Approved: August 3,2005
Date

MINUTES OF THE SENATE JUDICIARY COMMITTEE

The meeting was called to order by Chairman John Vratil at 8:00 A.M. on March 30, 2005, in Room 519-S of the Capitol.

All members were present except:
Barbara Allen- excused
Derek Schmidt- excused

Committee staff present:
Mike Heim, Kansas Legislative Research Department
Jill Wolters, Office of Revisor of Statutes
Helen Pedigo, Office of Revisor of Statutes
Nancy Lister, Committee Secretary
Melissa Calderwood, Legislative Research Department
Ken Wilke, Office of Revisor of Statutes
Jerry Ann Donaldson, Legislative Research Department

Conferees appearing before the committee:
Frank Henderson, Jr., Executive Director, Crime Victims Compensation Board
Representative Mike O'Neal
David Rogers, Attorney, Foulston, Siefkin, L.L.P.
Ann Kindling, Kansas Association of Defense Counsel
Jerry Palmer, Kansas Trial Lawyers Association
Jim Clark Kansas Bar Association
Ernest Kutzley, AARP Kansas
Sandy Barnett, Kansas Coalition Against Sexual and Domestic Violence
Sandy Rains, President, Kansaas MADD Association

Others attending:
See attached list.

Chairman Vratil opened the meeting. The Chairman stated that they had a confirmation hearing and an informational hearing scheduled for today. He introduced Mr. Frank Henderson, who was in attendance in conjunction with the confirmation hearing.

Confirmation Hearing on reappointment of Paula S. Salazar to serve a four-year term on the Crime Victims Compensation Board

Mr. Frank Henderson, Jr., Executive Director of the Crime Victims Compensation Board, Office of the Attorney General, stated that he was appearing before the Committee to answer any questions about the Board or Ms. Salazar. He stated Ms. Salazar had served on the Board since 1997 and has been a conscientious and faithful participant during her tenure on the Board, and he felt fortunate to have her serving as a member on the Board.

Chairman Vratil noted there were no questions from Committee members. He stated that he would like to postpone the confirmation vote until later in the meeting to give as many Committee members a chance to participate in the vote.

Chairman Vratil opened the informational hearing on **SB 102**.

SB 102 Informational hearing on the policy in SB 102 (collateral source benefits)

Proponents:
Representative Mike O'Neal testified in support of the bill and provided some background history on the issue and the bill history. Collateral source benefits have to do with medical malpractice and personal injury law suits, and what a jury is told regarding a plaintiff's losses incurred. The jury is not allowed to learn what losses have been recovered through health benefits or insurance. As a result, juries may award damages that

are in excess of actual losses.

Chairman Vratil stated that K.S.A. 60-258a is the statute that defines Kansas as a modified fault state, which means if a jury finds fault, for example, in an accident that the plaintiff is 10 percent at fault and the defendant 90 percent at fault, then the damage awards will reflect those percentages.

David Rogers, an Attorney in the law firm of Foulston, Siefkin, L.L.P., provided testimony in support of the bill. Since 1987, Mr. Rogers has primarily handled defense of personal injury cases, including liability, medical malpractice, premises liability and tort law. Mr. Rogers stated that as the law currently stands, the "collateral source rule" is an evidentiary matter. In court proceedings, the parties currently are restricted from presenting any evidence that the plaintiff has already received benefits of one kind or another for a given accident. The jury is told that the plaintiff has incurred the lost wages but is not told that the lost wages may have already been paid or will be paid by an insurance company or an ERISA plan. Mr. Rogers stated that **SB 102** will allow a jury to consider all of the pertinent evidence regarding special damages, leaving the determination of whether there is a net collateral source benefit to the discretion of the jury. (Attachment 1)

Ann Kindling, Kansas Association of Defense Counsel (KADC), stated that the KADC believes that the interests of justice will be served with the enactment of the bill. The goal of damages in a lawsuit is to make a plaintiff whole by compensating for monetary and non-monetary damages suffered at the hands of the defendant. Because of the collateral source rule, often times a plaintiff receives compensation that is above actual losses, resulting in a "windfall".

SB 102 will allow the jury to be told that certain monetary losses claimed by the plaintiff were actually paid by a third-party. Ms. Kindling stated that the latest amendment makes a reduction in the jury's award discretionary rather than mandatory, so the jury would be able to hear all the information and then decide whether to reduce the award at all, and if so, by how much.

Ms. Kindling stated that three aspects of this issue are often misunderstood: 1) collateral source benefits do not include amounts paid by a third-party who retains a lien or right of subrogation; 2) the law requires a defendant to take his victim as he finds him, which means that no two plaintiffs with identical injuries will receive the same damage award; 3) opponents often suggest that if a jury learns that a plaintiff was covered by insurance, then the jury should also be told whether the defendant had insurance. Again, the goal of damages is to compensate the plaintiff, not to punish the defendant. The plaintiff's damages should be the same regardless of whether they are paid by the defendant himself or by the defendant's liability insurer. (Attachment 2)

Written testimony was submitted by Cary Silverman, Esq., on behalf of the American Tort Reform Association (Attachment 3); Lew Ebert, President and CEO of The Kansas Chamber (Attachment 4); Sandy Praeger, Commissioner, Kansas Insurance Department (Attachment 5); Jerry Slaughter, Executive Director of the Kansas Medical Society (Attachment 6); and Larry Magill, Kansas Association of Insurance Agents (Attachment 7).

Opponents:
Jerry Palmer, with Palmer, Leatherman & White, L.L.P., appeared on behalf of the Kansas Trial Lawyers Assocation. Mr. Palmer stated that the way this bill came to be addressed was via a "gut'n go". Mr. Palmer stated that Kansas is deemed to be the most tort reformed state in the country, and the state that Forbes magazine called the most favorable state to do business in, from that standpoint. (Attachment 8)

Mr. Palmer stated that collateral sources are for the most part things which have been acquired by the victim through their own resources, such as privately purchased health insurance or disability insurance. It may also be in the form of the contract between employers and employees that the employer pays for in whole or in part. Many of these plans have within them subrogation provisions, which means that the insurance company advances the monies to the injured person, but if the insured person is reimbursed by the wrong-doer, then the insurance company or the employer under its plan gets those monies back so that it reduces and defrays the expanse of providing the benefit. Mr. Palmer cited examples, such as ERISA plans, personal injury protection benefits under auto insurance policies, benefits provided by the Veterans Administration. Kansas

law requires that Medicaid be repaid from and to the extent of any third-party benefits, and similar requirements exist under federal Medicare law. Mr. Palmer stated subrogation is not dealt with in **SB 102** and that enactment of it would place the obligation of state agencies in opposition to the requirements of federal law.

Mr. Palmer stated that there was a collateral source act passed in1988 by the Kansas Legislature that was struck down in 1993. At that time, it was determined that the average cost of producing the evidence on collateral source benefits, future collateral source benefits, and net collateral source benefits was so expensive that it should not be utilized in cases that didn't involve a potential claim of $150,000 or more. By today's consumer price index, the equivalent case would have to be a $243,000 case, as a result of inflation. The median tort jury verdict in fiscal year 2003 was less than 10 percent of this amount, $23,416. (Attachment 9) Because the issues revolving around proving collateral source would be many, the bill has the potential of driving up insurance premiums because of the additional defense costs that would be charged back to insurance companies who hire defense lawyers. Mr. Palmer also provided a chart comparing the average medical malpractice premiums where collateral sources are admissible in states with states where collateral sources are not admissible. Kansas ranks among the lowest premiums in the country. (Attachment 10). In summary, Mr. Palmer stated that for good governance, common sense and fairness, the bill should be defeated, as it is unworkable.

Jim Clark, Kansas Bar Association (KBA), stated that the KBA objected to the bill because of the way the bill came into being and because there are no figures to support the need for the bill. Mr. Clark stated that attached to his written testimony is an article on the issue of implementing the Kansas Collateral Source Rule, which addresses the difficulty that juries will have in computing the comparative fault and determining the net effect of the collateral source, the determination of future benefits, and other such issues. (Attachment 11)

Mr. Ernest Kutzley, AARP Kansas, stated that on behalf of the 350,000 members, he hoped the Committee would not oppose the collateral source rule. Many Kansans purchase insurance to protect themselves and their families from unforseen tragedies. AARP believes that SB 102 will punish Kansans for being prudent in insuring themselves against potential disasters. He asked the Committee not to support the bill. (Attachment 12)

Sandy Barnett, Kansas Coalition Against Sexual and Domestic Violence (KCASDV), stated that domestic violence and sexual assault impact every part of a person's life. Holding a perpetrator or wrongdoer accountable for the violence and damage done to a victim, whether the damage is emotional, physical or financial, or a combination, is important in helping victims recover. The current collateral source doctrine in Kansas supports the victim by placing the full responsibility for full compensation for injuries on the person doing the harm. Ms. Barnett cited two stories of actual victims, and how there were tremendous healthcare bills, as a result of injuries they received at the hands of others. Ms. Barnett asked the Committee to retain current law and oppose passage of **SB 102.** (Attachment 13)

Sandy Rains, President of Kansas MADD (Mothers Against Drunk Driving) Association, stated she was here to address the victim's side. Ms. Rains stated that the bill would allow juries to reduce the drunk driver's financial obligation on the amount that the injured victim receives in health insurance benefits. Ms. Rains summarized that victims have a right to be compensated fairly, that no one would willingly undergo the physical, psychological, and emotional trauma inflicted by a drunk driver. Ms. Rain stated MADD opposed any measure that would nullify the collateral source rule and asked the Committee to oppose **SB 102**.

A discussion ensued among the Committee. Several questions were raised by Committee members that were addressed by individuals who gave testimony on **SB 102**.

Written testimony was submitted by the Kansas AFL-CIO. (Attachment 14)

Chairman Vratil closed the hearing on **SB 102.**

Chairman Vratil asked the Committee to consider the confirmation of Paula S. Salazar.

MINUTES OF THE Senate Judiciary Committee at 8:00 A.M. on March 30, 2005, in Room 519-S of the Capitol.

Confirmation Hearing on reappointment of Paula S. Salazar to serve a four-year term on the Crime Victims Compensation Board

A motion was made to confirm the reappointment of Ms. Salazar to the Crime Victims Compensation Board for another four-year term. (Attachment 15) Senator Donovan moved, seconded by Senator Bruce, and the motion carried.

Chairman Vratil asked the Committee to consider action on **SB 102**.

Final Action:
SB 102 Informational hearing on the policy in SB 102 (collateral source benefits)

Chairman Vratil asked the committee to vote on whether to move the bill out of Committee and give the full Senate a chance to address and debate the issue. The vote was four favorable to moving the bill forward and four were opposed. Chairman Vratil stated that anytime there is a tie on a complex issue such as this, that he was in favor of allowing the full legislative body to address the issue and, therefore, he was voting in favor to move it forward (passed favorably) out of Committee.

Chairman Vratil adjourned the meeting at 9:30 A.M. There are no further Committee meetings scheduled.

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.

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 3-30-05

NAME	REPRESENTING
Jim Clark	KBA
Frank Henderson Jr	KS Atty Gen - CVCB
Sandy Barnett	KCSDV
Chip Wheelen	Asn of Osteopathic Med
Scott Heidner	KS Association of Defense Counsel
David Rogers	Foulston, Siefkin LLP
Anne Kindling	Kansas Assn of Defense Counsel
Lew Ebert	KS Chamber
Jim Moser	Foulston Siefkin LLP
[illegible]	AARP Kansas
Kevin Barone	KTLA
Ron Seeber	Hein Law Firm
Joyce Grover	KCSDV

TESTIMONY TO SENATE JUDICIARY COMMITTEE REGARDING

SENATE BILL NO. 102

MR. CHAIRMAN AND COMMITTEE MEMBERS:

My name is David Rogers. I am a partner in the law firm of Foulston, Siefkin LLP. I have been a lawyer since 1987 primarily handling the defense of personal injury cases including product liability, medical malpractice, premises liability and other tort law.

Given the nature of my practice I have encountered what lawyers refer to as the collateral source rule in many of the cases I handle. From my perspective, as the law currently stands, the collateral source rule, is an evidentiary matter. Simply stated, the parties (currently) are restricted from presenting any evidence that plaintiff has already received benefits of one kind or another for a given accident.

In many cases all or part of a plaintiff's lost wages have been paid or will be paid by an insurance company or ERISA plan. The jury is told that the plaintiff has incurred the lost wages but it is not told that the lost wages have already been paid or will be paid. This certainly creates the misperception that plaintiff has 'lost' this income and is probably behind on house payments or other necessities. Very often, the jury awards those lost wages and plaintiff recovers damages in the lawsuit that he or she never **lost** because of the accident.

Others on this panel will be able to address the impact, pro and con, of this legislation on insurance rates and the business community. There is no doubt, however, that the collateral source rule, as currently written, often results in a windfall to plaintiff. One of my concerns, however, has to do with integrity of the verdict itself. In every jury case the jury is instructed that sympathy should not enter into its verdict. However, when a jury is told that the plaintiff has incurred substantial wage loss and medical expense, but is not told that those losses already have been paid, that jury's natural reaction will be to want to help plaintiff with these perceived burdens regardless of other issues in the case. My conversations with jury members after a verdict is handed down confirm that this natural sympathy exists.

One of the goals of a personal injury suit, it seems to me, is to insure that the injured party receives damages commensurate with his or her loss; no more and no less. But when information on specific damages is deliberately withheld from the jury the chances of reaching this goal fall considerably. Senate Bill 102, in my opinion, will help to insure that the jury is given **all** of the pertinent information it needs to make as fair a decision as possible.

I note that the bill leaves the determination of whether there is a net collateral source benefit to the discretion of the jury. This reflects the confidence that most trial lawyers in the Midwest, plaintiff and defendant, have in the jury system. While there can be aberrations, most juries in our neck of the woods do the right thing.

I also note that the bill takes into account other reductions in the verdict that the plaintiff may face under our comparative fault law or statutory damage caps. The dovetailing of the net collateral source with these other deductions is wisely left for the judge to compute and not the jury.

In summary, I believe that Senate Bill 102 will help to insure fairer and more accurate verdicts by allowing the jury to consider **all** of the pertinent evidence regarding special damages.

Senate Judiciary
3-30-05
Attachment 1

Kansas Association of Defense Counsel
825 S. Kansas Avenue, Suite 500 • Topeka, KS 66612
Telephone: 785-232-9091 • FAX: 785-233-2206 • www.kadc.org

MEMORANDUM

TO: **Senate Judiciary Committee**

FROM: **Anne M. Kindling**
Kansas Association of Defense Counsel

DATE: **29 March 2005**

RE: **SB 102**

Chairman Vratil and Members of the Committee:

My name is Anne Kindling and I submit this written testimony in support of SB 102 on behalf of the Kansas Association of Defense Counsel.

