Approved March 21, 1988
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY.

The meeting was called to order by Senator Robert Frey at
Chairperson

10:00 a.m./~~p.m.~~ on March 16, 1988 in room 514-S of the Capitol.

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

Committee staff present:

Gordon Self, Office of Revisor of Statutes
Jerry Donaldson, Legislative Research Department

Conferees appearing before the committee:

Gerhard Metz, Kansas Chamber of Commerce and Industry
John Blythe, Kansas Farm Bureau
Richard Mason, Kansas Trial Lawyers
Tim Pickell, Westwood, Kansas
Professor James M. Concannon, Washburn University Law School
Ronald Schneider, The Kansas Rural Center, Kansas Audubon Society, Kansas Natural Resource Council and League of Women Voters.

Senate Bill 625 - Actions where exemplary or punitive damages recoverable.

Senate Bill 626 - Statute of limitations, actions involving health care providers.

Senate Bill 627 - Pain and suffering damages in personal injury actions.

Senate Bill 628 - Civil actions, purchase of annuity contracts for future economic losses.

Senate Bill 629 - Health care stabilization fund abolished.

Senate Bill 631 - Medical malpractice liability actions, attorney fees, noneconomic damages, annuity contracts.

House Bill 2692 - Damages for noneconomic loss in personal injury actions limited to $250,000.

House Bill 2693 - Collateral source benefits admissible.

House Bill 2731 - Exemplary damages in civil suits.

House Bill 3052 - Civil procedure and evidence relating to collateral source benefits.

Gerhard Metz, Kansas Chamber of Commerce and Industry, testified House Bill 2731, House Bill 2692 and House Bill 2693 represent a consolidation of the past three years work in the area of tort reform. We believe the three bills represent a reasoned, just and equitable approach to correcting some of the current problems in the civil justice system. Mr. Metz submitted a box of testimony and evidence offered by David Litwin, his predecessor, and other witnesses before this committee, the interim committee, the Bell Commission, and the House Judiciary Committee. This

Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

CONTINUATION SHEET

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY,

room 514-S, Statehouse, at 10:00 a.m./p.m. on March 16, 1988

Tort Reform Bills

box of testimony is available in the Office of Legislative Services. Copies of his handouts are attached (See Attachments I). filed next to original copy of minutes in 519-S storeroom.

John Blythe, Kansas Farm Bureau, appeared on behalf of Paul Fleener, Director Public Affairs Division of Kansas Farm Bureau. He asked the committee to read Mr. Feener's printed testimony that had been handed out to each committee member (See Attachment II). Mr. Blythe said this is a serious problem in the rural areas in the State of Kansas.

Richard Mason, Kansas Trial Lawyers, stated they are opposed to the three major tort reform bills that were sent over by the House. He said they are opposed because they don't think the intended effect is there, particularly for the doctors in the state. Moderation in the rates is little help to physicians in the state, particularly in the rural areas. Tort reform will not do what you want it to do, and that is for premiums of doctors in the state. Mr. Mason then introduced Tim Pickell from Westwood, Kansas.

Mr. Pickell testified, I don't think the punitive in any shape or form will lower the rates for doctors. I suggest that rather than adopting House Bill 2731 at all and rewrite the law on punitive damages, the legislature first attempt to deal with the problem by simply providing for sanctions against parties and their attorneys who file and pursue frivolous punitive damage claims. Defining "malice" to include "despicable conduct" is confusing since traditionally the common law has defined "malice" to mean "evil intent" or otherwise to refer to a person's state of mind; therefore, I suggest new Section 3(c) be reworded. 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. A copy of the handout is attached (See Attachment III).

Professor James M. Concannon, Washburn University Law School, testified on House Bill 2693. He stated, I support a rational change in the collateral source rule. The primary function of the modern tort system is to spread the costs of losses throughout society through insurance and that should be done as efficiently and economically as possible. The collateral source rule works an injustice when it permits an injured party to receive more in total compensation than the value of the harms the injured party suffered. A copy of his testimony is attached (See Attachment IV).

Ronald Schneider, The Kansas Rural center, Kansas Audubon Society, Kansas Natural Resource Council and the League of Women Voters, testified all of these organizations acknowledge that there is a serious problem concerning medical malpractice insurance in the State of Kansas. The proposed changes in punitive and exemplary damages law in Kansas go substantially beyond the issues related to malpractice damages and insurance, it touches upon punitive damages in all types of personal injury claims. A copy of his statement is attached (See Attachment V).

Committee discussion was then held with Mr. Schneider and Professor Concannon.

The meeting adjourned.

