Approved March 1, 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 11, 1988 in room 519-S of the Capitol.

All members were present except:
Representative Allen, Jenkins, Peterson, Shriver and Snowbarger who were 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:
Ronald Schneider, Kansas Rural Center, Whiting
Dennis Clyde, Kansas Trial Lawyers Assoc. Overland Park
John White, Kansas Trial Lawyers Assoc., Leavenworth
Professor Jim Concannon, Washburn Law School

Hearings for opponents 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

Representative Roy requested the Committee introduce a bill which would provide for a subrogation clause in insurance policies.

A motion was made by Representative Roy and seconded by Representative Whiteman to introduce the bill requested. The motion passed.

The minutes of February 1, 2, 3 and 4 were approved.

Testimony of Charlene A. Stinard, Kansas Natural Resource Council was distributed to the Committee. In her testimony she stated environmental damages can be extremely costly to rectify. Limiting the liability of industries handling hazardous substances removes an economic incentive,-liability for damages--which promotes safe handling of hazardous materials. She recommended if medical insurance is the problem, then the legislative issues ought to be recast to deal specifically with insurance, (see Attachment I).

Ronald Schneider testified he was also speaking on behalf of the League of Women Voters, Kansas Chapter of the Sierra Club, Kansas Audubon Council and the Kansas Natural Resource Council. He recommended the Committee not pass H.B. 2691. He stated damages resulting from hazardous waste or products are not easily measured. Punitive damages are often the only effective remedy against corporations which carelessly handle and dispose of these materials, (see Attachment II).

Dennis Clyde testified arbitrary "caps" or limits on punitive damage awards are unconstitutional and defeat the deterrent effect of exemplary damages. Punitive damages are awarded to punish a wrongdoer for his malicious, vindictive or willful and wanton invasion of another's rights, with the ultimate purpose being to restrain and deter from the commission of like wrongs. He stated the present act, as well as previous legislation, unconstitutionally deprives the injured party to the right to a trial by jury by requiring bifurcation of the trial for the assessment of punitive damages, (see Attachment III).

John L. White testified H.B. 2692 places caps on non-economic losses without instructing the jury as to the truth of and existence of the caps and could well end up costing the system more, (see Attachment IV).

Tom Sullivan testified that S.B. 258 would be acceptable. He said they are opposed to any modification of the collateral source rule. Some of the suggestions he made to the Committee were binding arbitration might help case load in the state; changing the insurance delivery system; that doctors without claims against them should not have to pay the same premiums as those who do have claims; limit the number of risk categories insurance companies have; that the H.C.S.F. insure all doctors that deliver babies rated on how many babies they deliver a year; or discontinue the H.C.S.F.

Professor Concannon testified he supports a rational change in the collateral source rule. Society can no longer afford to permit a claimant to obtain more than full recovery for his or her injuries. He said H.B. 2693 is an ill conceived and grossly unfair way to make the change and he believed that a fair and workable bill could be produced. He outlined some of the procedural problems that will have to be resolved, (see Attachment V).

The Committee meeting was ajuourned at 5:30 p.m.

GUEST REGISTER

DATE Feb. 11, 1988

NAME	ORGANIZATION	ADDRESS
Karin Lin	Close-Up Kansas	Manhattan
Ann Chung	Close-Up Kansas	Manhattan
Julie Fussen	Close-Up Kansas	Manhattan
Rebecca Page	Close-Up Kansas	Manhattan
Jud Fay	KLD	Topeka
Tom Bell	Ks. Hosp. Assn.	Topeka
Jim Rose	Close-Up - Kansas	Manhattan
Eric DeDonder	Close-Up - Kansas	Manhattan
Wesley Fryer	Close-Up Kansas	Manhattan
Alvin J. Stein	Eagle Beacon Publishing	Topeka Bus
Jeff Rockett	St Francis Med Center-Wichita	Topeka
Paul Chamnyu	intern	Topeka
Tom Palace	SRS	Topeka
Michael Mandigo	Sen. Gannon	Lawrence
Matt Lynch	Judicial Council	Topeka
PATRICIA HENSHALL	OJA	TOPEKA
Lori Callahan	Am. Lens Assoc.	Topeka
Kent Robertson	Ks. Consulting Engrs. Ks. Lodging Assn	Topeka
Whitney Damron	Pete McGill & Associates	Topeka
L. M. Cornish	Ks Assoc P/C & Cos	"
Fran Summers	Rep Whiteman	Lawrence
Rep. Fred Van Fossen	39 Dist. KCK 3050	8065 St KCK 66106
Belva Ott	Planned Parenthood of Ks.	Wichita