The KADC consists of more than 200 practicing attorneys who devote a substantial portion of their professional practice to the defense of lawsuits. The KADC maintains a strong interest in improving the adversary system and the administration of justice. We believe that the interests of justice will be served by the enactment of SB 102.

SB 102 will limit an archaic and old-fashioned rule of common law known as the collateral source rule. The collateral source rule was developed in the 19th century and prevents the jury from learning about payments that were made to or on behalf of the injured party from third-party sources, most notably health insurance benefits paid to the plaintiff's health care providers or to the plaintiff himself, even though the collateral source compensated all or a portion of the harm. In other words, the plaintiff files a lawsuit seeking damages for an injury, and in doing so the plaintiff seeks to recover the cost of medical care he had to obtain. Even if the plaintiff's health insurance paid all or part of his or her medical expenses, the jury cannot be told of this. The result is that the plaintiff is overcompensated for his losses.

The goal of damages in a lawsuit is to make the plaintiff whole by compensating him for the monetary and non-monetary damages suffered at the hands of the defendant. The monetary losses include the cost of medical care and other economic losses. However, when these medical costs have already been covered by health insurance, there is no actual monetary loss to the patient. Awarding the patient compensation for such sums, then, goes above and beyond the goal of damages and gives the plaintiff a windfall.

Senate Judiciary
3-30-05
Attachment 2

SB 102 will allow the jury to be told that certain of the monetary losses claimed by the plaintiff were actually paid by a third party. The jury will hear both sides of the equation: the benefits received by the plaintiff, as well as the costs of obtaining those benefits. The jury then can decide the net value to the plaintiff of such benefits. Additionally, the latest amendment makes a reduction in the jury's award discretionary rather than mandatory. Thus, the jury will hear all the information and then decide whether to reduce the award at all and, if so, by how much.

There are three aspects of this issue that are often misunderstood. First, collateral source benefits do not include amounts paid by a third party who retains a lien or right of subrogation. K.S.A. 60-3801(d) specifically excepts from the definition of "collateral source benefits" "services or benefits for which a valid lien or subrogation interest exists." For example, amounts paid by Medicaid for which a lien exists would not be considered a collateral source, nor would amounts paid by an employer's self-funded health or worker's compensation plan be subject to this legislation where the employer's plan retains the right of subrogation or lien.

Second, opponents of this legislation frequently argue that two plaintiffs with identical injuries should receive the same damages award, but this legislation will result in the two defendants paying different amounts depending on whether or not the plaintiff had health insurance. However, this premise is faulty because a plaintiff with health insurance is not "identical" to a plaintiff without health insurance. The law requires a defendant to take his victim as he finds him. Compare, for example, a car accident requiring replacement of the front quarterpanel of the plaintiff's vehicle. If the defendant is so unlucky as to hit a Rolls Royce, that defendant is going to pay more in damages than a defendant who collides with an older model Honda Civic. It is no different when you look at personal injuries. The plaintiff with health insurance simply isn't identical to the plaintiff without insurance, even if both suffered a knee injury, and that is the reason the economic losses recovered will be different.

A corollary to this argument is to consider the inequity in net recovery by the two plaintiffs due to operation of the collateral source rule. The plaintiff who lacks health insurance has already paid out of pocket his medical bills, while the plaintiff with health insurance has not. If the medical expenses total $100,000, for example, the plaintiff with health insurance will receive a net recovery of $100,000 greater than the plaintiff who lacked the resources to obtain health insurance and has paid that $100,000 out of pocket.

Third, opponents often suggest that if the jury learns the plaintiff was covered by insurance, then the jury should also be told the defendant had insurance. The goal of damages must again be considered. The goal of a damages award is to compensate the plaintiff for his loss, not to punish the defendant. The plaintiff's damages are the same regardless of whether they are paid by the defendant himself or by the defendant's liability insurer. The issue is the loss suffered by the plaintiff, not the source of payment for that loss.

Thank you for the opportunity to testify in support of this bill and I would be happy to stand for questions.

TESTIMONY OF CARY SILVERMAN, ESQ.
SHOOK, HARDY & BACON L.L.P.
WASHINGTON, D.C.
(202) 783-8400
CSILVERMAN@SHB.COM

ON BEHALF OF THE
AMERICAN TORT REFORM ASSOCIATION

IN SUPPORT OF S.B. 102
AS AMENDED BY THE HOUSE COMMITTEE OF THE WHOLE

BEFORE THE KANSAS
SENATE COMMITTEE ON THE JUDICIARY

WEDNESDAY
MARCH 30, 2005

Senate Judiciary
3-30-05
Attachment 3

TESTIMONY OF CARY SILVERMAN, ESQ.
SHOOK, HARDY & BACON L.L.P.

ON BEHALF OF THE
AMERICAN TORT REFORM ASSOCIATION

Chairman Vratil and Members of the Committee on the Judiciary, thank you for your consideration of S.B. 102 and for the opportunity to submit this prepared testimony in support of this proposal to reform Kansas's collateral source rule.

Background

By way of background, I am an attorney in the Washington, D.C. office of Shook, Hardy & Bacon L.L.P., a 500-attorney law firm based in Kansas City, Missouri. We have an office in Overland Park, Kansas, as well as in several other cities around the country.[1] I practice in the firm's Public Policy Group in Washington, D.C. I graduated from George Washington University with a law degree and Master of Public Administration in 2000, with honors. I received a Bachelor's degree in Management Science from the State University of New York College at Geneseo in 1997. Over the past two years, I have co-authored two law review articles addressing collateral source reform.[2]

I am testifying today on behalf of the American Tort Reform Association ("ATRA"). Founded in 1986, ATRA is a broad-based, bipartisan coalition of more than three hundred businesses, corporations, municipalities, associations, and professional firms that support civil justice reform. ATRA's mission is to bring greater fairness, balance, and predictability to the civil justice system through public education and legislative reform.[3] ATRA supports S.B. 102.

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1 For more information about Shook, Hardy & Bacon L.L.P., please visit our Internet website, www.shb.com.

2 *See* Victor E. Schwartz & Cary Silverman, *Toppling the House of Cards That Flowed From an Unsound Supreme Court Decision: End Inadmissibility of Railroad Disability Benefits in FELA Cases*, 30 TRANSP. L.J. 105 (2004); Steven B. Hantler, Victor E. Schwartz, Cary Silverman, and Emily J. Laird, *Moving Toward the Fully Informed Civil Jury*, -- GEORGETOWN J. L. & PUB. POL'Y -- (forthcoming 2005).

3 For more information about ATRA, please visit its Internet website, www.atra.org.

Background on the Collateral Source Rule

The purpose of tort law is to make an injured person whole. Given this principle, one would think that juries would be told if a plaintiff has already received compensation for the injury which is the subject of the lawsuit. Juries, however, are not given this information. The basis for keeping this information from the jury, "the Collateral Source Rule," dates back many years.[4] The Kansas Supreme Court appears to have first recognized the rule in 1918.[5]

This occurs because the collateral source rule provides that in computing damages, a jury is not permitted to consider compensation the plaintiff received for the injury from sources other than the defendant, even if the payments partially or completely mitigated the plaintiff's actual monetary loss. Evidence of payments coming from third parties are barred from the jury's ears, allowing an injured party to receive an award to cover lost wages or medical expenses even if he or she has already been reimbursed for those losses from a third party.

Consider a typical application of the collateral source rule from the practical perspective of the jurors. The jury has found in a slip-and-fall case that a neighborhood grocery store is liable because its employees failed to promptly pick up a broken jar of ketchup from the aisle and a fifty-year-old woman hurt her knee. The jury feels that the employer is minimally at fault because another customer dropped the jar just minutes before the fall, but also feels that it is fair to place the burden of the plaintiff's medical expenses and lost wages on the business owner, rather than the innocent customer. On the basis of the evidence before it, the jury awards $40,000 in medical expenses, $80,000 in lost wages and $100,000 in pain and suffering.

In arriving at its decision, because of the collateral source rule, that jury will not know that eighty percent of the plaintiff's medical expenses were covered by her employer-provided health insurance and that she is also collecting $1,500 each month in social security disability payments. Instead, in a vacuum, the jury will decide the amount due to the plaintiff and award the full amount of her past and

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[4] The first American application of the collateral source rule would appear to have occurred in the 1854 case of *The Propeller Monticello v. Mollison*, 58 U.S. (17 How.) 152 (1854).

[5] *Berry v. Dewey*, 102 Kan. 593, 172 P. 27 (1918).

future lost wages and medical bills, as well as compensation for pain and suffering. Jurors would not like this result if they knew about it.

Criticism of the Collateral Source Rule

Why is the jury barred from knowing that eighty percent of the plaintiff's expenses had already been paid? The collateral source rule has been called "one of the oddities of American accident law."[6] It reflects a potential conflict between two guiding objectives of tort law. The first is to compensate the injured party, to make him or her whole. The second, and more dubious, one is to burden the tortfeasor with the loss.

Courts have recognized that the collateral source rule may allow a plaintiff to collect twice for the same injury. While contrary to the fundamental principle that the purpose of tort law is to make a person whole, not "more than whole," the collateral source rule has been thought to protect against the risk that a jury may find no liability if it knew the plaintiff received compensation from other sources. This reasoning casts doubt on the ability of juries to render decisions based on the evidence as to a defendant's conduct. Courts have also allowed this exception to persist under the premise that a wrongdoer should not benefit simply because the injured party had access to other sources of compensation. It is not appropriate, however, to punish a defendant through an award of *compensatory* damages.

There are many criticisms of the collateral source rule. First, the bases for the collateral source rule, which came into being prior to the New Deal, are often not applicable in today's world of public benefits or employer-provided health insurance. Some courts, however, continue to strictly apply the collateral source rule to bar the jury from considering such payments to offset a defendant's liability. Though times and facts have changed, some courts have adhered rigorously to precedent and outdated reasoning. Courts also have applied the rule regardless of the degree of a defendant's wrongdoing. They have applied it even when defendants are strictly liable.

The collateral source rule also may encourage litigation because it creates incentives to sue, even if a person has already received or is receiving substantial

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[6] John G. Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 CAL. L. REV. 1478, 1478 (1966).

compensation. Such litigation, and the attendant transactional costs, such as attorneys' and expert witness fees and court expenses, may increase insurance premiums and needlessly use judicial resources. Awards in such cases serve little or no compensatory purpose. When the collateral source rule permits double compensation, the primary result is punishment of a defendant. Dispensing punishment through compensatory damages, however, improperly circumvents the constitutional safeguards established by the Supreme Court of the United States, as well as the Kansas Constitution, and this Legislature.[7] Moreover, the vast expansion of the availability of punitive damages between the 1960s and 1980s has further weakened the call to use the collateral source rule as a backdoor means to punish a defendant.[8]

Though the collateral source rule does not appear to still serve its original purpose in many instances, some courts, including those in Kansas, continue to cling to it quite tenaciously. These courts cite this rule to hide from juries evidence that could be very informative.

A Better Approach: Let the Jury Decide
Fair Compensation Based on All the Evidence

The collateral source rule continues in many contexts today, but its public policy weakness has caused a number of state legislatures and courts to reduce its reach or eliminate it altogether. A better approach, which is adopted by S.B. 102, is to allow juries to consider all of the compensation available to the plaintiff, including disability, healthcare insurance reimbursement of medical bills, and payments from settlements with other defendants. Likewise, evidence of what the plaintiff paid for the collateral source benefit, such as monthly insurance payments, would also be admissible for a jury's consideration. The result would be damage awards that fairly compensate injured persons for actual loss rather than doubly compensating them due to a legal fiction.

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7 For example, Kansas law requires clear and convincing evidence to support an award of punitive damages. KAN. STAT. ANN. § 60-3701(c) (2004).

8 Historically, and at the time of adoption of the collateral source rule, punitive damages were generally limited to cases of "the traditional intentional torts," designed to punish an individual's purposeful bad act against another. In the late 1960s, however, American courts radically expanded the availability of punitive damages beyond the traditional intentional torts. "Reckless disregard" became a popular standard for punitive damages liability, and "gross negligence" became enough to support a punitive damages award in some states. *See e.g.*, Wisker v. Hart, 766 P.2d 168 (Kan. 1988).

Over the past three decades, the majority of states have passed collateral source rule reform.[9] Several of these states permit the introduction of collateral source evidence in all cases. Other states permit its introduction in medical liability cases alone, as Kansas attempted to do in the mid-1980s.

Several of these states, such as Colorado, Illinois, and Iowa, have made reduction of compensatory damages by collateral sources mandatory in certain circumstances. Others, such as Arizona, Missouri, and South Dakota have made such reduction discretionary. As provided by S.B. 102, many states permit the plaintiff to set off the costs of obtaining collateral source benefits (e.g., the cost of insurance premiums) against any reductions for those benefits.[10]

The trend among states to eliminate the collateral source rule continues. Over the past two years, Ohio and Oklahoma passed civil justice reform that generally permits the introduction of collateral source benefits.[11] Most recently, the Missouri General Assembly enacted civil justice reform legislation that reaffirmed and strengthened the state's existing collateral source reform.[12] Missouri Governor Blunt is expected to sign that bill at the end of this month.

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9 *See* PROSSER, WADE AND SCHWARTZ'S CASES AND MATERIALS ON TORTS 542 (10th ed. 2000) (noting that over half of the states have modified the collateral source rule by statute). These states include Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Maine, Maryland, Michigan, Minnesota, Missouri, Montana, New Jersey, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, and Washington. *See, e.g.,* Ala. Code § 12-21-45(a); Alaska Stat. § 09.55.548; Ariz. Rev. Stat. Ann. § 12-565; Cal. Civ. Code § 3333.1; Colo. Rev. Stat. Ann. § 13-21-111.6; Conn. Gen. Stat. § 52.225a; Del. Code Ann. tit. 18, § 6862; Fla. Stat. Ann. § 768.76; Haw. Rev. Stat. § 663-22; Idaho Code Ann. § 6-1606; 735 Ill. Comp. Stat. Ann. 5/2-1205; Ind. Code Ann. § 34-44-1-2; Iowa Code § 147.136; Me. Rev. Stat. Ann. tit. 24 § 2961; Md. Cts. & Jud. Proc. Code Ann. § 3-2A-06(f); Mich. Comp. Laws Ann. § 600.6303; Minn. Stat. Ann. § 548.36; Mo. Rev. Stat. § 490.715; Mont. Code Ann. § 27-1-308; N.J. Stat. Ann. § 2A:15-92; N.Y. C.P.L.R. § 4545(a); N.D. Cent. Code § 32-03.2-06; Or. Rev. Stat. § 18.580; 40 Pa. Cons. Stat. Ann. § 1301.602; R.I. Gen. Laws § 9-19-34.1; S.D. Codified Laws § 21-3-12; Wash. Rev. Code Ann. § 7.70.080.

