be increased to an estimated 155% this July 1 to make up the shortfall.

The only thorough analysis of the effect of various tort reforms on claim costs has been done by Patricia M. Danzon, for the Rand Corporation. In 1986 she reported that states which enacted collateral source offsets had reductions in claim frequency by 14%, and claim severity by 11-18%. She also reported that the average impact of various laws which cap awards has been to reduce claim severity by 23%. Professor Danzon noted that since many of the reforms were under challenge and therefore might not have been enforced or applied in all cases, the estimates reported may actually understate the full, long-term impact of a reform once it has been declared constitutional.

It is this research, plus the evidence from other states where tort reform has had an opportunity to work, which seem to indicate that tort reform does have a corresponding, stabilizing bottom line. In fact, over the years, every credible organization (including the United States General Accounting Office

Study) which has studied the medical malpractice problem has called for reform of the tort laws which govern these cases. Our general counsel, Wayne Stratton, is with me today to discuss the specifics of the four bills you are considering and our rationale for the changes contained in them.

Although the issue is not a subject of the hearings today, I must raise the question of a constitutional amendment. Given the Farley decision and the Theis opinion in the Bell case, one is led to the inescapable conclusion that a constitutional amendment must accompany these bills, else they will be brushed aside by the Supreme Court in the Bell appeal currently underway. In the next few days we will ask the committee for the courtesy of introducing a constitutional amendment in order that the issue will have a chance to be thoroughly discussed.

In the meantime, it seems our only option is to proceed along the guidelines laid down for us by the Court in Farley, hence we urge your adoption of the four bills as they have been introduced. Bear in mind that watered-down versions of these bills will yield watered-down results, which is why we support them in their present form.

We sincerely believe, and the available evidence seems to show, that these reforms over the long run will help stabilize the volatile liability climate, and provide a basis for hope that the premium spiral will end. We urge you to act favorably on these bills, and reject any attempts to weaken their impact. Thank you for your consideration, and for the opportunity to appear today.

JS:nb

Attachments

KANSAS MEDICAL SOCIETY
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Medical Malpractice: Position Statement of the Kansas Medical Society
January 1988

In 1985 and 1986, the Kansas Medical Society asked the Legislature to address the problem of an escalating medical malpractice crisis. At that time, premiums had risen to an all-time high, and many physicians, especially in rural areas, were being forced to either curtail high risk services, or consider locating elsewhere. Especially hard hit were physicians who delivered babies, a significant percentage of whom said they would be forced to drop those services if premiums went much higher.

The Legislature responded after extensive study, hearings and debate by enacting a comprehensive package of reforms. The legislation dealt with many aspects of the liability problem, but principally with tort reform and physician competence issues.

The physician competence, or quality assurance, provisions of the legislation established an unprecedented reporting, peer review, risk management and disciplinary system involving health care professionals, hospitals and state regulatory agencies. The medical profession supported strengthening the quality assurance network, even though it is widely acknowledged that the liability crisis is not a result of health care provider competency problems.

The tort reform provisions of the legislation held great promise to stem the rising tide of claim payments and stabilize escalating premiums. In fact, premium increases the last two years had been moderated significantly in anticipation of the legislation's effect on claims as they worked their way through the "pipeline." The key elements of the package were caps on awards, abolition of the collateral source rule, a requirement that large judgments be "structured" utilizing annuities, and many other related reforms.

Unfortunately, on July 17, 1987, the Kansas Supreme Court in a split 4-3 vote, struck down the collateral source rule provision, holding that since the law did not apply across the board to all personal injury actions, it violated the equal protection clause of the state Constitution. That decision is significant because it likely indicates how the Court will rule in 1988 on the other tort reform provisions, such as the cap on awards.

The Court's ruling has had a devastating impact on the malpractice situation. Since the courts have kept the various reforms from being implemented during the litigation process, not one claim has been impacted, hence no savings have been realized (critics of tort reform disingenuously claim the reforms have failed to reduce losses and premiums, which is true as long as the courts prevent the implementation of the legislation). Consequently, malpractice insurers have to play "catch up" this year and raise premiums to account for the unrealized savings in claim costs.

Attachment IV

Instead of premiums stabilizing, physicians and hospitals can expect the cost of mandatory liability insurance to increase as much as 70% on July 1, 1988. With a jump of that magnitude, the total premium collected from doctors and hospitals in 1988 will be as much as $86 million, up from $11 million in 1982. The dollars paid out in awards and settlements in 1988 will be as much as $30 million, up from $7 million in 1982. There will be an estimated 360 medical malpractice suits filed in 1988, almost three times the 127 suits filed in 1982.

As the number of suits and size of the claims have increased, so have premiums. In 1988 it is estimated that malpractice insurance, mandated by law for physicians, will cost a family physician who delivers babies as much as $18,000 to $24,000, and a surgical specialist or obstetrician as much as $70,000 to $90,000. These intolerably high premiums are one facet of the complex malpractice crisis Kansas faces.

The crisis is manifested in many ways. It increases the cost of medical care for everyone. The cost of malpractice insurance is borne by all of us, including patients of doctors who have never been sued. The notion that million-dollar verdicts are paid by rich insurance companies is absurd. All Kansans pay when juries grant huge awards to plaintiffs (and their lawyers).

The malpractice crisis has a profoundly corrosive effect on the doctor-patient relationship. The bond of trust and compassion which enhanced patient care in the past, is being driven out by an attitude that doctor and patient may be adversaries in the courtroom if results aren't perfect.

The malpractice crisis has already restricted availability of care, notably in obstetrics, which is the fastest growing area of malpractice litigation. In a recent survey of family physicians, less than half currently deliver babies, and another third were planning to drop obstetrics, principally because of malpractice pressures. In the near future, access to obstetrical care may be severely restricted in many areas of our state. Almost two-thirds of the obstetricians in Kansas have been sued, and experts estimate that a young obstetrician entering practice today can expect to be sued eight times during his or her career.

One of the most disturbing aspects of this whole problem is its effect on young people contemplating a medical career in Kansas. Our young physicians, among the best trained in the world, have resigned themselves to the fact that medical malpractice suits are inevitable. Unquestionably, medical malpractice insurance costs affect a physician's decision on where to locate a medical practice. As Kansas malpractice insurance rates escalate, it puts us at a competitive disadvantage for young, highly trained physicians.

Clearly, this crisis must be resolved. If not addressed immediately, there will be serious problems in access to high risk services, such as obstetrics, in many of our state's rural areas.

The Legislature acted properly and wisely when it enacted the tort reforms discussed eariler. It is the tort system, the sprawling network of lawyers, courts and rules of law, which must be changed if we hope to achieve a solution to the malpractice dilemma. Consider the following obvious weaknesses of our present tort system: there is no objective standard of liability; there is no definite measure of compensation; the entire process is conducted at a high level of emotion and subjectivity; the cost of litigation is enormous; there is no restraint mechanism to prevent unnecessary litigation; and the system encourages higher and higher awards.

In fact it is estimated that transaction costs - lawyers' fees, court costs, expert witness fees, etc., - consume over 50% of all the dollars paid out by insurance companies. There is something seriously wrong with a system which returns to the injured patient less than half the total dollars expended. Quite simply, the tort system compensates the wrong people - the lawyers and expert witnesses - not plaintiffs.

The Legislature should correct the constitutional deficiencies in the tort reform legislation passed earlier, by extending its provisions across the board to all personal injury lawsuits. If it appears that those changes still do not satisfy constitutional objections, the Legislature should place a constitutional amendment on the ballot so the people can vote on whether the Legislature ought to have the ability to enact these reforms. Further, serious consideration must be given to finding an alternative compensation system which has lower transaction costs, so that more of the dollars expended go to patients. Finally, either the required level of insurance must be substantially reduced, or the mandatory insurance provision repealed, so that physicians can make coverage decisions based on the cost of insurance and their own risk of exposure.

The Kansas Medical Society does not support anything that will relieve negligent physicians of their responsibility to injured patients. Our record and support of strengthened peer review and disciplinary systems is consistent. However, balance must be restored to the liability system or our state will face a crisis in access to vital medical services.

ATTACHMENT A

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION 7

KANSAS MALPRACTICE VICTIMS
COALITION, et al.,
Plaintiffs,

vs. Case No. 86 CV 1700

FLETCHER BELL,
Defendant.

THE KANSAS MEDICAL SOCIETY AND
THE KANSAS HOSPITAL ASSOCIATION'S RESPONSE
TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Although plaintiffs have denominated their motion as one for summary judgment, in reality the proper procedural posture of the case is that of a trial on the record. At a hearing in this matter held August 23, 1987 it was agreed that the record consists of the legislative history of H.B. 2661, and items of which this court may take judicial notice. As a brief submitted for the purposes of a trial on the record a statement of uncontroverted facts is unnecessary.

The record in this case consists of the minutes of testimony and attachments before the Special Interim Committee on Medical Malpractice, the minutes of testimony and attachments before the House and Senate Judiciary Committees on H.B. 2661.

In 1976 the Kansas Legislature was confronted with the problem that medical malpractice liability insurance was becoming unavailable. The Legislature addressed this need by enacting laws that shortened the statute of limitations, modified the collateral source rule, established a screening panel procedure, established a mandatory insurance requirement and created the Health Care Providers Stabilization Fund. In the early 1980's it became evident that these reforms had not alleviated the crisis, in part because the most effective provision was declared

Attachment V

unconstitutional by the Kansas Supreme Court (See Wentling v. Medical Anesthesia Services, 237 Kan. 503, 701 P.2d 939 (1985)) and more importantly because the frequency and severity of claims continued to rise.

The 1985 Legislature again addressed the issue of medical malpractice insurance. Costs of the mandatory policy and surcharge to the Fund virtually made insurance unaffordable. The insurance companies who had offered policies were threatening to pull out of the state because of losses. Health care providers discussed leaving the state, eliminating high risk procedures and early retirement. See Testimony before the House and Senate Judiciary Committees on Senate Bill 110. Extensive legislation was proposed to combat these problems, but the legislature felt a more thorough investigation of the issues was warranted. Id.

Responding to testimony of proponents and opponents in 1985, the legislature created a special interim committee to study the issue in depth. Fletcher Bell also convened a citizens committee to study the insurance aspects of the crisis. Statutes abolishing the collateral source rule and limiting punitive damages were enacted. Id.

