Approved ______________________
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY.

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

10:00 a.m./pxx on March 17, 1988 in room 514-S of the Capitol.

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

Committee staff present:

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

Conferees appearing before the committee:

Ron Smith, Kansas Bar Association
Judge Woleslagel, Lyons, Kansas
Jack Euler, Kansas Bar Association
Jerry Palmer, Kansas Trial Lawyers
Lori Callahan, American Insurance Association
Mike Mullin, American Protection Insurance Company

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.

Ron Smith, Kansas Bar Association, introduced Judge Frederick Woleslagel, retired judge from Lyons, Kansas.

Judge Woleslagel testified five basic problems arise in considering House Bill 2693. 1. You properly are guided by the desire that your legislation results in fairness to the population as a whole. 2. The 1987 case of Farley v. Engelken

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.

Tort Reform Bills

stands today for the proposition that equal protection is not violated if the collateral source rule is modified and applied to tort injuries generally rather than medical malpractice injuries only. 3. In some cases, personal injuries result from a wrongdoer's criminal acts, as distinct from merely tortious acts. 4. The cost in time and money of discovery proceedings and evidence problems could more than absorb available collateral source benefits available to any party in some cases. 5. The jury time required in some cases for evidence as to amounts of collateral source benefits and costs thereof is disturbing. A copy of his statement is attached (See Attachment I).

Jack Euler, Kansas Bar Association, testified on House Bill 2693. He testified there are two important things to remember as far as the Bar is concerned. The bill must be amended to cover present damages only. The definition of what constitutes collateral source benefits in personal injury cases is wide open. If you leave the definition that broad we will have trouble in certain cases. If the proposed amendments are adopted, we will not oppose the legislation. A copy of the handout is attached (See Attachment II).

Jerry Palmer, Kansas Trial Lawyers, testified I don't see any evidence that tort victims are overcompensated by collateral source rule. Litigation in this state is rising out of automobile accidents. The filings from Florida indicated the premium impact of abolition of the collateral source rule in that state was about (.04%) four tenths of one percent for Aetna and 0% for St. Paul. The information from State Farm indicated a maximum of 1% premium impact in the State of Kansas. If it does not have much impact on affordability, it seems even more tenuous to believe that it would have any impact on the availability of insurance. He stated if the committee approves House Bill 2693, we strongly encourage you to also adopt House Bill 3062. We believe House Bill 3052 is constitutional and eliminates the cost and delay involved with primary evidence of collateral benefits for the smaller cases. We are opposed to House Bill 2693. Should the committee choose to pass it, however, we encourage you to adopt House Bill 3052 as well. A copy of the handout is attached (See Attachment III.

Mr. Palmer commented on the "Caps" issue, House Bill 2692. He stated whether it should be on noneconomic damages or pain and suffering, it is up to another body to decide. It seems better policy to not mess around with it. We still are opposed to it. A copy of testimony of Dennis Horner on behalf of the Kansas Trial Lawyers Association is attached concerning House Bill 2692 (See Attachment IV).

Lori Callahan, American Insurance Association, called the committee's attention to written testimony that was presented to the committee by the Kansas Chamber of Commerce and Industry. She said, if you water down tort reform, you are not going to have an effect on rates. She then introduced Mike Mullin, American Protection Insurance Company who testified as a proponent.

CONTINUATION SHEET

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY,

room 514-S, Statehouse, at 10:00 a.m./~~p.m.~~ on March 17, 1988

Tort Reform Bills

Mr. Mullin stated Kansas is very troubled with regard to malpractice. It is sort of an island in terms of its severity; we get hit for our policy limits. Judicial has done away with stacking of our policy limitation. We are really paying our policy limits twice. I don't think legislation is very effective in terms of rates. Mr. Mullin stated tort reform can make a substantial difference in rates. The bills before us will have a stabilizing or tempering effect, and the potential for elimination of the double dip. Tortfeasors normally don't get sued if they don't have any money. The insurance mechanism is being hit on both sides of the equation. You start one thing at a time, and that is to reduce the double payments. In regard to the pain and suffering cap, we have had experience in states, and the Indiana style cuts off at $500,000. We profess to be a strong opponent to pain and suffering cap or economic cap. If you put a cap on it and stabilize premium due on entire side of equation, we would not be so opposed. In regard to punative damages, we are against public policy for insurance company to insure a quasi intentional act. What you see in the newspaper about 4.5 million dollar and 1.8 million dollar awards, the juries see these newspapers. The Hyatt Regency jumbo had a delirious effct in this area. What are we going to do to bring it back into focus, to bring it back to where people can afford to pay the premium. The whole question of tort reform is whether or not we want to protect the tortfeasor mechanism for wrongdoers. We are all paying for the thrill of paying to the injured person. We are talking about a public policy issue. The chairman asked how he felt about subrogation? Mr. Mullin replied, it has some problems. From the insurance company perspective, we are going to add another layer of expense to the system. It is a good lawyer bill. It will require legal expertise. Subrogation right is based on an act against the doctor and you have to prove the tort. A committee member stated 38 states are doing it and we would be the 39th. Collateral source is confusing and hard to apply in a court room.

The meeting adjourned.