10 *See* Narayen v. Bailey, 747 A.2d 195, 201 (Md. Ct. Spec. App. 2000).

11 Am. Sub. S.B. 80, 125th Gen. Assem. (Ohio 2004) (to be codified as Ohio Rev. Code § 2315.20) (signed by Gov. Taft, Jan. 6, 2005, effective, Apr. 7, 2005); S.B. 629, § 6, 49th Leg., 1st Reg. Sess. (Okla. 2003) (signed by Gov. Henry, June 4, 2003, effective July 1, 2003).

12 *See* H.B. 393, 93rd Gen. Assem. (Mo. 2005) (amending Mo. Rev. Stat. § 490.715).

This Legislature Has Three Times Wisely Supported Collateral Source Reform

Three times over the past two decades, this Legislature has wisely sought to join the growing number of states that have enacted fair collateral source reform. In the first two instances, in 1985 and 1988, the reform applied only to health care providers and medical malpractice liability lawsuits, respectively. The most recent attempt at reform occurred in 1993, when the Legislature enacted the statute that remains on the books, but was found unconstitutional in *Thompson v. KFB Insurance Co.*, 252 Kan. 1010, 850 P.2d 773 (1993). In each instance, the Court found that distinctions in the law that eliminated the collateral source rule in some cases, but not others, rendered it infirm. In *Thompson*, it was the elimination of the collateral source rule only in cases with over $150,000 at issue that the Court found problematic. S.B. 102 responds to the Court's ruling by eliminating this $150,000 threshold. The bill also makes other minor modifications to the current statute to ensure its fair application in all cases.

Conclusion

S.B. 102 would provide a jury with the evidence it needs to fully and fairly compensate a plaintiff for his or her loss. It strikes a careful balance that protects the rights of both plaintiffs and defendants. It will help stem the litigation costs that hurt businesses, the state's economy, and consumers. The bill makes good public policy sense. ATRA supports it. Thank You.

Legislative Testimony

SB 102

Wednesday, March 30, 2005

Testimony before the Kansas Senate Judiciary Committee
By Lew Ebert, President and CEO

THE KANSAS CHAMBER

The Force for Business

835 SW Topeka Blvd.
Topeka, KS 66612-1671
785-357-6321
Fax: 785-357-4732
E-mail: info@kansaschamber.org
www.kansaschamber.org

Chairman Vratil and members of the Committee;

The Kansas Chamber and its over 10,000 members support passage of SB 102. The Collateral Source Rule prohibits a defendant from introducing evidence that the plaintiff received any benefits from sources outside the dispute. The Rule allows a plaintiff to recover the full amount of damages *twice.* This measure would allow evidence of collateral sources of payments to be admitted into evidence. There would not be a set-off of the amount received, but only that the information is admissible. I have attached a chart to my testimony that shows which states have made changes to the common law collateral source rule.

In our December 2004 CEO and Business Owner's Poll, 60% of the 300 respondents believe that our current litigation system is a deterrent to business growth and 83% believe that frivolous lawsuits increase the cost of doing business in the state. Our November 2004 poll of Registered Voters found the same firmly held belief. Nearly 65% of those participating believe that our current legal system should be reformed and 61% believe that lawsuit reform will contribute to economic growth.

When the last collateral source rule reform bill was passed, a $150,000 limit was imposed. SB 102 allows collateral sources of evidence to come in on all actions, regardless of the amount. Collateral source benefits include insurance policies, the gratuitous receipt of benefits such as wages or medical services, and governmental benefits such as workers' compensation and social security. The plaintiff receives compensation once from the insurance company, and then again at trial where no evidence of a prior recovery is permitted. Insurance does not compensate for an individual's injuries, but rather is a source of windfall profit.

We urge this committee to recommend favorably SB 102. Thank you for your time and I will be happy to answer any questions.

The Kansas Chamber, with headquarters in Topeka, is the statewide business advocacy group movin[illegible] becoming the best state in America to do business. The Kansas Chamber and its affiliate organizatio[illegible] Chamber Federation, have more than 10,000 member businesses, including local and regional cham[illegible] and trade organizations. The Chamber represents small, medium and large employers all across Kar[illegible]

Senate Judiciary
3-30-05
Attachment 4

ATRA Issues >>

Collateral Source Rule Reform

Issue:

Whether to permit evidence of a plaintiff's recovery from an independent party to be admitted when the plaintiff's claim is tried in court.

Problem:

The Collateral Source Rule prohibits a defendant from introducing evidence that the plaintiff received any benefits from sources outside the dispute. The Rule allows a plaintiff to recover the full amount of damages *twice* and also undermines the basis of a fault-based liability system.

Background:

When a plaintiff in a tort case receives benefits from an independent party to compensate the plaintiff's damages, these benefits are said to have come from a "collateral source." Collateral source benefits include insurance policies, the gratuitous receipt of benefits such as wages or medical services, and governmental benefits such as workers' compensation and social security.

The plaintiff receives compensation once from the insurance company, and then again at trial where no evidence of a prior recovery is permitted. Insurance does not compensate for an individual's injuries, but rather is a source of windfall profit. The insurance companies, in turn, pass on this expense to every consumer in the form of higher premiums.

In determining damages, a jury gives little thought to the degree of fault which should attach to a liable defendant. Instead, the jury imposes the full amount of the judgment on the defendant, regardless of its degree of fault or whether the plaintiff received collateral source payments. The Rule focuses on punishing defendants rather than making plaintiffs whole.

Rationale:

Whatever the historical reasons for tolerating double recoveries, today they are an unacceptable misallocation of scarce resources. Moreover, compassionate jurors are often motivated to return a verdict for the plaintiff, regardless of the merits of the plaintiff's claim, when they are uncertain whether the plaintiff would otherwise have the means to pay the bills resulting from the injury suffered.

Recommended Action:

Reform of the Collateral Source Rule is a high priority. State legislators should control the inequitable effects of the Rule by permitting evidence of collateral source payments to be presented to the jury. Some states have changed their evidentiary rules to allow evidence of collateral source payments to be admitted at trial, and several states have allowed the judge to offset awards by the amount of collateral source payments received. Many states have combined portions of these two solutions, resulting in a wide variety of statutes.

REDUCTION OF COMPENSATORY AWARDS BY COLLATERAL SOURCES

AS OF JUNE 30, 2001

1986

Alaska

Admissible as evidence and offset with broad exclusions

Colorado

Admissible as evidence and offset with broad exclusions

Connecticut

Admissible as evidence and offset with broad exclusions

Florida

Mandatory offset with broad exclusions

Hawaii

- Provided for payment of valid liens (arising out of claim for payment made from collateral sources for cost and expenses arising out of injury) from special damages recovered

- Prevented double recoveries by allowing subrogation liens by insurance companies or other sources; third parties are allowed to file a lien and collect the benefits paid to the plaintiff from the plaintiff's award; the amount of damages paid by the defendant to the

plaintiff is not affected

Illinois

- Only collateral sources for benefits over $25,000 can be offset

- Offset cannot reduce judgement by more than 50%

Indiana

Admissible as evidence with certain exclusions; court may reduce awards at its discretion; jury may be instructed to disregard tax consequences of its verdict

Michigan

Admissible after the verdict and before judgment is entered; courts can offset awards but cannot reduce the plaintiff's damages by more than amount awarded for economic damages

Minnesota

Admissible as evidence only for the court's review; offset is provided for but collateral sources having rights of subrogation are excluded

New York

Mandatory offset

1987

Alabama

Collateral sources allowed as evidence -- reduction not mandated

Iowa

Collateral sources allowed as evidence -- reduction not mandated

Missouri

Collateral sources allowed as evidence but as used as evidence, defendant waives the right to a credit against the judgment for that amount

Montana

Collateral source rule abolished -- reimbursement from collateral source is admissible in evidence -- unless the source of reimbursement has a subrogation right under state or

federal law, court is required to offset damages over $50,000

New Jersey

Mandatory offset of collateral source benefits other than workers' compensation and life insurance benefits

North Dakota

Mandatory offset of collateral source benefits other than life insurance or insurance purchased by recovering party

Ohio

Mandatory offset of any benefits received less the total of any costs paid for the benefit

Oregon

Allowed a judge to reduce awards for collateral sources

Excludes:

- life insurance and other death benefits

- benefits for which plaintiff has paid premiums

- retirement, disability, and pension plan benefits

- federal social security benefits

1988

Kentucky

The jury must be advised of collateral source payments and subrogation rights of collateral payers

1990

Idaho

Allowed the court to receive evidence of collateral source payments and reduce jury awards to the extent that they include double recoveries from sources other than federal benefits, life insurance or contractual subrogation rights.

1993

Arizona

Extended the existing collateral source legislation from medical malpractice issues to other forms of liability litigation (under this legislative approach, a jury would not be bound to deduct the amounts paid under a collateral source provision, but would be free to consider it in determining fair compensation for the injured party)

For specific model legislation, contact ATRA at 202-682-1163.

Related Documents:

The Litigation Explosion, What Happened When America Unleashed the Lawsuit New York: Trumar Talley Books, 1991

Loyola University of Chicago Law Journal, Judicial Conference Issue *Illinois' Landmark Tort Reform: The Sponsor's Policy Explanation* 24, no.4, (Summber 1996): 805-817

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Kansas Insurance Department

Sandy Praeger COMMISSIONER OF INSURANCE

Comments on
House Substitute for Senate Bill 102
By
Kansas Insurance Department
March 30, 2005

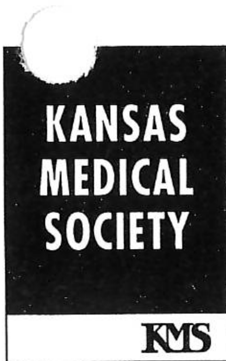
Members of the Committee:

In 1988, the Legislature enacted the Kansas Collateral Source Benefits Act, K.S.A. 60-3801, *et seq*. This Act limits the instances in which court litigants may collect double damages. It was intended to allow people to recover their actual unpaid damages in court, as opposed to being paid twice for the same damages.

In 1993, the Kansas Supreme Court, in the case of *Thompson v. KFB Ins. Co*, found that, "The provision of K.S.A.1992 Supp. 60-3802 which allows evidence of collateral source benefits where claimants demand judgment in excess of $150,000 is unconstitutional as a violation of the equal protection of law as guaranteed by the United States and Kansas Constitutions." The basis of that finding was the $150,000 threshold.

House Substitute for Senate Bill 102 corrects the constitutional defects of the Act. The "collateral source rule" itself is constitutional and the law in many jurisdictions. With the Act restored to operation, a positive impact on rates may be seen.

Senate Judiciary
3-30-05
Attachment 5

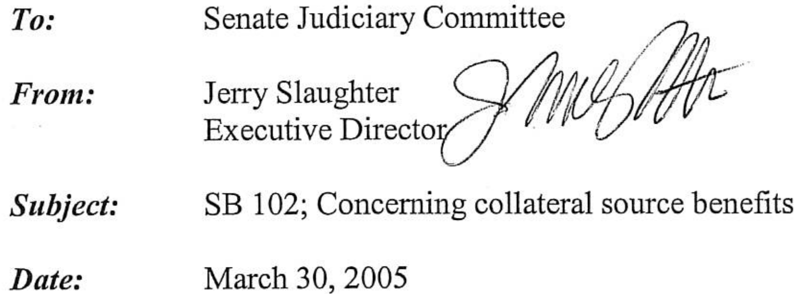


623 SW 10th Avenue
Topeka KS 66612-1627
785.235.2383
800.332.0156
fax 785.235.5114

kmsonline.org

To: Senate Judiciary Committee

From: Jerry Slaughter
Executive Director



Subject: SB 102; Concerning collateral source benefits

Date: March 30, 2005

The Kansas Medical Society appreciates the opportunity to appear in support of SB 102, which would allow evidence of collateral sources of payment in personal injury lawsuits.

This legislation is actually modeled after legislation we have previously introduced, and the legislature has passed, on three separate occasions – first in 1976, then again in 1985, and finally in 1988. As you know, the Kansas Supreme Court each time has struck down the legislature's various attempts to eliminate or alter the common law collateral source rule. However, we believe this version addresses the concerns of the Court, as they have been expressed in earlier decisions, and should be constitutionally sound.

This legislation was an integral part of the group of tort reform measures we advocated for in the past, and it would today provide added stability to our liability system without keeping individuals from receiving their true economic losses in such cases. Of note is the House floor amendment, which we believe strengthens this bill. Juries would be informed of any collateral sources of payment, but awards would only be reduced if the jury makes a net collateral source benefit determination. In other words, an offset would not be automatic. There would only be an offset if the jury felt it was merited, under the circumstances of the case. If enacted, and subsequently upheld by the courts, this legislation would help lower insurance costs by preventing double recovery, wherein plaintiffs recover damages which are in excess of the actual damages incurred. We urge you to report SB 102 favorably for passage. Thank you.

Senate Judiciary
3-30-05
Attachment 6

Testimony Before the Senate Judiciary Committee
On SB 102
By Larry Magill
Kansas Association of Insurance Agents
March 30, 2005

Thank you mister chairman and members of the committee for the opportunity to appear today in support of Senate Bill 102, the Collateral Source amendments. My name is Larry Magill and I'm representing the Kansas Association of Insurance Agents. We have approximately 425 member agencies across the state and another 125 branch offices that employ a total of approximately 2,500 people. Our members write approximately 70% of the business property and liability insurance in Kansas. As independent agents, they are free to represent multiple insurance companies.

One of our association's over-arching principals, and one of our National's, is that we support an affordable, fair and equitable tort liability system. That is why we have supported no-fault auto insurance, medical malpractice tort reforms and general tort reforms in the past in Kansas.

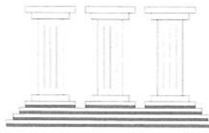
Today we support the Kansas Chamber of Commerce and Industry's effort to pass a constitutionally sound collateral source bill. Twice before we have been involved in this legislature's passage of collateral source changes only to have them struck down by the Supreme Court, first because they only applied to medical malpractice cases and then because of the threshold. The principal that a person should not recover twice for the same damages seems simple to us. It's fair that an injured person recover their medical costs from a responsible third party, once. It's fair that they recover for lost earnings, once. It is not fair that they recover twice. And that double recovery adds needless expense to the system.

We've heard the arguments that the injured person has paid for the insurance and should be entitled to keep the benefits. But in most cases the insurance is employer provided group health insurance and disability or workers compensation. And even if the individual pays for the insurance, double recovery increases everyone's cost of insurance. Most people would trade lower auto insurance cost today for a possible future recovery if they were injured.