With interim committee reports, recommendations and proposals in hand, the Kansas Legislature met in 1986 and enacted H.B. 2661. H.B. 2661 is a legislative scheme designed to resolve the medical malpractice liability crisis as the Legislature found it to exist. The legislative findings establish this crisis as reality and the factual record confirms the finding. The legislative findings and responses were not made casually. The Special Committee, and House and Senate Judiciary Committees received a thorough education on the existence of a problem and the best solutions.

The legislative facts of H.B. 2661 are as follows.

1. The Interim Special Committee on Medical Malpractice met fourteen times. At each meeting, a number of representatives from legal, medical, insurance and victims groups were present. See Minutes of Special Committee on Medical Malpractice, July 1-

2, 1985, July 18-19, 1985, August 15-16, 1985, September 12-13, 1985, October 10-11-1985, November 7-8, 1985, November 20-21, 1985.

2. At its first meeting the committee was educated in the present law relating to medical malpractice and was told how the Insurance Department and Board of Healing Arts operate. They were told that the Fund was in financial jeopardy and that its assets must be preserved. They were also told that insurance was becoming unaffordable and the underlying reasons for those increases. The committee was also cautioned that tort reform was not the answer, although other conferees believed tort reform was a viable alternative. See Testimony before Special Committee, July 1-2, 1985.

3. The committee heard a synopsis of the views of medical providers, the insurance industry, the legal profession and consumer groups. Id.

4. The insurance industry testified regarding their losses in Kansas in spite of increased reates. The insurance companies discussed insurance availability and statutes in other states that have afforded relief. See Testimony before Special Committee, July 18-19, 1985.

5. During the third committee meeting, the committee heard testimony from judges concerning methods of settlement. Members of the plaintiff and defense bar testified about their roles and concerns relating to medical malpractice actions. See Testimony before Special Committee, August 15-16, 1985.

6. The effectiveness of the Board of Healing Arts in disciplinary actions was discussed along with the need for effective peer review. Id.

7. The Kansas Medical Society presented options for the committees recommendation. Physicians and others testified about the high costs of premiums and that physicians were retiring early, leaving practice and eliminating procedures as a result. Victims, the Kansas Bar Association and K.T.L.A. testified that caps and other tort reform measures would not help rising

premiums, and that there was no crisis, just bad doctors. These groups presented alternative remedies. See Testimony before Special Committee, September 12-13-1985.

8. The Special Committee was advised of Fletcher Bell's Citizens Committee findings and recommendations. Those recommendations included caps and screening panels. The K.B.A. stated that were opposed to caps. See Testimony before Sepcial Committee, October 10-11, 1985.

9. Based on the evidence presented to it the Special Committee recommended caps, annuities, screening panel modifications, expert witness qualifications and peer review reporting statutes. See Proposal 47.

10. On January 13, 1986 the House Judiciary Committee heard testimony regarding the activities and conclusions of the Interim Committee. See Testimony before the House Judiciary Committee, January 13, 1986.

11. The House Judiciary Committee met thirteen times and heard evidence from legal, medical, insurance, victims and consumer groups. See Minutes of the House Judiciary Committee, January 12, 21, 22, 23, 27, 28, 1985, February 3, 4, 10, 11, 12, 13, 17, 1985.

12. The insurance industry presented evidence of financial losses, rising premium and decreased availability. The reasons behind the crisis were cited as the frequency and severity of claims. The insurance industry testified that if H.B. 2661 was passed that it could hold the line or reduce premiums and could increase availability. See Testimony before House Judiciary Committee, January 22-23, 1986.

13. The ability of the Board of Healing Arts to police negligent physicians was discussed. The Kansas Medical Society advocated strong peer review and risk management laws. K.T.L.A. told the committee that they were concerned about repeated suits against the same provider. See Testimony before House Judiciary Committee, January 27-28, 1986.

14. The House Judiciary Committee heard testimony from Jimmy Browning, M.D. that physicians were leaving their practices, particularly in rural areas. See Testimony before House Judiciary Committee, February 10, 1986.

15. Members of the Kansas Medical Malpractice Victims Coalition told the committee that caps would deprive them of their day in court, and about their own experiences. Id. The committee was also told caps were arbitrary and would not work. See Testimony before House Judiciary Committee, February 11, 1986.

16. Robert Hunter, appearing at the request of Governor Carlin, told the committee that the insurance crisis was manufactured. See Testimony before House Judiciary Committee, February 12, 1986.

17. Jerry Slaughter told the committee that the state run insurance company (JUA) was broke and had lost $7 million. The Fund is almost broke (having $19 million to cover and $47 million of claims in the pipeline) therefore this is not an insurance company rip-off, and bad doctors are not the cause of the problem. Id.

18. Anne Wigglesworth, a Wamego obstetrician, said that much of her work is now defensive medicine which raises consumer costs. The malpractice crisis has also affected her relationship with her patients. 25% of the physicians in Wamego have left or retired due to premiums. Id.

19. Dotson Bradbury, administrator of Greenwood County Hospital stated that of three general practitioners one has discontinued obstetric services and the other two are considering discontinuation of obstetrics. If this happens the citizens of the area will suffer. See Testimony before House Judiciary Committee, February 12, 1986.

20. Joe Knopp, Chairman of the House Judiciary Committee Testified in favor of caps and delineated the findings of the House Committee with regard to H.B. 2661. See Testimony before Senate Judiciary Committee, March 25, 1986.

21. The Senate Judiciary Committee heard testimony from the legal, medical, insurance, victims and consumer groups over six sessions. See Minutes of the Senate Judiciary Committee, March 25, 26, 27, 28, 31, 1986; April 1, 1986.

22. Consumer and citizen groups such as the Kansas Farm Bureau, A.A.R.P. and K.C.C.I. testified in favor of H.B. 2661. The governor's representative, K.B.A., K.T.L.A., malpractice victim representatives testified in opposition to the bill. See Testimony before the Senate Judiciary Committee, March 25-26, 1986.

23. All of the above facts were before the 1986 Kansas Legislature. Their proper and appropriate solution was to pass H.B. 2661.

I. THE PROPER ANALYSIS

1. Section 18 and Due Process.

Section 18 of the Kansas Bill of Rights states that "[a]ll persons...shall have remedy by due course of law and justice administered with delay." KAN. CONST. BILL OF RIGHTS § 18. Thirty-seven states, including the states that have upheld medical malpractice legislation, have similar provisions, all apparently derived from the Magna Carta.[1]

The purpose of Section 18 is to insure that there is judicial means of enforcing rights or redressing wrongs. Neeley v. St. Francis Hospital and School of Nursing, Inc., 192 Kan.

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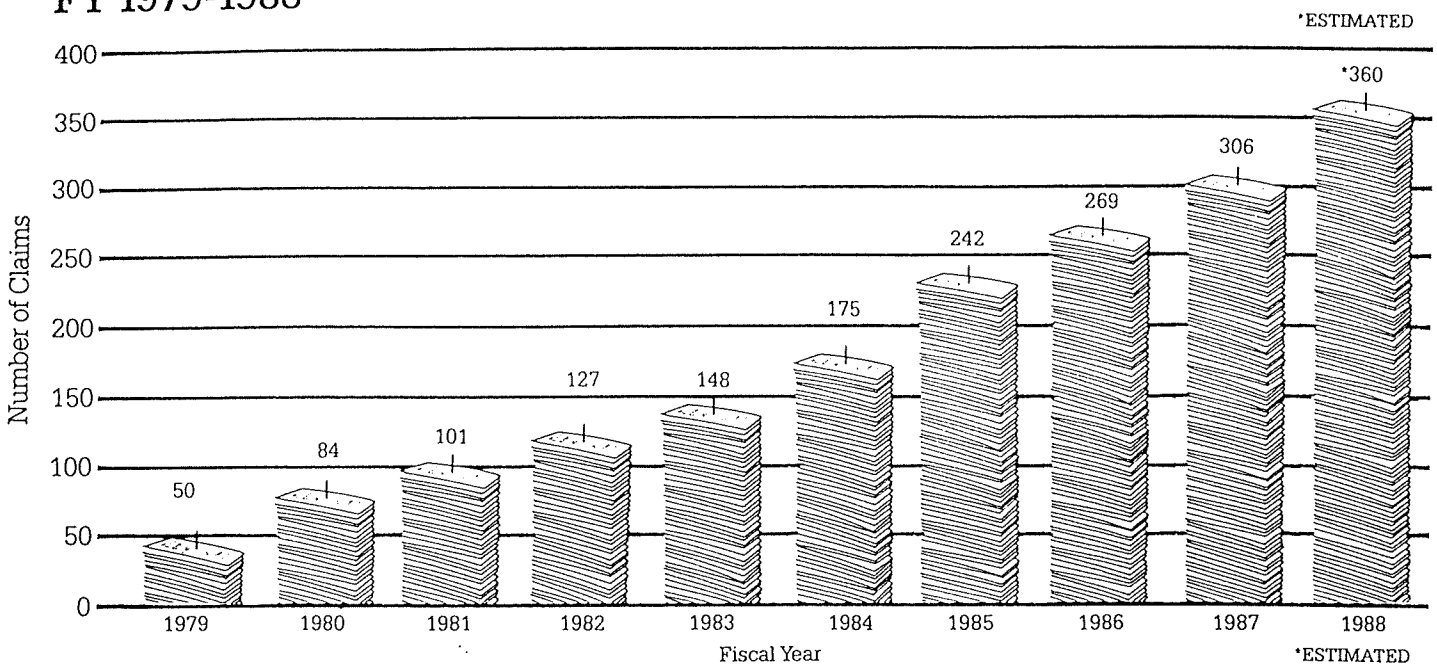
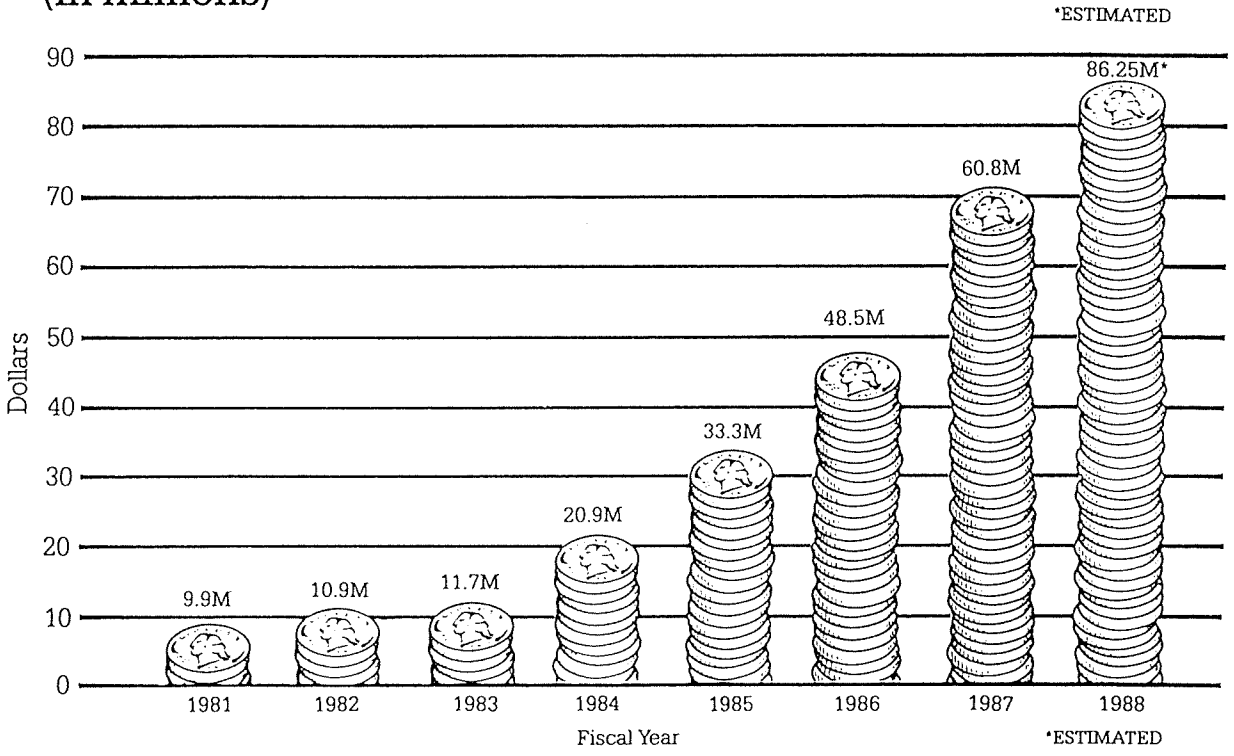
[1]Included in these thirty-seven states are Florida, Indiana, Maryland, Nebraska, Ohio and Wisconsin which plaintiffs expressly assert in their brief contain no such clause. See Okla. Const. art. 2, § 6. See Ala. Const. art. 1, § 13; Ark Const. art. 2, § 13; Colo. Const. art. 2, § 6; Conn. Const. art. 1, § 12; Del. Const. art. 1, §9; Fla. Const., Declaration of Rights § 4; Idaho Const. art. 1 § 18; Ill. Const. art 3, § 19; Ind. Const. art 1. § 12; Kan. Const., Bill of Rights § 18; Ky. Const. § 14; La. Const. art. 1, § 6; Me. Const. art. 1, § 19; Md. Const. Declaration of Rights art. 19; Mass. Const. pt. 1, art. 11; Minn. Const. art 1, § 8; Miss. Const. art 3, § 24; Mo. Const. art. 1, § 14, Mont. Const. art. 3, § 6; Neb. Const. art. 1, § 13; N.H. Const. pt. 1, art. 14; N.C. Const. art. 1, § 35; N.D. Const. art. 1, § 22; Ohio Const. art. 1, § 16; Ore. Const. art. 1, § 10; Pa. Const. art. 1, § 11; R.I. Const. art. 1, § 5; S.C. Const. art. 1, § 15; S.D. Const. art. 6, § 20; Tenn. Const. art. 1, § 17; Tex. Const. art. 1, § 13; Utah Const. art. 1, § 11; Vt. Const. ch. 1, art. 4; W. Va. Const. art. 1, § 17; Wis. Const. art. 1, § 9; Wyo. Const. art. 1, § 8.

