Approved 4-27-89
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY.

The meeting was called to order by Senator Wint Winter, Jr. at
Chairperson

3:30 a~~m~~./p.m. on March 21, 1989 in room 313-S of the Capitol.

All members ~~were~~ present ~~except~~: Senators Winter, Moran, Bond, Feleciano, Gaines, D. Kerr, Martin, Morris, Oleen, Parrish, Petty and Rock.

Committee staff present:

Mike Heim, Legislative Research Department
Gordon Self, Revisor of Statutes
Jane Tharp, Committee Secretary

Conferees appearing before the committee:

Cheri Davis, Towanda, Kansas
Ann Hebberger, League of Women Voters of Kansas
Gary McCallister, Kansas Trial Lawyers Association
Professor Pete Rowland, University of Kansas
Ivan W. Wyatt, Kansas Farmers Union
Ron Smith, Kansas Bar Association
Ann Miller, Kansas Bar Association
Donald F. Lindsey, Jr., United Transportation Union
Richard Crook, Private Citizen, Topeka, Kansas

The chairman announced the testimony we hear today will be in opposition to the resolution.

Senate Concurrent Resolution 1610 - Constitutional amendment to limit noneconomic damages on claims for personal injury.

Cherie Davis, Towanda, Kansas, testified in opposition to the bill. She related her experience with medical malpractice that caused brain damage to her child. A copy of her testimony is attached (See Attachment I).

Ann Hebberger, League of Women Voters of Kansas, testified the league believes that amendments pertaining to the State Constitution should be considered on the basis upon which the rights of all Kansans are guaranteed and protected, or upon broad governmental issues that affect the majority of the people in some manner. This proposed amendment does not fit our expectations. A copy of her testimony is attached (See Attachment II).

Gary McCallister, Kansas Trial Lawyers Association, stated their testimony will provide concrete reasons to vote against SCR 1610, including philosophical and practical problems of tampering with the Kansas Constitution; statutory limitations on the jury's right to determine damages are inherently unfair; the resolution simply will not accomplish its advertised objectives; and there are alternative, constitutional solutions to medical malpractice problems that will work. Copies of his handouts are attached (See Attachments III).

Professor Pete Rowland, University of Kansas, testified I am here because, although I respect the good intentions of those on the other side of this issue, my 16 years as a teacher and student of constitutional law convince me that any narrow benefits derived from the proposed amendment would be far outweighed by the damage done to the Kansas constitution and, ultimately, our constitutional form of government. A copy of his testimony is attached (See Attachment IV).

Ivan W. Wyatt, Kansas Farmers Union, testified at our executive board meeting on January 26, 1989, the coalition voted unanimously to oppose a constitutional amendment limiting damages in personal injury cases. A copy of his testimony is attached (See Attachment V).

SCR 1610 - continued

Ron Smith, Kansas Bar Association, responded to some of the remarks made yesterday by the Kansas Medical Society. He then introduced Ann Miller.

Ann Miller, Kansas Bar Association, testified KBA does not oppose valid statutory approaches to alleviating the insurance premium problems doctors face in Kansas. You are taking giant strides in lowering malpractice premiums by phasing out the Fund and mandatory insurance. KBA supports that. Part of our Kansas Plan includes experience rating of the physicians, a plan that was initially proposed by the Insurance Commissioner's Blue Ribbon panel on Medical Malpractice. We support that. We simply oppose SCR 1610 because we don't think it will work nearly as well as the legislative options you have in front of you. Copies of her testimony and other handouts are attached (See Attachments VI).

Donald F. Lindsey, Jr. United Transportation Union, testified the United Transportation Union has followed the case for tort reform in the United States closely during the last several years. While proponents of tort reform claim that the citizens of Kansas will be the winners, we feel only the insurance companies and big business will be able to claim victor, if arbitrary caps are imposed on injured victims. Copies of his testimony and and other material are attached (See Attachment VII).

The chairman inquired what would you estimate the amount of money that would be spent for advertising if this is on the ballot. Mr. Smith replied in Florida both sides spent about $12 million a piece. The insurance industry spent $30 million in California. The chairman inquired have you obtained an actuary yourselves? Mr. McCallister replied no, we have not hired an actuary, we introduced legislation to eliminate the fund. In response to a question concerning House Bill 2661 and reduction in premiums, Tony Valenti stated he did not believe there was a real cap in House Bill 2661. A committee member inquired of Mr. Rowland, would this constitutional amendment have to stand muster against the federal constitution? Mr. Rowland replied all would have to stand muster with federal.

Richard Crook, Private Citizen, stated I have constitutional rights to preserve, and I feel my rights to a trial will be taken away. Each of the trials should be separated, each on its own merits. If somebody knows they are negligent and they didn't do anything about it, you took that right away from me. Mr. Crook said we have rights to a trial. There has been a lot of good points brought up today. I don't see you are helping anything. Let the people have their day in court; let screening process get rid of the physicians. I hope you are paying attention to those people who are talking.

The meeting adjourned.

Copy of testimony on behalf of Fletcher Bell, Commissioner of Insurance, is attached (See Attachment VIII).

Copy of the guest list is attached (See Attachment IX).

GUEST LIST

COMMITTEE: SENATE JUDICIARY COMMITTEE DATE: 3-21-89
3:30 P.M.

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
Don Lindsey	Osawatomie	UTU
Jan Crocker	Topeka	Intern for Senator Rock
[illegible]	Topeka	KTLA
Cherie Davis	Towanda	Individual
Pete Rowland	Lawrence	KTLA
Chris Davis	Towanda	Individual
Norman L. Cooley	Wichita	Individual
Judy Cooley	WICHITA	"
Ann Hebberger	Overland Park	LWVK
Marilyn Bradt	Lawrence	KINH
Ivan W. Wyatt	McPherson	Ks Farmers Union
RICHARD L. CROOK	TOPEKA	INDIV.
Rich Dame	Hoisington	B.L.E
Tony Potter	Topeka	Intern - Rosenbaugh
Susan Stalker	Topeka	Intern - Kline
Jim Renne	Lawrence	Intern - Vidricksen
Starla Evans	Topeka	Intern - Crowell
S. Campbell	"	KTLA
Richard Vinan	"	"
Gary McCallister	"	"

Attachment IX
Senate Judiciary Comm.
3-21-89

TESTIMONY by Cherie Davis, Towanda, Kansas

Re: SCR 1610

Mr. Chairman and members of the Senate Judiciary Committee, my name is Cherie Davis. I am here today to tell you why I feel Senate Concurrent Resolution 1610 is wrong and why it should be defeated.

I want to speak to you about my personal experience with medical malpractice. But first, there are some general comments I think you should hear.

I am a Registered Nurse and a paramedic at Wesley Hospital, where I have been employed for the past 12 years. My husband, Chris, is also a paramedic. We are familiar with medicine, hospitals and doctors.

Even before our own experience, I was aware that medical malpractice does occur. Certainly Wesley is a fine hospital and I think most doctors are skilled, dedicated professionals. But mistakes <u>are</u> made.

Especially with medical malpractice, the injuries caused can be catastrophic. And catastrophic injuries most often create devastating costs for future health care.

When incidents of medical malpractice occur, my experience tells me that those causing the injury do not voluntarily want to pay for their mistakes. In the real world, it takes a lawsuit and the likelihood of a jury trial to even get people to talk about it.

My own case would have gone nowhere without the availability of our court system. I believe that knowing a jury of objective, impartial people would ultimately decide who's at fault and what the damages are, is what makes our system work. It seems to me this proposed amendment takes power away from the jury to make some of those decisions. And that's wrong.

Let me briefly tell you my experience.

Our first child, Shiloh, was 7 years old and in the second grade in 1986. One night, she became ill and by mid-afternoon the next day it was obvious she had a problem greater than the migraine headaches we had been told she had from time to time.

We took her to a pediatrician who immediately recognized the signs of a blocked shunt in her head, which is a life threatening neurological problem. She was admitted to the pediatric intensive care unit at Wesley.

The admitting doctor called in a pediatric neurologist, who decided it was not an emergency, but simply another migraine.

I asked him to order the definitive diagnostic test for this set of symptoms, a cat scan. He refused, and ordered an EEG instead, which was not read until after the incident occurred.

Attachment I
SJC
3-21-89 P.M

This specialist then left to attend a sporting event, without returning to check on Shiloh's condition. Nine hours later the pressure in her head grew to a point where she herniated within the skull. Her lungs ceased functioning.

Shiloh survived this needless catastrophe. She is maintained in our home, which is cheaper than a hospital, with the presence of a 24-hour-a-day nurse. It costs us $23,000 a month for her care. We have already spent $1 million to help keep her alive.

Shiloh is a loving, integral part of our family's life, just as any daughter is. She is aware of her surroundings, her younger brother and sister, and can express emotion. She can communicate through limited movement of her arms and legs. Her progress is very, very slow. We are told she may live until she is 50 years old.

Shiloh will never be able to live independently, always needing 24-hour personal care. She'll never work, never have children.

If Shiloh's emergency had been treated properly, it is almost certain she would have lived a normal life. Knowing that is very hard to live with.

We spent a great deal of time and money developing facts about Shiloh's future health care needs. None of these facts would ever have been made available to you or anyone in the Legislature.

I do not see how it is possible for this state to determine what fair compensation should be for my daughter. Every situation is unique. We are talking about individual human beings, with special circumstances and special needs. It is offensive to me to think that the Kansas Constitution would be changed to let the Legislature make an arbitrary decision about what Shiloh would need for her care the rest of her life.

Shiloh is not a statistic. She is a precious little girl whose ability to enjoy life has been destroyed through no fault of her own.

Changing our State's Constitution would ignore the existence of Shiloh and others like her. It is a frightening prospect.

I hope you will choose to do the right thing and reject this unjust proposal.

Thank you.

LEAGUE OF WOMEN VOTERS OF KANSAS

919½ South Kansas Avenue Topeka, KS 66612 (913) 234-5152

March 21, 1989

STATEMENT TO THE SENATE COMMITTEE ON JUDICIARY RE: SCR 1610

Mr. Chairman and Members of the Committee:

I am Ann Hebberger, President of the League of Women Voters of Kansas, speaking in opposition to SCR 1610.

The League believes that amendments pertaining to the State Constitution should be considered on the basis upon which the rights of all Kansans are guaranteed and protected, or upon broad governmental issues that affect the majority of the people in some manner. This proposed amendment does not fit our expectations.

Issues on which the League has supported constitutional amendments are: the Equal Rights Amendment because it provides equal rights for all; the Judicial section in the Constitution that changed the entire court system in Kansas; and changing the way the legislature apportions itself by using the federal census at the proper time instead of a state census nine years too late.

We would not support an amendment that says for example, only money raised by a state lottery will be used to fund the State Water Plan. We also do not support amendments that set a precedent to allow any special interest group who comes along to ruin the simplicity of the Kansas Constitution.

We cannot imagine those states that add amendments year after year have any idea what their Constitution is all about.

The League has faith in a legislative process that allows for statutory responses to concerns of special groups.

We believe that proposed amendments such as this one clutter up the Kansas Constitution, and we urge the Committee not to vote for SCR 1610.

Thank you for the opportunity to appear before you today.

Attachment II
SJC
3-21-89 A.M.

KANSAS
TRIAL LAWYERS ASSOCIATION

Jayhawk Tower, 700 S.W. Jackson, Suite 706, Topeka, Kansas 66603
(913) 232-7756

TESTIMONY
of the
KANSAS TRIAL LAWYERS ASSOCIATION

IN OPPOSITION TO SENATE CONCURRENT RESOLUTION 1610

March 21, 1989

Gary McCallister, President

As President of the Kansas Trial Lawyers Association and on behalf of our membership, I appreciate the opportunity to present our reasons for opposing SCR 1610.

I must confess that it has been difficult for us to limit our testimony on this proposal. It is almost unthinkable that individual constitutional rights of all Kansans will be restricted in an attempt to lower an overhead item, liability insurance, primarily at the urging of one of the most financially successful professions, medicine. This proposed constitutional amendment is contrary to basic reasons for the existence of constitutionally protected freedoms contained in the Bill of Rights and contrary to the essential principles of government upon which this state and country were founded.

Our testimony will provide you with concrete reasons to vote against SCR 1610, including:

1. philosophical and practical problems of tampering with the Kansas Constitution;

2. statutory limitations on the jury's right to determine damages are inherently unfair;

3. SCR 1610 simply will not accomplish its advertised objectives; and

4. there are alternative, <u>constitutional</u> solutions to medical malpractice problems that <u>will</u> work.

I will explain in detail these four areas of concern in just a moment. First, however, I think it is important to discuss why this issue is even before you this afternoon. In other words, what problem will this amendment purportedly solve?

Attachment III
SJC
3-21-89 a.m.

The Coalition for Tort Reform suggests that we "cannot allow noneconomic damages to escalate totally unrestrained". Yet they offer absolutely no legitimate documentation for this allegation. You are asked to simply take their perception as fact. I should point out in 1987 the Legislature enacted HB 2021 to specifically answer the question of how juries in our state render their decisions about awarding all types of damages, including noneconomic damages. The Judicial Administration is in the process of compiling those itemized jury verdict statistics right now. Until they are available, no one can accurately state to what extent Kansas juries make such awards.

A second "problem" SCR 1610 is supposedly intended to address is the rising costs of liability insurance. Without question, proponents are unable to establish this relationship.

First of all, if there is a trend in the cost of liability insurance at this point in the insurance cycle it is that rates are dropping. Insurance trade publications speak of "price wars" in the property/casualty marketplace, with average premiums falling in the last twelve months. Business Insurance magazine, in its January 2, 1989 issue, stated "These are the good old days for insurance buyers. Rates continue to drop with insurers cutting property/casualty rates between 25% and 40% and general liability rates between 10% and 33%...."

Yesterday the proponents provided you with absolutely nothing to indicate there is any problem with high liability insurance premiums, with the notable exception of medical malpractice. Yet SCR 1610 is applicable to all personal injury actions.

Let us turn our attention to the issue which is the apparent driving force for a constitutional amendment in Kansas. It is true that medical malpractice premiums have risen. But, frankly, we question whether the level of premiums is in fact "driving doctors out of our state". According to the University of Kansas Report on Medically Underserved Areas, Kansas had a net gain of 278 FTE physicians in 1988, a 9% increase. And this increase came in a year, 1988, when the population of the State of Kansas actually dropped. The KU Report concluded, "There is, however, a significant increase in 1988 FTE from 1987, due to the combined effects of several factors..."

Even testimony by the executive director of the Kansas Medical Society before a Senate Committee on February 21 of this year verifies the true situation with respect to the trend in the number of Kansas physicians. He said, "We're in a stable environment as far as the number of doctors in our state is concerned. Doctors come, and doctors go, but since 1984 the overall numbers haven't changed that much. We have about the same number as in 1984."

The KU Report documents there were 65 counties either underserved or critically underserved in 1988. That is the exact number they reported for 1987 as well ... no change. The situation with the much publicized specialty of obstetrics showed similar results. In 1988

there were eight areas of underserved or critically underserved. In 1987 there were nine. The obstetrics "crisis" actually improved slightly.

It is also important to consider other, more influential factors in an individual physician's decision to locate or remain in our state. The general condition of the Kansas economy, especially in rural areas, serves as a disincentive for a broad range of professionals and businesses to remain in those communities. Recent news accounts document the loss of family farms in Kansas. Between 1982 and 1987, 5,617 farms went out of business. As demonstrated in HCR 5002, already adopted by the House, rural hospitals are at a competitive disadvantage with respect to their reimbursement for Medicare patients. This obviously effects physicians as well. And finally, the special problems confronting health care providers because of the existence of the Health Care Stabilization Fund offer yet another motivation to not practice medicine in rural Kansas.

You are told that medical malpractice insurance premiums cause an increase in the overall cost of health care. Estimates vary on the percentage these premiums add to the nation's health care bill. The highest estimate we have found is 1.5%. In Blue Cross/Blue Shield's newsletter, Healthplan, dated Summer, 1988, they listed nine reasons health care costs have risen. Malpractice insurance wasn't even mentioned and, later, attempts by physicians to justify an increase in reimbursement level due to rising professional liability premiums were rejected. Completely eliminating this component would have a negligible impact on consumer health care costs.

Media accounts of doctors packing their bags to leave for a safe malpractice haven suggest physicians as a class are suffering financially. A study from the national publication Medical Economics shows that the average OB/GYN had a net income of $137,780 in 1986. That's after all expenses are paid, including 9.6% of gross for liability insurance. OB/GYN's in the Midwest did even better, netting an average $151,000. And it is obstetricians that we hear most often complaining about their insurance bill. Our point is not that doctors have a high income. They work long, hard hours and provide a critical service to our society. However, all doctors simply do not have a legitimate economic problem with their malpractice insurance bill.

This proposed constitutional amendment is said to be needed because of the unique problems we face in Kansas. It is true we are "unique" in that our Health Care Stabilization Fund provides tail coverage for all health care providers. This feature makes it very attractive for Kansas doctors to relocate in another state. And no other state even comes close to our mandatory $3.2 million in insurance requirement. Those unique aspects of this complex debate can and should be rectified. HB 2501, already passed unanimously by the House, does just that.

But high malpractice insurance premiums are not peculiar to Kansas. Looking at statistics compiled by our Department of Insurance in 1987 for a slide presentation regarding the Health Care

Stabilization Fund, it is abundantly clear Kansas rates are at least comparable, but arguably less expensive than those in most other states.

We heard yesterday that we can't compare Kansas to Oklahoma, which has no tort reform, but we can compare our state to California, which does. You were told OB's in Los Angeles pay $40,000 for insurance. We have attached a chart prepared by the Kansas Legislative Research Department which shows California OB's actually pay $108,000, while Kansas OB's pay 62,000.

The Medical Society also told you that California rates stabilized immediately after the U.S. Supreme Court decision on their tort reform package. That's just simply not true.

California medical malpractice premiums stabilized long before the Court decision. And there was a specific reason this occurred. The Southern California Medical Association sued their primary private insurance carrier, alleging excess premiums. The courts agreed, and mandated the insurance company rebate over $40,000,000 to the physicians.

Following this action, the doctors formed their own mutual insurance companies and instituted meaningful peer review and risk management standards. The two companies now write about 80% of the malpractice coverage in California.

Again, these changes in California rates preceded the Court decision upholding various "tort reforms".

And what about the Kansas Supreme Court? Is it different from other state courts in terms of rulings on the constitutionality of "tort reform"? Quite the contrary. Eleven other state supreme courts have ruled caps on damages violated their respective constitutions. Those states include Florida, Idaho, Illinois, Louisiana, Minnesota, Montana, New Hampshire, North Dakota, Ohio, Oklahoma, and Texas. Kansas, therefore, is in the mainstream of judicial thought on this issue.

Furthermore, there are nine "tort reforms" affecting medical malpractice cases in our statutes that have not been "thrown out" by the Supreme Court. These include:

* A 1988 law allowing evidence of collateral source benefits

* A shortened statute of limitations

* A screening panel of three doctors is mandatory upon request by either party prior to a case going to trial and the results are admissible to the jury

* Pre-trial settlement conferences are mandatory

* Limitations are placed upon who can qualify as an expert witness

* Punitive damages are capped

* Vicarious liability does not apply to professional corporations or partnerships

* Jury verdicts must be itemized

* There is a mandatory review of plaintiff's attorney fees by the judge in all malpractice cases

The final and most troubling "problem" this amendment is touted as being able to solve is the jury system. We hear over and over that juries are "out of control". This begs the obvious question of "Whose control?". Is it really a problem if juries are out of the control of the state legislature and the accompanying special interest groups that attempt to influence its decisions? Certainly not.

Rather than pointing the finger at juries, as do the proponents, without substantiating how they are "out of control", wouldn't it be more prudent to actually document jury verdicts in Kansas and then make a judgment about the decisions juries make? It is, and you have, by past legislation.

The Office of Judicial Administration has compiled statistics on jury verdicts since 1986. Their study for FY 1987 concludes "It is evident from an inspection of the data in this report that jury verdicts in the overwhelming majority of cases in the state are quite modest...."

The more recent report for FY 88, just released this past January, demonstrates for the third year in a row juries are in control. During that year, 309 tort cases went to a jury verdict. In 41% of those cases, the defendant prevailed. In those remaining cases in which the jury rendered a plaintiff's verdict, the median monetary award was $17,261, without considering reductions for comparative fault and other post-trial reductions.

This report specifically focused on medical malpractice trial verdicts, of which there were twenty-three, two more than the previous year. Juries decided for the defendant health care provider in sixteen of those cases. In the last three years, there have been only three medical malpractice verdicts in excess of $1 million. Looking at these statistics as a whole, it is impossible to find any support for the popular and unsubstantiated notion that "juries are out of control".

If it's true that jury verdicts drive settlements, then it is logical to project similar results for cases that are resolved prior to trial. Our experience as trial lawyers, now substantiated by through statistical studies, suggests that Kansas juries are conservative, but fair. And frankly, that's a pretty good description of what a jury should be. Jury verdicts do influence settlements, and the clear indications are that settlements are not "out of control" either.

Before moving on to the reasons we oppose this specific constitutional amendment, I invite you to keep in mind these "problems" SCR 1610 will attempt to address. In most cases those "problems" don't even exist. And in the few instances where they do, the threshold question becomes "Is a constitutional amendment the best way to solve them?"

PHILOSOPHICAL/PRACTICAL CONCERNS

Our primary opposition to the Resolution before you is that it requires Kansans to give up certain freedoms. Regardless of the objective of this proposal, we must not lose sight of this very grave fact.

The specific constitutional rights we'll all have put in jeopardy are spelled out in the recent Supreme Court decisions you've heard so much about. In the case of Malpractice Victims v. Bell, the Court decided the 1986 malpractice legislation was deficient because it violated Section 5 of the Kansas Bill of Rights (right to trial by jury) and also violated Section 18 of the Kansas Bill of Rights (remedy by due course of law). In an earlier case, the Supreme Court in Farley v. Engelken decided the 1985 malpractice legislation on the Collateral Source Rule also violated Section 1 (equal protection) of the Kansas Bill of Rights. Thus to be effective, SCR 1610 must necessarily make legislative action superior to Sections 1, 5 and 18 of the Kansas Bill of Rights.

It is not true that the Court told the Legislature in their Bell decision that a constitutional amendment is the only way to resolve the "tort reform" issue. What they said is that the "tort reforms" offered no quid pro quo. They pointed out that citizens lost certain rights for which they were given nothing in return.

The Kansas Constitution is different in structure from the United State Constitution. The Bill of Rights in the United States Constitution is found in the first ten Amendments. In the Kansas Constitution the Bill of Rights precedes both the Executive Article (Article 1) and the Legislative Article (Article 2). The framers of the Kansas Constitution clearly intended for the Bill of Rights to be paramount to the authority of both the Executive branch and the Legislature.

Section 18 of our Constitution, with respect to remedy by due course of law, has no counterpart in the United State Constitution. The regulation of rights as between citizens, either their contractual rights or their non-contractual rights (tort), was left to the states in the case of Erie v. Tompkins before the enactment of the Kansas Constitution. Thus, the only constitutional provision governing our citizens on the important issue of the remedy by due course of law is found in the State, not the Federal Constitution. Tampering with a segment of the Constitution which grants us the ability to use the judicial system to settle disputes between citizens is a very serious matter.

In order to accomplish the proponent's purpose, they must upset the checks and balances intended in our Constitution. Prior to the enactment of the Kansas Constitution, the Supreme Court of the United States decided the case of Marbury v. Madison, holding in issues determining the constitutionality of Congressional Acts the Supreme Court has the final word. This stabilizing premise carried over into the Kansas Constitution and has been the practice ever since. What this amendment would do is remove from the authority of the judiciary the ability to declare a specific kind of legislation unconstitutional as violating portions of the Bill of Rights. At a minimum, SCR 1610 will be the first tragic step towards weakening the principle of separation of powers fundamental to our state and our country's heritage.

The precedent this change in the Kansas Constitution will set is without parallel in our country. The Kansas Bill of Rights has only had one of its provisions ever amended, and that was more than 100 years ago. Sections 1, 5 and 18 have never been amended and so far as we know, nothing has ever been submitted to the voters that having effect. The Legislature will be upsetting 130 years of legislative history in order to achieve the proposed result.

SCR 1610 clearly carries the mark of creating a special interest constitution. The special interests are the potential wrongdoers and only those people who have been found at fault for causing a serious injury would ever be potentially benefited by this amendment. Constitutions are not created for the purpose of protecting the rights of those with the greatest political influence. Just the opposite is true.

When Florida voters were asked last November to adopt a similar constitutional amendment limiting noneconomic damages, it was rejected 57% to 43%. The majority chose not to give up their personal freedoms to help a special interest group.

The real issue in the debate is not, as the Tort Reform Coalition says, "whether the people of Kansas have the exclusive authority over tort liability". Nor is this a battle between the courts and the Legislature. The issue is whether we want our rights protected by the Constitution, or by the Legislature and the lobbyists working to influence it.

CAPS ARE UNFAIR

Of all the so-called "tort reforms", or "jury management laws" that have been debated over the years, caps on noneconomic damages are the most arbitrary and unfair. We are talking here about limiting reparation to Kansans who are the most catastrophically injured. The attitude seems to be "If you're hurt a little bit, you deserve compensation. But if you're hurt alot ... sorry."

The implications of this proposal are that no injured victim's pain, lost quality of life, lost companionship, and permanent disability or disfigurement should be valued at more than a pre-determined amount and no jury selected from the public at large is

competent to determine the value of these aspects of human life based upon all the facts and circumstances of the case. This notion is a slap in the face to the people of our state. It is a fundamental concept of our society that a jury of one's peers is the most qualified group to evaluate these intangible losses, not special interest groups speaking through the Kansas Constitution or Legislature.

Yes, we trust voters in the jury box because they hear all the facts. Citizens in the voting booth hear none of the facts of individual cases and it is thus impossible for them to make an informed decision.

A limitation on damage awards might allow those who potentially cause injuries to better predict their losses. Instead of producing a less dangerous product or providing a safer service, manufacturers and providers of services could anticipate these injuries as a cost of doing business. The deterrent affect of the tort system, including noneconomic damages, has led to safer automobiles, seat belts, safety-glass windshields, non-flammable clothing, chain saw guards, parking-lot lights, child-proof containers, and safer toys for children. Do we really want to minimize this deterrent affect?

It has been well documented that caps discriminate against women, children, and people at or near the end of their employment years. They often suffer little or no lost income when hurt by someone's negligence. Noneconomic damages are the only meaningful way to compensate them for their reduced quality of life.

If a wrongdoer's negligence kills a child, there are no medical bills to pay and no lost earnings to recover. The family suffers what the law considers noneconomic loss. When a wrongdoer injures a child there may be continuing medical expenses. The amendment, by limiting noneconomic damages, will afford more protection to a wrongdoer who kills someone than who simply injures their victim. It will be cheaper for the wrongdoer to cause death than to cause an injury. Surely this is not the kind of law we want in Kansas.

There is an interesting provision of SCR 1610 that illustrates the arbitrary and unjust nature of the proposal. It will limit damages for many wrongdoers, but not for those who are convicted of a crime. What possible difference should it make to a victim whether their injury is caused by a criminal? Is the victim entitled to less compensation because they are hurt by a non-criminal? We are at a loss to understand the logic of this thinking.

SCR 1610 WON'T WORK

The bottom line goal of SCR 1610 is to reduce liability insurance premiums, particularly for the doctors who feel they deserve help the most. Yet reading this proposal, we cannot find the word "insurance" anywhere. This constitutional amendment is apparently not about insurance rates.

But we all know this is exactly why this amendment is before you. Why is it that references to insurance premiums or rates aren't in this Resolution? Where were the lobbyists for the insurance industry yesterday? Why didn't they step forward to answer your questions about this proposal? The answer is that the insurance industry has always, always refused to link any "tort reforms" to reduced premiums.

If this constitutional amendment is the answer, we encourage you to ask the property/casualty carriers three very simple questions:

1. What affect will SCR 1610 have on insurance premiums?

2. How much will this amendment reduce premiums, if at all?

3. When will these affects be reflected in the liability insurance bills of Kansas consumers?

Following yesterday's attempt to dramatize for you the mounds of information the Legislature has been given on these issues, we contemplated bringing our own box. Our box would have all the insurance industry testimony that clearly links "tort reform" to specific lower insurance premiums. We couldn't find a box small enough to contain such data.

Conferees, speaking before various Committees of this Legislature, and who are proponents of this Resolution, have publicly stated there is no real relationship between jury management and insurance premiums:

> "We have never said that tort reform will lower rates," Jerry Slaughter, Executive Director of the Kansas Medical Society.
>
> "None would have a significant impact," Mike Mullen, Chief Executive Officer of Medical Protective Insurance Co., when asked which of the proposed 1988 Medical Society reforms would have the greatest impact on rates. (MedPro writes more medical malpractice insurance in Kansas than any other company.)
>
> The 1985/1986 medical malpractice reforms in Kansas were among the most comprehensive in the nation, according to Kim Yelkin in testimony before the House Judiciary Committee. Yet The St. Paul Insurance Co. governmental affairs director said these changes only caused them to lower their subsequent rate hike from 80% to 75%, a 5% savings.
>
> "They are just nibbling around the edges," Wayne Stratton, general counsel for the Kansas Medical Society and Kansas Hospital Association when asked to evaluate the premium impact on the four "tort reform" bills considered in the 1988 Legislature.

We are convinced, based upon past experience, you will not be given a direct response to the questions we recommend you pose to the insurance industry. Maybe things have changed. But before adopting SCR 1610, we urge you to insist on a satisfactory answer to these questions that are at the very heart of this debate.

SCR 1610, in our opinion, will never solve the problems its proponents say it will. But even if it could, when will the benefits trickle down to consumers? The Department of Insurance presented its analysis to an interim committee this past fall. Quoting their written testimony, they said the following: "A constitutional amendment requires a 2/3 vote of the Legislature followed by a vote of the public. The amendment process is extremely time consuming and costly to the interested parties. A constitutional amendment will not result in any cost savings to health care providers until the amendment is approved and implementing legislation enacted. Complete implementation could take many years and be too late to prevent serious dislocations in the health care system."

The constitutional amendment route surely must be seen as absolutely the worst way to deal with the alleged "insurance crisis". If we believe all the predictions of doctors leaving Kansas, there will be no doctors left in our state to help by the time SCR 1610 has a chance to produce any results.

Whatever our liability insurance problems in Kansas are, SCR 1610 is not the answer.

THERE ARE ALTERNATIVES

There are realistic, workable and constitutional alternative solutions to deal with the legitimate problems associated with medical malpractice liability insurance problems. These alternatives are not just theoretical, they're real and they exist in bill form. Without going into too much detail, let me summarize them for you:

1. HB 2501 passed the House unanimously on March 7 and has been assigned to this Committee. It offers health care providers three optional levels of coverage to purchase from the Fund. It discontinues the questionable public policy of providing free tail coverage insurance to doctors who set up a practice in another state.

   By itself, this bill will provide more immediate premium relief to Kansas doctors than any package of solutions that will be debated this session. All health care providers don't need $3.2 million worth of liability insurance and many want much less. Actuaries for the Fund estimate that HB 2501 will reduce by 45% the premiums that health care providers will otherwise have to pay over the next five years. If your goal as a legislator is to cut doctors' malpractice insurance costs, HB 2501 is the answer.

2. Currently in Kansas, our insurance companies charge doctors in a given category of practice the same rate, irrespective of whether an individual physician has been successfully sued for malpractice. Additionally, no consideration is given to the risk exposure within each specialty. Family practitioners that deliver 10 babies a year pay the same rate as those that deliver 200 babies. HB 2543 addresses both of these

inconsistencies, and will be especially beneficial to rural health care providers. It is scheduled for hearings in the House next Monday.

3. Four different bills before this Legislature attempt to subsidize insurance expenses for doctors whose individual malpractice insurance bill is creating a legitimate economic problem. The funds to accomplish this goal come from a variety of sources, including tax credits, in-hospital day patient charges, increased premium taxes on insurance companies and surplus medical scholarship funds. Admittedly, all are controversial, but the Legislature should have the opportunity to make a public policy decision. Is the "insurance crisis" serious enough to "put our money where our mouth is"? Or is it only a big enough problem that we ask the victims of medical malpractice and other negligent acts to give up some of their deserved reparation. That is for you to decide.

4. Additional competition for malpractice insurance business would be healthy. HB 2458 would allow risk retention groups to sell this product in our state, as they may in 41 other states. In testimony before this Committee yesterday, a company from Georgia told you they wanted to sell malpractice insurance in Kansas and at approximately 25% lower rates. We certainly support this concept. The Kansas Medical Society, interestingly, opposes it.

My final comment to this committee addresses your individual concerns as elected officials. Surveys suggest many voters want to be able to vote on this issue. Those polls would likely be quite different if the respondents were told that the amendment is in no way linked to lower insurance rates.

Nevertheless, the "let the people decide" argument will be one you'll have to consider.

Ours is a representative form of government. "Let the people decide" could be applied to any piece of legislation that is being considered. But to do so would be totally irresponsible and in derogation of the authority vested in the Legislature. Testimony on SB 282 in the Senate just last week offers a comparative example of why the Legislature should not simply relinquish tough political decisions to a vote of the people. That bill would make it illegal for insurance companies in Kansas to fix prices. There is no question in our minds that Kansans, if given the opportunity, would approve such a change overwhelmingly. Yet we know SB 282 is a complicated proposal and deserves the scrutiny of the Legislature itself.

A legislator should only vote for this Resolution if he or she believes in this constitutional change. A vote for such a proposition must be made with great intentionality, recognizing the unprecedented nature of the action. This is not a matter of letting people decide whether they want to drink or gamble, which were <u>expansions</u> of constitutional rights. Here we are dealing with <u>limiting</u> the Bill of

Rights. This is the basic compact between the people and the government. You have a difficult political decision to make. But it properly rests with you, based upon your personal judgment of the merits of SCR 1610 itself.

Again, I appreciate this opportunity to present our opposition to SCR 1610 to this committee and urge that you reject it and allow the Legislature to focus its attention on more constructive solutions. Thank you.

MEDICAL MALPRATICE BASIC PREMIUMS RANKED BY STATE

State	BASIC * 1 MILLION/ 3 MILLION	PHYSICIAN 1A (.32)	PHYSICIAN 1 (.40)	PHYSICIAN 2 (.60)	FAMILY OR GEN. PRACTICE (.80)	FAMILY PRACTICE (4) (1.00)	ANESTHESIOLOGISTS (5A) (1.40)	SURGERY 5 (1.60)	SURGERY 6 (2.20)	OBSTETRICS 7 (2.76)	SURGERY NEUROLOGICAL (3.48)
Indiana **	6,081	1,946	2,432	3,649	4,865	6,081	8,513	9,730	13,378	16,784	21,162
Nebraska **	6,556	2,098	2,622	3,934	5,245	6,556	9,178	10,490	14,423	18,095	22,815
North Carolina	7,088	2,268	2,835	4,253	5,670	7,088	9,923	11,341	15,594	19,563	24,666
Arkansas	7,683	2,459	3,073	4,610	6,146	7,683	10,756	12,293	16,903	21,205	26,737
South Carolina	7,804	2,497	3,122	4,682	6,243	7,804	10,926	12,486	17,169	21,539	27,158
South Dakota	9,140	2,925	3,656	5,484	7,312	9,140	12,796	14,624	20,108	25,226	31,807
Tennessee	9,182	2,938	3,673	5,509	7,346	9,182	12,855	14,691	20,200	25,342	31,953
Nebraska ***	9,506	3,042	3,802	5,704	7,605	9,506	13,309	15,210	20,914	26,237	33,082
KANSAS **	10,021	3,207	4,008	6,013	8,017	10,021	14,029	16,034	22,046	27,658	34,873
Pennsylvania **	10,034	3,211	4,014	6,020	8,027	10,034	14,048	16,054	22,075	27,694	34,918
Virginia	11,202	3,585	4,481	6,721	8,962	11,202	15,683	17,923	24,644	30,918	38,983
Minnesota	12,044	3,854	4,818	7,226	9,635	12,044	16,862	19,270	26,497	33,241	41,913
Wisconsin **/***	12,044	3,854	4,818	7,226	9,635	12,044	16,862	19,270	26,497	33,241	41,913
Louisiana **/***	12,329	3,945	4,932	7,397	9,863	12,329	17,261	19,726	27,124	34,028	42,905
Indiana ***	13,682	4,378	5,473	8,209	10,946	13,682	19,155	21,892	30,101	37,763	47,614
Kentucky	13,812	4,420	5,525	8,287	11,050	13,812	19,337	22,099	30,386	38,121	48,066
North Dakota	15,061	4,820	6,024	9,037	12,049	15,061	21,085	24,098	33,134	41,568	52,412
Pennsylvania ***	15,653	5,009	6,261	9,392	12,522	15,653	21,914	25,045	34,437	43,202	81,763
Vermont	15,704	5,025	6,282	9,422	12,563	15,704	21,986	25,126	34,549	43,343	54,650
Iowa	16,505	5,282	6,602	9,903	13,204	16,505	23,107	26,408	36,311	45,554	57,437
Maine	16,968	5,430	6,787	10,181	13,574	16,968	23,755	27,149	37,330	46,832	59,049
Delaware	17,048	5,455	6,819	10,229	13,638	17,048	23,867	27,277	37,506	47,052	59,327
Georgia	18,446	5,903	7,378	11,068	14,757	18,446	25,824	29,514	40,581	50,911	64,192
Alabama	18,820	6,022	7,528	11,292	15,056	18,820	26,348	30,112	41,404	51,943	65,494
Mississippi	18,916	6,053	7,566	11,350	15,133	18,916	26,482	30,266	41,615	52,208	65,828
Connecticut	19,199	6,144	7,680	11,519	15,359	19,199	26,879	30,718	42,238	52,989	66,813
Oklahoma	19,716	6,309	7,886	11,830	15,773	19,716	27,602	31,546	43,375	54,416	68,612
Colorado	19,873	6,359	7,949	11,924	15,898	19,873	27,822	31,797	43,721	54,849	69,158
Montana	21,470	6,870	8,588	12,882	17,176	21,470	30,058	34,352	47,234	59,257	74,716
Utah	21,900	7,008	8,760	13,140	17,520	21,900	30,660	35,040	48,180	60,444	76,212
KANSAS ***	22,547	7,215	9,019	13,528	18,038	22,547	31,566	36,076	49,604	62,230	78,464
Ohio -	22,939	7,340	9,176	13,763	18,351	22,939	32,115	36,702	50,466	63,312	79,828
Maryland	23,187	7,420	9,275	13,912	18,550	23,187	32,462	37,099	51,011	63,996	80,691
Texas	26,253	8,401	10,501	15,752	21,002	26,253	36,754	42,005	57,757	72,458	91,360
Idaho	27,136	8,684	10,854	16,282	21,709	27,136	37,990	43,418	59,699	74,895	94,433
New Jersey -	27,179	8,697	10,872	16,307	21,743	27,179	38,051	43,486	59,794	75,014	94,583
West Virginia	27,218	8,710	10,887	16,331	21,774	27,218	38,105	43,549	59,880	75,122	94,719
Washington	29,613	9,476	11,845	17,768	23,690	29,613	41,458	47,381	65,149	81,732	103,053
Wyoming	29,667	9,493	11,867	17,800	23,734	29,667	41,534	47,467	65,267	81,881	103,241
Illinois -	29,753	9,521	11,901	17,852	23,802	29,753	41,654	47,605	65,457	82,118	103,540
Arizona -	30,475	9,752	12,190	18,285	24,380	30,475	42,665	48,760	67,045	84,111	106,053
Oregon	32,057	10,258	12,823	19,234	25,646	32,057	44,880	51,291	70,525	88,477	111,558
Missouri	34,710	11,107	13,884	20,826	27,768	34,710	48,594	55,536	76,362	95,800	120,791
California	39,281	12,570	15,712	23,569	31,425	39,281	54,993	62,850	86,418	108,416	136,698
Nevada	39,360	12,595	15,744	23,616	31,488	39,360	55,104	62,976	86,592	108,634	136,973

* Class four doctor/mature claims-made rate at $1 million/$3 million limits

** Limits Table (States with Funds)
Indiana $100,000/$300,000
Nebraska $200,000/$600,000
Kansas $200,000/$600,000
Pennsylvania $200,000/$600,000
Wisconsin $400,000/$1 million
Louisiana $100,000/$300,000

*** Kansas with 125% surcharge coverage includes: basic $200,000/$600,000; $3 million/$6 million excess; and tail coverage

*** Indiana with 125% surcharge coverage includes: $400,000 fund coverage; extra charge for tail cover not included in premium shown

*** Nebraska with 45% surcharge coverage includes: $800,000 excess from Fund per injured person; 85% providers choose claims-made policies with no tail coverage reflected in premium shown

*** Wisconsin does not collect surcharge; premium for unlimited Fund coverage is priced in th policy but that charge is not reflected in premium shown; Fund operated on a pay as you go basis

*** Louisiana does not collect surcharge; Excess coverage from the Fund is unkown; Premium for Fund coverage is priced in the policy b that charge is not reflected in premium shown

*** Pennsylvania with 56% surcharge coverage includes:

Kansas Legislative Research Department
Basic premium data provided by the St. Paul Companies,
Fund data provided by Kansas Insurance Department

CURRENT KANSAS MEDICAL MALPRACTICE

"TORT REFORMS"

The Kansas Supreme Court has in fact held unconstitutional three of the "tort reforms" passed by the Legislature in 1985 and 1986:

1. Reducing a jury verdict to a predetermined, arbitrary cap,
2. A requirement to pay future damages over a period of time, usually with an annuity not owned by the victim, and
3. Mandatory reduction of a jury verdict by the amount of health insurance benefits the victim had.