We've heard the argument that collateral source only discloses the injured party's insurance coverage and not the responsible party's. That's apples and oranges. The injured party is trying to establish the amount of damages and their recovery from other sources reduces their out of pocket costs and their damages. The amount of liability insurance is simply a measure of how deep the "deep pocket" is. Revealing the amount of liability insurance would drive up costs by encouraging juries to look on the liability insurance limits as if they were "free money". When in reality, we all pay for the liability system costs.

We urge the committee to act favorably on SB 102.

Senate Judiciary
3-30-05
Attachment 7



KANSAS TRIAL LAWYERS ASSOCIATION

Lawyers Representing Consumers

To: Chairman Vratil and Members of the Senate Judiciary Committee

From: Jerry R. Palmer, Palmer, Leatherman & White LLP

Date: March 30, 2005

Re: SB 102

Chairman Vratil and Members of the Senate Judiciary Committee:

My name is Jerry Palmer and I am an attorney in Topeka. I am also a member of the Kansas Trial Lawyers Association and I am here today to express opposition to SB102. The Kansas Trial Lawyers Association supports the current civil justice system in which wrong-doers are held fully accountable for the harm and damage that they cause. How this particular bill comes to you is also a great concern as to how laws are made and in itself may raise constitutional issues.

1. HOW NOT TO MAKE GOOD LAW "GUT N GO" SB 102

The House Insurance Committee gutted the work of the Kansas Senate on a bill concerning health insurance which provided written notice of the carrier's decision to close the block of business to its existing policy holders, among other things. It provided a method for those consumers to purchase that policy or contract during a 60 day grace period. It was a consumer protection type bill and would have been a valuable piece of legislation. However, when it got to the House, words which had been basically the provisions of HB2150 (a bill in fact heard in the House Judiciary Committee which did not pass out of that committee) were transplanted into this bill. It then faced floor amendments and it comes back to this body simply for concurrence or perhaps referral to a conference committee. It contains additional provisions that were never part of HB2150. The bill has never been considered by either body through its

Terry Humphrey, Executive Director

Fire Station No. 2 • 719 SW Van Buren Street, Suite 100 • Topeka, Ks 66603-3715 • 785.232.7756 •

E-Mail: triallaw @ ink.org

committee system. I think we would all agree that we would not want a book on "How Law is Made" to include a chapter on "Gut-n-Go" and use this bill as an example. The bill though really is a good example, in its present form, of why there are procedures and why laws are supposed to be made in a certain way, filled with procedural safe guards to assure the best laws possible.

Certainly no one has made a case for the urgency of this legislation. Kansas has been deemed to be the most tort reformed state in the country. Forbes Magazine deemed Kansas in 2004 the most favorable state to do business, from that standpoint. If Kansas business cannot compete on the basis of its tort reform record there is nothing this bill is going to do to make the state business environment any more attractive. We are already the most attractive from that standpoint. Why we would want to sacrifice our legislative principle for more tort reform is a case not made. How an insurance bill in Chapter 40 becomes transformed into a Chapter 60 bill, Dealing with Collateral Source Benefits, that is absolutely anti consumer, is a transition that I assume our courts would frown upon and may very well run into Article 2 Section 16 problem regarding Subject and Titling of Bills. This could only further conflicts between the branches of government (which really needs no further issues to be in conflict about) and this conflict is totally avoidable.

2. SUBSTANTIVE OBECTIONS

A. FAIRNESS

The Collateral Source Rule is part of the common law which is adopted in this state and if there is to be a legislative substitute there must be some "quid pro quo" for purposes of due process as recognized by Section 18 of the Kansas Constitution under which there has been much litigation. There is more than 200 years of experience within the United States and over 100 years in Kansas alone with this rule of law. Benefits received by a victim from a "source" wholly independent and collateral to the wrong-doer, will not diminish the damages otherwise recoverable from the wrong-doer. The idea of tort law is that first a person should be compensated for the damages and secondly, that there should be

a deterrent effect in civil law so that others will not follow the example of the wrong-doer.

i. The cost of injury is not eliminated. S.B. 102 would simply transfer that cost from a wrong-doer, to a health care plan or insurer. The wrongdoer is protected, the injured insured who acted responsibly by purchasing health insurance is penalized, and the liability insurer is allowed to conduct business as usual without a mandated premium reduction.

B. SUBROGATION PROBLEM

Collateral sources are for the most part those things which have been acquired by the victim through their own resources. Examples of this are privately purchased health insurance or disability insurance. It may also be in the form of the contract between employers and employees that the employer will pay for, in whole or in part, health insurance for the employee or disability insurance for the employee. Many of these plans have within them subrogation provisions. This means that the insurance company advances the monies to the injured person, but if the insured person is reimbursed by the wrong-doer then the insurance company or the employer under its plan gets those monies back so that it reduces and defrays the expense of providing the benefit. Examples of this are ERISA plans, personal injury protection benefits under auto insurance policies, health and disability insurance policies purchased by individuals, benefits provided by the Veterans Administration, benefits provided pursuant to workers compensation act, benefits provided pursuant to federal employees compensation, and for services rendered in military facilities. Under this bill the employee or the insured may have the duty to reimburse, but not have a right to collect in the first place. Although the Kansas Legislature, if given enough time, may be able to deal with the consequences of acquired benefits and subrogation, they certainly can't do anything about all of the federal benefits that have subrogation clauses, including Medicare and Medicaid.

C. MEDICAID - A SPECIAL PROBLEM

The Federal Medicaid act requires State Medicaid agencies to take all reasonable measure to ascertain the legal liabilities of third parties to pay for care and services arising out of injury, disease or disability and "to seek reimbursement for such assistance to the extent of such legal liability. 42 U.S.C. § 1396(a)(25)(A), (B). Kansas law requires that Medicaid be repaid from and to the extent of any third party benefits. For budgetary reasons, such recovery is important to most States, including Kansas. Similar requirements exist under Federal Medicare laws. Medicare is secondary payer and in the event it pays Medicare benefits, it is entitled to reimbursement out of any third party recovery. Enactment of S.B. 102 will place the obligation of State agencies in opposition to the requirements of Federal law. *Jones v. Heller*, Nevada Supreme Court, Slip. Opinion, Docket No. 43940 (Op. filed 9/18/2004).

D. TAKING WITHOUT JUST COMPENSATION

By contract, many injured Kansans have purchased individual health care plans in which they have valuable property rights. The application of S.B. 102 would impair this property right and constitutes taking without payment of just compensation.

3. WORKABILITY

Beyond the issues raised by the subrogation mentioned above, there are also the problems that were recognized by the Legislature when this matter was passed in 1988 before it was struck down in 1993. At that time, it was pretty much agreed that the cost of producing the evidence on Collateral Source Benefits, Future Collateral Source Benefits, and Net Collateral Source Benefits was so expensive that it shouldn't be utilized in cases that didn't involve a potential claim of $150,000 or more. If we ratchet that up by the consumer price index we are now talking about

the equivalent case being a $243,000 case, since we have experienced inflation over the last 27 years. Few cases that are tried have a recovery that high. The median tort verdict in FY 2003 was less than 10% of this number ($23,416) (see attachment).

How would one go about proving collateral source? First there would be the payments that were actually made. Then there would be a proof as to how much those benefits cost. A question comes in then as to how many years do you look back for insurance premiums being paid by the employer and by the individual. This requires evidence to be taken from employees of the employer who handle financial issues. It also takes an analysis of the history of the insuring agreements. As we all know, deductibles and co-insurance payments vary from year to year. There are frequently lifetime benefits which of course are lost and cannot be reconstituted unless some economist can give a formula for that. Then there is a projection of what the future costs are going to be that are going to be insured and by whom and how much money is going to be available for that purpose. That to some degree depends upon the solvency of the employer and the solvency of the insurance company. After you get past those questions then there is a question whether the employee will remain with this employer and have this particular plan available to them. Assuming that the same plan will be available may be a safe bet for somebody who works at Goodyear, not so safe a bet if someone is working for a restaurant chain. At some point, an insurance actuary and/or economist might be utilized in one of these cases on both sides. This would be regarded as a "defense lawyers dream" because all of that takes time and money to put together and to be part of any case. It could make cases absolutely unaffordable unless they were very large and thus deny remedies to many people who are wrongfully injured by others. It has the potential of driving up insurance premiums because of the additional defense costs that will be charged back to the insurance companies who hire the defense lawyers. The bill is unworkable and it was viewed as unworkable at less $150,000 in 1988, why would it be any more workable today with no line drawn? The line drawing of course did constitute a Constitutional problem; however, little thought has been given to why in 1988 a line was drawn; it was for workability.

4. CONSTITUTIONALITY

There are a variety of constitutional objections to dealing with the collateral source doctrine. One of which is a separation of powers argument which has not so far been treated by our Supreme Court. Equal protection and due process issues have been raised and have defeated other statues besides the previously mentioned Thompson v. KFB case in 1993 there is Farley v. Enlgeken 241 Kan. 663 in 1987 case, and Wentling v. Anesthesia Services PA a 1985 case. Why anyone would think that a bill conceived in the manner that this bill is being conceived without sober consideration of what has been found constitutionally defective in other bills, is not easily explained.

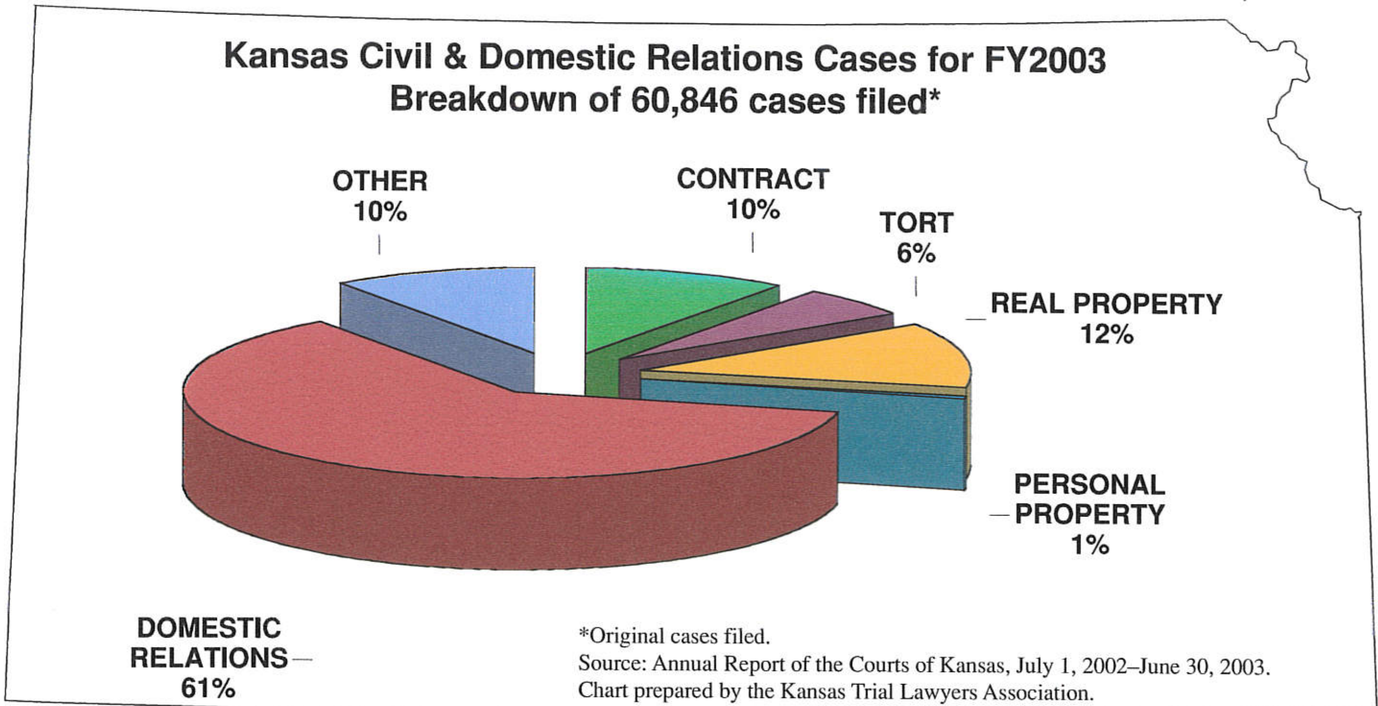
5. CONCLUSION

For the reasons of good governance, common sense and fairness this bill ought to be defeated and if anything is going to happen in the conference committee it ought to be restoration of the good consumer protection law that was embedded in it when it passed out of this body before it got dismembered in the House.

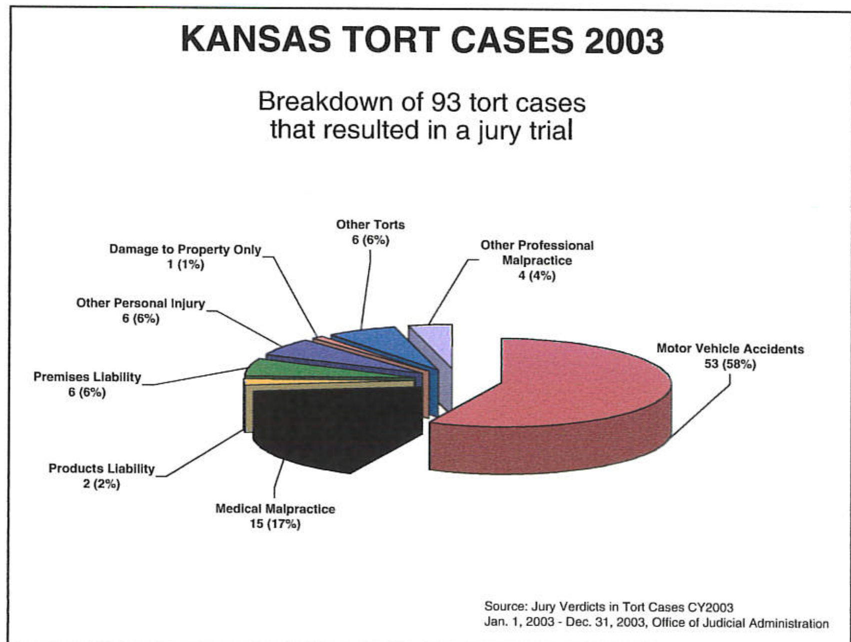
There is no "litigation crisis" in Kansas

Only 6% of cases filed in Kansas are torts.