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

GUEST LIST

COMMITTEE: SENATE JUDICIARY COMMITTEE DATE: 3-17-88

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
Margaret Post Ahrens	Topeka	Ks Chapter Sierra
Rob Taber	Lawrence	Nat. Fed. of the blind
Pam Scott	Topeka	Insurance Dept
[illegible]	Topeka	KIA
[illegible] Smith	"	[illegible]
Michael Woolf	"	KTLA
Ron Calbert	Newton	U.T.U.
Harold Riehm	Topeka	KAOM
David Hufford	Colwich, Ks.	KMS
[illegible]	Ft. Wayne, Ind	Med Pro
[illegible]	" "	" "
Lori Callahan	Topeka	Am. Ins. Assn.
[illegible]	Topeka	Ks Trial Lawyers Assn
Frederick Woleslagel	Lyons	KBA
Jack R Euler	Troy	KBARA
Matt Lynch	Topeka	Judicial Council
[illegible]	"	KRA
Gerhard Metz	Topeka	KCCI
Nancy L. Oswalt	OP	Intern
Tom Bell	Topeka	KHA
[illegible]	"	Ks Assoc P/C Cos
[illegible]	Topeka	KMS / KHA

Att. V

3-17-88

Christel Marquardt, President
Dale Pohl, President-elect
A.J. "Jack" Focht, Vice President
Alan Goering, Secretary-Treasurer
Jack Euler, Past President

Marcia Poell, Executive Director
Ginger Brinker, Director of Administration
Patti Slider, Public Information Director
Ronald Smith, Legislative Counsel
Art Thompson, Legal Services Coordinator
Dru Toebben, Continuing Legal Education Director

March 17, 1988

HB 2693

Mr. Chairman. Members of the House Judiciary Committee. I am Frederick Woleslagel, retired judge from Lyons, Kansas.

Five basic problems arise in considering HB 2693:

1. You properly are guided by the desire that your legislation results in fairness to the population as a whole. It is rather difficult to see how a modification of the present collateral source rule satisfies that guideline. The premise for modification seems to be that occasionally an injured person recovers more than actual damages when collateral source benefits are added to a court judgment against parties at fault.

Overall, however, people who pay health care premiums do not benefit in excess of the premiums they have paid. If it were otherwise, Blue Cross & Blue Shield, Prudential, and other providers would be

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Att. I

bankrupt. Thus HB 2693 might be considered legislation which favors people at fault to the detriment of people who pay premiums for their own health care.

2. The 1987 case of Farley v. Engelken, 241 Kan. 663, stands today for the proposition that equal protection is not violated if the collateral source rule is modified and applied to tort injuries generally rather than medical malpractice injuries only. The court did not address whether such general application would be found unconstitutional in some cases because of Sec. 18 of the Kansas Constitution providing that people may not have property taken without due process of law. Resultantly, a possible constitutional problem remains.

3. In some cases, personal injuries result from a wrongdoer's criminal acts, as distinct from merely tortious acts. The people of Kansas are concerned about compensation for victims of crime. It seems incongruous that this bill could furnish funds paid for by the victim to the wrongdoer to reduce the damages he otherwise would owe the victim. In this connection I note that in some views that have been presented to you it is assumed that comparative negligence does not apply when an intentional tort is involved. I believed that admitted actual malice of a client was not comparable to mere negligence of his attorneys. Hunt v. Dresie, 241 Kan. 647 (1987) holds the contrary.

4. The cost in time and money of discovery proceedings and evidence problems could more than absorb available collateral source benefits available to any party in some cases. I understand there is a separate bill introduced that would limit modifying the collateral

source rule to catastrophic cases. I would see a likely equal protection defect therein under Farley v. Engelken.

5. The jury time required in some cases for evidence as to amounts of collateral source benefits and costs thereof is disturbing. No less disturbing is the necessity of making the jury decide how far back in premium payments they should go in determining cost. What are they to do about small benefits received through the years? Is interest on old premiums to be added? Or the effect of inflation throughout the years?

It is an overall fairness problem and I am unable to formulate guidelines that should be given to the jury in instruction. Even more disturbing yet is the fact that there is no way to know if some present collateral source will continue to be available for future payments otherwise required (overlooked premiums payment or loss of job and group eligibility from the provider lost and new provider excludes existing injury).

The passage of pending periodic payment of judgment legislation would be helpful as to some facets of these problems. But not all. Future benefits and future costs are each purely speculative and, at best, require expensive expert testimony for what it may be worth. Not much really. Proper determinations just cannot be made at the time of jury trial. Two alternate solutions will be offered hereafter.

While the above problems might lead you to conclude that the present rule should not be modified, I appear on behalf of, and in support of, the position taken by the Kansas Bar Association. It has informed you that it will not oppose a modification if the result is

workable in our court system. Accordingly I address what modifications seem necessary to arrive at a workable result. This returns us to the fifth problem.

Recommendations

Sections 2, 3 and 4 of the bill provide admissibility of evidence as to benefits, cost of benefits, and the determination of net benefits. It is an unusual determination, a dangling factual finding, as the jury does nothing with the determination that may well have been the most time consuming for them. Instead, the application of the finding is left to the judge under Section 5(b). I believe this is wisely left to the judge.