A copy of the guest list is attached (See Attachment

GUEST LIST

COMMITTEE: SENATE JUDICIARY COMMITTEE DATE: 3-16-88

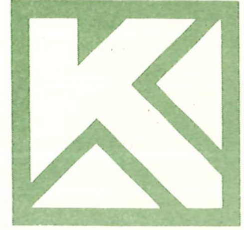
NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
Gerhard Metz	Topeka	KCCI
[illegible]	"	KCRA
Tim V. Pickell	~~4102~~ Westwood, Ks.	KTLA
Bob [illegible]	Topeka	KTLA
Lee Wright	Overland Park	Farmers Ins. Group
Barbara Snider	Topeka	Pete McGill & Assoc
Pam Scott	Topeka	Insurance Dept
Michael [illegible]	"	KTLA
[illegible]	"	Ks assoc P/C Cos
Ron Calbert	Newton	U.T.U.
Matt Lynch	Topeka	Jud. Council
Bud Grant	"	KCCI
Walt Darling	Topeka	Div. of Budget
Matt Truell	Topeka	AP
Julie Nelson	Topeka	KLSI
Ronald Schneider	Lawrence, KS.	KS. Rural Center
Kevin Kelly	Overland Park	Senn
Rebecca Rice	Topeka	KSOS
Ron ~~Smith~~	"	KGBA
M. Hanna	"	Cap-Journal
[illegible]	"	KHOW
Lori Callahan	"	Am. Ins. Assn
Ron Gaches	Wichita	Boeing

Att. VI

3-15-88

LEGISLATIVE TESTIMONY

Kansas Chamber of Commerce and Industry



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

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

HB 2731, 2692 & 2693 March 15, 1988

Testimony Before the
Senate Judiciary Committee

by

Gerhard Metz

Mr. Chairman and members of the Committee, I am Gerhard Metz, representing the Kansas Chamber of Commerce and Industry and the Kansas Coalition for Tort Reform, of which KCCI is a member. Thank you for the opportunity to testify in support of House Bills 2731, 2692, and 2693.

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

The Coalition's membership includes the following: Kansas Chamber of Commerce and Industry; Kansas Farm Bureau; Kansas Contractors Association; Independent Insurance Agents of Kansas; Kansas Railroad Association; Wichita Area Chamber of Commerce; Kansas Motor Carriers Association; Kansas Society of Architects; Kansas Medical Society; Kansas Hospital Association; Associated General Contractors of Kansas; Kansas Association of Broadcasters; Kansas Grain and Feed Dealers Association; Kansas Association of Property and Casualty Insurance Cos., Inc.; Kansas Consulting Engineers; Kansas Engineering Society; Kansas Motor Car Dealers Association; Kansas Lodging Association; Kansas Petroleum Council; Kansas Independent Oil and Gas Association; American Insurance Association; Kansas League of Savings Institutions; Wichita Independent Business Association; Western Retail Implement and Hardware Association; Alliance of American Insurers; Kansas Telecommunications Association; National Federation of Independent Business/Kansas; Merrell Dow Pharmaceuticals, Inc.; Hutchinson Division, Lear Siegler, Inc.; Becker Corporation; The Coleman Co., Inc.; FMC Corporation; Puritan-Bennett Corp.; Seaton Media Group; ; Kansas Oil Marketers Association; Boeing Military Airplane Company; National Association of Independent Insurers; National Association of Mutual Insurance Companies; Kansas Fertilizer and Chemical Association; Wes Sowers, Management Counsel; Beech Aircraft Corporation; Cooper Industries, Funk Manufacturing Div.; Southwestern Bell Telephone Co.; Allied-Signal, Inc., King Radio; Kansas Life Insurance Companies; and HCA Wesley Medical Center.

Att. I

As you are all aware, these three bills represent a consolidation of the past three years' work in the area of tort reform. Our coalition members have taken the opinion expressed by Justice Lockett in the Farley decision as to the need for uniformity of application of tort reform legislation quite seriously. House Bills 2731, 2692 and 2693 represent, we believe, a reasoned, just and equitable approach to correcting some of the current problems in the civil justice system.

We wish, also, to address some specific questions that have been made about the need for tort reform legislation. Two major allegations have been put forward: that non-medical proponents of tort reform and the business community, generally have failed to come forward with testimony and evidence of the existence of a problem, and, that statistical data do not support the existence of a problem, or a sound basis for public perceptions of the same. To the first assertion, we can bring substantial and concrete refutation. In this box are copies of the testimony and evidence offered by my predecessor in this position, Mr. David Litwin, and other witnesses before this committee, the interim committee, the Bell Commission, and your counterparts in the House. The documentation is ongoing, and the Coalition wish the record clearly to reflect their continuing interest in and support of tort reform legislation. As to the view that the liability crisis is restricted to the medical profession, we need only point to the results of a poll conducted during the fall of 1987 by an independent research and polling firm. The polling instrument was subject to the most rigorous tests to assure its impartiality, and the results tested by standard statistical methods to insure an unbiased, accurate reflection of public opinion across Kansas. These results, along with a layman's explanation, have been distributed to you, today, and demonstrate unequivocally that across the state, cutting across demographic as well as geographic lines, the people of Kansas perceive some aspects of the civil justice system to be in need of reform, despite an overall faith in the legal system, generally.

