Approved: April 2, 1997
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY

The meeting was called to order by Chairperson Tim Emert at 10:13 a.m. on March 25, 1997 in Room 514-S of the Capitol.

All members were present except:

Committee staff present: Mike Heim, Legislative Research Department
Jerry Donaldson, Legislative Research Department
Gordon Self, Revisor of Statutes
Mary Blair, Committee Secretary

Conferees appearing before the committee: Ron Smith, Kansas Bar Association (KBA)
Brad Smoot, Ks. Civil Law Forum (KCLF)
Jerry Slaughter, Ks. Medical Society (KMS)
Bob Corkins, Ks. Chamber of Commerce & Industry (KCCI)

Others attending: See attached list

Senator Bond made a motion to approve the minutes of the March 21, 1997 meeting, Senator Schraad seconded. Motion carried.

HB 2143 - Nonpecuniary damages in wrongful death action

Conferee Smith, KBA, testified as neutral on **HB 2143**. He stated that KBA's only concern was the efforts made on the House floor to impose a contingent fee limit on nonpecuniary loss in wrongful death cases and urged the committee to reject such efforts. He explained the contingency fee process and pointed out that it is regulated by the Courts, whose regulation is strict, rule-based, all-encompassing and more beneficial to the client than legislative oversight. He provided a copy of the Model Rule of Professional Conduct 1.5 - Fees. (attachment 1)

All of the following conferees are **opponents** of **HB 2143.**

Conferee Smoot, KCLF, explained the distinct legal history of wrongful death cases describing the difference between wrongful death actions and personal injury claims. He cited the survivorship statute as a means by which heirs may be able to recover compensation for their loss. He stated that most plaintiffs can be fairly compensated under current Kansas law but agreed that "in a rare case where there is an instantaneous death and the heirs are dependent on the deceased that the current $100,000 cap can seem harsh" and he suggested that rather than adding increased monies for all wrongful death cases the legislature should "fix" the specific problem. He cautioned that **HB 2143** would have an adverse effect on businesses and consumers "who must ultimately pay the costs of the tort liability system". He urged the committee to amend **HB 2143** to raise the cap to $250,000 when only a wrongful death action is filed. (attachment 2)

Conferee Slaughter, KMS, stated that **HB 2143** increases the limit on non-pecuniary damages in wrongful death cases from $100,000 to $500,000. a measure which the KMS opposes in its current form. He defined wrongful death suits and explained that juries can award unlimited compensation for pecuniary damages which include financial losses such as funeral expenses, medical bills and lost income the decedent would have otherwise contributed to the heirs. He described non-pecuniary damages as non-financial losses such as loss of companionship, parental care or guidance and stated that such losses are difficult to quantify. He stated that these losses are capped by law at $100,000, explained the public policy rationale for this limit, and detailed the "dramatic impact" a fivefold increase, as stated in the bill, would have on professional liability premiums physicians and hospitals pay; he supported the latter statement statistically. For cases in which there is no economic loss, for example with a small child or elderly person, and where the claimant dies instantly without recourse for survivorship action, KMS offered a balloon amendment. (attachment 3)

Conferee Bleeker stated that **HB 2143** applies to jury verdict for non-pecuniary damages and that the vast majority of these cases in Kansas result in an award of non-pecuniary damages that is less than the present statutory cap pointing out that juries are unaware of the cap since the law prohibits the court from instructing or informing them of the statutory cap or its application. He suggested that this fact shows that the present cap "is neither too low nor out of touch with the values of citizens of this state". He cited a number of problems that can occur if the cap is raised: it is a disincentive to settlement and will greatly increase the number of suits tried by juries increasing the workload of already overburdened courts and delaying compensation to the heirs; heirs will mistakenly equate the cap as placing a value on the lives of their loved ones which a cap does not do since value cannot be quantified-it merely attempts to compensate survivors for their grief, bereavement and sorrow; it is an ineffective and inefficient method of compensating victims and lines the pockets of attorneys who take these cases on a contingency basis; and it will increase insurance premiums and ultimately cost society. (attachment 4)

Conferee Corkins, KCCI, described the function of KCCI and presented reasons why KCCI supports limitations on tort liability. He cited a review done by the University of Illinois College of Law on traditional tort reform rationale which acknowledged links between liability laws and economic growth and gave an overview of a study performed by the National Bureau of Economic Research (NBER) in Cambridge, MA. He stated KCCI suspects "that the relationship between rising jury awards and economic growth is, on the whole, both linear and inverse" and urged committee to vote against **HB 2143**. (attachment 5) He added that KCCI would support the balloon amendment as proposed by KMS.

Written testimony opposing **HB 2143** was received from: Kansas Association of Insurance Agents; (attachment 6) Kansas Hospital Association; (attachment 7) The State Farm Insurance Companies; (attachment 8) Kansas Association of Property and Casualty Insurance Companies. (attachment 9)

Written testimony suggesting an amendment to Section 3 Of **HB 2143** was received from Kansas Association of Defense Counsel. (attachment 10)

Written testimony addressing **HB 2143** opponents claims was received from Kansas Trial Lawyers Association. (attachment 11)

Following discussion Senator Donovan moved to adopt the balloon amendments, Senator Pugh seconded. After further discussion Senator Petty made a substitute motion to pass **HB 2143** out favorably, Senator Harrington seconded. Motion carried on a vote of 6-5.

The Chair adjourned the meeting at 11:00 a.m.

The next scheduled meeting is March 26, 1997

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 3/25/97 pl

NAME	REPRESENTING
Jim Keele	BLE
Tom Young	AARP
Callie Tell Denton	Bottenberg & Assoc.
Steve Blanck	Hubbell Assoc.
Heather Randall	Whitney Damron, P.A.
Jacob Loewen	KFB
Christy Crenshaw	Shamrock Angus Farms
Chris Keehan	KTLA
Steve Dickerson	"
Diane M. Isabell	KTLA
Matthew	Representing me
Jerry Sloan	OJA
Rita NM	HCSF
Bob Corkins	KCCI
Kevin Davis	Am. Family Ins.
David Hanson	Ks Assoc P & C / NAII
A. SNOW MD	Myself
Maryanne Lippincott	KTLA
Henry A. Lippincott	KTLA

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 3/25/97 p2

NAME	REPRESENTING
Steven L Cif	2143
Kelly Kultala	City of Overland Park
Dale Swenson	REP
Terry Humphrey	KTLA
Gail Youngren	2143
Wayne P Shaller	KMS
Jeffrey Sonnich	KMS
Kay Rideker	KaMMCO
Lori Callahan	KaMMCO
Meg Henson	KMS
Harry Blaker	self

KANSAS BAR ASSOCIATION

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Legislative Testimony

TO: Members, Senate Judiciary Committee

FROM: Ron Smith, KBA General Counsel

SUBJ: Percentage limits on contingent fees

DATE: March 24, 1997

The Kansas Bar Association has no position on the topic of statutory limits on wrongful death actions. Our only concern is that on the House floor efforts were made to impose a contingent fee limit on that portion of the recovery known as nonpecuinary loss. Please reject any such efforts to impose any contingent fee limits on this or any other bill in the Senate.