Malpractice Claims Filed FY 1979-1988

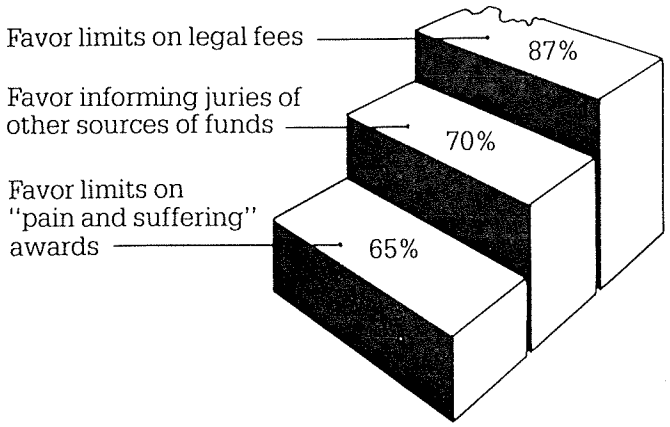


Medical Malpractice Premiums Paid in Kansas, FY 1981-1987 (in millions)



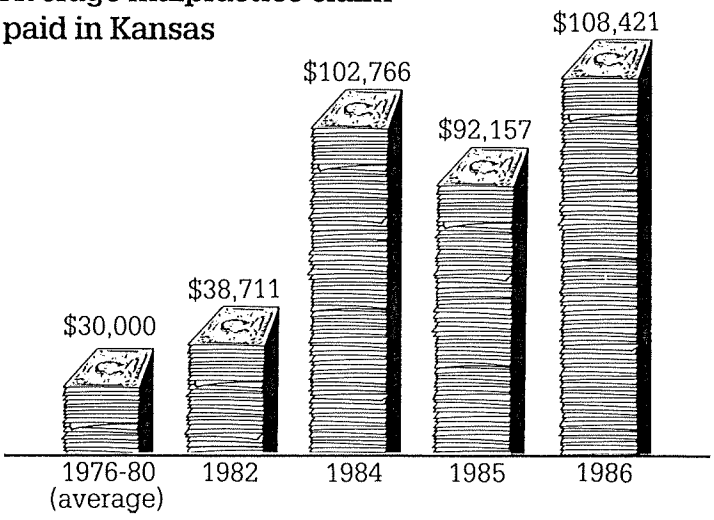
Attachment VI

Kansans' Attitudes Toward Malpractice Tort Reform



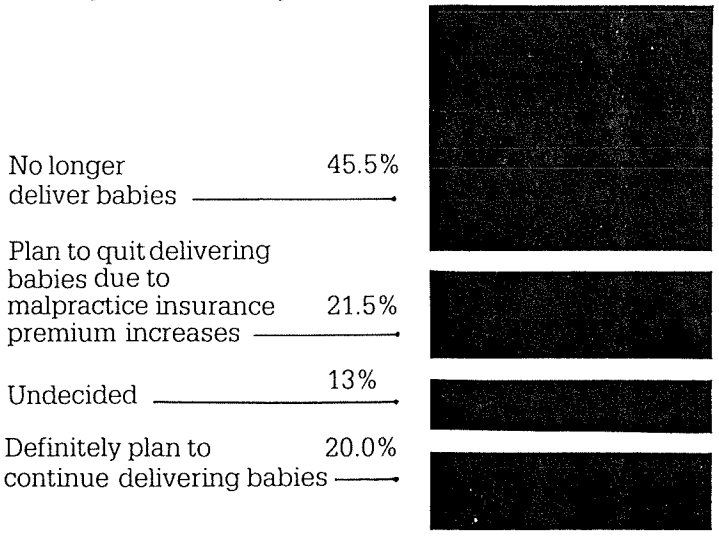
Source: Survey by The Research Partnership, November 11, 1987, of geographically representative random sample of 1250 Kansans. Survey conducted between October 19th and 26th, 1987.

Average malpractice claim paid in Kansas



Source: Kansas Medical Society, based on data obtained from Kansas Insurance Department.

Family Practice Physicians

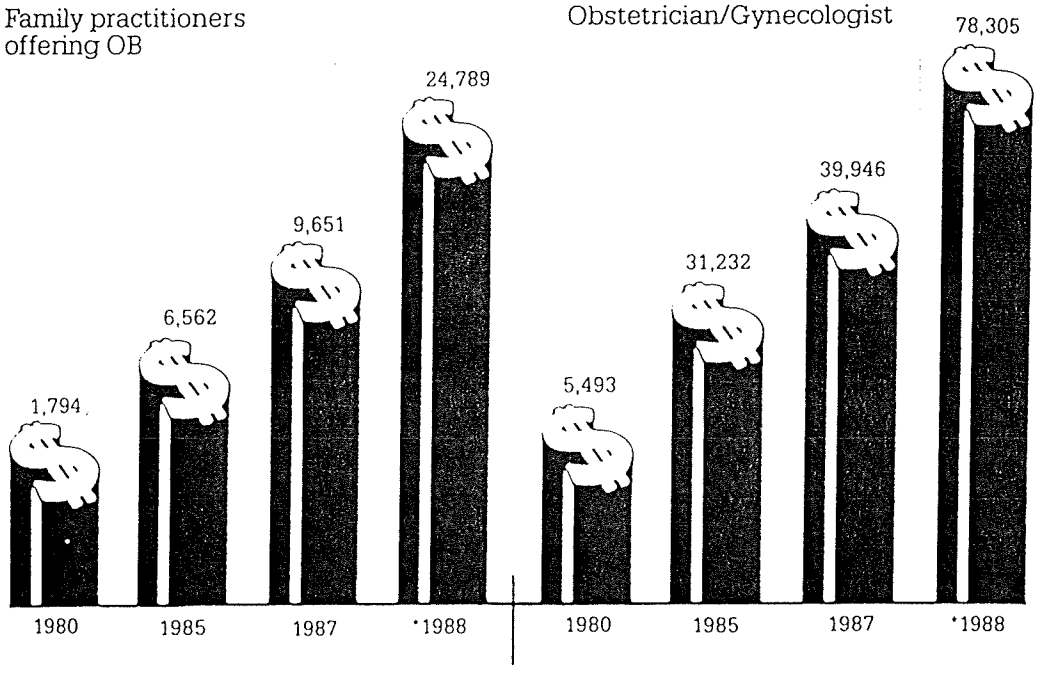


Source: Kansas Academy of Family Physicians survey of family practice physicians, 1987. Survey of 428 Kansas physicians with average of 17 years in practice.

Transaction Costs in the Malpractice System

Source: Kansas Medical Society

Average Malpractice Premiums for Family Practice and OB/GYN



Source: Kansas Commissioner of Insurance. Figures include calculated assessments for Health Care Stabilization Fund. *1988 figures are estimates based on applications for rate increases submitted to the Commissioner of Insurance.