Opponents of tort reform like to point to the results of a survey conducted by the Judicial Council which reflect no significant increase in the number of

plaintiffs' verdicts returned. What this survey ignores is the high cost of defense even when the defendant prevails; defendants' costs are not subsidized by the plaintiffs, even though plaintiffs who do not win need not pay, in many circumstances, owing to contingent fee contracts. Furthermore, the Judicial Council's survey does not reflect the number of filings. Cases that do not go to judgment, but are settled at an earlier stage, still cost money to defend or to negotiate. Until the tort system ceases to be a kind of lottery for which the ticket is essentially free, these costs will continue to increase.

Members of the Kansas Coalition for Tort Reform believe that by reporting House Bills 2731, 2692, and 2693 favorably you will be acting responsibly, in a manner consistent with your previous resolve to restore balance and stability to a system that has, over time, gone askew. By limiting the awards of punitive damages to those cases where conduct is clearly despicable, and allowing such damages to be pledonly when discovery has progressed far enough to support such a pleading, as HB 2731 does, we can be sure that punitive damages serve their proper function, and not as a way to coerce settlement in cases that might successfully be defended. By establishing limits on awards of future pain and suffering, as HB 2692 does, you can correct one of the areas in tort law least verifiable and most subject to abuse. Finally, we see the Collateral Source Rule to be an inequitable anachronism, and its abolition, insofar as is practically possible, to be a step in the direction of doing away with double recovery resulting from the fantastic premise that no-one would purchase insurance unless he felt that he would be allowed to use it as a means of double recovery--the only true "windfall" anyone will be addressing this session. HB 2693 addresses this problem; and because we believe that half-measures would result in problems of fundamental justice, not to mention creating further constitutional problems, we cannot support HB 3052, but must oppose it as an attempt to dilute the effect of HB 2693.

Thank you once again for the opportunity to appear before you this morning. Please feel free to call upon me if you need further explanation of our positions stated here this morning.

3-15-88

Kansas Farm Bureau

PUBLIC POLICY STATEMENT

SENATE COMMITTEE ON JUDICIARY

Re: Legislation Pertaining To TORT REFORM and Medical Malpractice

March 14, 1988
Topeka, Kansas

Presented by:
Paul E. Fleener, Director
Public Affairs Division
Kansas Farm Bureau

Mr. Chairman and Members of the Committee:

My name is Paul E. Fleener. I am the Director of Public Affairs for Kansas Farm Bureau.

Our members have followed with interest the legislative activity on Medical Malpractice and Tort Reform. We were present during the 1976 Interim when exhaustive studies were held and many remedies were advanced. A package of 13 bills was the product of that Interim Committee study. Twelve of those bills passed into law. Yet, **the problem continues nearly unabated.**

Awards are astronomical. Medical practitioners are regrouping, retrenching, or retiring. In the rural communities of this state, the medical malpractice problem poses not just serious, but dire prospects and consequences.

Our farmers and ranchers have continued to study this issue. They examined it before our 1985 Annual Meeting. At the 1986 Annual Meeting, the issue of Tort Reform was discussed at length in the business meetings of the voting delegates from 105 county Farm Bureaus. Then, because of court actions, the whole issue of Tort Reform and Medical Malpractice again came before our

Att. II

membership and voting delegates in the '87 Annual Meeting. Delegates adopted the resolution which is attached. That policy puts us in the position of **a strong proponent for Tort Reform** as contained in many of the bills before you today.

The notion of "liability" has been expanded broadly in recent years. Legislators, judges and juries have been pushing out the frontiers of responsibility. The result has been that individuals, businesses and public agencies are being required to compensate more readily, **and more generously,** than ever before. Clearly, individuals do bear the cost of the liability crisis. Consumers pay higher fees for health care and for education. They pay higher state and local taxes, and higher prices for almost everything they purchase. Society is going to bear the cost, as well, for the countless products and activities that will no longer be available unless this "tort liability crisis" is met head-on.

Perhaps the biggest cost in all of the liability litigation is this: It is undermining the competitiveness of U.S. industry. Our society today has **an almost irrational focus on litigation** as the way to solve all problems. We are not here to point fingers at any one profession or service. We are here simply to tell you that farmers and ranchers across this state have a felt need, more than a perception ... a genuine belief ... that something needs to be done now to reform the situation.