In a February 25th letter to the House, Jerry Slaughter wrote, "This increase in awards will mean an additional $200,000 to [plaintiff lawyers], since most contingent fee contracts results in 50% of the award or settlement going to the lawyer." (emphasis added) The statement assumes that plaintiffs win every trial and a full recovery is had on each verdict. This statement is not accurate. Jerry makes this sound like an everyday event. It is not. While some fee contracts provide for a contingent fee of 50%, the "contingency" which triggers such a fee is the very rare event when the case has gone through one trial, been taken to the Kansas Supreme Court on appeal, and a second trial is ordered. To recover, a plaintiff attorney must prove negligence and recover an award before there is any fee. Then the fee contract often is reviewed by a judge for reasonableness. *I doubt that any attorney is entitled to 50% of a pre-trial settlement and I do not know of a single judge that would grant such a settlement division even if the contract allowed it.*

You do not engage in government paternalism in any other area. Only when lawyer fees are involved is the legislature asked to set limits. Good public policy is not the goal. The goal is retaliation. Yes, doctors get paid low fees for Medicare and Medicaid patients. Doctors and lawyers are part of different professions. What government does to the physician is not part of what government does for the attorney. If you want to guarantee the attorney gets paid even if unsuccessful, then I'm sure the attorneys will be glad to let government regulate them. Physicians get paid regardless of what happens to the patient although at a lower rate depending on whether the patient is Medicare or Medicaid, or part of a health care group. Keep in mind that the attorney must convince other persons that the defendant was negligent, caused injury to the client, and that the client should be compensated. Like doctors, attorneys *earn* their fee but in a much different manner in an non-guaranteed basis.

Finally, two things have happened since 1975 which allows you to forget legislative regulation of attorney fee contracts. First, **the courts strictly review all fee contracts, especially contingent fee contracts.**

It used to be that the Courts did not regulate fee contracts unless they were "excessive." Not so any more. **Every fee must be reasonable under the circumstances or it is not allowed.** I have provided you a copy of Model Rule 1.5. This rule governs *all fee contracts, including all contingent fee contracts.*

1. Nowhere in this rule does it state the attorney is entitled to whatever the attorney bargains for. The rule states that a fee must be reasonable under the circumstances of the case.

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2. The contingent fee agreement must be in writing. The failure to provide a written contract can cost the attorney his contracted fee. *In re estate of Katchatag*, 907 P.2d 458 (Alaska, 1995); *Schneiderjon v. Krupa*, 514 N.E.2d 1200 (1987); *Kaplan v. Pavalon & Gifford*, 806 F.Supp. 192 (N.D.Ill. 1993), aff'd 12 F.3d 87 (7th Cir. 1993); *Scolinos v. Kolts*, Calif. Ct.App.2d, Dist. No. B077734, 11 Law.Man.Prof.Conduct 236 (Aug. 1995).
3. The client must be informed in writing that the client has the right to have the contingent fee reviewed by the court for reasonableness.
4. A judges determination of reasonableness controls even if it conflicts with the amounts allowed by contract, subject to the limits imposed in the contract itself.
5. Unlike every where else, in Kansas the contingent fee percentage is applied AFTER the expenses of litigation are deducted from the recovery.
6. Clients of lawyers have the absolute right to have a judge determine the reasonableness of the contract without having to begin a lawsuit over fees. No other client of a professional has that right.

Second, the rules have changed in how corporations hire attorneys. It used to be the rule that if the client can pay by the hour, the attorney should be hired on that basis. However, corporations can and do hire attorneys on contingent fees all the time. Vinson & Elkins, a large Houston firm, was hired in the late 1980s by several utility companies in an anti-trust case against several railroads where $1.4 billion in damages were recovered and the firm took a 30% fee. Why are we considering any kind of limitation on attorneys fees for people?

A) Corporations hire attorneys on contingent fees all the time because such fee agreements shift the risk of loss to the attorneys, not the stockholders.

B) Corporations have unlimited authority to structure fee contracts whether they are plaintiffs or defendants.

C) Why do we take the paternalistic view that victims of negligence cannot structure a contract that benefits them?

Judicial oversight and regulation of the practice of law is strict, it is rule-based, it is all-encompassing, and more beneficial to the *client* than legislative oversight. Statutory regulation of fees is archaic and unnecessary.

Thank you.

Model Rule of Professional Conduct 1.5
Fees

(a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

(c) A lawyer's fee shall be reasonable but a court determination that a fee is not reasonable shall not be presumptive evidence of a violation that requires discipline of the attorney.

(d) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (f) or other law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, and the litigation and other expenses to be deducted from the recovery. All such expenses shall be deducted before the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the client's share and amount and the method of its determination. The statement shall advise the client of the right to have the fee reviewed as provided in subsection (e).

(e) Upon application by the client, all fee contracts shall be subject to review and approval by the appropriate court having jurisdiction of the matter and the court shall have the authority to determine whether the contract is reasonable. If the court finds the contract is not reasonable, it shall set and allow a reasonable fee.

(f) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony, support, or property settlement; or

(2) a contingent fee for representing a defendant in a criminal case; or

(3) a contingent fee in any other matter in which such a fee is precluded by statute.

(g) A division of fee between lawyers who are not in the same firm may be made if the client is advised of and does not object to the participation of all the lawyers involved, and the total fee is reasonable.

(h) This rule does not prohibit payments to former partners or associates or their estates pursuant to a separation or retirement agreement.

Comment

Origin

Rule 1.5 as adopted contains 1.5(a) and (b) as promulgated in the Model Rules. [Paragraphs] (c), (d) and (e) have been modified. The Kansas Committee recommended adoption of Model Rule 1.5 with no changes. Rule 1.5 as adopted followed a study of attorney fees by a special committee of the Kansas Judicial Council formed pursuant to Concurrent Resolution 5053 of the Kansas House of Representatives adopted April 8, 1986. The rule as finally adopted took into consideration Model Rule 1.5, the Kansas Committee recommendations and the recommendations of the special committee of the Kansas Judicial Council.

Basis or Rate of Fee

When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee. In a new client-lawyer relationship, however, an understanding as to the fee should be promptly established. It is not necessary to recite all the factors that underlie the basis of the fee, but only those that are directly involved in its computation. It is sufficient, for example, to state that the basic rate is an

hourly charge or a fixed amount or an estimated amount, or to identify the factors that may be taken into account in finally fixing the fee. When developments occur during the representation that render an earlier estimate substantially inaccurate, a revised estimate should be provided to the client. A written statement concerning the fee reduces the possibility of misunderstanding. Furnishing the client with a simple memorandum or a copy of the lawyer's customary fee schedule is sufficient if the basis or rate of the fee is set forth.

Terms of Payment

A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(j). However, a fee paid in property instead of money may be subject to special scrutiny because it involves questions concerning both the value of the services and the lawyer's special knowledge of the value of the property.

An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures. When there is doubt whether a contingent fee is consistent with the client's best interest, the lawyer should offer the client alternative bases for the fee and explain their implications. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage.

Division of Fee

A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist, or when a lawyer refers a matter to a lawyer in another jurisdiction. Paragraph (g) permits the lawyers to divide a fee by agreement between the participating lawyers if the client is advised, does not object, and the total fee is reasonable. It does not require disclosure to the client of the share that each lawyer is to receive.

Disputes Over Fees

If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure. The fact that a fee may be lower than the customary fee charged in the locality for similar services shall not be a basis for finding the fee to be unreasonable.

> *NOTE: The KBA has a statewide fee dispute resolution committee chaired by Lawrence District Judge Ron Fairchild. It augments the excellent fee dispute resolution systems found in Sedgwick, Johnson and Wyandotte Counties.*

Code Comparison

DR 2-106(A) provides that, "A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee." It also provides that, "A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee." The factors to be considered in determining reasonableness are identical to those in Rule 1.5(a). EC 2-17 states that, "A lawyer should not charge more than a reasonable fee . . . ."

There is no counterpart to Rule 1.5(b) in the Disciplinary Rules of the Code. EC 2-19 states that, "It is usually beneficial to reduce to writing the understanding of the parties regarding the fee, particularly when it is contingent."

With regard to Rule 1.5(g), DR 2-107(A) permits a division of fees only if: "(1) The client consents to employment of the other lawyer after a full disclosure that a division of fees will be made. (2) The division is in proportion to the services performed and responsibility assumed by each. (3) The total fee does not exceed clearly reasonable compensation . . . ." Rule 1.5(g) permits division without regard to the services rendered by each lawyer if the client is advised, does not object, and the total fee is reasonable.