GUEST REGISTER

DATE Feb. 11, 1988

NAME	ORGANIZATION	ADDRESS
Heidi Lindsey	Close-Up Kansas	Wichita
Jennifer Waren	"	Wichita
Sherri [illegible]	"	"
Doug Martin	"	"
Jeff [illegible]	"	"
John Calvert	Close-up Kansas	"
Bobby Queen	Close Up Kansas	"
Cliff Heckathorn	Ks. Head Injury Assoc.	Topeka
Kim Baki	Charter Hospital	Topeka
Linda Jacobs	SRS - Johnson County	Shawnee, KS
John R. White	KTLA	Lenexa, KS
James M Concannon	—	Topeka
Michael Wolf	Kansas Victims' Coalition	Top.
Ron Schneider	KS. RURAL CENTER	LAWRENCE
Jon Sullivan	KTLA	KC
[illegible] Clyde	KTLA	KC
[illegible]	KMBC/KTVA Atty	Topeka
Peta Wallmut	Close-up Kansas	Lawrence
Frank McCleary	" " " " "	"
Rebecca Springer		Lawrence
Mikka Gee	CLOSE-UP KANSAS	LAWRENCE
Meg Johnson	Close-Up Kansas	Lawrence
Daria Sander	Close Up Kansas	Lawrence
Marcus Riehm	KAOM	TOPEKA

Kansas Natural Resource Council

February 8, 1988

Concerning: HB 2691: Limitations on punitive damages
HB 2692: Caps on noneconomic damages
HB 2693: Collateral sources
HB 2690: Periodic payment of awards

House Concurrent Resolution 5037: Constitutional Amendment

The proposed bills and constitutional amendment listed above deal with tort reform. The Kansas Natural Resource Council would like to raise three issues.

I. Tort reform is widely perceived as a medical malpractice issue. While we are sympathetic to the problems facing the medical community, we are also concerned about the broader implications of this tort reform for environmental areas. Perhaps, if medical insurance is the problem, then the legislative issues ought to be recast to deal specifically with insurance.

II. This tort reform legislation and amendment have ramifications for environmental issues. Consider how they might apply to the manufacture, storage, transport, disposal, and incineration of hazardous materials. Should a Kansas citizen be harmed by a chemical spill, this legislation would:

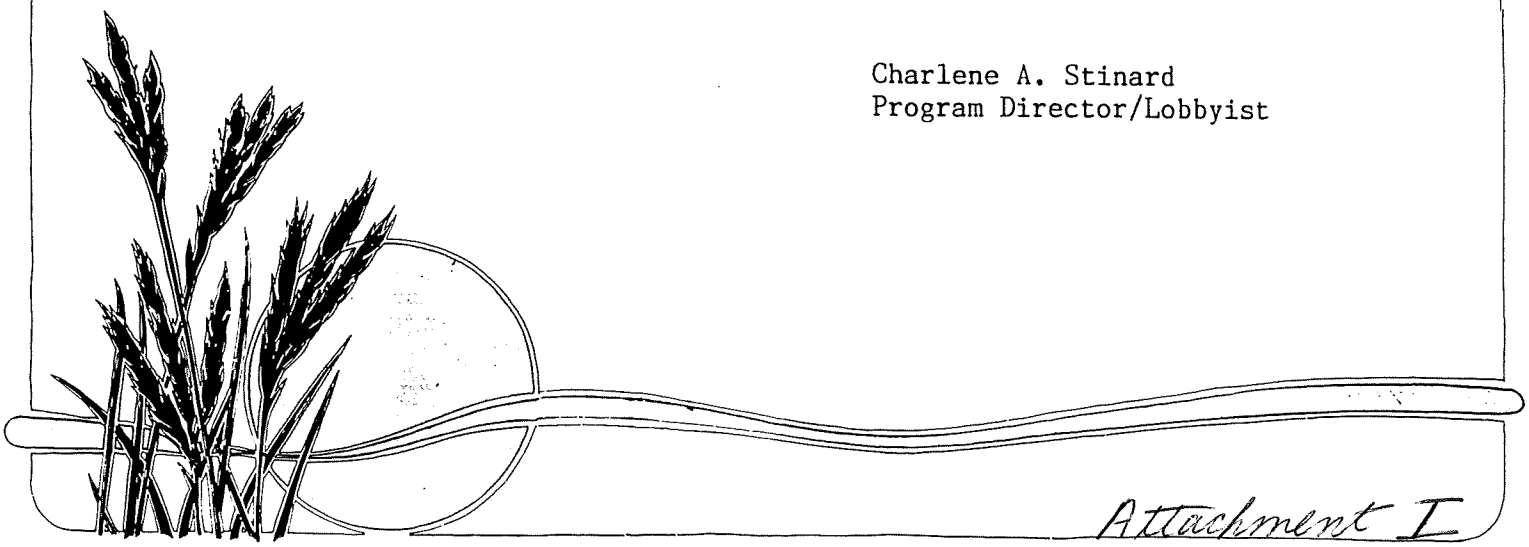
a) limit recovery and punitive damages and require proof that the responsible company/person intended to cause harm;