Finally, Mr. Chairman, our overall policy statement supports a prohibition of **"filing of liability claims in circuits other than those whose jurisdiction includes the location of the event ..."** We believe this certainly relates to more than public

utilities and common carriers, addressed in 1987 legialation. There is a good rationale for lawsuits to be tried in the county where the action arises. We ask for Committee consideration of our position on venue as you work Tort Reform in 1988.

Attachment
Tort Reform
House Judiciary
March 14, 1988

Below is the resolution adopted by voting delegates from 105 county Farm Bureau organizations at the Annual Meeting of Kansas Farm Bureau held in Wichita, Kansas on November 29-30, December 1, 1987.

Tort Liability Reform

We commend the Kansas Legislature for its support of legislation in 1987 to provide a start on "Tort Reform." We believe more needs to be done. We support additional tort reform measures which would:

* Limit use of contingency fee arrangements;
* Reform the collateral source rule to mandate revealing other sources of compensation for damages available to the plaintiff;
* Establish a maximum seven-year statute of limitations on liability claims and reduce the time of discovery for an alleged act of negligence or omission;
* Prohibit the filing of liability claims in circuits other than those whose jurisdiction includes the location of the event from which the liability claim arises, or the plaintiff's home address;
* Prohibit any person from filing a liability claim if the person is trespassing or breaking a law at the time of an injury.
* Prohibit publication of the dollar amount sought in any malpractice suit;
* Require professional review and fact-finding in cases where any professional is charged with malpractice, negligence or omission;
* Establish a legal procedure for arbitration of cases where negligence or omission is charged; and
* Limit the amount of money which can be recovered in any malpractice suit.

3-16-88

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March 9, 1988

Senator Robert G. Fry
Kansas Senate
State Capitol Building
Topeka, KS 66612

RE: House Bill Number 2731

Dear Senator Fry :

I previously testified as a representative of KTLA before the House Judiciary Committee regarding legislation on punitive damages. I would like to take a few minutes of your time to discuss the more significant specific concerns I have with regard to HB 2731 for the purpose of persuading you to consider certain amendments to the bill which might be suggested to the Senate Judiciary Committee.

There are several facets of the legislation which I do not agree with and do not consider to be in the best interest of the Kansas citizenry as a whole, such as caps and bifurcated trials which do away with the right to a trial by jury on the determination of all aspects of the damage issue. I am enclosing my position paper which I submitted to the House Judiciary Committee which includes a discussion of several issues. At this time, however, I wish to direct comments to specific provisions of HB 2731-Am. as passed by the House. The specific issues I will explore are as follows:

1. The types of conduct for which punitive damages should be awardable and the definition thereof;

2. The responsibility of an employer or principal for the acts of an employee or agent giving rise to punitive damages;

3. Frivolous damage claims.

Attach III

FRIVOLOUS CLAIMS

When I testified before the House Judiciary Committee I suggested to the committee that legitimate concerns of punitive damage claims being used as a so-called "hammer", or to harass or annoy the other party in a lawsuit, could be completely remedied by a statutory provision which permitted sanctions in such cases. I feel this approach is entirely more rational and justifiable than rewriting the law on punitive damages. The Judiciary Committee and the House, however, not only adopted legislation dealing with frivolous punitive damage claims, but additionally rewrote the law on punitive damages as well. Therefore, I first suggest that rather than adopting House Bill Number 2731 at all and rewrite the law on punitive damages, the legislature first attempt to deal with the problem by simply providing for sanctions against parties and their attorneys who file and pursue frivolous punitive damage claims.

In any event, regardless of what is done with the rest of House Bill Number 2731, I offer some comments regarding potential legislation for frivolous punitive damage claims. K.S.A. 60-211 provides, in part, as follows:

> The signature of a person constitutes a certificate by the person that the person has read the pleading; that to the best of the person's knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; and that it is not imposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of the litigation. . . . If a pleading, motion or other paper provided for by this Article is signed in violation of this Section, the Court upon motion or upon its own initiative upon notice and after opportunity to be heard, shall impose upon the person who signed it or a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the

> reasonable expenses incurred because of the filing of the pleading, motion or other paper, including reasonable attorney's fees.

Further, K.S.A. 60-2007(b) provides:

> At the time of assessment of the cost of any action to which this Section applies, if the Court finds that a party, in a pleading, motion or response thereto, has asserted a claim or defense, including set-offs and counterclaims, or is denied the truth of a factual statement in a pleading or during discovery, without a reasonable basis in fact and not in good faith, the Court shall assess against the party as additional cost of the action, and allow to the other parties, reasonable attorney's fees and expenses incurred by the other parties as a result of such claim, defense or denial. An attorney may be held individually or jointly and severally liable with a party for such additional cost where the Court finds that the attorney knowingly and not in good faith asserted such a claim, defense or denial or, having gained knowledge of its falsity, fail to inform the Court promptly that such claim, defense or denial was without reasonable basis and fact.