DR 2-106(B) provides that, "A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case." Rule 1.5(f) expands the prohibition to certain domestic matters and other matters precluded by statute. Rule 1.5(h) is identical to DR 2-107(B).

There is no counterpart to Rule 1.5(c), (d), and (e) in the Code.

S.J. 3-25 att #2

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STATEMENT OF BRAD SMOOT, COORDINATOR KANSAS CIVIL LAW FORUM TO THE SENATE JUDICIARY COMMITTEE REGARDING 1997 HOUSE BILL 2143 MARCH 25, 1997

Mr. Chairman and Members:

Thank you for this opportunity to address 1997 House Bill 2143. I appear on behalf of the Kansas Civil Law Forum. Our membership includes numerous businesses, professionals and their associations. A listing of our 1996 membership is attached to the prepared statement for your reference.

On behalf of these members we appear today in opposition to HB 2143 which would amend K.S.A. 60-1903 to increase the liability exposure for non-pecuniary damages in wrongful death cases from $100,000 to $500,000.

To begin with, wrongful death actions have a distinct legal history. Under common law there was no right to recover for wrongful death. This cause of action has been created exclusively by statute while the exposure and costs associated with it have expanded radically in the last 100 years. Originally, recovery for pecuniary and non-pecuniary damages was limited by the statutory cap. Later, the cap was removed completely for pecuniary losses (1975) and the cap on non-pecuniary losses was generously increased 400% to $100,000 in 1984.

It is also important to remember that personal injury actions and wrongful death actions attempt to compensate different plaintiffs and different injuries. In personal injury claims, we compensate the actual victim or his or her estate for any pain and suffering, disfigurement and disability. In wrongful death actions, the heirs are compensated for their emotional and economic losses. Of course, actual economic or pecuniary damages in both cases are unlimited and may result in multi-million dollar judgments benefiting plaintiffs, their families and counsel.

Moreover, the Kansas survivorship statute permits the estate (and indirectly the heirs) to also recover for any pain and suffering prior to death even when that period of time is a matter of moments. See Ingram

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v. Howard-Needles-Tanner & Bergendoff, 234 Kan. 289, 627 P.2d 1083 (1983). In Lieker v. Gafford, 245 Kan. 325 (1989), which upheld the $100,000 wrongful death cap, the deceased's heirs recovered full economic damages and non-economic damages for both the personal injuries of the deceased and the statutory $100,000 maximum for wrongful death. In all, plaintiffs were awarded more than $2.3 million dollars. (See attached list of damages available to plaintiffs.)

Although no amount of money can replace a loved one, between full compensation for economic losses and the frequent opportunity for heirs to collect on both wrongful death and the deceased's survival claim, it would appear that most plaintiffs can be fairly compensated under current Kansas law. It is only that rare case where there is an instantaneous death and the heirs are dependent on the deceased that the current $100,000 cap can seem harsh. Rather than fix this problem, proponents would add hundreds of thousands of dollars to all wrongful cases; adding millions of dollars to our tort litigation system.

In 1986, a well-reasoned article appeared in the Kansas Trial Lawyers own journal and concluded:

> "The legislature's increase in the limit on non-pecuniary damages dramatically improves recovery possibilities in all cases. Further, the liberal attitudes courts have taken with survival actions and pecuniary damages, allows claimants to overcome prior legal restrictions on recovery. For years the barriers to relief in wrongful death cases have been artificial legal restrictions and limitations. Now most of those obstacles are gone."

In summary, we believe a blanket increase in the wrongful death damage cap is unnecessary. And since personal injury claims are frequently tried and compensated together with wrongful death claims, we have no reason to believe the current legal framework is unfair to most heirs and beneficiaries. A better solution would be to "fix" the specific problem for those cases where only a wrongful death case is warranted by the facts. Finally, we believe that such a drastic increase in the wrongful death caps as is proposed in HB 2143 will have an adverse effect on businesses and consumers who must ultimately pay the costs of the tort liability system. Consequently, we urge the Committee to amend HB 2143 to raise the cap to $250,000 when only a wrongful death action is filed.

Thank you for your time and attention.

KANSAS CIVIL LAW FORUM

A Coalition of Professionals and Businesses Interested in the Kansas Court System

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KCLF MEMBERSHIP LIST - 1996

American Tort Reform Association
Beech Aircraft Corporation
Kansas Association of Defense Counsel
Kansas Association of Insurance Agents
Kansas Association of Property and Casualty Insurers
Kansas Hospital Association
Kansas Medical Mutual Insurance Company
Kansas Medical Society
Pfizer, Inc.
Southwestern Bell Telephone
The Boeing Company
Kansas Railroads
Western Resources, Inc.

TRADITIONAL CLAIMS FOR DAMAGES IN WRONGFUL DEATH CASES (PER K.S.A. 60-1901 et seq.) WITH ACCOMPANYING PERSONAL INJURY ACTION ON BEHALF OF DECEASED (SURVIVORSHIP ACTION) PER K.S.A. 60-1801 et seq. (See also PIK § 9.01 et seq.)

I. Personal Injuries

a. Economic Damages (unlimited)

Medical care (past & future)
Hospitalization (past & future)
Loss of time or income (to date & future)
Aggravation of pre-existing ailments

b. Non-Economic Damages (limited)

Pain & suffering
Disabilities
Disfigurement
Mental anguish

c. Loss or Impairment of Services (Loss of Consortium)

II. Property Damages

Cost of repairs not to exceed value (difference in FMV) (unlimited)
Loss of use (unlimited)

III. Wrongful Death

a. pecuniary losses (unlimited)

1. loss of service, attention, marital care, parental care, advice and protection

2. loss of education, physical, moral training and guidance

3. loss of earnings

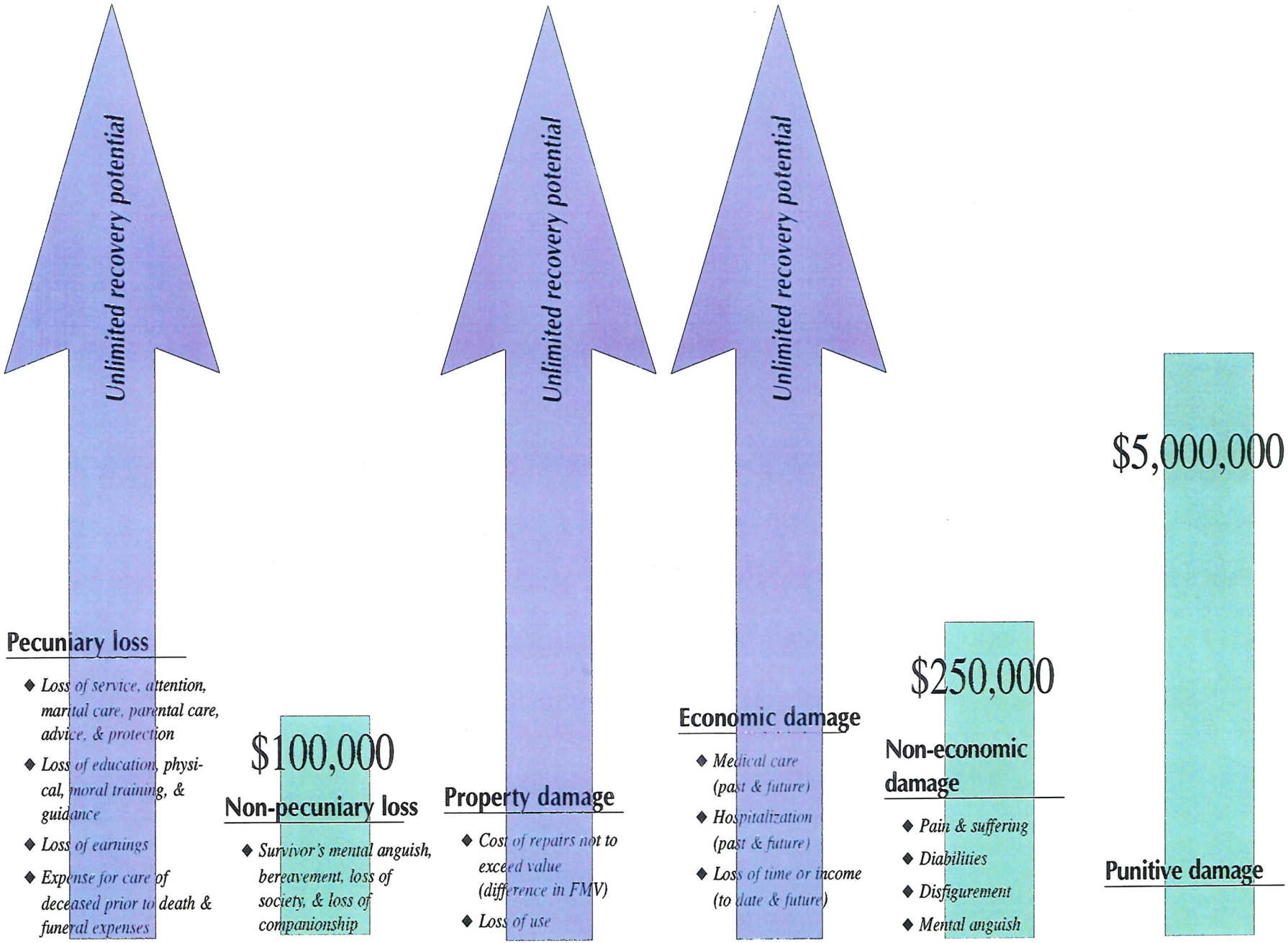
4. expense for care of deceased prior to death and funeral expenses