However, it is important to note that many limitations placed on the civil justice system that relate specifically to medical malpractice remain in the law, including:

* A 1988 law allowing evidence of collateral source benefits
* A shortened statute of limitations
* The results of a screening panel of three doctors is available to either party prior to a case going to trial
* Pre-trial settlement conferences are mandatory
* Limitations on who can qualify as an expert witness
* Punitive damages are capped
* Vicarious liability does not apply to doctor corporations or partnerships
* Jury verdicts must be itemized
* And there is a mandatory review of plaintiff's attorney fees by the judge in all malpractice cases

What are the Answers to these Questions ?

1. **What** affect will SCR 1610 have on insurance premiums?
2. **How much** will this amendment reduce premiums, if at all ?
3. **When** will these affects be reflected in the liability insurance bills of Kansas consumers?

Does "Tort Reform" lower Rates ?

"We have never said that tort reform will lower rates," Jerry Slaughter, Executive Director of the Kansas Medical Society.

* * * * * * * * * * * * *

"None would have a significant impact," said Mike Mullen, Chief Executive Officer of Medical Protective Insurance Co., when asked which of the proposed Medical Society's 1988 reforms would have the greatest impact on rates. MedPro writes more medical malpractice insurance in Kansas than any other company.

* * * * * * * * * * * * *

The 1985/1986 malpractice reforms in Kansas were among the most comprehensive in the nation, according to Kim Yelkin in testimony before the House Judiciary Committee. Yet the St. Paul Insurance Co. governmental affairs director said these changes only caused them to lower their subsequent rate hike from 80% to 75%, a 5% savings.

* * * * * * * * * * * * *

"They are just nibbling around the edges," said Wayne Stratton, general counsel for the Kansas Medical Society and Kansas Hospital Association when asked to evaluate the premium impact on the four "tort reform" bills considered in the 1988 Legislature.

KANSAS
TRIAL LAWYERS ASSOCIATION

Jayhawk Tower, 700 S.W. Jackson, Suite 706, Topeka, Kansas 66603
(913) 232-7756

October 25, 1988

The Honorable Mike Hayden
Governor
State Capitol
Topeka, Kansas 66612-1590

Dear Governor Hayden:

Following our meeting with you on August 22, 1988, we provided you a letter outlining some of our views concerning the current medical malpractice insurance situation in Kansas as well as some possible avenues for solving this problem.

Since our August meeting, we have continued in our effort to pursue some of these solutions by developing specific written proposals with an eye towards drafting legislation for the upcoming session as well as discuss these proposals with various representatives of the news media and lawmakers. We have been pleased that many of our suggestions have received positive responses as well as support. One such example is shown in the editorial written by the Great Bend Tribune on October 7, 1988, a copy of which is enclosed.

I would very much like the opportunity to personally visit with you and representatives of your staff who are working on these issues. I believe that a candid discussion on our parts might well result in more positive proposals for the Legislature to consider in January. At the same time, such a discussion will provide us with the additional insight and expertise available from your office in order for a genuine impact on medical malpractice premiums to realistically occur as a result of meaningful and constitutional legislation.

I would appreciate the courtesy of a response at your earliest convenience. Thank you for your consideration of this matter.

Very truly yours,

Gary D. McCallister,
President

GDM:slz
cc: Richard Mason
John Johnson
Enc.

No Response as of March 21, 1989

KANSAS TRIAL LAWYERS ASSOCIATION

Jayhawk Tower, 700 S.W. Jackson, Suite 706, Topeka, Kansas 66603
(913) 232-7756

January 17, 1989

Terry Polins, M.D.
President, Kansas Medical Society
7602 E. Harry
Wichita, KS 67207

Dear Dr. Polins:

As the Kansas Legislature convenes for the 1989 session, I felt it might be useful for us to discuss, in behalf of our respective organizations, some of the issues which involve the subject of medical malpractice in hopes of finding a common ground upon which we might stand in attempting to provide meaningful solutions to the Legislature on these difficult issues.

We are convinced that one of the greatest public health issues facing our state is the need to assure that quality health care will be available for Kansans. In this regard, we are concerned about the rural community's ability to recruit and retain qualified physicans to provide quality health care. There are certain instances where physicans delivering babies and performing surgery within the rural areas of our state have legitimate economic concerns relating to the size of their malpractice premiums which may, in some instances, influence their decision to continue to provide such medical services. This is an immediate need which needs to be identified by the Legislature and for which legislation should be directly addressed.

KTLA has publicly supported certain short and long term solutions to these problems. Among these are:

1. The elimination of the Health Care Stabilization Fund and the funding of the unliquidated liability in a fiscally responsible manner.

2. The lowering of levels of mandatory insurance for health care providers so that immediate premium reductions can occur and physicans are given the ability to make their own economic decisions concerning the levels of coverage they need.

3. Require insurance companies to experience rate physicans.

4. Require insurance companies writing medical negligence coverage to lower premiums for physicans who have never been successfully sued for malpractice and charge doctors a rate based in part upon the number of babies they deliver or surgeries they perform each year.

5. Provide business incentives to help recruit and retain qualified physicans, through either tax credits or direct subsidies, and to help those doctors pay their insurance premiums.

6. Proceed with efforts to repeal state antitrust exemptions applying to insurance companies so as to create a more competitive environment for insurance carriers writing professional liability policies.

I am convinced that we have before us the pieces of a puzzle which need to be jointly assembled in order to find proper and constitutional solutions to the problems which face certain physicans in Kansas. I feel the resources and talents of our respective organizations can be better utilized in sincerely working towards a solution rather than waging ongoing legislative battles which as of yet have not borne any fruit for the citizens of the State of Kansas.

I am available to meet with you at your convenience to discuss these matters.

Very truly yours,

Gary D. McCallister,
President

GDM:slz
cc: Richard Mason

No Response as of March 21, 1989

K. 355, 360, 362 P.2d 599. Rehearing 24, 364 P.2d 668.

zing city to extend its credit for pro- industry (12-1740 to 12-1749) does n. State, *ex rel.*, v. City of Pittsburg, 364 P.2d 71.

of 79-2804b, limiting time for chal- closure judgment, do not violate this n v. Lemmon, 189 K. 619, 622, 624, 5. Dismissed: 375 U.S. 5, 84 S.Ct. 40.

zing bank commissioner to withdraw ties without notice or hearing, and no his official action is unconstitutional. v. Koeneke, 137 K. 7, 18, 20 P.2d 460.

fied elector of the several counties is ual power in making laws. Harris v. 183, 187, 204, 387 P.2d 771.

"Sunday Closing Law" of 1963 held stitutional. Boyer v. Ferguson, 192 K. d 775.

equal protection could not be satis- f people has a voice in selecting two arris v. Shanahan, 192 K. 629, 634, .

where no express provision for no- atute, reasonable notice will be im- vice Gas Co. v. State Corporation K. 707, 713, 391 P.2d 74.

ectors to vote in state elections dis- opinion). Harris v. Anderson, 194 K. 400 P.2d 25. Certiorari denied: 382 185, 15 L.Ed.2d 150.

club act (41-2601 et seq.), not in Tri-State Hotel Co. v. Londerholm, 59, 760, 763, 408 P.2d 877.

of purposeful exclusions from jury d. Woods v. Munns, 347 F.2d 948,

nsibility act (8-722 et seq.), does not ion of law. State v. Finley, 198 K. P.2d 251. Judgment vacated: State v. 433 P.2d 414.

in case, constructive service in tax ceedings held to violate this section. County Commissioners, 200 K. 74, d 858.

not refer to preliminary examina- due process. State v. Trotter, 203 K. 3.

and addresses of adverse parties are certainable, notice of pending pro- ation service alone insufficient to requirements. Chapin v. Aylward, 4 P.2d 177.

90 relating to basis of ascertaining constitutional. Missouri Pacific Donald, 207 K. 744, 751, 486 P.2d K. 479, 493 P.2d 280.

ocess requires notice of proceedings ly calculated to inform parties af- f Barnes, 212 K. 502, 520, 512 P.2d

statute (8-122b) held unconstitu- l protection guarantees of United stitution. Henry v. Bauder, 213 K. P.2d 362.

roneous judgment rendered under to date act held unconstitutional;

trial ordered under present law. Vaughn v. Murray, 214 K. 456, 458, 521 P.2d 262.

60. Governmental immunity doctrine as declared in 46-901, 46-902 unconstitutional and void. Brown v. Wichita State University, 217 K. 279, 280, 281, 295, 297, 540 P.2d 66. Reversed and remanded: 219 K. 2, 3, 25, 26, 28, 36, 40, 547 P.2d 1015.

61. Service by publication in tax foreclosure proceeding satisfied constitutional requirements; property description sufficient. Board of County Commissioners v. Alldritt, 217 K. 331, 536 P.2d 1377.

62. Under facts, action against city on common law theories dismissed; governmental immunity. Bribiesca v. City of Wichita, 221 K. 571, 572, 561 P.2d 816.

63. Traditional classifications applied to attractive nuisance actions do not deny equal protection. Gerchberg v. Loney, 223 K. 446, 452, 576 P.2d 593.

64. Health care provider insurance availability act provisions do not violate equal protection of laws. State, *ex rel.*, Schneider v. Liggett, 223 K. 610, 611, 613, 616, 618, 620, 576 P.2d 221.

65. County resolution establishing solid waste management system with different rates for farm and city property held constitutional. Zerr v. Tilton, 224 K. 394, 395, 581 P.2d 364.

66. Equal protection of law not violated by 61-1805. Threadgill v. Beard, 225 K. 296, 301, 590 P.2d 1021.

§ 3. Right of peaceable assembly; petition. The people have the right to assemble, in a peaceable manner, to consult for their common good, to instruct their representatives, and to petition the government, or any department thereof, for the redress of grievances.

Research and Practice Aids:

Constitutional Law⇐91.
C.J.S. Constitutional Law § 214.
Am. Jur. 2d Constitutional Law §§ 329 to 331, 353 to 355.

CASE ANNOTATIONS

1. Association of railroad employees; negotiations with employer; section not violated. Flynn v. Brotherhood of Railroad Trainmen, 111 K. 415, 419, 207 P. 829.

2. Chief arbiter of public policy in this state is the legislature. State, *ex rel.*, v. Board of Education, 122 K. 701, 708, 253 P. 251.

§ 4. Bear arms; armies. The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be tolerated, and the military shall be in strict subordination to the civil power.

Research and Practice Aids:

Militia⇐1, 2.
Hatcher's Digest, Carrying Weapons § 1.
C.J.S. Militia § 1 et seq.

CASE ANNOTATIONS

1. No limitation on power to prohibit promiscuous carrying of arms. Salina v. Blaksley, 72 K. 230, 83 P. 619.

2. K.S.A. 21-2611 held constitutional; legislature has power to define what constitutes crime. State v. Bolin, 200 K. 369, 370, 436 P.2d 978.

3. Section confers right to bear arms to the people, meaning "people" as a collective body. City of Junction City v. Lee, 216 K. 495, 497, 532 P.2d 1292.

4. Section does not prohibit enactment of laws prohibiting promiscuous carrying of arms. City of Junction City v. Lee, 216 K. 495, 497, 532 P.2d 1292.

§ 5. Trial by jury. The right of trial by jury shall be inviolate.

Cross References to Related Sections:

Grand juries, see ch. 22, art. 30.
Trials in criminal proceedings, see ch. 22, art. 34.
Jury service and selection of jurors, see 43-155 et seq.
Trial of civil actions in district court, see 60-238, 60-239, 60-247 to 60-253.
Trial of civil actions in courts of limited jurisdiction, see 61-1716.
Right to speedy public trial by impartial jury in criminal prosecutions, see Bill of Rights, Kan. Const., § 10.

Research and Practice Aids:

Jury⇐9 et seq.
Hatcher's Digest, Juries § 14.
C.J.S. Juries § 9 et seq.

Judicial Council Bulletin References:

Abolition of general verdict proposed, C. L. Hunt, 1936 J.C.B. 51, 58.
Abolition of jury trials in county courts suggested, James M. McDermott, 1948 J.C.B. 40, 46.

Law Review and Bar Journal References:

Comments on validity of legislation providing jury trials in contempt cases, 6 J.B.A.K. 270, 272 (1938).
Mentioned in "Plea Bargaining—Justice Off the Record," Robert L. Heath, 9 W.L.J. 430 (1970).
Cited in comment concerning constitutionality of the six-man jury in Kansas, Jay W. Vander Velde, 12 W.L.J. 249, 250 (1973).
Mentioned in survey of criminal procedure, Cynthia Hartman, 15 W.L.J. 350, 354 (1976).
Cited in note, "Civil Juries: Recent Legislation Allowing Nonunanimous Verdicts," Thomas J. Koehler, 18 W.L.J. 269, 281, 285 (1979).

CASE ANNOTATIONS

1. Verdict of jury must be verdict of each individual juror. Bowman v. Wheaton, 2 K.A. 581, 584, 44 P. 750.

2. Superadded conditions of recognizance not cause for dismissal on appeal. City of Kansas City v. Hescher, 4 K.A. 782, 792, 46 P. 1005.

3. Applied only to cases so triable at common law. Kimball *et al.* v. Connor, Starks *et al.*, 3 K. 414, 432.

4. In quo warranto defendant is "probably" entitled to jury trial. The State, *ex rel.*, v. Allen, 5 K. 213, 220.

5. Municipal court trial without jury when jury obtainable on appeal. City of Emporia v. Volmer, 12 K. 622, 631.

6. In action for recovery of money, jury may be demanded. Board of Education v. Scoville, 13 K. 17, 33.

7. When trial by jury not a matter of right. Ross v. Comm'rs of Crawford Co., 16 K. 411.

8. Court may send any issues in equity case to jury. Hixon v. George, 18 K. 253, 256.

SJC
3-21-89 P.M

McCarter

9. Duty of courts to enforce rigid observance of statutes. The State v. Snyder, 20 K. 306.

10. Jury trial not matter of right in action for divorce. Carpenter v. Carpenter, 30 K. 712, 718, 2 P. 122.

11. Where no jury in first instance, right on appeal inviolate. *In re* Rolfs, *Petitioner,* 30 K. 758, 761, 1 P. 523.

12. Power of legislature limited by provisions of bill of rights. Atchison Street Rly. Co. v. Mo. Pac. Rly. Co., 31 K. 660, 665, 3 P. 284.

13. Not entitled to jury in "proceedings in aid of execution." *In re* Burrows, *Petitioner,* 33 K. 675, 677, 680, 7 P. 148.

14. Not entitled to trial by jury for violating city ordinance. The State, *ex rel.,* v. City of Topeka, 36 K. 76, 85, 86, 12 P. 310.

15. Jury not necessary in proceedings to annex land to city. Callon v. Junction City, 43 K. 627, 629, 23 P. 652. Criticized: Town of Fairbanks v. Barrack, 282 F. 420.

16. Not entitled to jury for violation of injunction. The State, *ex rel.,* v. Durein, 46 K. 695, 697, 27 P. 148.

17. Appeal to court with jury, must be without unreasonable restrictions. *In re* Jahn, *Petitioner,* 55 K. 694, 697, 698, 41 P. 956. Overruled: City of Fort Scott v. Arbuckle, 165 K. 374, 196 P.2d 217.

18. Twelve jurors necessary in trial on felony charge. The State v. Simons, 61 K. 752, 754, 60 P. 1052.

19. Jury not guaranteed in proceedings to establish boundary lines. Swarz v. Ramala, 63 K. 633, 636, 66 P. 649.

20. Trial in police court without jury does not violate section. *In re* Kinsel, 64 K. 1, 3, 67 P. 634. Overruled: City of Fort Scott v. Arbuckle, 165 K. 374, 196 P.2d 217.

21. Declaring places common nuisances where intoxicating liquor sold, etc., valid. The State v. McManus, 65 K. 720, 722, 70 P. 700.

22. Jury not demandable as matter of right in quo warranto. Wheeler v. Caldwell, 68 K. 776, 778, 75 P. 1031.

23. Right to jury of twelve may be waived in misdemeanors. The State v. Wells, 69 K. 792, 793, 77 P. 547.

24. Not entitled to jury in injunction under prohibitory liquor law. Cowdery v. The State, 71 K. 450, 80 P. 953.

25. Cities may destroy intoxicating liquor and property used in selling. Stahl v. Lee, 71 K. 511, 519, 80 P. 983.

26. Dispute regarding boundary; no jury as matter of right. Mathis v. Strunk, 73 K. 595, 597, 85 P. 590.

27. Plea in abatement; age of defendant; defendant entitled to jury. The State v. Dunn, 75 K. 799, 802, 90 P. 231.

28. Suit to cancel lease, equitable; not entitled to jury. Mills v. Hartz, 77 K. 218, 223, 94 P. 142.

29. Not entitled to jury on trial for indirect contempt. The State v. Johnston, 78 K. 615, 618, 97 P. 790.

30. Jury to try title to and possession of real estate. Atkinson v. Crowe, 80 K. 161, 163, 102 P. 50, 106 P. 1052.

31. In partition, jury to try ownership and right of possession. Gordon v. Munn, 83 K. 242, 244, 111 P. 177.

32. Section not violated by jury of four in lunacy inquest. The State v. Linderholm, 84 K. 603, 114 P. 857.

33. Act providing for charging of expenses by entomological commission, valid. Balch v. Glenn, 85 K. 735, 739, 119 P. 67.

34. Acquittal on ground of insanity; commitment; right of jury. *In re* Clark, 86 K. 539, 540, 121 P. 492.

35. Execution against person; no jury demandable as matter of right. Tatlow v. Bacon, 101 K. 26, 30, 165 P. 835.

36. Action to set aside will; not entitled to jury. Cole v. Drum, 109 K. 148, 153, 197 P. 1105.

37. Vagrancy; waiver of right to trial by jury. *In re* Clancy, *Petitioner,* 112 K. 247, 249, 210 P. 487.

38. Section only applies to cases that were triable by jury before constitution adopted. State v. Lee, 113 K. 462, 215 P. 299.

39. No right to trial by jury in suit for accounting among stockholders. Spena v. Goffe, 119 K. 831, 241 P. 257.

40. Presumption that officers knew of insolvency of bank does not contravene section. Ramsey Petroleum Co. v. Adams, 119 K. 844, 241 P. 433.

41. Denial of jury trial nonprejudicial where complaining party's testimony establishes fact. Wheat Growers Ass'n v. Goering, 123 K. 508, 256 P. 119.

42. Substance of pleadings determines character of action. Estey v. Holdren, 126 K. 385, 387, 267 P. 1098.

43. Right to jury trial is to be determined by pleadings rather than evidence. Gresty v. Briggs, 127 K. 151, 272 P. 178.

44. Discharge of jury for inability to agree held not jeopardy. State v. Tucker, 137 K. 84, 89, 19 P.2d 436.

45. Allowance of claims under "cash-basis" law without jury discussed. State, *ex rel.,* v. Board of Education, 137 K. 451, 452, 21 P.2d 295.

46. Reference of action for attorney fees to referee held valid. Kagey v. Fox West Coast Theatres, 139 K. 301, 305, 31 P.2d 67.

47. Action to set aside chattel mortgage; jury trial properly denied. Sawyer v. Ryan, 141 K. 368, 41 P.2d 740.

48. Award of workmen's compensation differs from ordinary money judgment. Woods v. Jacob Dold Packing Co., 141 K. 748, 749, 43 P.2d 786.

49. Habitual criminal act (21-107a) held valid. Levell v. Simpson, 142 K. 892, 897, 52 P.2d 372.

50. Judgment of conviction rendered after jury discharged is void; jeopardy; habeas corpus. *In re* Rockwood, 146 K. 386, 387, 69 P.2d 703.

51. Action to recover attorney fee; jury trial demandable as of right. Hasty v. Pierpont, 146 K. 517, 518, 72 P.2d 69.

52. Pleadings in action resulting from real-estate exchange examined; jury demandable. Icenogle v. Mitchell, 149 K. 880, 89 P.2d 857.

53. Right of garnishee to trial by jury discussed but not determined. Elliott v. Behner, 150 K. 876, 888, 96 P.2d 852.

54. Criminal statute (21-818) not so vague as to be unconstitutional. State v. Carr, 151 K. 36, 37, 39, 98 P.2d 393.

55. Right to jury trial inapplicable to equity suits; mortgage foreclosure. State Bank of Downs v. Criswell, 155 K. 314, 316, 124 P.2d 500.

56. Constitution does not guarantee an appeal to supreme court. Cochran v. Amrine, 155 K. 777, 778, 130 P.2d 605.

57. Felony; defendant may waive rights and consent to jury of less than twelve. State v. Scott, 156 K. 11, 12, 14, 131 P.2d 664.

58. Jury trial not demandable on appeal from police court conviction. City of Fort Scott v. Arbuckle, 165 K. 374, 376, 378, 379, 380, 382, 383, 384, 385, 388, 389, 196 P.2d 217.

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. State v. Scott, 156 K. 11, 12,

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Fort Scott v. Arbuckle, 165 K.
2, 383, 384, 385, 388, 389, 196

59. Right to jury trial is privilege and may be waived. State v. Christensen, 166 K. 152, 156, 199 P.2d 475.

60. Reasonableness of granting permit by zoning board; no right to jury. Duggins v. Board of County Commissioners, 179 K. 101, 106, 293 P.2d 258.

61. Case may be withdrawn from jury upon point of law, when. Ogilvie v. Mangels, 183 K. 733, 738, 332 P.2d 581.

62. Constitution does not guarantee criminal defendant appeal to supreme court. State v. Sims, 184 K. 587, 588, 337 P.2d 704.

63. Section inapplicable to bastardy proceeding which is statutory action. State, *ex rel.*, v. Pinkerton, 185 K. 68, 69, 70, 340 P.2d 393.

64. Mortgage foreclosure; right to jury trial mentioned but not determined. Commercial Savings & Loan Ass'n v. Curts, 187 K. 18, 19, 354 P.2d 86.

65. Jury trial not demandable in declaratory judgment action to construe gas purchase contract to determine questions of law only and not to recovery of money. Pan American Petroleum Corporation v. Cities Service Gas Co., 191 K. 511, 518, 382 P.2d 645.

66. Provision for jury not vital in proceedings to correct assessments. Ross v. Comm'rs of Crawford Co., 16 K. 411.

67. Destruction of obscene books seized without notice on an order by district court after hearing approved by Kansas Supreme Court. State v. A. Quantity of Copies of Books, 191 K. 13, 16, 379 P.2d 254. Reversed: 378 U.S. 205, 84 S.Ct. 1723, 12 L.Ed.2d 809.

68. Right to trial by jury mentioned (dissenting opinion). Hornback v. Missouri-Kansas-Texas Rld. Co., 193 K. 395, 399, 395 P.2d 379.

69. Rights not violated by court's failure to advise of statutory right to appeal. Ware v. State, 198 K. 523, 525, 426 P.2d 78.

70. Action to quiet title involves matters of equitable cognizance; triable without a jury. Hindman v. Shepard, 205 K. 207, 215, 468 P.2d 103.

71. Right to jury trial refers to that right as it existed at common law; unavailable where issue not justiciable at common law. Craig v. Hamilton, 213 K. 665, 670, 518 P.2d 539.

72. Right to 12-man jury not matter of substantive law; subject to regulation by legislature, courts and parties to case. Palmer v. Ford Motor Company, 498 F.2d 952, 954.

73. Failure to advise of right to trial by jury; no waiver; conviction reversed. State v. Irving, 216 K. 588, 533 P.2d 1225.

74. Method of jury selection did not violate defendants rights to trial by impartial jury under federal or state constitutions. State v. Campbell, 217 K. 756, 761, 539 P.2d 329.

75. Right to jury trial extends only to where right existed at common law; disciplinary proceedings to determine judicial propriety only. *In re* Rome, 218 K. 198, 204, 542 P.2d 676.

76. Question raised but not determined as to whether 44-1011 grants jury trial as matter of right; no demand made. Stephens v. Unified School District, 218 K. 220, 231, 546 P.2d 197.

77. Judgment rendered during period when neither party entitled to counsel or jury trial reversed and remanded. Windholz v. Willis, 1 K.A.2d 683, 685, 573 P.2d 1100.

78. Discussed; recoupment statute (22-4513) unconstitutional not on due process and right to jury trial arguments but on right to counsel and equal protection grounds. Simmons v. James, 467 F. Supp. 1068, 1070, 1080.

§ 6. Slavery prohibited. There shall be no slavery in this state; and no involuntary servitude, except for the punishment of crime, whereof the party shall have been duly convicted.

Research and Practice Aids:

Constitutional Law⇐83(2).
Hatcher's Digest, Constitutional Law § 67.
C.J.S. Constitutional Law § 203(1) et seq.

CASE ANNOTATIONS

1. Act requiring work on roads to pay poll tax, valid, *In re* Dassler, *Petitioner*, 35 K. 678, 684, 12 P. 130.

2. Does not prohibit labor on streets for poll taxes. The State, *ex rel.*, v. City of Topeka, 36 K. 76, 85, 12 P. 310.

3. Ordinance permitting employment of city prisoners on streets held valid. City of Topeka v. Boutwell, 53 K. 20, 30, 35 P. 819.

4. Act requiring vendors of motor fuels to collect tax valid. State, *ex rel.*, v. State Commission of Revenue and Taxation, 163 K. 240, 246, 250, 251, 181 P.2d 532.

5. Individual may be required to give services to state without compensation. State, *ex rel.*, v. State Commission of Revenue and Taxation, 163 K. 240, 246, 250, 251, 181 P.2d 532.

6. Commencement of sentence under 62-1528 not violation of appellant's rights hereunder. Craven v. Hudspeth, 172 K. 731, 732, 242 P.2d 823.

7. Applied in determining district judge in one district without power to authorize telephone interception where devices and equipment located in another county. State v. Adams, 2 K.A.2d 135, 136, 137, 576 P.2d 242.

§ 7. Religious liberty. The right to worship God according to the dictates of conscience shall never be infringed; nor shall any person be compelled to attend or support any form of worship; nor shall any control of or interference with the rights of conscience be permitted, nor any preference be given by law to any religious establishment or mode of worship. No religious test or property qualification shall be required for any office of public trust, nor for any vote at any election, nor shall any person be incompetent to testify on account of religious belief.

Research and Practice Aids:

Constitutional Law⇐84.
Hatcher's Digest, Constitutional Law § 67.
C.J.S. Constitutional Law § 206.
Am. Jur. 2d Constitutional Law §§ 329 to 331, 337 to 340.

Law Review and Bar Journal References:

Case in annotation No. 14 below discussed in 1955-56 survey of taxation law, Leslie T. Tupy, 5 K.L.R. 324, 326 (1956).

13. Execution against person of judgment debtor not forbidden by section. *In re* Heath, *Petitioner,* 40 K. 333, 337, 19 P. 926.

14. Section would not compel legislature to imprison for fraudulent debt. The State v. Weiss, 84 K. 165, 168, 113 P. 388.

15. Arrest of judgment debtor; wrongful imprisonment in jail. Haglund v. Bank, 100 K. 279, 284, 164 P. 167.

16. Execution against the person; fraud; statute constitutional. Tatlow v. Bacon, 101 K. 26, 29, 165 P. 835.

17. Bulk-sales law constitutional; valid exercise of police power. Burnett v. Trimmell, 103 K. 130, 173 P. 6.

18. Worthless check act (21-554 to 21-556) does not violate. Windle v. Wire, 179 K. 239, 241, 294 P.2d 213.

19. Prohibits arrest and imprisonment of surety on recognizance bond as method of collecting on forfeiture. City of Westwood v. Holland, 193 K. 375, 377, 378, 394 P.2d 56.

20. Constitutionality of worthless check statute (21-3707) upheld; imprisonment thereunder is for fraud. State v. Haremza, 213 K. 201, 202, 209, 515 P.2d 1217.

21. Conviction of theft; evidence not product of illegal search and seizure. State v. Hubbard, 215 K. 42, 46, 523 P.2d 387.

§ 17. Property rights of citizens and aliens. No distinction shall ever be made between citizens of the state of Kansas and the citizens of other states and territories of the United States in reference to the purchase, enjoyment or descent of property. The rights of aliens in reference to the purchase, enjoyment or descent of property may be regulated by law.

Revisor's Notes:

This section was submitted by the Legislature at the session of 1887 (L. 1887, Senate Joint Resolution No. 6), and was adopted Nov. 6, 1888.

Original section 17 of the Bill of Rights read as follows:

> "**§ 17.** No distinction shall ever be made between citizens and aliens in reference to the purchase, enjoyment or descent of property."

Research and Practice Aids:

Aliens⇐5 et seq.
Hatcher's Digest, Constitutional Law §§ 61, 68.
C.J.S. Aliens § 11 et seq.
Am. Jur. 2d Aliens and Citizens §§ 7, 11 et seq.

CASE ANNOTATIONS

1. Attachment against nonresidents without undertaking does not violate this section. Head v. Daniels, 38 K. 1, 2, 10, 15 P. 911.

2. Husband conveying lands when wife nonresident; wife retains no interest. Buffington v. Grosvenor, 46 K. 730, 732, 733, 27 P. 137.

3. Attachment against nonresident executor on obligation of nonresident not violative. Manley v. Mayer, 68 K. 377, 380, 75 P. 550.

4. Common-law right of aliens abrogated by original section 17. Madden v. The State, 68 K. 658, 660, 75 P. 1023.

5. Under original section, statute descents and distributions applied to aliens. Sparks v. Bodensick, 72 K. 5, 82 P. 463.

6. Section authorizes legislature to regulate, not to prohibit, aliens inheriting. The State v. Ellis, 72 K. 285, 290, 291, 83 P. 1045.

7. Legislature can now regulate right of aliens holding real estate. Cramer v. McCann, 83 K. 719, 723, 112 P. 832.

8. Amendment of this section without statute reinstated the common-law rule. Johnson v. Olson, 92 K. 819, 821, 142 P. 256.

9. In absence of treaty alien can neither take land by descent nor transmit it to another. Botello v. Tharp, 121 K. 229, 246 P. 521.

10. Limiting right of inheritance to law of state of adoption does not offend section. Riemann v. Riemann, 123 K. 718, 256 P. 1004. Reversed: Riemann v. Riemann, 124 K. 539, 262 P. 16.

11. Amendment as to aliens reinstated common-law rule. Fergus v. Tomlinson, 126 K. 427, 268 P. 849.

12. Act (22-1201 to 22-1206, now repealed) not violative of this section. Hauser v. Estate of Doyle, 143 K. 719, 723, 56 P.2d 1217.

13. Statute avoiding unrecorded instruments conveying mineral rights (79-420) held valid. Hushaw v. Kansas Farmers' Union Royalty Co., 149 K. 64, 66, 68, 74, 86 P.2d 559.

14. Bank bylaw restricting transfer of bank stock held invalid. Wentworth v. Russell State Bank, 167 K. 246, 250, 256, 205 P.2d 972.

15. Mentioned in defining term "eligible for citizenship" used in 59-511. Hughes v. Kerfoot, 175 K. 181, 183, 263 P.2d 226.

16. "New Goods Public Auction Law" unreasonable, arbitrary, discriminatory, prohibitory and unconstitutional. Gilbert v. Mathews, 186 K. 672, 677, 686, 352 P.2d 58.

17. K.S.A. 21-2611 held constitutional; legislature has power to define what constitutes crime. State v. Bolin, 200 K. 369, 370, 436 P.2d 978.

§ 18. Justice without delay. All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay.

Research and Practice Aids:

Constitutional Law⇐327.
Hatcher's Digest, Constitutional Law §§ 59 to 66; Criminal Law §§ 78, 79.
C.J.S. Constitutional Law § 719.
Am. Jur. 2d Constitutional Law §§ 329 to 334, 554.

Law Review and Bar Journal References:

Notice in probate law as part of due process, Richard C. Harris, 22 J.B.A.K. 199, 200 (1954).

Mentioned in 1955-56 survey of law of administration of estates, Richard C. Harris, 5 K.L.R. 143, 148 (1956).

Case in annotation No. 66 below discussed in 1957-59 survey of constitutional and administrative law, Fred N. Six and John W. Brand, Jr., 8 K.L.R. 222, 225, 226 (1959).

Mentioned in article on a government's immunity from liability in the performance of its functions, Steadman Ball, 30 J.B.A.K. 187, 190 (1961).

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Discussed with respect to invalidity of 17-1725, John H. Johntz, Jr., 14 K.L.R. 193, 202 (1965).

Invalidity of K.S.A. 17-1725 mentioned in discussing charitable immunity, Jon F. Love, 6 W.L.J. 205, 210 (1966).

Discussed in "Anatomical Gifts"; constitutionality of K.S.A. 1968 Supp. 65-3207 and loss of constitutional rights considered, M. Martin Halley and William F. Harvey, 69 J.K.M.S. 343, 344 (1968).

Constitutional issues raised in a comment on governmental immunity in Kansas, William P. Tanner III, 19 K.L.R. 211, 221 (1971).

Discussed in "The Kansas Guest Act: Let's Take Another Look," William P. Tanner III, 20 K.L.R. 283 (1971).

Cited in comment on wrongful life actions, Steven G. Cooper, 11 W.L.J. 286, 288 (1972).

Mentioned in comment on Kansas Courts of Appeals, Gregory A. Dean, 12 W.L.J. 378 (1973).

Cited in note on "Hospitals' Role and Responsibility in Health Care Delivery," Alan Rupe, Robert D. Steiger, 14 W.L.J. 580, 607 (1975).

Discussed in context of governmental immunity statutes and first *Brown* decision (Brown v. Wichita State University, 217 K. 279), Nancy Scherer, 15 W.L.J. 155, 157, 158, 159 (1976).

Discussed in "Swift Currents of Change in the Law of Defamation," M. C. Slough, 45 J.B.A.K. 17, 30 (1976).

Discussed in note on Kansas governmental immunity statutes, 25 K.L.R. 140, 148, 149 (1976).

Mentioned in "Governmental Immunity: Despotic Mantle or Creature of Necessity," Philip A. Harley and Bruce Wasinger, 16 W.L.J. 13, 16, 17, 19, 20, 21, 40 (1976).

CASE ANNOTATIONS

1. "Due process of law" decisions have little application in Kansas. Gilchrist v. Schmidling, 12 K. 263, 271.

2. Granting attorney fees in actions for killing stock, not unconstitutional. K. P. Rly. Co. v. Mower, 16 K. 573, 582.

3. Redress for all injuries suffered provided for in "civil action." A.T.&S.F. Rld. Co. v. Rice, 36 K. 593, 599, 14 P. 229.

4. Section not violated by ordinance providing extension of city limits. Callen v. Junction City, 43 K. 627, 629, 23 P. 652. Criticized: Town of Fairbanks v. Barrack, 282 F. 420.

5. Cited in case discussing jurisdiction writ of error *coram nobis*. The State v. Calhoun, 50 K. 523, 532, 537, 32 P. 38.

6. "Occupying-claimant act" does not conflict with this section. Dietzler v. Wilhite, 55 K. 200, 203, 40 P. 272.

7. Legislative investigating committee not given power to imprison for contempt. *In re* Davis, 58 K. 368, 373, 49 P. 160.

8. Attorneys' fees in action against railroads for causing fire, constitutional. Railroad Co. v. Matthews, 58 K. 447, 450, 49 P. 602. Affirmed: Atchison, Topeka & Santa Fe R. Co. v. Matthews, 174 U.S. 96, 19 S.Ct. 609, 43 L.Ed. 909.

9. Act providing for condemnation of site for schoolhouse, held valid. Buckwalter v. School District, 65 K. 603, 606, 70 P. 605.

10. Proceedings to condemn and destroy liquors and paraphernalia valid. The State v. McManus, 65 K. 720, 722, 70 P. 700.

11. "Remedy" means by tribunal having jurisdiction; section not satisfied otherwise. Hanson v. Krehbiel, 68 K. 670, 672, 75 P. 1041.

12. Words of section not given unlimited signification in all cases. Coleman v. MacLennan, 78 K. 711, 722, 98 P. 281.

13. Common-law interpretation not strictly applied in slander by spoken words. Cooper v. Seaverns, 81 K. 267, 284, 105 P. 509.

14. Mere irregularity in administering law does not deny constitutional right. Griggs v. Hanson, 86 K. 632, 634, 121 P. 1094.

15. Acquittal on ground of insanity; commitment of dangerous insane; constitutionality. *In re* Clark, 86 K. 539, 121 P. 492.