b) restrict unfairly the damages awarded to children and senior citizens, whose "lost wages" cannot be calculated;

c) deduct from recovered monies the amount paid to an individual by insurance.

III. Environmental damages can be extremely costly to rectify. Limiting the liability of industries handling hazardous substances removes an economic incentive -- liability for damages -- which promotes safe handling of hazardous materials. We do not want Kansas sending an invitation to hazardous substance businesses to locate in or transport through our state because the liability risks are so minimal.

Charlene A. Stinard
Program Director/Lobbyist



Attachment I

1516 Topeka Avenue • Topeka, Kansas 66612 • (913) 233-6707

THE KANSAS RURAL CENTER, INC.
304 Pratt Street
WHITING, KANSAS 66552
Phone: (913) 873-3431

TESTIMONY ON HOUSE BILL NO. 2691

Mr. Chairman, and members of the committee, I am Ronald Schneider representing the Kansas Rural Center. I am also speaking on behalf of the League of Women Voters, the Kansas Chapter of the Sierra Club, the Kansas Audubon Council, and the Kansas Natural Resource Council.

All of these organizations acknowledge that there is a serious problem concerning medical malpractice insurance in the state of Kansas, and elsewhere. However, H.B. 2691 goes substantially beyond the issues related to medical malpractice damages; it touches upon punitive damages in all types of personal injury claims.

Our organizations are specifically concerned about personal injuries resulting from the negligent manufacture, incineration, transportation, storage and disposal of hazardous waste and products. The proposed bill has significant implications limiting punitive damages in this category of torts. Not only are there arbitrary caps imposed by H.B. 2691, but also there is an overwhelming burden of proof placed upon the victim. The injured party must prove that the tortfeasor acted with "the intent to injure, fraud or malice."

In many cases involving negligence and hazardous materials, the damages are substantial, and involve a number of victims. Punitive damages act as a significant deterrence to these pervasive injuries. Environmental damage has far reaching implications, and often requires extraordinary concern by all participants. The limitations on punitive damages may not adequately protect and serve the public in this area of personal injury law.

The proposed bill shall affect all injured parties in the state of Kansas. All of our organizations urge this committee to study the impact of this bill. We believe that it requires additional research and evaluation before action is taken.

The Kansas Rural Center further recommends that you not only study the issues, but that this committee defeat H.B. 2691. Damages resulting from hazardous waste or products are not easily measured. Punitive damages are often the only effective remedy against corporations which carelessly handle and dispose of these materials. If this bill becomes law, it will be virtually impossible to prove that a party intended to injure the victim. Even the most careless and irresponsible corporation does not intend to injure people. Exemplary and punitive damages shall be non-existent under this proposed law. In summary, The Kansas Rural Center is certain that this is bad law for all Kansans. We urge you to vote against H.B. 2691.

Attachment II

DENNIS CLYDE - KTCA

PUNITIVE DAMAGE LEGISLATION IS A STEP IN THE WRONG DIRECTION

Punitive damages remain as the most effective remedy of consumer protection against defectively designed mass produced articles. They provide a motive for private individuals to enforce rules of law and enable them to recoup the expense of doing so.

Grimshaw v. Ford Motor Company, 119 California App. 3d 757, 810, 174 California Reporter 348 (1981).