b. non-pecuniary (limited)

1. survivor's mental anguish, bereavement, loss of society, loss of companionship

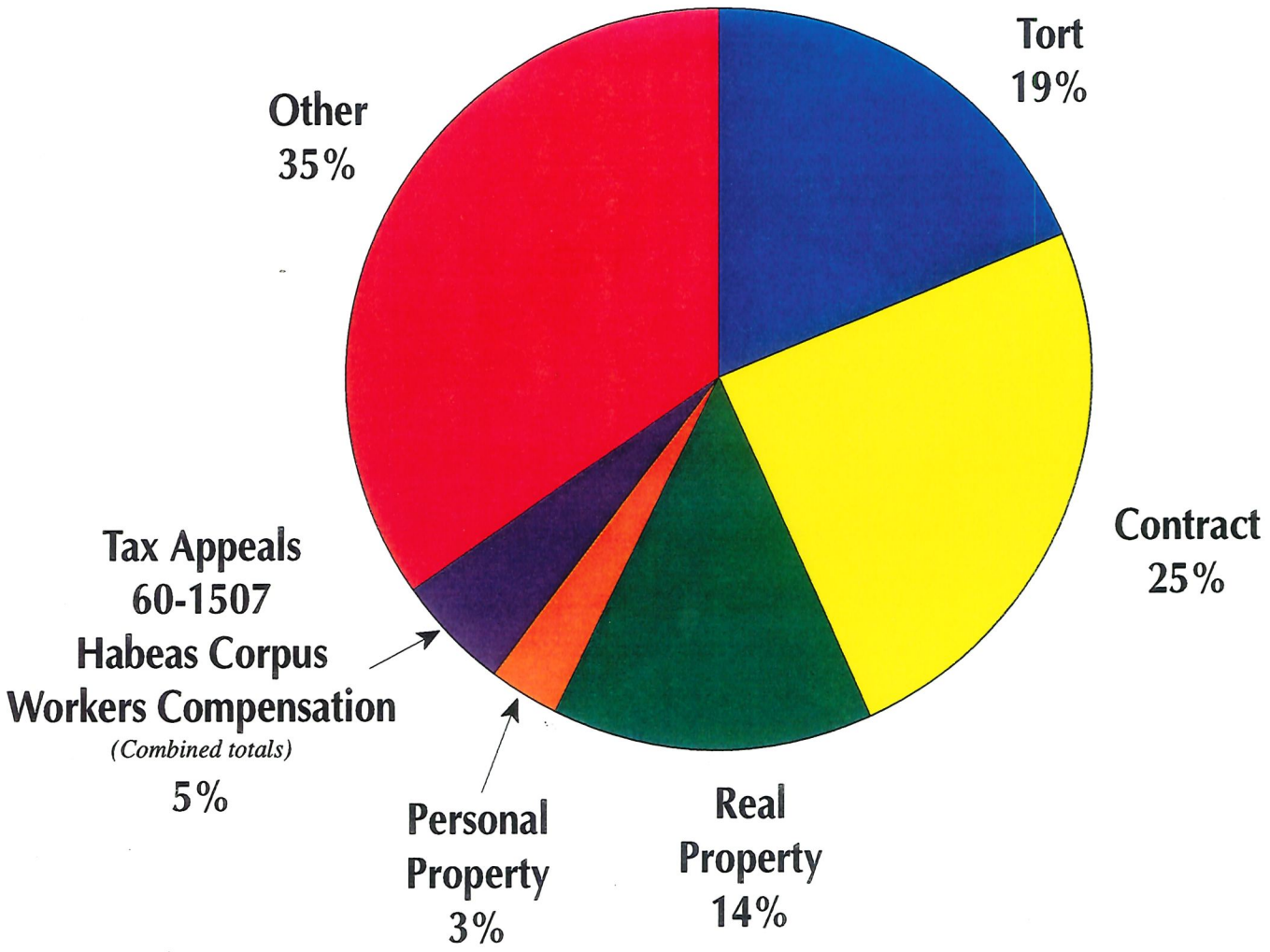
Damages in Wrongful Death Cases

(If not instantaneous death)



Kansas Civil Cases FY 1995-1996*

Year ending June 30, 1996



Source: Summary of Regular Civil Caseload for the St
Annual Report of the Courts of Kansas, 1996

Estimated financial impact of HB 2143: $321 million

Total tort cases*	3656
Wrongful death cases**	x 22%
Total wrongful death cases	804
Potential increased payments under HB 2143	$400,000
Additional claim potential	**$321,600,000**

* *Annual report of the Courts of Kansas, 1996*

** *1996 Kansas Verdict Survey, Jury Verdict Research (19 percent settlements + 3 percent verdicts)*

Note: Annual Survey of Vital Statistics 1995, reflects total unintentional unjury deaths of 971.

S. Jud 3/25 att #3

KANSAS MEDICAL SOCIETY

March 25, 1997

TO: Senate Judiciary Committee

FROM: Jerry Slaughter
Executive Director

SUBJECT: HB 2143; concerning wrongful death recovery limits

The Kansas Medical Society appreciates the opportunity to testify on HB 2143, which would increase the limit on non-pecuniary damages in wrongful death cases from $100,000 to $500,000. We oppose the bill in its present form, but will be offering an amendment today which will address the most problematic area identified by the bill's supporters.

This is a difficult issue to discuss because in every case it involves the loss of a loved one. No amount of money can replace a life. The personal stories you heard yesterday were poignant and tragic. Our opposition to this bill does not mean we are unsympathetic to their losses, or the losses of others. Yet, in bringing this issue to your attention, the proponents give you an opportunity to take a thorough look at the whole issue and address it in a thoughtful, reasoned manner.

Wrongful death lawsuits are actions filed by the survivors or relatives of a person who they believe died as a result of another's negligence. In these lawsuits there is no limit on the amount a jury can award for "pecuniary" damages. Pecuniary damages include financial losses such as funeral expenses, medical bills, and the lost income that the decedent would have otherwise contributed to the heirs. By contrast "nonpecuniary" damages are capped by law currently at $100,000. Nonpecuniary damages are generally non-financial losses such as loss of companionship, loss of parental care or guidance, and other damages which by their nature are hard to quantify.

