

Approved 4-30-92
Date

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY

The meeting was called to order by Rep. John Solbach at
Chairperson

12:15 ~~am~~/p.m. on April 1, 1992 in room 527-S of the Capitol.

All members were present except:

Representatives Gregory, Heinemann, Snowbarger and Vancrum who were excused.

Committee staff present:

Jerry Donaldson, Legislative Research
Jill Wolters, Revisor of Statutes
Judy Goeden, Committee Secretary

Conferees appearing before the committee:

Bud Grant Kansas Chamber of Commerce & Industry
Ron Smith, Kansas Bar Association

The chairman called the meeting to order.

Hearing on HB 3200, an act concerning civil procedure; civil penalties for theft, was opened.

Bud Grant, Kansas Chamber of Commerce & Industry, testified in favor of HB 3200. He said 44 states already have similar legislation. Shoplifting in Kansas is a \$260 million problem. In answer to a member's question he said that he felt that guardian should be clarified so legal guardians such as foster parents would not be included in this bill.

Ron Smith, Kansas Bar Association, testified in opposition to HB 3200. (Attachment #1) He answered committee members questions.

Hearing on HB 3200 was closed.

Rep. Everhart moved to have necessary technical amendments made to HB 2253, then recommend HB 2253 as amended favorably for passage. Rep. Hochhauser seconded the motion. Motion carried.

Rep. Gomez moved to report SB 757 favorably for passage. Rep. Garner seconded the motion. Motion carried.

Rep. O'Neal moved to recommend HB 670 favorably for passage. Rep. Everhart seconded the motion.

Rep. Hamilton made a substitute motion to amend SB 670 to include in line 37, Section 4, law firms, and adding prohibition of disclosure to third party. Rep. Smith seconded the motion. Motion carried.

Rep. O'Neal moved to report SB 670 as amended favorably for passage. Rep. Gomez seconded the motion. Motion carried.

Rep. O'Neal moved to amend HB 3200 to exclude certain guardians. Rep. Pauls seconded the motion. Motion carried.

Rep. Rock moved to amend HB 3200 to include "either/or civil or criminal. Rep. Gomez seconded the motion. Motion failed.

Rep. O'Neal moved to amend HB 3200 by stating merchandise of a value under \$2,500. Rep. seconded the motion. Motion carried.

Rep. O'Neal moved to further amend HB 3200 to state not less than \$50 or not more than \$250 fine. Rep. Garner seconded the motion. Motion carried.

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

CONTINUATION SHEET

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY,
room 527-SStatehouse, at 12:15 ~~am~~/p.m. on April 1, 1992

Rep. O'Neal moved to report HB 3200 as amended favorably for passage. Rep. Lawrence seconded the motion. Motion failed.

The Committee requested and Jerry Donaldson was directed to write a formal committee request for an interim study on HB 3200.

Meeting adjourned at 1:45 P.M.



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Elsie Lesser, Continuing Legal Education Director
Patti Slider, Communications Director
Ronald Smith, General Counsel
Art Thompson, Public Service/IOLTA Director

POSITION STATEMENT

TO: House Judiciary Committee
FROM: Ron Smith, KBA General Counsel
SUBJ: HB 3200
DATE: April 1, 1992

There are several policy issues in this bill. KBA opposes a statutory civil liability for theft, primarily because it makes unnecessary changes and limitations to the common law. Among our reasons for opposition are:

1. While punitive damages ordinarily survive bankruptcy, most thieves are judgment-proof. The civil law already allows a civil action for theft, but not parental liability unless the child maliciously or willfully destroys property of another.¹ The peanut is the special new authority to sue the parents of thieves who are minors.
2. What this bill does is raise a question of whether 3200's remedies are the SOLE civil remedy for theft, rather than the general common law theory that one can sue a criminal in civil court for damages.
3. In an era of difficulties in adequate financing of judicial budgets, this law will certainly increase litigation. Further, subsection 1(b) creates a limited form of "parental malpractice." However, since parental negligence is unnecessary in order to be liable, I'm unsure whether litigation costs and damages under this bill is or will be covered under homeowner's or renter's insurance which is usually based on negligence. If so, it is ironic that the Kansas business community -- long a champion of less litigation for lower insurance -- is pushing this legislation which may slightly increase homeowner's insurance, if the acts are covered. If the cost of litigation is not covered, then HB 3200 increases the liability of every parent.