Punitive damages are awarded to punish a wrongdoer for his malicious, vindictive, or willful and wanton invasion of another's rights, with the ultimate purpose being to restrain and deter from the commission of like wrongs. Under existing Kansas common law, the injured party making a claim for punitive damages has the burden of proving, "Gross neglective duty as to event a reckless indifference of the rights of others on the part of the wrongdoer." Ford v. Guarantee Abstract & Title Company, 220 Kan. 224, Syl. 6 (1976).

The present act circumvents and frustrates the ultimate purpose of punitive damages in several respects.

A. The requirement of malice, fraud or intent to injury purports to condone, or otherwise excuse, the more common, scheming and deceitful wrongdoers who effect injustice and injury by looking the other way purposefully to avoid liability. The wrongdoer can avoid liability by

Attachment III

failing (purposefully) to investigate hazards or potentially dangerous products, which place one in the position of making the affirmative decision to act, or to refuse to act. When profit is the motive, as is usually the case, the wrongdoer will not look the "gift horse in the mouth" to avoid any appearance (evidence) of intent. On the other hand, the apathetic and irresponsible can smile all the way to the bank.

The notion of punitive damages are punishment for "mere negligence" is absolutely unfounded. The common law of Kansas has always clearly required the essence of "outrageous" conduct, or more, as a threshold to exemplary damages. More than a mere failure to exercise ordinary care, the courts mandate evidence of "oppression", "fraud", or "a gross neglect of duty to events a reckless disregard of the rights of others on the part of the wrongdoer." Tetuan v. A.H. Robbins Co., 241 Kan. 441, 481 (1987).

B. The requirement of express ratification to impose vicarious liability will serve as an excuse for the powers in the market force to let others do their dirty work for them. Since this country's inception, our civil justice system has logically and rationally accepted the English common law principle that a master is responsible for his servant's acts or omissions occurring within the scope of employment, or a principle for his agent's conduct in the scope of his authority. This principle assures that employees, agents and servants will be adequately trained

and supervised, as well as other safeguards in the work place and the stream of commerce. The employer is, and should be, responsible for seeing that his employee conducts the business in such a manner as to safeguard the safety, health and welfare of the employer's customers and the public. Requiring express ratification as a threshold to punitive damage assessment against the "profit-taker" means that anything the hired help does, despite a complete and total lack of supervision or training, is not the responsibility of those profiting from the misconduct, as long as they do not expressly ratify actions, which in reality, are under their control and responsibility.

C. Arbitrary "caps" or limits on punitive damage awards are unconstitutional and defeat the deterrent effect of exemplary damages. The trier of fact must be left with the power to assess sufficient awards correlating with the financial condition of the wrongdoer and the enormity of the conduct. By arbitrarily capping the award, the intentional wrongdoer need only measure his potential profit against his limited potential exposure. Even the extra step of allowing punitive damages to equal the profit received by reason of the wrongful conduct, regardless of the caps, has no deterrent effect, since the wrongdoer is only giving up his ill-gotten gains. Punitive damages are a portion of tort liability. Ford v. Guarantee Abstract & Title Co., 221 Kan. 244, 258 (1976). The right to trial by jury necessitates that the trier of fact be allowed to determine the requisite

amount of all damages, including those which serve to punish.

Rather than taking the club from the jury's hands, or placing an arbitrary limit on the court or jury's ability to award punitive damages, reasonable and substantially detailed guidelines for consideration in arriving at the award is the more responsible approach to any perceived problem. The Legislature has established reasonable and helpful guidelines in the past by requiring that the trier of fact consider such things as the foreseeability of the harm, the profitability of the misconduct, the duration of the misconduct, the financial condition of the defendant and so forth. By providing such mandated instructions to the jury, the Legislature assures that the trier of fact will perform its function in a reasonable and responsible manner. Such an approach is far superior to the deprivation of the constitutional right to jury trial and the elimination of a very necessary "balance of arms" for the injured consumer.

D. The requirement that 50% of the punitive damage award go to the state treasury circumvents consumer protection by taking away the injured party's opportunity to recoup the expenses of litigation and compensate for the inconvenience of vindicating consumer rights for the benefit of the general welfare. Except for very limited statutory actions, punitive damages are the only opportunity for the consumer to recover attorney's fees and litigation expenses, in addition to compensatory damages. In awarding punitive

damages, traditionally the trier of fact has also been allowed to consider the time and inconvenience incurred by the injured party in having to prosecute his or her claims. By taking 50% of a punitive damage award for deposit in the state treasury, the Legislature is effectively depriving the injured party of the benefit of these damages. As a practical matter, it could also be well expected that such legislation would have a chilling affect on injured consumers who would have no reason then to believe that, even in the event of a completely successful trial, they will be reimbursed the often substantial costs and expense of litigation. Further, by taking these funds for deposit in the state treasury and credit to the state general fund, there is not even a suggestion that such funds would be used for the benefit of similar consumers injured by the wrongdoer.