In my opinion, existing law pursuant to K.S.A. 60-211 and 60-2007 specifically provides for and allows the assessment of sanctions for asserting a frivolous punitive damage claim. The legislature could simply make clear its concern and intent with regard to the assessment of sanctions for frivolous punitive damage claims by specifically inserting such language as "including a claim for punitive damages" into both of the aforesaid statutes.

New Section 4 of HB 2731-Am. precludes a plaintiff from asserting a claim for punitive damages without a prior Court order. The major problem with new Section 4 is in the last sentence of that Section. A party must seek a Court order allowing a claim for punitive damages either (a) within two years after the Petition is filed; or (b) not less than nine months before the date the matter is first set for trial, whichever is earlier. I read this sentence to mean that if a case goes to trial within 18 months after the filing of the Petition, the claim for punitive damages must be made not less than nine months before the date the case is first set for trial.

The first problem here is that most cases are set for trial only two or three months before they are to be tried. In a case which is set for trial within one year of the date the Petition is filed, the plaintiff has only three months in which to establish a sufficient showing to make a claim for punitive damages. Since it is quite common for a defendant to take up to 60 days to answer the Petition this only allows 30 days for the plaintiff to conduct enough discovery to determine whether or not he has a sufficient claim for punitive damages. Furthermore, three months after the filing of the Petition none of the parties probably have any idea when the case is going to be tried. Even within the same judicial district the jury trial docket of different judges can differ substantially as to case load and the time in which it takes to obtain a jury trial setting.

Secondly, the more complex cases which involve several defendants and require depositions and other forms of discovery from one end of the country to the other are not ready for trial within two years. Therefore, there are several cases in which the plaintiff may not learn through discovery that he or she has a probable claim for punitive damages until more than two years after the filing of the Petition.

I suggest that the legislature either consider adding an escape clause to the last sentence of new Section 4 which would allow a plaintiff to assert a claim for punitive damages outside the time limit provided in new Section 4 upon a showing of good cause, or I believe the legislature should consider a different approach all together. I see no reason why a claim for punitive damages should necessarily be treated any differently then a claim for unliquidated damages pursuant to Supreme Court Rule 118. Pursuant to Supreme Court Rule 118 a party can amend upward his or her claim for damages at any time upon the filing of a Motion to Amend "if the judge hearing a Motion to Amend the amount recited in the written statement is satisfied the reasons recited in the motion justify the amendment." In fact, it appears to me that Supreme Court Rule 118 will overlap with new Section 4 to some degree and to that extent the two may be contradictory. If the legislature is intent upon precluding a plaintiff from making a claim for punitive damages in the Petition or initial pleading, then I submit that the best suggestion is that punitive damage claims follow Supreme Court Rule 118 in that a plaintiff should be allowed to submit a claim for punitive damages at any time "if

the judge hearing the Motion to Amend to add a claim for punitive damages is satisfied the reasons recited in the motion justify the amendment."

TYPES OF CONDUCT FOR WHICH PUNITIVE DAMAGES CAN BE AWARDED

New Section 3(c) of HB 2731-Am. requires that a plaintiff must prove, "by clear and convincing evidence in the initial phase of the trial, that the defendant acted toward the plaintiff with willful conduct, fraud or malice." I am concerned that the effect of this language is to eliminate other types of conduct for which punitive damages have been assessable in the past. I am also fairly well confident that the legislature does not really wish to intend to eliminate the assessability of punitive damages in certain types of cases which I feel may be excluded.

Kansas law is quite clear that punitive damages cannot be assessed for ordinary negligence and it is not the position of myself or KTLA that punitive damages should be awarded in cases where the proof demonstrates only ordinary negligence. However, there are clearly situations where the conduct falls somewhere between negligence and "willful, fraudulent or malicious" where I feel strongly that punitive damages should be assessable if, of course, the trier of fact so determines. In such cases it can be nearly impossible to prove that the defendant acted "willfully" or with "fraud" or with "malice." This is particularly true, where the burden of proof has been increased to require "clear and convincing evidence." This type of conduct has formerly been referred to by the courts as "outrageous" or "oppressive", or "a reckless or complete and total disregard of the rights of others." Tetuan v. A.H. Robbins Company, 241 Kan. 441, 481 (1987); Ford v. Guaranty Abstract and Title Company, 220 Kan. 224, Syl. 6 (1976).