KANSAS MEDICAL SOCIETY
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Comparison of Medical Malpractice Liability Insurance Premium Rates
January 1988

Introduction

KMS is often asked whether Kansas premiums for medical malpractice liability insurance are higher or lower than premiums in surrounding states. The fact of the matter is that it is impossible to make truly valid comparisons because circumstances differ from state to state. There are so many variables, often reflecting different laws, that the more one tries to analyze the differences, the more difficult it becomes to control variables and ascertain what significant factors determine why premiums are higher or lower in one state versus another.

There are simplistic comparisons available. Attachment A is an example of such a comparison which reflects premium rates for class 4 physicians insured by St. Paul Fire and Marine Insurance Company as of July 1, 1987. St. Paul's class 4 includes general or family practice physicians not primarily engaged in major surgery and emergency practice physicians who do not perform major surgery.

At first glance, the comparison map depicts Kansas in a favorable position, and Nebraska even better. The asterisk footnote explains why; the rates cited are for only $200,000/$600,000 coverage, whereas most of the others are for $1 million coverage - a significant difference. We have added our own note at the bottom of the page to explain that in order to equate Kansas with most of the other states, it is necessary to add a 90 percent surcharge for 1987 (and an estimated 150% surcharge for 1988), thereby reflecting $1 million/$3 million coverage.

Kansas

The St. Paul rate reflected on the comparison map was not the lowest Kansas rate in 1987. The Medical Protective Company, which insures about the same number of Kansas physicians that St. Paul does, offered the same $200,000/$600,000 coverage for only $4,105. When adjusted to reflect the 90% surcharge to finance the Health Care Stabilization Fund, the rate equated to $7,800 for $1 million coverage.

The Medical Protective rate was, however, artificially low in 1987. That company had avoided premium increases following enactment of medical malpractice liability reforms in 1986. A recently approved rate adjustment will result in an average 54 percent increase in 1988 premiums charged by the Medical Protective Company. Thus, the 1988 Medical Protective rate is $6,240 for the primary coverage, plus an estimated $9,360 HCSF surcharge (effective 7/1/88), for a total of $15,600, a 100% increase.

Attachment VII

Another important consideration that should be kept in mind is the uniqueness of Kansas' method of providing "excess insurance." While the health care provider must find a commercial insurance carrier or resort to the Health Care Providers Insurance Availability Plan for the first layer of $200,000 per occurrence and $600,000 aggregate coverage, the remaining layer of coverage of $1 million per occurrence is purchased from the state by way of a surcharge added to the commercial premium. The surcharge which is levied by the Insurance Commissioner and credited to the Health Care Stabilization Fund, includes a premium component which prepays the insureds future tail coverage. By contrast, in most states when a physician retires, he or she must purchase an insurance policy to cover any liability that may arise as a result of exposures to risk during the time when the physician was practicing medicine. The tail coverage benefit of participating in the Kansas HCSF can be an important consideration for a health care provider who is planning for retirement.

Finally, it should be noted that Kansas statute requires insurance coverage for health care providers as a condition of licensure. Some would argue that this legal mandate spreads risk among all health care providers, thus resulting in slightly lower premium rates for them all. Others would counter that this creates a captive market of insurance customers as well as a reasonably assured guarantee of recovery, combined with the HCSF "deep pocket." This, of course, tends to apply upward pressure on settlements and awards which then contributes to the never ending loss-premium spiral that plagues physicians and ultimately, the consumers of health care services.

Nebraska

The situation in Nebraska is similar to Kansas but there are some important differences. There is a statutory requirement that health care providers be insured for at least $200,000/$600,000 coverage but any excess coverage is optional. An insured may purchase up to $1 million coverage by participating in a state administered fund. The state fund is financed by a surcharge on the commercial premium but the surcharge may not exceed a 50 percent rate. For example, a maximum 50 percent surcharge added to the rate cited in Attachment A would result in a total premium of $10,902 for $1 million coverage (compared to the 1987 Kansas cost of $18,162 with St. Paul).

The St. Paul Company is the principal insurer in Nebraska. About two-thirds of Nebraska's physicians are insured by St. Paul. Because of its loss experience in Nebraska, the St. Paul Company has requested a ten percent reduction in medical malpractice premium rates.

Colorado

The situation in Colorado is very different from Kansas. There is no legal requirement that health care providers be insured for professional liability risks nor is there a state administered insurance fund. Physicians who apply for hospital privileges are normally required to have at least $1 million coverage, however. This is because it is a condition imposed by companies insuring hospitals.

The Colorado rate cited in Attachment A is somewhat misleading because the St. Paul Company insures only a modest ratio of Colorado physicians. About 80 percent of the doctors there are insured by the Colorado Physicians Insurance Company (COPIC). The COPIC premium for a physician in a risk classification analogous to St. Paul class 4 was $10,136 for $1 million coverage (this compares to the estimated 1988 rates for St. Paul of $23,898 and Medical Protective of $15,600, including HCSF surcharge).

Oklahoma

Circumstances in Oklahoma are more similar to Colorado than Kansas. There is no mandatory medical malpractice insurance requirement nor is there a state administered excess insurance fund. Most hospital insurers require that each medical staff have at least $1 million coverage or otherwise the insurer will not offer coverage for the hospital.

Again, the comparison map is misleading because St. Paul insures only a small ratio of Oklahoma physicians. Most doctors there (about 90 percent) are insured by the Physicians Liability Insurance Company (PLICO). The 1987 premium rate for a family practice physician who does not perform major surgery was only $3,910 for $1 million coverage.

Missouri

Missouri law does require $500,000 minimum medical malpractice liability coverage but only if the health care provider practices in a county with a population of 75,000 or more residents. Otherwise, there is no mandatory coverage but hospital insurers normally impose the requirement that medical staffs be insured. The State of Missouri does not administer an excess insurance fund.

The comparison map (Attachment A) is again misleading because St. Paul is not a major insurer in Missouri. In fact it was impossible to obtain a reasonably valid rate comparison for two principal reasons. First, Missouri law does not regulate medical malpractice insurance rates. Consequently it was not possible to locate a central agency that had access to 1987 rates being charged. Secondly, there are several companies offering medical malpractice coverage in Missouri; perhaps because rates are not regulated. One major Missouri insurer promised to send a copy of their rate schedule but at the time of this writing, has not.

Conclusion

Most Kansas physicians could re-locate to any one of three of our bordering states and obtain the same level of medical malpractice liability coverage at a lower premium. Nebraska and Oklahoma appear particularly attractive when compared to the Kansas situation.

Obviously a health care provider will consider numerous factors in addition to insurance rates when considering where to practice. An older Kansas physician thinking about retirement would certainly have a different perspec-

tive because of the tail coverage consideration. A mid-career Kansas physician would have to weigh the disadvantages of giving up an established practice to start over again in a neighboring state versus the advantage of lower insurance premiums. For the mid-career physician there would probably be personal considerations as well, like uprooting one's family and moving to a completely new community.

For a young physician who has recently completed a residency program, it would appear advantageous to establish one's practice in Nebraska, Colorado, or Oklahoma rather than Kansas. The cost avoidance attributable to lower medical malpractice insurance premiums would surely amount to adequate savings to finance the eventual cost of tail coverage upon retirement. The savings could amount to enough money to pay back one's financial obligation under the Kansas Medical Scholarship Program rather than comply with the agreement to practice in an underserved area of Kansas.

Update

Medical Liability Insurance Rate Comparisons

When The St. Paul's proposed rates are implemented, average premiums on an annual basis will range from $6,846 in Arkansas to $56,580 in the metro Chicago, Illinois, area. (See map.)

These average premiums are based on Class 4 doctor, mature claims-made rates for liability limits of $1 million/$3 million.

Proposed Rates

The St. Paul defines a Class 4 doctor as a family or general practitioner who performs major surgery or an emergency medicine physician who doesn't perform major surgery. Class 4 doctor rates reflect the average premiums charged for all physicians and surgeons insured by The St. Paul.

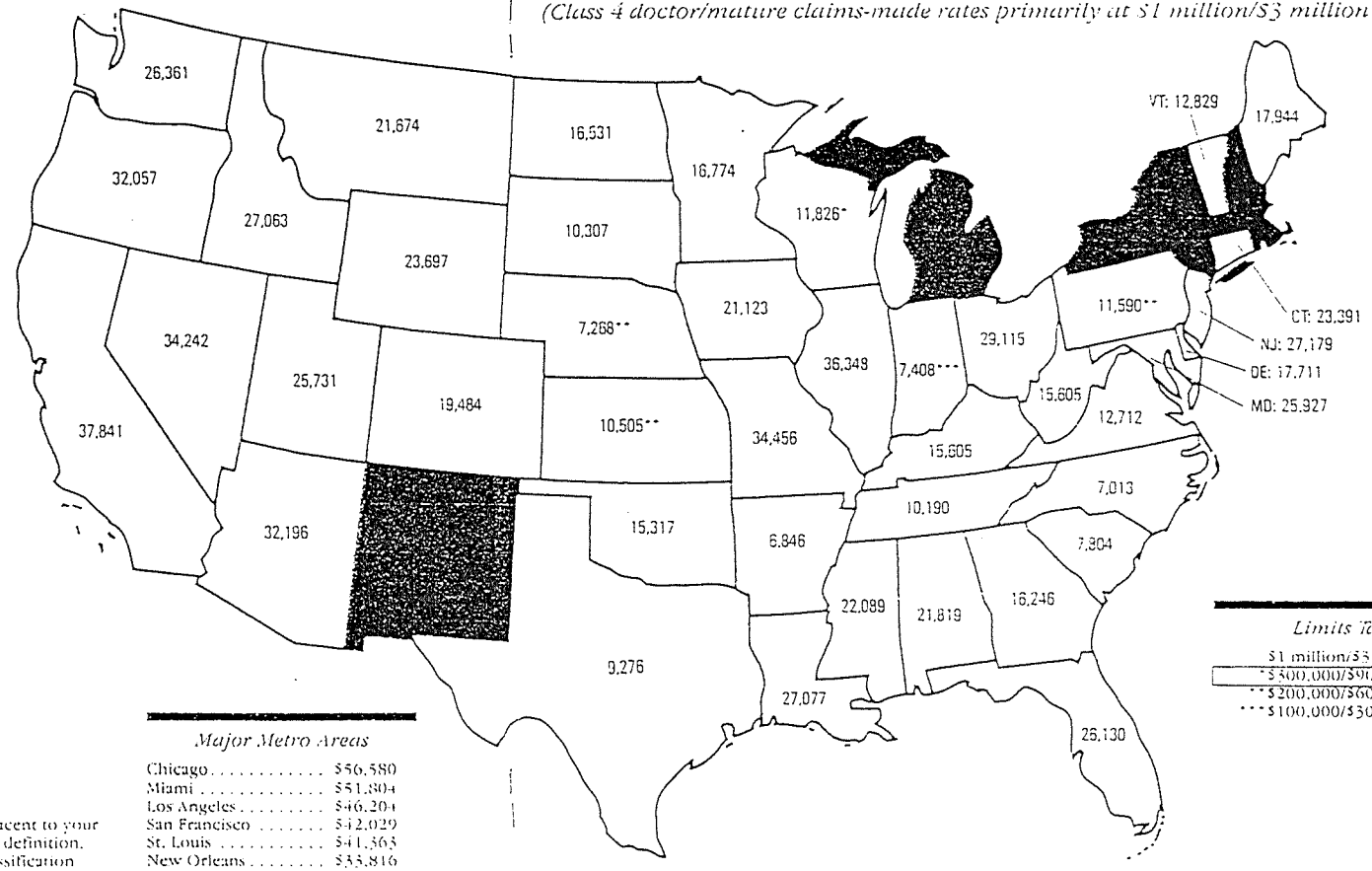
The map shows the proposed average rates on an annual basis for $1 million/$3 million limits of liability across the country (except in states where lower limits are mandatory). U.S. major metro areas, which reflect a separate St. Paul rating territory from the remainder of their state, are listed with their average rate in the chart below the map.