E. The present act, as well as previous legislation, unconstitutionally deprives the injured party to the right to a trial by jury by requiring bifurcation of the trial for the assessment of punitive damages. Since punitive damages are a portion of tort liability, the jury must be allowed to determine and assess all damages to which the injured party is entitled.

WRITTEN OUTLINE OF ORAL TESTIMONY OF:

JOHN L. WHITE

ON BEHALF OF THE KANSAS TRIAL LAWYERS ASSOCIATION

TO: THE HONORABLE MEMBERS OF THE HOUSE JUDICIARY COMMITTEE

RE: House Bill Number 2692, "Caps" Relating to Damages for Non-economic Losses Proven in Personal Injury Actions

1. The caps proposed in this bill seek to exchange the principle and right of trial by jury for proposed relief of health care providers in Kansas with respect to the premium costs for malpractice insurance coverage. While the limitations on victims' rights and trial by jury are absolute and clear in this bill, this committee has been presented with no empirical data that this bill will have any substantial or measurable effect on the problem of medical malpractice insurance rates. Judge Theis' opinion concerning the 1987 legislative enactments notes the continued increases in malpractice insurance rates and the paucity of empirical data supporting the relationship between caps and medical malpractice insurance rates. The position of the Kansas Trial Lawyers Association is that the rights of victims are substantial, and the principle of right to trial by jury stands at the heart of our democratic system, while acknowledging the problems of insurance coverage of physicians in this State, particularly in rural areas. However, given the gravity of these competing interests, we strongly urge that actions not be taken without the reliable expectation of beneficial results.

2. It is the further position of the Kansas Trial Lawyers Association that

Attachment IV

placing caps on non-economic losses as this bill purports to do, without instructing the jury as to the truth of and existence of these caps, could well end up costing the "system" more. The simple reason for this position is that the existence and presence of these caps will absolutely negatively impact the efficiency of agreed-upon settlements in complaints of medical professional negligence. While much has been said about the costs of plaintiffs' attorneys fees in these kinds of cases, it should be noted that the defense costs of representation and trying these cases represents a very substantial portion of the costs of this system. By reducing or eliminating the prospects of settlement in major cases, there will be more trials and fewer settlements which reasonably can be calculated to increase the costs of the system as a whole, and presumably would have some impact on premiums paid by physicians.

3. In addition to the lack of data suggesting that this bill be effective in achieving its stated goal, and the potential negative impact on that stated goal, the KTLA wishes to point up the difficulty of drafting this legislation in such a way as to not be constitutionally defective. While I understand that the committee has probably received lawyer opinions on this subject ad nauseum, it should be remembered that this confused state of affairs can only make it more difficult for physicians and the companies which write professional negligence insurance in this State. Given that the goal is to stablize the costs of medical malpractice insurance coverage, particularly for physicians practicing in the less lucrative fields of rural medicine, the constitutional confusion which is presented by any such attempt will not assist them with their problem and has the potential to actually worsen the instability of the premium rates charged to them by the insurance carriers.

4. In an effort to aid the committe with what we understand and acknowledge to be difficult legislative decisions, the Kansas Trial Lawyers Association will be presenting some ideas on legislation which would directly aid in remedying the problems of rural physicians, while passing constitutional muster. Mr. Tom Sullivan, the current president of the Kansas Trial Lawyers Association, will be presenting the results of our research and suggestions during his testimony before this committee.