16. Workmen's compensation act of 1911 does not violate this section. Shade v. Cement Co., 93 K. 257, 258, 144 P. 249.

17. Workmen's compensation act; defenses; act constitutional. Hovis v. Refining Co., 95 K. 505, 511, 148 P. 626.

18. Action for divorce; divorce refused; division of property; statute constitutional. Putnam v. Putnam, 104 K. 47, 51, 177 P. 838.

19. Farm crossing over railroad right-of-way; act unconstitutional. Chamberlain v. Railway Co., 107 K. 341, 344, 191 P. 261.

20. Conclusion reached by court before motions heard, held not error. Oil and Gas Co. v. Strauss, 110 K. 608, 611, 203 P. 1111.

21. Every person is entitled to contract relative to his employees. Coppage v. Kansas, 236 U.S. 1, 23, 35 S.Ct. 240, 59 L.Ed. 441.

22. Contract relating to electricity rates cannot be impaired unless unreasonable. Railroad and Light Co. v. Court of Industrial Relations, 113 K. 217, 229, 214 P. 797, 803.

23. Condemnation of school site without provision for consequential damages to adjoining property owners does not offend section. Mayfield v. Board of Education, 118 K. 138, 139, 233 P. 1024.

24. Statute relating to forfeiture of life insurance policy does not operate prospectively. Bank Savings Life Ins. Co. v. Baker, 120 K. 756, 761, 244 P. 862.

25. Section cited in determining whether publication was actionable per se. Knapp v. Green, 123 K. 550, 256 P. 153. Questioned: Jerald v. Houston, 124 K. 657, 670, 261 P. 851.

26. Act making transfer of stock after insolvency void as to double liability of stockholder is valid. Glenn v. Callahan, 125 K. 44, 262 P. 583.

27. Statute which gives a party a right may also make conditions as to notice. Davis v. City of El Dorado, 126 K. 153, 267 P. 7.

28. Act creating county court does not offend section. Brockway v. Wagner, 126 K. 285, 268 P. 96.

29. Compulsory reference in derogation of jury trial violates section. Estey v. Holdren, 126 K. 385, 267 P. 1098.

30. Penalty for failure to produce evidence held constitutional. Edmonds v. Federal Securities Co., 131 K. 11, 16, 290 P. 3.

31. Lack of notice requirement in workmen's compensation act considered. Schmeling v. F. W. Wool-

worth Co., 137 K. 573, 580, 21 P.2d 337. Rehearing denied: 138 K. 281, 282, 26 P.2d 265.

32. Bylaw of fraternal benefit society held to deny due process. Wichita Council v. Security Benefit Ass'n, 138 K. 841, 847, 28 P.2d 976.

33. Corporation cemetery tax act held to deny equal protection of law. Mount Hope Cemetery Co. v. Pleasant, 139 K. 417, 424, 32 P.2d 500.

34. County's claim against city for election expenses under "cash-basis law" held valid. City of Weir v. Cherokee County Comm'rs, 140 K. 30, 33, 33 P.2d 1108.

35. Wyandotte county grand jury act violates this section. State, *ex rel.*, v. Wyandotte County Comm'rs, 140 K. 744, 750, 39 P.2d 286.

36. Cited in case discussing application of 1935 mortgage moratorium act. Kansas City Life Ins. Co. v. Anthony, 142 K. 670, 683, 52 P.2d 1208.

37. Court must confirm mortgage-foreclosure sale where proceedings regular and price adequate. Liberty Savings & Loan Ass'n v. Hanson, 145 K. 174, 176, 64 P.2d 609.

38. State has right to maintain timely action to contest a will. State v. Keach, 145 K. 403, 406, 65 P.2d 598.

39. Junior mortgagee not party to foreclosure proceeding; right to foreclose unaffected. Motor Equipment Co. v. Winters, 146 K. 127, 134, 135, 136, 69 P.2d 23.

40. Action to recover attorney fee; jury trial demandable as of right. Hasty v. Pierpont, 146 K. 517, 518, 72 P.2d 69.

41. Cited in discussing but not determining constitutionality of 39-313. State v. Lange, 148 K. 614, 616, 618, 83 P.2d 653.

42. Statute avoiding unrecorded instruments conveying mineral rights (79-420) held valid. Hushaw v. Kansas Farmers' Union Royalty Co., 149 K. 64, 66, 68, 74, 86 P.2d 559.

43. Eminent domain statute (12-639) providing no prospective or anticipated damages held valid. Loomis v. City of Augusta, 151 K. 343, 345, 347, 99 P.2d 988.

44. Constitution does not guarantee an appeal to supreme court. Cochran v. Amrine, 155 K. 777, 778, 130 P.2d 605.

45. Statute making dental board's order revoking license effective while appeal pending valid. Bohl v. Teall, 157 K. 239, 241, 242, 139 P.2d 418.

46. Oil proration order charging overage for excess production deemed unconstitutional (dissenting opinion). Bennett v. Corporation Commission, 157 K. 589, 598, 600, 142 P.2d 810.

47. Cited; denial of equal rights by labor union violated federal constitution. Betts v. Easley, 161 K. 459, 463, 169 P.2d 831.

48. Person suffering bodily injury as result of another's negligence has remedy. Rowell v. City of Wichita, 162 K. 294, 300, 176 P.2d 590.

49. Constitutional test of tax is whether anything is given for that which is taken. Morton Salt Co. v. City of South Hutchinson, 159 F.2d 897, 900.

50. Section imposes only limited restrictions upon taxing power of state. Morton Salt Co. v. City of South Hutchinson, 159 F.2d 897, 900.

51. Section 44-504 limiting time for widow to bring wrongful death action valid. Elam v. Bruenger, 165 K. 31, 34, 40, 193 P.2d 225.

52. Guest statute (8-122b) does not violate this section. Bailey v. Resner, 168 K. 439, 444, 214 P.2d 323; Wright v. Pizel, 168 K. 493, 494, 495, 496, 499, 504, 214 P.2d 328.

53. Cited; fraternal society member could not resort to courts when remedies within society not exhausted. Zeidler v. Knights of Columbus, 172 K. 557, 566, 241 P.2d 761.

54. Mentioned; corporation commission's order refusing to reinstate canceled underages upheld. Republic Natural Gas Co. v. State Corporation Commission, 173 K. 172, 178, 244 P.2d 1196.

55. Court will not determine constitutional questions not properly presented. State, *ex rel.*, v. Richardson, 174 K. 382, 390, 256 P.2d 135.

56. Discussed; taxes properly levied on property in duly annexed city addition. Smith v. City of Prairie Village, 175 K. 469, 473, 264 P.2d 1053.

57. Act authorizing combined waterworks and sewage disposal systems held valid. City of Lawrence v. Robb, 175 K. 495, 498, 504, 505, 265 P.2d 317.

58. Exemption of charitable institutions from tort liability held contrary to this section. Noel v. Menninger Foundation, 175 K. 751, 762, 763, 267 P.2d 751.

59. Motion picture censorship act is definite and valid. Holmby Productions, Inc. v. Vaughn, 177 K. 728, 730, 282 P.2d 412. Reversed: 350 U.S. 870, 76 S.Ct. 117, 100 L.Ed. 770.

60. Procedure for creation of water district (19-3501 et seq.) valid. Water District No. 1 v. Robb, 182 K. 2, 17, 318 P.2d 387.

61. Mentioned; fair trade act held unconstitutional in part. Quality Oil Co. v. du Pont & Co., 182 K. 488, 491, 322 P.2d 731.

62. Unfair practices act proper exercise of police power; one clause thereof invalid. State v. Consumers Warehouse Market, 183 K. 502, 504, 505, 329 P.2d 638.

63. Test for determining validity of price regulation legislation stated and applied. State v. Consumers Warehouse Market, 183 K. 502, 504, 505, 329 P.2d 638.

64. Test of due process in exercise of police power stated and applied. State v. Consumers Warehouse Market, 183 K. 502, 504, 505, 329 P.2d 638.

65. Constitution does not guarantee criminal defendant appeal to supreme court. State v. Sims, 184 K. 587, 588, 337 P.2d 704.

66. Part of dairy industry unfair practices act held unconstitutional; due process. State, *ex rel.*, v. Fleming Co., 184 K. 674, 677, 682, 683, 684, 339 P.2d 12.

67. Attorney general properly superseded county attorney by intervening in original supreme court action. State, *ex rel.*, v. City of Kansas City, 186 K. 190, 193, 350 P.2d 37. Certiorari denied: 363 U.S. 831, 80 S.Ct. 1598, 4 L.Ed.2d 1525.

68. Corporation commission's order requiring ratable taking of gas by all purchasing companies issued under 55-703 upheld. Northern Natural Gas Co. v. State Corporation Commission, 188 K. 351, 354, 362 P.2d 609. Northern Natural Gas Co. v. Corporation Commission, 188 K. 355, 360, 362 P.2d 599. Rehearing denied: 188 K. 624, 364 P.2d 668. Reversed: 372 U.S. 84, 83 S.Ct. 646, 9 L.Ed.2d 601.

69. Act authorizing city to extend its credit for promotion of private industry (12-1740 to 12-1749) does not violate section. State, *ex rel.*, v. City of Pittsburg, 188 K. 612, 621, 364 P.2d 71.

70. Various federal and state constitutional objec-

tions to Water Appropriation Act (82a-701 et seq.) considered; act valid. Williams v. City of Wichita, 190 K. 317, 318, 325, 340, 374 P.2d 578.

71. Both city of Kansas City and board of public utilities of city of Kansas City are liable for negligence in conduct of proprietary functions of board. Seely v. Board of Public Utilities, 143 K. 965, 973, 57 P.2d 471.

72. Workmen's compensation law provides adequate and appropriate remedy and does not deprive persons of their property without due process of law. Baker v. St. Louis Smelting & Refining Co., 145 K. 273, 279, 65 P.2d 284.

73. Judicial process, in garnishment et cetera, can only be made effective upon sufficient notice. State Bank of Dodge City v. McKibben, 146 K. 341, 345, 70 P.2d 1.

74. Consolidation of separate appeals in eminent domain proceedings is proper; does not violate due process laws. Moore v. Kansas Turnpike Authority, 181 K. 51, 310 P.2d 199. Reversed in part: 181 K. 840, 317 P.2d 384.

75. Mentioned; where no express provision for notice is made in statute, reasonable notice will be implied. Cities Service Gas Co. v. State Corporation Commission, 192 K. 707, 713, 391 P.2d 74.

76. Section 17-1725 conferring exemption from forced process held unconstitutional. Neely v. St. Francis Hospital & School of Nursing, 192 K. 716, 717, 720, 722, 723, 391 P.2d 155.

77. In absence of statute imposing liability, county is not liable for negligence. Caywood v. Board of County Commissioners, 194 K. 419, 423, 399 P.2d 561.

78. Rule that neither spouse may maintain an action in tort for damages against the other not in violation of this section. Fisher v. Toler, 194 K. 701, 702, 401 P.2d 1012.

79. Wife has no cause of action for loss of consortium from injury to husband by third party; 23-203 and 23-205 modify common law. Criqui v. Blaw-Knox Corporation, 318 F.2d 811, 813, 814.

80. Constitutionality of 50-503 (*a*) of the dairy practices act, upheld; "due process." State, *ex rel.*, v. Fairmont Foods Co., 196 K. 73, 77, 82, 410 P.2d 308.

81. K.S.A. 21-1212, prevention of animal nuisances, violates due process requirements hereof (dissenting opinion). State v. Johnson, 196 K. 208, 215, 410 P.2d 423.

82. Doctrine of "governmental immunity" not in conflict herewith. McCoy v. Board of Regents, 196 K. 506, 511, 512, 413 P.2d 73.

83. Price control of liquor under 41-1111 et seq., not violative hereof. Laird & Company v. Cheney, 196 K. 675, 678, 682, 684, 414 P.2d 18. Dismissed: 384 U.S. 371, 87 S.Ct. 531, 17 L.Ed.2d 430.

84. Zoning ordinance alleged to deprive of property without due process of law. Bodine v. City of Overland Park, 198 K. 371, 373, 424 P.2d 513.

85. Rights not violated by court's failure to advise of statutory right to appeal. Ware v. State, 198 K. 523, 525, 426 P.2d 78.

86. Cited; right of accused to speedy public trial. State v. Wilson, 198 K. 532, 533, 426 P.2d 288.

87. Safety responsibility act (8-722 et seq.), does not deny due process of law. State v. Finley, 198 K. 585, 586, 592, 593, 594, 596, 599, 601, 426 P.2d 251. Judgment vacated: State v. Finley, 199 K. 615, 433 P.2d 414.

88. Legislation does not deny due process where procedural safeguards may be supplied by the agency administering the law. Rydd v. State Board of Health, 202 K. 721, 725, 726, 727, 451 P.2d 239.

89. The guest statute (8-122b) does not contravene the due process clause hereunder. Westover v. Schaffer, 205 K. 62, 64, 468 P.2d 251.

90. Cited in case holding remedy in inverse condemnation action is properly with the courts. Sanders v. State Highway Commission, 211 K. 776, 788, 508 P.2d 981.

91. Mentioned; constitutional attack on 8-122b; guest statute declared unconstitutional as violative of the equal protection clause. Henry v. Bauder, 213 K. 751, 752, 518 P.2d 362.

92. Mentioned; class action against gas utility contesting legality of late charge assessments made by utility. Tennyson v. Gas Service Company, 367 F. Supp. 102, 103.

93. Construed; no-fault insurance act (40-3101 et seq.) held constitutional. Manzanares v. Bell, 214 K. 589, 597, 598, 599, 617, 625, 626, 522 P.2d 1291.

94. Libel and slander action; standards stated for individual not public official; liability based on negligence. Gobin v. Globe Publishing Co., 216 K. 223, 232, 531 P.2d 76.

95. Method of jury selection did not violate defendant's rights to trial by impartial jury under federal or state constitutions. State v. Campbell, 217 K. 756, 761, 539 P.2d 329.

96. Governmental immunity doctrine as declared in 46-901, 46-902 unconstitutional and void. Brown v. Wichita State University, 217 K. 279, 280, 281, 295, 297, 302, 303, 540 P.2d 66. Reversed and remanded: 219 K. 2, 3, 25, 26, 28, 36, 40, 547 P.2d 1015.

97. Where teacher terminated at mid-year, without a hearing, entitled to back pay until due process given. Wertz v. Southern Cloud Unified School District, 218 K. 25, 27, 542 P.2d 339.

98. Constitutionality of 46-143 raised but not determined in construing section; "candidate" and "member elect" distinguished. Rogers v. Shanahan, 221 K. 221, 223, 565 P.2d 1384.

99. Under facts, action against city on common law theories dismissed; governmental immunity. Bribiesca v. City of Wichita, 221 K. 571, 572, 561 P.2d 816.

100. K.S.A. 22-2512 and 22-3901 not in contravention of federal or state constitution. State v. Pinball Machines, 222 K. 416, 419, 565 P.2d 236.

101. Mandatory malpractice insurance requirement of Health Care Provider Act does not violate constitutional due process provisions. State, *ex rel.* Schneider v. Liggett, 223 K. 610, 611, 612, 613, 614, 616, 576 P.2d 221.

102. Due process of law not violated by 61-1805. Threadgill v. Beard, 225 K. 296, 301, 590 P.2d 1021.

103. Discussed; recoupment statute (22-4513) unconstitutional not on due process and right to jury trial arguments but on right to counsel and equal protection grounds. Simmons v. James, 467 F.Supp. 1068, 1070, 1080.

§ 19. Emoluments or privileges prohibited. No hereditary emoluments, honors, or privileges shall ever be granted or conferred by the state.

Research and Practice Aids:

Constitutional Law⇐82 et seq.

C.J.S. Constitutional Law § 199 et seq.

Testimony
of
Pete Rowland
Professor of Political Science
University of Kansas
In Opposition to Senate Concurrent Resolution 1610
March 21, 1989

Thank you for the opportunity to testify before you today. Since coming to the University of Kansas ten years ago my family and I have enthusiastically adopted Kansas as our home. Over the last two years six of my relatives from Texas have moved to Lawrence. They share our enthusiasm for Kansas and, more importantly, Kansans.

It is because my family and I have joined our future to the future of our adopted state that I welcome the opportunity to testify against the pending proposal to reform tort law by amending the state's constitution. I come to you with no axe to grind regarding tort reform in general or SCR 1610 in particular. Rather, I am here because, although I respect the good intentions of those on the other side of this issue, my 16 years as a teacher and student of constitutional law convince me that any narrow benefits derived from the proposed amendment would be far outweighed by the damage done to the Kansas constitution and, ultimately, our constitutional form of government.

Each time I introduce a new group of undergraduates to constitutional law my own respect for the genius of constitutional democracy grows. Every semester I recognize more clearly that a constitution is not just a document, it is the codification of the fundamental beliefs we cherish above all others. It is a codification of moral values! The U.S.

SJC
3-21-89 P.M.

Constitution tells us not just that slavery is illegal, it tells us that it is wrong!

Each time I teach Constitutional Law I also gain a renewed appreciation for the fragility of constitutional democracy. I recognize anew that calling a document "The Constitution" does not make it a constitution in any meaningful sense. And I recognize that the fragility of constitutions is unavoidable--it is rooted in the basic principles of constitutional government, principles that have made the United States the world's oldest, most respected democracy.

The basic, fundamental purpose of a constitution is to "govern the governors" by establishing the rules under which the game of politics is to be played. As is so often the case, James Madison said it best in 1789 when he urged citizens to ratify the constitution that has served the United States so well.

> "In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first oblige the government to control the governed; and in the next place, oblige it to control itself."

If it is to govern the governors and establish the fundamental rules of the political game, a constitution must be superior to all other forms of law. It must be the supreme law of the land, superior to statutory, administrative or common law. Otherwise, how is it to govern the those who determine our speed limits, our child support payments, or a host of other determinations elected officials make in a representative democracy?

If our constitution is to function as that supreme law that governs the governors it must be buffered from the transitory winds of public opinion. If we try to make our constitution responsive to each year's political crisis, if we use the amendment process to clutter it with each year's response to that crisis, we remove it from its proper pedestal above the day-to-day political fray and lower it to the rough-and-tumble arena of passionate, self-interested politics.

Once relegated to the political arena a constitution begins to lose its integrity, its ability to govern the governors. If relegated to this status often enough it ceases to function as the fundamental law that governs the governors as they pursue the interests of constituents and clients. When this happens, we no longer have a constitution in any meaningful sense.

In other words, if we use our constitution to set narrow policies, such as maximum damages in medical malpractice suits, we compromise its ability to provide the basic principles of governmental organization and operation. If we do so often enough we will destroy its integrity as a constitution, and it will cease to function as a constitution.

Although I am not here to testify for or against the substantive wisdom of particular legislation, I would close by noting that, in my opinion, SCR 1610 poses a particularly ominous threat to constitutional government. It writes special interest legislation into the constitution and uses the constitution to protect tortfeasors from their victims. In pursuit of these special interests it explicitly rejects the Kansas

Constitution's basic commitment (Section 18) to judicial remedy by due course of law. And, most damaging of all, it implicitly rejects the fundamental constitutional concepts of separation of powers and judicial review by denying the Supreme Court the power to determine whether certain legislation violates certain portions of the Constitution's Bill of Rights. Regardless of the short-term wisdom of tort reform, what could be more damaging to separation of powers and the fundamental premises of constitutional democracy?

Should we conclude, then, that constitutions should be immutable, that they should be immune to basic social change? Of course not. Constitutions should incorporate basic social change into the principles that govern the governors. The U.S. Constitution has been amended to incorporate our societal rejection of slavery, our belief that one should not be denied the right to vote because of gender, and our fundamental commitment to individual freedoms. It is hard to imagine, however, the U.S. Constitution amended to limit jury awards in medical malpractice suits.

Our constitution has served us well. It is respected among constitutional scholars because it, better than most state constitutions, has been protected from the temptation to sacrifice constitutional integrity on the alter of political expediency. Let's keep it that way. Let's keep the debate over medical malpractice in the courts and legislature, where it belongs.

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Attachment II
Senate Judiciary Committee
3-21-89

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STATEMENT

OF

IVAN W. WYATT, PRESIDENT KANSAS FARMERS UNION
AND
MEMBER OF EXECUTIVE COMMITTEE
KANSAS COALITION OF FARMERS AND LABORERS

BEFORE

THE SENATE JUDICIARY COMMITTEE

ON

SENATE CONCURRENT RESOLUTION 1610

MARCH 21, 1989

MR. CHAIRMAN, MEMBERS OF THE COMMITTEE:

I AM IVAN WYATT, PRESIDENT OF THE KANSAS FARMERS UNION AND MEMBER OF THE EXECUTIVE COMMITTEE OF THE KANSAS COALITION OF FARMERS AND LABOR.

MEMBERS OF THE COALITION ARE:

KANSAS FARMERS UNION, OF WHICH I AM PRESIDENT

KANSAS AMERICAN AGRICULTURAL MOVEMENT, INC. AND GRASSROOTS

JEWISH COMMUNITY RELATION'S BUREAU OF KANSAS CITY

KANSAS RURAL CENTER

KANSAS NATIONAL FARMERS ORGANIZATION

KANSAS RURAL LIFE COMMITTEE

KANSAS AFL-CIO

KANSAS CATHOLIC RURAL LIFE

THIS COALITION REPRESENTS OVER 100,000 FAMILIES AND INDIVIDUALS LOCATED IN EVERY COUNTY OF THE STATE OF KANSAS.

AT OUR EXECUTIVE BOARD MEETING ON JANUARY 26, 1989, THE COALITION VOTED UNANIMOUSLY TO OPPOSE A CONSTITUTIONAL AMENDMENT LIMITING DAMAGES IN PERSONAL INJURY CASES. SENATE CONCURRENT RESOLUTION 1610 CERTAINLY DOES THAT AND WE WANT TO URGE YOU TO DEFEAT THIS PROPOSAL.

Attachment I
SJC
3-21-89

OUR COALITION'S MEMBERS ARE WORKING PEOPLE, WHETHER THEY ARE

ON THE FARM OR IN THE FACTORIES OF THIS STATE. THE VERY NATURE OF THEIR WORK EXPOSES THEM TO MORE SERIOUS INJURY THAN THE AVERAGE KANSAS CITIZEN. FOR THOSE COVERED BY WORKER'S COMPENSATION, WE ARE CONSTANTLY REMINDED OF THE UNFAIR COMPENSATION SYSTEM THEY FACE WHEN THEY ARE INJURED ON THE JOB. FOR FARMERS INJURED DUE TO THE NEGLIGENCE OF A PRODUCT MANUFACTURER, THEIR FINANCIAL LOSS CAN BE DEVASTATING. IT IS ESPECIALLY DIFFICULT FOR A FARMER TO DOCUMENT LOST WAGES. THEREFORE, IN MANY CASES NON-ECONOMIC DAMAGES MAY PROVIDE THE ONLY METHOD TO COMPENSATE AN INJURED FARMER FOR A LIFETIME OF DISABILITY.

IN RECENT TIMES, WE HAVE SEEN WHAT APPEARS TO BE AN ATTACK ON OUR JURY SYSTEM OF JUSTICE. PASSAGE OF SCR NO. 1610 COULD LEND SUPPORT TO THAT TREND.

HOWEVER, WE CONTINUE TO SUPPORT THE JURY PROCESS AND BELIEVE THE JURY SHOULD MAKE THOSE DECISIONS IN EACH INDIVIDUAL CASE, NOT THE STATE LEGISLATURE.

FROM WHAT I HAVE READ AND HEARD, YOU, AS LEGISLATORS, ARE BEING TOLD THAT THIS CONSTITUTIONAL AMENDMENT IS NEEDED TO KEEP DOCTORS FROM LEAVING KANSAS, ESPECIALLY RURAL COMMUNITIES. NO ONE IS MORE CONCERNED ABOUT RURAL HEALTH CARE THAN WE ARE. BUT WE ARE CONVINCED THIS RESOLUTION, SCR 1610, WILL DO LITTLE TO LOWER INSURANCE PREMIUMS FOR DOCTORS AND WON'T CAUSE DOCTORS TO STAY IN KANSAS. I'VE NOT READ A WORD FROM THE INSURANCE INDUSTRY THAT SCR 1610 WOULD CAUSE THEM TO LOWER RATES AT ALL, LET ALONE ENOUGH TO MAKE A DIFFERENCE IN A DOCTOR'S DECISION ABOUT WHERE TO PRACTICE MEDICINE.

A CONSTITUTIONAL AMENDMENT AS PROPOSED IN SCR 1610 IS TOO SERIOUS A MOVE TO MAKE WITHOUT ALL THE FACTS BEING PRESENT.

THERE IS THE FEELING THAT WHILE DOCTORS ARE BEING PITTED AGAINST THE LAWYERS, AND LAWYERS AGAINST THE DOCTORS AND THE VICTIM'S RIGHTS ARE BEING TRAMPLED DURING THE FRAY, THE MALPRACTICE INSURANCE

ANIES WILL WALTZ AWAY WITH THE PRIZE.

SUCH ACTIONS IN OTHER STATES HAVEN'T SOLVED THE PROBLEM. THEREFORE WE ASK THE FOLLOWING QUESTIONS CONCERNING SCR-1610.

1. WILL IT REDUCE MEDICAL MALPRACTICE INSURANCE PREMIUMS IN KANSAS? PROBABLY NOT.

2. WILL IT SOLVE THE MALPRACTICE PROBLEM? MOST CERTAINLY NOT. THIS IS THE REAL CONCERN OF PEOPLE. THIS CONSTITUTIONAL AMENDMENT WOULD DO NOTHING TO IMPROVE THE SITUATION, AND COULD CAUSE A SENSE OF LAXNESS TO SET IN.

3. WILL IT BE FAIR TO FUTURE MEDICAL MALPRACTICE VICTIMS? CERTAINLY NOT.

SCR 1610 APPEARS TO PROTECT THE INDIVIDUAL'S RIGHTS FOR FULL COMPENSATION FOR INJURIES THAT RESULT FROM THE ACTION OF A PARTY CAUSING THE INJURY WHICH RESULTS IN A CRIMINAL CONVICTION. BUT WHO DRAWS THE LINE BETWEEN A SIMPLE MALPRACTICE OR NEGLIGENT ACT AND CRIMINAL MALPRACTICE OR NEGLIGENT ACT. IN THE CASE OF A DRUNKEN DRIVER, YOU CAN CHECK FOR ALCOHOLIC LEVELS, HOW DO YOU CHECK A SURGEON OR WHOEVER WEEKS OR MONTHS LATER?

THERE IS NOTHING IN THIS RESOLUTION THAT SETS THE GUIDELINES DETERMINING WHO BEARS THE BURDEN OF PROOF OF CRIMINAL NEGLIGENCE OR INCOMPETENCE. IS IT PRUDENT OR PROPER TO SADDLE THE VICTIM WITH THE BURDEN OF PROOF OR DETERMINATION?

TO SITE ONE VICTIM'S CASE, THE VICTIM WAS DENIED ACCESS TO INFORMATION PERTINENT TO HIS CASE IN A JURY TRIAL, AGAINST A SURGEON WHO HAD BEEN SUED 48 TIMES FOR MALPRACTICE. THIS ISSUE IS A CAN OF WORMS AND ALL WE HAVE DONE IS JUST LIFTED THE LID.

IN CLOSING, SPEAKING AS THE KANSAS FARMERS UNION PRESIDENT, I SHOULD RELATE THAT AT OUR CONVENTION HELD IN JANUARY THIS YEAR, WE HELD A WORKSHOP PANEL MADE UP OF REPRESENTATIVES OF RURAL HOSPITALS, THE KANSAS MEDICAL SOCIETY, THE KANSAS TRIAL LAWYERS AND THE STATE'S

LARGER URBAN HOSPITALS.

FOLLOWING THESE WORKSHOPS, THE KANSAS FARMERS UNION MEMBERS ADOPTED THEIR POLICY ON THIS ISSUE. IT READS AS FOLLOWS:

"WE SUPPORT THE EFFORTS OF THE STATE BOARD OF HEALING ARTS, UNDER THE DIRECTION OF DIRECTOR RICHARD GANNON, TO REMOVE SUB-STANDARD PHYSICIANS FROM PRACTICE."

"WE SUPPORT NO MALPRACTICE LEGISLATION THAT LIMITS VICTIMS RIGHTS UNTIL FULL DISCLOSURE IS MADE BY INSURANCE CARRIERS CONCERNING COSTS, LOSSES AND PROFITS."

THE KANSAS FARMERS UNION MEMBERS, AND THE OTHER MEMBERS OF THE COALITION OF FARMERS AND LABORERS HAVE SPOKEN CLEARLY ON THIS ISSUE.

WE URGE YOU TO VOTE "NO" ON SCR-1610.

THANK YOU.

STATEMENT

OF

IVAN W. WYATT, PRESIDENT KANSAS FARMERS UNION
AND
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KANSAS COALITION OF FARMERS AND LABORERS

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3-21-89 Att.

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HOWEVER, WE CONTINUE TO SUPPORT THE JURY PROCESS AND BELIEVE THE JURY SHOULD MAKE THOSE DECISIONS IN EACH INDIVIDUAL CASE, NOT THE STATE LEGISLATURE.

FROM WHAT I HAVE READ AND HEARD, YOU, AS LEGISLATORS, ARE BEING TOLD THAT THIS CONSTITUTIONAL AMENDMENT IS NEEDED TO KEEP DOCTORS FROM LEAVING KANSAS, ESPECIALLY RURAL COMMUNITIES. NO ONE IS MORE CONCERNED ABOUT RURAL HEALTH CARE THAN WE ARE. BUT WE ARE CONVINCED THIS RESOLUTION, SCR 1610, WILL DO LITTLE TO LOWER INSURANCE PREMIUMS FOR DOCTORS AND WON'T CAUSE DOCTORS TO STAY IN KANSAS. I'VE NOT READ A WORD FROM THE INSURANCE INDUSTRY THAT SCR 1610 WOULD CAUSE THEM TO LOWER RATES AT ALL, LET ALONE ENOUGH TO MAKE A DIFFERENCE IN A DOCTOR'S DECISION ABOUT WHERE TO PRACTICE MEDICINE.

A CONSTITUTIONAL AMENDMENT AS PROPOSED IN SCR 1610 IS TOO SERIOUS A MOVE TO MAKE WITHOUT ALL THE FACTS BEING PRESENT.

THERE IS THE FEELING THAT WHILE DOCTORS ARE BEING PITTED AGAINST THE LAWYERS, AND LAWYERS AGAINST THE DOCTORS AND THE VICTIM'S RIGHTS ARE BEING TRAMPLED DURING THE FRAY, THE MALPRACTICE INSURANCE

CO NIES WILL WALTZ AWAY WITH THE PRIZE.

SUCH ACTIONS IN OTHER STATES HAVEN'T SOLVED THE PROBLEM. THEREFORE WE ASK THE FOLLOWING QUESTIONS CONCERNING SCR-1610.

1. WILL IT REDUCE MEDICAL MALPRACTICE INSURANCE PREMIUMS IN KANSAS? PROBABLY NOT.

2. WILL IT SOLVE THE MALPRACTICE PROBLEM? MOST CERTAINLY NOT. THIS IS THE REAL CONCERN OF PEOPLE. THIS CONSTITUTIONAL AMENDMENT WOULD DO NOTHING TO IMPROVE THE SITUATION, AND COULD CAUSE A SENSE OF LAXNESS TO SET IN.

3. WILL IT BE FAIR TO FUTURE MEDICAL MALPRACTICE VICTIMS? CERTAINLY NOT.

SCR 1610 APPEARS TO PROTECT THE INDIVIDUAL'S RIGHTS FOR FULL COMPENSATION FOR INJURIES THAT RESULT FROM THE ACTION OF A PARTY CAUSING THE INJURY WHICH RESULTS IN A CRIMINAL CONVICTION. BUT WHO DRAWS THE LINE BETWEEN A SIMPLE MALPRACTICE OR NEGLIGENT ACT AND CRIMINAL MALPRACTICE OR NEGLIGENT ACT. IN THE CASE OF A DRUNKEN DRIVER, YOU CAN CHECK FOR ALCOHOLIC LEVELS, HOW DO YOU CHECK A SURGEON OR WHOEVER WEEKS OR MONTHS LATER?

THERE IS NOTHING IN THIS RESOLUTION THAT SETS THE GUIDELINES DETERMINING WHO BEARS THE BURDEN OF PROOF OF CRIMINAL NEGLIGENCE OR INCOMPETENCE. IS IT PRUDENT OR PROPER TO SADDLE THE VICTIM WITH THE BURDEN OF PROOF OR DETERMINATION?

TO SITE ONE VICTIM'S CASE, THE VICTIM WAS DENIED ACCESS TO INFORMATION PERTINENT TO HIS CASE IN A JURY TRIAL, AGAINST A SURGEON WHO HAD BEEN SUED 48 TIMES FOR MALPRACTICE. THIS ISSUE IS A CAN OF WORMS AND ALL WE HAVE DONE IS JUST LIFTED THE LID.

IN CLOSING, SPEAKING AS THE KANSAS FARMERS UNION PRESIDENT, I SHOULD RELATE THAT AT OUR CONVENTION HELD IN JANUARY THIS YEAR, WE HELD A WORKSHOP PANEL MADE UP OF REPRESENTATIVES OF RURAL HOSPITALS, THE KANSAS MEDICAL SOCIETY, THE KANSAS TRIAL LAWYERS AND THE STATE'S

LAR[illegible]R URBAN HOSPITALS.

FOLLOWING THESE WORKSHOPS, THE KANSAS FARMERS UNION MEMBERS ADOPTED THEIR POLICY ON THIS ISSUE. IT READS AS FOLLOWS:

"WE SUPPORT THE EFFORTS OF THE STATE BOARD OF HEALING ARTS, UNDER THE DIRECTION OF DIRECTOR RICHARD GANNON, TO REMOVE SUB-STANDARD PHYSICIANS FROM PRACTICE."

"WE SUPPORT NO MALPRACTICE LEGISLATION THAT LIMITS VICTIMS RIGHTS UNTIL FULL DISCLOSURE IS MADE BY INSURANCE CARRIERS CONCERNING COSTS, LOSSES AND PROFITS."

THE KANSAS FARMERS UNION MEMBERS, AND THE OTHER MEMBERS OF THE COALITION OF FARMERS AND LABORERS HAVE SPOKEN CLEARLY ON THIS ISSUE.

WE URGE YOU TO VOTE "NO" ON SCR-1610.

THANK YOU.

KANSAS BAR ASSOCIATION

SCR 1610
Senate Judiciary Committee
March 21, 1989

Mr. Chairman, and members of the Senate Judiciary Committee. I am Anne Miller. I am a partner in the Manhattan firm of Everett, Seaton & Miller. I appear today representing the Kansas Bar Association. I have no monetary interest in this issue. I do not represent plaintiffs in medical malpractice; I do not defend doctors in medical malpractice. My interest is as a Kansan and as a student of the constitution. The constitutional amendment proposed by SCR 1610 is touted as the way to reduce doctor's insurance premiums.

Will it work? I predict the amendment will affect doctor's premiums about like what human sacrifices did for rain insurance for the Aztecs. Doctors and medical consumers will not benefit from it. The President of Medical Protective Insurance company told you last year at this time -- and the transcript is in your folder -- that premiums will not decrease because of a $250,000 cap on noneconomic damages.

The foundation of an American democracy is equality before the law, not the right to buy insurance at levels a majority of the legislature thinks is appropriate. While legislative limits attempt to insure awards are rationally related to the damage evidence presented, such review is a function of the judicial branch of government -- after hearing and reviewing the evidence. The legislative branch of government hears no evidence in individual cases.

The Right to Vote

For those who think that this amendment is like any other amendment -- that people ought to be allowed to vote on any issue -- I would respond that in 1986 if doctors had said publicly that if the lottery amendment passed they would leave Kansas, the lottery amendment might not have passed. But that only measures the importance medical patients place on the opinion of their physicians. It is relatively easy for doctors to simply scare their patients in order to get their amendment passed. They may tell patients they won't be around to practice medicine if the amendment doesn't pass. Slick television advertizing may show hospitals with "closed" signs on the emergency room door. Frightened patients may write you and demand action because their doctors have told them no other alternative is available.

1200 Harrison • P.O. Box 1037 • Topeka, Kansas 66601-1037 • FAX (913) 234-3813 • Telephone (913) 234-5696

Attachment VI
SJC
3-21-89 P.M.

How do we know this will happen? Because that's the type of ads the Florida medical society ran last summer and fall. Patients already are flooding legislators in Salina, Beloit, Ellsworth, and Concordia.

Abraham Lincoln once said that "Lies can go halfway around the world before Truth can get its shoes on."

Jerry Slaughter, Executive Director of the Kansas Medical Society, tells people we often amend our constitution; that SCR 1610 is no big deal. But look it up. Only once since 1859 have we amended the Kansas bill of rights. That was in 1972. It dealt with forfeiting your estate for conviction of a crime. That change protected people from legislative activity; it did not take rights away from people. In reality, we've never amended our constitution to take away the effectiveness of the bill of the rights.

If it is simply a matter of the people changing their constitution, why is it necessary to distort the judicial track record? Jerry Slaughter wrote in the March 5th Kansas City Star: the court "rejects even modest legislative intrusion into the court's absolute control over tort law." I wonder when he became spokesman for any court?

Judges are bound by an oath to uphold the constitution. You took the same oath. So did I. Dozens of tort reform bills enacted by this legislature have been upheld in the courts since 1974. [A list is in your folder.] Yet there are people in my town and even newspaper editors and reporters -- because of Mr. Slaughter's remarks -- who believe every tort reform has been struck down by the courts.

Nationally, malpractice claims have been declining the last two years. [See the attached article.] In Kansas, over the last two years claims peaked at 319, fell to 284 last fiscal year, and if current trends hold up, will be around 270 by June 30, 1989, the most recent fiscal year. Possibly two straight years of decline. If that decline continue, that has to be good news for doctor's premiums.

On February 27th, the Wichita Eagle-Beacon reported the St. Paul Insurance company was lifting its moratorium on writing new medical malpractice insurance policies in Kansas. Their spokesman said they would consider writing excess insurance coverage once the Fund is phased out. That's not the sign of a state medical malpractice insurance industry in crisis.

Analysis of the Amendment

My other purpose today is to speak to the specifics of this constitutional amendment and acquaint you with some future problems lurking on the horizon if this amendment is enacted. Let's assume 51% of the voters enact this constitutional amendment.

One problem with SCR 1610 is that, like the annual battle over the School Finance Formula, state policy on noneconomic damages will never be settled. You will face annual battles to set and reset these "limits."

Footnotes

1) An example of a longer statute of repose is the proposed 25 year statute of repose on a product in the federal product liability bill, H.R. 1115 of the 100th Congress. If that law were in effect and a Cessna built 28 years ago had a structural defect causing injury, the entire claim would be barred even though the 2-year statute of limitation has not run.

2) Prosser on Torts, 4th Ed. p. 144.

3) Id.