The first example which comes to mind is the drunk driver. An unintoxicated driver who breaches the ordinary standard of care by running a stop sign, or driving too fast, commits ordinary negligence and the law has never allowed assessment of punitive damages for this conduct. What about a drunk driver, however? The drunk driver does not necessarily "willfully" run the stop sign, speed or follow the car in front of him too close. Indeed, I do not believe any driver, drunk or sober, "willfully" loses control of his car to cross the center lane and cause a head-on

collision which results in the serious injury and death of the occupants of his car and the other car involved in the collision. Certainly, this type of conduct is also not covered within the classifications of "fraud", or "malice." It seems to me, however, that the act of driving the vehicle in the first place while intoxicated evinces a complete and total disregard of the rights and safety of others, or may be "outrageous", or "despicable." The situation is particularly exaggerated by a driver who has a history of repeatedly driving intoxicated in violation of the laws of this state. This does not necessarily, however, make the actions of the drunk driver in running the stop sign and causing a serious injury accident "willful", but it certainly seems "reckless."

In addition to the case of the drunk driver, defendants in other types of cases have caused serious personal injury or property damage without specifically intending to do so. These defendants do sometimes, however, go beyond mere negligence through the exercise of complete apathy which can be shocking under the circumstances, or otherwise act with a complete and total disregard as to the consequences of their actions even though they may have no specific "will" or "intent" to cause injury. I am concerned that HB 2731 excludes this type of conduct by requiring a showing by clear and convincing evidence of "willful" conduct. The term "willful" is defined in Black's Law Dictionary, Revised 4th edition (1968) to include such words as "intentionally", "designedly" and "purposefully."

It would appear that the legislature in proposing HB 2731 has intended to allow for the assessment of punitive damages in these other types of situations by including "despicable conduct" in the definition of "malice" at Section 6(d). However, in doing so the legislature has included the term "willful" within the definition of despicable conduct as set out in Section 6(d).

In short, I would like to suggest that you consider an amendment to the bill which would essentially include the same language, but I believe make the bill less confusing and more meaningful of hopefully the actual intent of the legislature. I believe that defining "malice" to include "despicable conduct" is confusing since traditionally the common law has defined "malice" to mean "evil intent" or otherwise to refer to a person's state of mind. Therefore, I suggest that new Section 3(c) be reworded as follows:

(c) In any civil action where claims for exemplary or punitive damages are included, the plaintiff shall have the burden of proving, by clear and convincing evidence in the initial phase of the trial, that the defendant acted toward the plaintiff with willful conduct, despicable conduct, fraud or malice.

The language regarding despicable conduct should then be removed from Section 6(d) as a part of the definition of malice. I would then suggest that former Section 6(f) be used to include a definition of the term "despicable conduct." I suggest the following definition for despicable conduct:

"Despicable conduct" is conduct which is outrageous or which is carried on by the defendant with a complete and total disregard of the rights or safety of others.

RESPONSIBILITY OF THE EMPLOYER OR PRINCIPAL

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. Our civil justice system has logically and rationally always 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 principal 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 realty, are under their complete control and responsibility. By requiring express ratification or authority the principal or employer need only make sure that he

turns his head the other way while his agents or employees commit despicable, willful and fraudulent acts in order to avoid vicarious liability for punitive damages.

The practical problem here really lies in the burden of proof. This is a real world and we all know that an employer or principal can either know, or have reason to know, that his employee or agent is defrauding consumers or committing willful acts or omissions which threaten the safety or welfare of the public, without ever expressly ratifying or authorizing the conduct. Indeed, I submit that there are and will be many situations where an employer or principal simply says "get it done -- I do not want to know the details and do not care how you get it done, just get it done." As long as such conversations are not documented in written form as a practical matter the injured public will never be able to hold the party who gained the most by the misconduct, the employer or principal, liable for punitive damages. On the other hand, when vicarious liability can be founded upon the actions of an employee or agent which are taken to further the interest of the employer or principal, or which are within the scope of employment or agency, then the employer or principal has reason to adequately supervise and monitor the conduct of the employee or agent and to protect innocent third persons from the fraud or wrongful misconduct of the employee or agent.

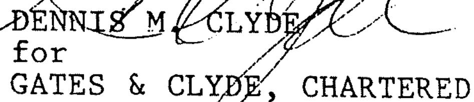
In effect, through the passage of HB 2731 the legislature is telling the employer that if he personally commits fraud or other willful conduct for the purpose of obtaining a profit, he may be assessed punitive damages. If, however, the same employer's agent commits that fraud or willful conduct for the purpose of obtaining the same profit to the benefit of the employer, the employer cannot be assessed punitive damages unless the plaintiff can present evidence the conduct was "authorized or ratified by a person expressly empowered to do so", even though the employer is the one who directly benefitted from the ill-gotten gains. Further, I respectfully submit that there is no logical reason for distinguishing between the liability of an employer for actual damages caused by the mere negligence of his employee and the liability of an employer for the fraud, malicious and willful acts of his employee. The disparate treatment of liability for punitive damages and actual damages simply makes no sense.

Therefore, I strongly suggest that the legislature consider the elimination of sub-sections (1) and (2) of new Section 3(d) and, thereby, continue vicarious liability for punitive damages in accordance with common law principles.