The public policy rationale behind limiting nonpecuniary and other non-economic damages is that the legislature recognized years ago that the subjective nature of these non-financial damages made them impossible to quantify, and created the potential for excessive awards, driven by the emotional nature of these claims. Claims for economic or pecuniary losses are not limited, since they can be measured and valued by a jury with reasonable certainty.

The fivefold increase in the nonpecuniary limit in this bill will have a dramatic impact on the professional liability premiums physicians and hospitals pay. In Kansas, every physician is required by law to carry malpractice insurance, as a guarantee of financial responsibility. If a patient is injured through a physician's negligence, there will be funds available to compensate that patient. You heard from the proponents that raising the limit on nonpecuniary damages would not affect medical malpractice costs. Nothing could be further from the truth.

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Western Kansas office • 311 E 25th St. • Hays KS 67601 • 913.625.8215 • 800.293.2363 • FAX 913.625.8234

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During fiscal year 1996, for example, there were 96 medical malpractice cases tried or settled by the Health Care Stabilization Fund. Of those, 26 involved a claim for wrongful death. The potential liability of the Fund, on the non-pecuniary portion of the wrongful death claims alone under current law was $2.6 million (26 x $100,000). If the limit of $500,000 that is in HB 2143 had been in effect last year, the total potential liability would have been $13 million, an increase of $10.4 million on the same number of claims. Increases in claims of that magnitude spread over the 3000+ physicians who practice in Kansas will drive medical malpractice rates up significantly. A $10 million increase in claims at the Fund represents a 43% increase over the amount paid out in awards and settlements by the Fund last year. Anyone who thinks for a moment that increasing the wrongful death limit will not impact physician's malpractice premiums is either naive or not being forthright. The additional $10 million dollars will have to be collected from premiums physicians pay.

You also heard from the proponents that malpractice claim filings were down, as were claim costs. That is also not true in Kansas. In 1995 a record 326 malpractice suits were filed against the Health Care Stabilization Fund. The average wrongful death claim payment from the Fund last year was over $530,000, which seems to contradict testimony that wrongful death claimants are receiving only $100,000 for their claims, at least in medical malpractice claims.

In fact, if you look closer at the typical wrongful death claim, you find that in the vast majority of cases, claimants are receiving far more than $100,000. As has been pointed out by other conferees, most wrongful death claims involve pecuniary damages which are not limited, and are accompanied by a survivorship action which includes both economic and noneconomic damages of the decedent. It is only in those cases in which there is no economic loss and the claimant dies instantly, that the award is limited to $100,000. Typically, those cases involve the very young or elderly. We are offering an amendment today that deals with those cases by raising the limit to $250,000 if no personal injury claim accompanies the wrongful death claim. If a survivorship action is filed with the wrongful death claim, the limit on nonpecuniary damages would remain at $100,000, since unlimited compensation would still be allowed for pecuniary loss, as well as unlimited economic loss in the survivorship action.

This amendment goes a long way to address the problem identified by the proponents as the most unfair part of the current law. It assures that no claimant, particularly in cases involving the very young or elderly, will get just $100,000 in wrongful death claims.

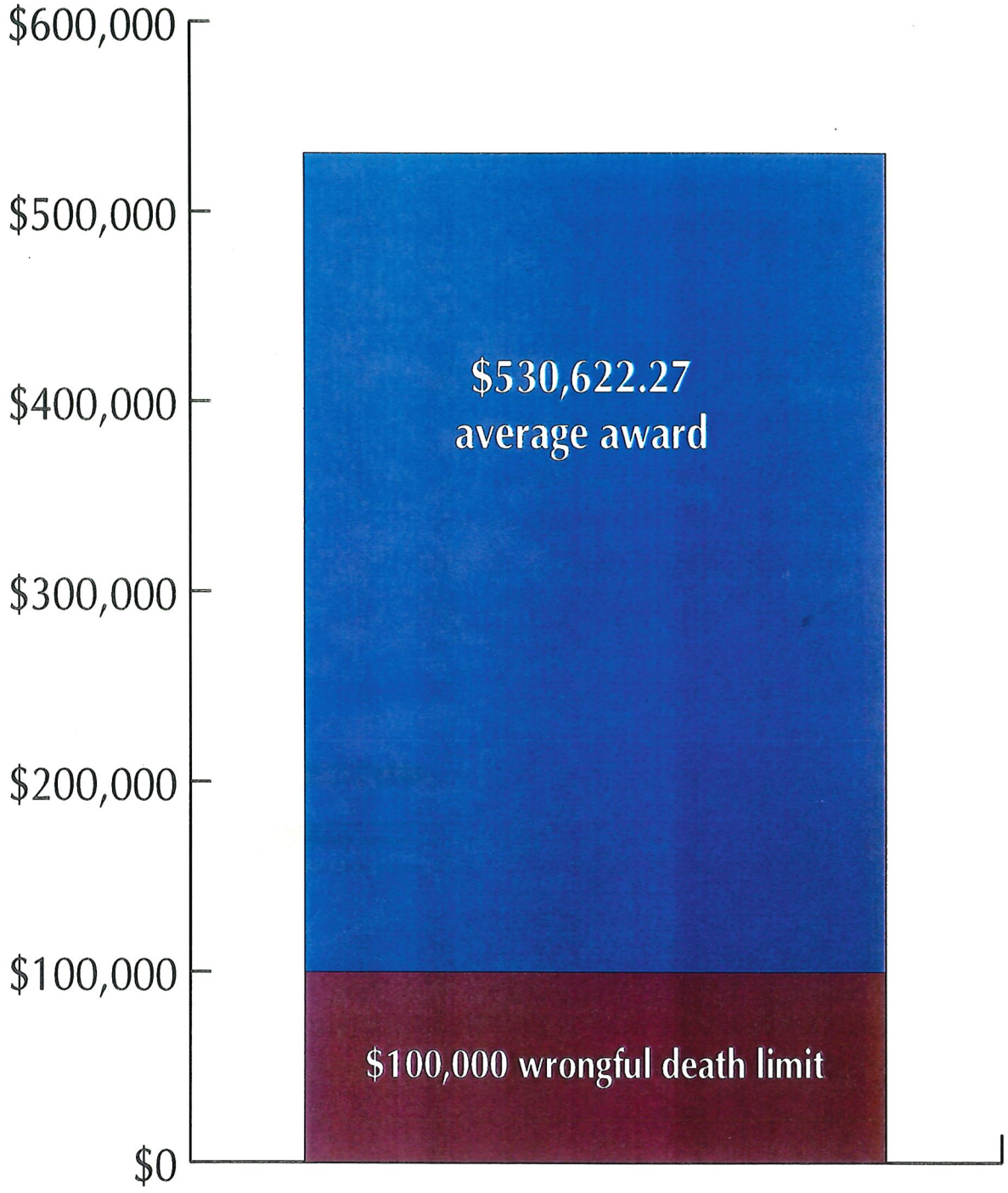
In summary, we believe an across the board increase in the limit on nonpecuniary loss in wrongful death claims is not warranted. It will drive up insurance costs for everyone, including physicians, who could see double digit premium increases reminiscent of the mid-80's. We urge you to adopt the amendment described above, which more than doubles the limit on nonpecuinary loss for children, the elderly, and others with no economic losses. Thank you.

Eighty percent of the States do not have Wrongful D… …omic damages).

* Cap on Medical Malpractice wrongful death cases only which is unconstitutional in Kansas. Malpractice Victims v. Bell.