¹K.S.A. 38-120. See also **Hanks v. Booth**, 240 Kan. 30.
1200 Harrison • P.O. Box 1037 • Topeka, Kansas 66601-1037 • FAX (913) 234-3813 • Telephone (913) 234-5696

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4. I am also personally concerned that many of these actions will be brought in small claims court where the jurisdiction is less than \$1,000. If that happens, parents and the minor child cannot hire counsel until they APPEAL the action. Then if they lose that appeal, the small claims act imposes a unilateral attorney fee shift. If we're going to impose new costs of litigation on parents that may or may not be insured, then you should put in an amendment that such claims under this section cannot be brought in small claims court. The plaintiff can still file an action pro se under Chapter 61, but at least defendants will have a choice whether to hire counsel.

5. The criminal law usually provides restitution to the merchant if there is a conviction. The problem has been the courts are ill-equipped to oversee such restitution. CSOs hate that function. There is considerable law on the books to be helpful in getting restitution to victims of property crimes,² but admittedly the state has not pressed that issue to help merchants. The criminal law does not provide is a judgment upon which the store can garnish wages or take unilateral civil action. However, holding parents liable for a minor child's transgressions is making parents guarantors of their child's conduct, and is an unusual remedy for problems in the criminal restitution system.

6. HB 3200 is specific law regarding civil remedies for what amounts to "theft." If a wealthy kleptomaniac took a new BMW off the dealer's lot and converts the car and has all the requisite intent, when punished, actual damages might be thousands of dollars but the limit on exemplary damages under section 1(b) is \$250 even though a larger punitive award might be needed to dissuade future conduct. The general rule of statutory construction is that where there is conflict between general and specific statutes, the specific legislation controls.³ HB 3200 is the specific remedy for civil liability for theft of merchandise. It severely limits punitive damage awards -- even when larger awards might be appropriate under K.S.A. 60-3401 which ties punitive damage awards to one year's gross income.

²In the KBA-sponsored Property Crime Victims Reparations Act, enacted in 1990. However, the restitution system in that act requires local prosecutors and county commissions to implement the program, and that has happened only in Salina.

³**Read v Miller**, 14 Kan App.2d 274, 276, 788 P.2d 883 (1990); further, 247 Kan 557, 802 P.2d 528 (1990); **State v. Montgomery**, 14 K.A.2d 577, 796 P.2d 559 (1990).

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7. Line 28 places liability on parents or guardians who have "custody" of an unemancipated minor. Is the state who has a child in foster care a "guardian?" Is there "custody?" Is the state liable, the same as a parent? If not, why not? The **right to assert legal control over the well-being of a child** is what constitutes "custody." Therefore, isn't the state that exerts such control liable to the merchant? If you exempt the state, then the law may not treat all persons similarly situated equally.

8. As to parental liability, a fundamental issue is whether parents should have unlimited liability in a civil court for the thefts and intentional acts of a minor who might be 16 or 17 but uncontrollable. As a practical matter, the only way parents can protect themselves is to formally emancipate their uncontrollable child as soon as possible.

HB 3200 is different from K.S.A. 38-120. K.S.A. 38-120 makes parents liable for destruction of property or personal injury by the parent's child, if the child lives with the parents and maliciously or willfully destroys property or injures another. However, damages under 38-120 are limited to \$1,000 plus court costs. No pain and suffering is allowed, but medical expenses may be recovered for bodily injury. If the plaintiff can prove the child acted because of "parental neglect" the \$1,000 limit is lifted. Case law indicates both the act and the harm must be intended by the child before the parents are liable.⁴

HB 3200 involves no parental neglect standard, has no dollar limit on actual damages, and the parents are liable regardless whether the child intended the act and the harm.

9. Finally, subsection 1(b) makes the parents of a minor child who have joint custody jointly liable even if the parents are divorced and perhaps have remarried. There is no limiting feature to the word "custody." A parent living in another town, or state, can be made liable.

For these reasons, KBA opposes such legislation.

⁴Hanks v. Booth, supra.

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