CONCLUSION

I sincerely appreciate your time and attention. This letter has grown somewhat lengthier than I anticipated and would have liked. Due to my serious concern over the few Sections of the bill which I have chosen to limit discussion to at this time, I did want to make an effort to cover them thoroughly. If you should have any questions, or like any further substantiation of the points made above, please let me know and I will be sure to respond promptly and succinctly.

Very truly yours,

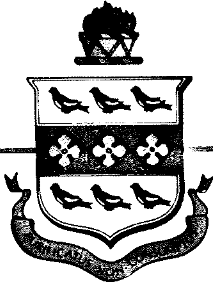


DENNIS M. CLYDE
for
GATES & CLYDE, CHARTERED

DMC/dds

cc: Mr. Richard Mason

3-16-88



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TESTIMONY BEFORE SENATE JUDICIARY COMMITTEE
ON HB 2693
PROFESSOR JAMES M. CONCANNON
MARCH 16, 1988

I support a rational change in the collateral source rule. The primary function of the modern tort system is to spread the costs of losses throughout society through insurance and that should be done as efficiently and economically as possible. The collateral source rule works an injustice when it permits an injured party to receive more in total compensation than the value of the harms the injured party suffered. 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.

Having accepted that principle, a second one necessarily follows from it: the fact that a claimant has received collateral source payments should cause the judgment against a defendant to be reduced only when that collateral source payment causes the claimant to receive more as compensation for his or her injuries than the total damages suffered.

Legislation in prior years dealing with the collateral source rule has been defective because it has failed to recognize this second principle. In many cases, primarily under the comparative negligence statute, a collateral source payment does not cause a claimant to receive more than full compensation. HB 2693 as it was introduced suffered the same defect.

The amendments added by the House Committee made significant improvements. Payments for which there is a right of subrogation were stricken from the definition of "collateral source benefits," in recognition that such payments do not produce double recovery. While section 4 provides that the jury is to determine the amount of net collateral source benefits received as an additional finding in its itemized verdict, it also contemplates that the jury will continue to make a finding of the total damages suffered by the claimant and that the jury will be told that in arriving at this number it must make no subtraction because of any payments the claimant received from others. Section 5 then provides that the subtraction from the judgment because of collateral source benefits should be done by the court, rather than the jury, after the court applies the comparative negligence statute.

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Under K.S.A. 60-258a, the claimant bears the risk of loss not only for damages attributable to the claimant's own fault but also for those damages attributable to the fault of those persons from whom the claimant cannot recover: immune parties, insolvent parties, unknown parties like a hit and run driver, etc. My argument has been that collateral source payments received by the claimant are appropriately treated as self-insurance for these risks of unrecoverable loss. Only when collateral source payments exceed these uncollectible damages do the collateral source payments cause the claimant to receive double recovery. Section 5 as passed by the House thus appropriately provides that collateral source payments are to be credited first to those damages attributable to the fault of the plaintiff and then, at line 101, to "the amount by which the legal right to recover such judgment was reduced pursuant to subsections (c) and (d)..." The reference to reduction of the "legal right to" recover is unfortunately vague. I have reasonable confidence that this language means that collateral source payments will be credited first to damages attributable to the fault of immune parties, since immunity goes to the "legal right" to recover damages. I am less certain but nevertheless believe this language will allow collateral source payments to be credited first to the damages attributable to the fault of unknown parties. In one sense, there is a legal right to recover from the unknown party, but no judgment can be entered against an unknown party and the legal right to recover from the defendant has been reduced by the comparative negligence statute "other than by virtue of the claimant's ... decision not to assert a legally enforceable claim against ... an unnamed party." I have a real fear, however, that the House's language would not permit collateral source payments to be credited first to damages attributed to an insolvent party since a "legal" right to recover the judgment exists against an insolvent party even though there is no "practical" right to recover.

The bill could be clarified in one of two ways. Line 101 could be changed to read: "subsection (a), above, and the amount by which the ~~legal right~~ claimant's ability to." Alternatively, the following language could be added at line 105: "and the amount of damages attributed to the causal negligence of a person or party which cannot be recovered because such person or party is insolvent or bankrupt at the time of trial."

One other change is needed, wholly apart from comparative negligence concerns, to make certain that collateral source payments are used to reduce the judgment only when there is in fact double recovery. A claimant should be entitled to treat collateral source payments as self-insurance for amounts of damages the claimant actually suffered but which the claimant is not allowed to recover because of a statutory cap on the amount of recovery. If this is not done, defendant receives the benefit of the claimant's collateral sources before the claimant has been made whole. Again, language could be added at line 105: "and the amount by which the award of damages has been reduced because

of a statutory limitation upon the recovery of damages."