For reasons already given, such wisdom might be extended by providing the judge alone should hear all evidence touching upon collateral source benefits and determine net benefits. This saves juror time and effort leaving the jury to determine the more substantial questions of comparative fault and damages. It also comports with the Kansas position that insurance coverage and the extent thereof are not matters for the jury. This is my suggestion to you. Apportionment for any credits from future collateral source benefits can be made by the judge in the years as they actually accrue. You avoid the absurdity of computing benefits "reasonably certain to be received". There is no certainty, reasonable or otherwise, and statutory language changes nothing as to that fact.

With this change in the statute, I find it workably acceptable. Importantly, to me, it creates no problem relative to jury instruction. That can be handled as simply as we attempt to handle it now.

Alternative

Should you feel compelled to leave this area for jury evidence and determination, I suggest an alternate solution that I believe is workable. But just barely and not at all desirable. Specifically, provide that in making any finding as to benefits, cost of benefits and determination of net benefits the jury functions as an advisory jury only. (A diminished jury authorization I avoided like a plague for all my life).

This clears the judge to correct an inept determintion of a complex problem presented to them. Otherwise, the judge is placed in the uncomfortable position of utilizing additure or remittitur.

With this solution, many of the problems remain and an instruction is required that the jury not consider net benefits in its finding of damages. You might assume the jurors would be perturbed that they had to make a difficult finding for no apparent reason. You would try to ameliorate that by assuring the jurors in another instruction he would utilize the finding in making the final award.

Yes, the jurors would wonder then why the judge didn't just handle the whole sticky collateral benefit matter. And yes, the judge would have preferred that you authorized him to do so.

I hope these remarks will prove to be of some assistance to you.

KANSAS BAR ASSOCIATION

Christel Marquardt, President
Dale Pohl, President-elect
A.J. "Jack" Focht, Vice President
Alan Goering, Secretary-Treasurer
Jack Euler, Past President

Marcia Poell, Executive Director
Ginger Brinker, Director of Administration
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Dru Toebben, Continuing Legal Education Director

March 16, 1988
HB 2693

Mr. Chairman. Members of the Senate Judiciary Committee. I am Jack Euler, representing the Kansas Bar Association.

The Kansas Bar Association has many concerns about this legislation. Primary among them are that this legislation be workable when used. Its limits are simple. This legislation will be used only when (1) plaintiffs have collateral sources of benefits paid to them, and (2) get a verdict for money damages. In this regard, Kansas sees considerably more automobile litigation than medical malpractice plaintiff verdicts. If this legislation is not constitutional or does not work well in ordinary automobile verdicts, it really won't matter how well it works in medical malpractice cases.

The whole change in the common law collateral source rule is to effect situations where there is a so-called "double recovery." To allow the evidence for other purposes is improper. Where there is no double recovery (i.e. when subrogation interests are present) or where plaintiff is responsible for part of the damages, the rule should not change.

For a variety of practical reasons, we think the law should apply to present damages only, and be a post-trial hearing to the judge, with

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Att. II

applicable post-trial setoff credits along the lines of Professor Concannon's economic theory.

Whatever else you do, give Kansans a bill which is workable and makes sense within our entire civil procedure code. We believe our recommendations work toward these goals.

Definitions Section 1(b)

The definition of what constitutes collateral source benefits in personal injury cases is wide open. There are three clear exceptions: (1) disability insurance proceeds, (2) life insurance proceeds, and (3) all other services or benefits for which a valid lien or subrogation interest exists.

Several readily identifiable problems arise.

Criminal restitution. If a person commits a criminal driving offense, such as reckless driving or driving while intoxicated, that act may also create civil liability. If the sentencing court orders restitution to the victim, under the definition, since there is no subrogation interest, that becomes a collateral source. The amount of criminal restitution is fixed by a separate court, with no opportunity by the victim to put on evidence or even be assured of the restitution being paid. It would be ironic if intentional tort-feasors are allowed to reduce their actual damage losses by restitution in a criminal act where they have been found guilty beyond reasonable doubt.

Identical Insurance Companies Some automobile insurance companies write so many policies the probability of the same company writing policies for both parties is relatively high. Under the law, the compa-

ny is not allowed to choose which of its insureds it likes best; by law it must represent the defendant. Under the House version, the company for some tactical advantage could unilaterally waive its subrogation interest in the plaintiff's recovery. By doing so it can then put into evidence the plaintiff-insured of the company has had PIP benefits paid. Yet the plaintiff is precluded by KSA 60-454 from showing the same company that waived the PIP subrogation insures the defendant.

The criminal restitution problem must be remedied in the definition of a collateral source benefit. The dual insurance company provision is quickly remedied if the Senate adopts a post-trial hearing to the court without submitting this collateral source information to the jury because the incentive to waive the subrogation would no longer exist. An amendment is recommended and attached.

Post-Trial Hearing to Determine Collateral Sources

KBA's major concern with HB 2693 is it allows presentation of collateral source evidence to a jury. We do not think it advisable for a number of reasons:

1. The purpose of a jury is to decide disputed facts if relevant to the issues at trial. Juries are not to be the repository of information merely because they are fact-finders. If the facts of how much collateral source has been received, and the amounts paid to secure the collateral source, are not in dispute, it is entirely proper for a pretrial motion for partial summary judgment, which can be enforced in a post-trial action by the judge. It shortens trial, and is one last factual dispute for the jury.