Respectfully submitted,

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School of Law
Topeka, Kansas 66621
Phone 913-295-6660

TESTIMONY BEFORE HOUSE JUDICIARY COMMITTEE ON HB 2693
PROFESSOR JAMES M. CONCANNON
FEBRUARY 11, 1987

I support a rational change in the collateral source rule. As a matter of economics, society no longer can afford to permit a claimant to obtain more than full recovery for his or her injuries. When the collateral source rule was invented at common law, there was not the general coverage of losses by insurance that we have today. We were dealing mostly with the personal resources of the parties and when we had a windfall to give either to the wrongdoer or to the totally innocent victim, the only kind who was allowed to recover at common law, the choice was easy. The modern tort system is simply different. Every party may be partially at fault and in multiple party cases, the most at fault party sometimes is able to recover, at least proportionately, from those who are less at fault. With the advent of insurance for virtually everything that happens, the primary function of the tort system is to spread losses throughout society and that should be done as efficiently and economically as possible. Certainly another important function of the tort system is deterrence of wrongful conduct and a major dismantling of the tort system would be undesirable, but I do not believe that a rational change in the collateral source rule will itself undermine the deterrent effect of our tort system.

Having said that, HB 2693 is an ill-conceived and grossly unfair way to make the change. Ironically, at one level it does too little. If as a matter of public policy it is undesirable to permit a plaintiff to receive compensation exceeding plaintiff's total loss, that should be flatly prohibited. Instead, this bill leaves what is a question of public policy to the utter whim of individual juries, case by case, with no guidelines or standards whatsoever. To say simply that the jury "shall consider" collateral source payments leaves open the possibility that double recovery still will be permitted.

Worse than that, this bill goes far beyond the only evil that exists to be remedied, that of permitting recovery of more than the total damages suffered. I believe that a fair and workable bill can be produced that will remedy that evil but there are many complicated procedural problems that have to be resolved and a couple of substantive ones as well.

(1) Amounts that an injured party receives from sources that are entitled to subrogation from the judgment must be defined out of the term "collateral source benefits" and should not be subject to the act. By the very definition of the term

Attachment V

"subrogation," there is no double recovery to be eliminated. Under HB 2693, if the jury reduces the verdict because of such payments, the inevitable result as to subrogation rights created by federal law and a probable result as to other subrogation rights is that not only would the injured party not receive damages from defendant for amounts for which there was a subrogation right, the injured party would still have to repay the subrogated party out of the reduced award of damages the injured party received. A double whammy indeed! The proper purpose of subrogation is to make sure that only one source, not two, pays for a loss. The result here would be that nobody pays for what is concededly a loss. This may be not merely bad policy but an unconstitutional taking of property rights.

If, on the other hand, the court were to conclude as to state created subrogation rights that the injured party does not have to repay to the subrogated payor amounts the jury does not actually include in the judgment, then we are allowing individual juries to override the legislative determination that a subrogation right ought to exist. Of course the jury will be spurred on by closing arguments by lawyers for defendants to which the subrogated parties cannot respond because they are not represented at trial. This makes no sense to me either. When the legislature creates a right of subrogation, it is making a policy judgment about whether the costs of a particular injury should be spread through the insurance system of the tortfeasor or the insurance system of the party who makes an initial payment to the injured party. The legislature certainly is free to change its view of public policy and abolish most subrogation rights, although it obviously cannot affect subrogation rights created by federal law. It is certainly more efficient to spread losses through first party insurance coverage than it is to spread losses through a tortfeasor's insurance because that avoids the systems costs of shifting the loss from the first insurance carrier to the second. But these are policy questions -- if we abolish an employer's right of subrogation for workers' compensation payments that are made, either directly or indirectly through this legislation, the employer's cost of workers compensation insurance, that the legislature had made mandatory for them to carry, will rise. My point is that these public policy questions are questions of law, not fact, and ought to be made by the legislature after careful thought, not by individual lay juries on a case by case basis.

(2) If the subrogation problem were solved, this bill might have worked, sort of, prior to 1974. Under the old regime, even 1% of contributory negligence barred all recovery. Only 0% at fault plaintiffs could win and when they won they were entitled to recovery for all of their damages from defendants. In that system, every collateral source payment for which there was no subrogation right caused plaintiff to receive more than the total damages plaintiff had suffered. If the collateral source rule were abolished in the old contributory negligence system, in some respects it would not have mattered much how we did it. We could, as this bill would do, admit evidence of the collateral

source payments and let the jury subtract them from the total damages and return a net damage award, or we could have the jury find the total damages suffered by the injured party and have the judge subtract the collateral source payments from the jury award. Procedure would not have been very important. Either way we would reach the same result. Plaintiff would obtain a judgment for actual damages minus collateral source payments but would be fully compensated.