4) Hardy v. VerMeulen, 32 Ohio St. 3d 45, 512 NE 2d 626 (1987). In Mominee v. Scherbarth, 503 N.E.2d 717 (1986), the Ohio Supreme Court ruled a four statute was unconstitutional regarding minors.

5) 5 U.S. (1 Cranch) 137, 163 (1803), cited with approval in Kansas Malpractice Victims Coalition v. Bell, 243 Kan. 333, 757 P.2d 251 (1988).

6) A lawsuit is a form of petitioning for "redress of grievances" and is constitutionally protected. City of Long Beach v. Bozek, 645 P.2D 137 (1982). See also United Transportation Union v. Michigan Bar Assoc., 401 U.S. 576 (1971).

7) Brubaker v. Cavanaugh, 741 F.2d 318, 321 (1984) in federal courts. See also Stephens v. Snyder Clinic Ass'n, 230 Kan 115, 631 P.2d 222 (1981).

8) Carson v. Maurer, 120 N.H. 925, 931-32, 424 A.2d 825, 830 (1980)

9) Kenyon v. Hammer, 688 P.2d 961 (Ariz. 1984)

10) Id., pp 975 and 976

11) Willis v. Maverick, ___ SW2d ___, (#C-6225, S. Ct., Texas, decided July 6, 1988).

12) Id, slip opinion p. 6.

13) Id, slip opinion p. 7.

14) Ernest v. Faler, 237 Kan. 125, 697 P.2d 870

15) Id., p. 137

16) Citing Section 18 of the Kansas Bill of Rights.

17) Ernest, supra, p. 133.

18) Id., p. 134

4. What kind of injuries are involved in such cases? Is there a closed claim study that could help answer these questions?

The proponents need to make their case a little better. The American Tort Reform Association does not recommend a statute of limitation even remotely similar to SB 225. To go to the extreme of SB 225 puts Kansas on the far end of statutory law regarding statutes of limitation.

In a constitution, every word is important. If it means what it says, and I think it does, no other provision of the constitution can limit the authority of a legislature enacting a law limiting noneconomic damages! There is no other reasonable interpretation.

What that means is no other provisions of the Kansas constitution will apply to interpret resulting legislation. That means:

@ Section 1 of the Bill of Rights, granting equal rights to Kansas Citizens is gone.

@ Section 2, of the bill of rights, which states "No special privileges or immunities shall ever be granted by the legislature, which may not be altered, revoked or repealed by the same body; and this power shall be exercised by no other tribunal or agency." Bypassing this phrase allows a legislature to enact noneconomic damage laws providing that no future legislature may amend or repeal the statute.

@ The bill of rights, §5 which makes the right of trial by jury inviolate. Clearly, §5 and §2's loss means the amendment would allow a jury to set actual damages, but a nonjudicial tribunal -- perhaps a panel of doctors -- to determine noneconomic damages.

@ Article II, §17 requires uniform operation of laws of a general nature. That section is abridged by this amendment for noneconomic damage laws.

@ Article II, §13 requires a legislative majority vote to "pass any bill." This amendment clearly says the legislature may pass legislation concerning noneconomic loss without regard to ANY other part of the constitution, including the legislative article. Under that type of law, and with §2 of the Bill of Rights not applicable, a single legislature could make a law "limiting" noneconomic loss and add a proviso requiring a super-majority vote (e.g. 75%) to repeal the same law. Or the first legislature could pass a statute that says noneconomic loss shall be whatever the jury says it shall be, and then put on the super-majority vote requirement to keep future legislatures from repealing it. It raises unknown questions of whether the first legislature can bind a subsequent one.

@ Article II, §14 grants the governor a veto over legislative action, and requires 2/3rds votes to override a veto. This amendment is attempting to bypass the separate branch of government called the Judiciary. Why not bypass the Executive Branch, too. Can they pass a law that says it shall be law regardless of whether the governor signs it?

If this is beginning to sound like Alice in Wonderland, it is because the amendment sounds good, but nobody's thinking about what happens if it passes.

Regarding malpractice insurance, Kansans are being asked to change the constitution to limit awards when Kansas malpractice insurance is not based solely on Kansas experience. Thus, changes in Kansas awards because of the amendment will not necessarily be reflected in Kansas premiums.

Constitutions should confer rights, not limit them. The amendment limits damages even when the negligence is willful, wanton or reckless.

No state has regulated awards with a constitutional amendment of this nature.

Federalizes Appeals

The amendment federalizes major civil trial appeals on noneconomic damages. This is because the Kansas Supreme Court cannot use the Kansas Constitution to determine constitutionality. By "federalizing the appeal," I mean either federal judges in Kansas, the 10th Circuit, or the U.S. Supreme Court will decide Kansas noneconomic damage issues based on the federal constitution, not the Kansas constitution.

For all practical intents, This means that judges of the 10th Circuit Court of Appeals who live primarily outside of Kansas will determine our state law without being able to refer to the state constitution. The expense of federal appellate litigation -- especially to the U.S. Supreme Court -- is burdensome.

Some of the wording in the proposed amendment is troublesome:

1. Punitive Damages The definition of of noneconomic damages needs to include precise language whether or not the amendment is intended to allow the legislature to limit punitive or exemplary damages. Punitive damages are a form of noneconomic loss. The phrase "other losses which are intangible in nature" in lines 42-43 fit the definition of punitive damages. Punitive damages are not covered by insurance. Therefore it would seem important that you exclude them. We'd simply like that point clarified in the definition.

2. "Limit Awards" is an Anti-Defendant Amendment
This amendment allows the legislature to "limit" noneconomic loss. There is no standard in the language. It allows a legislature to bypass the right to trial by jury in noneconomic loss matters. Theoretically, there is nothing in this language to prevent a future legislature from requiring by law that noneconomic damages SHALL be at least three times actual damages. Or ten times actual damages--regardless of what the jury says. This might result in noneconomic damages higher than what a jury would award.

3. Section 1 is frightening in terms of future unknowns. This amendment says in lines 31-33 that "No provision of this constitution shall limit the powers of the legislature herein conferred..." To my knowledge, no other phrase like this has occurred in the other state's constitutional amendment.

4. Exception for Criminal Activity

This exception to the otherwise all-encompassing legislative power is interesting. The language stands for the proposition that a jury is fully qualified to award full noneconomic damages if the injury results from a conviction from criminal activity, but unqualified to award full noneconomic damages if ordinary negligence is involved.

The reason for this "crime" exception is public relations. Florida's Amendment 10 which failed last November (43-57%) had a straight $100,000 limit for noneconomic loss. The opposition called it the "Drug Dealer's and Drunk Driver's Protection Act." So, proponents of SCR 1610 have decided that persons committing crimes could have their liability for noneconomic damages unlimited.

SCR 1610 creates a constitutional right to unlimited noneconomic damages when there is an underlying conviction of a crime. Legislative interference is forbidden. This exception makes sense ONLY if the constitutional amendment itself made sense, which it doesn't. What about defendants who act willfully, recklessly or are intentionally indifferent to whether their conduct causes harm to others? What about businesses which don't care if their activities pollute streams? If a county attorney hasn't the abilities or the financial resources to take on a big company and prove criminal activity, the limitation by the legislature goes into effect for all persons hurt by the defendant.

Bypass No-fault Automobile Insurance. Kansas no fault laws say that if medical injuries are less than $2,000, you cannot sue for any pain and suffering. This is an existing limit on noneconomic loss. However, the criminal conviction exception creates a constitutional right to unlimited noneconomic damages where a crime can be proven. In many instances, the no fault laws are bypassed by this constitutional amendment, if a crime is proven, even if medical damages are only a few hundred dollars.

Most automobile accidents involve some traffic violation for which a fine or small jail term is imposed. If nothing else, the crime of inattentive driving is charged. In order to preserve a civil damage cap, is an insurance company going to help defendants fight even the inattentive driving charge? Will county attorneys and judges face jury trials on minor traffic misdemeanors?

Bypasses Statutory Limitations on Wrongful Death Caps. Kansas law limits nonpecuniary loss in wrongful death actions to $100,000. Yet because of the criminal conviction exception, if a conviction is secured, the legislature cannot limit resulting civil liability for wrongful death because of the constitutional amendment's new right to unlimited noneconomic loss.

Private Prosecutor. To preserve an unlimited civil lawsuit, a plaintiff who has been injured through activity that is also a crime can file a criminal complaint with the county attorney. This would be necessary if for any reason the county attorney declined to prosecute. Since 1923 plaintiffs have been authorized statutorily to hire private prosecutors under KSA 19-

717. This law prohibits a court from dismissing a criminal action without the private prosecutor's authority even if the county attorney wants to.

The problem with this amendment when it is mixed with current law it says to people that no matter how horrible the conduct, if you can just avoid criminal prosecution, state laws will limit your civil liability, too. Let me give you a well-known example of the problem with unprosecuted criminal exceptions.

Klaus von Bulow married a wealthy woman. A few years ago, he was arrested and charged in New York with attempted murder in the alleged poisoning of his wife who, after the poisoning, went into a coma. He was convicted once, appealed, and the conviction was overturned. He was tried again and, because of the criminal beyond reasonable doubt standard, was acquitted. If he had been convicted of the crime, the law would keep him from inheriting half his wife's estate rumored to be in the tens of millions of dollars. Because he was not convicted, Von Bulow's stepchildren then went to court in a civil action for personal injuries, primarily for noneconomic loss. A jury found by a preponderance of evidence that Von Bulow was responsible for his wife's coma, and awarded an amount of money to the children that represented what Von Bulow would have inherited from his wife's estate had she died.

If that action were brought today in Kansas, the children would have been limited to $250,000 in noneconomic loss because of the 1988 legislation. The remainder would still go to Von Bulow.

Why should state government be in the business of creating constitutional amendments that protect wrongdoers simply because their crimes cannot be proven beyond reasonable doubt?

Medical negligence as a crime. K.S.A. 65-2862 makes it a misdemeanor to violate the healing arts act. Amendments to SB 182 makes repeated violations of the act a Class "E" felony. The problem is individuals cannot ask a county attorney to prosecute a physician. KSA 65-2866 says only upon request of the Board of Healing Arts can a county attorney or the attorney general prosecute for a violation of the healing arts act. As a practical matter, criminal prosecution is authorized by the board only when an unlicensed person attempts to practice a healing art.

The sad thing is that if a doctor has had one too many drinks at the country club and who drives and hits somebody, he faces the crime of driving under the influence. If he kills someone, he faces prison. If convicted, under the proposed constitutional amendment, the doctor faces unlimited noneconomic damages. His whole estate is at risk.

Yet if that same doctor gets to the hospital and goes into surgery under the influence of alcohol, that is a crime because it violates the healing arts act, but it is actionable only if the Board of Healing Arts authorizes it. The result of such surgery might be the same as a DUI -- a death or a severely injured plaintiff. But the civil right to bring a lawsuit is different. One type of recklessness has unlimited noneconomic damages; the other does not.

There have been instances where doctors have mixed a surgery practice with alcohol abuse. [See the attached article.] It doesn't take a rocket scientist to see what those claims might have been. It has resulted in civil malpractice actions and license revocation proceedings, but no crimes being charged. We have no crime in Kansas for operating on a patient while under the influence of alcohol which can be pursued at the discretion of the county attorney.

Those are the problems I see with the "conviction of a crime" exception. There may be others. The doctor's lobbyists wrote SCR 1610. If they've not thought through this exception, it shows a poor job of conceiving the amendment in the first place.

Explanatory Section

The explanatory section is the final bit of information the voter will receive on this amendment before voting. What goes into the explanatory section is not haphazard. It is controlled by Article XIV, §1 of the state constitution. The constitution requires that while the explanation is to be "nontechnical," it must state "the intent or purpose" of the proposed constitutional amendment. Sec. 2 of SCR 1610 basically restates the definition of noneconomic loss, and does not state the intent or purpose of the constitutional amendment. Unless you comply with Article XIV, §1, at the very least even if this amendment passes the legislature, it is open to a lawsuit interpreting the completeness of the explanatory section.

Federal Supremacy Clause

It is unclear whether the 7th Amendment to the U.S. Constitution guarantees the right to a civil jury trial in federal diversity actions in Kansas involving state caps on awards. If it does, it would supersede the state constitutional amendment in federal diversity cases. The Commissioner of Insurance indicated last summer in testimony to the Special Interim Committee on Insurance that this problem could limit a constitutional amendment as an effective tool. Forty percent of our population lives in border counties. Cases with significant damages would simply be brought in federal court.

The question is whether a state legislature can limit what a federal jury acting under the 7th Amendment to the federal constitution can award in a common law malpractice action. In Boyd v. Bulala, 672 F. Supp. 915 (Virginia, 1987), a federal district judge answered that question "No." These issues are on appeal in the federal 4th Circuit.

Conclusion

KBA does not oppose valid statutory approaches to alleviating the insurance premium problems doctors face in Kansas. We've offered help in the past, and offer help now. You are taking giant strides in lowering malpractice premiums by phasing out the Fund and mandatory insurance. KBA Supports that. Part of our Kansas Plan includes experience rating of the physicians, a plan that was initially proposed by the Insurance Commissioner's Blue Ribbon panel on Medical Malpractice. We support that. We simply oppose SCR 1610 because we don't think it will work nearly as well as the legislative options you have in front of you.

MEDICAL MALPRACTICE

Issue: A Constitutional Amendment limiting jury recoveries in personal injury actions.

KBA Position: *The KBA is unalterably OPPOSED to any constitutional amendment designed or intended to permit the enactment, modification or repeal of rules of common law regarding the jury's role in determining liability or damages in personal injury actions.*

Rationale: A rapid increase in medical malpractice insurance premiums resulted in tort reform legislation in 1986. Such legislation included limitations on what juries could award in medical malpractice actions. In 1988 the Kansas Supreme Court ruled such limits were unconstitutional because they violated sections of the Kansas Bill of Rights which preserve the right to trial by jury. Some special interests now prefer a constitutional amendment to effect such change. The entire justification for tort reform is the effect such change might have on insurance premiums. Few persons can show limitations on awards will solve the malpractice crisis or lower premiums. Any benefit to society comes only at the expense of those few catastrophically injured Kansans. A constitution protects people from government; it limits governmental power. To amend the constitution grants the state legislature unchecked power and should not be used as an instrument for special interests to grant partial immunity to wrongdoers.

The essence of the time-honored and hard-won right to trial by jury is the ability of a jury to hear the evidence and then make a difference in the outcome of the trial. A constitutional amendment destroys that essence. The constitutions of Kansas and the United States both preserve the right to jury trial. To allow such important provisions to be amended for expedient and unprincipled ends would make our constitutional guarantees a hollow covenant.

Voters can speak for themselves

By Jerry Slaughter
Executive director
Kansas Medical Society

Your right to vote. That's the issue. Should Kansans be given the opportunity to vote on a constitutional amendment which authorizes the Legislature to enact tort reform laws?

Pro

We believe the voters should decide this issue. The Kansas Trial Lawyers Association and the Kansas Bar Association apparently don't want people to have access to their constitution, at least on this issue. While the contingency fee industry now rails against "tampering" with the constitution's "bedrock" principles, where were they two years ago? In 1986, Kansans "tampered" with their constitution six times; reversing long-standing prohibitions on gambling and liquor-by-the-drink, and ending uniformity under the law when it comes to property taxation. Where were these self-appointed defenders of the constitutional status quo then?

In court. Reaping a bounty provided by a generous tort system which commonly pays the contingency fee lawyer 40-50 percent of awards and settlements. You needn't look further for the reason lawyers oppose change in tort laws. Proposals designed to hold down excessive awards also hold down excessive rewards for lawyers.

Since 1986, after countless hours of fact-finding, study and debate, the Kansas Legislature and two different governors in three successive years approved laws setting reasonable limits on non-economic awards. The Legislature found that reasonable restraints on awards would stabilize premiums and still compensate people adequately for their losses. In fact, the state of Kansas was able to reduce the state-collected portion of malpractice premiums by 21 percent as a result of the 1986 reform laws. On June 3, 1988, the Kansas Supreme Court struck a blow against the Legislature's tort reform efforts, declaring that the state constitution did not permit limits on damage awards.

The court ruling sent a clear message to the Legislature, consumers, health-care providers and the business community in Kansas that even modest legislative intrusion into the court's absolute control over tort law would not be tolerated. In spite of compelling need for, and the public benefits of, statutory tort reform, it is clear that the Kansas Supreme Court will not allow the Legislature to impose any reasonable restraints on the tort system without first amending the state constitution.

During these years of dedicated legislative effort, the liability and insurance situation in Kansas has worsened. Many physicians have left the state or retired early, while others have been forced to reduce basic health care services in order to qualify for lower-risk, less-expensive liability insurance. Hospitals are closing whole departments, and face threats to their viability, especially in rural areas.

Businesses are compelled either to increase their prices or discontinue goods and services offered to consumers. At a time when many other states have passed successful tort reforms (at last count, 18 states had passed limits on non-economic damages), Kansas is seen by the business and professional communities as an unpredictable environment with an unstable tort system and a Legislature that has been prevented from establishing public policy in this vital area.

Today the legal system for resolving personal injury disputes remains unrestrained and very costly. Of the total dollars expended by Kansas medical malpractice insurers, less than half are actually paid to plaintiffs as compensation for their injuries. Transaction costs, particularly legal fees, consume the majority of medical malpractice insurance dollars. This unacceptable situation is characteristic of the liability environment in general.

Under the court's interpretations of the state constitution, the Legislature cannot limit the amount of money awarded to plaintiffs in personal injury cases without first amending the state constitution. Thus, the constitutional issue is whether the people of Kansas want the courts to have exclusive authority over tort liability issues or would like that power to be shared with their elected Legislature.

The proposed constitutional amendment would authorize the Legislature to enact laws that limit awards for "non-economic" damages only, such as pain and suffering. In cases involving crimes, such as drunken driving, the statutory limits would not apply.

The constitution of Kansas belongs to the people of Kansas. It is the written authority by which the powers of the public are delegated to the three branches of government. The people created the constitution, and only the people can change it. In order for the people to be able to vote on this most critical issue, two-thirds of the Legislature must vote to put the question on the ballot. If the people approve the amendment, the Legislature would then be authorized to re-enact the same or similar limits on non-economic damages that it has already passed.

The Legislature has tried for years to remedy the tort litigation crisis, only to be thwarted by the courts. In such cases, where ongoing disagreements exist between the legislative and judicial branches of government over establishing public policy, we must turn to the people for guidance and resolution.

We believe Kansans should be given the right to vote on the critical issue of tort reform.

Obstetrics Leads

Malpractice: Claims Down, Costs Are Up

BY ANDREW BLUM
National Law Journal Staff Reporter

THE WAR ON THE medical malpractice battleground continues to escalate, as lawyers for plaintiffs and insurers debate the significance of new figures showing that for the past several years the frequency of claims declined while their severity rose.

To no one's surprise, plaintiffs' lawyers discount the importance of the numbers — one describes them as "mumbo jumbo" — while defense attorneys who represent insurers say they seem to be part of a trend.

For example, St. Paul Fire and Marine Insurance — the country's largest insurer of hospitals — detailed in its 1988 annual report to hospital policyholders that the frequency of reported claims (except in California) dropped in 1987 for the second straight year, to 3.4 claims per 100 occupied beds, from 3.5 in 1986.

"While this short-term trend is encouraging, it remains to be seen if it is truly a change in long-term frequency trends or only a temporary lull," says Joseph B. Nardi, president of St. Paul's medical services division, which insures 1,500 of the nation's 6,821 hospitals, as well as 35,000 doctors and surgeons.

St. Paul says the severity of average cost per reported claim, capped at $100,000, increased to $17,330 in 1987, from $13,966 in 1986. (Severity includes claims paid, claims closed without payment, open claims and loss expenses. The company uses the $100,000 figure for rate-making purposes.)

Tort Reform Responsible?

St. Paul, reporting separately to physicians and surgeons, says frequency also dropped in 1987 to 15.4 claims per 100 doctors, from 17 in 1986; the current rate is the lowest since 1982. And, similar to its other figures, St. Paul notes, the severity of average costs, capped at $200,000, rose to $41,456 from $35,660.

"This is the first time we capped losses at $200,000; rather than $100,000, to report severity," says Mr. Nardi. "That is because more and more losses have exceeded the $100,000 level — another indication of the mounting costs of claims."

Some lawyers attribute the decline in the number of cases to tort reform, which resulted in, among other things, more stringent requirements for filing claims and smaller cases becoming less profitable for lawyers to bring. The growth in severity, according to observers, is attributable to a variety of factors including inflation, a more sophisticated plaintiffs' bar and greater public awareness of malpractice cases.

One plaintiffs' attorney, Bruce R. Pfaff of Chicago's Corboy & DeMetrio P.C., questions the reliability of St. Paul's figures. Because the insurer, in reporting claims frequency and average costs figures, didn't break out litigation costs, Mr. Pfaff says, "average cost per claim is meaningless as far as I'm concerned...That is no real measure as to what juries are doing."


Thomas Demetrio

Thomas A. DeMetrio, a name partner in the firm and president of the Illinois Trial Lawyers Association, says there is no such thing as a trend because juries view each case on its merits. Going one step further, he says, "Plaintiffs' lawyers don't spend their time assimilating that [average cost] type of information."

For one attorney, the explanation for the new figures is simple. Pamela A. Liapakis, of New York's Lipsig, Sullivan & Liapakis P.C. says: "Tort reform has made lesser claims so unprofitable for the attorney that attorneys can no longer take them."


Pamela Liapakis

Mr. Pfaff notes that in Illinois, a 1985 law requiring substantiation of claims has led to a reduction in their number. Under the law, an attorney filing a medical malpractice claim must attach a letter from a doctor saying the case has merit.

"Before 1985, a lawyer could interview clients and that afternoon file a complaint. That is bad practice," says Mr. Pfaff. "That accounted for a lot of cases without merit...There are far less of those now."


Bruce Pfaff

Statistically, Mr. Pfaff notes, awards are up — but so are medical costs. "It's kind of ironic that part of an award goes back to the medical profession to pay for treatment."

High Defense Costs

While plaintiffs' attorneys disagree with the insurers' views, it was the so-called 1975 insurance crisis that caused St. Paul to stop selling medical malpractice policies in New York state.

To fill that gap, doctors there formed New York's Medical Liability Mutual Insurance Co., the second-largest medical insurer, a non-profit company insuring 14,500 doctors and, more recently, 26 hospitals.

Medical Liability Mutual does not break out figures as does St. Paul, or on a year-by-year basis, but says the defendant doctor prevailed in 57.8 percent of all cases from July 1, 1975, through Sept. 30, 1988. That meshes with the fact that statistically, doctors generally do well before juries, winning 50 percent or more of the time.

The company reports that in the 12,303 cases that closed short of trial the defendant doctor won in 59.4 percent of the cases. The average defense

Top 10 Allegations by Frequency

Allegation	Number of claims	Average cost*
Surgery/postoperative complications	1,957	$51,115
Improper treatment/birth-related	933	$123,901
Failure to diagnose/cancer	768	$96,210
Surgery/inadvertent act	478	$48,862
Failure to diagnose/fracture or dislocation	415	$39,913
Improper treatment/fracture or dislocation	375	$48,676
Improper treatment/drug side effect	374	$53,197
Failure to diagnose/infection	350	$81,523
Surgery/inappropriate procedure	340	$51,461
Improper treatment/infection	332	$52,751

* The average cost includes the total value of the claim, including allocated legal expenses with no cap on individual claims.

Source: St. Paul Fire and Marine Insurance 1988 Report to Policyholders

cost was $6,958 without indemnity, while the average total payment in the cases $129,642.

In 3,742 cases closed at trial, the doctor won 52.7 percent of the time, with average cost of $26,601 without indemnity. In paid cases, the average total payment was $205,221.

Defense costs, meanwhile, were addressed in an October 1988 newsletter issued by Fort Wayne, Ind.'s The Medical Protective Co., a privately held company insuring 55,000 to 60,000 doctors and dentists in 24 states.

"It is currently fashionable, even among some professional groups, to criticize the cost of defending doctors," it says. "The true picture emerges when we look at the situation in detail."

"The total dollars for defense chew up about one-third of all the dollars paid out by our company," the newsletter says. "When the known contingent fee amounts of plaintiffs' attorneys are added to this, it appears that the patients themselves receive less than half the dollars being paid out by insurance companies."

St. Paul's hospital report, meanwhile, cites figures from Jury Verdict Research to show that average malpractice awards reached an eight-year high of $1.5 million in 1986. And, of 2,294 verdicts of $1 million or more from 1980 to 1987, 446 were medical malpractice cases.

The most expensive claims, St. Paul notes, are still found in obstetrics, with the average cost increasing to $84,932 from $73,387. It further points out that insured hospitals report more claims that are estimated to result in payments of $1 million or more.

A review of 16,568 claims reported by hospitals from 1983 through 1987 shows 16 were paid with a combined loss and defense cost of $1 million or more. Another nine claims remained open at the time of the report.

Those 25 claims compared with six cases from 1978 to 1982. And St. Paul adds, while the million-dollar claims represent a small percentage of closed claims, the number of large losses continues to increase.

And, looking at all claims involving doctors, surgeons and hospitals from 1978 to 1987, it reports 80 paid claims with a combined loss and defense cost of $1 million or more each and 50 more open.

According to St. Paul, the leading allegations by frequency included surgery/postoperative complications with 1,957 claims at an average cost of $51,115; followed by improper treatment/birth related, 933 claims, average cost $123,901; failure to diagnose/cancer, 768 claims, $96,210 average cost; surgery/inadvertent act, 478 claims, $48,862 average cost; failure to diagnose/fracture or dislocation, 415 claims and average cost of $39,913.

Other top allegations were improper treatment/fracture or dislocation, 375 claims, average cost of $48,676; improper treatment/drug side effect, 374 claims, average cost of $53,197; failure to diagnose/infection, 350 claims, average cost of $81,523; surgery/inappropriate procedure, 340 claims, average cost of $51,461; and improper treatment/infection, 332 claims, average cost of $52,751.

Profits an Issue?

Stepping back from sheer numbers, Medical Liability Mutual President Arthur J. Mannix Jr., a practicing doctor, says in the 1987 annual report that, "The heart of the [malpractice] problem is the increase in the cost of claims, claims which have not been restricted by any meaningful tort reform."

Mr. Pfaff says that is just a continuation of the effort by insurers to change the system to their advantage. "The problem of insurance companies making money is what he's addressing," he says.

"It's been shown in studies that insurance companies failing [to make money] or making a profit is determined by how well they do investing money and has far less to do with [litigation]," contends Mr. Pfaff.

However, Mr. Mannix, saying making money isn't as easy as it seems, cites a New York State Insurance Department study that reports "premium rates have climbed rapidly over the years, but have not kept pace with the combined increases in severity and frequency."

"Those who would like to perpetuate the myth that we collect premiums and earn investment income while paying only modest amounts to resolve claims," Mr. Mannix says, "should note that in 1987 indemnity and legal expense payments amounted to approximately $245 million and the company has now paid over $1 billion in losses and loss expenses."

His explanation for the frequency drop takes note of company policy resisting groundless claims. "This may be a significant factor in easing claim frequency," he says. "Our message is resoundingly clear in the legal community that we will not pay money unless a claim has merit."

Medical Protective takes a similar tack, claiming that more than half of the cases brought are without foundation — in almost all jurisdictions — and are resolved with little or no payment.

Discounting such trends, Edward P. Milstein of Lipsig Sullivan says he never considers frequency or severity. The only thing he thinks about is "what is the specific coverage" in a case because "the rest is meaningless."

Nonetheless, he adds, there is a disturbing trend in New York since passage of a 1986 tort reform package: the number of medical malpractice claims and Requests for Judicial Intervention have fallen drastically.

According to figures compiled by the New York State Office of Court Administration, there were 14,222 RJIs in 1986, but that fell to 7,926 in 1987. Mr. Milstein explains many of the 1986 filings were made to beat the tort reform deadline.

He points out that the decline continued through the first four months of 1988, when there were 1,469 RJIs. "If annualized that's 4,500...That explains the frequency drop."

Mr. Milstein says an additional problem facing plaintiffs' attorneys is another part of New York state tort reform that changed legal fees in medical malpractice cases from 33 percent to a staggered basis. Now, they are 30 percent on the first $250,000; 25 percent for the next $250,000; 15 percent for the next $250,000; and 10 percent of any amount more than $1.25 million.

'Classic' Cancer Cases

In Virginia, though, defense attorneys discount the tort reform explanation, notes John B. Russell of Richmond, Va.'s Browder, Russell, Morris & Butcher.

"I can't deny that, but it would not be applicable in Virginia," he says, pointing out that there is a damage cap of $1 million. "There are not that many cases like that."

Mr. Russell, chairman of the Defense Research Institute's Medical Professional Liability Committee, says St. Paul's figures seem about right from his experience defending doctors. "I had concluded in my own mind claims were more severe," he added.

To the surprise of no one, plaintiffs' lawyers scoff at the figures' importance, while defense attorneys say they're part of a trend.

"I can certainly say that severity has gotten considerably worse over the last two to three years," says Mr. Russell, who has seen fewer small claims and many more serious injury claims.

Gary K. Smith of Memphis, Tenn.'s Shuttleworth, Smith and Webb agrees severity is up but is disinclined to say frequency is down, citing a high concentration of medical facilities in the area. That, he says, results in a great deal of claims.

Mr. Smith, who handles cases for a doctor-owned company, State Volunteer Mutual, says the severity is due to higher verdicts in cases plaintiffs have won awards.

Like others, Mr. Smith has seen more cases being filed that would rarely have been claims a few years ago. "The classic," he says, is "a proliferation of cancer cases in medical malpractice cases."

Many of those are hard for plaintiffs to prove, and he notes that although awards overall are up, Tennessee is still a conservative jury state. "The overwhelming number of cases — medical malpractice and other — are won by the defendant," he adds.

While there is a general tendency for plaintiffs to achieve settlements in strong cases and for defendants to go to trial with favorable cases, Mr. Smith says doctors are a special breed in the courtroom.

"Doctors, more than the typical insured," he explains, "have their professional reputation on the line and are less likely to be agreeable to see a case settled for the sake of it going away."

A Practitioner's Guide to Tort Reform of the '80s:

What Happened and What's Left after Judicial Scrutiny

By Jerry R. Palmer and Martha M. Snyder

Introduction — Four Years of Legislation, 1985-1988

On June 8, 1966, a small group of law students studying for the Kansas bar examination emerged from the basement of Washburn Law School to see the devastation wrought by the most destructive tornado in the state's long history of tornadic activity. The landscape had totally changed; where buildings had stood, there was rubble. Where there had been long rows of evergreens, there was twisted debris and an overwhelming pungent smell.

Downed electric lines made the trip from the Washburn campus extremely treacherous, but as we looked to the east we saw the tornado pass from the city limits of Topeka and blue sky emerge. A brilliant sun was beaming through the settling dust. I was fortunate to have that experience at the very beginning of my legal career, better to appreciate what would happen in Topeka in the legislative sessions of 1985 through 1988 as the sun starts to shine through the settling dust.

In 1985 Governor Carlin signed a medical malpractice bill known as SB 110, which permitted evidence of collateral sources to be admitted in medical negligence trials.[1] The bill limited punitive damage awards to 25 percent of a defendant's gross income for any one of the previous five years or $3 million, whichever was less.[2] The legislation also required 50 percent of a punitive damage award to be paid directly to the Health Care Stabilization Fund.[3]

In 1986 another sweeping act concerning medical negligence was enacted. Its primary features were a $250,000 cap on non-economic loss and a $1 million overall cap[4] with a provision for catastrophic medical expense up to $3 million under certain conditions.[5] Also included were provisions for the admissibility of findings by panels,[6] restrictions on the qualification of witnesses to testify as experts,[7] and the structured payout of judgments.[8]

A potpourri of "reform" enacted in 1987 included (1) itemized jury verdicts,[9] (2) amendments to the Kansas Tort Claims Act[10] designed to overcome the impact of two Supreme Court decisions[11] and to establish the claims procedure for municipalities,[12] (3) an across-the-board punitive damage limitation,[13] (4) panels for all professional negligence actions,[14] (5) limitations on venue for persons suing public utilities and common carriers,[15] (6) a $250,000 pain-and-suffering cap,[16] (7) some limitations on liability for certified public accountants[17] and corporate directors[18] as well as (8) a bill immunizing volunteers under certain circumstances.[19]

At the close of the longest session ever, 1988 reform legislation resulted in modifications of the across-the-board punitive damage bill,[20] the adoption of an across-the-board collateral source bill,[21] and an extension of the $250,000 cap to cover all non-economic damages.[22]

In response to a perceived threat from the Kansas Supreme Court exercising its "check" in the Kansas constitutional government scheme, legislators toyed with a modest proposal to revise the Kansas Constitution to make the Article II powers of the legislature supercede the Bill of Rights when it came to tort reform legislation.

The Supreme Court of Kansas then had its chance to review the constitutional issues raised in two early

Footnotes

1. K.S.A. 1985 Supp. 60-3403.
2. K.S.A. 1985 Supp. 60-3402(d).
3. K.S.A. 1985 Supp. 60-3402(e).
4. K.S.A. 1986 Supp. 60-3407.
5. K.S.A. 1986 Supp. 60-3411.
6. K.S.A. 1986 Supp. 65-4904.
7. K.S.A. 1986 Supp. 60-3412.
8. K.S.A. 1986 Supp. 60-3409.
9. K.S.A. 1987 Supp. 60-3408 and K.S.A. 1987 Supp. 60-249(a).
10. K.S.A. 1987 Supp. 75-6104(d) and (e).
11. Fudge v. City of Kansas City, 239 Kan. 369 (1986) and Allen v. Kansas Department of S.R.S., 240 Kan. 620 (1987).
12. K.S.A. 1987 Supp. 12-105b(d).
13. K.S.A. 1987 Supp. 60-3701.
14. K.S.A. 1987 Supp. 60-3501.
15. K.S.A. 1987 Supp. 60-606.
16. K.S.A. 1987 Supp. 60-19a01(b).
17. K.S.A. 1987 Supp. 1-402.
18. K.S.A. 1987 Supp. 17-6002(b)(8).
19. K.S.A. 1987 Supp. 60-3601.
20. H.B. 2731.
21. H.B. 2693.
22. H.B. 2692.

challenges, **Farley v. Engelken**, 241 Kan. 663 (1987) and **Malpractice Victims Coalition, et al. v. Bell**, ____ Kan. ____ **(June 3, 1988). In Farley**, the Court ruled unconstitutional those provisions of the 1985 Act which revised the collateral source rule in medical malpractice actions as repugnant to the equal protection provisions of Section 1 of the Bill of Rights.

In **Malpractice Victims**, the Court found violations of the "remedy by due course of law" and "right of trial by jury" provisions of the Kansas Bill of Rights, thus overruling the legislature's attempts to cap non-economic and overall losses and to require structured judgments.

The subject of attorney fees, which had been addressed as a legislative matter in 1985, was ultimately handled by the Supreme Court in Model Rules of Professional Conduct (M.R.P.C.) 1.5(d) in 1988.

What the Court has said in **Farley** and **Malpractice Victims** should preordain what will happen to the limitations on damages imposed in both 1987 and 1988. It seems appropriate then, as the dust settles after the adjournment of the legislature, to try to sort out which laws are currently in effect and how a practicing lawyer might choose to deal with them in the representation of clients. This article will not discuss the subjects of workers' compensation or no-fault vehicle insurance.

That effort included a $6.5 million national advertising campaign to "change the widely-held perception of an insurance crisis to a perception of a lawsuit crisis."

A Brief and Unobjective Overview of the Tort Reform Movement

Following a meeting of the National Association of Insurance Commissioners in December of 1984, the Insurance Information Institute, the public relations arm of the industry, announced an "effort to market the idea that there was something wrong with the civil justice system in the United States."[23] That effort included a $6.5 million national advertising campaign to "change the widely-held perception of an insurance crisis to a perception of a lawsuit crisis."[24]

The basic theme also adopted by the American Tort Reform Association (ATRA) was that judges had radically changed tort law to stack the deck against defendants, leading to an explosion in the number of tort lawsuits and in the amounts that juries awarded to plaintiffs. That development had, in turn, resulted in huge losses to the insurance industry which necessitated premium increases.

In February 1986 the Department of Justice released its report, "The Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability."[25] The document was intended to promote the adoption of a proposed package of tort reform measures.

While the task force had not accumulated any data of its own, it relied upon the interpretation of selected data. The findings of the working group essentially adopted the ATRA position. A letter from President Reagan also joined the call for tort reform.

The Kansas Tort Reform Association, an outgrowth of the Kansas Association of Commerce and Industry, and the Kansas Medical Society were the primary carriers of "tort reform" in the Kansas legislature.

The 1988 agenda of the Kansas Medical Society, which became the focus of the 1988 legislature's tort reform movement, in general included four proposals: (1) a cap on non-economic damages at $250,000, (2) a structured judgments bill, (3) a limitation on punitive damages, and (4) a collateral source bill.

The premise in the 1985 legislature for tort reform focused on the affordability of liability insurance and to some extent its availability. This persisted through 1987. However, by 1987, the markets were turning around, and the liability insurance business had become quite profitable again. This fact was exerting the downward pressures on rates, except in the medical malpractice area where rates continued to ascend.

Also by 1987, some of the information concerning the litigation explosion was tempered by the National Center

23. National Underwriter, Dec. 21, 1984 at 1, 2 and 46.
24. Journal of Commerce, Mar. 19, 1986 at 1, 20.
25. U.S. Department of Justice publications.
26. See, for example Smith v. Dept. of Insurance, 507 So.2d 1080 (Fla. 1987); Duren v. Suburban Community Hospital, 24 Ohio Misc.2d 25, 482 N.E.2d 1358 (1985); Baptist Hospital of Southeast Texas, Inc. v. Baber, 672 S.W.2d 296 (Tex. App. 1984); and Boyd v. Bulula, 672 F.Supp. 915 (W.D. Va. 1987).

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for State Courts' report of actual figures on litigation in the state courts. The Kansas Supreme Court statistics for 1986 and for 1987 showing actual awards also diminished the hysteria surrounding the hypothecated "run-away jury."

In 1988 attorneys general in several states filed a class action lawsuit against members of the insurance industry claiming that it had artificially created a crisis in various lines of insurance. Popular magazines and the working press started to question more closely the tort reformers, and the pace of enactments of tort reform measures around the country dropped off in 1988.

In 1988, attorneys general in several states filed a class action lawsuit against members of the insurance industry claiming that it had artificially created a crisis in various lines of insurance.

At approximately the same time, the supreme courts of several states and United States district courts started to dismantle the enactments of the preceding years as being offensive to state constitutions, particularly those provisions dealing with open courts and remedies by due course of law.[26]

Enactments Found to be Unconstitutional and Others Most Likely to Fall

The first significant constitutional test of Kansas tort reform legislation was the case of **Farley v. Engelken**, *supra*, decided July 17, 1987. This was a consolidated appeal of three cases and dealt with a statute providing that evidence of any collateral source payment, such as insurance benefits, workers' compensation payments and social welfare benefits, was admissible in medical malpractice actions and that the jury should consider such payments in determining damages.