Submitted by Jerry Palmer



- √ Only 6% of cases filed in Kansas are torts, or personal injury cases.
- √ 93 tort cases were decided by juries in 2003, down from 112 cases in 2002 and 135 cases in 2003.
- √ More than half of all tort cases involve auto accidents.
- √ The median award in 2003 was $23,416.
- √ Punitive damages were awarded in only 3 cases in 2003. All 3 cases involved auto accidents.



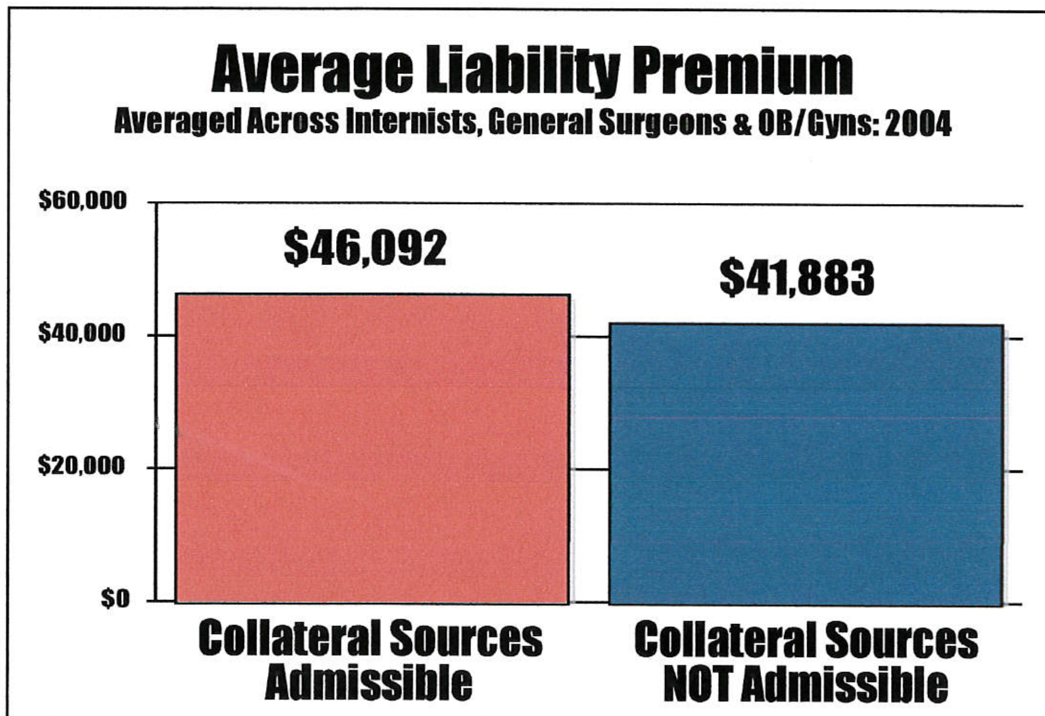
Check Your Facts Before You Change the Law

Senate Judiciary
3-30-05
Attachment 9

Collateral Source Rule

Submitted by Jerry Palmer

Does Admissibility Lower Malpractice Premiums? NO.



- **Insurance Companies Argue That Making Collateral Sources Admissible Lowers Premiums**
- **Premiums In States Where Sources Are Admissible Actually Have 10% Higher Premiums**
- **Kansas Has Amongst The Lowest Premiums In The Country—There Is No Malpractice Crisis**

Derived from data provided by Medical Liability Monitor (Oct 2004)

Senate Judiciary
3-30-05
Attachment 10

KANSAS BAR ASSOCIATION

Testimony in Opposition to

SENATE BILL NO. 102

Presented to the Senate Judiciary Committee
Special Hearing
March 30, 2005

The Kansas Bar Association is a voluntary non-profit association with a membership of over 6000 attorneys registered to practice law in Kansas. KBA appears in opposition to **SB 102**, which would abolish the collateral source rule in Kansas.

The Kansas Bar Association has a long-held position in opposition to any changes in the tort law system, including but not limited to:

- Rules governing residency of expert witnesses;
- Creation of dollar caps on non-pecuniary losses in personal injury actions;
- Overall limits on awards;
- Statutes of limitation or
- Changes in the collateral source rule regarding insurance proceeds or other economic considerations not amounting to post-injury personal mitigation of damages

unless proponents of such change can demonstrate a clear and convincing public need for such change and such change can demonstrate a clearly defined public benefit.

There has been no such showing of need for this bill, and particularly, no showing of why a tort feasor should benefit by the existence of collateral source benefits to the injured party.

We have attached to our testimony an article from a 1989 issue of the *Journal of the Kansas Bar Association*, written by Professor Jim Concannon and former KBA Legislative Counsel Ron Smith, which, while dated, gives a good background on the issue of the collateral source rule and discusses the many problems associated with repeal of the rule.

Without a showing of need for such legislation, other than vague allegations of "double recovery" on the part of the plaintiff, the Kansas Bar Association remains opposed to abolishing the collateral source rule, and is, consequently, opposed to **SB 102**.

James W. Clark
KBA Legislative Counsel

Senate Judiciary
3-30-05
Attachment 11

More Goo for Our Tort Stew:

Implementing the Kansas Collateral Source Rule

By James Concannon* and Ron Smith**

Trial lawyers and consumer groups believe "tort reform" is an overcorrection to a fickle insurance boom and bust cycle, and higher liability premiums are a self-inflicted wound brought on by an imprudent insurance investment policy called cash flow underwriting.[1] Business owners and professionals feel the legal system is not as sensitive as it should be to what high premiums do to the quality of medicine or the economic chill on Main Street.[2] Between these polar extremes important changes in the collateral source rule were made as tort reform. This article examines these changes and some of the legal and evidentiary questions raised by the new law.

The Kansas Coalition for Tort Reform set the climate of the legislative debate, arguing legislative regulation of the common law collateral source rule merely "allows juries to know the facts and do what is fair."[3] As this article demonstrates, the legislation does considerably more.

Purpose and History

The collateral source rule received little scholarly attention until the mid-20th century, when commentators began focusing on the rule's underlying theories.[4] Fanning the fire of change were numerous no-fault automobile insurance systems and the movement toward social safety nets like Medicare and various state-sponsored mandatory insurance mechanisms.[5] The 1970s brought the first medical malpractice "crisis." The 1980s saw both product liability and medical malpractice insurance emergencies. In each instance, changing the collateral source rule became a focus of reform.[6]

The battle over the collateral source rule raged for years in the courts with innovative arguments.[7] The struggle shifted in the mid-1970s to state legislatures. There is little uniformity in the types and breadth of statutory regulation of collateral source rules.[8] We say regulation because nowhere does a statute completely abolish a state's common law rule.

Kansas Legislative Responses

As a reaction to the first medical malpractice crisis in 1976, K.S.A. 60-471 was enacted. That statute allowed juries in actions against health care providers to hear evidence of reimbursements or indemnifications paid to injured plaintiffs, except for insurance payments and HMO benefits where the plaintiff or plaintiff's employer paid for the premiums, in whole or in part. It excluded evidence of collateral benefits where subrogation or lien rights existed. The resulting law was declared invalid by one federal district court[9] and in 1985 the Kansas Supreme Court held it violated equal protection provisions of the U.S. and Kansas Constitutions.[10]

In 1985, rapidly increasing premiums prompted health

FOOTNOTES

*Concannon is a graduate of the University of Kansas School of Law and is dean of the Washburn University Law School. **Smith is a 1977 graduate of Washburn Law School and is Legislative Counsel for the Kansas Bar Association. Both have made presentations to the Kansas Legislature on the collateral source rule. The views in this article are those of the authors and not of any organization.

1. Report on Kansas Legislative Interim Studies to the 1987 Legislature, Proposal #29, Tort Reform and Liability Insurance, by the Special Committee on Tort Reform and Liability Insurance, p. 584, and p. 589. Hereafter this report is referred to as "Interim Reports."

2. 1986 Interim reports, p. 583.

3. From a May 1987 mailing by the Kansas Coalition for Tort Reform, the Kansas arm of the American Tort Reform Association.

4. Bell, Complete Elimination of the Collateral Source Rule — A Partial Answer to Criticism of the Present Injury Reparations System, 14 N.H.B.J. 20 (1972); Fleming, The Collateral Source Rule and Loss Allocation in Tort Law, 54 Calif. L. Rev. 1478 (1966); Peckinpaugh, An Analysis of the Collateral Source Rule, 32 Ins. Counsel J. 32 (1965); Schwartz, The Collateral Source Rule, 77 Harv. L. Rev. 741 (1964).

5. Prosser on Torts, 4th Ed., pp. 559-570.

6. Richardson, "The Collateral Source Rule," 42 Missouri B.A. 373, 378 (1986).

7. Richardson, supra, reports a 1921 case where a Kansas City, Missouri newsboy hitched a ride on the outside of a trolley car. The conductor angrily knocked the boy under the trolley, which severed the boy's leg at mid-thigh. On appeal, defense counsel argued the $3,350 verdict was excessive because, "Everyone knows, and the writer believes the court will take judicial notice of the fact that a crippled boy does make more money selling newspapers than a boy who is not crippled." Citing Samples v. Kansas City Railway Co., 232 S.W. 1049 (Mo. Ct. App. 1921).

8. See footnote 70, infra, listing various state collateral source rule statutes. See also Alabama, Code §6-5-523-525 effective 1987; Arizona, Rev. Stat. Ann. §12-565. Effective 1985; California, Civil Code §3333.1, effective 1975; Nebraska, Rev. Stat. §44-2819, effective 1976; Utah, Code Ann. §78-14-4.5, effective 1985; and Washington, Rev. Code, §7.70.080, effective 1975. In October 1987, the Ohio legislature enacted a comprehensive tort reform package that contained some collateral source changes.

9. Doran v. Priddy, 534 F. Supp. 30 (D. Kan. 1981). Judge Theis used a "heightened scrutiny" test.

10. Wentling v. Medical Anesthesia Services, 237 Kan. 503, 701 P.2d 939 (1985). A 5-2 majority agreed with Judge Theis' opinion in Doran, supra.

11-2

care providers to propose a broader statute. Contrary to the 1976 act, K.S.A. 1985 Supp. 60-3403 allowed submission to the jury of evidence of all defined collateral sources, regardless of whether subrogation interests existed. Evidence of subrogation interests was also allowed. During the 1987 session, other non-medical organizations introduced HB 2471, which attempted to broaden K.S.A. 1986 Supp. 60-3403 for use in all personal injury actions but the bill failed in the House of Representatives.[11]

K.S.A. 1987 Supp. 60-3403 was ruled unconstitutional in **Farley v. Engelken.**[12] Justice Lockett's concurring opinion in **Farley** suggested a statute might fare better constitutionally if it affected all litigants alike. The 1988 legislature accepted Justice Lockett's invitation for a broader approach to reform but learned construction of a statutory rule change was not a simple task.

Chapter 222 — An Overview

Chapter 222 of the 1988 Session Laws (K.S.A. 1988 Supp. 60-3801 *et seq.*) implemented the collateral source rule change. It is a unique piece of legislation. It not only changes the law of damages but also implements new economic and compensatory theory. Within its provisions are conflicts, the most obvious being that the legislature wants juries to hear evidence of present and future collateral source benefits but only when the entire claim exceeds $150,000.[13]

K.S.A. 1988 Supp. 60-3801(b) broadly defines collateral sources with three major exemptions: (1) life insurance, (2) disability insurance, and (3) any other service or insurance where subrogation or lien rights exist. The act itself does not create a lien or subrogation interest. Gratuitous services remain exempt, as at common law. Most important, any collateral source must be received "as the result of the occurrence upon which the personal injury action is based" or the statute is inapplicable.[14]

The statutory definition of collateral source is different from its common law root. The common law collateral source rule blocked admission only of evidence of payments made "independent of the tort-feasor."[15] If the tort-feasor paid part or all of the damages, for example a parent's hospitalization insurance for the child's injuries, such evidence was not shielded from the jury in states where children can sue parents for injuries in automobile accidents.[16]

"Collateral source benefits" is a term with a distinctive definition based only on the receipt of benefits by the plaintiff and the nature of those benefits, not the payor of the benefits. Parental benefits may be collateral sources because of the definition in K.S.A. 1988 Supp. 60-3801(b) even if the parent is a codefendant for comparative negligence purposes and even though at common law the collateral source rule would not apply to these benefits.

This "independent of the tort-feasor" point is important for two reasons. First, K.S.A. 1988 Supp. 60-3802 appears to prohibit any collateral source benefit as defined in the statute from being introduced unless the claim exceeds $150,000. Thus, in actions for less than $150,000, amounts which heretofore had not been collateral payments subject to the common law rule now may be excluded from evidence. The threshold and the definition may have changed the common law so that evidence the defendant previously could introduce is no longer admissible.

Second, even if evidence of payments by a tort-feasor is introduced, the K.S.A. 1988 Supp. 60-3805 credits and offsets temper much of the advantage of the tort-feasor.

K.S.A. 1988 Supp. 60-3802 limits presentation of collateral source evidence to a jury. Defendant appears to have the burden of proof to establish the extent to which collateral benefits have been or will be provided, and the plaintiff has the burden to establish the cost of the benefits.

The legislature included future collateral source benefits as admissible evidence.[17] The difficulties this will create at trial are discussed below.

The legislation is prospective in application and effective for claims "accruing" on or after July 1, 1988.[18]

11. HB 2471 was introduced as a committee bill, originally resembling K.S.A. 1987 Supp. 60-3403, except it applied in all personal injury cases. After floor amendments were added, the bill was killed on the House Floor, 50-72. (1987 House Journal, p. 421.)
12. 241 Kan. 663, 740 P.2d 1058 (1987).
13. K.S.A. 1988 Supp. 60-3802. There is no individual rationale for the $150,000 figure except that is the number to which four of the six conferees on the conference committee could agree.
14. K.S.A. 1988 Supp. 60-3801(b).
15. Restatement (Second) of Torts, §920A.
16. A parent may be a codefendant for comparative negligence purposes.
17. K.S.A. 1988 Supp. 60-3802.
18. K.S.A. 1988 Supp. 60-3807.

About the Authors

JAMES M. CONCANNON is Dean of the Washburn University School of Law where he has taught civil procedure, evidence and appellate law since 1973. Concannon was named the William O. Douglas Outstanding Professor in 1977. He received his B.S. and J.D. degrees from the University of Kansas. He was a senior contributing editor of **"Evidence in America: Federal Rules in the States,"** *and he has published legal articles in the* **Journal** *and elsewhere. He is a member of the Topeka, Kansas and American Bar Associations and the Kansas Trial Lawyers Association.*

RON SMITH has been Legislative Counsel for the Kansas Bar Association since August of 1984. He is the KBA liaison with legislative staff; his lobbying experience dates to 1974. Smith is editor of the KBA legislative bulletin, Oyez, Oyez.