2. All the House version does is require the jury to determine net collateral source benefits. There is no authority in the bill -- nor should there be -- for the jury to act on the determination it has made. It is the judge who makes Sec. 5 credits. He must instruct the jury -- and insure their compliance by a statement on the verdict form -- that when they find the amount of collateral source benefits, they are not to reduce that amount from the total damages. Otherwise, the jury would be doing what the judge is supposed to do contrary to legislative intent. Same thing with the cost of the collateral source benefits. Further, if for any reason the jury put zeros in those two blanks in the verdict form -- which they can -- then they tie the judge's hands. He cannot later reduce the verdict under Section 5 because that would be contrary to the jury's findings. He would have to order a new trial on damages, which is expensive to all parties.

3. The proponents of the House version argue this information is given to the jury merely to "tell the jury the truth." Keep in mind we've never told the jury all facts surrounding the case, such as the defendant's insurance company and limits of coverage. KSA 60-454 prohibits such information. The wealth of litigants, their insurance company, amounts of coverage -- none of these factors are relevant to the issues of liability, causation and damages.

4. Many times the amount of the collateral source benefits and the cost of the benefits are not in dispute. Often we know how much Blue Cross has paid, and how much in premiums the plaintiff has paid. To allow such information to go to the jury serves only some prejudicial value for the defendant. Undisputed factual evidence designed for

use in post-trial relief should go to the judge for post-trial relief, not a jury acting as a middleman. If for some particular reason a judge needs to know what amount within a verdict for medical damages constitutes present or future hospital costs, or present or future physician costs, such information can be obtained under current law using a special verdict question. To get this finding from a jury, it is not necessary to inform the jury that Blue Cross has already paid those damages.

5. There are procedural reasons not to put such information in front of the jury.

> (a) The trial judge maintains the power to decide whether the verdict is appropriate under the evidence. [KSA 60-259] HB 2693 doesn't change this power, nor should it. If a jury is given the prejudicial information concerning Blue Cross payments, the judge still gets to determine whether the jury rendered an inadequate verdict. Since the judge retains that statutory power, KBA recommends the Senate adopt a procedure for a post-trial hearing to the judge after he or she has decided that the verdict is sufficient as a matter of law, and has overruled any motion for new trial under 60-259.

> (b) The House version of HB 2693 makes it possible for plaintiffs to force defendants to agree not to submit such information anyway -- under threat of attorney fee and cost sanctions. K.S.A. 60-236 allows requests for admissions to be made by one party to another. The purpose of the statute is to allow litigants to avoid the necessity of proving facts that one side or the other should "stipulate" to at trial. Under case law, when admissions and undisputed testimony leave no question of fact to be decided, issues may be determined as a matter of law (that is, the court decides the issues). See Campbell 66 Express Inc. v. Adventure Line Mfg. Co., 209 Kan. 357, 358, 496 P.2d 1351.

>> Example: In practice, a plaintiff might ask the defendant to "admit" under KSA 60-236 that Blue Cross paid $10,000 in benefits, and that plaintiff paid at least $10,000 in premiums over the twenty years he has had Blue Cross coverage. The plaintiff would include affidavits with such a request, or deposition transcripts, etc. Defendant is put in a procedural box. If he de-

nies the request to stipulate that there is zero percent effect the plaintiff must prove that fact in court in front of a jury. If the jury finds similar amounts to those questions, K.S.A. 60-237(c) allows the plaintiff to apply to the court for attorney fees and costs of proving the matter in court. The Court can penalize the defendant for, in essence, wasting the court's time proving facts the plaintiff would have stipulated to. The court has considerable discretion in determining whether the party objecting to a request for admissions has abused the statute [Binyon v. Nesseth, 231 Kan. 381 (1982)].

As these illustrations show, a plaintiff is in a position under current rules of procedure to force a defendant to pay a stiff penalty in attorneys fees and costs of litigation if it becomes necessary to put on evidence to the jury. All of these problems are avoided with KBA's preferred alternative collateral source change: a post-trial hearing to the judge. The attached balloon amendment implements this recommendation.

Present Damages Only

The problem with allowing future economic loss to be reduced by either a judge or jury when there are collateral sources of benefits paid in the future is both a procedural and philosophical problem. For example, under the House version a plaintiff may see evidence introduced attempting to diminish the jury's award for damages even though the defendant, because of insurance policy limitations, does not have the ability to pay the full potential verdict. As such the defendant is given a procedural advantage.

Because KBA recommends the use of a post-trial hearing to the judge, the distinction between hearing evidence of present collateral source benefits verses future C.S. benefits is mooted. Our balloon

would allow judges to hear evidence as to the present benefits to be received (and thereby allow them to be reduced from the verdict). It is unnecessary to allow future collateral source issues to go to the jury or the judge if the Periodic Payment of Judgments Act is used.

The problem with having a judge or jury determine future collateral benefits, such as Blue Cross, is the speculative nature of such evidence. Too many uncontrollable things can happen to upset the jury's or the judge's future predictions, such as a victim's parent providing Blue Cross coverage losing a job after trial and losing the fringe benefits that go with the job.