The case was decided by a plurality. Justice Herd, joined by Chief Justice Prager, found that the statute violated the equal rights guarantee of the Kansas Constitution under Section 1 of the Bill of Rights. They determined that the statute impinged on important interests and was therefore subject to a heightened level of scrutiny described as the "intermediate level" of scrutiny.

These justices viewed the malpractice victims as being politically powerless and a "semi-suspect" group. Such groups traditionally had received enhanced judicial review when legislation affected their rights. Justices Prager and Herd declined to look at the Section 18 "remedy by due course of law" provision of the Bill of Rights as they felt that was unnecessary. They believed that if a crisis existed the remedy should not be placed on the shoulders of malpractice victims, rather it was more appropriate that it be placed on the "negligent health care providers."[27]

Justices Lockett and Allegrucci, issuing a separate concurring opinion, disagreed with the use of the intermediate use of scrutiny because they viewed this as dealing only with an evidentiary issue. They did find the legislation to be "unjust and patently unfair and not even meeting the minimal requirements of a rational basis test."

Justice Holmes, dissenting for the rest of the Court even though expressing serious doubts that the reform statute would accomplish the results sought by the legislature, took the view that the rational basis standard of review applied and that the enactment passed muster under the test.

Simultaneously being processed at the district court level was the challenge to the 1986 Act in **Malpractice Victims Coalition, et al. v. Bell.** More recently, the decision of the trial court was substantially upheld in the June 3, 1988 opinion by the Kansas Supreme Court, *supra*.

When certain sections of the 1986 Act were reviewed by the high court, five of the justices agreed that the provisions for caps ($250,000 non-economic loss, $1 million overall, up to $3 million for medical expenses) as well as the provision dealing with structured judgments offended Section 5 of the Kansas Constitution's Bill of Rights pertaining to the right to trial by jury as well as Section 18's guarantee of a remedy by due course of law. No equal protection analysis was deemed necessary.

The way in which the Supreme Court dealt with the 1986 medical malpractice legislation clearly implies that the portions of the 1987 and 1988 Acts pertaining to the $250,000 caps on pain and suffering and non-economic loss, respectively, could not be found constitutional.

The Current Law

What follows is a description of the bills or the portions of bills that remain intact as of July 1, 1988 and some thoughts about practical application of these laws.

The 1986 House Bill 2661 provided limitations of $250,000 for all non-economic damages and total recovery of one million dollars from all providers of medical services,[28] subject to a "pinhole" provision,[29] which provided for a supplementary grant equivalent to no more than $2 million upon application by the plaintiff for future medical care.

The Supreme Court in **Malpractice Victims Coalition et al. v. Bell** struck down all of this language as violating the Kansas Constitution's Bill of Rights Section 5, guaranteeing the "inviolate" right to trial by jury, and Section 18, guaranteeing "remedy by due course of law."

The Court found that no adequate substitute remedy had been provided, and thus these sections were unconstitutional.

The majority distinguished the malpractice legislation from enactments such as Workers' Compensation and the No-Fault law because in those cases the legislature had initially provided an adequate substitute remedy. When the argument for substitute remedy raised by the appellants (the Commissioner of Insurance, the Kansas Hospital Association and the Kansas Medical Society) was considered, the court found that no adequate substitute remedy

27. 241 Kan. at 667.
28. K.S.A. 1986 Supp. 60-3407.
29. K.S.A. 1986 Supp. 60-3411.

had been provided, and thus these sections were unconstitutional.

There were, though, other sections of the medical negligence law which were not addressed in the case or considered by the Court and which remain viable. This is not to say, however, that successful constitutional attacks could not be made against them. The provisions which remain and are controlling are as follows:

a. **Itemized verdict:** K.S.A. 60-3408 provides that the verdict shall specify the period of time over which the payment for future economic losses will be needed. This may have been a predicate to the caps on liability in K.S.A. 60-3409 which were struck down in the **Malpractice Victims** Opinion, but K.S.A. 60-3408 was not specifically addressed.

The lawyer in a malpractice case should make a record noting the apparent conflict between the language in the malpractice act and K.S.A 60-249a pertaining to itemized verdicts in personal injury actions.

b. **The qualification of expert witnesses:** Under the act, the requirement for medical expert testimony will not be met unless the witness called devotes at least 50 percent of his or her professional time for the two-year period next preceding the incident at issue to "actual clinical practice" in the same profession in which the defendant is licensed.

This statute references the standard of care of a "practitioner of the healing arts." Presumably that means "health care providers" as defined within K.S.A. 1987 Supp. 40-3401, which includes the individuals licensed by the Board of Healing Arts such as optometrists, podiatrists, pharmacists and certified registered nurse anesthetists. It would arguably not then cover registered nurses and licensed practical nurses.

c. **Settlement conferences:** A settlement conference must be held not less than 30 days before a trial and must be conducted by the trial judge or a designee of the trial judge. Attorneys who conduct the trial and all parties or persons with authority to settle the claim are required to attend unless excused by the Court for good cause shown. To protect the sanctity of the process, offers, admissions and statements made in conjunction with the settlement conference are not admissible at trial or in any other action.[30]

d. **Health Care Provider insurance coverage:** K.S.A. 40-3403(e) was amended in 1986 to reduce the coverage from $3 million for any one judgment or settlement per provider with a $6 million limitation for an entire fiscal year down to a $1 million limit on the Fund per occurrence per provider, in accordance with the limitation of liability of $1 million per occurrence.[31] Therefore, after noting that the legislature could do anything with the Health Care Stabilization Fund that it wanted to including abolition, the Court in **Malpractice Victims** determined that no modification would be recognized until further enactments by the legislature.

e. **Vicarious liability:** The side issue which the district judge had considered in **Malpractice Victims**, but which had not been raised by any party, was whether or not there could be a limitation of vicarious liability by health care providers who were qualified for coverage. The appellate court took a neutral position on that question and found that it procedurally was not correct for the trial court to have decided that issue.[32] Thus, the question of whether a physician's professional corporation or partnership needs to be named as a party remains an open question.

f. **Screening panels:** The previous provisions excluding evidence of the screening panel report were changed in K.S.A. 65-4904 to provide that the written report of the screening panel or testimony of members of the panel shall be admissible in any subsequent legal proceeding.

Some lawyers, on behalf of claimants, found this to be a pretty cheap way to get an expert opinion.

Other amendments deal with the panel's compensation and allocate the cost of the panel to the party in whose favor the majority rules. When the panel makes no recommendation, each side pays one-half the cost. Some lawyers, on behalf of claimants, found this to be a pretty cheap way to get an expert opinion. A panel would be requested and if the plaintiff won the plaintiff would pay the relatively low cost involved in the panel proceeding and automatically have a favorable piece of evidence which was admissible plus at least two experts available to be subpoenaed. So it appears that one method intended to diminish litigation may actually have contributed to increasing the number of claims.

Other Personal Injury Actions After July 1, 1988

What follows is a description of the bills or the portions of bills that remain intact as of July 1, 1988 and some thoughts about practical applications of these laws.

1. **Attorney fees:** The tort reform agenda called for a regulation of attorney fees. The legislature declined to limit attorney fees even in the area of medical malpractice cases where funds would be collected from the Health Care Stabilization Fund (a live issue until the final hours of the 1988 session).

However, when the Supreme Court adopted the rules relating to the discipline of attorneys published March 1, 1988, M.R.P.C. 1.5 did address some of the issues and in a sense represents the Court's exercise of jurisdiction in the field of contingency fees after a special committee of the Judicial Council considered the issue.[33]

Another attorney fee provision, relating solely to medical negligence actions, was a 1986 amendment to K.S.A 7-121b, which provided that both parties' attorneys' fees be approved by the judge prior to final district court level disposition of the case, "after an evidentiary hearing" where

30. K.S.A. 1987 Supp. 60-3413.

31. Malpractice Victims Coalition, et al. v. Bell, et al., Slip Opinion No. 61,945, dec'd June 3, 1988, p.27.

32. Id, at p. 29.

33. The result is subparagraph d, and its requirements are that (a) the contingency fee agreement be in writing, (b) it contain a statement of the method by which the fee will be determined and the amounts that accrue to the lawyer as a result of settlement, trial or appeal, (c) litigation and other expenses must be deducted from the recovery before computation of the fee, (d) the attorney provide the client with a written statement showing the outcome of the matter, the client's share and the method of determination, (e) the statement must advise the client of the right to have the fee reviewed by an appropriate court, and (f) the court has the authority to determine whether the contract is reasonable. If the court makes the predicate finding that the fee is not reasonable then the court sets and allows a reasonable fee.
It should be noted that contingent fees are not the only fees subject to being reviewed by the court, but it is the only fee arrangement that requires a disclosure by the attorney to the client in writing that the client has the right to have the fee reviewed by a judge.

the reasonableness of the fees would be determined.[34] This statute sunsets July 1, 1989, unless re-enacted.

2. **Panels for all professionals:** With the liberalized use of pretrial screening panels, the 1987 legislature adopted malpractice liability screening panels for all professional licensees.[35]

Either party may file a memorandum with the district court, whether or not a lawsuit has been filed, and the court shall convene a professional malpractice screening panel.

Each side designates a person licensed in the same manner as the defendant. A third person is selected by the parties or, if joint selection fails, the court makes the appointment. The court also appoints a lawyer as a non-voting member to chair the panel. The licensing agency is responsible for maintaining a current list of the licensees available to serve on the screening panels. The panel is directed within 90 days after it has commenced to make a written report on the issue of whether or not the licensee departed from the standard of conduct in a way which caused the complaining party damage.

Written opinions are to be supported by corroborating references to published literature and other relevant documents. The panel is charged with the responsibility of notifying the parties as to when their decision is to be handed down and within seven days of the decision provide a copy of the opinion with any concurring or dissenting opinions to the parties, their lawyer and to the Commissioner of Insurance.

As in medical negligence actions, this screening panel report is admissible in any subsequent legal proceeding and either party may subpoena any or all members of the panel as witnesses for examination relating to these issues at trial. A party may reject the final determination and proceed with the action in the district court.[36] Costs are also assessed, as with medical screening panels, to the prevailing party.

The statute of limitations is tolled by the filing of a memorandum requesting the convening of the panel until a period 30 days after the screening panel has issued its written recommendation.

3. **Modifications to the Collateral Source Rule:** After the 1986 medical malpractice revisions of the Collateral Source Rule were struck down by the Supreme Court in **Farley v. Engelken, supra,** the Kansas Medical Society proposed legislation that would affect all tort litigation in compliance with the invitation extended by the concurring justices.

The legislative history of this particular bill is so complicated that little could be gained from a research standpoint except to review the written and oral testimony of Washburn University Law School Dean (then Professor) James Concannon, who is primarily responsible for the portions of the act that integrate this collateral source rule with the Kansas Comparative Negligence Act.[37]

Some highlights of the bill are:

a. Collateral source benefits are defined as benefits which have been received or "are reasonably expected to be received by the claimant" for expenses incurred or reasonably expected to be incurred. Excluded are life or disability insurance benefits or benefits gratuitously bestowed on the claimant. Neither does the term include any services or benefits for which there is a valid lien or subrogation interest (such as workers' compensation, P.I.P. benefits under the no-fault automobile insurance act and benefits from the Veterans Administration) nor are amounts from criminal restitution or compensation paid through victims' assistance considered collateral source benefits.

b. The cost of collateral source benefits includes the amounts paid or to be paid in the future to secure the benefit (either paid by the claimant or someone on behalf of the claimant). If the amount of a benefit paid (or to be paid) encompasses amounts paid over a period of time which enhance the benefit, then those amounts paid shall also be admissible in determining the cost.

c. Net collateral source benefits are then defined as "collateral source benefits" minus cost of collateral source benefits.

d. The evidence of collateral source benefits or their cost is inadmissible in cases involving a demand for judgment less than $150,000.

e. The trier of fact determines the net collateral source benefits received and those reasonably expected to be received in the future. If the trier of fact is a jury, that is done by itemization of the verdict.

f. The court has the duty to reduce the judgment by the amount of the net collateral source benefit but then takes into consideration certain adjustments which include: (1) the percentage of comparative fault attributed to the claimant; (2) the uncollectible portion of a verdict caused by the comparative negligence of parties joined by defendants (such as an employer covered by Workers' Compensation); (3) losses due to the claimant's inability to recover because of the insolvency or bankruptcy of a "person;" (4) the amount the award of damage has been reduced because of a statutory limit upon the recovery of damages (for example, the wrongful death non-pecuniary limit of $100,000).

The evidence of collateral source benefits or their cost is inadmissible in cases involving a demand for judgment less than $150,000.

g. The Act affects only those causes of action accruing on or after July 1, 1988.

In addition, the Act repeals K.S.A. 60-3403, the Medical Malpractice Collateral Source Rule, which had previously been found unconstitutional by the Kansas Supreme Court. The practical effect of the Act is to reduce the verdict by the amount of medical insurance paid or reasonably expected to be paid by private medical insurance such as Blue Cross Blue Shield.

34. The old law had only two criteria by which the fee would be judged: (a) the nature and difficulty of the issues involved in the case, and (b) the time reasonably necessary to prepare and present the case. The new law uses the same eight criteria as are found M.R.P.C. 1.5 on the determination of a reasonable fee, so in addition to the time and the nature of the issues inquiry, the following are relevant: (a) the skill requisite to perform the legal service properly, (b) preclusion of other employment, (c) the fee customarily charged in the locality, (d) the amount involved and the result obtained, (e) time limitations imposed by the client or the circumstances, (f) nature and length of professional relationship with the client, (g) the experience, reputation and ability of the attorney performing the services, and (h) whether the fee is fixed or contingent.

35. K.S.A. 1987 Supp. 60-3501 et seq.

36. K.S.A. 1987 Supp. 60-3506.

37. K.S.A. 1987 Supp. 60-258a.

Does the employer's payment count? The argument can be made by claimant that it is part of an employment contract and it is paid to him in lieu of other compensation. The claimant could argue that by being a member of a group the payment for the entire group should be taken into consideration.

A further argument would be that it is not just the premiums from the date of the accident through the date of the expected last payment by the medical insurance that should be considered, but all payments for medical insurance that have ever been made by or on behalf of the individual claimant. Defendants might raise issues concerning the appropriate amount of the payment in the case of a family rather than individual plan.

Representative Wunsch, chair of the House Judiciary Committee, was the author of that portion of the cost section dealing with "amounts paid over a period of time, thus making the benefit greater." It is uncertain, though, whether any evidence exists in the record as to what he meant by those words or what type of insurance he had in mind. The phrase is left unclear in its application and might encompass various federal programs that have no subrogation rights and state welfare benefits.

This is a bill that may well deserve to be revisited by the legislature and will certainly be subject to considerable interpretation as the various examples of collateral source benefits and the payments for them are offered in evidence at the district court level. Presumably the act will apply to actions in the U.S. District Courts.

4. **Punitive Damages:** There are three punitive damage bills. K.S.A. 1987 Supp. 60-3402 was in effect from July 1, 1985 up to, but not including, July 1, 1988 for causes of action occurring between those dates in medical negligence actions. Its principal provisions are as follows: (a) bifurcated trial — the trier of fact first determines, along with all other issues, whether or not any exemplary damages should be allowed. If the jury finds in the affirmative, then a separate proceeding is conducted to the court to determine the amount of the damages to be awarded.

Punitive damages cannot be awarded against the principal or employer unless the conduct was authorized or ratified by a person empowered to do so.

(b) At the separate subsequent hearing, the court will consider evidence of the financial condition of the defendant, including gross income earned from professional services in the five years next preceding the wrongful act. There is no explanation of other evidence that might be admitted except the limitation on the defendant's gross income.

(c) The burden of proof for the trier of fact as to whether any damages should be awarded is "clear and convincing evidence" that the actions of the defendant toward the plaintiff were "willful conduct, wanton conduct, fraud or malice."

(d) The amount of punitive damages is limited to 25 percent of the annual gross income from professional services based on the highest annual income within the five-year period before the act, but, in no event can a punitive damage award exceed $3 million.

(e) Of the punitive damages awarded, 50 percent goes to the plaintiff and 50 percent is paid to the state treasurer for deposit in the Health Care Stabilization Fund.

(f) Punitive damages cannot be awarded against the principal or employer unless the conduct was authorized or ratified by a person empowered to do so. This rule also applies to a professional corporation.

The second punitive damages act is K.S.A. 1987 Supp. 60-3701, passed in 1987. This statute applies to all actions other than medical malpractice actions. Essentially the 1988 session of the legislature simply amended the 1987 act to include health care providers in the third punitive damages bill, effective July 1, 1988.

The principal features of the across-the-board punitive damages act are as follows:

(a) The trier of fact shall determine, concurrent with all other issues, whether punitive damages shall be allowed. If they are, then a separate proceeding is conducted by the court to determine the amount of the damages.

(b) What the court may consider at this separate subsequent hearing is the likelihood at the time of the wrongful act that "serious harm would arise from the defendant's misconduct;" the defendant's awareness of the likelihood that harm would result from the misconduct; the profitability of the misconduct; the duration of the misconduct and any intentional concealment thereof; the attitude and actions of the defendant after discovering the misconduct; the financial condition of the defendant; and the "total deterrent effect" of other damages either compensatory or exemplary or fines to which the defendant has been or "may be subjected."

(c) The burden of proof in the initial phase of the trial is "clear and convincing evidence" that the defendant acted toward the plaintiff with willful conduct, wanton conduct, fraud or malice.

(d) Vicarious liability for punitive damages follows the same rule as the 1985 act requiring ratification of the act by the principal.

(e) The award cannot exceed 100 percent of the annual gross income in the highest year out of the last five years next preceding the wrongful act or $5 million, whichever is less. However, if the court finds the profitability of a defendant's misconduct exceeds or is expected to exceed these limitations, then the court may award an amount equal to one and one-half times the amount of profit that the defendant gained or is expected to gain by reason of the misconduct.

The statute also changes the way in which matters are pled by amending K.S.A. 60-209. In the original pleadings, no claim for punitive damages may be asserted. Plaintiff must later file an amended pleading claiming punitive damages on motions supported by affidavits that plaintiff has established a "probability that plaintiff will prevail on the claim." The motion must be filed at or before the pretrial conference.

Practitioners should note that most probably the procedure affects any case filed after July 1, 1988. A question arises as to whether this applies to cases filed in the U.S. District Court. A question arises as to how this applies to cases filed in federal court, i.e. whether the provisions are

procedural or substantive in nature. The 1987 law affects all personal injury actions arising after July 1, 1987 for non-medical malpractice cases and all cases arising after July 1, 1988.

It is worth noting that there is no severability provision in the statute. This becomes significant in view of the fact that punitive damages are to be assessed by the court and not by the jury. One who confronts the limitations of these statutes should consider the implications of **Malpractice Victims Coalition, et al. v. Bell**, supra, and the discussion of the Kansas Constitution's Bill of Rights §5 that the right to trial by jury remain inviolate.

There may be a doubtful claim of right to collect exemplary damages. However, the language of §5 of the Bill of Rights, as it has been interpreted, may have grave implications for the constitutionality of all three punitive damage bills and should be researched by counsel confronting these problems.

5. **Itemization of Verdicts:** K.S.A. 1987 Supp. 60-249(a) provides that in personal injury actions the trier of fact will itemize as follows: (a) non-economic injuries and losses — including pain and suffering, disability, disfigurement and any accompanying mental anguish; (b) reasonable expenses of necessary medical care, hospitalization and treatment received; and (c) economic injuries and losses other than medical expenses. The court is advised to instruct the jury only on those categories of damages set forth in P.I.K. Civil 2d 9.01 "upon which there is some evidence to base an award."

The statute provides that further itemization may be required if another statute requires breaking the injuries and damages into those sustained to date and those for injuries and losses "reasonably expected to be sustained in the future."[38] A question for future resolution is whether "reasonably expected" is a lesser standard than "more probably than not."

6. **Venue Over Public Utilities, Common Carriers and Transportation Systems:** The 1987 amendment to the statute[39] provides that public utilities, common carriers or transportation systems may be sued for liabilities, penalties or forfeitures in any county in which the entity operates regularly. Subsection b requires that personal injury or wrongful death actions shall be brought either in the county in which the injury occurred or in the county in which the plaintiff resided at the time of the injury. The practical effects of this statute will be to reduce the amount of litigation in Wyandotte County, Kansas and to prevent cases arising in rural areas from being filed in the urban counties.

7. **Modifications to the Tort Claims Act:** Two Supreme Court opinions raised concerns in the 1987 session of the legislature. They were the cases of **Fudge v. City of Kansas City**, 239 Kan. 369 (1986) and **Allen v. Kansas Department of S.R.S.**, 240 Kan. 620 (1987).

The response to **Fudge** was to adopt a new Section (d) to K.S.A. 75-6104 exempting from liability the following: "adoption or enforcement of, or failure to adopt or enforce, any written personnel policy which protects persons' health or safety unless a duty of care, independent of such policy, is owed to the specific individual injured, except that the finder of fact may consider the failure to comply with any written personnel policy in determining the question of negligence."

The intent was to overcome that part of **Fudge** where the court based liability on the violation of a personnel policy requiring officers to take a suspected drunk driver into custody. In the **Fudge** situation, an apparently intoxicated driver was not detained by officers and subsequently caused a head-on automobile collision with the plaintiff. The jury assessed a percentage of fault to the City of Kansas City, Kansas.

The new statute seems to require that some common law duty pre-exist to render the personnel policy admissible on the subject of negligence.

The new statute seems to require that some common law duty pre-exist to render the personnel policy admissible on the subject of negligence.

The response to the **Allen** case was a modification of the discretionary function clause in the exemptions to liability section. That exemption now reads, "any claim based upon the exercise or performance [of] or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee, whether or not the discretion is abused and regardless of the level of discretion involved."[40]

The **Allen** case involved a Social and Rehabilitation Services client who had vomited in a hallway in a building where S.R.S. leased space. The building management failed to respond to the request from S.R.S. to clean up the mess. Someone from S.R.S. did the cleaning, and thereafter plaintiff slipped and fell on the patch of floor which had not been cleaned properly. S.R.S. was held liable for the negligent cleaning even though it had no duty under the lease to clean this common area adjacent to its leased space.

It is interesting to compare the legislative remedy with the definition of "discretionary function" that was adopted by the Kansas Supreme Court in **Hopkins v. State.**[41] The Court reasoned at page 610, "Discretion implies the exercise of discriminating judgment within the bounds of reason. . . . It involves the choice of exercising of the will, of determination made between competing and sometimes conflicting considerations. Discretion imparts that a choice of action is determined, and that action should be taken with reason and good conscience in the interest of protecting the rights of all parties and serving the ends of justice."

Governmental discretion is an esoteric subject and deserving of a separate treatise. The language that has been used to attempt to overcome the impact of **Allen** does not seem to fit, and the word "level" is bound to be troubling. It presumably is meant to imply something about whether a person is a low "level" employee versus a supervisory "level" employee. It could equally apply to an agency director

38. K.S.A. 1987 Supp. 60-249a(b).
39. K.S.A. 1987 Supp. 60-606.
40. K.S.A. 1987 Supp 75-6104(e).

who decides on a reorganization plan for the agency (a high "level" decision) rather than the same person's decision on the number of paper clips to order (a low "level" decision).

The issue of abuse of discretion begs the question. If one exercises a discretionary function and does not abuse discretion, liability does not follow. If one abuses one's discretion, and the act was within the terminology "discretionary function," then the issue of abuse is irrelevant because the "function" itself is exempt. It is extremely hard to predict how this language will be asserted as a defense and even more questionable as to what an appellate court will do when it tries to construe this language for application to a given set of facts.

A new exemption[42] to the tort claims act excludes claims for damages arising from the performance of certain community service work (except for operation of motor vehicles). Community service work is defined as work performed by a person as a result of a diversion contract, court ordered supervised community corrections program, condition of probation or other court ordered disposition.[43]

Other sections of the law were liberalized to assist governmental employees in obtaining reimbursement of their attorney fees incurred in defending tort claims.[44]

A tort claims procedure against "municipalities" was enacted by amending K.S.A. 12-105b. The definition of "municipalities" under K.S.A. 105a was expanded greatly.

The new provision requires a written notice "before commencing such action."[45] The notice is to be filed with the clerk of the governing body of the municipality and it should contain:

There is a prohibition on commencing a tort action for 120 days after the notice has been filed.

- name and address of the claimant and the claimant's attorney.
- a concise statement of the factual basis of the claim with date, time, place, circumstances and the description of the negligent act,
- name and address of public employee involved,
- a description of the nature and extent of the injury claimed, and
- a statement of the amount of monetary damages claimed.

"Substantial compliance" with these provisions is required.

There is a prohibition on commencing a tort action for 120 days after the notice has been filed. The statute provides that a claim is "deemed denied" if the municipality fails to approve the claim within the 120-day period, provided settlement has not been reached. The statute of limitations that would ordinarily have applied to the claim still applies, except that if compliance with a provison for the notice would otherwise result in the barring of the action such time period shall be extended by the time period required for compliance with the provisions of the section.

Practitioners should consider a number of traps for the unwary. The first occurs when the claim is filed and the 120 days run shortly before the statute of limitation expires. In that situation, prudence would require an immediate filing upon the denial.

A second trap is where the 120 days run or the denial itself is made after the statute of limitation has expired. There is no time set for extension within which to file nor is a reasonable period even suggested. Certainly a filing on the same day as the denial would comply with the statute, but anything beyond that is going to create some jeopardy for the plaintiff and for plaintiff's counsel.

Another approach may be to recognize that the statute of limitation is only a defense to be pled by the municipality and to obtain an agreement from the governing board that no such defense will be raised in consideration of plaintiff's forbearance of suit until a date certain.

8. **Immunities and Limitations of Liability:**

a. **Qualified immunity for volunteers** K.S.A 1987 Supp. 60-3601 provides for the immunity from liability of volunteers of certain non-profit organizations. Non-profit organizations are those recognized under 501(c) of the Internal Revenue Code. "Volunteer" includes the unpaid person who works with the non-profit organization either in the executive director or other agency role but does not include those who deliver health care services to patients in a medical care facility.

If these non-profit organizations carry general liability coverage, their volunteers are immune from liability for their acts or omissions not constituting willful or wanton misconduct or other intentionally tortious conduct. If the volunteer is required to be insured by law (such as maintenance of minimum limits on an automobile), then the volunteer's liability is extended only to the extent of insurance coverage.

Volunteers who are in an executive or directorial capacity are not vicariously liable unless they ratify the type of act for which the volunteer would be liable (willful, wanton, intentional acts). Essentially, the statute does not operate to limit liability where insurance is already in place but requires the organization to have general liability insurance coverage if it seeks to have its volunteers qualify for immunity within the act.

b. **Special rules for CPAs:** Certified public accountants obtain some limitation of their liability under K.S.A. 1987 Supp. 1-402 and 1-403. The limitation is a restriction on standing to bring such claims.

The plaintiff must have directly engaged the CPA or the firm to perform the professional accounting services, unless the defendant knew at the time of the engagement or the client agreed with the professional during the period of service that the work product would be made available to the plaintiff. This understanding must have been memorialized in writing and the defendant must have known the plaintiff intended to rely upon the professional accounting services rendered in connection with specified transactions described in writing.

c. **Limits on personal liability of corporate directors:** Corporate directors obtained some special language and a modification of K.S.A. 1987 Supp. 17-6002(b)(8). This sec-

41. 237 Kan. 601 (1985).
42. K.S.A. 1987 Supp. 75-6104(s).
43. K.S.A. 1987 Supp. 75-6102(e).
44. K.S.A. 1987 Supp. 75-6108(f).
45. K.S.A. 1987 Supp. 12-105b(d).

tion permits in the articles of incorporation a provision eliminating or limiting the personal liability of a director to the corporation or its stockholders, policy holders or members for monetary damages for breach of fiduciary duties as a director.

Corporate directors obtained some special language and a modification of K.S.A. 1987 Supp. 17-6002(b)(8).

The provision is limited though in that it may not eliminate the liability of a director for:

- breach of the director's duty of loyalty to the corporation, its shareholders, policy holders or members;
- acts or omissions not in good faith which involve intentional misconduct or a knowing violation of the law;
- violations under K.S.A. 17-6424 (relating to unlawful dividend, stock purchase or stock redemption);
- transactions from which the director derived an improper personal benefit; and
- any act prior to the date on which the provision became effective (July 1, 1988).

9. **Arbitration:** K.S.A. 5-401 was amended to refer specifically to the arbitration of tort claims, and the key words in the statute remain "existing controversy." Arbitration agreements are valid for later-arising controversies, unless they deal with contracts of insurance, contracts between employers and employees or their representatives or claims in tort.

Thus, persons with tort claims which have already arisen may enter valid, enforceable and irrevocable agreements for arbitration. The law remains in effect, though, that arbitration agreements for controversies "thereafter arising" are not valid with respect to claims in tort.

Conclusion

Although some things have changed, much remains the same. This reassurance follows the **Farley** and **Malpractice Victims** decisions in which the Kansas Supreme Court tested much of the 1980s tort reform legislation.

The case resolving the implied invalidation of K.S.A. 1987 Supp. 60-19a01's $250,000 cap on pain and suffering and its amendment in 1988 applying to all non-economic damages[46] remains to be tested. However, no consistent ruling of the Supreme Court could be made to reject the reasoning of the Court in the **Malpractice Victims** case.

"H.B. 2661, without question, eradicates the right to a remedy by due course of law for certain injuries . . ."

As stated in the majority opinion by Chief Justice Prager, "H.B. 2661, without question, eradicates the right to a remedy by due course of law for certain injuries. . . It eliminates the right to a remedy for those injured by a certain favored group of tortfeasors."

"The cap and annuity provisions of H.B. 2661 infringe upon a medical malpractice victim's constitutional right to a remedy by due course of law, and no **quid pro quo** is provided in return. The trial court was correct in holding the caps and the annuity provisions unconstitutional as a violation of Section 18."[47]

While some statutes await judicial scrutiny, for example, those dealing with punitive damages, others may be eligible for testing but discretion and broader political considerations might restrict the interest in such a challenge, for example, our unique collateral source law.

The dust is settling, the sun is shining, the tornado has run out of wind and the rebuilding can commence. ■

46. H.B. 2692.

47. **Malpractice Victims Coalition, et al. v. Bell, et al.**, Slip Opinion No. 61,945, June 3, 1988, pp. 27-28.

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Company lifts malpractice insurance lid

St. Paul Fire & Marine Insurance Co., which provides malpractice insurance coverage for about 40 percent of Kansas doctors, has started to take new clients in Kansas, lifting a moratorium it had since 1986 on new business in the state. A spokeswoman said the company has decided to accept new clients, but only if they are in medical practices that have four or more doctors. The company also decided it would provide malpractice insurance beyond the $200,000 limit it now offers if a state-administered fund were abolished, she said.

State's most-sued doctor spurs dispute over board's power

By Kaye Schultz
Staff Writer

Two years after John Krupka left Kansas, the state board in charge of regulating physicians is waging a legal battle over its authority to suspend or revoke the license of the former Wichita neurosurgeon.

At stake is the issue of whether physicians can avert board discipline by discontinuing their practice and simply allowing their Kansas licenses to lapse.

A new lawsuit filed last week alleging that Krupka performed unnecessary surgery on a woman in 1984 brings the number of malpractice actions filed against Krupka in Sedgwick County District Court since 1984 to 46.

Records of the Kansas Board of Healing Arts indicate Krupka is by far the most-sued physician in Kansas.

Krupka now lives in Illinois and has not practiced medicine since he left Kansas in early 1986. His Wichita lawyer, Gregory Lower, said many of the lawsuits filed against Krupka "came about because of publicity about previous (malpractice) cases." Lower said several of the lawsuits have been dismissed recently, but he said he could not state how many.

Krupka's license to practice medicine in Kansas was canceled in August 1987 as a matter of routine because Krupka had failed to renew it. As a result, Lower is asking that the disciplinary action pending against Krupka before the board be dismissed as moot.

But officials of the healing arts board, which has been criticized for not acting more quickly against Krupka, said they fear such a decision would set a dangerous precedent for physician discipline in the state.

"The crux is whether an intentional failure to renew deprives the board of the right to proceed with discipline," said Larry Buening, legal counsel for the board.

"If the allegations (against Krupka) are true, failure to renew a license doesn't prevent him from being licensed in another state."

The healing arts board called Krupka to a December 1985 hearing after he had been sued for malpractice nine times and had failed to complete two alcohol treatment programs. That same month, Krupka applied for a license to practice medicine in Indiana. The Indiana application was rejected in February 1986 when officials there discovered Krupka had falsified his application by answering "no" to a question on whether he had ever been treated for alcohol or drug addiction.

In a June 1987 petition alleging there is probable cause for revocation or suspension of Krupka's license, the Healing Arts Board charged the former Kansas physician with violations including performing unnecessary surgeries and improper procedures, substandard surgical techniques, delays in performing surgery and failure to provide adequate postoperative care.

Notes on Medical Malpractice Crisis
From brief of amicus
Consumer Federation of America
In Boyd v. Bulala, 4th Circuit

"There exists a further, more disturbing reason for the court to examine such statutes (limiting awards) with care. The nature and causes of the alleged crisis in insurance premiums were matters within the closely-held knowledge of the insurance industry but was not fully available to the legislature. Those who urged the necessity for limiting the rights of victims strenuously argued that insurance was rapidly becoming unaffordable and unavailable because the insurers were suffering unacceptable losses. St. Paul Fire and Marine, the nation's largest malpractice insurer and insurer of 80% of Virginia's physicians in 1975, made this argument in strong terms in its position paper "Preserving a Medical Malpractice Insurance Marketplace: Problems and Solutions," distributed to legislators. See summary at Taylor and Shields, at 805-07.

"These 'losses,' however, were chiefly the result of the industry's peculiar method of bookkeeping. St. Paul collected $54 million in premiums from (Virginia) doctors in 1975. Most of this was labeled as "reserves" for payment of claims made in later years for occurrence in 1975 (termed 'incurred but not reported,' IBNR). St. Paul was entitled to deduct these as "losses" in 1975, though the money remained with the company, earning interest. The company's subsequent financial statements reveal that these premiums were far in excess of its needs. By 1985, after paying virtually all claims arising out of 1975 occurrences, payments to victims, expenses and attorney fees together amounted to only $28 million. In 1976, St. Paul hiked its rates and collected $104 million. Ten years later, it had paid only $29 million in claims, expenses and fees for 1976. [Annual Statement of St. Paul Fire and Marine Ins. Co., Schedule P (1985), in Best's Reproductions of Annual Statements -- Property Casualty 1395 (1986 ed.)] The underwriting losses of which the company complained so bitterly when seeking legislative favor were, in reality huge profits."

Boyd, pp. 7-8

RESOLUTION

WHEREAS, increasing malpractice insurance rates in Kansas prompted the Kansas Legislature to enact certain "tort reform" measures in 1985 and 1986, which measures would have limited awards to victims of medical malpractice; and

WHEREAS, the Kansas Supreme Court has ruled that such limitations violate said victims constitutional guarantees of the right to jury trial and due process; and

WHEREAS, The Kansas Medical Society and others are now recommending and intend to have introduced in the 1989 Kansas Legislative session a resolution which would propose an amendment to the Kansas Constitution; and

WHEREAS, said resolution would either propose to amend the Kansas Constitution to authorize the legislature to enact "reasonable limits" on personal injury awards or in the alternative place limiting language and dollar amounts into the Kansas Constitution itself; and

WHEREAS, The Johnson County Bar Association strongly supports responsible solutions to the so called "medical malpractice crisis" and all positive efforts to assure adequate health care availability to all Kansans; and

WHEREAS, The Johnson County Bar Association does not believe that the recommended constitutional amendment will solve the problem of escalating medical malpractice insurance premimums nor does it represent a responsible solution to the "medical malpractice crisis"; and

WHEREAS, The Johnson County Bar Association has grave reservations with respect to any proposal which would alter the jury system for the benefit of any special interest group or amend the Kansas Constitution to limit a victim's right to trial by jury, due process, or equal protection of the law;

NOW, BE IT THEREFORE RESOLVED, by the Board of Directors of The Johnson County Bar Association that The Johnson County Bar Association is unequivocally opposed to:

1) any Kansas Constitutional amendment which, for the benefit of a special interest group, is designed or intended to permit the legislature to enact, amend, modify, or repeal any statute or rule of common law relating to the determination of liability or damages for personal injury or death in violation of existing constitutional guarantees; or

2) any Kansas Constitutional amendment which, for the benefit of a special interest group, by its own terms limits the rights and existing constitutional guarantees of any victim with respect to the determination of liability or damages for personal injury or death.

JOHNSON COUNTY BAR ASSOCIATION
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Million-Dollar Verdicts and Other Rarities

4/8/87 WSJ

By PHILIP J. HERMANN

While states debate the issue of tort reform and escalating insurance premiums continue to plague the U.S. economy, the insurance crisis is often blamed on "giveaway" juries. In truth, juries decide only a small percentage of personal-injury claims and, with few exceptions, are generally consistent and conservative in the awards they render. Research consistently shows that they are far less generous toward plaintiffs than final settlement offers and arbitration panels are.

"Some 98% of the millions of insurance claims filed each year are settled . . . only 2% cannot be resolved without litigation," reports William E. Bailey in the Winter 1987 issue of The Brief, a magazine of the American Bar Association. He is special counsel to the Insurance Information Institute for tort liability issues.

State Farm Insurance Cos., which covers one-fifth of all insured automobiles in the U.S., reports similar litigation statistics for the automobile-insurance industry. "We can argue that of the 31 million auto accidents occurring annually, only 1.61% wind up in litigation," says Leo J. Jordan, the insurer's associate general counsel.

Of the claims that *are* litigated, Mr. Bailey estimates that 92% are settled before trial and 4.5% are settled during the early stages of trial. This means that only 3.5% are tried to a verdict.

A total of 866,000 personal-injury tort lawsuits were resolved in 1985, according to the Institute for Civil Justice, a division of Rand Corp. If 3.5% of these lawsuits ended in jury decisions, as is estimated, then 30,310 verdicts were rendered in 1985. Jurors awarded nothing in 40% of these cases, according to Jury Verdict Research, a percentage that has not fluctuated more than three points in a quarter-century. When jurors do award compensation to plaintiffs, a majority of those awards for specific injuries consistently fall within a 25% range above or below the median jury award.

In contrast, there is usually great disparity between plaintiff demands and defense offers, and there is frequently little correlation among demands, offers and jury awards. In fact, plaintiffs and defendants often would be better off reaching prompt settlements rather than taking chances on jury verdicts. A recent Jury Verdict Research analysis of 443 jury awards in back and neck cases, which are a category frequently handled by attorneys, reveals that only one final settlement offer in six was within 25% of the actual jury award. Nearly a quarter of the final offers were 26% to 600% greater than the jury awards. Only one final settlement demand in six was within 25% of the jury award, but more than half of the final demands were 26% to 1,100% greater than the verdict.