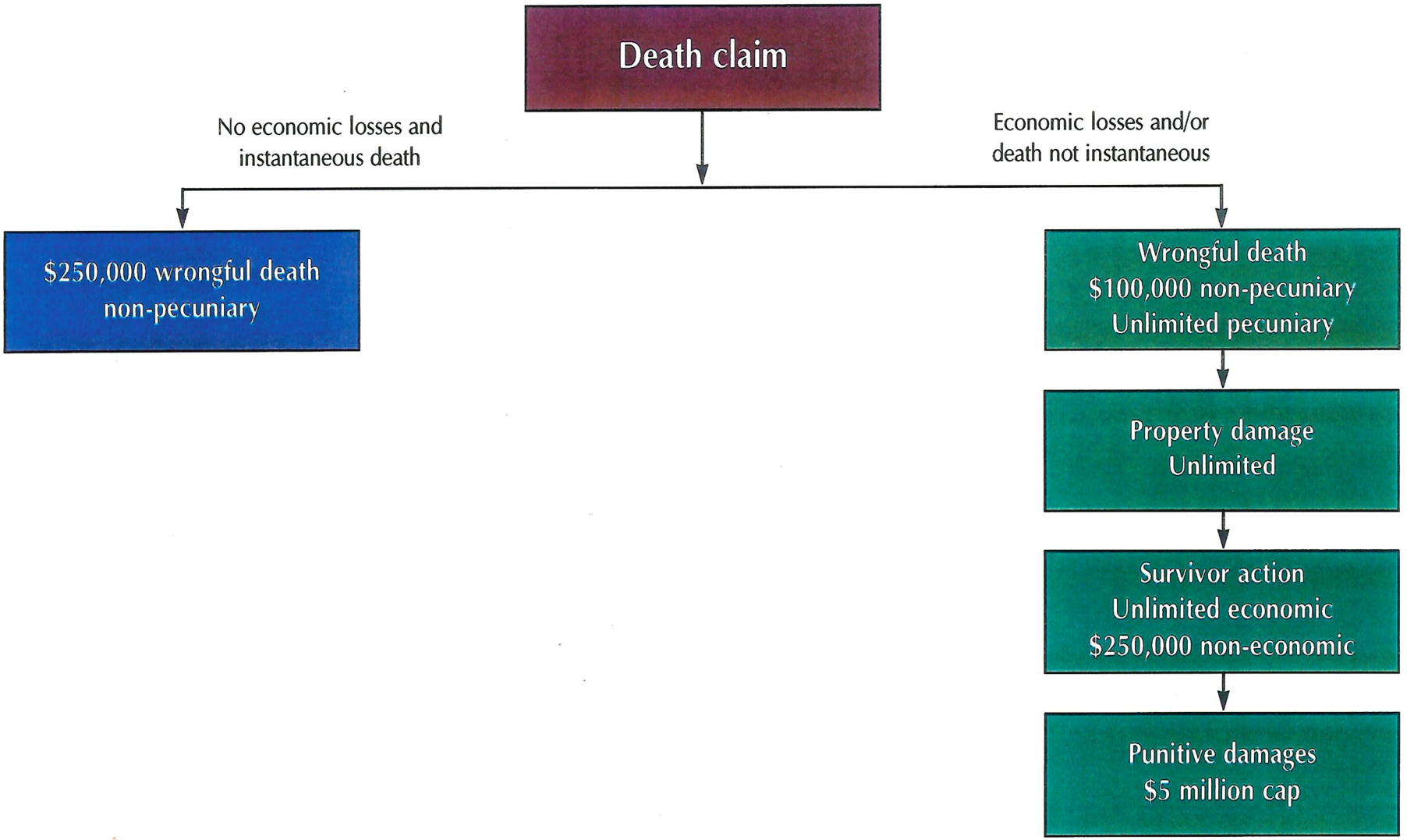
Source: State Trial Lawyer Associations and ATLA.

Average Kansas medical malpractice wrongful death payments



Source: Kansas Health Care Stabilization Fund, 1996

Wrongful death only amendment



HOUSE BILL No. 2143

By Representatives Swenson, Flaharty, Garner, Howell, Nichols, O'Connor, Pauls, Powers and Spangler

1-30

AN ACT concerning civil procedure; relating to wrongful death; amending K.S.A. 60-1903 and repealing the existing section.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 60-1903 is hereby amended to read as follows: 60-1903. (a) In any wrongful death action, the court or jury may award such damages as are found to be fair and just under all the facts and circumstances, but the damages, other than pecuniary loss sustained by an heir at law, cannot exceed in the aggregate the sum of ~~$100,000~~ ~~$500,000~~ and costs.

: (1) $100,000, if the personal representative of the deceased maintains a personal injury cause of action, and costs; or (2) $250,000, if no personal injury cause of action is maintained,

(b) If a wrongful death action is to a jury, the court shall not instruct the jury on the monetary limitation imposed by subsection (a) upon recovery of damages for nonpecuniary loss. If the jury verdict results in an award of damages for nonpecuniary loss which, after deduction of any amounts pursuant to K.S.A. 60-258a and amendments thereto, exceeds the limitation of subsection (a), the court shall enter judgment for damages ~~of $100,000 $500,000~~ for nonpecuniary loss.

as provided in subsection (a)

(c) In any wrongful death action, the verdict shall be itemized by the trier of fact to reflect the amounts, if any, awarded for:

(1) Nonpecuniary damages;

(2) expenses for the care of the deceased caused by the injury; and

(3) pecuniary damages other than those itemized under subsection (c)(2).

(d) Where applicable, the amounts required to be itemized pursuant to subsections (c)(1) and (c)(3) shall be further itemized by the trier of fact to reflect those amounts awarded for injuries and losses sustained to date and those awarded for injuries and losses reasonably expected to be sustained in the future.

(e) In any wrongful death action, the trial court shall instruct the jury only on those items of damage upon which there is some evidence to base an award.

Sec. 2. K.S.A. 60-1903 is hereby repealed.

Sec. 3. This act shall take effect and be in force from and after its publication in the statute book.

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SENATE JUDICIARY COMMITTEE

MARCH 25, 1997
TESTIMONY IN OPPOSITION TO H.B. 2143
NON PECUNIARY DAMAGES IN WRONGFUL DEATH ACTIONS

HARRY BLEEKER
5948 16TH ST. TERR.
GREAT BEND, KS 67530

It is important to understand what this bill will or will not accomplish. First, it only applies to jury verdicts for non-pecuniary damages. Much of the emotional and compelling testimony you have heard or will hear in favor of increasing the non- pecuniary cap is offered by heirs of decedents who have settled their claims. The reason for this is simple. The vast majority of cases tried to juries in the state of Kansas result in an award of non-pecuniary damages that is less than the present statutory cap. This should immediately suggest to members of this committee that the present cap is neither too low nor or out of touch with the values of citizens of this state.

Juries in the state of Kansas, consistently return verdicts for non-pecuniary damages of less than $100,000.00, despite the fact that they are totally unaware of the statutory cap. Present law prohibits the court from instructing or informing the jury of the statutory cap or its application. The statutory cap on non-pecuniary damages typically does not limit the recovery of heirs in wrongful death suits. However, raising the cap creates a number of problems and side effects that are neither desirable nor conducive to the fair compensation of victims.

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First, it is a disincentive to settlement and will greatly increase the number of suits that will be tried to juries, thereby increasing the workload of our already overburdened courts and delaying compensation to the heirs in wrongful death actions. Since the current cap closely reflects the verdicts returned by juries across this state and closely reflects jury verdicts that can be expected to be returned in the future, valuation of claims and proposed settlement offers to the heirs in wrongful death actions will remain unchanged. However, by increasing the potential recovery by five-fold, plaintiffs will have little incentive to settle their claims at a figure that juries are likely to return a verdict at, but rather will be encouraged to "roll the dice" in hopes of obtaining a much larger judgment, regardless of how remote such a likelihood is.

Secondly, heirs mistakenly equate the cap on non-pecuniary damages as placing a value on the lives of their loved ones. Nothing could be further from the truth. The statutory cap for non-pecuniary damages in wrongful death actions compensates the survivors for their grief, for their bereavement, for their sorrow; not for the value of the decedent. Such a figure is by definition impossible to place a monetary figure on. Nothing this committee can do will compensate the witnesses who have testified before it in favor of increasing the cap. Will $500,000.00 compensate them? If asked, each and every witness would tell this committee that no amount of money would compensate them for their grief. Not a million dollars, not ten million dollars. No amount of money will reduce their grief. No amount of money will bring their loved one back. It will only increase

their bank account.