The legislature is considering a major change in the way future losses are proved and paid in SB 258. SB 258 is in conference committee, and there is no reason why SB 258 cannot handle this problem of speculativeness. SB 258, the Periodic Payment of Judgments Act, allows losses to be paid when the jury says they are needed. To that extent, SB 258 allows the future to take care of itself. This principle applies to future collateral source benefits received, too.

> Example as recommended by the House: Under HB 2693, tied in with relevant provisions of SB 258, the jury would determine on a year by year basis, how much medical care would be needed. HB 2693 also presumes the jury will hear testimony that Blue Cross will pay up to a million dollars in future benefits. The jury could then plug those reductions into the annual formula when making findings under SB 258. If a year after trial the Blue Cross benefits predicted to be there are lost, the claimant has been irrevocably penalized: the jury reduced the award assuming BC/BS benefits would be there, which they weren't. Yet the judgment cannot be reopened to assess damages against the defendant. The possibility of such happening creates serious due process and equal protection and concerns for plaintiffs which may render HB 2693 unconstitutional as applied.

> Example as Recommended by KBA: If HB 2693 applied only to present collateral source benefits, SB 258 could be amended in Conference Committee so that the claimant (or claimant's guardians

or trustees or parents) must file with the Court each year a certificate as to how much collateral source benefits (as defined) were provided during the previous year. After making the calculations and taking into consideration the comparative negligence and other economic concerns of Professor Concannon, the company paying the damages on an annual basis could be allowed a reduction on their annual installment for those collateral source benefits exceeding the plaintiff's portion of damages.

(a) This is a form of "shadow verdict." It is a contingent verdict, which all future verdicts are under SB 258. But it maintains primary responsibility on the tortfeasor to pay the future damages, unless the plaintiff shows other sources paid part or all the cost of future benefits.

(b) This proposal actually presents a good option for the defendant's casualty insurance company. Let's use the Health Care Stabilization Fund as an example:

1. If the HCSF medical experts indicate a badly injured child is not going to live very long, even though the jury has ordered payments far into the future, under SB 258 the Fund has the option of paying the damages out over time, or buying an annuity to fund these damages. If the child dies earlier than the jury predicted, and the HCSF is paying the damages themselves all the benefits of the Section 11, SB 258, abatement policy as well as credits for future collateral source benefits actually used by plaintiff accrues to the benefit of the Fund.

2. If the claimant will live a long time, the HCSF may elect to purchase the annuity and take the savings this option provides. The fact that SB 258 would allow the annuity company the additional benefit of a credit for other collateral sources actually used will accrue to the Fund's benefit when the price of the annuity is offered. It may in fact be another catalyst to get an life company to bid on the annuity in the first place. [There may be concerns with the effect on tax policy of the U.S. Government regarding such annuities where the annuitant is given annual credits. But that should simply be "income" to the life company, and not render the entire annuity taxable.]

Post-Trial Judicial Credits

Section 5 of HB 2693 sets up additional credit considerations by the judge. It implements part of the economic theory of Professor James Concannon that before the collateral source benefits of the

claimant are used to benefit the defendants, they should first be used as payment of damages the plaintiff must assume or absorb by virtue of the comparative negligence act and other state laws limiting recoveries.

The House version of Section 5 can be interpreted to apply a credit only to those cases involving comparative negligence where there is either some percentage of fault on the plaintiff, or an immune codefendant or a phantom codefendant. There are also cases where the plaintiff is zero percent negligent, and intentional tort cases, where equal protection would demand that Section 5 also apply a credit.

Under our system of law, the total damages suffered by a plaintiff is determined by a jury. As stated before, the cost of a hospitalization after a car wreck is part of the damages caused by the car wreck whether it is paid by Blue Cross or not. An unpaid portion of a verdict is still unpaid whether or not the reason is a separate statute limiting awards, or caused by a codefendant's insolvency.

We believe Professor Concannon's recommendations have merit and should be adopted as a separate section 5. However, we suggest you not include the language as part of KSA 60-258a.

Conclusion

With the adoption of the recommended amendments, we think this law would be rationally based, and constitutional under our current constitution. We cannot, of course, state with certainty what the Court will do. KBA opposes HB 2693 as it left the House. If changed in the

manner suggested by our testimony and per the attached amendments, KBA will not oppose the legislation.

The Kansas Bar Association is the largest voluntary association of lawyers in the state, representing nearly 5,000 of the state's 6,500 lawyers. Its members include corporate counsel, firms of all sizes, solo practitioners, law professors and the judiciary.

The 106-year-old Association provides continuing legal education for its members, and a number of other educational and professional services to its members through 11 different sections of the practice of law: Administrative Law, Aviation law, Corporation, Business and Banking, Family Law, Law Office Economics, Litigation Law, Military Law, Oil and Gas, Real Estate, Probate and Trust Law, Tax Law and the Young Lawyers Section. Association members operate a Client Security Fund, a variety of charitable programs through an IOLTA program overseen by the Kansas Bar Foundation, and Legal Aid and Referral Systems. Through its committee structure, KBA members provides legal services to the elderly, support of alternative dispute resolution programs in conjunction with local bar associations, and helps the Office of Disciplinary Administration investigate claims of attorney misconduct.