He obtained his B.A. in history, political science and English from Kansas Wesleyan in 1973, and his J.D. from the Washburn University School of Law in 1976.

Smith is Secretary for the Government Relations Section of the National Association of Bar Executives.

11-3

Collateral Source Law as Economic Theory

Whatever problems the common law causes insurance companies or their insureds, the common law collateral source rule simplifies a trial. Whether a plaintiff is listed in the Fortune 1000, receives payments from insurance, gratuities from Mom, or exists on welfare is irrelevant to determining whether plaintiff was injured by defendant's negligence and the amount of damages sustained. The jury focuses on the culpability of the parties, not on the private resources of either party to pay damages. The legislation undoes this symmetry.

The legislature's new economic theory may be stated as follows. Each injury produces total damages, economic and noneconomic. If the injury is self-inflicted, first party insurance pays the damages up to limits in the policy. Where the injury is caused by another's negligence, the total cost

That determination is made without the jury knowing what ceilings state law imposes on awards or exactly what the court will do with the jury's comparative negligence determinations.

is determined by a trier of fact. That determination is made without the jury knowing what ceilings state law imposes on awards or exactly what the court will do with the jury's comparative negligence determinations.

The principle is that "net collateral source benefits" should be used to reduce the judgment against a defendant only when plaintiff would otherwise receive total compensation exceeding the total damages determined to be suffered by plaintiff. Before any reduction, plaintiff is entitled to apply collateral benefits first to any portion of total damages suffered which for one reason or another is self-insured or otherwise uncollectable.

When plaintiff has collateral sources, the legislation provides a rational way of allocating such collateral sources to account for the holes or the uncollectible damages now imposed by other Kansas law.[19] Connecticut has a similar allocation law,[20] and Montana allows a post-judgment reduction of an award only after the plaintiff is fully compensated.[21]

Procedural Due Process

When criticizing the rational basis of K.S.A. 1987 Supp. 60-3403, Justice Lockett in **Farley** worried about "inherent incommunication" of collateral source statutes.[22] One of the difficulties was permitting judicial discretion whether to admit evidence of payments by the claimant to purchase the benefits while removing judicial discretion whether to admit evidence of payments to the claimant.[23] Similar ambiguities have caused remedial tort reform such as K.S.A. 60-471 to be declared unconstitutional.[24] The Kansas Supreme Court has a lengthy history of constitutional concerns about legislation which alters or limits remedies.[25]

Practical Problems with the Statute

I. Property Collateral Sources

No legislation is gap-free. The collateral source law is no exception. For example, K.S.A. 1988 Supp. 60-3801(a) purports to limit the act to personal injury and death claims. In the real world personal injury claims often are mixed with property damage actions. The common law collateral source rule apparently still applies to the property damage claim brought within a personal injury or death action.

An illustration makes the point. Assume because of negligent maintenance of a railroad right of way a train derails, destroying a multimillion dollar bridge over a downtown traffic-way as well as injuring motorists driving underneath. Depending on the facts, the municipality might be a codefendant in a suit by the motorists but may also file a cross-claim against the railroad for property damage. The municipality may receive a federal grant to repair the damaged bridge or may have purchased property insurance for such calamities.[26]

Individuals with personal injuries suffered in the derailment may have their collateral sources of indemnification deducted from their awards yet the city's receipt of property collateral source payments is not used to reduce its award. The railroad is the common defendant in both claims and the root negligence is the same. The only difference is that one claimant's collateral source is health insurance and the other claimant's benefits come from a governmental grant or property insurance. The first mixed insurance case involving personal injury and property collateral sources will raise an interesting equal protection argument for the plaintiff.

II. Comparative Negligence

Kansas plaintiffs injured by defendants' negligence can be partially responsible for their own injuries. The absence of joint and several liability reduces the incidence of double payments under the common law collateral source rule.[27]

19. K.S.A. 60-258a. K.S.A. 1987 Supp. 60-19a01, Chapter 216 of the 1988 session laws of Kansas, and K.S.A. 60-1903. There is also a $500,000 overall limit on awards under the Kansas Tort Claims Act. K.S.A. 1987 Supp. 75-6105.

20. §52-225a-225d.

21. §27-1-307 and §27-1-308.

22. 241 Kan. at 681.

23. "As written, the statute could be interpreted to give a judge in a particular case the discretion to admit or exclude evidence of a plaintiff's payments. It is unlikely that the intent of the legislature in enacting this statute was to confer greater rights upon defendants than upon plaintiffs." 241 Kan. at 681; emphasis added.

24. Wentling v. Medical Anesthesia Services, supra, at 517, where a divided court outlines "inequitable treatment of two patients suffering similar injuries at the hands of the same health care provider" and other "invidious hypothetical" examples.

25. See Hanson v. Krehbiel, 68 Kan. 670, 75 P. 1041 (1904), and its offspring.

26. See Town of East Troy v. Soo Line R.R. Co., 476 F. Supp. 252 (E.D. Wis. 1979), aff'd 653 F. 2d 1123 (7th Cir. 1980), cert. denied 450 U.S. 922 (1981). There is, of course, an exception to the common law rule on government payments where the government is the defendant. A payment by one agency of the government to a plaintiff for medical expenses would not be excluded by the common law collateral source rule merely because another agency was the defendant. The common fund is the state general fund. In some jurisdictions, jurors are entitled to know that a fund common to the collateral source agency and the defendant has already paid part of the damages. Green v. U.S., 530 F. Supp. 633 (E.D. Wis. 1982) aff'd 709 F.2d 1158 (7th Cir. 1983). Further, the common law collateral source rule impermissibly allows a form of punitive damages against a municipality where punitive damages are not otherwise allowed by statutes. City of Salinas v. Souza and McCue Const. Co., 66 Cal. 2d 217, 57 Cal. Rptr. 337, 424 P.2d 921 (1967). In City, the court rejected use of the collateral source rule against a public entity since it would impose an unjust burden on the taxpayer while having no deterrent effect on a government since "government" is an abstract entity and government's employees were the true culprits.

27. Until the mid-1980s, when the latest wave of "tort reforms" began in state legislatures, Kansas was one of only four states which by statute had totally abolished joint and several liability for unintentional acts or omissions.

28. K.S.A. 60-258a. A claimant declared to be 25% negligent in his own injury sees the codefendants pay only 75% of all damages, including those for which the plaintiff has already been compensated, such as medical expenses paid by health insurance.

29. Because all such uses of the statute were appealed and Farley, supra, struck down the statute, the court was not called upon to solve this procedural conundrum.

30. K.S.A. 1988 Supp. 60-3802, 60-3803 and 60-3804.

31. K.S.A. 1988 Supp. 60-3805.

By definition there is no double recovery for the proportionate damages a plaintiff pays or absorbs from plaintiff's own resources.[28]

In K.S.A. 1987 Supp. 60-3403 the legislature did not indicate how judges were to mesh the change in the rule with the judicial duty to reduce the jury's gross verdict because of comparative negligence.[29] K.S.A. 1988 Supp. 60-3805 recognizes that problem. An elaborate system is created whereby the jury determines total damages, percentages of negligence attributed to the parties and collateral source benefits and costs,[30] but the judge apportions payment of the whole loss between plaintiff and defense resources.[31] This procedure is no more than a logical addition to post-trial judicial duties imposed by the comparative negligence act.[32]

By definition there is no double recovery for the proportionate damages a plaintiff pays or absorbs from plaintiff's own resources.

To avoid possible unfairness meshing comparative negligence with the collateral source statute, K.S.A. 1988 Supp. 60-3805 gives plaintiff credit for that portion of collateral source benefits which pay plaintiff's proportionate share of liability.[33]

> *Assume plaintiff has $200,000 in damages, and $50,000 in BC/BS payments already received, plaintiff was 20 percent negligent, and two codefendants D(1) and D(2) were equally at fault for the remaining negligence (40 percent each). If the common law collateral source rule remains in place, plaintiff recovers only $160,000 from defendants and keeps $50,000 paid by BC/BS.*
>
> *Under the new law, $40,000, representing the plaintiff's proportionate negligence, is first credited against the $50,000 of the medical expenses already paid by plaintiff's health insurance resources. The remainder, $10,000, is reduced from the total remaining defense liability, and the $160,000 judgment becomes a $150,000 judgment split equally if both codefendants are solvent.*

A. Limits on Recovery: Immune and Insolvent Codefendants

If a codefendant is either insolvent or immune or is a phantom or not otherwise subject to personal jurisdiction, another consideration applies.[34] If D(1) is immune, D(2) as the sole remaining solvent defendant does not get to claim the remaining $10,000 collateral source reduction because by law plaintiff must absorb D(1)'s share of liability.

Because of the self-insurance/economic theory behind the bill, plaintiff's collateral sources must also back fill for defendants who are insolvent, immune or uninsured.[35] In these circumstances, D(2) receives no deduction for plaintiff's collateral sources and owes his proportionate $80,000 in full, which is no more than the comparative negligence statute otherwise imposes.[36]

Plaintiff cannot receive collateral source credits under K.S.A. 1988 Supp. 60-3805 for the negligence of any party with whom plaintiff previously has settled or agreed not to assert a claim. Plaintiffs either make good or bad settlements and it was not felt appropriate to allow poor settlement negotiations to produce a credit. Presumably the reverse also is true. If plaintiff settled for an amount more than the jury awards against the settling defendant, the excess is not considered a collateral source. The law generally favors settlements and it seems inconsistent to penalize litigants who do so.

To trigger the exception, the plaintiff must make a "decision not to assert a legally enforceable claim against a named or unnamed party."[37] It is an open question what happens when plaintiff does not learn of the possible liability of a person until after a statute of limitations has expired, perhaps because of a defendant's refusal to supply pertinent information.

Can plaintiff argue there was no decision not to assert a claim against that person thus allowing any collateral source benefits to be offset under K.S.A. 1988 Supp. 60-3805? The word "decision" implies a conscious choice. Defendant may argue there is a "decision" when reasonable diligence would have uncovered the party. Plaintiff will counter that without a Rule 11 (K.S.A. 60-211) basis upon which to file the claim, there is no decision not to assert it.[38]

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While bankruptcy seems cut and dried, insolvency may present factual issues. Does a defendant who seeks to have the judgment reduced have the burden of persuasion that plaintiff will be able to collect the judgment, or does the plaintiff who opposes reduction in the judgment have the burden to prove the plaintiff is unable to collect the judgment? Post-verdict discovery may be necessary in either event, probably in connection with a motion pursuant to K.S.A. 60-260(b)(1) or (2) when an insolvency becomes apparent after a K.S.A. 1988 Supp. 60-3805 reduction has been made. The reference to insolvency or bankruptcy of a "person" in this statute parallels the generic reference to "person" in the comparative negligence statute and thus should include corporate insolvencies and bankruptcies.[39]

32. Courts may need to instruct juries their only role is to determine disputed collateral source benefits received and costs thereof. They are not to reduce the gross verdict: such power is reserved to the court under K.S.A. 1988 supp. 60-3805.

33. Dean Concannon suggested this change to the 1987 House Judiciary Committee considering HB 2471. With a year to ponder, the 1988 legislature adopted the Concannon theory as the crux of K.S.A. 1988 Supp. 60-3805 post-trial adjustments.

34. K.S.A. 1988 Supp. 60-3805(a) (3) and (a) (4).

35. How K.S.A. 1988 Supp. 60-3805 affects proportionate judgments of underinsured codefendants is not specified in the act. The co-defendant may be partially insolvent under K.S.A. 1988 Supp. 60-3805, giving plaintiff partial credit for collateral source payments. Reductions in the judgment should be apportioned according to amounts actually paid by each defendant.

36. Plaintiff recovers $50,000 from his own resources and $80,000 from D(2). $130,000 total on a $200,000 injury. There is no double recovery in the classic sense.

37. K.S.A. 1988 Supp. 60-3805(a) (2).

38. Obviously, plaintiff's counsel should make sure the decision not to file a timely claim is the client's in order to avoid a later malpractice claim.

39. See a previous discussion of this question in Palmer and Snyder, "A Practitioner's Guide to Tort Refort of the 80's: What Happened and What's Left After Judicial Scrutiny?", 57 J.K.B.A. 25-26, November/December 1988 pp. 25-26.

40. K.S.A. 1988 Supp. 60-3805(a) (4).

11-5

B. Limits on Awards:

Statutory Caps

The act recognizes statutory barriers may prevent a full recovery. Plaintiff's collateral sources are not to be deducted when plaintiff does not receive full recovery. Any difference between limits imposed by law and the jury's itemized verdict becomes a K.S.A. 1988 Supp. 60-3805 credit for the plaintiff against net collateral source benefits.[40]

III. Subrogation Interests

A. Generally

The legislature's treatment of subrogation interests is a key element in use of the new law. At common law the existence of subrogation interests is kept from the jury unless the subrogee is a real party in interest and made a party to the litigation.[41] Under the collateral source statute, if the plaintiff already has been paid by insurance for part of or all the medical expenses but the insurer has a subrogation or lien interest, the evidence is inadmissible.[42]

The legislature faced a public policy dilemma. It has created statutory subrogation interests in third party negligence claims by a variety of interests, especially in mandatory no-fault insurance compensation systems.[43] Subrogation forces the liabilty insurance or private resources of the defendant to bear the risk of loss, not the claimant's first-party insurance.[44] K.S.A. 1988 Supp. 60-3801 *et seq.* leaves collateral source benefits with statutory and contractual subrogation rights unaffected. The theory behind this *status quo* arrangement is that no double recovery occurs.

Current Kansas regulations prohibit domestic health insurance companies from subrogating third party litigation claims.[45] Kansas hospitals are allowed statutory $5,000 liens against third-party recoveries by accident victims not covered by workers' compensation.[46] Consideration of subrogation interests — by alerting the jury to their presence — has been deemed inappropriate in a previous law journal article discussing Kansas legislative changes to the common law rule.[47] In any event, the 1988 legislature chose to abandon its 1985 theory and not put subrogation evidence in front of the jury, for some very practical reasons.[48]

B. Workplace negligence

Workers' compensation laws were not intended to eliminate or curtail all of the employee's common law rights to sue for negligence and resulting damages. Workers' compensation only prohibits tort actions against the employer. Actions against third party tort-feasors who cause workplace injuries are common.[49]

An injured Kansas employee must bring a third-party action within one year (the limit is 18 months if the injury causes death) or an automatic assignment of rights operates to preserve the *employer's* right of subrogation against the tort-feasor.[50] Public policy allows the employer to recover from the tort-feasor not on a strict subrogation basis, but on the theory the *employer* was harmed by the tort-feasor's negligence.[51]

Sometimes an employer is made a party to the lawsuit for comparative negligence purposes. Although the employer is immune from paying damages, workers' compensation law limits the employer's subrogation rights to a reciprocal of the percentage to which an employer is negligent. If the employer is found 25 percent negligent, the employer collects only 75 percent of its subrogation interest.[52] The employee keeps the other portion of his economic loss which he otherwise would owe through subrogation. This 1984 workers' compensation amendment intended (1) to penalize the employer who is partially negligent in the employee's injury and (2) benefit the employee.