Any figure, whether determined by an impartial legislature, or by a grieving heir, is necessarily based upon emotion. That figure will never be "fair" to anyone. By fixing the statutory cap at a figure consistent with what juries of this state regularly find, it is appropriately giving certainty to a figure that is uncertain. It is giving consistency to a figure that is inconsistent. To increase the statutory cap for wrongful death by five-fold will guarantee the opposite.

Thirdly, increasing the cap on non-pecuniary damages is an ineffective and inefficient method of compensating victims. Virtually all wrongful death suits are handled by plaintiff's attorneys on a contingency fee basis. Hence the strong support of the Kansas Trial Lawyers Association and the marshaling of a large number of witnesses to present emotional testimony to this committee. Most contingency fee arrangements provide for fees of 40% or more after suit is filed and 50% or more on appeal. It is not hard to see why the plaintiff's attorneys would be in favor of a bill that could increase their fees by $200,000.00 on just one case.

Lastly, this bill only addresses future parties. You and me. Tomorrow you may find yourself the defendant. You may be the plaintiff. Society will pay the cost. There is no real doubt that the cost of increasing the exposure for wrongful death by five-fold will be passed on to each of us in increased insurance premiums. Our auto insurance will go up as it must. Automobile insurance companies will be caught in a "Catch 22." Currently they know what a jury will

normally do and they know what a jury can do. The two are the same. It is certain. If the potential exposure is increased five-fold, the carrier will still know what a jury will normally do, it can not predict what a jury can do. This bill makes it impossible to fairly, accurately and consistently evaluate claims. The winners are the lawyers. Society is the loser.

Thank you for your time and consideration.

LEGISLATIVE TESTIMONY

Kansas Chamber of Commerce and Industry

835 SW Topeka Blvd. Topeka, Kansas 66612-1671 (913) 357-6321 FAX (913) 357-4732

HB 2143 March 25, 1997

KANSAS CHAMBER OF COMMERCE AND INDUSTRY

Testimony Before the

Senate Committee on Judiciary

by

Bob Corkins
Director of Taxation

Honorable Chair and members of the Committee:

My name is Bob Corkins, representing the Kansas Chamber of Commerce and Industry. I appreciate this opportunity to express our members' views on the subject of tort reform and, in particular, their opposition to the higher civil damage awards which HB 2143 would permit.

The Kansas Chamber of Commerce and Industry (KCCI) is a statewide organization dedicated to the promotion of economic growth and job creation within Kansas, and to the protection and support of the private competitive enterprise system.

KCCI is comprised of more than 3,000 businesses which includes 200 local and regional chambers of commerce and trade organizations which represent over 161,000 business men and women. The organization represents both large and small employers in Kansas, with 47% of KCCI's members having less than 25 employees, and 77% having less than 100 employees. KCCI receives no government funding.

The KCCI Board of Directors establishes policies through the work of hundreds of the organization's members who make up its various committees. These policies are the guiding principles of the organization and translate into views such as those expressed here.

The business community has assumed a high profile in this area of legislation for many years and our reasons for supporting limitations on tort liability have been consistent throughout. By

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raining business costs, we protect and create jobs, help curb inflation, and develop a higher earning power for Kansans at large.

KCCI views this proposal as being contrary to those efforts. Rises in litigation filings and jury awards have historically been closely linked to overly cautious, perhaps even paranoid, business reactions. Such counter-growth responses are logical on their face and intuitively seem correct. Policymakers over the years have also been inundated with anecdotal examples of companies that make one defensive move after another to protect themselves from exposure to litigation, with none of these moves serving to maximize economic growth.

Our research now allows us to take the argument one step further. The University of Illinois College of Law published a series of papers in 1995 that look at the traditional tort reform rationale and apply an objective empirical analysis. Their review includes a clear acknowledgment of the links between liability laws and economic growth and speaks appreciatively of a study performed by the National Bureau of Economic Research in Cambridge, MA.

The Illinois scholars refer to the NBER study as the "first detailed statistical analysis of the effect of limiting liability on economic growth." The study examined government economic data from 1969 through 1990 and "[a] strong correlation was found between the number of laws limiting liability a state had enacted, such as caps on damage awards, and levels of employment and productivity that state enjoyed." Fourteen of 17 of the business types studied benefited from liability limitations, with employment growing an average of 18% in miscellaneous repair services, 23% in amusement and recreation, and 25% in motion pictures. In contrast, the NBER study concluded, employment fell when laws that favored plaintiffs were enacted. The University of Illinois noted some limitations in the NBER methodology, but reemphasized it as one of the few empirical studies ever done and concluded that it bolsters the arguments business leaders have always made regarding tort reform. Additional results from the NBER study are presented below.

Although not all effects of damage award liberalization can be quantified, a fair assumption is that each business has its own breaking point. Perhaps a few additional dollars in legal costs this year is all that it takes to send Company X into bankruptcy or into closing down their second production shift. Perhaps just a slight expansion of lawsuit exposure is enough to prevent Company Y from marketing their new allergy medication, or from using a new technique which extracts 5%

...e oil from wells that would otherwise be capped. We suspect that the relationship between ... jury awards and economic growth is, on the whole, both linear and inverse.

KCCI appreciates the steps the legislature has taken to rein in unreasonable litigation growth. Noncompensatory damage limits have been the most appropriate means for curbing jury awards and, we believe, should continue to serve that function. We therefore respectfully ask for your vote against HB 2143. Thank you for your time and consideration.

EFFECT OF LIABILITY ON ECONOMIC GROWTH

Effect	% of Large Firms Reporting Effect	% of Small Firms Reporting Effect
Closed production plants	8%	2%
Laid off workers	15%	9%
Decided against acquiring or merging	17%	11%
Moved production offshore	4%	2%
Lost market share	22%	25%

SOURCE: McGuire, *The Impact of Product Liability*, Tables 28, 31, 59, 61, pp. 19-20, 34-35 as cited in Research and Policy Committee of the Committee for Economic Development, *Who Should be Liable?* p. 95 (1989)

Testimony regarding House Bill 2143

Presented by Patrick J. Morris
Executive Vice President of the Kansas Association of Insurance Agents
(March 25, 1997 - Senate Judiciary Committee)

Thank you Mr. Chairman and members of this committee for the opportunity to present written testimony in opposition to the passage of House Bill 2143. The Kansas Association of Insurance Agents is a insurance trade association that represents over 600 independent agency members across Kansas who employ more that 3,000 people.

Our concern with House Bill 2143 is that an increase in the cap on wrongful death claims for non-pecuniary damages from $100,000 to $500,000 will eventually increase malpractice premiums for all doctors and hospitals; and that this increase will result in higher health care costs. Those increases will have an impact on consumers and the price that they pay for insurance, as well as on the companies that avail themselves to offer insurance in the state of Kansas. Also, we have concerns about the unintended consequences and adverse effects that this bill may produce concerning the Health Care Stabilization Fund and the resulting effect on the insurance marketplace.

One of the challenges facing a state the size of Kansas is to maintain an open, competitive market for the various types of insurance which will provide the most options to buyers at the lowest cost. As independent small businessmen and women, our members are free to represent as many insurance companies as they need and can attract to provide their clients with the best coverage at the best price. Our members directly represent consumers, and want to maintain a healthy insurance industry in Kansas. Our largest concern with this proposed bill is that consumers will not be the winners in this proposal, nor will injured Kansans. The big winner in House Bill 2143 will be plaintiff attorneys. This legislation will mean huge increases for the plaintiff attorneys in these cases due to contingency fee contracts; yet, will undoubtedly result in insurance premium increases for Kansans.