Its legislative policy is crafted by its 42-member Legislative Committee, which is composed of attorneys from all the different interests, practice areas, and disciplines within the Bar. The Legislative Committee reviews legislative proposals and makes recommendations to the Board of Governors. The Board of Governors, through its full panel or the Executive Committee, makes, revises or amends final association legislative policy.

Suggested KBA Amendments

[As Amended by House Committee of the Whole]

As Amended by House Committee

Session of 1988

HOUSE BILL No. 2693

By Committee on Judiciary

1-22

0021 AN ACT concerning civil procedure and evidence; relating to
0022 collateral source benefits; ~~amending K.S.A. 1987 Supp. 60-~~
0023 ~~258a and repealing the existing section; also~~ repealing K.S.A.
0024 1987 Supp. 60-3403.

0025 *Be it enacted by the Legislature of the State of Kansas:*
0026 New Section 1. As used in this act:
0027 (a) "Claimant" means any person seeking damages in an
0028 action for personal injury or death, and includes the heirs at law,
0029 executor or administrator of a decedent's estate.

[NOTE: Applies only to personal injury cases.]

0030 (b) "Collateral source benefits" means ~~any of the following~~
0031 benefits which were [~~or are reasonably expected to be~~] received
0032 by a claimant, or by someone for the benefit of a claimant, for
0033 expenses incurred [~~or reasonably expected certain to be incurred~~]
0034 as a result of the occurrence upon which the personal injury
0035 action is based~~: (1) Any benefits received as a result of any~~
0036 ~~medical or other insurance coverage, or any benefit in the nature~~
0037 ~~of insurance coverage~~, except life or disability insurance ~~cover-~~
0038 ~~age; and (2) any workers compensation benefit, military service~~
0039 ~~benefit plan, employment wage continuation plan, welfare ben-~~
0040 ~~efit program or other publicly funded benefit plan or program~~
0041 ~~provided by law.~~ benefits or benefits gratuitously bestowed on
0042 the claimant. Such term shall not include services or benefits for
0043 which a valid lien or subrogation interest exists; however, noth-
0044 ing in this act shall be construed to create or modify lien or
0045 subrogation interests not otherwise allowed by law.

[Stricken language in lines 31 and 33 implements KBA's preference for a post-trial hearing to the Court concerning present damages only. Without these changes, section 1(b) still requires a court to make a pretrial determination that the benefits in the future are "reasonably certain to be incurred".]

[The term shall not include amounts included as part of a criminal sentencing order or pursuant to state programs of victims assistance incurred by virtue of the defendant also committing a criminal act.]

0046 (c) "Cost of the collateral source benefit" means the amount
0047 paid [~~or to be paid in the future~~] to secure a collateral source

[NOTE: See our text.]

0048 benefit by the claimant or by anyone on behalf of the claimant. If
0049 the amount of any benefit paid [or to be paid] encompasses
0050 amounts paid over a period of time, thus making the benefit
0051 greater than it would be without such amounts paid, then evi-
0052 dence of such amounts paid shall be admissible in determining
0053 the "cost of the collateral source benefit."
0054 (d) "Net collateral source benefits" means the sum of collat-
0055 eral source benefits after subtracting the cost of the collateral
0056 source benefit.
0057 New Sec. 2. In any action for personal injury or death, evi-
0058 dence of collateral source benefits received, [or evidence of
0059 collateral source benefits which are reasonably expected certain
0060 to be received in the future,] shall be admissible.
0061 New Sec. 3. When evidence of collateral source benefits is
0062 admitted into evidence pursuant to section 2, evidence of the
0063 cost of the collateral source benefit and the extent to which the
0064 right to recovery is subject to a lien or subrogation shall be
0065 admissible.
0066 New Sec. 4. In determining damages in any action for per-
0067 sonal injury or death, the trier of fact shall consider: (a) The
0068 extent to which damages awarded will duplicate collateral
0069 source benefits and (b) the cost of the collateral source benefit
0070 and any lien or subrogation right. In determining damages in an
0071 action for personal injury or death, the trier of fact shall deter-
0072 mine the net collateral source benefits received and the net
0073 collateral source benefits reasonably certain to be received in the
0074 future. If the action for personal injury or death is tried to a jury,
0075 the jury will be instructed to make such determination by itemi-
0076 zation of the verdict.
0077 Sec. 5. K.S.A. 1987 Supp. 60-258a is hereby amended to read
0078 as follows: 60-258a. (a) The contributory negligence of any party
0079 in a civil action shall not bar such party or such party's legal
0080 representative from recovering damages for negligence resulting
0081 in death, personal injury, property damage or economic loss, if
0082 such party's negligence was less than the causal negligence of
0083 the party or parties against whom claim for recovery is made, but
0084 the award of damages to any party in such action shall be

in a post-trial evidentiary hearing to the trial court.

[NOTE: this amendment implement's KBA's key concern that a post-trial hearing be used to reduce the jury's award. The evidence is not presented to the jury.]

New Section 4. In determining damages in an action for personal injury or death, the court shall determine the net collateral source benefits received or incurred for damages which have accrued prior to trial.