With the advent of comparative negligence in 1974, procedure becomes absolutely crucial. Whenever comparative fault is alleged, it is impossible to tell at any time prior to the entry of judgment whether or not a collateral source payment produces a double recovery. Assume plaintiff's total damages from an incident are $100,000 and that plaintiff received $40,000 in Blue Cross/Blue Shield payments. If the jury finds plaintiff to be 20% at fault, our present system grants judgment against defendant for $80,000 for its proportionate fault. When this is combined with the $40,000, it means that plaintiff will receive a total of $120,000 in payments for injuries valued by the jury at $100,000. Part of the collateral source payment produces double recovery, but only part. Of course, the double recovery is not the full $20,000 difference since we would need to take into account whatever costs were incurred by plaintiff in procuring the collateral source benefit, but the judgment against defendant should be reduced by the net amount of the double recovery.

However, if the jury finds plaintiff to be 40% (or more) at fault, plaintiff will not receive a double recovery. The 40% at fault plaintiff is entitled to judgment against defendant for $60,000 and the $40,000 Blue Cross/Blue Shield payment reimburses plaintiff for the damages plaintiff actually suffered that are attributable to plaintiff's own fault. The total received by plaintiff is $100,000, and this is not one penny more than the total damages suffered.

Not one of the policy reasons for abolishing the collateral source rule is present in this last example. Indeed, I believe we have a justifiable expectation that whatever payments we receive from first party insurance coverage such as Blue Cross/ Blue Shield will be used in the event of litigation to cover whatever damages we have suffered that are attributable to our own fault and the fault of those from whom, for one reason or another, we will not be able to recover damages. HB 2693 grossly violates that justifiable expectation and will work grave injustice. I will not bore you with the mathematics[1] but the

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[1] HB 2693 contemplates that in my example of the 40% at fault plaintiff who has $100,000 total damages from the incident, the jury will subtract the $40,000 Blue Cross/Blue Shield payment from the total medical damages proved at trial before making an entry on the line for medical expenses on the itemized verdict form. Thus, when we add up all the itemized damages listed on the verdict form, the total will be only $60,000. The judge then

bottom line is this: By having the jury deduct for collateral source payments before the comparative fault judgment can be calculated, we are making a reduction before it is possible to know whether the collateral source payment has produced double recovery. For my 40% at fault plaintiff, not only will there be no double recovery, there will be far less ($24,000 less) than a full recovery, even though plaintiff had procured enough personal insurance to cover all damages attributed to his or her own fault. While I am not really a constitutional law scholar, I strongly suspect that this feature of the bill violates the due process guarantee of the federal constitution. We purchase insurance coverage hoping to make ourselves whole in the event of a loss but this bill gives defendant the benefit of that insurance before we have been made whole.

If I understand the argument Wayne Stratton has made through the years, it is that damages are not damages if they have been paid by someone else. If that is the argument, it is quite simply wrong because it ignores our comparative fault statute. The damages are the total harms that one suffers from an incident. The issue is how are we going to apply the available resources, those of the tortfeasor defendant and the collateral source, to cover those damages. If you don't start with total damages, you distort the outcome in a very unfair way.

To avoid injustice, legislation in this area has to have these attributes:

A. Collateral source payments must be credited first to damages attributable to the fault of plaintiff and of those parties from whom plaintiff cannot recover for reasons other than simply a failure to assert a claim --- phantom parties, immune parties, employers to the extent the damages attributed to their fault exceed their workers compensation payments, parties who are insolvent in whole or in part. Collateral source payments also should be credited first to those damages the jury determines that plaintiff actually suffered but which plaintiff is not allowed to recover because of a limitation on recovery of damages established by some other law. The example I am thinking of is the limitation on recovery for wrongful death where we already have insulated defendants from liability.

B. For the comparative fault calculation to work properly,

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would have to apply the comparative fault percentages to reduce that amount. Judgment would be entered against defendant for 60% X $60,000 or only $36,000. Defendant has caused $60,000 worth of damages (60% x the $100,000 total damages) but pays $24,000 less than the total damages defendant has caused. The plaintiff's total recovery would be the $36,000 judgment plus the $40,000 from Blue Cross/Blue Shield, or a total of only $76,000. Putting it another way, the plaintiff who was responsible for only $40,000 of his or her damages (40% x $100,000) ends up having to cover through his or her own resources (including Blue Cross/Blue Shield) $64,000 or 64% of the loss.

the jury's verdict must include all damages plaintiff suffered in the incident, whether they were paid by collateral sources or not. Because we cannot determine if there is a double recovery until the percentages of fault and the total amount of damages are determined, the actual reduction for collateral source payments must be done by the judge in a post-verdict hearing. When a verdict is returned, the judge first should calculate the judgment required by the comparative negligence statute as though there were no collateral source payments. Then the judge should apply collateral source payments for which there is no subrogation right first to the damages attributable to the fault of plaintiff and other parties as I just mentioned, then credit the double recovery that is left against the damages attributable to the judgment defendants' fault pro rata.