We would urge the committee to reject House Bill 2143 in its present form.

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HOSPITAL ASSOCIATION

Memorandum

Donald A. Wilson
President

TO: SENATE JUDICIARY COMMITTEE

FROM: KANSAS HOSPITAL ASSOCIATION
Thomas L. Bell, Sr. Vice President/Legal Counsel

RE: HB 2143

DATE: March 25, 1997

Thank you for the opportunity to comment regarding HB 2143, which would raise the cap on wrongful death claims for non-pecuniary damages from $100,000 to $500,000.

The Kansas Hospital Association is opposed to this legislation as currently written for the following reasons:

- It will increase malpractice premiums all doctors and hospitals pay. Those increases will eventually be passed on to the public in the form of higher health care costs;

- There currently is no limit on pecuniary damages (medical expenses, funeral expense, lost income, etc.) in wrongful death cases. Non-pecuniary damages (pain, suffering, loss of companionship, etc.) are limited because it is impossible to place an objective value on them; and

- It will adversely affect the Health Care Stabilization Fund. If HB 2143 had been law last year, the claims for non-pecuniary loss would likely have been over $10 million higher. That increase would come directly from premiums doctors and hospitals pay.

We do support, however, the amendment offered by the Kansas Medical Society. This amendment would raise the limit to $250,000 in wrongful death only cases. We think this is an appropriate compromise.

Thank you for your consideration of our comments.

TLB / pc

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215 S.E. 8th • P.O. Box 2308 • Topeka, Kansas 66601-2308 • (913) 233-7436 • FAX (913) 233-6955

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MEMORANDUM

TO: The Honorable Tim Emert, Chair
House Judiciary Committee

FROM: Teresa L. Sittenauer
The State Farm Insurance Companies

DATE: March 25, 1997

RE: H.B. 2143

Mr. Chairman, Members of the Committee: My name is Teresa Sittenauer and I am Legislative Counsel for The State Farm Insurance Companies. We appreciate the opportunity to present our testimony in opposition to H.B. 2143. This legislation would raise the cap on nonpecuniary damages in a wrongful death action from $100,000 to $500,000.

State Farm rises in opposition to this bill because of the burden it would place on Kansas insurance consumers. For instance, Kansans who purchase automobile insurance to cover wrongful death and related claims up to the current cap amounts will be forced to purchase more insurance simply to ensure that they are covered to the maximum limits against nonpecuniary damages in a wrongful death claim. We estimate that the additional insurance necessary to provide coverage to the proposed maximum cap on wrongful death damages will cost insurance consumers 20% more per policy.

This is not to say that consumers will be forced to purchase insurance coverage up to the maximum limits to cover a wrongful death claim. However, the alternative to rising premiums is facing the potential exposure to such a claim with inadequate insurance to cover the award. Kansas insurance consumers are thus trapped in a "catch-22." They must either pay higher premiums to provide coverage for the increased cap, or face exposure to a $500,000 award with policy limits far

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below that amount.

The provisions of this bill in no way impact the amount a claimant can recover for pecuniary loss--for instance, the cost of medical bills, etc. This bill would simply raise the recoverable amount on nonpecuniary damages in a wrongful death suit, with the effect of driving up insurance rates and/or exposing individuals to greater risk of loss at the hands of a wrongful death claim. We urge the committee to reject H.B. 2143.

Respectfully submitted,

Teresa L. Sittenauer

D:\CORRES\HB2143.TES

David A. Hanson
Kansas Association of Property
and Casualty Insurance Companies
Topeka, Kansas
(913) 232-0545

TESTIMONY ON HB2143
March 24, 1997

TO: Senate Judiciary Committee
State Capitol
Topeka, Kansas

RE: House Bill No. 2143

Mr. Chairman and Members of the Committee:

Thank you for this opportunity to appear before the Committee. I am David Hanson and am appearing on behalf of the Kansas Association of Property and Casualty Insurance Companies, whose members are domestic insurance companies in Kansas. We are very concerned that the proposed increase in nonpecuniary damages from $100,000 to $500,000 is unwarranted and will result not only in more litigation with the potential for substantially higher verdicts, but also increased costs to the insuring public in Kansas from higher premiums necessary to insure against the increase in potential liability. We must therefore strongly oppose this proposal.

Thank you for your consideration.

Respectfully,

David A. Hanson

DAVID A. HANSON

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TESTIMONY
Senate Judiciary Committee
Tuesday, March 25, 1997
H.B 2143

Chairman Emert, members of the Committee, I am Bill Henry, Executive Secretary for the Kansas Association of Defense Counsel. I appear before you today to make two suggestions that we believe you should consider in acting on H.B. 2143.

The establishment of a cap on non-pecuniary damages is policy decision that has been made by the Kansas Legislature. We have differences within our own association as to what that figure should be in wrongful death actions. We hope this Committee looks seriously at this policy issue of increasing the $100,000 limit to $500,000.

The Kansas Association of Defense Counsel is composed of more than 300 individual attorneys across the State who do defense work in civil litigation. Based upon their experience, our legislative committee makes the following recommendations to you.

Our first suggestion is that we should clarify in Section 3, what actions will be affected by any change in the wrongful death limit. Generally, any legislative action is prospective, that is the action is presumed to take effect in the future and any actions currently on file could not appeal or seek a larger amount, if this Committee determines that an increase is appropriate. However, Section 3 simply states this act will be effective from and after its publication in the Statute Book. Does that mean any action accruing before that time is limited to the current $100,000 limitation? Does that mean an accident which leads to a wrongful death that occurred before the publication in the Statute book - but filed after the publication - is covered by the current statutory figure or the increased figure?

To eliminate this quandary we suggest Section 3 be amended to state that any action accruing after publication in the Statute Book would be eligible for the increased non-pecuniary loss sustained in that event.

Secondly, there are several court decisions in Kansas which have blurred the distinction between pecuniary and non-pecuniary damages. If the Judiciary Committee is concerned with this important policy issue, we encourage the Committee to look at the "water front" before taking action on increasing the $100,000 limitation. An interim study would be an appropriate step to look at the entire subject of non-pecuniary losses and some of our court's holdings in this area.

Should the Committee wish to proceed on H.B. 2143 at this time we would hope the Committee would clearly clarify in Section 3, what actions in wrongful death area to apply any new limitation. The Committee might also wish to consider in its minutes their clear intent in this area.

Respectfully submitted:

William M. Henry,
Executive Secretary
Kansas Association of Defense Counsel

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KANSAS TRIAL LAWYERS ASSOCIATION

Lawyers Representing Consumers

March 25, 1997

TO: Senate Judiciary Committee
FROM: Terry Humphrey, Executive Director, KTLA
RE: House Bill 2143

Thank you so much for the courtesy you extended to those who testified yesterday on House Bill 2143. As you know, it is very important to these families that their stories be heard, particularly by legislators in a position to change the experience for other families.

Unfortunately, due to time limitations, KTLA was not able to address all the points of debate we had planned. I do think it is important for you to have more information on one specific argument of the opponents to HB 2143.

Opponents to HB 2143 have often stated that under current law, recovery is adequate for victims - even families who lose a child - due to the availability of a second legal action, a survival action. What is not stated, is how difficult it is to succeed in a survival action.

It is true that the wrongful death of a loved one may generate two legal claims, a wrongful death claim and what is commonly referred to as a "survival" claim. However, it is not true that a survival claim is possible in every, or even most, wrongful death cases. The two claims compensate different damages and losses. The wrongful death claim compensates the surviving family's damages and losses. The core of a survival claim is to compensate the probate estate for conscious pain and suffering. If the injured victim didn't consciously suffer, as was the case with Jonathan Lippincott, no survival action is possible.

Again, thank you for your courtesy and your attention to this critical issue.

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Terry Humphrey, Executive Director

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E-Mail: triallaw @ ink.org