Although the employer is immune from paying damages, workers' compensation law limits the employer's subrogation right to a reciprocal of the percentage to which an employer is negligent.

Yet the new statutes create a Hobson's Choice for the employee and procedural problems for the Court. The exclusion of collateral source ". . . services or benefits for which a valid lien or subrogation interest exists . . ." might be construed to preclude evidence of the employer's payment in all such cases. Potentially at least, all benefits paid are subrogated. However, the amount of the reduction of the employer's lien also might be held to be a collateral source under K.S.A. 1988 Supp. 60-3801(b). The benefits were paid as compensation for injury due to the accident.

How do the court and counsel present evidence to the jury when K.S.A. 1988 Supp. 60-3801(b) says if the benefits are subrogated such benefits are not collateral sources? Sometimes benefits are subrogated, sometimes not, depending on the jury's assignment of percentages of negligence. Further, if the reduction in the amount subject to subrogation becomes the employee's collateral source, the full amount of damages attributed to the employer's fault then must be considered uncollectible damages from an immune codefendant for purposes of K.S.A. 1988 Supp.

41. Klinzmann v. Beale, 9 Kan. App. 2d 20, 28-29, 670 P.2d 67 (1983).

42. K.S.A. 1988 Supp. 60-3801(b). An exception might be a case of malingering, where the defense wants to show the medical damages are high because of the direct action of the plaintiff. Such inquiry is complicated and requires that counsel lay a strong foundation. Acosta v. Southern California Rapid Transit Dist., 2 Cal.3d 19, 84 Cal. Rptr. 184, 465 P.2d 72 (1970).

43. K.S.A. 40-3113a and K.S.A. 44-504.

44. The theory is the subrogee is damaged by the actions of the third party causing injury to the insured and has a separate cause of action.

45. K.A.R. 40-1-20. Self-insured health insurance by employers or companies in other states doing business in Kansas is not regulated by the Kansas rule. A major sideshow in the 1988 session occurred over subrogation rights of health insurance. SB 630 allowed full health insurance subrogation. It passed the Senate, but stalled in the House without becoming law. Current Kansas law is in the minority, however: 38 other states allow subrogation of health insurance to third party claims.

46. K.S.A. 1987 Supp. 65-406. Even Veterans' Administration hospitals invoke this lien. An attempt in 1987 to increase the amount of the statutory lien to $50,000 did not pass.

47. "The state cannot effect the reforms called for by abolishing the collateral source rule if it leaves the right of subrogation in place." McDowell, "The Collateral Source Rule — The American Medical Association and Tort Reform," 24 Washburn L. J. 205, at 225 (1985).

48. See the interesting result that happens when state tort reforms do not take into account the supremacy of federal law and subrogation of federal workers' compensation statutes in U.S. v. Lorenzetti, 467 U.S. 167, 81 L.Ed.2d 134, 104 S.Ct. 2284 (1984). "More important, the fact that changing state tort laws may have led to unforeseen consequences does not mean that the federal statutory scheme may be judicially expanded to take those changes into account." (467 U.S. 169, emphasis added).

49. A 1980 book documents the growth of cases where employees injured in workplace accidents by defective manufacturing, products sue the manufacturer, but the author concludes this may be due in part to state workers' compensation benefits being "inadequate." Lieberman, The Litigious Society. In 1980, 4,239 of 13,554 product liability cases filed in federal district courts nationally (31% of all federal civil filings) were asbestosis cases, a form of third-party personal injury arising primarily in the workplace environment.

50. K.S.A. 44-504(b).

51. Keeton, Insurance Law — Basic Text, p. 151 (West 1971).

52. See Wilson v. Probst, 224 Kan. 459, 581 P.2d 380 (1971), and statutory changes that resulted in K.S.A. 44-504(b) and (d).

11-6

60-3805(a)(2) credits.[53] The solution may be to have the jury determine the amount of workers' compensation payments as part of the verdict, then let the judge determine whether any amount is a collateral source. However, this solution is not currently allowed by the statute and further legislative amendment may be needed to clarify it.

The effect of the new law on third party negligence cases is an interesting, and perhaps unavoidable, paradox in public policy. K.S.A. 44-504(b)'s reduction in subrogation rights for employer negligence is clearly intended to reward the plaintiff employee, but the new law may transfer the intended benefit to the other negligent tort-feasor whose actions at least partly contribute to the employer having to expend workers' compensation benefits in the first place.

C. PIP Subrogation in Automobile Negligence Cases

Subrogation rights in Personal Injury Protection benefits (PIP) are controlled by K.S.A. 40-3113a.[54] Subsection (b) of that statute limits subrogation rights " . . . to the extent of duplicative personal injury protection benefits provided to date of such recovery . . . ." The Kansas Supreme Court has defined "duplicative" to mean those damages recovered by an injured insured which, if subrogation is thwarted, constitutes a double recovery.[55]

Once subrogated, the collateral source law does not apply. If the amounts paid are not duplicative, then they are collateral sources under the act, which defendant can seek to use post-trial to reduce the verdict.

Under present case law where defendant tenders policy limits and the claimant accepts the limits in settlement of the total claim, the PIP carrier is subrogated as a matter of law because the settlement duplicates the benefits provided.[56] Once subrogated, the collateral source law does not apply. If the amounts paid are not duplicative, then they are collateral sources under the act, which defendant can seek to use post-trial to reduce the verdict.

Our no-fault law raises other considerations.

PIP subrogation interests are handled differently than other automobile subrogation statutes such as K.S.A. 40-287 which governs subrogation of uninsured and underinsured motorist coverage. Where both ordinary PIP subrogation and uninsured motorist subrogation are part of the trial, the judge will have a complex determination whether the extent of the subrogation interest precludes double recovery.

Whether a K.S.A. 40-3113a subrogation right can be exercised often cannot be determined until a trier of fact decides total actual damages.[57] This might mean that a claimant who seeks a judgment in excess of policy limits has preserved maximum subrogation and thus avoided application of the collateral source statutes. More likely, this situation sets up the need for a post-trial evidentiary hearing on the nature and existence of "duplicative" PIP coverage.

What are the rights, duties and responsibilities of an automobile insurance company that insures both the plaintiff and defendant? Can a company write in its contract that if two of its insureds collide and one sues the other, no subrogation right exists? While certainly this is a voluntary waiver under previous law, such a decision under K.S.A. 1988 Supp. 60-3801 *et seq.* means the company's insured defendant can introduce medical and other PIP payments to influence the jury's consideration of the overall award. The claims must exceed the dollar threshold for this possibility to occur.

D. Subrogation of Federal Entitlement Programs

About 10 percent of all Kansans are eligible for Medicare benefits, for which federal law allows subrogation.[58] The Veterans' Administration has subrogation interests for certain services it provides veterans.[59] Federal employees in Kansas are subject to FECA subrogation if injured on the job.[60] Even the Kansas Department of Social and Rehabilitation Services has a program subrogating third party claims where medical expenses were first paid by Medicaid.[61]

The type and extent of subrogation is important. If the benefit is not fully repaid under the subrogation clause, it is a double recovery and might be a collateral source subject to K.S.A. 1988 Supp. 60-3801 *et seq.*

IV. Future Collateral Source Benefits

K.S.A. 1988 Supp. 60-3802 states "evidence of . . . collateral source benefits which are reasonably expected to be received in the future shall be admissible." Several interesting problems are created by this clause. If damages to a child are severe and defendant's experts testify the child will not live very long, on equity grounds will defendant be precluded from introducing evidence of future medical benefits to be received for a period longer than life expectancy? Defendant may argue that evidence of benefits to be received for the life expectancy determined by plaintiff's experts is admissible, leaving it to the jury to determine the amount of future benefits based upon its resolution of the dispute over life expectancy.

K.S.A. 1988 Supp. 60-3802, the threshold and "when applicable" section, plainly states evidence of future collateral sources is admissible only when such evidence is "reasonably expected" to be received in the future. This implies a judicial determination whether to allow evidence of future collateral source benefits.

An earlier version of the act would have imposed a "reasonably certain" test before such evidence would be

53. Is this both a collateral source benefit and an amount of an award constituting a "payment" by an "immune" codefendant?

54. Easom v. Farmers Insurance Co., 221 Kan. 415, syl. 4, 560 P.2d 177 (1977). Easom established a three part test: (1) The PIP subrogation right is limited to those damages recovered by the injured insured which are duplicative of PIP benefits; (2) damages are duplicative when the failure to reimburse the PIP carrier results in a double recovery by the insured; and (3) PIP benefits are presumed to be included in any recovery effected by an injured insured, either by way of settlement or judgment in the absence of proof to the contrary, and the burden of supplying such proof is on the insured.

55. Interestingly, this statute allows health insurance benefits paid by a casualty insurance company to be subrogated, while K.A.R. 40-1-20 prohibits domestic health insurance companies — which may have made payments in the same automobile accident — from subrogating.

56. Russell v. Mackey, 225 Kan. 588, 592 P.2d 902 (1979).

57. Kansas Farm Bur. Ins. Co. v. Miller, 236 Kan. 811, 696 P.2d 961 (1985).

58. 42 U.S.C. §1395y(b); 42 CFR §405.322 *et seq.* For an excellent treatment of Medicare's subrogation interests in tort litigation, see Williams, "Medicare as Secondary Payor," 31 Res Gestae 188 (Indiana Bar Assn. Oct. 87).

59. 38 U.S.C. §629 *et seq.*

60. 5 U.S.C. §§8101 *et seq.*

61. K.S.A. 39-719a.

11-7

admissible. New York has such a test.[62] The standard in most states is that such benefits "will be payable." None has the relatively unstructured "reasonably expected" test like Kansas.[63]

The legislature did not define what standard of proof is necessary for defendants to show that benefits are "reasonably expected" to be received in the future. That means initially the judiciary will legislate this standard. The

The legislature did not define what standard of proof is necessary for defendants to show that benefits are "reasonably expected" to be received in the future.

phrase "reasonably expected" is used in P.I.K. Civil 9.01, Elements of Personal Injury Damage instructions. Since P.I.K. 9.01 is part of the standard instructions given to personal injury juries, this indicates the "more probably true than not true" standard of proof would be appropriate.[64] Until judicial standards of what constitutes "reasonably expected" benefits are formed, counsel will cross swords often.

V. Future Eligibility for Private Health Insurance

While evidence of health insurance covering future medical care can be introduced, the new statutes do not specifically allow claimants to show any difficulty they may have in maintaining eligibility for future health insurance. However, the definition of the cost of the collateral source benefits appears to allow such leeway. The operative words are "amounts paid . . . to secure" a collateral source benefit.[65] To read the new law as precluding evidence other than premiums would not make sense. Had the legislature meant to admit only premiums paid, it could have so stated. Further, if the jury is to determine accurately if future benefits are "reasonably expected" to be received, it must be made aware of the ease with which health insurance benefits are subject to cancellation or loss based on job choices.

The right to future private or public health insurance benefits is not guaranteed. Such benefits must be purchased. Health insurance for a catastrophically injured child's future medical care depends on the parents' maintaining continuous medical insurance coverage.[66]

Proving the cost of covered future medical care or the cost of remaining eligible for such care requires additional discovery as well as testimony. Clearly, if the statute allows introduction of future collateral source benefits, it must also allow evidence of how inflation may affect future costs of securing such benefits.

Rapidly rising health insurance costs may make current employer-paid health insurance unaffordable in the future.[67] Claimants who receive health insurance as part of their employment benefits may be disadvantaged if their union elects to change health insurance plans as part of its collective bargaining strategy. If such a change occurs after the jury assumed these benefits would be paid in the future, the claimant not only loses the health insurance but also has no way to reopen the verdict to have the negligent tortfeasor pay the future medical care resulting from his actions. A change of employers by a child's parents (or a change in private health insurance carriers for whatever reason) invokes new "waiting periods" and exclusions of known diseases or preexisting injuries. Once the jury's decision is made and post-trial motions are completed, claimants have limited remedies since **res judicata** applies.[68]

VI. State Medical Services or Institutional Care

In cases where the $150,000 threshold is not exceeded, the existence and availability of tax-funded institutional care for injured citizens is inadmissible. However, such benefits are an admissible collateral source under the new law if the threshold is exceeded and there is no government subrogation or lien interest in the benefits provided. Some states have seen new types of "experts" testify to the "availability" of state or federal programs to assist the injured person or the family.

The new statutes are silent as to whether defendant can argue the existence of future government benefits if the plaintiff fails to seek benefits from government programs to which plaintiff is entitled. Plaintiff may not need public assistance, but may have to admit the reason is private

62. Civil Practice L & R. §4545.

63. A key amendment to understanding legislative intent came during Senate floor debate. The Senate Judiciary Committee had taken the House version, which allowed the jury to consider future collateral source benefits, and modified the bill so that only present damages could be considered for reduction from the verdict and only by the trial judge in a post-verdict hearing. Senator Gaines amended the bill on the floor so that the judge could consider evidence of future collateral source benefits. He explained his reasoning by reading a portion of a letter from the primary proponents of the legislation, the Kansas Medical Society: "I've asked the Kansas Medical Society to tell us what are those outside sources we are going to consider. In their writing they said.

"... the rationale for allowing the judge to consider benefits to be received in the future is that, especially in medical malpractice cases involving minors, there are frequently collateral source benefits paid which can have a substantial impact on award costs. For example, in addition to the traditional benefits of health insurance etc., there are many publicly funded programs for children such as rehabilitation and counseling services and the providing of equipment in services for special needs educational pruposes in physical or occupational therapy services programs."

Under questioning as to what programs he intended be included by the amendment, Gaines stated, "I tried to answer as best I could about what those would be. I envision those as applied by the trial judge to be things that are vested. Let me read again, for example, 'in addition to the traditional benefits of health insurance etc., there are many publicly funded programs for children such as rehabilitation and counseling services, the providing of equipment and services for special needs educational purposes in physical or occupational therapy services programs.' That's not difficult for a judge to determine. If those things are available, why do we want the HCSF to pay for that a second time? The logic to that is understandable. *** When they approached me and said, 'we want the judge to be able to consider the fact that there are many federal programs out there that substantially would result in a double payment. The government is going to provide those [benefits] despite any type of a judgment or award and we want credit to that extent.' Those are vested types of benefits that aren't going to run away from anyone; they aren't conjectural. It applies particularly to a brain injured child. ***" (Emphasis added)

The Conference Committee later changed the Senate version of the bill so that the jury instead of the judge decided the amount of future collateral source benefits. But it appears Senator Gaines intended that his amendment apply to future collateral source benefits which vest, presumably by time of trial. A complete transcript of the House and Senate floor debates on this legislation is available from the Kansas Bar Association. The minutes of judiciary committees are available from the Legislative Services Department in the Statehouse.