C. To preserve the right to jury trial, disputed factual issues about damages still must be resolved by the jury. The itemized verdict form must be drafted to enable the court to determine what damages that are awarded reflect collateral source payments. The P.I.K. Committee can work on that. Parties ordinarily will stipulate to the amounts of collateral source payments made prior to trial. The main problem again is with future damages. If there is a dispute about the amount of future damages that are the subject of collateral source payments, the jury could be required to answer special questions specifying, for example, both the total amount of medical damages and also the portion of that total that represents hospital and doctor bills that we know are going to be covered by Blue Cross/Blue Shield, of course without having to mention specifically that collateral source payments will be made.

(3) Let me identify some of the other problems that fair and workable legislation would have to address:

A. The problem of how to handle future collateral source payments is a very difficult one. It does not seem fair to reduce the judgment because of, for example, future Blue Cross/Blue Shield payments plaintiff expects to receive and then have the plaintiff lose that expected coverage due to loss of employment, cancellation of a benefit program by an employer or public source, change of employment with the loss of coverage for preexisting conditions, or whatever reason. Indeed, it seems unfair in effect to chain a person to that person's current job just to keep flowing collateral source payments that were used to reduce a tortfeasor's judgment. If we are going to apply the act to future benefits and enter the kind of judgment we presently enter that conclusively settles the matter, the least we must do is to discount the theoretical amount of future collateral source payments by the likelihood that loss of coverage, insolvency of the provider, or the like will occur. Needless to say, that would be a very speculative decision from the points of view of both sides in the case. Moreover, there ought to be some escape mechanism in the event our assumptions turn out to be seriously wrong. The only safe way to handle it would be to have defendants pay the full judgment as they do now and then have the future collateral source benefits that involve double recovery

paid to the defendants or their insurers as they become due.

The problem might be somewhat easier to handle where there is periodic payment of the judgment. The liability for damages could be fixed without regard for collateral source payments, but the amount of the duplicative collateral source benefits actually received could be credited against each periodic payment as it becomes due. Then, if the collateral source ultimately fails, the full periodic payment originally required would still be due.

Since the periodic payment of judgments legislation makes its use optional with the parties, I suppose it would be necessary to provide for how future payments are to be handled both under that act and under our present system.

B. There will be new system costs from any legislation in this area. If the parties do not stipulate on these matters, there will have to be discovery, perhaps even from non-parties, relating to the amount and cost of collateral source benefits, the likelihood of continuation of collateral source payments by the provider, the provider's solvency, and the future eligibility of the plaintiff for benefits. Ironically, legislation justified in part by the fact it reduces system costs produces some of its own. Perhaps there is some monetary threshold at which we should recognize that the new system costs exceed the benefit.

C. The mere recovery of a judgment may eliminate eligibility for some collateral source benefits, as that term is broadly defined in this bill. I suppose, for example, that the solvency provided by a judgment would eliminate eligibility for future welfare payments. This suggests a broader issue regarding publicly funded benefit programs. Many of them have subrogation rights already and would be excluded from the definition of collateral sources under my proposal. To the extent they are treated as collateral sources when there is no subrogation right, a curious result is reached even under my proposal. Tax generated funds that now provide a windfall to injured parties will become a windfall to tortfeasors. In one sense that is the ultimate loss spreading mechanism, but it is a bit difficult to understand why taxpayers should fund windfalls to either side in litigation. The most sensible approach probably would be to create subrogation rights for publicly funded payors in those cases where they do not now exist, although only to the extent that the publicly funded payment has produced a double recovery as I have defined it.

D. Finally, the term "collateral source benefits" must be defined with precision. HB 2693 vaguely refers to "any benefit in the nature of insurance coverage." I'm not sure what that means. What are the "other publicly funded benefit plan[s] or program[s] provided by law?"

This may look like a black hole of procedural problems. It has looked that way to me at times. I do believe, however, that a fair and workable bill can be produced. I am certain that HB 2693 is not that bill.