Similar trends can be seen in the decisions of arbitration panels, which are usually made up of attorneys. A major insurance company reports in an in-house study prepared by Jury Verdict Research that arbitration panels found for the defendant in only 5% of all cases. The report also says that arbitrators awarded an average of three times more than jurors for similar claims.

Last month, an arbitration panel of three attorneys awarded one of the largest accidental-death awards ever rendered—$13 million to the wife of a man who was killed when a car hit the bicycle he was riding. The attorney arbitrators were selected by the dead man's estate and two insurance companies.

Many critics refer to "million-dollar verdicts" as though they are typical of jurors' awards. However, only 2,564 verdicts of $1 million or more have been reported since 1962. Wrongful-death claims represented 22% of these awards, followed by 20% for brain damage, 15% for spinal-cord injuries, and 8% for arm and/or leg amputations.

Juries nationwide rendered 488 verdicts of $1 million or more in 1985; they constituted only 1.61% of the estimated 30,310 personal-injury awards for that year. Injuries resulting from medical malpractice accounted for 79 of the "million-dollar verdicts." However, plaintiffs recovered money in an average of only 38% of all medical malpractice cases. Product liability claims resulted in 83 of the million-dollar verdicts, and plaintiffs won monetary awards in an average of 57% of all product liability cases.

Verdicts considered excessive may be reduced by court action or post-trial settlements, which often yield a fraction of the original award. A study of 198 million-dollar awards by the American Trial Lawyers Association (ATLA) in 1986 shows that the verdicts totaled $790.6 million. However, the amount actually paid out was $339.2 million, or 43% of the verdict.

Although overall verdict amounts have increased, the rate of increase is less than the rise in major health-care costs. These costs are vital elements in personal-injury verdicts. According to the U.S. Health Care Financing Administration, the cost of in-patient, outpatient and physician care has risen an average of 15.8% from 1978 to 1984. During the same period, verdict amounts rose an average of only 12.9%.

Even if all juries rendered "runaway" verdicts, this would represent only a small percentage of all personal-injury compensation. It is not plausible that juries have been a significant, direct cause of the insurance crisis. Moreover, lawyers and insurers often overestimate the generosity of jurors, with final offers and demands showing little correlation with what jurors actually award for specific injuries and liabilities. When blame is apportioned for the crisis, some must go to the lawyers and insurers.

Mr. Hermann, an attorney, is founder and chairman of Jury Verdict Research, a legal research and publishing company based in Solon, Ohio.

THE WICHITA EAGLE-BEACON Wednesday, January 18, 1989

Hospitals negotiating for doctors' insurance

By Debra Beachy
Staff Writer

Two Wichita hospitals, trying a new approach to stem the rising cost of medical malpractice insurance, are negotiating with insurance companies to offer coverage to doctors who have admitting privileges.

"We're excited about it. We think it might be something of a breakthrough for the medical staff's malpractice premium burden," said Martyn Howgill, senior vice president of marketing and strategic planning for HCA Wesley Medical Center.

Wesley and St. Francis Regional Medical Center both are negotiating contracts, according to hospital executives.

Doctors at Wesley have been told that they could pay between 10 percent and 40 percent less under such a group plan with the New York-based Continental Insurance Co. than they pay individually.

The negotiations, which would apply to as many as 600 doctors who admit patients to Wesley, should be completed by February, according to Howgill.

St. Francis also is negotiating with a large insurance company to cover doctors who admit patients, spokesman Larry Baker said. Baker gave no details, saying in a prepared statement, "It is conceivable that an announcement will be made in the near future."

Other Kansas hospitals subsidize their admitting doctors' malpractice costs, especially in rural areas. But Wesley is the first hospital in the state to negotiate insurance coverage for its admitting doctors, according to the Kansas Hospital Association.

J.G. Kendrick, Wesley senior vice president for medical and professional development, said the malpractice coverage would be tied to Wesley's quality assurance program under which doctors' performance is monitored by the hospital.

Doctors said they welcomed attempts by Wesley and other hospitals to help ease the costs of malpractice insurance.

"Anything that will help the situation will be greatly appreciated," said Paul Stein, a neurosurgeon. "Malpractice for neurosurgeons in Kansas is reaching crisis proportions. Last year, I paid $37,000 for malpractice insurance. This year, I paid $94,000. I've never had to defend a lawsuit in court. ... If it goes on at a geometric rate, there will come a point where I'll go somewhere else."

Doug Horbelt, a gynecologist, said the Wesley plan could have a "tremendously positive effect" on malpractice insurance costs by attracting more insurance companies to the Kansas insurance market.

But general surgeon Paul Harrison said that while the hospitals' new approach "may give some physicians a short-term break," only legislation will solve the problem of rising malpractice costs.

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Lawrence Journal-World

FEB. 23. 1989

Judge rules fetus legally is a person

From Staff and Wire Reports

In what's being called the first such ruling in Kansas, a Douglas County District judge has ruled that a fetus aborted before it reaches viability is legally a person whose parents can sue for damages for its pain and suffering.

District Judge Mike Malone issued the ruling Wednesday in a lawsuit filed by Brenda and Bennie Humes.

The couple filed suit in 1987 against Dr. Dale L. Clinton of Lawrence and Alza Corp., a California manufacturer of an intrauterine birth control device that Mrs. Humes had been using.

The suit contends that the doctor and manufacturer were negligent in not making clear the effective life of the device. According to the ruling, it was put in place on June 4, 1985, by Clinton, after an earlier abortion performed by Clinton.

The IUD contained the female hormone progesterone, which was released over a period of time. The device was approved for use for 12 months, after which replacement was recommended.

ACCORDING TO the ruling, the defendants agree that Clinton did not give Mrs. Humes an Alza patient information sheet, required by federal law, spelling out the 12-month time frame and warning that she could become pregnant even with the device in place.

Instead, the ruling said, he gave her an information sheet he had prepared stating that "pregnancies are rare" and that the device "should be changed about every 15 months."

Mrs. Humes became pregnant in August 1986, 14 months after the IUD was inserted. In November, after being told by another physician that continuing the pregnancy posed life-threatening risks because of the presence of the IUD; Mrs. Humes had an abortion at the Kansas University Medical Center.

Malone's ruling said the couple may sue Clinton for negligence while Mrs. Hume was under his care.

In his decision Wednesday, Malone said that Mrs. Humes has suffered continued physical and psychological distress since the abortion. The judge said that whether a 16½-week old fetus experiences pain and suffering during an abortion — one basis for its survivors to claim damages — was an issue for a jury to decide.

He noted that Kansas law already had recognized an unborn, viable child as a person under the state's wrongful death statute in a 1962 case involving a traffic death.

MALONE SAID that any distinction over the viability of an unborn child — its ability to survive outside the womb — is not logical. He said that if negligent conduct prevents a fetus from reaching viability, the offender should not be any less responsible than if the negligence prevented the birth of a viable fetus.

He said in his ruling, "Failure to prove viability would relieve the (defendants) of any legal responsibility no matter how obvious the negligence was. This no-harm-no-foul logic may be acceptable in a game of basketball but not where human life ends as a result of someone's negligence."

John McClelland, attorney for the Humeses, said "It's the first time as far as we know in the country that a court has recognized an action to recover (damages) for pain and suffering for a fetus during an abortion," he said.

"HE ALSO recognizes that life really starts the moment of conception and there is no artificial dividing line where a fetus automatically becomes a human being."

Thomas E. Wright, a Topeka attorney representing Clinton, argued that a non-viable fetus was not a person within the meaning of the state's wrongful death statute. Wright also argued that to allow the issue of pain and suffering to be presented to a jury based on the speculative chance that the fetus felt pain would allow the jury to award damages for a pain that the medical community is not certain exists.

Malone stayed the proceedings of the lawsuit so the defendants can appeal the ruling to a higher court in Kansas.

Lightplane industry turns skyward after dismal period

1/19/88

By Tom Webb
Of our Washington bureau

WASHINGTON — The U.S. lightplane industry, which had been caught in a frightful 10-year tailspin, announced Wednesday that new airplane sales finally rebounded in 1988, with most companies actually turning a profit.

"For the first time in a decade, we saw an increase in both billings and the number of aircraft delivered last year," said Ed Stimpson, president of the General Aviation Manufacturers Association. "We hope the downward spiral has ended."

There were 1,143 lightplanes delivered to buyers last year, a modest 5.3 percent improvement from the previous year's 1,085 airplanes. But while officials were grateful the numbers were climbing again, the figures still represent a 93 percent drop in plane sales from the industry's 1978 peak.

"This once robust industry still faces a long and hard road back to where we were just a few years ago when we delivered nearly 18,000 aircraft," Stimpson said.

But Wednesday was time for some smiling faces, too. Thanks to surging sales of expensive business jets, the nine lightplane makers reported a 40 percent increase in billings, to $1.9 billion.

In fact, two-thirds of the industry's 1988 billings came from the

● PROFITS, 8A, Col. 1

● PROFITS, from 1A

growing popularity of business jets.

All three of Wichita's lightplane companies expect to report profits in 1988, the first time in years.

Of the three, Beech Aircraft Corp. recorded the biggest gains, passing crosstown rival Cessna to become the leading Wichita lightplane maker in 1988. Beech sold 54 more airplanes last year than it did the year before, and recorded a 62 percent jump in billings.

"Beech was the (nation's) No. 1 company for general aviation deliveries in 1988," said Beech spokesman Drew Steketee. "We delivered 332 general aviation aircraft." That includes 17 that were delivered to the U.S. military.

Equally important, "Beech regained profitability in 1988, and that's another accomplishment," Steketee said.

Wichita's Learjet Corp. also reported increases in 1988, delivering seven more Learjets than in the previous year, and seeing billings jump 35 percent.

"There was a nice increase over 1987, and we're quite pleased by the year," said Learjet spokesman Bill Robinson. "We expect to show a profit in 1988, which is the first time the company has been profitable since 1983."

Wichita's Cessna Aircraft Co. saw its sales, plane deliveries and market share all drop in 1988. But a good share of that decline reflects the company's decision to get out of the piston-engine aircraft market, a company spokesman said.

"Even though our dollars and units were down, it really was a pretty good year, all things considered," said spokesman Dean Humphrey. "Our profitability was up significantly ... and our order-taking was exceptional."

Cessna has a 55-plane backlog of orders on its Citation V business jet, as well as a sizable backlog for the Caravan turboprops, Humphrey said.

Aside from Beech, Cessna and Learjet, the industry's GAMA trade group reported billings and deliveries from Fairchild Aircraft, Gulfstream Aerospace, Piper Aircraft, Lake Aircraft, Maule Aircraft and Mooney Aircraft.

Gulfstream alone accounted for 43 percent of the industry's sales, as sales of its large Gulfstream IV business jet nearly doubled.

Despite the first industrywide upturn in a decade, GAMA officials used Wednesday's announcement as an occasion to plea again for relief against huge lawsuit awards and soaring insurance costs that they blame for pricing airplanes out of the market. The industry wants Congress to limit its liability on airplanes that were built 30 or 40 years ago.

"If the Wright Brothers were still flying, they'd still be responsible for that airplane," Stimpson said.

In 1987, the lightplane industry estimated it paid about $200 million in legal costs and damage awards while selling only about 1,000 airplanes.

Except for the continuing product liability problems, the outlook for the industry seems to be improving, several GAMA officials said Wednesday. The glut of used airplanes is finally drying up, thanks partly to lean years where few airplanes were built.

In addition, the Air Force is shopping for 211 business jets, and the award of the $1.5 billion contract would provide a huge boost to the winning company. The contract will be awarded later this year.

The resurgence of the general aviation industry led to questions Wednesday about whether plane makers would renew attention on building single-engine piston airplanes for training pilots and recreational fliers, rather than aiming at building expensive business jets for corporate clients.

Max Bleck, Beech's president and chief executive officer as well as this year's GAMA chairman, said Beech is forecasting a modest increase in sales of single-engine piston- powered airplanes, but stopped far short of forecasting a resurgence for the less-expensive models.

WIN

GENERAL AVIATION SHIPMENTS

	4TH QTR 1988		1988 TOTAL				1987 TOTAL			
	Units	Billings (Millions)	Units	Market Share	Billings (Millions)	Market Share	Units	Market Share	Billings (Millions)	Market Share
Beech	114	$202.9	372	32.5%	$510.8	26.8%	314	28.9%	$315.0	23.1%
Cessna	45	97.9	161	14.0%	329.8	17.2%	187	17.2%	356	26.1%
Learjet	10	38.8	23	2.0%	89.4	4.6	16	1.5%	66	4.8%
Gulfstream	18	345.7	51	4.4%	828.9	43.2	30	2.8%	421	30.9%
Piper	92	14.3	282	24.6%	50.7	2.6%	282	26.0%	76	5.6%
Fairchild	17	61.2	29	2.5%	103.6	5.4%	36	3.3%	119	8.8%
Others	44	n.a.	225	19.6%	n.a.	n.a.	220	20.3%	9	0.7%
Total Industry	340	$761	1,143		$1,913		1,085		$1,363	

TECHNOLOGY

Improper Medical Care Caused Deaths In Up to 27% of Hospital Cases Reviewed

By MICHAEL WALDHOLZ
Staff Reporter of THE WALL STREET JOURNAL

A review of the medical records of elderly patients who died from three common illnesses at 12 hospitals found that improper medical care caused the deaths in as many as 27% of the cases.

The study, by researchers at Rand Corp., of Santa Monica, Calif., found that the "preventable" deaths were caused by such substandard practices as the hospital staff's failure to respond to repeated complaints of chest pain in patients with heart disease, administering the wrong antibiotics for pneumonia patients and misdiagnosing strokes. Especially revealing was the discovery that almost all the deaths were caused by just nine types of errors.

"The numbers of preventable deaths were very high and very disturbing," said Robert W. DuBois, an author of the study. "[They] were much higher than we expected."

The hospitals in the study were owned or managed by American Medical International Inc., the Beverly Hills, Calif., investor-owned hospital company that helped support the research. The study didn't specifically name the hospitals, noting only that they were in the Southwest and West.

The Rand report is the most recent in a series of studies by Dr. DuBois and his colleague, Robert H. Brook, who are investigating ways to identify poor hospital care and the reasons for it.

American Medical said the study was "instructive ... in identifying specific areas that demanded immediate evaluation." The company said it helped underwrite the research and opened its records to an "unprecedented" analysis of its records to help develop a model by which all hospitals can more "effectively monitor patient-care quality."

The study is the first of its kind to show a link between a high death rate and poor medical practices. As such, the study's release—it was published over the weekend in the current issue of Annals of Internal Medicine—is expected to intensify sharply the debate over whether the federal and state governments should make public reports identifying the percentage of patients who die at hospitals.

Doctors and hospitals have attacked the U.S. Department of Health and Human Services for its hospital-mortality report, which was first released last December and which is expected to be updated annually. The American Hospital Association called the government's mortality statistics "meaningless," arguing that they don't indicate if a hospital treats especially sick patients or ones with complicated problems who might be at greater risk of dying.

But Dr. DuBois said that the Rand report "shows there is a connection between a high mortality rate and improper care" and that "mortality rates can be useful in evaluating hospitals."

The Rand report looked at 1985 hospital records of 182 patients who died at 12 hospitals, six with mortality rates higher than expected and six with death rates lower than expected for treating heart attacks, pneumonia and strokes. In a previous study published last December, the researchers found that 5.7% of the patients treated at the hospitals with high death rates died unnecessarily. They also deemed unnecessary 3.2% of the deaths at hospitals with low death rates.

In the new report, teams of three doctors using a Rand-created analysis system conducted detailed reviews of the patient medical records. In 14% of the cases studied, all three doctors agreed that the deaths were preventable, while two of three agreed in 27% of the cases.

The researchers found, to their surprise, that errors bunched together in nine identifiable groups. For instance, treatment mistakes, not diagnosis errors, were implicated in the 23 heart-attack deaths deemed preventable. Almost half the 18 preventable stroke deaths resulted from the failure to conduct a series of standard diagnostic tests. And a group of specific diagnostic and treatment errors were involved in the 17 pneumonia deaths.

The Rand team suggested that hospitals conduct similar reviews to flag their own problems. The researchers said they were unable to predict which cases were most liable to result in a preventable death. But they did find that those patients who were less-severely ill when they entered the hospital were more likely to sustain a preventable death. Recently, hospitals have begun using several computerized programs to classify patients' so-called "severity of illness" as a way of identifying patients most at risk of dying.

LAW

Litigation Boom?, Professor Turns Up a New Culprit

By PAUL M. BARRETT
Staff Reporter of THE WALL STREET JOURNAL

Few people would disagree that Americans have gone lawsuit-crazy. Even former U.S. Chief Justice Warren E. Burger has called the phenomenon a "litigation explosion during this generation."

Common to such laments is the contention that a marked increase in product-liability suits has led to what the National Association of Manufacturers recently called "a blood bath for U.S. businesses."

But Marc Galanter, a law professor at the University of Wisconsin, is challenging the conventional wisdom. In the latest of a series of studies on U.S. litigation, he maintains that increased filings in federal courts have been sparked more by businesses suing one another over contract disputes than by citizens attacking corporate defendants.

Mr. Galanter says that his preliminary results "cast a lot of doubt on the widely held assumption that it's primarily the ordinary guy suing the big company that has caused a litigation explosion."

Corporate Honesty

Some colleagues say Mr. Galanter's study could affect the continuing debate over so-called tort-reform statutes, which do such things as set caps on jury awards for injuries. Lately, plaintiffs' lawyers have stepped up court challenges to such statutes, arguing that the restrictions aren't based on accurate information about the state of the civil justice system.

Jerry J. Phillips, a law professor at the University of Tennessee, asserts that Mr. Galanter's research "raises questions that legislators ought to consider about whether the insurers and manufacturers have been so honest" in portraying a litigation landscape dominated by tort suits.

The statistics seem to support Mr. Galanter's arguments. He found that between 1960 and 1986 the number of contract disputes filed annually in federal trial courts increased 258%, to 47,443 cases from 13,268. That rise far outstripped the growth in tort cases, in which plaintiffs seek civil remedies for physical injuries and other kinds of harm. In the same period, tort filings increased 114%, to 41,979 cases from 19,584.

Yet the rise in corporate contract disputes "has not only escaped condemnation, but has rarely if ever been mentioned as the scene of burgeoning caseloads," Mr. Galanter argues in the study, which was published last month by the University of Wisconsin's Institute for Legal Studies.

In an interview, the 57-year-old professor attributes the lack of attention paid to contract filings to the success of corporations and their lawyers in shaping popular perceptions of what goes on in the courts. He also blames the press for sensationalizing arguably trivial cases in which individuals win unusually large injury awards.

Mr. Galanter, who based his work on statistics from the Administrative Office of the U.S. Courts, admits that he, too, had been "blind" to the contract filings because "we are conditioned not to think of businesses contributing to the so-called litigation explosion." He says he noticed the trend only when his son arranged the data on a computer spreadsheet. "Suddenly, it jumped out," he recalls.

He concedes that the study is limited because it focuses exclusively on the federal courts, where only a small fraction of all litigation in the country takes place. But reliable comparative data on the state courts are relatively rare, he explains. In any case, most of the warnings about runaway litigiousness also rely on federal-court figures.

Those figures show that total civil filings rose 398% between 1960 and 1986, to 254,000 from 51,000. By 1986, contract cases made up 18.7% of the total, surpassing tort cases (at 16.5%) as the largest category.

Critics of Mr. Galanter's research say his statistics distract attention from simple realities. James W. Morris III, president of the Defense Research Institute, an association of corporate and insurance defense lawyers, contends that the rash of huge product-liability jury awards, not aggregate numbers of cases, is what concerns his clients most.

Moreover, he says that Mr. Galanter's research doesn't account for thousands of

Please Turn to Page B8, Column 3

settlements reluctantly agreed to each year by corporate defendants afraid of risking an unpredictable jury trial. "What he doesn't explain is that expectations have been greatly raised and that, these days, potentially any case can blow up on you," says Mr. Morris.

Mr. Galanter agrees that a huge share of civil filings—more than 90%, by most estimates—end in settlement rather than in courtroom confrontation. But he interprets the situation as illustrating that lawsuits are frequently part of a more complicated negotiation process, and that the legal system isn't collapsing amid all-out combat.

Mr. Galanter also says that Mr. Morris's comments about product-liability suits ignore important distinctions. He argues that while the overall number of such suits in federal courts has skyrocketed, along with the upper limit of jury awards in some regions, certain products have distorted the situation.

In 1986, for example, suits over asbestos accounted for 43% of all federal product-liability cases. That discrete "subpopulation" of cases has grown as the insulation material's disease-causing properties became known, says Mr. Galanter, but will eventually dwindle because asbestos products aren't made anymore.

A Need for Further Research

As for the causes of the surge in contract fights, those remain unclear. Mr. Galanter speculates that relevant factors include increased franchising, the rise in mergers and acquisitions, and the trend toward internationalization of the economy. However, he adds, "more study needs to be done."

Mr. Galanter's interpretation of his findings builds on his earlier research, which has stirred considerable controversy. Mr. Galanter is well known in legal circles for espousing unorthodox views and backing them with empirical research. He frequently criticizes traditional legal scholarship as being dominated by theoretical parsing of rules and appellate-court opinions.

Mr. Galanter has written that, according to available data, Americans aren't markedly more litigious today than in Colonial times and in the early 1800s. He has also argued that, while the Japanese seem more restrained about suing one another, Americans go to court at a rate roughly comparable to people in England, Australia, Denmark and New Zealand.

Says David B. Rottman, director of statistics for the National Center for State Courts in Williamsburg, Va., "No academic is as widely read by people in the courts, even if he hasn't persuaded a lot of people."

Kansas needs facts on a malpractice issue

2-5-89
KCT

A lack of documented information has plagued the so-called medical malpractice insurance "crisis" in Kansas. Indeed, far-reaching decisions have been made on little more than anecdotal, emotionally tinged accounts that doctors were fleeing the state because of escalating malpractice insurance premiums. Twice the state Legislature has reacted to this high pressure and twice laws it enacted have been found unconstitutional by the Kansas Supreme Court.

Now the issue is before the Legislature again, with many of the same threats and speculation over lack of medical services resounding through the legislative halls. Two recent reports might shed some light on the matter.

The Office of Judicial Administration found that juries in state courts, where a majority of medical malpractice suits is litigated, awarded damages in only seven medical malpractice suits last year. Among those cases only two verdicts exceeded $1 million. Altogether, 23 medical practice cases went to juries. In seven the plaintiff won and in 16 the defendant prevailed. Sixty-six cases were settled out of court. Courts in 55 of the 105 counties had no tort suits. This hardly smacks of a crisis, especially one that would merit a constitutional amendment that could disrupt long-standing legal rights.

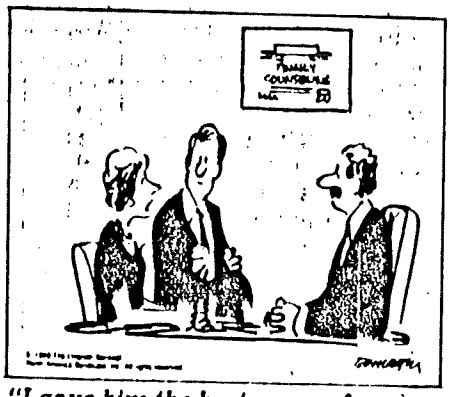
The second report of note is about the Missouri experience. Doctors and lawyers negotiated a compromise on malpractice issues after lengthy discussions. Their agreement was incorporated into legislation approved by the General Assembly in 1986. It limits awards for non-economic damages such as pain and suffering. Before a case can be filed, an affidavit must be obtained from a medical expert verifying that a lawsuit has merit.

The Missouri Division of Insurance said late last year that there were fewer claims filed in 1987, along with reduced average payments. Nevertheless, malpractice insurance premiums were up 5 to 10 percent, according to a medical authority. The report showed Missouri insurers' loss ratio in 1987 at 75 percent. It was 97.7 percent in 1986 and 122.8 percent in 1985. Further premium increases are expected, however.

Thus the Missouri experience brings into question what impact, if any, restrictions on awards have on malpractice insurance premiums.

Nonetheless, medical and insurance interests in Kansas are seeking legislation that would lead to caps on damage awards as a way to reduce malpractice insurance costs. Doctors appear to be divided over whether to abolish a state fund that helps pay malpractice claims. A special interim legislative committee proposed that it be abolished, allowing market forces to prevail.

As the Missouri experience seems to indicate, caps on damage awards may not necessarily be the appropriate remedy for increasing insurance premiums. That possibility, and the relatively low number of malpractice cases in Kansas, raises serious questions about capping awards when such a drastic measure might not resolve the problem.



"I gave him the best years of my life . . . the Reagan years!"

• *SPORTS:* KU defeats K-State, 64-63 — page 17.

• *LEGISLATURE:* Senate approves DUI bill — page 7.

The Topeka Capital-Journal

FRIDAY, February 19, 1988 | 32 pages | Official County and City Newspaper | single copy 25¢ | Topeka, Kansas

Surveyed jurors call system fair

A Kansas Bar Association poll released Thursday shows that Kansans who have been on juries don't think the civil justice system in Kansas needs any "reform."

Christel Marquardt, president of the KBA, said 500 former jurors questioned in late January by the Topeka polling firm of Capital Research Services included 70 respondents who have household members who are in the medical business, either doctors, nurses or hospital employees.

"The current jury system we have for dealing with all cases, and especially with medical malpractice cases, is fair. Jurors who are actually involved in the cases think it is fair," Marquardt said.

"These people we surveyed have no vested interest in the cases."

She said that the results of the poll should show "that people don't want Kansas to give doctors protections (from liability) that no other group of people have."

Those protections from liability, or limits on ability for victims of medical malpractice to recover damages for their injuries, are keys to medical malpractice legislation.

Marquardt said the bar's survey should show lawmakers, and the Kansas public, that the medical malpractice issue is one that should be solved without making major changes in the state's legal system.

The survey nearly counters one conducted last month by the Kansas Medical Society, which was said to show that major changes were needed in law relating to medical malpractice lawsuits.

"A convincing 86 percent of the 506 jurors surveyed say the jury system fairly balances the rights of the plaintiff and the defendant in civil lawsuits. And two out of every three say the size of the awards in such cases is also fair. Fifteen percent said they were too low," the KBA said.

In a closely linked series of questions, the survey showed that 60 percent of former jury members believed that judges should have the authority to limit jury damage awards. They have that authority now.

But in a second question, 62 percent said "no" to the question: "Would you favor or would you oppose a law which would limit jury awards to $250,000 for pain and suffering for people who have been permanently disabled, paralyzed or badly disfigured by the negligence of another?"

Only 5 percent of the 500 jurors in civil liability cases heard medical malpractice cases. Thirty-seven percent heard auto accident, contract disputes or other civil cases.

The poll included a couple of questions dealing with the concept of a panel of doctors deciding medical malpractice cases.

Although 22 percent of respondents thought the doctor panel would render more fair awards, and 17 percent said the result would be about the same as a jury award, only 14 percent of respondents said they would be willing to have a doctor panel determine a malpractice case involving them or a member of their family.

Grants help towns' search for doctors

By Debra Beachy
Staff Writer

The small, rural town of Onaga has been searching for a physician for a year.

Plainville began its search four months ago, hoping to find a doctor in time to keep the town's hospital open.

It took Ashland two years to find a doctor. Jetmore looked for more than a year before its search ended successfully this summer.

Of those four towns, three of them have something in common.

ONAGA, IN northeastern Kansas, and Jetmore and Ashland, in western Kansas, sought two-year grants totaling $203,000 from the Wesley Foundation to help in their recruitment struggle.

The money was pivotal in attracting physicians to Ashland and Jetmore, doctors and hospital administrators say. And money gives recruiters in Onaga confidence that their search will end soon.

Plainville hasn't received a grant.

After its only physician left in July, the Rooks County town launched a direct mail campaign to 800 of the town's high school alumni who have moved away. It is asking them to help their hometown in its quest for a doctor by posting ads for the job in hospitals and universities in towns where they now live.

"Contacting the town's former residents is a new approach. The idea to contact high school alumni who moved away from home just came up at one of our meetings," said Pete Janatello, a local businessman who is vice chairman of Plainville's Physician Recruitment Committee.

COMPETITION FOR physicians and the soaring cost of doctors' malpractice insurance are forcing rural Kansas towns to find innovative ways to attract family doctors.

But there is no substitute for money in finding a doctor, according to Joe Engleken, administrator of the Onaga Community Hospital.

"The recruitment is extremely competitive, especially for family practitioners," he said.

'We have done a tremendous amount of national mailouts. ... We have spent hours on the telephone calling physicians all over the country. Doctors have so many opportunities, and they are not hesitant to tell you they are looking for the best opportunity," Engleken said.

Worse yet, family practitioners, the kind of doctor rural communities need are "getting soaked up everywhere," he said.

"HEALTH CARE is exploding with so many opportunities. And there are just plain fewer people going through medical school," Engleken said.

But with the $75,000 Wesley Foundation grant and the matching funds raised by Onaga of $37,500, chances of finding a doctor by January are good, he said.

A Kansas Hospital Association spokeswoman said there aren't any statistics on how many rural Kansas hospitals are searching for doctors, but that "many" throughout the state are looking for physicians. Of the state's 105 counties, 57 have been designated as critically underserved areas by the University of Kansas Medical School, which rates availability of medical services throughout the state.

Like Onaga, Jetmore found that Wesley provided the funds needed to get the doctor's job filled.

"It (the $63,000 grant) was the big carrot," said Rhonda White, administrator of Jetmore's Hodgeman County Health Center, in southwestern Kansas.

"WE HAD to come up with $31,500. It was a 2-for-1 matching fund," White said.

The funds enabled the hospital to offer a supplement to guarantee the doctor's earnings, a key factor in attracting a physician.

And the money met the expenses of "looking for the right mix — matching the physician to the community," she said.

Hodgeman County, where Jetmore is the county seat, has a ratio of one doctor to every 4,484 residents. Clark County, with Ashland as the county seat, has a ratio of one doctor for every 5,464 residents. Both towns, along with Onaga, and Plainville are in counties designated as critically underserved.

Ashland recruited Tom Gibbon, a family practitioner. Gibbon said the coverage of malpractice insurance and guaranteed earnings as well as the town itself convinced him to take the job.

"I WAS thinking of a rural setting from the beginning," said Gibbon, who added that Ashland "is still the kind of a place where a man's handshake is as good as his word."

But the insurance coverage and earnings guarantee for the first two years made the job especially attractive, he said.

"I don't know if it was exactly unique, but it was a major thing they had to offer," said Gibbon, who recently finished his residency.

"It was clear," he said, "that whatever needs I had in getting started would be adequately met."

LiabilityWeek

PO Box 6654 McLean, Virginia 22106 Editor and Publisher John V. Reistrup

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PRODUCT LIABILITY RISKS FOCUS ON A FEW MANUFACTURERS, STUDY SAYS

A new study by the RAND Corp. indicates that although product liability suits are a growing concern for U.S. manufacturers, the phenomenon is an "epidemic" for only a few major companies.

The study of federal court suits -- an estimated nine of every 1,000 product liability suits filed -- indicated that 19,500 of the country's 360,000 manufacturers were the targets of suits. And of that total, 17,000 were sued only once.

About half the claims involved only 80 companies, the study found. Roughly 80,000 claims are pending against Manville and other former asbestos manufacturers, the study said -- more than 60 percent of all the liability claims. A.H. Robins, which like Manville went bankrupt over liability claims, faces 5,400 suits over its Dalkon Shield intrauterine device, RAND reported.

Terence Dungworth, lead researcher on the year-long study, said it was undertaken to provide background for congressional consideration of federal product liability legislation.

Copies of the product liability study are available from RAND at 1700 Main St., P.O. Box 2138, Santa Monica, CA 90406.

BOY SCOUTS GET $45,000 "WRIST SLAP" IN SUIT OVER PEDOPHILE

A Virginia jury has found the National Capital Area Council of the Boy Scouts liable for $45,000 in damages to a former scout who was sexually abused by a pedophilic scoutmaster who slipped through the system.

The jury, whose foreman described the verdict as a slap on the wrist for the scouting organization, found no liability on the part of the national Boy Scouts of America, another defendant in the suit. (Continued on page 9)

FIGHT FOR TORT REFORM WAS WORTH THE COST, INSURANCE EXECUTIVES SAY

Leading the fight for tort reform was worth the cost of stirring up potential enemies, several insurance executives told their peers last week.

"I don't think anybody has paid a higher price than Aetna" for espousing tort reform, said Ronald E. Compton, president of Aetna Life & Casualty. "And I would answer clearly and unequivocally that we would do it again."

The property/casualty insurance industry is now embroiled with consumer advocates and the plaintiffs' bar in a nationwide fight over auto insurance, and it's been suggested that the fight for tort reform riled those traditional adversaries. (Continued on page 10)

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* WATCH ON THE MEDIA *

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Business Week reported in its Jan. 9 issue on the prospects that there will be a repeat of the "soft market" in property/casualty insurance in the early 1980s that fueled a later crisis in liability insurance.

The magazine's Christopher Farrell reported signs that price-cutting won't be as great. The industry is paying increased federal taxes and has been warned by earlier insolvencies, for example, and the anger of both commercial buyers and consumers militate against drastic cuts.

Nevertheless, Farrell wrote, the industry is in danger of a severe shakeout.

Congressional testimony has indicated that the recent crisis in affordability and availability of liability insurance crisis was, at least in large part, a result of the flow of investment into the property/casualty industry in the early 1980s followed by an ebb from the industry in the mid-1980s.

* * *

The Journal of Commerce reported Jan. 6 that more than 2,200 investors have dropped out of Lloyd's of London, partly because of a lawsuit by 19 state attorneys general charging antitrust violations and fear of asbestos-related claims.

Lloyd's officials say, however, that available capacity won't decrease because of increased commitments by remaining members.

Lloyd's, a major reinsurer of liability coverage, isn't a traditional insurance company but rather a collection of syndicates that agree to underwrite particular risks. It recently raised its required commitment to 250,000 pounds.

* * *

In its Dec. 29 issue, The Wall Street Journal examined the question of liability by owners of property whose condition contributes to criminal activities.

A "Law" column by Christi Harlan said U.S. courts usually have determined that property owners are liable when there's a link between the party injured in the criminal activity and the property owner, as in the case of a guest in a hotel.

But situations where such a link is lacking also are being debated, Harlan wrote, such as the case of a woman attacked in a vacant lot where overgrown brush concealed the crime from passers-by.

VIRGINIA SUIT OVER SCOUTMASTER'S PEDOPHILIA GOES TO JURY

Now 17, the plaintiff was 12 when the acts occurred. His suit claims they brought on emotional disturbances.

Bittenbender already had pleaded guilty to sexual offenses in Rhode Island when he took over the Virginia troop. He is now serving a 44-year sentence for offenses against the plaintiff and two other boys.

"They took an ostrich's position," plaintiff's attorney William Barton said of the scouting groups, and locked "their dark secrets within their cabinets."

BEFORE THE SENATE JUDICIARY COMMITTEE
STATE OF KANSAS

IN THE MATTER OF)
HOUSE BILL 2693)

P A R T I A L

T R A N S C R I P T

O F

Proceedings held on the 17th day of March, 1988, beginning at 9:45 a.m., before the Senate Judiciary Committee consisting of Senator Robert Frey, Chairman; Senator Jeanne Hoferer, member; Senator Paul Feleciano, member; Senator Frank Gaines, member; Senator Audrey Langworthy, member; Senator Nancy Parrish, member; Senator Jack Steineger, member; Senator Robert Talkington, member.

and it is presented by insurance companies, insurance trade associations, and the Insurance Rating Association to show you what Aetna said in Florida and in that letter, and I'd ask that you refer to that. But I'll tell you that the Aetna letter says when you pass watered-down tort reform, which Florida has just done because they were responding to some legislation that had just been enacted, you're not going to have an effect on rates. And I would ask you to review that letter. That's what that says.

I will now turn this over to Mike Mullin who is president of Medical Protective Insurance Company, and he will address questions that you have and make comments with regard to the medical malpractice arena. Thank you.

SENATOR FREY: I might explain to the Committee that Mr. Mullin has a scheduling problem, and he's here as a proponent, and he's not here to produce rebuttal testimony. He's here as a proponent. Mr. Mullin.

MR. MULLIN: Thank you, Senator Frey. Mr. Chairman, members of the Committee, it's a pleasure to again appear before this body on a very similar subject of what we've considered

over the last several years, and I'll be very brief this morning because I think perhaps my role might be better served to allow you to ask me questions, if that's the Chairman's desire, and to perhaps answer some questions that have been raised by publicity I've seen in the press here about my own comments and those of other insurance company representatives as to actual effect of, quote, tort reform.

As I understand it, there are still three bills pending and a fourth which is under consideration, but those really are collateral source, the non-economic or pain and suffering cap as it has now been characterized, the punitive damage measure and then, in parenthesis, the periodic payment question.

Before addressing those specifically or directing comments to them, I wanted to characterize, if I can, for you just briefly the way we as insurance companies see Kansas as an environment.

Kansas is very troubled, particularly from the medical malpractice standpoint, but I think the American Insurance Association companies who are workers compensation, products

liability, general liability, and other major liability lines of business companies would say virtually the same things that I'm saying. Kansas is sort of an island in terms of its severity primarily.

We get hit regularly in Kansas for our $200,000 policy limits, and, in fact, one of the things that has compounded this again lately is the fact that the judicial decisions have done away with one piece of what we consider to be the most beneficial legislation from the standpoint of rates, and that was the doing away with the stacking of our policy limits as an underlying carrier before a plaintiff could get to the Fund on medical malpractice. That was a provision in the prior act that, in essence, did away with vicarious liability which would require us to always pay our partnership corporation policy in addition to our health care provider policy before the plaintiff got to the fund.

Well, if you put that into context of what it really means, what it means is we're really paying our policy limits twice in this state before payment from the Fund begins to inure to the benefit of the plaintiff. And that

has a substantial rating effect on the primary later. Well, that's one of a number of things.

I want to remind you that before the House committee that was studying tort reform legislation of two years ago, the Medical Protective Company said, "Even though this is not 100 percent what we would write if we wrote it, this is legislation that we think will have a beneficial effect on the environment in this state, and we are so sure that it will have an ameliorating effect on rates that we'll stand pat on the rates for two years. We will not take any rate increases," and we did that.

See P. 7

January the 1st of this year was the first time that we had changed our rates in two years. And it was my sincere hope that we would not have to do that based on the legislation that was passed. I still think and David Murry who is with me here today still thinks that had that legislation that was passed been allowed to operate, we would not have had to have the kind of rate increases that we have taken.

But we had to take a 55 percent rate increase January the 1st. We didn't get all we asked for from the Commissioner. We're filing

another 55 percent rate increase that we intend to become effective July the 1st of this year. And, of course, that is exactly the opposite thing we would like to see happen.

People think insurance companies can stay ahead of this game by taking these rate increases in an attempt to make money. The fact of the matter is that for the last ten years in this state the Medical Protective Company has a solid pattern of over 100 percent loss ratios. 1985 was one the worst years, and it's now developed out enough to where we can see what the statistics really look like. It's one of the worst years we have ever had, not as a company but in any state.