Individual premiums are not only affected by the state in which the physician practices but also the territory (if applicable), the limits of liability selected, the number of claims-made coverage years, and his or her specialty.

Rates by Specialty

Via last year's reply cards, many of you requested that we publish these proposed average rates for each of our nine rating classifications. Unfortunately, space does not permit us to do that on the adjacent map. However, you may compare your specialty's average rate by referring to the "Specialty By Rating Classification" chart on page 5. Adjacent to your rating class/specialty definition, you'll find rating classification relativities. Multiplication of your rating classification's relativity by your state's Class 4 Physician rate will produce a close approximation of your specialty's proposed average rate in your state.

St. Paul Fire and Marine Insurance Company
Proposed Physician & Surgeon Average Rates
On An Annual Basis After July 1, 1987
(Class 4 doctor/mature claims-made rates primarily at $1 million/$3 million limits)



Limits Table

$1 million/$3 million
*$500,000/$900,000
**$200,000/$600,000
***$100,000/$300,000

The St. Paul does not offer physician and surgeon medical liability insurance in these states.

Major Metro Areas

Chicago	$56,580
Miami	$51,804
Los Angeles	$46,204
San Francisco	$42,029
St. Louis	$41,365
New Orleans	$35,816
Washington D.C.	$30,529
Stamford	$30,127
New Haven	$27,715
Philadelphia	$22,335**
Philadelphia surrounding area	$18,560**
Houston	$15,849

Note: In order to equate Kansas to most other states (amounts not accompanied by asterisks), i.e., $1.0 million coverage, it is necessary to apply the HCSF surcharge. At the 1987 surcharge rate of 90%, Kansas premium is $19,960.00. At the 1988 estimated surcharge of 150%, the total premium would be $26,262.

Kansas Academy of Family Physicians

KAFP Practice Survey—
Focus on Obstetrics and Medical Liability

September, 1987

Ernie J. Chaney, M.D., Director—
St. Joseph Family Practice Residency Program
Wichita, Kansas
Richard L. Watson, Jr., M.D., Third Year Resident—
St. Joseph Family Practice Residency Program
Wichita, Kansas
Walter D. Bettis, Executive Director—
Kansas Academy of Family Physicians
Wichita, Kansas

Attachment VIII

KANSAS ACADEMY OF FAMILY PHYSICIANS
818 Carriage Parkway • Wichita, Kansas 67208 • (316) 651-2238

Executive Summary

In September of 1987, the Kansas Academy of Family Physicians surveyed their membership to assess Family Physicians role in obstetrical service for their Kansas patients.

In addition to current activity in the obstetrical area of practice, the KAFP obtained data that indicates the immediate future of the Family Physicians continued role in obstetrical care.

The information and data being reported is based on a 70 percent (428) response from the 607 members of the KAFP, representing 7,191 years of total practice experience.

According to the survey, Family Physicians deliver approximately 25 percent (9750) of the infants in Kansas on an annual basis.

Forty six percent of Family Physicians (195) have discontinued obstetrics citing medical liability as the primary reason for ceasing this service. Interestly enough, close to half of these Family Physicians have quit practicing obstetrics within the last 5 years, indicative of the escalation in medical liabilty premiums and as a part of on going risk management. After careful examination of the reasons Family Physicians had discontinued obstetrics cited 63 percent (123) ceased due directly to malpractice premiums and extended liability risk.

Currently, 54 percent (233) of the Family Physicians include obstetrics as an active part of their practice. Of the 233 Family Physicians currently practicing obstetrics, we discovered a significant number of these physicians will soon discontinue this portion of their practice. Specifically, when asked "if annual premiums continue to increase (question 12 on the practice survey) will you continue obstetrical practice", the response was alarming. Twenty one percent (90) will stop delivering babies. Twenty percent (86) indicate they will continue to offer obstetrical care to their patients. Thirteen percent (56) are undecided in regard to their continuation of obstetrical care in 1988.

The survey indicated 197 suits had been filed against the responding 428 Family Physicians. Forty two of these cases involved obstetrics. Of the responding physicians, twenty one percent had been named as a defendant in one or more cases. Taking into consideration the number of participating physicians in this survey coupled with their years in practice and extensive patient contacts, we feel the malpractice case load is significantly low for Family Physicians, yet the medical liability crisis is still felt by the specialist in Family Medicine.

Conclusion

The survey by the Kansas Academy of Family Physicians supports suspected trends in obstetrical practice by Family Physicians in the state of Kansas. As the data indicates, Family Physicians will curtail those segments of their practice that involve the greatest degree of litigious risk, in this case obstetrics. This allows Family Physicians to enter a lower risk classification realizing lower premium rates. The availability and affordability of quality comprehensive health care for the patients of Kansas is certainly in jeopardy based on the current climate of medical liability in Kansas.

Formal Testimony

to

Kansas House of Representatives

Judiciary Committee

The Honorable Robert S. Wunsch, Chairman

The Honorable Michael R. O'Neal, Vice Chairman

by

Ernie J. Chaney, M.D.
Director-St. Joseph Family Practice Residency Program
Associate Professor-Dept. of Family and Community Medicine-UKSM-Wichita
Chairman-Medical Liability Committee-Ks. Academy of Family Physicians

KAFP Practice Survey- 1987

1) _____Age

2) _____Years in practice

3) Please circle the style of practice that best describes your current situation.
   a) Solo
   b) Group
   c) Multi-speciality group

4) ____yes ____no Are you currently Board Certified?

5) ____yes ____no Are you currently practicing obstetrics? **(IF YOU HAVE DISCONTINUED OBSTETRICS, PLEASE CONTINUE WITH WITH QUESTION 8)**

6) _____1985 How many deliveries annually?
   _____1986
   _____1987 (projected estimate)

7) _____1985 What was your annual malpractice premium?
   _____1986
   _____1987

8) _____year in which you ceased obstetrics in your practice?

9) Why did you discontinue OB? **(Please circle one or more appropriate answers)**
   a) Malpractice premiums
   b) Other economic considerations
   c) Lifestyle (i.e. time) considerations
   d) Inability to obtain or maintain privileges

10) _____ How many malpractice cases have you been a defendent?

11) _____ How many cases were OB related?

12) ____yes ____no **If projections in annual premiums continue to increase (Medical Defense - 60%, PHICO - 35%, St. Paul - 36%, Medical Protective - expects to announce an increase as of Jan. 1) will you continue obstetrical practice?**

13) If you were to discontinue obstetrics how far would your patients have to travel for their obstetrical care? **(Please Check)**
   _____ 0 - 5 miles
   _____ 5 - 15 miles
   _____ 15 - 30 miles
   _____ 30 - 50 miles
   _____ 50 or more

14) ____yes ____no Do you feel the Kansas Academy should take a public position on the medical malpractice issue?

15) ____yes ____no In addition to public awareness programs that have been conducted by the Kansas Medical Society, do you feel the KAFP should conduct similar efforts of public education regarding the malpractice situation from the perspective of the Family Physician. **(This type of program could be initiated and coordinated with KMS in order for a unified approach this situation.)**

Practicing OB	233				1-50	Years
Not Practicing OB	195					in
Deliveries in '85	8349	'86	8255	'87	8517	Practice
Malpractice Suits	197					
OB Related	42		21.32%			

If premiums continue to increase will you continue to practice OB?

OUT OF PRACTICING OB PHYSICIANS

Yes	86	20%
No	90	21%
Maybe	56	13%

Miles Patients would have to drive?

OUT OF NONPRACTICING OB PHYSICIANS

0-5	42	21.54%
5-15	5	2.56%
15-30	14	7.18%
30-50	6	3.08%
50 or more	2	1.03%
No Response	126	64.62%

OUT OF PRACTICING OB PHYSICIANS

0-5	105	45.06%
5-15	16	6.87%
15-30	35	15.02%
30-50	43	18.45%
50 or more	22	9.44%
No Response	12	5.15%

NOTE

To indicate what percentage of Family Physicians practice obstetrics, we have obtained the 1986 live births by county from the Department of Health and Environment. According to the 1986 data, 39,177 babies were delivered. According to our survey 8,255 of those 39,177 births were delivered by Family Physicians 21%

Premiums: Practicing OB				Not Practicing OB		
Responses	Total	Average		Responses	Total	Average
166	1,198,599	7,220.48	'85	22	123,831	5,628.68
188	1,586,055	8,436.46	'86	22	141,322	6,423.73
200	1,836,198	9,180.99	'87	22	140,263	6,375.59

# of Responses	428	70.16 %
Average Age of Physicians who Responded	46	
Average Years in Practice	17	
Solo Practice	149	34.81 %
Group Practice	222	51.87 %
Multi-Specialty Practice	37	9.64 %
Other Practice	6	1.40 %
Board Certified	335	78.27 %
Not Board Certified	92	21.49 %
Practicing OB	233	54.44 %
Not Practicing OB	195	45.56 %

Reason for Discontinuing OB? (Percentage based on Physicians not practicing OB and has multiple answers)

Malpractice Premiums	123	63.08 %
Lifestyle Considerations	102	52.30 %
Unable To Obtain/Maintain Privileges	1	.51 %
Other Economic Considerations	26	13.33 %

Should the KAFP take a public position on the medical malpractice issue?