0085 diminished in proportion to the amount of negligence attributed
0086 to such party. If any such party is claiming damages for a
0087 decedent's wrongful death, the negligence of the decedent, if
0088 any, shall be imputed to such party.
0089 (b) Where the comparative negligence of the parties in any
0090 such action is an issue, the jury shall return special verdicts, or in
0091 the absence of a jury, the court shall make special findings,
0092 determining the percentage of negligence attributable to each of
0093 the parties, and determining the total amount of damages sus-
0094 tained by each of the claimants, and the entry of judgment shall
0095 be made by the court. No general verdict shall be returned by the
0096 jury. *With respect to the actions to which 1988 House Bill No.*
0097 *2693 relates, the amount of the judgment for past damages shall*
0098 *be reduced by the amount of net collateral source benefits*
0099 *received, but only to the extent that such benefits exceed the*
0100 *amount by which such judgment was reduced pursuant to*
0101 *subsection (a), above, and the amount by which the legal right to*
0102 *recover such judgment was limited by the application of sub-*
0103 *sections (c) and (d), below, other than by virtue of claimant's*
0104 *settlement with or decision not to assert a legally enforceable*
0105 *claim against a named or an unnamed party. In the same*
0106 *manner, the amount of the judgment for future damages, if any,*
0107 *shall be reduced by the amount of net collateral source benefits*
0108 *found to be receivable in the future.*
0109 (c) On motion of any party against whom a claim is asserted
0110 for negligence resulting in death, personal injury, property
0111 damage or economic loss, any other person whose causal negli-
0112 gence is claimed to have contributed to such death, personal
0113 injury, property damage or economic loss, shall be joined as an
0114 additional party to the action.
0115 (d) Where the comparative negligence of the parties in any
0116 action is an issue and recovery is allowed against more than one
0117 party, each such party shall be liable for that portion of the total
0118 dollar amount awarded as damages to any claimant in the pro-
0119 portion that the amount of such party's causal negligence bears to
0120 the amount of the causal negligence attributed to all parties
0121 against whom such recovery is allowed.

0122 (e) ~~The provisions of this section shall be applicable to ac-~~
0123 ~~tions pursuant to this chapter and to actions commenced pursu-~~
0124 ~~ant to the code of civil procedure for limited actions.~~
0125 ~~Sec. 5.~~ New Sec. 6 The provisions of this act shall apply to
0126 ~~any action pending or brought on or after July 1, 1988, regardless~~
0127 ~~of when the cause of action occurred~~ [causes of action accruing
0128 on or after July 1, 1988].
0129 Sec. ~~6~~ 7. K.S.A. 1987 Supp. ~~60-3403 is~~ 60-258a and 60-3403
0130 are hereby repealed.
0131 Sec. ~~7~~ 8. This act shall take effect and be in force from and
0132 after its publication in the statute book.

[Even though the comparative negligence statute 60-258a applies to all death, personal injury, property and economic loss cases, Professor Concannon points out HB 2693 only applies to personal injury and death cases. A better recommendation is to put the new language in lines 96 through 108 in a separate section 5, and simply refer to KSA 60-258a(a) and subsections (c) and (d) when appropriate. Otherwise, HB 2693 may be construed as allowing the post-trial reductions in the verdict according to this new language only in cases where comparative negligence is an issue. There are other types of tort cases, i.e. intentional torts, causing personal injury where this change is intended to apply, too.]

New Sec. 5

The amount of the judgment for past damages shall be reduced by the court as follows. (a) The judgment for past damages shall be reduced by the amount of net collateral source benefits received, but only to the extent that such benefits exceed the aggregate amount by which (1) such judgment was reduced pursuant to K.S.A. 60-258a(a); (2) the amount by which the claimant's ability to recover such judgment was limited by the application of K.S.A. 60-258a(c) and K.S.A. 60-258a(d), other than by virtue of claimant's settlement with or decision not to assert a legally enforceable claim against a named or an unnamed party; (3) the amount by which a codefendant not named as a party by the claimant is insolvent or bankrupt; and (4) the amount by which the award of damages has been reduced because of a statutory limit upon the recovery of damages.

3-17-88

KANSAS TRIAL LAWYERS ASSOCIATION

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March 17, 1988

TO: MEMBERS OF THE SENATE JUDICIARY COMMITTEE

FROM: KANSAS TRIAL LAWYERS ASSOCIATION

RE: HB 2693 & HB 3052 - COLLATERAL SOURCE RULE

The Kansas Trial Lawyers Association appreciates the opportunity to provide input into your consideration of modification of the collateral source rule. We are opposed to HB 2693. Should your committee choose to pass it, however, we encourage you to adopt HB 3052 as well.

WHAT IS THE COLLATERAL SOURCE RULE?

The Collateral Source Rule is a rule of evidence which prohibits the introduction of evidence of payments to an injured person made through medical insurance, disability insurance, workers compensation and certain other types of benefits which have been secured by the injured person's premiums for private insurance or, in his negotiations with his employer, the premiums provided in whole or in part as a payment in lieu of wages. Likewise, the wealth of a party is not admissible nor is a party's poverty admissible to show that an injury has some differential impact on that person.