Let me make four other observations:

(1) Under section 2, HB 2693 would apply in any action for personal injury or death. Section 5 puts the procedure for crediting collateral source benefits against the judgment into the comparative negligence statute, K.S.A. 60-258a. The difficulty with that is that K.S.A. 60-258a does not apply to every action for personal injury or death, only those involving comparative fault. For example, intentional tort cases are not included. It probably would be better to have a separate section that specifies how collateral source benefits should be credited that merely cross-references to K.S.A. 60-258a.

(2) To the extent that future collateral source benefits are included in the bill, it is critical to make certain that the periodic payments of judgments act handles future collateral source payments in the way that HB 2693 specifies --- i.e. that each future installment will be reduced by the applicable comparative fault percentages and then he future collateral source payments will be credited as specified in this bill, first to uncollectible amounts, then to reduce the payment owed by defendant. When the periodic payment of judgments act is used, there would be no need for the trier of fact to determine the amount of future collateral source payments. We could simply look each time a future installment of damages is due to see if collateral source payments have been made during that period.

(3) There is no inherent reason why this bill should be limited in section 2 to actions for personal injury or death,to the exclusion of actions for property damages or economic loss. In other words, the bill might be made applicable to any action in tort.

(4) To the extent the legislature chooses to create new subrogation rights, e.g. for health insurers, the same comparative fault problems I have described will exist. As a matter of public policy the right of subrogation is justified only to the extent the claimant will receive double recovery, a total recovery in excess of the claimant's total damages. Thus, before there is a right of subrogation, the insured should be able to credit his or her own insurance payments first to the damages attributable to the claimant's fault and to the fault of immune, unknown or insolvent parties from whom the claimant cannot recover, as well as any other non-recoverable loss. If this is not done, claimants will be much worse off under a system of subrogation than they would be under HB 2693.

3-16-88

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Testimony on Proposed
Punitive and Exemplary Damages Legislation

Chairman Frey, and members of this committee. I am Ronald Schneider, speaking on behalf of the Kansas Rural Center. We are a private, non-profit organization which focuses on agricultural, natural resource, and rural issues. We have been incorporated since 1979. I am also speaking on behalf of the Kansas Natural Resource Council, the League of Women Voters, and the Kansas Audubon Society.

All of these organizations acknowledge that there is a serious problem concerning medical malpractice insurance in the state of Kansas. However, the proposed changes in punitive and exemplary damages law in Kansas go substantially beyond the issues related to malpractice damages and insurance; it touches upon punitive damages in all types of personal injury claims.

In fact, as you know, punitive damages have little, if any, relationship to costs of malpractice insurance. A physician cannot be insured for punitive damages under any circumstance, because it is against public policy to insure such reckless and outrageous conduct. Thus, we believe that it is false and deceptive to link punitive damage legislation to medical malpractice insurance.

Our organizations are specifically concerned about personal injuries resulting from the negligent manufacture, incineration, transportation, storage, and disposal of hazardous waste and

Att. V

products. The proposed amendments in HB 2731, and related bills, have significant implications limiting punitive damages in this category of personal injury law. Not only are there arbitrary caps imposed by legislation, but also, there is an overwhelming burden of proof placed upon victims to prove punitive damages. The injured party must prove that the wrongdoer intended to harm another.

In many cases involving negligence and hazardous materials, the damages are substantial, and involve a number of victims. Large areas of the environment and personal properties are destroyed by toxic pollution. Punitive damages act as a significant deterrent to these pervasive injuries and damages. Environmental damage has far-reaching implications, and often requires extraordinary concern by all producers, consumers, manufacturers, and transporters of hazardous materials. The limitations proposed by these punitive damages amendments do not adequately protect and serve the public in this area of personal injury legislation.

The proposed amendments and bills affect all injured parties in the state of Kansas--the victims who are injured by the actions of a drunk driver, the farmers whose land and water is polluted by corporate dumping upstream, and victims of injuries from products sold by manufacturers who know that their products are dangerous and flawed. All of our organizations urge this committee to closely study the impact of these amendments. We believe that there are many issues that have not been addressed, and that the questions concerning punitive damages demand further research and evaluation.

The Kansas Rural Center and the Kansas Audubon Society further recommend that you not only study the issues, but that this committee defeat the proposed "reforms" to punitive damages legislation. 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 these amendments are made, it will be virtually impossible to prove that a party intended to injure the victim. Even the most careless and irresponsible corporate polluter does not intend to injure people. Exemplary and punitive damages shall be essentially non-existent under the proposed legislation.

In summary, we recommend that punitive damages should be recoverable when damages and injury result from gross negligence, or outrageous conduct of wrongdoers. The Kansas Rural Center and the Audubon Society are certain that these proposals make bad law for all Kansans. We urge you to vote against these amendments and related bills.