Yes	415	96.96 %
No	3	.70 %
No Response	10	2.34%

Should the KAFP conduct efforts of public education RE: the malpractice situation from the perspective of Family Physicians?

Yes	407	95.09%
No	6	1.40%
No Response	15	3.50%

Kansas Academy of Family Physicians

818 Carriage Parkway, P.O. Box 20597 • Wichita, Kansas 67208 • (316) 651-2238

Walter D. Bettis
Executive Director

I am Ernie J. Chaney, M.D., Associate Professor of Family & Community Medicine at the University of Kansas School of Medicine-Wichita and Director of the St. Joseph Family Practice Residency Training Program. I am a graduate of the University of Kansas School of Medicine and Practiced in the North Central Kansas in Republic County, Belleville, Kansas from 1957 to 1983. I joined the faculty at the University of Kansas School of Medicine-Wichita in 1983 and have been Director of the Residency Training Program at St. Joseph Medical Center since that time. I have had the privilege of serving as President of the Kansas Academy of Family Physicians and President of the American Academy of Family Physicians and the country's largest specialty society, and currently serve as President of the Family Health Foundation of America. I service as a Technical Advisor to the Harvard AMA Relative Study and AM Actively involved in the Practice of Family Medicine including Obstetrics, both normal and complicated.

In my role as health care provider to rural Kansas I have delivered several thousand children and have performed multiple operative Obstetric procedures. I appreciate the opportunity to express my concerns to this August Body in regards to our current problems with Medical Liability Insurance.

I believe the greatest impact on the current problem will be on the reproductive age females who will find it very difficult to find medical care in their local rural communities. The problem will also impact on rural hospitals as they find decreasing census, decreasing income, lack of physicians to support the institution and eventual closure. The ripple effect, however, will continue farther than that and effect academic medicine, particularly in the specialty in the Family Medicine. Family Practice is that specialty of medicine that is not limited to treatment of individuals by disease, organ sites, sex or age. One of the core areas in Family Medicine is Obstetrics because that is the beginning of family existence. Indeed, as the liability crisis precludes the practice of that part of our specialty, we will see a decrease emphasis on that training in the training sites and physicians will enter the practice of medicine without the skills necessary to deliver obstetrical care to the citizens in the State of Kansas. Recently, the Kansas Academy of Family Physicians surveyed its active membership in regards to their practices and anticipated changes that may occur with the increasing medical liability insurance premiums. A copy of those findings are included in your handouts and I would be most pleased to answer specific questions that you might have.

If I might briefly summarize those, I would say that the results indicate a significant number of Family Physicians who have been in practice reasonably long period of time and who have probably attained the peak of their medical practice have already discontinued doing Obstetrics because of the increase in liability problems and changing lifestyles. Of those individuals who currently do Obstetrics, the majority will discontinue delivery of infants because of the rapidly rising liability costs. In many rural hospitals the Family Physicians deliver from 20-50 infants a year, and if the cost of liability insurance increases by $10,000-$15,000 it is easy to see that the patient must bear an additional $200-$500 cost to their deliveries. You all are aware that wheat is less than $3.00/bushel and the farm economy certainly is not flourishing and I am doubtful that any of the individuals that I took care of in Republic County would be able to bear that increase in cost. It would, therefore, seem logical that many physicians would discontinue Obstetrics. If, indeed, they live on the borders as I did in north central Kansas and as I am currently located in Wichita, Kansas, it would seem also reasonable that they may move across the border to continue their medical practice and utilize the lower liability rates available in the border states.

There is also no question in my mind as an educator and teacher of young Family Physicians, that we will have a distinctly difficult task in retaining those physicians in the State of Kansas. Many of my residents are indebted to Kansas for their educational expenses and intend to pay back by practicing in underserved areas. However, it will not be economically feasible to do so in

the practice of Obstetrics, and consequently, many will leave the state. While they will pay back their loans; that certainly does not solve the physician supply problems that we are currently facing in the specialty of Family Medicine.

I might parenthetically add that if you have any questions of the need for Family Physicians, I certainly can supply you with the information indicating that we are grossly underserved in my specialty in the State of Kansas and, indeed, nationally also. I am sure you will hear other testimony regarding the causes of the Medical Liability Crisis, and while I have my own suggestions for improvement, I don't believe that is the reason for my testimony, but I would be pleased to answer any questions you may have along that line.

Once again, I appreciate your kindness in allowing me to share my deep concerns with you for it is my belief that unless some solution to this very difficult problem is not found, and found rapidly, the State of Kansas will suffer irreparable damage to the high quality of medical care it now enjoys.

E.J. Chaney, M.D.
Director, Family Practice Residency Program
Associate Professor
Department of Family and Community Medicine
University of Kansas School of Medicine-Wichita

Senate

COLLATERAL SOURCE RULE

This act repeals K.S.A. 60-3403, the abolition of the collateral source rule in medical malpractice actions passed by the legislature in 1986. The Kansas Supreme Court held that law unconstitutional in Farley v. Engelken, 241 Kan. 663 (1987). Under this act, evidence of collateral source benefits will be admissible in all personal injury trials after July 1, 1988. If such evidence of collateral source benefits is presented, evidence of the cost of securing the benefit and amounts to be taken out of any award to pay back those benefits is also admissible. Upon receiving this evidence, the trier of fact must consider whether any award will duplicate the collateral source benefits, along with the cost of securing the benefit and amounts to be deducted from any award for liens or subrogation.

Attachment IX

PUNITIVE DAMAGES

The new Kansas Punitive Damages Bill amends and consolidates the two previous punitive damage laws. K.S.A. 60-3402, the law applying to punitive damages in medical malpractice cases and the general punitive damages award statute enacted in 1987 are amended so that they apply only to causes of action accruing before the effective date of this act. The two laws are then consolidated into this act.

Under the new act, punitive damages are recoverable in civil tort cases when the claimant shows by clear and convincing evidence that the tortfeasor acted with intent to injure, fraudulently or with malice. The ability to recover punitive damages is determined during the initial trial, but the amount of punitive damages to be awarded is determined during a separate proceeding. During that separate proceeding evidence of the financial condition of the party against whom damages are to be assessed is heard, along with evidence of aggravating or mitigating factors. Evidence presented during the initial trial, relevant to the punitive damage award, may also be considered.

Punitive damages awarded under the act may not exceed 25% of the party's highest annual gross income for the preceding five years, or three million dollars. Fifty percent of any punitive damage award is paid to state general fund.

Attachment X

WHY KANSAS NEEDS A NEW PUNITIVE DAMAGE LAW

The tort system is founded upon the idea of compensation, rather than punishment. Retribution is instead confined to the criminal arena. However, the concept of exemplary, or punitive damages interjects the elements of punishment inherent in the criminal justice system into the tort system. Punitive damages are designed to punish and deter conduct.

In the criminal justice system, the defendant knows that if he is found guilty he will be punished. The defendant also knows the parameters of that punishment. But, in the civil justice system, a defendant has no idea whether the jury will so punish him, or what that punishment will consist of. Further, in the criminal justice system, the victim may be financially compensated by restitution. The victim does not however financially benefit from any punishment imposed upon the defendant. Instead, society as a whole benefits from the punishment imposed. In the civil system, conduct that forms the basis for a punitive damage award harms society as well as the claimant, but the claimant is the only beneficiary of the punishment imposed. The new Kansas Punitive Damages Act is designed to provide the same knowledge the tortfeasor that is available to his counterparts in the criminal justice system and to enable the claimant and society to benefit equally from any punitive damage award.

In 1985, the Kansas legislature passed a law that modified the doctrine of punitive damages in medical malpractice cases. K.S.A. 60-3402 provided that the jury would decide if punitive damages were to be awarded and created a separate proceeding for the court to determine the amount of punitive damages. The statute codified the applicable law that the claimant had to show the jury by clear and convincing evidence that he was entitled to recover punitive damages because the tortfeasor acted willfully, wantonly, fraudulently or with malice. The statute then set parameters for the amount of the award, and provided that half of the award would be paid into the Health Care Stabilization Fund. The statute also eliminated vicarious responsibility for the payment of punitive damages unless the conduct was ratified. The 1985 law went part way towards closing the civil-criminal distinctions in punitive damage awards, but it did not go quite far enough.

In 1987 the Kansas legislature again addressed the issue of punitive damages. While basically the same, HB2025 took K.S.A. 60-3402 a few steps further, but still failed to go far enough. HB2025 applied to all civil actions and added a list of aggravating and mitigating factors for the court to consider. It too stated limits on the amount that could be assessed.

The present act completes the evolution begin by K.S.A. 60-3402 and HB2025. First, it applies to civil torts because only in civil tort actions is the danger of a criminal penalty present

for what is simply a higher level of negligence. Second, it assures that the conduct punished is truly criminal in nature and thus deserving of punishment instead of punishing what is in reality negligence. The act accomplishes this by making punitive damages recoverable when the defendant acts with malice, fraud or intent to injure. Mere "heightened negligence" is no longer enough to invoke a criminal sanction. The new act maintains the bifurcated system set forth in prior statutes, and allows the court to consider evidence of aggravating and mitigating circumstances in the punitive damages phase. Unlike HB2025, these circumstances follow prior Kansas case law.

The act, like its predecessors, sets a limit on the punishment imposed and provides the benefit to society by making half of the award payable to the general fund. It also assures that the state cannot become a party and request punitive damages merely to enrich itself. Finally, the act requires express ratification of the conduct to vicariously assess punitive damages.

The new act makes relatively few changes in Kansas punitive damage law. However, the changes it does make are important. They assure that criminal-type conduct will be addressed in an appropriate manner by utilization of the existing remedies of the criminal system or the administrative licensing system. When egregious conduct justifies compensation via the tort system, the act assures that punishment is for criminal, not merely negligent conduct and sets forth the parameters of the punishment to be imposed. Finally, the act assures that punishment benefits all citizens of the state, and does not only provide a claimant with "smart money."

NON-ECONOMIC DAMAGES

This bill is designed to consolidate all of the present laws limiting non-economic damages into one law. The bill provides that the limitation on non-economic damages in medical malpractices cases (K.S.A. 60-3407) and the limitation on pain and suffering in personal injury actions apply only to causes of action accruing before the effective date of this act. This act then combines both statutes into one law that provides a limitation of $250,000 on non-economic losses in causes of action accruing after its effective date of July 1, 1988.