You can look at Michigan or Illinois or other states that everyone thinks has tremendously bad experience. Kansas is right up there with them and may even turn out to be worse in the latest year that we have fully developed statistics on.

Very aggravating situation, particularly since I was born and raised in this state, and I know that it has traditionally been a conservative environment in terms of the kind

of problem that we're seeing.

Well, let's turn our attention briefly to the legislation that's before you. I've been quoted a couple of times as having said that I don't think that the legislation is going to be particularly effective in terms of rates. Well, I stand by that statement in part, but part of what I said was not brought out in the quotations.

Tort reform can make a substantial difference in rates. There is no question in my mind that it can. It depends upon what degree of tort reform you as a Legislature decide to engage in.

The Bills that are before us now will have a stabilizing or a tempering effect on rates. They are not going to reduce rates. There's no question in my mind about that. The Collateral Source Rule, if given the opporunity to operate-- a case that just came down Dodge City that I was told about this morning for the very first time, not one of our cases, but the jury awarded a million eight. And I guess this was just in the last few weeks.

A good part of that million eight, I

was told almost a million dollars, was for medical that either had been paid or would in the future be paid, and that was a payable by medical insurance. Well, the effect of changing Collateral Source Rule would have obviously been to reduce that award or the payment on that award by whatever amount proscribed in your Collateral Source Bill change but up to a million dollars. And that does have a dramatic effect on payout.

Now, my point on collateral source isn't that if you pass collateral source you're going to see a sweeping change in the insurance company rates. I don't think you will, but I do think you're going to see some tempering of payout from the fund, because the Collateral Source Rule change, if it effects anything, is going to effect the jumbo award where you have tremendous medical injuries, medical payments, and potential for an elimination of the double dip.

Now, the whole issue resolves down to an insurance issue on collateral source because in collateral source, you're talking about a simple question of whether or not an individual

who has had the foresight to buy a health care policy or who is fortunate enough to be employed in a group that has a health care policy, whether or not that payment should be allowed in addition to whatever is recovered from a tort feasor.

Tort feasors normally don't get sued if they don't have insurance. Rule number one, when you go to law school, is you first have to have some money there before you go sue somebody, generally. Well, it's an insurance issue on both sides of the equation.

Now, my point on this is very simple. We have got a problem in this state with the insurance mechanism, and why? It's because it's been hit so hard that the companies, A, either won't write the business or, B, can't figure out how to price it. The first thing you have to do is to figure out why that is the case. And I'm saying to you one reason is because the insurance mechanism is being hit on both sides of the equation very hard.

Now, it doesn't matter particularly to insurance companies because we rate based on that environment. Who does it matter to? It

matters to the people that pay the premium. Now, if you want to pay premium based on double payment, every time a case like that comes down the pike that's what you've got.

Today, if you want to start in the direct of eliminating some of the excesses in the system that are resulting in those higher payments, you start one thing at a time, and the first and the most obvious is to reduce the double payment.

Now, is that unfair to me if I have had the foresight to cover myself with Blue Cross/Blue Shield or Aetna on a health insurance policy and I'm injured as a result of medical negligence in a hospital and I have the opportunity then to recover from my Blue Cross/Blue Shield if I'm in the hospital and then sue the doctor and recover again for that?

Well, it's a good argument that it's unfair because I paid premium, didn't I, for the Blue Cross/Blue Shield, or my employer did. Well, what's the problem, however, if in this Bill consideration is given for the premium that I paid in the offsetting procedure? I'm not going to be out any money. I'm still going to

be made whole, and I thought, when I went to law school, the purpose for litigation, particularly when you're suing a third party, was to be made whole. Is it to be awarded damages or is it to be rewarded because I was fortunate enough be in the situation of being able to get collection from two people.

I don't think it's the latter, but that's kind of what we have today, and it's not that way only in Kansas. It's that way in a lot of states, but many states have started in the direction of eliminating that. My position is and the company's position is, it's an access that should be done away with.

A similar kind of argument on the pain and suffering cap, we have had some experiences in the states which have implemented caps on awards. The most effective cap is the Indiana style which cuts off payments for anything at $500,000. Well, it's been argued, and I don't profess to be a strong proponent in either direction, for either the pain and suffering cap as opposed to the total cap. I think either has its place.

It's a legislative decision. If you

don't want it cut off, total economic payment to a plaintiff at 500,000 or a million dollar level, well, the next best alternative in terms of stabilizing the insurance pricing mechanism is to go to the side of the non-economic loss, pain and suffering, mental anguish, inconvenience, loss the consortium.

And the reason why it's important if you're going to cap that side of the equation at some number is because Jerry Palmer and the Kansas Trial Lawyers are effective in argument and they will be able to shift around the pain and suffering argument and go, as they've done in Texas and other places, to things like loss of consortium or inconvenience or mental anguish of not only being the person but a relative of that injured person. And before long we will be right back in the same situation we are with where we're targeting today primarily on pain and suffering for the injured person. If we're going to put a cap on it and stabilize insurance pricing mechanism, we virtually have to do it on the entire side of the equation, not on just a piece of it.

And finally and probably least

importantly from the insurance company's perspective is this issue of punitive damages. We don't insure punitive damages in Kansas. The old case of American Surety versus Gold, which I think was a Tenth Circuit appeal case, basically said that it's against public policy for insurance companies to insure or indemnify a tort feasor for what is construed to be a quasi intentional act. That gives him license to do it so you shouldn't be able to insure him, so we don't.

But the problem with the jumbo punitive damage awards compounded by the large pain, suffering, mental anguish, inconvenience, and other kinds of awards plus the more minor actual expense awards stacked together is that what you see in the newspaper is the $14.5 million award in Kansas City or a $4.5 million award in Pittsburg or a $1.8 million award in-- well, juries are reading the newspapers and they're seeing those numbers, and I can tell you from first-hand on-the-site experience that the Hyatt Regency disaster in Kansas City with the jumbo awards that emerged therefrom had a dilatorious effect on the environment in Eastern

Kansas because after that happened, the medical malpractice experience in that state went exactly the same direction.

So what are we going to do to bring the thing back into focus. One little step at a time, and we're taking small steps here. We're going to have to bring it back to a point where not insurance companies can make money - oh, I'd like it if we could - but where people can afford to pay the premium.

Where is the deterrent effect. Let me ask--

SENATOR FREY: You've got just a couple of minutes.

MR. MULLIN: I'm sorry, I'm almost finished.

SENATOR FREY: There probably are some questions.

MR. MULLIN: Well, I've heard-- not today because I'm not in a rebuttal mode, and I won't even make reference to Jerry Palmer's comments, but the whole cycle of the question on tort reform always boils down to one of whether or not we want to protect the tort feasor, whether or not there should be any sheltering

BILL OF RIGHTS

§ 1. Equal rights. All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness.

History: Adopted by convention, July 29, 1859; ratified by electors, Oct. 4, 1859; L. 1861, p. 47.

§ 2. Political power; privileges. All political power is inherent in the people, and all free governments are founded on their authority, and are instituted for their equal protection and benefit. No special privileges or immunities shall ever be granted by the legislature, which may not be altered, revoked or repealed by the same body; and this power shall be exercised by no other tribunal or agency.

History: Adopted by convention, July 29, 1859; ratified by electors, Oct. 4, 1859; L. 1861, p. 47.

§ 5. Trial by jury. The right of trial by jury shall be inviolate.

History: Adopted by convention, July 29, 1859; ratified by electors, Oct. 4, 1859; L. 1861, p. 48.

§ 18. Justice without delay. All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay.

History: Adopted by convention, July 29, 1859; ratified by electors, Oct. 4, 1859; L. 1861, p. 49.

ARTICLE II

§ 13. Majority for passage of bills. A majority of the members then elected (or appointed) and qualified of each house, voting in the affirmative, shall be necessary to pass any bill. Two-thirds (2/3) of the members then elected (or appointed) and qualified in each house, voting in the affirmative, shall be necessary to ratify any amendment to the Constitution of the United States or to make any application for congress to call a convention for proposing amendments to the Constitution of the United States.

History: Adopted by convention, July 29, 1859; ratified by electors, Oct. 4, 1859; L. 1861, p. 52; L. 1974, ch. 458, § 1; Nov. 5, 1974.

§ 14. Approval of bills; vetoes. (a) Within ten days after passage, every bill shall be signed by the presiding officers and presented to the governor. If the governor approves a bill, he shall sign it. If the governor does not approve a bill, the governor shall veto it by returning the bill, with a veto message of the objections, to the house of origin of the bill. Whenever a veto message is so received, the message shall be entered in the journal and in not more than thirty calendar days (excluding the day received), the house of origin shall reconsider the bill. If two-thirds of the members then elected (or appointed) and qualified shall vote to pass the bill, it shall be sent, with the veto message, to the other house, which shall in not more than thirty calendar days (excluding the day received) also reconsider the bill, and if approved by two-thirds of the members then elected (or appointed) and qualified, it shall become a law, notwithstanding the governor's veto.

If any bill shall not be returned within ten calendar days (excluding the day presented) after it shall have been presented to the governor, it shall become a law in like manner as if it had been signed by the governor.

(b) If any bill presented to the governor contains several items of appropriation of money, one or more of such items may be disapproved by the governor while the other portion of the bill is approved by the governor. In case the governor does so disapprove, a veto message of the governor stating the item or items disapproved, and the reasons therefor, shall be appended to the bill at the time it is signed, and the bill shall be returned with the veto message to the house of origin of the bill. Whenever a veto message is so received, the message shall be entered in the journal and, in not more than thirty calendar days, the house of origin shall reconsider the items of the bill which have been disapproved. If two-thirds of the members then elected (or appointed) and qualified shall vote to approve any item disapproved by the governor, the bill, with the veto message, shall be sent to the other house, which shall in not more than thirty calendar days also reconsider each such item so approved by the house of origin, and if approved by two-thirds of all the members then elected (or appointed) and qualified, any such item shall take effect and become a part of the bill.

History: Adopted by convention, July 29, 1859; ratified by electors, Oct. 4, 1859; L. 1861, p. 52; L. 1903, ch. 545, § 1; L. 1974, ch. 458, § 1; Nov. 5, 1974.

ARTICLE II

§ 17. Uniform operation of laws of a general nature. All laws of a general nature shall have a uniform operation throughout the state: *Provided,* The legislature may designate areas in counties that have become urban in character as "urban areas" and enact special laws giving to any one or more of such counties or urban areas such powers of local government and consolidation of local government as the legislature may deem proper.

History: Adopted by convention, July 29, 1859; ratified by electors, Oct. 4, 1859; L. 1861, p. 53; L. 1905, ch. 543, § 1; 1953 S.C.R. 13, § 1; L. 1974, ch. 458, § 1; Nov. 5, 1974.

ARTICLE XIV

§ 1. Proposals by legislature; approval by electors. Propositions for the amendment of this constitution may be made by concurrent resolution originating in either house of the legislature, and if two-thirds of all the members elected (or appointed) and qualified of each house shall approve such resolution, the secretary of state shall cause such resolution to be published in the manner provided by law. At the next election for representatives or a special election called by concurrent resolution of the legislature for the purpose of submitting constitutional propositions, such proposition to amend the constitution shall be submitted, both by title and by the amendment as a whole, to the electors for their approval or rejection. The title by which a proposition is submitted shall be specified in the concurrent resolution making the proposition and shall be a brief nontechnical statement expressing the intent or purpose of the proposition and the effect of a vote for and a vote against the proposition. If a majority of the electors voting on any such amendment shall vote for the amendment, the same shall become a part of the constitution. When more than one amendment shall be submitted at the same election, such amendments shall be so submitted as to enable the electors to vote on each amendment separately. One amendment of the constitution may revise any entire article, except the article on general provisions, and in revising any article, the article may be renumbered and all or parts of other articles may be amended, or amended and transferred to the article being revised. Not more than five amendments shall be submitted at the same election.

History: Adopted by convention, July 29, 1859; ratified by electors, Oct. 4, 1859; L. 1861, p. 65; L. 1970, ch. 411, § 1; L. 1980, ch. 355; Nov. 4, 1980.

19-717. Prosecuting witness may employ assistant attorney; dismissal of action in such cases, when. That the prosecuting witness in any criminal action or proceeding may, at his own expense, employ an attorney or attorneys to assist the county attorney to perform his duties in any criminal action or proceeding under any of the laws of the state of Kansas, and such attorney or attorneys shall be recognized by the county attorney and court as associate counsel in such action or proceeding, and no prosecution shall be dismissed over the objection of such associate counsel until the reason of the county attorney for such dismissal, together with the objections thereto of such associate counsel, shall have been filed in writing, argued by counsel, and fully considered by the court.

History: L. 1901, ch. 62, § 1; March 15; R.S. 1923, 19-717.

22-3212. Discovery and inspection. (1) Upon request, the prosecuting attorney shall permit the defendant to inspect and copy or photograph any relevant (a) written or recorded statements or confessions made by the defendant, or copies thereof, which are or have been in the possession, custody or control of the prosecution, the existence of which is known, or by the exercise of due diligence may become known, to the prosecuting attorney; (b) results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case, or copies thereof, the existence of which is known, or by the exercise of due diligence may become known, to the prosecuting attorney; (c) recorded testimony of the defendant before a grand jury or at an inquisition; and (d) memoranda of any oral confession made by the defendant and a list of the witnesses to such confession, the existence of which is known, or by the exercise of due diligence may become known to the prosecuting attorney.

(2) Upon request, the prosecuting attorney shall permit the defendant to inspect and copy or photograph books, papers, documents, tangible objects, buildings or places, or copies, or portions thereof, which are or have been within the possession, custody or control of the prosecution, and which are material to the case and will not place an unreasonable burden upon the prosecution. Except as provided in subsections (1)(b) and (1)(d), this section does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by officers in connection with the investigation or prosecution of the case, or of statements made by state witnesses or prospective state witnesses (other than the defendant) except as may be provided by law.

(3) If the defendant seeks discovery and inspection under subsection (1)(b) or subsection (2) of this section, the defendant shall permit the attorney for the prosecution to inspect and copy or photograph scientific or medical reports, books, papers, documents, tangible objects, or copies or portions thereof, which the defendant intends to produce at the trial, and which are material to the case and will not place an unreasonable burden on the defense. Except as to scientific or medical reports, this subsection does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or the defendant's attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by prosecution or defense witnesses, or by prospective prosecution or defense witnesses, to the defendant, the defendant's agents or attorneys.

(4) The prosecuting attorney and the defendant shall cooperate in discovery and reach agreement on the time, place and manner of making the discovery and inspection permitted, so as to avoid the necessity for court intervention.

(5) Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted or deferred or make such other order as is appropriate. Upon motion, the court may permit either party to make such showing, in whole or in part, in the form of a written statement to be inspected privately by the court. If the court enters an order granting relief following such a private showing, the entire text of the statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

(6) Discovery under this section must be completed no later than twenty (20) days after arraignment or at such reasonable later time as the court may permit.

(7) If, subsequent to compliance with an order issued pursuant to this section, and prior to or during trial, a party discovers additional material previously requested or ordered which is subject to discovery or inspection under this section, the party shall promptly notify the other party or the party's attorney or the court of the existence of the additional material. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this section or with an order issued pursuant to this section, the court may order such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as it deems just under the circumstances.

History: L. 1970, ch. 129, § 22-3212; am. by Supreme Court (order dated Dec. 5, 1980); eff. Jan. 21, 1981.

65-2862. Penalties for violations of act; second conviction. Any person violating any of the provisions of this act, except as specific penalties are herein otherwise imposed, shall be deemed guilty of a misdemeanor and upon conviction thereof shall pay a fine of not less than fifty dollars ($50) nor more than two hundred dollars ($200) for each separate offense, and a person for a second violation of any of the provisions of this act, wherein another specific penalty is not expressly imposed, shall be deemed guilty of a misdemeanor and upon conviction thereof shall pay a fine of not less than one hundred dollars ($100) nor more than five hundred dollars ($500) for each separate offense.

History: L. 1957, ch. 343, § 62; July 1.

65-2866. Attorney general, county or district attorney to prosecute violations. Upon the request of the board, the attorney general or county or district attorney of the proper county shall institute in the name of the state or board the proper proceedings against any person regarding whom a complaint has been made charging him or her with the violation of any of the provisions of this act, and the attorney general, and such county or district attorney, at the request of the attorney general or of the board shall appear and prosecute any and all such actions.

History: L. 1957, ch. 343, § 66; L. 1976, ch. 273, § 28; Feb. 13.

SB 182

Sec. 4. K.S.A. 65-2862 is hereby amended to read as follows: 65-2862. Any person violating any of the provisions of this act, except as specific penalties are herein otherwise imposed, shall be deemed guilty of a *class A* misdemeanor ~~and upon conviction thereof shall pay a fine of not less than fifty dollars ($50) nor more than two hundred dollars ($200) for each separate offense~~, and a person for a second *or subsequent* violation of any of the provisions of this act, wherein another specific penalty is not expressly imposed, shall be ~~deemed~~ guilty of a ~~misdemeanor and upon conviction thereof shall pay a fine of not less than one hundred dollars ($100) nor more than five hundred dollars ($500) for each separate offense~~ *class E felony*.

Non-Federal Physicians Per Hundred Thousand
TABLE I -- Selected & Regional State Analysis
(Source: AMA 1986 Demographic Information, Kansas State Library)

STATE	(000) Population	Total M.D.	per 100000	Age is 65 or Older	Number 100000	Age 55-64	Number 100000	Age is Under 54	Number 100000
NY	17,772	57,779	325.1	8,885	50.0	7,943	44.7	40,951	230.4
CAL	26,981	71,349	264.4	11,625	43.1	11,158	41.4	48,566	180.0
FLA	11,675	27,838	238.4	6,471	55.4	4,105	34.3	17,345	148.6
COLO	3,267	7,028	215.1	911	27.9	994	30.4	5,123	156.8
MO	5,066	9,996	197.3	1,186	23.4	1,350	26.6	7,460	147.3
KS	2,460	4,460	181.3	690	28.0	612	24.9	3,158	128.4
TX	16,685	29,207	175.0	3,562	21.3	4,283	25.7	21,362	128.0
NEB	1,598	2,762	172.8	391	24.5	402	25.1	1,969	123.2
IND	5,504	8,731	158.6	1,338	24.3	1,287	25.2	6,006	109.1
ARK	2,372	3,664	154.5	532	22.4	483	20.4	2,649	111.7
OK	3,305	4,994	151.1	677	20.5	711	21.5	3,606	109.1
WYOM	507	706	139.0	100	19.7	99	19.5	507	100.0
IOWA	2,851	4,384	136.7	642	21.5	644	21.6	3,098	108.7
U.S. Totals	241,078	547,222	227.0	81,108	33.6	77,818	32.3	388,296	161.0

Non-Federal Physicians Per Hundred Thousand
TABLE II -- Selected State Analysis
Family Practice, Surgeons & OBGYN per 100,000
(Source: AMA 1986 Demographic Information, Kansas State Library)

STATE	General Practice & Family Practice	No. Per 100,000 pop.	General Surgeons	No Per 100,000 pop.	Obstetrics/ Gynecology	No. per 100000 pop
KS	844	34.3	340	13.8	220	8.9
MO	968	19.1	701	13.8	597	5.9
CO	990	30.3	426	13.0	388	11.9
OK	872	26.4	305	9.2	302	9.1
NEBR	613	38.3	195	12.2	128	8.0
IND	1,853	33.6	556	10.1	428	7.7
CAL	8,372	31.0	3,840	14.2	3,882	14.3
FLA	3,214	27.5	1,582	13.5	1,429	12.2

TABLE III -- Family Practice, Surgeons & OBGYNs; % of total Medical Community

STATE	General Practice & Family Practice	General Surgeons	Obstetrics/ Gynecology
KS	19.9%	7.6%	4.9%
MO	9.7	7.0	5.9
CO	14.0	6.1	5.5
OK	17.4	6.1	6.0
NEB	22.2	7.0	4.6
IND	33.6	10.1	7.7
CAL	31.0	14.2	14.3
FLA	27.5	13.5	12.2

Explanation of Figures

This database was prepared by the American Medical Association based on national demographic in 1986. It is on microfilm in the state library. Not all states are included although information was available for all states.

This information is 1986 statistics only. This information was prepared before the 1986 tort reforms of the Kansas Medical Society were enacted and well before any legal challenges to them.

Generally it can be said about these 1986 statistics:

- Four states -- California, New York, Florida and Texas -- account for the residence of three in every ten American doctors.
- The Midwest has fewer doctors per hundred thousand than the east and west coasts. Further, most medical schools are located on the coasts. Urban states tend to have more doctors per hundred thousand than rural states. That tends to explain Colorado

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Ks. Bar Assoc.

and Missouri total physician numbers / 100,000 are higher than Kansas. Kansas numbers are greater than Oklahoma or Nebraska, however.

- Among contiguous states (NEB, OK, CO, & MO), Kansas has the highest measure of physicians who are already 65 or older and nearing retirement. One in six doctors has already reached 65. Thirty percent are 55 or older, a time when professionals begin looking at retirement. Replacing retired physicians from below is easier in Missouri and Colorado than Oklahoma, Nebraska or Kansas because the "Below 54" age group per 100,000 population is larger. At the same time, the past few years the legislature has cut back on medical scholarship programs for those Kansans who agree to live and work in Kansas after graduating from medical school.

- Indiana is often hailed as a safe-haven for doctors and medical malpractice because of the Indiana Plan, which limits recovery in medical malpractice actions to $500,000 total. Indiana has had this plan since 1976, and some of the lowest costs of insurance in any state. However, comparing Indiana and Kansas statistics in Tables I and II show Kansas doctors/population numbers are better, indicating factors other than malpractice laws and insurance rates influenced doctors relocating in Kansas or Indiana.

- Iowa and Arkansas are two other states where insurers indicate malpractice premiums are much better than in Kansas. However, more physicians per hundred thousand population practice in Kansas than in those states. See Table I.

- Table II compares local states in terms of basic medicine. Kansas trails only Nebraska in the number of contiguous states with primary care physicians (General practice and family practice). Kansas has more family practice physicians than California or Florida on a population basis.

- Kansas has more general surgeons per 100,000 than any of the compared states. Kansas is competitive with all contiguous states for OBGYNs except Colorado. Kansas leads Indiana in all three categories.

- Table III shows that only Nebraska exceeds Kansas in the percentage of the entire licensed non-federal medical community who are primary care physicians. Missouri's numbers are down considerably, indicating that a higher proportion of their medical community are other types of specialists than family practice, surgery or OBGYNs.

- While Kansas OBGYN percentages in Table III are the lowest among the reported states except Nebraska, keep in mind this data was prior to 1986 tort reforms in Kansas designed to help the higher risk physicians with insurance costs. Further, according to the Department of Health & Environment, in 1980 Kansas had 158 practicing OBGYNs. In 1984, the numbers peaked to 189. In FY 1986 and 1987, the numbers were 181 and 178, respectively. Numbers of OB-GYNS have generally risen slightly since 1980, so the total percentage of the medical community that was OB-GYNs was probably low throughout this decade. (The difference in reported numbers between the AMA and the KDHR is probably federally-employed OBGYNs and OBGYN residents, which are not included in the KDHR numbers.)

- Interestingly, Table III shows a higher percentage of surgeons and OBGYNs practicing in Indiana than in the Midwestern states. One might conclude that is the absolute $500,000 cap on liability in the Indiana Plan. However, Colorado has an absolute $1 million cap on medical malpractice cases with a $250,000 limit on noneconomic damages; Nebraska has a $1 million limit on total awards and Missouri has a $350,000 cap on noneconomic loss. Even with these tort law variances, the numbers are not much different in Kansas and Oklahoma, the states which have no limitation on awards in medical malpractice cases (other than wrongful death actions). The differences in the malpractice laws do not appear to make that much difference in the demographic spread of doctors in these medical categories.

A SECOND CENTURY OF SERVICE
1882
KANSAS BAR ASSOCIATION

SCR 1610
Senate Judiciary Committee
March 21, 1989

Mr. Chairman, and members of the Senate Judiciary Committee. I am Ron Smith, legislative counsel. KBA's presentation is in two parts, the first by me which shall be mercifully short.

Some of you are members of the Financial Institutions and Insurance committee. In your earlier discussions on the Health Care Stabilization Fund, Senator Karr raised the issue whether there was any information comparing the number of doctors in Kansas with surrounding states on a "per 100,000 population basis."

The 1986 demographic statistics from the American Medical Association and available in the state library microfilm show that, on a population comparison basis, Kansas has as many, if not more, doctors in critical specialities as surrounding states when compared on a per 100,000 population basis. Our state comparisons are favorable even to states like Indiana and Nebraska allegedly with more conservative tort laws because of caps.

The AMA statistics are available for all states, but I chose to compare only key states around Kansas. I chose to use the 'per 100,000' comparison because raw numbers of doctors in each state is not an apples to apples comparison. These numbers are included in the folder attached to this cover statement.

Generally, the entire Midwest and especially the plains states have fewer doctors per 100,000 than the coasts. Colorado has 215 per 100,000, Missouri, 197, Kansas, 181, Oklahoma, 151 and Nebraska has 172. Overall, Kansas is right in the middle. States like New York and California lead the nation in the number of doctors, but they are the largest and most urbanized states, so that is not surprising. The fact that Colorado and Missouri lead the 5-state analysis is also not surprising since those states have the largest metropolitan centers.

What is surprising from the figures is the following:

1) Kansas doctors who were 65 or older in 1986 comprise 28 per 100,000 population, the highest of the four surrounding states (Colo. 27.9; Mo. 23.4; Neb., 24.5; and Okla., 20.5). That means Kansas has a higher proportion of its doctors nearing retirement age.

1200 Harrison • P.O. Box 1037 • Topeka, Kansas 66601-1037 • FAX (913) 234-3813 • Telephone (913) 234-5696

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2) Table II compares non-federal physicians per hundred thousand population among three important areas: family practice (general practice), obstetrics, and general surgeons. Of the surrounding states, Kansas has the highest number of general and family practice doctors per 100,000 population.

3) In 1986 we had more physicians per 100,000 population than Indiana, which is often cited by insurance companies as a state with the best medical malpractice insurance climate because of their limitations on awards.

4) In the category of General Surgeons, in 1986 Kansas tied for best among the surrounding states with Missouri at 13.8 surgeons per 100,000 population.

5) In the obstetrics category, 1986 figures show Kansas in the middle of the 5-state analysis with 8.9 physicians per 100,000.

6) "In all three critical categories, in 1986, there were more general practice doctors, OBGYNs, and surgeons in Kansas per 100,000 than Indiana, with its conservative tort laws.

The statistics are not able to show that doctors go where the malpractice laws are most restrictive on recovery. Nebraska and Missouri have statutes limiting awards, yet Kansas generally has more doctors than Nebraska and exceed those in Missouri in some speciality areas.

The price of malpractice insurance is just one issue that determines where doctors practice medicine. One could conclude that urbanization is a factor that attracts physicians. Correspondingly, where population declines, it is possible that doctors will leave.

A logical question is whether there has been a material change in the numbers since 1986. It would be interesting to see a comparison of 1988 AMA data with 1986. The AMA data is not county-specific, so we don't know where all the OBGYNS are, etc. What we do know from recent reports are:

(a) raw numbers of Kansas physicians have increased in 1987 and 1988 over 1986 figures; and

(b) Last year's census data shows our state has lost total population especially in the rural areas.

If those two trends hold true, then today's Kansas numbers compared on a per 100,000 population basis would be slightly better than in 1986. We don't know where that puts us in relation to the other states, however.

united transportation union

KANSAS STATE LEGISLATIVE BOARD

DONALD F. LINDSEY, JR.
DIRECTOR/CHAIRMAN

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MARCH 21, 1989

STATEMENT OF DONALD F. LINDSEY JR., DIRECTOR
KANSAS STATE LEGISLATIVE BOARD
UNITED TRANSPORTATION UNION
IN OPPOSITION OF
SENATE CONCURRENT RESOLUTION 1610

PRESENTED TO
SENATE JUDICIARY COMMITTEE
HONORABLE WINT WINTER, CHAIRMAN

Mr. Chairman and Members of the Committee, I am Don Lindsey, Director of the **Kansas State Legislative Board, United Transportation Union.** I am a duly elected officer, authorized to speak for our some 6,000 active and retired members and their families who reside in the State of Kansas. I appear in opposition to Senate Concurrent Resolution 1610.

The United Transportation Union has followed the case for tort reform in the United States closely during the last several years. While proponents of tort reform claim that the citizens of Kansas will be the winners, we feel only the insurance companies and big business will be able to claim victory, if arbitrary caps are imposed on injured victims.

In our opinion, if one reads SCR 1610 carefully, it says much more than is written. It says, in essence, that the people of this state are incompetent to make honest, rational decisions based on facts which are presented to them, under the rules of evidence in accordance with our judicial system. It says that individuals who reside in the state of Kansas are no longer unique. The quality of their life is meaningless. They are merely a statistic and regardless of the circumstances which contributed to their injuries, they are only entitled to an arbitrary amount. This amount to be decided upon by a legislative body, far removed from the facts and the everyday suffering they bear.

Attached to my testimony are "Pro" and "Con" letters, relating to SCR 1610, which appeared in the Opinion Section of the Kansas City Star on March 5, 1989. One argument stated the people of Kansas want to share the authority over tort liability with their elected Legislature, rather than leave it under the authority of the court system. It is our observation when an individual is injured, there is no sharing of his or her injury in regards to the pain, the suffering and the disruption of one's everyday life with anyone but the individual who suffered the injury.

Attachment VII
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Also, the proponent suggested that this constitutional amendment is no different from when Kansans "tampered" with the constitution to allow pari-mutual betting and liquor-by-the-drink. It is vastly different. Those two amendments **expanded** the rights of Kansans to choose for themselves. SCR 1610 would **restrict**, not expand, the rights of every man, woman and child in the state of Kansas. This is wrong.

I have also attached a copy of an article from a local newspaper in my area which graphically depicts the injuries a man suffered in an accident at work. This is not shown to shock the committee but merely to illustrate the very type of injuries SCR 1610 would place arbitrary caps on.

Whenever a headline appears - **JURY AWARDS INDIVIDUAL $750,000** - the reader's first impression is " some people have all the luck". Only if you read the small print do you find that the award was based on severe catastrophic injuries and the individuals life will never be the same. Often, it is proven the accident occurred because the manufacturer took a calculated risk in supplying an unsafe product rather than go to the expense of re-tooling to make the product safe. These decisions are almost always made in the name of profit. Arbitrary caps on non-economic loss would encourage, rather than discourage, these types of decisions.

In closing, we feel that if SCR 1610 appears on the ballot, the pollsters and 30 second sound bites will be used to influence the public's perception of the law. This approach does not allow the Legislature to seek compromise or find middle ground solutions to complex problems. We would ask this committee to recommend Senate Concurrent Resolution 1610, unfavorable for passage.

THE ISSUE IS INSURANC

Voters can speak for themselves

By Jerry Slaughter
Executive director
Kansas Medical Society

Your right to vote. That's the issue. Should Kansans be given the opportunity to vote on a constitutional amendment which authorizes the Legislature to enact tort reform laws?

Pro

We believe the voters should decide this issue. The Kansas Trial Lawyers Association and the Kansas Bar Association apparently don't want people to have access to their constitution, at least on this issue. While the contingency fee industry now rails against "tampering" with the constitution's "bedrock" principles, where were they two years ago? In 1986, Kansans "tampered" with their constitution six times, reversing long-standing prohibitions on gambling and liquor-by-the-drink, and ending uniformity under the law when it comes to property taxation. Where were these self-appointed defenders of the constitutional status quo then?

In court. Reaping a bounty provided by a generous tort system which commonly pays the contingency fee lawyer 40-50 percent of awards and settlements. You needn't look further for the reason lawyers oppose change in tort laws. Proposals designed to hold down excessive awards also hold down excessive rewards for lawyers.

Since 1986, after countless hours of fact-finding, study and debate, the Kansas Legislature and two different governors in three successive years approved laws setting reasonable limits on non-economic awards. The Legislature found that reasonable restraints on awards would stabilize premiums and still compensate people adequately for their losses. In fact, the state of Kansas was able to reduce the state-collected portion of malpractice premiums by 21 percent as a result of the 1986 reform laws. On June 3, 1988, the Kansas Supreme Court struck a blow against the Legislature's tort reform efforts, declaring that the state constitution did not permit limits on damage awards.

The court ruling sent a clear message to the Legislature, consumers, health-care providers and the business community in Kansas that even modest legislative intrusion into the court's absolute control over tort law would not be tolerated. In spite of compelling need for, and the public benefits of, statutory tort reform, it is clear that the Kansas Supreme Court will not allow the Legislature to impose any reasonable restraints on the tort system without first amending the state constitution.

During these years of dedicated legislative effort, the liability and insurance situation in Kansas has worsened. Many physicians have left the state or retired early, while others have been forced to reduce basic health care services in order to qualify for lower-risk, less-expensive liability insurance. Hospitals are closing whole departments, and face threats to their viability, especially in rural areas.

Businesses are compelled either to increase their prices or discontinue goods and services offered to consumers. At a time when many other states have passed successful tort reforms (at last count, 18 states had passed limits on non-economic damages), Kansas is seen by the business and professional communities as an unpredictable environment with an unstable tort system and a Legislature that has been prevented from establishing public policy in this vital area.

Today the legal system for resolving personal injury disputes remains unrestrained and very costly. Of the total dollars expended by Kansas medical malpractice insurers, less than half are actually paid to plaintiffs as compensation for their injuries. Transaction costs, particularly legal fees, consume the majority of medical malpractice insurance dollars. This unacceptable situation is characteristic of the liability environment in general.

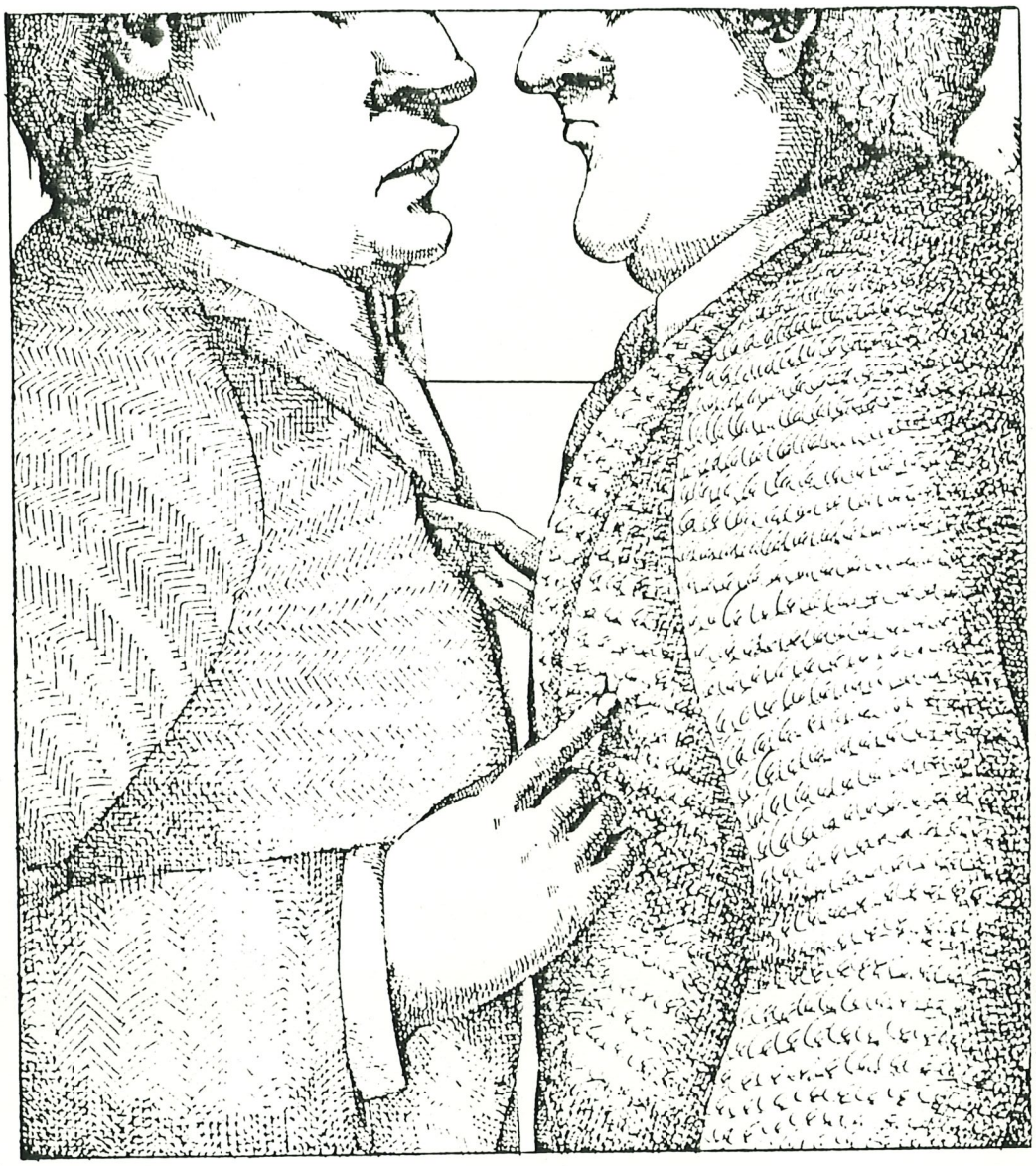
Under the court's interpretations of the state constitution, the Legislature cannot limit the amount of money awarded to plaintiffs in personal injury cases without first amending the state constitution. Thus, the constitutional issue is whether the people of Kansas want the courts to have exclusive authority over tort liability issues or would like that power to be shared with their elected Legislature.

The proposed constitutional amendment would authorize the Legislature to enact laws that limit awards for "non-economic" damages only, such as pain and suffering. In cases involving crimes, such as drunken driving, the statutory limits would not apply.

The constitution of Kansas belongs to the people of Kansas. It is the written authority by which the powers of the public are delegated to the three branches of government. The people created the constitution, and only the people can change it. In order for the people to be able to vote on this most critical issue, two-thirds of the Legislature must vote to put the question on the ballot. If the people approve the amendment, the Legislature would then be authorized to re-enact the same or similar limits on non-economic damages that it has already passed.

The Legislature has tried for years to remedy the tort litigation crisis, only to be thwarted by the courts. In such cases, where ongoing disagreements exist between the legislative and judicial branches of government over establishing public policy, we must turn to the people for guidance and resolution.

We believe Kansans should be given the right to vote on the critical issue of tort reform.



The Kansas Supreme Court has ruled that laws enacted to deal with medical malpractice insurance in the state have been unconstitutional. Consequently, an attempt is being made in this session of the Legislature to develop a proposed constitutional amendment on the issue. *The Star* has invited representatives of the medical and legal professions to comment on the proposed amendment.