The legal view of personal injury damages is that if a wrongdoer causes injury, then he should pay the full measure of that injury, measured by the damage inflicted, including medical expense, lost income, pain, suffering, disfigurement and disability. Therefore, it is not a relevant issue as to how much the plaintiff has secured unto himself through insurance for this type of casualty.

POLICIES OF THE TORT LAW UNDERLYING THE RULE.

The rule of relevancy is that only those things which should make a difference to a jury in its assessments of fault and blame should be brought to the jury's attention through evidence. Tort law has two goals--full compensation of the victim by the wrongdoer and deterrence of the wrongful or negligent conduct by the assessment of responsibility to a wrongdoer. It must be remembered that a jury has reached a conclusion that there is fault on the part of the defendant

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Att. III

before the jury can reach the issue of damages. The jury cannot decide damages until it has decided the issue of fault. Only if it finds fault on the defendants in an amount greater than the percentage on the part of the plaintiff will they turn their attention to the evidence respecting damages. Certainly, if the tort law is to have a deterrent effect, then giving a wrongdoer a break because a person has insurance is counterproductive to that policy goal.

DOES THE RULE CREATE "DOUBLE PAYMENT" TO THE VICTIM?

The issue of full compensation is where the critics focus on the collateral source rule, claiming that the plaintiff receives a "windfall" and therefore is overcompensated. The reality, of course, is that in the real world people do not fall victim to an injury and an insurance company immediately writes them a check for their full damages. There are transaction costs. Certainly, before any evidentiary consideration comes into the picture, there would have to be a lawsuit filed, which usually means the person has had to retain an attorney.

Other transaction expenses are court costs, the costs of discovery, including deposition expenses, travel, the securing of medical records, the payment to doctors for rendering medical reports, or giving medical depositions, perhaps the hiring of an expert witness, photographs, preparation of exhibits, photocopying of records and reports. Experience tells us that these transaction costs, in order to secure compensation, almost always exceed the sums of money represented by the collateral sources. These sums are not collectible from the defendant.

An argument might be posed by the defendant that if the plaintiff's costs and expenses are to be reimbursed in case the plaintiff wins, then likewise the defendant should be so compensated. The reasoning under the "American Rule" is that each party should bear the burden of their own expenses. However, when a policy issue is being taken up as to whether the collateral source should be deducted, it is fair to take into consideration the transaction costs to the plaintiff trying to achieve full compensation versus the sums of money he has received from his own insurance secured through his efforts or through his contracts with his employer.

OTHER CONSIDERATIONS

It should be a matter of indifference to the defendant whether he causes harm to a person who is either wealthy enough to take care of their needs and does not feel the need for insurance, or injures a person in the middle class who could not afford a catastrophe and so has expended sums of money in small increments to protect against the risk of the catastrophic loss. The injury is the same and the damages are the same.

What policy is advanced by abolition of the collateral source rule? In theory, if wrongdoers have to pay less for the consequence of their wrongful acts, then they and others who are potential wrongdoers have secured liability insurance against the risk of being found guilty of wrongdoing will find more competition for their business and the insurance will become less expensive. There are two pieces of empirical information

which contradict the affordability issue. One is the filings from Florida indicating that the premium impact of abolition of the collateral source rule in that state was about (.04%) four tenths of one percent for Aetna and 0% for St. Paul. Likewise, the information from State Farm indicated a maximum of 1% premium impact in the State of Kansas. If it does not have much impact on affordability, it seems even more tenuous to believe that it would have any impact on the availability of insurance.

Another corollary argument is worth mentioning. If an insurer is subrogated, such as the employer in workers compensation, the state or the federal government that supplies benefits pursuant to legislation such as SRS or Champus or military hospitals for veterans and their families, modification of the collateral source rule will make a lawsuit unduly complex. To introduce the fact of the collateral source and then the impact of subrogation will add significantly to the overall transaction costs to which we earlier referred. This is especially a concern when essentially the plaintiff is a conduit for the dollars from wrongdoer back to the person who provided the service.

HB 2693

Specifically with respect to HB 2693, there are three portions of the bill that are critical to insure it provides at least a minimum amount of fairness to plaintiffs.

First, the language defining future collateral source benefits references those benefits that are reasonably <u>certain</u> to be received. This is important because some such benefits are anything but reasonably certain to exist in the future. Plaintiffs should not be penalized for future benefits they never receive.

Second, the comparative fault language is necessary to preclude situations where plaintiffs in effect lose part of their deserved compensation due to the partial fault of others.

Finally, to protect the constitutionality of HB 2693, the new law should only apply to causes of action on or after July 1, 1988. Beyond that, it would be inherently unfair to change rules in the middle of the game to have this bill apply to pending cases.

HB 3052

If the Committee approves HB 2693, we strongly encourage you to also adopt HB 3062. We believe HB 3052 is constitutional and eliminates the cost and delay involved with primary evidence of collateral benefits for the smaller cases.

3-17-88

WRITTEN OUTLINE OF ORAL TESTIMONY OF:

DENNIS HORNER

ON BEHALF OF THE KANSAS TRIAL LAWYERS ASSOCIATION

TO: THE HONORABLE MEMBERS OF THE SENATE 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

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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.