Attachment XI

PERIODIC PAYMENT OF DAMAGES

This act is designed to assure that damage payments in personal injury actions are made as the claimant needs them. In so doing, damage awards may be drafted with precision, and the problems associated with paying a large sum of money in the present to pay future expenses are alleviated.

Under this act, juries are required to itemize awards for past and future damages, for economic and non-economic losses, and to state the number of years over which future damages are to be paid. The jury does not reduce the future damages figure to present value. Damages incurred to the date of judgment, or past damages, are paid in a lump sum. Upon the request of any party, the court will require that future damages be paid periodically over the number of years set forth in the verdict.

An annuity is then purchased to pay for the judgment, subject to court approval. Execution on the judgment is stayed until the annuity is purchased and approved. In the event an annuity is not purchased the court may reduce the judgment to present value and require a lump sum payment.

The act also provides for the abatement of payments when the party receiving payments dies. In a wrongful death action, the deceased beneficiary's share is redistributed among the living beneficiaries. To protect payments from creditors, the annuity is exempt from levy, garnishment or attachment. The annuity payments are not taxable income to the beneficiary.

Since attorney fees are often paid from awards, the act sets forth options for the payment of such fees. The fee can be paid out of the lump sum award and periodic payments, or may be paid in lump sum in an amount not to exceed 1/3 of the cost of the annuity. The amount paid to purchase the annuity is then reduced accordingly.

To guarantee that payments will be secure, annuities purchased under this act are covered by to the Kansas Life and Health Insurance Guaranty Act.

Attachment XII

Comparison of Senate Bill 258 and The Kansas Periodic Payment of Personal Injury Judgments Act

Senate Bill 258 follows the uniform law commissioner's model Periodic Payment of Judgments Act. It requires itemization of verdicts by a jury and provides that upon the death of the plaintiff the obligation to pay installments for medical or other costs of health care or non-economic loss shall terminate.

The Kansas Periodic Payment of Personal Injury Judgments Act similarly requires itemizations of verdicts and provides that future damages for personal injury or death will abate at the time of death. The significant difference between the two is that the Kansas Act is much simpler and achieves the requirements of reducing damages to present value by use of the purchase of an annuity from an insurance company satisfactory to the court. The advantages of the Kansas Act are as follows:

1. It will be utilized in all cases when requested by either party.

2. It permits a plaintiff to offer evidence concerning the future costs of anticipated expenses. It is not necessary that the plaintiff introduce evidence of the present value of such costs as this is automatically calculated by the purchase of an annuity. Consequently, it is unnecessary for the legislation to pick an arbitrary discount rate.

3. It is unnecessary for defendants or insurers to carry a continuing liability upon their books as this is transferred to the annuity company. The annuity figures are mortality-weighted and the company assumes the risk of a person living beyond that time anticipated.

4. The suggested bill substitutes the strength of a life insurance company approved by the court and the Kansas Guaranty Fund to guarantee future payments for the judgment debtor or his insurer for the judgment debtor or insurer.

5. The jury verdict will be itemized to more readily determine if it is supported by the evidence.

6. The annuity is exempt from the claims of creditors until the payments are actually made.

7. The suggested Act is designed to insure the non-taxability of the annuity payments.

Attachment XIII

Session of 1988

HOUSE BILL No. 2690

By Committee on Judiciary

1-22

AN ACT concerning the periodic payment of damages in personal injury actions; enacting the periodic payment of personal injury judgments act; amending K.S.A. 40-3003, 60-262 and 60-2103 and K.S.A. 1987 Supp. 60-249a and 60-1903 and repealing the existing sections.

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

New Section 1. (a) The purposes of this act are to: (1) Alleviate some of the practical problems incident to unpredictability of large future losses; (2) effectuate more precise awards of damages for actual losses; (3) pay damages as the trier of fact finds the losses will accrue; and (4) assure that payments of damages more nearly serve the purposes for which they are awarded.

(b) This act shall be known as the periodic payment of personal injury judgments act.

New Sec. 2. As used in this act:

(a) "Economic loss" means: (1) Reasonable expenses of necessary medical care and related benefits,; (2) lost wages, time or income by reason of any disability; (3) aggravation of a preexisting ailment or condition because of the bodily injury; and (4) other harm for which money damages can be measured. In actions for wrongful death, the term means damages allowable pursuant to K.S.A. 60-1904 and amendments thereto.

(b) "Future damages" means damages arising from personal injury or death which the trier of fact finds will be incurred after the damages findings are made.

(c) "Medical care and related benefits" means reasonable expenses of necessary medical care, hospitalization and treatment.

Attachment XIV

(d) "Noneconomic loss" means pain and suffering, disability, disfigurement and any accompanying mental anguish. In actions for wrongful death, the term means damages allowable pursuant to K.S.A. 60-1904 and amendments thereto.

(e) "Past damages" means damages that have been incurred when the damages findings are made, including any punitive or exemplary damages allowed by law.

(f) "Personal injury action" means any action seeking damages for personal injury or death. Personal injury action includes medical malpractice liability actions.

~~New Sec. 3. In any personal injury action past damages shall be paid in lump sum.~~

~~New Sec. 4. At the request of any party to such action made prior to trial, the court shall include in the judgment a requirement that future damages be paid in periodic payments. In any trial in which a party has elected to proceed under this act, the finder of fact shall not reduce the damages awarded to present value. Judgment shall be entered for past damages and judgment shall be entered for future damages prorated over the number of years specified by the finder of fact.~~

New Sec. ~~4~~ 3. Upon the death of the party for whom the damages have been awarded in any personal injury action, that portion of the periodic payments awarded for medical care and related benefits and for noneconomic loss which are due in the future shall terminate and abate. However, if a judgment in an action for wrongful death provides for periodic payments to be made to more than one individual, the surviving beneficiaries shall succeed to the shares of the deceased beneficiaries in proportion to their shares in the judgment.

New Sec. ~~5~~ 4. As a condition of approving periodic payments of future damages under this act, the court shall require a party against whom damages have been assessed, or that party's representative, to purchase an annuity or annuities from a company satisfactory to the court to assure full payment of such damages and to make a qualified assignment as described in section 130 of the Internal Revenue Code of 1986. In the event such an assignment is not made or such an annuity or annuities is not

Section 3. At the request of any party to a personal injury action made prior to trial, the court shall include in the judgment a requirement that future damages be paid in periodic payments. In any trial in which a party has elected to proceed under this act, the finder of fact shall not reduce the damages awarded to present value. Judgment shall be entered as follows:

(a) for past damages in lump sum;

(b) for future damages, excluding medical care and related benefits, prorated over the number of years specified by the finder of fact, and

(c) for future medical care and related benefits for the number of years and allocated in the manner specified by the finder of fact.

purchased, the court shall reduce the damages to present value, after receiving evidence of the appropriate discount rate, and shall enter judgment for a lump sum. When an assignment is made and when an annuity or annuities is purchased as the method of making periodic payments, the judgment shall be deemed satisfied upon the payment of past damages, purchase of the annuity or annuities, the making of a qualified assignment and approval by the court.

Sec. 76. K.S.A. 60-2103 is hereby amended to read as follows: 60-2103. (a) *When and how taken.* When an appeal is permitted by law from a district court to an appellate court, the time within which an appeal may be taken shall be ~~thirty (30)~~ *30* days from the entry of the judgment, as provided by K.S.A. 60-258, *and amendments thereto,* except that upon a showing of excusable neglect based on a failure of a party to learn of the entry of judgment the district court in any action may extend the time for appeal not exceeding ~~thirty (30)~~ *30* days from the expiration of the original time herein prescribed. The running of the time for appeal is terminated by a timely motion made pursuant to any of the rules hereinafter enumerated, and the full time for appeal fixed in this subsection commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: *(1)* Granting or denying a motion for judgment under subsection (b) of K.S.A. 60-250~~; or~~, *and amendments thereto; or (2)* granting or denying a motion under subsection (b) of K.S.A. 60-252, *and amendments thereto,* to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; ~~or~~ *(3)* granting or denying a motion under K.S.A. 60-259, *and amendments thereto,* to alter or amend the judgment; or *(4)* denying a motion for new trial under K.S.A. 60-259, *and amendments thereto.*

A party may appeal from a judgment by filing with the clerk of the district court a notice of appeal. Failure of the appellant to take any of the further steps to secure the review of the judgment appealed from does not affect the validity of the appeal, but is ground only for such remedies as are specified in this chapter, or

when no remedy is specified, for such action as the appellate court having jurisdiction over the appeal deems appropriate, which may include dismissal of the appeal. If the record on appeal has not been filed with the appellate court, the parties, with the approval of the district court, may dismiss the appeal by stipulation filed in the district court, or that court may dismiss the appeal upon motion and notice by the appellant.

(b) *Notice of appeal.* The notice of appeal shall specify the parties taking the appeal; shall designate the judgment or part thereof appealed from, and shall name the appellate court to which the appeal is taken. The appealing party shall cause notice of the appeal to be served upon all other parties to the judgment as provided in K.S.A. 60-205, *and amendments thereto*, but ~~his or her~~ *such appealing party's* failure so to do does not affect the validity of the appeal.

(c) *Security for costs.* Security for the costs on appeal shall be given in such sum and manner as shall be prescribed by a general rule of the supreme court unless the appellate court shall make a different order applicable to a particular case.

(d) *Supersedeas bond.* Whenever an appellant entitled thereto desires a stay on appeal, ~~he or she~~ *such appellant* may present to the district court for its approval a supersedeas bond which shall have such surety or sureties as the court requires. The bond shall be conditioned for the satisfaction of the judgment in full together with costs, interest, and damages for delay, if for any reason the appeal is dismissed, or if the judgment is affirmed, and to satisfy in full such modification of the judgment such costs, interest, and damages as the appellate court may adjudge and award. When the judgment is for the recovery of money not otherwise secured, the amount of the bond shall be fixed at such sum as will cover the whole amount of the judgment remaining unsatisfied, costs on the appeal, interest, and damages for delay, unless the court after notice and hearing and for good cause shown fixes a different amount or orders security other than the bond. *If the periodic payment of personal injury judgment act applies to the judgment, the amount of the bond shall be fixed at such sum as will cover the whole amount of past*

damages, the amount the district court finds to reasonably represent the cost of an annuity which would be sufficient to satisfy the portion of the judgment for future damages, interest and the costs on appeal, unless the court, after notice and hearing and for good cause shown, fixes a different amount or orders security other than the bond. When the judgment determines the disposition of the property in controversy as in real actions, replevin, and actions to foreclose mortgages or when such property is in the custody of the sheriff or when the proceeds of such property or a bond for its value is in the custody or control of the court, the amount of the supersedeas bond shall be fixed after notice and hearing at such sum only as will secure the amount recovered for the use and detention of the property, the costs of the action, costs on appeal, interest, and damages for delay. When an order is made discharging, vacating, or modifying a provisional remedy, or modifying or dissolving an injunction, a party aggrieved thereby shall be entitled, upon application to the judge, to have the operation of such order suspended for a period of not to exceed ~~ten (10)~~ *10* days on condition that, within ~~said~~ *such* period of ~~ten (10)~~ *10* days such party shall file a notice of appeal and obtain the approval of such supersedeas bond as is required under this section.