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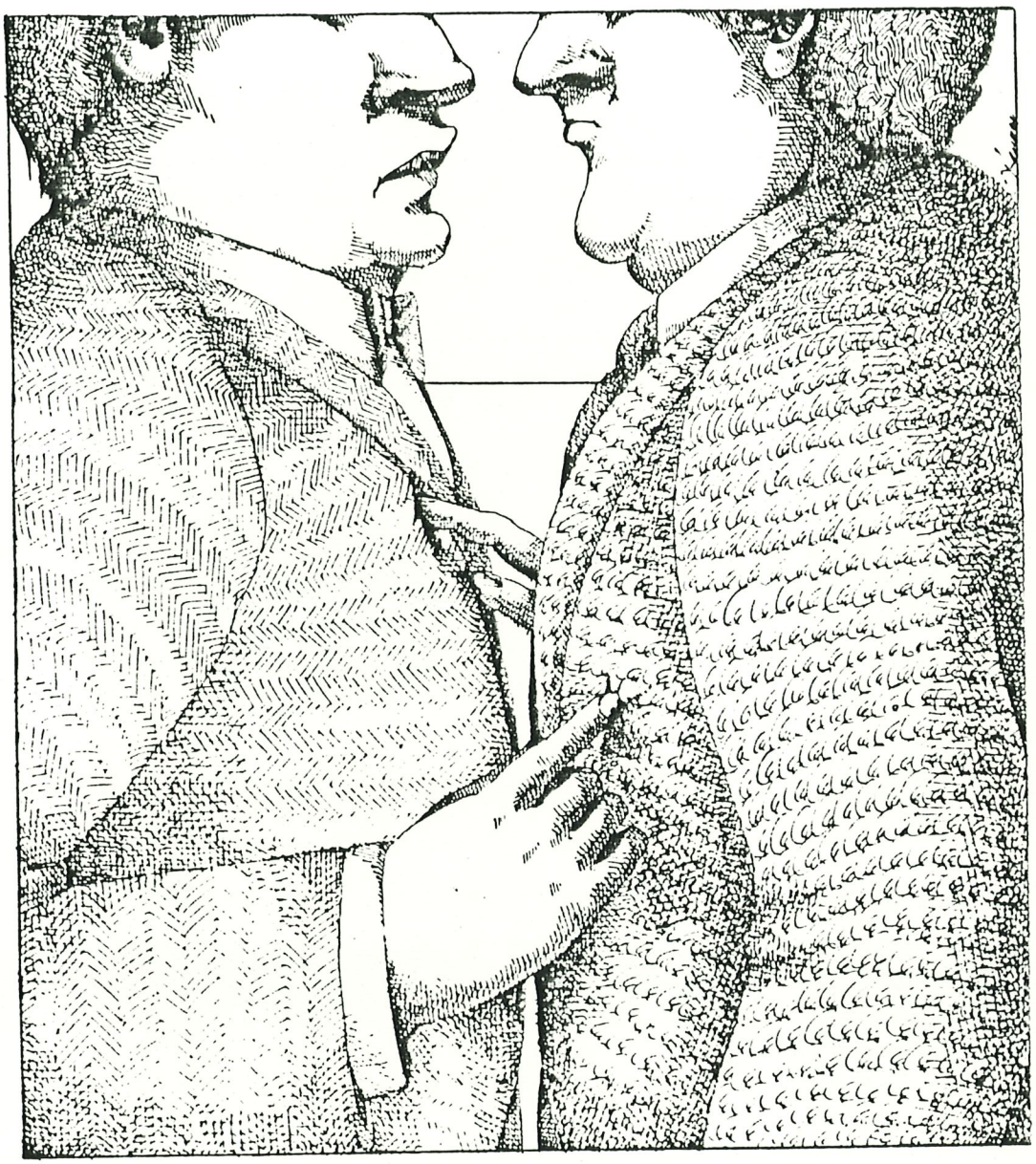

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We believe Kansans should be

Amendment is no way to decide

By Gary D. McCallister
President
Kansas Trial Lawyers Association
and Timothy Alvarez
Vice president for public affairs
Kansas Trial Lawyers Association

The state of Kansas is indeed facing real problems associated with the medical malpractice insurance delivery system. The Kansas Medical Society, a coalition of business groups and even the governor have decided the answer is **Con** to change the state constitution.

Specifically, they propose that the jury's power to decide damages in a personal injury action be subjugated to the 165-member state Legislature. In other words, as few as 63 representatives and 21 senators could arbitrarily decide the monetary worth of Kansans injured by another's negligence.

The Legislature would determine this price tag on the value of human life without any facts concerning the individual cases to which it would apply. Such caps are not only unjust, they discriminate against women, children and senior citizens.

This special-interest amendment, referred to as SCR 1610, asks Kansans to sacrifice certain constitutional rights in order to attempt to lower an overhead item (liability insurance) for doctors, manufacturers and others. We are talking about an individual's right to equal protection under the law, a trial by jury of one's peers and the ability to demand an adequate remedy for injuries. These rights have not been amended since the Kansas Constitution was adopted in 1859. If SCR 1610 were passed by the Legislature and approved by the people, it would give Kansas the dubious distinction of being the first state to succumb to special interests in such a dramatic fashion.

The debate over medical malpractice in Kansas has been on-going since the last "crisis" in 1975. It has been characterized by emotional rhetoric and unrealistic expectations, rather than fact. As an example, we have been told that doctors are fleeing Kansas. Yet a report released by the University of Kansas Medical Center within the last two weeks concludes that "There is, however, a significant increase in 1988 FTE (full-time equivalent physicians) from 1987, due to the combined effect of several factors . . . "

Specifically, the report documents the fact that there were 278 more physicians in 1988 than 1987, a 9 percent increase. And that came in a year when the Kansas population actually dropped.

The Kansas Supreme Court, through its Office of Judicial Administration, has studied the facts about personal injury lawsuits for three years. Rather than prove the allegation that juries are "out of control," it concluded in 1988 "It is evident from an inspection of the data in this

Amendment continued from pg. 11E

report that jury verdicts in the overwhelming majority of cases in the state are quite modest . . ."

The study goes on to point out there were 309 cases tried by a jury in FY 1988, and that defendants won 41 percent of the time. The median award for the plantiff was only $17,261. Even for medical malpractice cases, often the most expensive to compensate, plantiffs prevailed in only 30 percent of the cases. In the last two years, only three medical malpractice verdicts were above $1 million.

It is also noteworthy that medical malpractice cases actually dropped 10 percent in Kansas last year.

A major thrust of the "tort reformers" propaganda focuses on lawyers. This is understandable. However, some lawyers under fire actually sit on the Kansas Supreme Court. Critics suggest our court is out of step with the rest of the country.

But, again, the facts tell a different story. Eleven of 18 states have ruled caps on damages are unconstitutional. The trend clearly indicates Kansas is in the mainstream of judicial thought.

There are realistic, workable and constitutional alternative solutions to deal with the legitimate problems associated with medical malpractice liability insurance. Let us summarize them.

● HB 2047 would eliminate the Health Care Stabilization Fund on July 1 of this year. It also would allow health care providers to buy the level of insurance they feel is necessary. Its concepts are supported by our association. Interestingly, the Kansas Medical Society opposes HB 2047.

This bill would provide more immediate relief to Kansas doctors than any package of solutions that will be debated this year. All doctors don't need $3.2 million worth of liability insurance.

● Currently in Kansas, our insurance companies charge doctors in a given category of practice the same rate, irrespective of whether an individual physician has been successfully sued for malpractice. Additionally, family practitioners who deliver 10 babies a year pay the same rate as those who deliver 200 babies. One proposal addresses both of these inconsistencies, and would be especially beneficial to rural physicians.

● Four different bills in the House would subsidize insurance premiums for doctors whose individual malpractice insurance bill might cause them to change their practice. The funds to accomplish this come from a variety of sources, including tax credits, in-hospital day patient charges and increased premium taxes on insurance companies.

As the issue of a special-interest constitutional amendment is debated, we invite readers to ponder three questions the insurance industry should answer when SCR 1610 is scheduled for hearings: 1) What effect will it have on insurance premiums?, 2) how much will it reduce premiums?, and 3) when will it be reflected in the form of lower premiums for Kansas consumers? We doubt that the liability insurance industry will satisfactorily answer these questions. Even the executive director of the Kansas Medical Society has told the Legislature, "We have never said tort reform will lower insurance rates."

Finally, we want to address the notion that regardless of an individual legislator's opinion about SCR 1610, he or she should "let the people decide."

Ours is a representative form of government. "Let the people decide" could be applied to any piece of legislation being considered. But to do so would be totally irresponsible and in derogation of the authority vested in the Legislature. A lawmaker should only vote for this proposal if he or she believes in this constitutional change, recognizing the unprecedented nature of the action. This is not a matter of letting people decide whether they want to drink or gamble, which were expansions of constitutional rights. Here we are dealing with limiting the Kansas Bill of Rights. Members of the Legislature have a difficult political decision to make. But it properly rests with them.

Medical malpractice insurance problems in Kansas certainly must be addressed. A constitutional amendment, however, simply is not the answer. SCR 1610 is a political placebo that should not be taken.

Agents continued from pg. 11E

The Miami Republic
Contents © Copyright 1988 Miami County Publishing Co. Paola, Kansas **Wednesday** July 20, 1988 34 Pages Official City Newspaper

Photo by Sarah Maloney

Recovery
David Hurlbut works each day to return his burned body to a state as close to normal as is possible. His wife, Ruth, helps him bathe and dress and daughters Jenny Lea, 2, and Lindsey Marie, one month, provide laughter and the normalcy of family life. Hurlbut suffered severe burns over 30 percent of his body in the explosion and fire Jan. 20 at J&J Metal Products in Paola.

One day at a time

Burn victim, family face long recovery

By Sarah Maloney
Staff Writer

PARKER — David Hurlbut can shift the manual transmission in a pickup, turn on the television set, punch telephone keys, turn a doorknob and feed himself.

So what? Those tasks are mindlessly performed every day by millions of people.

Hurlbut, 27, isn't like millions of people. He has no thumbs, no fingers on his right hand and four, inch-long nubs on his left hand.

Six months ago he suffered third-, fourth-, and fifth-degree burns over 30 percent of his body. His hands, upper body and head were burned almost beyond recognition.

He was not expected to live. Yet he survived the explosion and fire at J&J Metal Products in Paola that killed two co-workers the afternoon of Jan. 20.

Two months and nine operations later he walked out of the University of Kansas Medical Center. Alive.

He has had one operation since then and faces many more to restore his body and life to as close to normal as possible.

Expenses are being paid through Workers Compensation claims.

The explosion

It was almost quitting time on a gray January afternoon. Hurlbut was cold, even through layers of clothing. He shut down the forklift truck he was driving and walked into the asphalt dipping vat building to get warm.

He sat down in a chair by the stove. Charles C. Hoffman and John P. Windisch were working in the building.

"I looked at my watch and told them it was time to go get the forklift truck and tools because it was about quitting time. That's when it blew. It knocked me off my chair," Hurlbut said in a recent interview.

Something caused an explosion under the vat of hot asphalt. Tar, heated to 250 to 450 degrees Fahrenheit, sprayed the three men. Hurlbut said he felt his hands on fire and screamed. Hot air rushed into his lungs, burning them as the tar caught his clothing on fire and burned his body.

Hurlbut said his only thought was to get out of the building. He crawled to the door, stood up, opened the door and ran outside. His clothes were ablaze.

J&J Metal employees Don Trumbly and Jack Savage rolled Hurlbut on the ground to smother the fire. An office employee dialed 911. Five minutes later an ambulance was at the scene.

Authorities called the explosion and fire, which killed Hoffman and Windisch, the worst industrial accident in Paola.

The local ambulance service took Hurlbut to Miami County Hospital, where he talked with his wife, Ruth. Life Flight helicopter flew him to the burn unit of the University of Kansas Medical Center in Kansas City, Kan.

> "He was so badly burned that the doctors didn't think he would make it through the first few hours."
>
> Ruth Hurlbut
> Victim's wife

By the time the helicopter landed, the morphine had taken effect, Hurlbut said.

"I shut my eyes and passed out," he said.

He's been told he talked to Ruth and to his parents at the medical center. He does not remember.

Nor does Hurlbut remember much of what happened during the next 1½ months. He does not remember all of the skin grafting operations that began three days after the explosion.

"They had me so drugged up for six weeks, I really didn't know what was going on," he said.

Ruth remembers.

Life since Jan. 20 has been chronicled in her pocket calendar.

David was in the intensive care unit of the burn unit from Jan. 20 to Feb. 22. His first skin grafting operation was three days after the explosion. He would have eight more in late January and through February. He started walking March 1. He was at the medical center 68 days. It's all there, written in the little squares on the calendar pages.

Ruth, who was pregnant with the couple's second child, spent part of every day with David. She moved from their Parker home to live with her parents in Paola.

Her parents, other relatives and friends took care of toddler Jenny Lea. A second daughter, Lindsey Marie, was born June 27.

"I took care of myself because I didn't want to lose the baby. I was living on the fact that David was still alive," Ruth Hurlbut said.

David Hurlbut's burns — from the top of his head, down most of his body to his left calf — were so deep that many caused nerve damage. Hurlbut said he would never grow hair nor sweat where he was burned.

His fingers were burned so badly they could not be saved. His wedding ring melted. The leather strap of his watch

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Survivor

(Continued from Page 1A)
seared into his skin and had to be cut off.

His face was destroyed. He has no ears and the bare minimum of a nose. Physicians crafted and grafted new eyelids in an operation. His vision, hearing and sense of smell were not affected by the fire, but his tear ducts were damaged, so his eyes drain water.

"He was so badly burned that the doctors didn't think he would make it through the first few hours," Ruth said.

One physician said that two out of three people burned as badly as David was would have died, she said.

David said that two things saved his life. Two pairs of gloves, three layers of clothing on his legs and five layers on his chest slowed the flames. Secondly, he breathed in little of the damaging hot smoke and air.

Physicians feared that his insides were as badly burned as his outside. If so, his chances of survival would have been cut. Because Hurlbut held his breath after that first scream, his lungs and other organs were not exposed to the burning hot air and smoke.

The mending

Hurlbut's recuperation began almost immediately after the explosion and fire.

The third day he was in the medical center, physicians began grafting skin. They cut strips and squares of unburned flesh, stretched it taut and sewed it over the burns.

One square inch of skin can be stretched to cover three square inches of burn, he said. Ten to 12 days after a skin graft, physicians can take more skin from the same unburned area.

Skin grafts cover his face, head, shoulders, sides of his body, across his buttocks, on his inner thighs and on his left calf.

All of the skin grafts came from unburned portions of his body. Skin cannot be transplanted from one person to another.

Nine of the skin graft operations were performed by March 1. The 10th operation — touch ups — was performed in April.

The new skin is very tender and breaks easily, Hurlbut said. A slight bump can mean a cut.

Hurlbut wears a Jobst suit over his body 24 hours a day. It is an elastic garment that fits like a second skin. He takes it off only to bathe.

The suit's purpose is twofold — to protect skin grafts and to keep pressure on scars so they will be as flat and thin as possible. Scars are the places where the skin grafts were knitted into his unburned skin surrounding a burned area.

The scars will be active or healing a year after the operation, he said.

The Jobst suit includes a clear plastic face mask and elastic mesh covering for his head. He is to wear that 20 hours a day, again to keep pressure on scars.

After the skin grafting operations came therapy and exercises. Hurlbut's leg muscles were so weak that he had to learn to walk again. He began walking March 1.

Hurlbut exercises every day to stretch grafted skin and loosen stiff joints. Each day he bends his wrists in and out, trying to move them farther, for example.

"If I miss a day, it takes two days to make it up," he said.

Hurlbut has missed few days. He is so diligent at exercising at home that he no longer goes into the medical center for therapy.

Nor does he take any pain medication. He recently stopped taking an antihistamine to relieve itching of his healing skin grafts. Hurlbut said that before the accident he rarely took medicine, so he was eager to get off the pain killers.

Physicians at the medical center have given Hurlbut few restrictions. He can go where he wants to and do whatever he can do. They want him to learn to do as many everyday tasks as possible and outfitted him with some tools to help.

A fork and a spoon attach to his wrists with Velcro. A durable plastic hook straps to his arm with Velcro, giving him leverage to open car doors. A flexible ring on the hook can be adjusted to turn a doorknob. He even uses this hook to pull something as tiny as a television on/off button and the adjustments on his videocassette recorder. A pointed object with a round knob on the end is used to punch telephone buttons.

"About the only thing I can't do is unlock a house door," he said.

Hurlbut uses a beer can cooler to cushion the manual transmission stick on his pickup. He has rigged a way to cast a fishing pole and reel in his catch. A fishing buddy must bait the hook and remove the fish, however.

He is working on a way to pull the trigger of a rifle so he can resume hunting, a favorite pastime.

David is not the only Hurlbut proficient with hooks and Velcro. Jenny, 2, has learned to open doors and turn on the television set using her father's tools.

Hurlbut's physicians are impressed with his mobility and ingenuity, Ruth said.

"They are really amazed at what he can do," she said.

David said, "I was the kind of person who was always on the go and that helped me (recover). I try things and if I can't, I ask for help."

Hurlbut spent the last week of March in a rehabilitation apartment at the medical center. There he learned to cope with home living. Ruth spent three days with him there, learning to help him bathe and dress."

"They wanted us to work out any problems before we came home," she said.

Ruth is grateful that David is trying to recover and that he doesn't hide in self-pity. His positive attitude really helps, she said.

The future

Hurlbut's physicians want to restore him to as near normal as possible. It will take years and more operations. Just how many he doesn't know.

"I'm new at this, just like the next person," he said.

This week his left hand was to be measured for a hook.

An operation to be performed this fall will use part of his right arm to reconstruct a nose.

Hurlbut said that his burned skin would never look normal and that it would always be sensitive to extreme hot and cold temperatures due to nerves damaged by the fire.

This summer he must wear a sunblock rated at 30 when outside and avoid being in direct sunlight. Physicians have told him he will be just as sensitive to cold weather.

In a few years, he should be able to gauge how much hot or cold weather he can tolerate.

His face is to be restored to near normal through plastic surgery.

"Within two years, they (physicians) said, people shouldn't see a scar on my face," he said.

Artificial ears will be the last step in getting a new face, he said.

Thus far, Workers Compensation claims have paid his expenses. Ruth quit her job in the Miami County clerk's office to care for David and their two young daughters.

More surgery may be performed on his hands.

The nub of Hurlbut's left index finger may be transferred to fashion a thumb and toes may be transferred to fashion fingers.

No timetable has been set for those operations.

But Hurlbut can wait.

"I've got lots of time," he said.

Meanwhile, he is learning to be as independent as possible.

He survived. That is what's important, David and Ruth said.

TESTIMONY OF TED F. FAY, JR.

ATTORNEY FOR THE

HEALTH CARE STABILIZATION FUND

ON BEHALF OF

FLETCHER BELL

COMMISSIONER OF INSURANCE

REGARDING SENATE CONCURRENT RESOLUTION NO. 1610
(CONSTITUTIONAL AMENDMENT)

BEFORE THE SENATE JUDICIARY COMMITTEE

MARCH 21, 1989

Attachment VIII
Senate Judiciary Com
3-21-89

I AM TED FAY, ATTORNEY FOR THE HEALTH CARE STABILIZATION FUND AND I AM TESTIFYING TODAY ON BEHALF OF FLETCHER BELL, KANSAS COMMISSIONER OF INSURANCE REGARDING THE PROPOSED CONSTITUTIONAL AMENDMENT IN SENATE CONCURRENT RESOLUTION NO. 1610.

PETER HUBER, IN HIS RECENT BOOK, "LIABILITY THE LEGAL REVOLUTION AND ITS CONSEQUENCES", DOCUMENTS VERY PRECISELY THE CHANGES THAT HAVE OCCURRED IN OUR LEGAL SYSTEM DURING THE LAST TWENTY FIVE YEARS.

OUR LIABILITY SYSTEM IS NOT THE SAME SYSTEM THAT EXISTED LESS THAN THREE DECADES AGO. CONCEPTS OF LIABILITY HAVE BEEN EXPANDED BY THE JUDICIAL SYSTEM IN AN EFFORT TO SOCIALIZE DAMAGES THROUGH THE INSURANCE MECHANISM. THOSE THAT HAVE ADVOCATED THIS CONCEPT OF JUDICIAL EXPANSION, SOMETIMES REFERRED TO AS THE TRAYNOR SCHOOL, IN RECOGNITION OF JUDGE ROGER TRAYNOR'S IMPORTANT ROLE IN CREATING THIS REVOLUTIONARY CONCEPT, PRESENTS A RELATIVELY SIMPLE CONCEPT. SPECIFICALLY, JUDGE TRAYNOR BELIEVED THAT, IN ORDER TO FUND THE DAMAGES OF THOSE INJURED BY OUR MODERN SOCIETY, THE TORT LIABILITY SYSTEM SHOULD BE EXPANDED AND THE DAMAGES PASSED THROUGH TO THE CONSUMERS OF THE PRODUCTS OR SERVICES CAUSING THE INJURIES. IN THIS

WAY COSTS ARE PASSED ON TO A BROAD BASE OF PERSONS WHO EITHER PURCHASE A PARTICULAR PRODUCT OR SERVICE.

THOSE WHO ARE INJURED OR DIE IN A PRIVATE AIRPLANE DISASTER RECOVER FROM THE PLANE MANUFACTURER, WHO PASSES THE COST ON TO THE PURCHASER OF ALL PRIVATE AIRPLANES. THOSE WHO SUFFER PREDICTABLE BUT RARE SIDE EFFECTS FROM A DRUG PRODUCT RECOVER THEIR DAMAGES AND THE COST IS PASSED ON TO ALL PERSONS BUYING THE DRUG. THOSE INJURED WHILE IN THE MEDICAL SYSTEM, RECOVER FROM THE HEALTH CARE PROVIDER AND THE COSTS ARE PASSED ON THROUGH INSURANCE TO ALL OF THOSE USING THE PROVIDERS SERVICES.

MR. HUBER MENTIONS THAT THE ORIGINAL MOTIVES OF JUDGE TRAYNOR, AND THOSE ADVOCATING HIS POSITION, WERE NO DOUBT WELL INTENTIONED. THE NEW PHILOSOPHY WOULD MAKE IT EASIER FOR THOSE SUFFERING SERIOUS INJURIES TO BE COMPENSATED FOR INJURIES THEY MIGHT OTHERWISE BE UNABLE TO ACCOMMODATE FROM OTHER PERSONAL ECONOMIC RESOURCES.

HOWEVER, IN THE COURT'S ATTEMPTS TO SOCIALIZE DAMAGES THROUGH THE INSURANCE MECHANISM, THE COURTS HAVE GRADUALLY ADDED SUBSTANTIAL COSTS TO THE LIABILITY SYSTEM. FOR TWENTY FIVE YEARS, THE COURTS--AND TO SOME EXTENT THE LEGISLATURES--IN THE UNITED STATES HAVE EXPANDED THE LIABILITY SYSTEM WITH LITTLE RECOGNITION OR ACKNOWLEDGEMENT OF THE COSTS OF THEIR NEW TORT SYSTEM. NOT ONLY HAS IT BECOME EASIER FOR INDIVIDUALS TO RECOVER IN A LIABILITY ACTION, BUT DAMAGES THEMSELVES HAVE BEEN EXPANDED.

TODAY, THE PUBLIC IS REBELLING AGAINST THESE NEW INCREASED LIABILITY COSTS, PARTICULARLY IN THOSE LIABILITY AREAS THAT HAVE EXPERIENCED THE GREATEST DISLOCATIONS. IN THE CASE OF INCREASED LIABILITY INSURANCE COSTS, THOSE WHO HEAR THE PUBLIC'S COMPLAINTS AND PASS THEM ON TO YOU, ARE THE INSURANCE COMPANIES AND THE INSUREDS THEMSELVES. THIS HAS MISTAKENLY LEAD SOME TO CONCLUDE THAT INSURANCE COMPANIES AND BUSINESSES ARE ASKING FOR REFORM IN ORDER TO INCREASE THEIR PROFITS.

IN FACT, THESE NEW COSTS WILL ALMOST CERTAINLY BE EVENTUALLY PASSED ON TO THE CONSUMER AND INSURANCE COMPANIES AND BUSINESSES ARE SIMPLY CARRYING THE PUBLIC'S MESSAGE. IF THE COSTS BECOME TOO HIGH, THE CONSUMER WILL EITHER BE UNABLE TO PAY FOR THIS HIGHER LIABILITY PREMIUM, OR WILL SIMPLY CHANGE THE WAY THEY DO BUSINESS. IN A RURAL COMMUNITY, WHEN THE HEALTH CARE PROVIDER CAN NO LONGER DELIVER ENOUGH BABIES TO PAY FOR HIS OR HER MEDICAL MALPRACTICE INSURANCE, THEY WILL STOP DELIVERING BABIES. WHEN DRUG COMPANIES CAN NO LONGER PASS THE LIABILITY INSURANCE PREMIUM ON TO THE PUBLIC, THE DRUG WILL BE WITHDRAWN. IF CITIES AND SCHOOLS CAN NO LONGER INSURE PLAYGROUNDS, THE PLAYGROUNDS WILL BE REMOVED. AS YOU KNOW, THESE ARE NOT JUST THEORETICAL EXAMPLES. ALL OF THESE THINGS HAVE HAPPENED.

ACCORDING TO MR. HUBER, THESE LIABILITY SYSTEM COSTS ARE MAKING FOR A LESS SAFE, LESS COMPETITIVE, MORE EXPENSIVE SOCIETY.

I MIGHT TAKE A MOMENT TO COMMENT UPON MR. HUBER'S CREDENTIALS. MR. HUBER RECEIVED HIS DOCTORATE DEGREE FROM

MASSACHUSETTS INSTITUTE OF TECHNOLOGY. AT THE AGE OF TWENTY-THREE. HE THEN ATTENDED HARVARD LAW SCHOOL WHERE HE WAS GRADUATED SUMMA CUM LAUDE, A FEAT NO OTHER HARVARD LAW SCHOOL GRADUATE HAS ACCOMPLISHED DURING THE LAST EIGHTEEN YEARS. HE CLERKED FOR JUSTICE SANDRA DAY O'CONNOR OF THE UNITED STATES SUPREME COURT. UNQUESTIONABLY, MR. HUBER IS ONE OF THE LAW'S NEW INTELLECTUALS AND HIS COMMENTS DEMONSTRATE THAT THIS IS NOT A BATTLE BETWEEN LAWYERS AND DOCTORS, OR LAWYERS AND BUSINESSMEN; IT IS ALSO A FIGHT BETWEEN DIFFERENT SCHOOLS WITHIN THE LEGAL PROFESSION.

BECAUSE OF THESE PRESSURES FOR REFORM, WE CAN HOPE THE COURTS WILL EVENTUALLY MOVE TOWARD A MORE CONSERVATIVE JUDICIAL SYSTEM. OTHERWISE, AT THE PRESENT RATE OF EXPANSION, THE SYSTEM FACES CERTAIN DISASTER. IN THE MEANTIME, HOWEVER, THE PUBLIC IS NOT WILLING TO WAIT FOR THE COURTS TO ACT BUT DEMANDS REASONABLE RESTRICTIONS UPON THE BLOATED COSTS OF OUR MODERN JUDICIAL SYSTEM.

SINCE 1985 THERE HAS NOT BEEN A YEAR THAT THIS LEGISLATURE HAS NOT ENACTED LAWS IN AN ATTEMPT TO CONTROL THESE EXPENSES. YET, MANY

OF THE MAJOR COST SAVINGS PROVISIONS OF THESE LAWS HAVE BEEN FOUND TO BE UNCONSTITUTIONAL UNDER THE BILL OF RIGHTS OF THE KANSAS CONSTITUTION.

OTHER STATES HAVE ENACTED SIMILAR LAWS WHICH HAVE BEEN APPROVED AS CONSTITUTIONAL BY THEIR COURTS, BUT NOT IN KANSAS.

EVEN CALIFORNIA, JUDGE TRAYNOR'S HOME JURISDICTION, AND A STATE LONG KNOWN FOR ITS EXPANSIONIST JUDICIAL TENDENCIES, HAS ENACTED AND APPROVED A CAP ON NON-ECONOMIC DAMAGES.

THESE LAWS WERE ENACTED WITH SUBSTANTIAL PUBLIC AND BIPARTISAN LEGISLATIVE AND EXECUTIVE BRANCH SUPPORT DESPITE ENORMOUS SUMS SPENT BY SOME ORGANIZATIONS TO OBTAIN THEIR DEFEAT.

THE LEGISLATURE HAS FEW OPTIONS REMAINING TO ADDRESS THE PUBLIC'S CONCERNS. THE LEGISLATURE CAN TINKER WITH THE INSURANCE MECHANISM BUT THIS WILL NOT SOLVE THE UNDERLYING PROBLEM FACING THIS STATE.

SOME SUGGEST THAT HOUSE BILL NO. 2501, ALLOWING PROVIDERS TO HAVE OPTIONAL LEVELS OF COVERAGE, AND PHASING OUT THE HEALTH CARE

STABILIZATION FUND, WILL SOLVE THE MEDICAL MALPRACTICE PROBLEM BY ALLOWING SIZEABLE REDUCTIONS IN PREMIUMS. DO NOT BE MISLEAD. THE COST PER THOUSAND OF MEDICAL MALPRACTICE INSURANCE WILL GO UP, NOT DOWN. EVEN IF A PROVIDER REDUCES HIS OR HER COVERAGE TO THE $100,000 HEALTH CARE STABILIZATION FUND LEVEL ($300,000 TOTAL COVERAGE), THE SURCHARGE MAY NOT BE MUCH LOWER THAN AT PRESENT, SINCE THE FUND MUST COLLECT ENOUGH MONEY OVER THE NEXT FIVE YEARS TO FUND THE TERMINATION OF THE HEALTH CARE STABILIZATION FUND IN JULY OF 1994. HOUSE BILL NO. 2501 MAY BE HELPFUL BUT IT WILL NOT SOLVE, AND IN FACT MAY AGGRAVATE, THE UNDERLYING MEDICAL MALPRACTICE DISLOCATIONS OCCURRING IN KANSAS. ANY REDUCTIONS "SAVINGS" EMANATING FROM ENACTMENT OF HOUSE BILL NO. 2501 WILL BE A RESULT OF THE REDUCED COVERAGE PERMITTED BY THE OPTIONAL LEVELS. IN OTHER WORDS, THOSE SELECTING LOWER LIMITS OF FUND COVERAGE WILL NOT PAY AS MUCH OF A SURCHARGE AS THEY WOULD FOR THE PRESENT $3,000,000/$6,000,000 LIMITS BUT THAT DOES NOT NECESSARILY MEAN A REDUCTION IN THE SURCHARGE AMOUNT.

WILL THE PROPOSED CONSTITUTIONAL AMENDMENT UNDERMINE BASIC RIGHTS PROTECTED BY THE KANSAS CONSTITUTION? IT SEEMS HIGHLY UNLIKELY. THE PROPOSED CONSTITUTIONAL AMENDMENT NARROWLY LIMITS ITS APPLICATION AND WILL REQUIRE FUTURE IMPLEMENTING LEGISLATION. FURTHERMORE, THE BILL OF RIGHTS OF THE FEDERAL CONSTITUTION WILL STILL PROVIDE ITS HISTORIC PROTECTION.

THOSE WHO CONTEND THAT OUR CONSTITUTIONAL RIGHTS ARE IMMUTABLE IGNORE THE RECENT NEW INTERPRETATIONS OF THE CONSTITUTION BY THE KANSAS SUPREME COURT. IF OUR CONSTITUTIONAL RIGHTS WERE TRULY IMMUTABLE THEN THE JUDICIAL INTERPRETATION OF THOSE RIGHTS WOULD ALSO REMAIN CONSTANT. BUT THOSE WHO ARGUE AGAINST CHANGE, IGNORE THE SUBSTANTIAL CHANGES THAT HAVE ALREADY OCCURRED. WOULD THESE SO CALLED TRADITIONALISTS BE WILLING TO RETURN TO THE LEGAL SYSTEM OF 1960? THE 1960 SYSTEM WOULD CAUSE NO COST PROBLEMS TODAY, BUT THOSE WHO ARGUE AGAINST CHANGE ARE THE SAME PERSONS AND ORGANIZATIONS WHO HAVE ARGUED FOR, AND OBTAINED, MANY OF THE LEGAL CHANGES THAT HAVE CHANGED OUR SYSTEM AND ADDED TO ITS COSTS. THEY ARE NOT AGAINST

CHANGE, THEY MERELY WISH TO FREEZE OR FURTHER EXPAND THE CHANGES OF THE LAST TWENTY FIVE YEARS THAT HAVE SOCIALIZED DAMAGES.

WILL THE PROPOSED CONSTITUTIONAL AMENDMENT PERMIT LOWER PREMIUMS AND SURCHARGES? THAT DEPENDS. IF THE COURTS CONTINUE TO EXPAND OTHER AREAS OF THE SYSTEM AND ADD TO ITS COSTS, IT IS POSSIBLE THAT THE SAVINGS FROM THE CONSTITUTIONAL AMENDMENT WILL BE DILUTED BY THE COURTS.

THERE ARE CASES IN KANSAS PRESENTLY ON APPEAL, IN WHICH PLAINTIFF'S ATTORNEYS ARE REQUESTING FURTHER EXPANSION OF THE LIABILITY SYSTEM. IN A FEW OF THESE CASES, COURT ACTION COULD RESULT IN SIGNIFICANT NEW COSTS. THESE COSTS COULD BE GREATER THAN THE POSSIBLE SAVINGS FROM THE MODEST CONSTITUTIONAL AMENDMENT BEING PROPOSED.

THIS, HOWEVER, IS CERTAIN, PREMIUMS AND SURCHARGES WILL CERTAINLY BE LESS WITH A CONSTITUTIONAL AMENDMENT THAN WITHOUT.

FINALLY, LET ME TAKE A MINUTE TO DISCUSS THE ALLEGATIONS OF THE KANSAS BAR ASSOCIATION, THAT OUR PROBLEMS ARE CAUSED BY THE

INSURANCE INDUSTRY. LAWYERS HAVE CONSTANTLY RAISED THIS OBJECTION OVER THE YEARS, KNOWING NO DOUBT THAT THE PUBLIC, ON THE WHOLE, IS HARDLY LESS SUSPICIOUS OF THE INSURANCE INDUSTRY THAN OF THE LEGAL PROFESSION.

THIS ISSUE HAS BEEN STUDIED IN DEPTH BOTH BY CITIZENS COMMITTEES APPOINTED BY FLETCHER BELL IN 1985 AND 1986, AND BY THE 1985 INTERIM COMMITTEE OF THIS LEGISLATURE. THESE COMMITTEES DID NOT FIND THE PROBLEM TO BE INSURANCE COMPANY PROFITS. IN THE AREA OF MEDICAL MALPRACTICE, THE FOLLOWING EVIDENCE SUGGESTS THAT INSURANCE COMPANY PROFITS ARE NOT THE CAUSE OF OUR PROBLEMS.

1) MEDICAL DEFENSE INSURANCE COMPANY, A NON PROFIT MISSOURI PHYSICIAN OWNED COMPANY, WITHDREW FROM KANSAS LAST YEAR ALLEGING THEY COULD NOT SURVIVE WITH THEIR RATE STRUCTURE, EVEN THOUGH THEIR RATES WERE COMPARABLE TO THE RATES CHARGED BY PRIVATE INSURANCE COMPANIES IN KANSAS.

2) ONLY TWO MEDICAL MALPRACTICE INSURANCE COMPANIES HAVE MAJOR POSITIONS IN THE KANSAS MARKET. IF HUGE PROFITS WERE AVAILABLE, MORE INSURANCE COMPANIES WOULD ENTER THE MARKET.

3) THE HEALTH CARE STABILIZATION FUND, ADMINISTERED BY THE STATE IS NON PROFIT, HAS EVERY REASON TO OPERATE AS EFFICIENTLY AS POSSIBLE, AND NO REASON WHATSOEVER TO CONCEAL SUCCESS, BUT HAS EXPERIENCED THE SAME SOARING LOSSES AS PRIVATE INSURANCE COMPANIES.

4) KANSAS IS A PRIOR APPROVAL STATE AND RATES MUST BE SUBMITTED FOR APPROVAL PRIOR TO IMPLEMENTATION. RATES ARE DISAPPROVED IF FOUND TO BE UNFAIRLY DISCRIMINATORY, UNREASONABLE OR EXCESSIVE.

5) IN FISCAL YEAR 1989 TOTAL PREMIUMS AND SURCHARGES FOR MEDICAL MALPRACTICE INSURANCE IN KANSAS TOTAL $93 MILLION. ONLY $33 MILLION OF THIS AMOUNT WILL GO TO PRIVATE INSURANCE COMPANIES.

THIS SUM IS ONLY SLIGHTLY GREATER THAN THE AMOUNT THAT WILL BE PAID FROM FISCAL YEAR 1989 PREMIUMS AND SURCHARGES FOR PLAINTIFFS' ATTORNEY FEES. PRIVATE INSURANCE COMPANIES MUST PAY LOSSES FROM THE $33 MILLION THEY COLLECT. PLAINTIFF'S ATTORNEYS NEED ONLY PAY OVERHEAD COSTS.

6) LOSS DATA FIGURES IN KANSAS DO NOT INDICATE SIZABLE PROFITS BY MEDICAL MALPRACTICE INSURERS. WHILE THESE FIGURES ARE UNDER CONSTANT REVIEW BY THE INSURANCE DEPARTMENT, THERE IS NO EVIDENCE TO DATE THAT THESE LOSS FIGURES ARE INCORRECT. EVEN IF THESE LOSS FIGURES WERE INCORRECT, IT IS HIGHLY UNLIKELY LARGE ENOUGH CHANGES IN THE FIGURES COULD OCCUR TO REDUCE MEDICAL MALPRACTICE INSURANCE COSTS APPRECIABLY.

7) SOME HEALTH CARE PROVIDERS PAY VERY LOW PREMIUMS AND SURCHARGES. PHARMACISTS FOR EXAMPLE PAY ONLY $150 PER YEAR. THIS DEMONSTRATES THAT WHEN LOSSES ARE LOW, PREMIUMS REMAIN LOW.

SUMMARY

CAPS ON AWARDS ARE ADMITTEDLY AN AWKWARD WAY TO SOLVE PROBLEMS WITHIN THE JUDICIAL SYSTEM. NEVERTHELESS, THEY ARE ONE OF THE FEW WAYS LEGISLATURES HAVE HISTORICALLY CONTROLLED COSTS IMPOSED BY OUR JUDICIAL SYSTEM. IT MIGHT BE BETTER IF OUR COURT SYSTEM WOULD CORRECT ITS OWN EXCESSES, AND THIS MIGHT OCCUR IN FUTURE YEARS. HOWEVER, IN THE MEANTIME, IF THE LEGISLATURE IS TO TAKE EVEN THE SMALL STEP PROPOSED TO LIMIT NON ECONOMIC DAMAGES, THE ONLY OPTION AVAILABLE IS TO TAKE SUCH ACTION BY MEANS OF AN AMENDMENT, AND TRUST THE PUBLIC TO BE THE FINAL ARBITRATORS OF THE DECISION.

LE/6080