(e) *Failure to file or insufficiency of bond.* If a supersedeas bond is not filed within the time specified, or if the bond filed is found insufficient, and if the action is not yet docketed with the appellate court, a bond may be filed at such time before the action is so docketed as may be fixed by the district court. After the action is so docketed, application for leave to file a bond may be made only in the appellate court.

(f) *Judgment against surety.* By entering into a supersedeas bond given pursuant to subsections (c) and (d) ~~of this section~~, the surety submits ~~himself or herself~~ to the jurisdiction of the court and irrevocably appoints the clerk of the court as ~~his or her~~ *such surety's* agent upon whom any papers affecting ~~his or her~~ *such surety's* liability on the bond may be served. ~~His or her~~ *The surety's* liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the

motion as the judge prescribes may be served on the clerk of the court who shall forthwith mail copies to the surety if ~~his or her~~ *such surety's* address is known.

(g) *Docketing record on appeal.* The record on appeal shall be filed and docketed with the appellate court at such time as the supreme court may prescribe by rule.

(h) *Cross-appeal.* When notice of appeal has been served in a case and the appellee desires to have a review of rulings and decisions of which ~~he or she~~ *such appellee* complains, the appellee shall within ~~twenty (20)~~ *20* days after the notice of appeal has been served upon ~~him or her~~ *such appellee's* and filed with the clerk of the trial court, give notice of ~~his or her~~ *the appellee's* cross-appeal.

(i) *Intermediate rulings.* When an appeal or cross-appeal has been timely perfected the fact that some ruling of which the appealing or cross-appealing party complains was made more than ~~thirty (30)~~ *30* days before filing of the notice of appeal shall not prevent a review of the ruling.

New Sec. ~~8~~ 7. If a party for whom damages have been awarded and attorney have agreed that attorney fees be paid from the award pursuant to a contingency fee arrangement, the portion of the fee attributable to past damages shall be paid in lump sum and the portion of the fee attributable to future damages shall be paid periodically. The foregoing notwithstanding, the claimant and the claimant's attorney may elect to apply a portion, not to exceed 1/3 of the total cost of the annuity or annuities specified in section 6 in satisfaction of the claimant's attorney fees. The balance of such cost shall be utilized to purchase the annuity or annuities, which shall be deemed to fully satisfy the requirements of section 6 even though it provides a level of payments below that found by the trier of fact for future damages.

New Sec. ~~9~~ 8. If an annuity is purchased pursuant to this act by the party against whom damages have been assessed or by the party's insurer, neither the claimant nor the claimant's attorney shall own, receive by assignment or otherwise have any interest in the ownership or purchase of the annuity and periodic payments made through such annuity shall not be accelerated,

such party's

deferred, increased or decreased by the claimant or the claimant's attorney. If the party against whom damages have been assessed or such party's insurer assigns the obligation to pay, the assignee shall not provide to the claimant or to the claimant's attorney rights against the assignee which are greater than those of a general creditor and the assignee's obligation shall be no greater than the obligation of the assignor.

New Sec. ~~XX~~ 10. Benefits under an annuity contract awarded pursuant to this act shall not be assignable or subject to levy, execution, attachment, garnishment or any other remedy or procedure for the recovery or collection of a debt until payment is accrued, and this exemption cannot be waived.

Sec. ~~XX~~ 11. K.S.A. 60-262 is hereby amended to read as follows: 60-262. (a) *Automatic stay; exceptions — injunctions and receiverships.* Except as stated herein, no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of ~~ten (10)~~ *10* days after its entry. Unless otherwise ordered by the court, an interlocutory or final judgment in an action for an injunction or in a receivership action, shall not be stayed during the period after its entry and until an appeal is taken or during the pendency of an appeal. The provisions of subsection (c) ~~of this section~~ govern the suspending, modifying, restoring, or granting of an injunction during the pendency of an appeal.

(b) *Stay on motion for new trial or for judgment.* In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of or any proceedings to enforce a judgment pending the disposition of a motion for a new trial or to alter or amend a judgment made pursuant to K.S.A. 60-259, *and amendments thereto,* or of a motion for relief from a judgment or order made pursuant to K.S.A. 60-260, *and amendments thereto,* or of a motion for judgment in accordance with a motion for a directed verdict made pursuant to K.S.A. 60-250, *and amendments thereto,* or of a motion for amendment to the findings or for additional findings made pursuant to K.S.A. 60-252(b), *and amendments thereto, for such time as may be required to comply with the periodic*

payment of personal injury judgments act.

(c) *Injunction pending appeal.* When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the judge in ~~said~~ *such* judge's discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party.

(d) *Stay upon appeal.* When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subsection (a) ~~of this section~~. The bond may be given at or after the time of filing the notice of appeal. The stay is effective when the supersedeas bond is approved by the court.

(e) *Stay in favor of the state or agency thereof.* When an appeal is taken by the state or an officer or agency thereof or by direction of any department of the state and the operation or enforcement of the judgment is stayed, no bond, obligation, or other security shall be required from the appellant.

(f) *Power of appellate court not limited.* The provisions in this section do not limit any power of the appellate court or of a judge or justice thereof to stay proceedings during the pendency of an appeal or to suspend, modify, restore, or grant an injunction during the pendency of an appeal or to make any order appropriate to preserve the *status quo* or the effectiveness of the judgment subsequently to be entered.

(g) *Stay of judgment upon multiple claims.* When a court has ordered a final judgment on some but not all of the claims presented in the action under the conditions stated in K.S.A. 60-254(b), *and amendments thereto,* the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

Sec. ~~12~~ 11. K.S.A. 40-3003 is hereby amended to read as follows: 40-3003. (a) This act shall provide coverage, for the policies and contracts specified in subsection (b), for:

(1) Persons who, regardless of where they reside, except for nonresident certificate holders under group policies or contracts, are the beneficiaries, assignees or payees of the persons covered under paragraph (2); and

(2) persons who are owners of or certificate holders under such policies or contracts, and who:

(A) Are residents;

(B) are not residents, but only with respect to an annuity contract awarded pursuant to K.S.A. ~~1986~~ *1987* Supp. 60-3407 or 60-3409, *and amendments thereto, or the Kansas periodic payment of personal injury judgments act* or an annuity contract for future economic loss procured pursuant to a settlement agreement in a medical malpractice liability action, as defined by K.S.A. ~~1985~~ *1987* Supp. 60-3401 and amendments thereto, *or the Kansas periodic payment of personal injury judgments act*; or

(C) are not residents, but only under all of the following conditions:

(i) The insurers which issued such policies or contracts are domiciled in this state;

(ii) such insurers never had a license or certificate of authority in the states in which such persons reside;

(iii) such states have associations similar to the association created by this act; and

(iv) such persons are not eligible for coverage by such associations.

(b) This act shall provide coverage to the persons specified in subsection (a) for direct, nongroup life, health, annuity and supplemental policies or contracts, and for certificates under direct group policies and contracts issued by member insurers, except as limited by this act.

Sec. ~~13~~ 12. K.S.A. 1987 Supp. 60-249a is hereby amended to read as follows: 60-249a. (a) In any action for damages for personal injury, the verdict shall be itemized by the trier of fact to reflect the amounts, if any, awarded for:

(1) ~~Noneconomic injuries and losses, as follows:~~

~~(A) Pain and suffering;~~

~~(B) disability;~~

~~(C) disfigurement, and any accompanying mental anguish;~~

~~(2) reasonable expenses of necessary medical care, hospitalization and treatment received~~ *medical care and related benefits;* ~~and~~

~~(3)~~ (2) economic ~~injuries and~~ losses ~~other than those itemized under subsection (a)(2).~~

(b) Where applicable, the amounts required to be itemized pursuant to subsection (a) shall be further itemized by the trier of fact to reflect those amounts awarded for ~~injuries and losses sustained to date~~ past damages and those awarded for ~~injuries and losses reasonably expected to be sustained in the future.~~ future damages. In addition any award for future damages shall specifically identify the amount awarded for future medical care and related benefits.

(c) the trier of fact shall state the anticipated period of time in years over which payment of damages is necessary.

~~(c)~~ *(d)* In any action for damages for personal injury, the trial court shall instruct the jury only on those items of damage upon which there is some evidence to base an award.

Sec. 14. K.S.A. 1987 Supp. 60-1903 is hereby amended to read as follows: 60-1903. (a) In any wrongful death action, the court or jury may award such damages as are found to be fair and just under all the facts and circumstances, but the damages, other than pecuniary loss sustained by an heir at law, cannot exceed in the aggregate the sum of $100,000 and costs.

(b) If a wrongful death action is to a jury, the court shall not instruct the jury on the monetary limitation imposed by subsection (a) upon recovery of damages for nonpecuniary loss. If the jury verdict results in an award of damages for nonpecuniary loss which, after deduction of any amounts pursuant to K.S.A. 60-258a and amendments thereto, exceeds the limitation of subsection (a), the court shall enter judgment for damages of $100,000 for nonpecuniary loss.

(c) In any wrongful death action, the verdict shall be itemized by the trier of fact to reflect the amounts, if any, awarded for:

(1) Nonpecuniary damages;

(2) expenses for the care of the deceased caused by the injury; and

(3) pecuniary damages other than those itemized under subsection (c)(2).

(d) Where applicable, the amounts required to be itemized pursuant to subsections (c)(1) and (c)(3) shall be further itemized by the trier of fact to reflect those amounts awarded for injuries and losses sustained to date and those awarded for injuries and losses reasonably expected to be sustained in the future *and shall state the period of time in years over which payment of damages is necessary.*

(e) In any wrongful death action, the trial court shall instruct the jury only on those items of damage upon which there is some evidence to base an award.

Sec. ~~15~~ 14/ K.S.A. 40-3003, 60-262 and 60-2103 and K.S.A. 1987 Supp. 60-249a and 60-1903 are hereby repealed.

Sec. ~~16~~ 15/ This act shall take effect and be in force from and after its publication in the statute book.