64. See P.I.K. Civil 2d 2.10. This definitional hiatus by the legislature raises the age old question of how much speculation and conjecture courts should tolerate concerning the future availability of collateral source benefits. Review the Kansas rule in Ratterree v. Bartlett, 238 Kan. 11, 707 P.2d 1063 (1985) where the Kansas Supreme Court restated its general rule that opinions by expert witnesses should not concern matters which are mere speculation or conjecture. Also see Admissibility of Expert Medical Testimony as to Future Consequences of Injury as Affected by Expression In Terms of Probability or Possibility, 75 A.L.R.3d 11 (1977). The lead case in this annotation is Nunez v. Wilson, 211 Kan. 443, 507 P.2d 329 (1973), later modified in Ratterree, supra.

65. K.S.A. 1988 Supp. 60-3801(c).

66. Blue Cross and Blue Shield typically covers medical care for a dependent child only until age 21 and only up to stated policy limits ($1 million for major medical). At age 21, with existing medical problems requiring long-term care, a disabled child probably will not qualify for his or her own Blue Cross plan for the preexisting injury. Even if a policy is available, the covered procedures within each policy vary from year to year.

67. The June 22, 1987 Washington Post reports health care expenditures account for nearly 11% of the current U.S. GNP, but are headed towards capturing 15% of GNP by the year 2000. Total U.S. Health costs will triple by 2000, from $458 billion to $1.5 trillion. Per capita costs will grow from $1,837 in 1986 to $5,551 in 2000. Price inflation rather than increased use, says columnist Michael Specter, accounted for 54% of the 1986 increase.

68. Try to argue that K.S.A. 60-260(b) (5) or (b) (6) allows reopening the judgment if the problem occurs. A simpler approach (substantively, not necessarily procedurally) to proving future collateral source benefits is a periodic payment of judgments statute, which was considered in 1987 SB 258. It did not pass.

11-8

resources or wealth. This presents a clash between the admissibility of "reasonably expected to be received" public resources and the "gratuitous services" exception.

To the extent evidence of publicly-funded benefits is presented to the jury, rebuttal should try to show (1) such programs are subject to future funding by the legislature or Congress, funding over which the claimant has no control, and (2) the benefits provided in such programs change frequently. However, the speculative nature of future welfare program funding goes only to the weight, not the admissibility, of the evidence, if the court otherwise rules the benefits are reasonably expected to be received. The new statutes allow evidence of non-subrogated public assistance even when it will benefit foreign individuals, corporations or insurers whose Kansas tax burden to help pay for this tax-funded alternative is slight or nonexistent.

VII. Life and Disability Insurance

All collateral sources are subject to the act except those expressly excluded, such as life and disability insurance. Life insurance is excepted because it often is purchased for investment motives in addition to its traditional purpose.[69] Life insurance often is exempted in other states' collateral source legislation.[70]

The portion contributed by the employee plus investment earnings should not be deemed a collateral source.

However, discrimination between similar types of collateral sources has been held unconstitutional by one Kansas court.[71] A wage continuation plan is an understanding with an employer that salary will be paid to an employee or executive of a company during any period of time that such person is disabled or injured. Such plans are collateral sources under K.S.A. 1988 Supp. 60-3801(b) unless there is a subrogation interest.[72] Yet another form of insurance, disability insurance, is an exempt collateral source even though its function is similar to a wage continuation plan.

Some employers have ERISA pension plans which allow the accumulated retirement fund to be given to the employee if the employee is disabled (or employee's estate if the employee dies). While the portion of the fund contributed by the employer certainly is a common law collateral source, it is uncertain whether ERISA proceeds are considered a collateral source under the new definitions.[73] The portion contributed by the employee plus investment earnings should not be deemed a collateral source.

VIII. Trial Concerns

Obviously the biggest change in the law is the conduct of the trial. The following is not an exhaustive list of concerns for trial counsel but gives an idea of some issues counsel must address.

A. Discovery Issues and Costs

Since the common law rule did not allow evidence of collateral source benefits or costs "paid to secure" the benefits, litigants heretofore spent little time developing such evidence. K.S.A. 1988 Supp. 60-3801 *et seq.* may require presentation of such evidence at trial. This means new costs of litigation in developing and presenting this evidence.[74]

Showing amounts paid to secure the right to the collateral source benefit requires new and perhaps extensive discovery, depending on the interpretation of the phrase costs "paid to secure" the benefit.[75] Experts from health insurance companies and personnel planning administration fields may be needed to testify. Indeed, the legislature may have spawned a whole new class of witnesses: public benefits experts.

What relevant time period is to be used to determine amounts paid "to secure the benefits"? As a practical matter few consumers keep their cancelled insurance premium checks for twenty or thirty years. Reconstructing insurance coverage and premium payments over a long time period is a significant financial burden.

B. Additional Discovery Impact on Employers

Absent pretrial stipulation by the parties, where an employee's health or disability insurance is provided by an employer and the employee (or dependent) is injured by negligent third parties, the employer must be prepared to testify on the cost of the benefit in any personal injury action in which an employee or employee's dependent is the claimant.

The purpose of plaintiff's evidence will be to persuade the jury that future collateral source benefits are not "reasonably expected to be received." Defendant, of course, will want to show the benefits will be provided. If the availability of future medical care through plaintiff's own health insurance is an issue, the employer might testify to the claimant's long-term job prospects and the corporate philosophy on maintaining health benefits as a long-term

69. See Dean Concannon's written testimony to the House Judiciary Committee, February 11, 1988.

70. State statutes that limit the common law collateral source rule but which exempt life insurance proceeds from the definition of a collateral source include: Alaska, Stat. §09.55.548, medical malpractice only, effective 1976, §09.17.070; Colorado, Rev. Stat. §13-21-111.6, excludes collateral sources directly purchased by the injured party, effective 1986; Connecticut, Gen. Stat. §52-225a-225d, medical malpractice only effective 1985, applied to all tort actions by amendment 1987; Delaware, Code Ann. tit. 18, §6861-6862, medical malpractice only; Florida, Stat. §768.50, effective 1976, but see §768.76, allowing deductions for life insurance if there is no subrogation right, effective 1986; Georgia, Code §51-12-1 (105-2005), effective 1987; Illinois, Rev. Stat. ch. 110, §2-1205, excluded only if there is subrogation right, effective 1985, §2-1205.1, effective 1986; Indiana, Code §34-4-36-1-3, effective 1986; Iowa, Code §147.136, does not include assets of a claimant or claimant's immediate family, amendment effective 1987; Michigan, Stat. Ann. §27A.6303, 27A.6304, effective 1986; Minnesota, Stat. §548.36, effective 1986; Montana, Code Ann. §27-1-307, §27-1-308, effective 1987; New Hampshire, Rev. Stat. Ann. §507-C:7, medical malpractice only, declared unconstitutional in Carson v. Maurer, 120 N.H. 925, 424 A.2d 825 (1980); New York, Civ. Prac. Law and R. §4545, effective 1986; North Dakota, Cent. Code §26-40.1-08, effective 1977 but repealed 1983; Ohio, Rev. Code Ann. §2317.45, effective 1988, see also §2305.27, effective 1976, held unconstitutional in Simon v. St. Elizabeth Medical Center, 3 Ohio Op. 3d 164, 355 N.E.2d 903 (19760, and Graley v. Satayatham, 74 Ohio Op. 2d 316, 343 N.E.2d 832 (1975), but see Holaday v. Bethezda Hosp., 29 Ohio App. 3d 347, 505 N.E.2d 1003 (1986); Oregon, 1987 Or. Laws ch. 774; Pennsylvania, Stat. Ann. tit. 40, §1301.602, medical malpractice only, public collateral sources only, effective 1975; Rhode Island, Gen. Laws §9-19-34, medical malpractice only, effective 1976; South Dakota, Codified Laws Ann. §21-3-12, medical malpractice only, exempts privately purchased insurance, effective 1977; Tennessee, Code Ann. §29-26-119, medical malpractice, exempts privately purchased insurance, effective 1975.

71. Discriminatory treatment between victims of negligence whose "collateral sources" are different ". . . does not have a reasonable and substantial relation to the purpose of keeping down rates." Doran v. Priddy, 534 F. Supp. 30, at 38 (D. Kan., 1981), cited with approval in Farley, supra.

72. Or unless wage continuation plans are considered "gratuitous services" under K.S.A. 1988 Supp. 60-3801(b) and thereby exempt.

73. One might argue that to include ERISA funds diminishes the intended benefit conveyed thereunder, contrary to federal supremacy considerations. Further, Key Man insurance is another form of insurance that is neither fish nor fowl, neither disability insurance or life insurance. Is it a collateral source benefit under K.S.A. 1988 supp. 60-3801 *et seq.*?

74. K.S.A. 1988 Supp. 60-3801(b) and (c).

75. K.S.A. 1988 Supp. 60-3801(c) and 60-3803.

11-9

benefit. If a corporation is considering scaling back the work force or reducing employee fringe benefits over the period a dependent child may need care, that is a material fact the jury must know before deciding which benefits are "reasonably expected" to be received in the future. Employer layoff histories necessarily will be explored.

Unfortunately if a child-claimant's parent is a discipline problem at work and may be fired in the future (thus impairing access to continuous employer-paid health insurance), this evidence may have to come out to dissuade a jury from including those amounts in the future benefits "reasonably expected" to be received. Yet such information may have other, unintended consequences.[76]

C. Thresholds

No reduction of a judgment occurs, nor should evidence be introduced, if the demand for judgment does not exceed $150,000. Defendants will need to invoke Supreme Court Rule 118 to obtain a statement of the amount of damages sought. The threshold is a "claim" threshold, not one based on the amount of duplicative damages contained in the pleadings.

No reduction of a judgment occurs, nor should evidence be introduced, if the demand for judgment does not exceed $150,000.

Presumably, damages that are sought other than "personal injury or death," such as property damages and consequential economic loss from damage to property, are disregarded in determining whether the threshold is met, but K.S.A. 1988 Supp. 60-3802 is unclear on this point. For tactical purposes, when collateral sources cover many of the damages, claims exceeding $150,000 might be scaled back to within the threshold limit to avoid this new burden.

An unanswered question is whether a claim by plaintiff exceeding the threshold means that collateral sources are admissible on a defense counterclaim for personal injury tried in the same lawsuit. Whether the defendant's collateral sources can be introduced then or whether a defendant must have a separate $150,000 counterclaim to trigger the statute remains to be addressed judicially or legislatively.

D. Relief from Judgment

An open question is whether relief from the judgment will be available pursuant to K.S.A. 60-260(b)(5) or (6) if a serious error is made. If a defendant thought to be solvent is shown — long after rendition of the judgment — to have been insolvent, or when a collateral source the jury assumed would be available in the future later proves not to be available, what can a court do? The current answer appears to be nothing.

E. Defense Strategy

The new law opens up additional defense strategies. If the evidence is admissible, defense counsel presumably may make references to the evidence beginning with voir dire examination to mitigate the nature and extent of the damages.

Because the object is to bring as many collateral sources into the equation as possible, defense counsel seeing the existence of a subrogation interest may consider a pretrial "buy out" of the subrogee's lien or subrogation interest. Plaintiff has no vested interest in a subrogee's contract rights regarding repayment of a subrogation or lien interest, and, subrogation interests usually being a creature of contract, assignment of such interests is common. The buy out becomes a form of financial "hedging" by defendants or, more probably, their insurers. Employers may jump at the chance to recoup a small percentage of every loss associated with third party negligence rather than wait for subrogation interests that might not materialize.

If defendant makes a pretrial purchase of the subrogee's interest and plaintiff prevails at trial, is defendant then able to subtract the subrogated interest from the award by treating it as a collateral source? Plaintiff might respond that defendant has no standing to introduce evidence of the subrogated amount unless the defendant formally waives enforcement of the subrogation lien. These waters are all uncharted, and the record is silent on legislative intent.

Some practical limitations on hedging exist. If the defense is lack of liability or causation, then hedging is a waste of defense resources. Hedging may be attractive only in medium size cases where damages are not limited by other statutes and the plaintiff is only slightly at fault. The $150,000 threshold precludes hedging smaller cases. The larger the subrogation interest purchased by defendant and the greater the possibility of a substantial pain and suffering verdict, the more plaintiff's K.S.A. 1988 Supp. 60-3805 protections come into play.

If the defense is lack of liability or causation, then hedging is a waste of defense resources.

Assuming statutory limits on recovery of noneconomic loss withstand analysis by the Kansas Supreme Court, where there are catastrophic injuries and the jury awards noneconomic damages in excess of statutory amounts, K.S.A. 1988 Supp. 60-3805(a) (4) would preclude larger hedged amounts from being offset. Hedging too big a piece of pie means the plaintiff may get to keep most of it anyway, yet with additional defense costs.[77]

76. Corporate counsel take heed! Employers swearing under oath as to the disciplinary status of an employee at the time of the deposition or trial may be impeached by such statements in later unrelated employment law proceedings.

77. The contrary is also true. If the Kansas Supreme Court extends the rationale of Kansas Malpractice Victims Coalition (KMVC) v. Bell, 243 Kan. 333, 757 P.2d 251, 257 (1988) to 1988 legislation limiting noneconomic losses in other lawsuits, it will increase the likelihood defense hedging could significantly reduce defendant's exposure. In medical malpractice actions where the plaintiff has little or no comparative negligence, buying out a $200,000 workers' compensation subrogation claim for ten cents on the dollar allows defendant to introduce $200,000 of collateral sources into evidence. If the jury returns a verdict for the defense, the defense costs are $20,000 higher. If it finds for the plaintiff but indicates $200,000 in collateral benefits were received, less costs, defendant's exposure is potentially reduced by $180,000 — the $200,000 in benefits not paid in the verdict minus the cost of hedging.

11-10

F. Plaintiff's Strategies

A tactical reason behind allowing juries to learn of plaintiff's collateral source benefits is to reduce the sympathy factor.[78] That might facilitate a defense verdict, or perhaps affect noneconomic damages awarded. To the extent these are valid considerations, plaintiff's counsel wants to keep collateral source evidence away from the jury while maximizing recovery. Turning otherwise admissible benefits into benefits with a subrogation interest is one way to create inadmissible evidence.

One method is a voluntary bilateral subrogation contract between the claimant and the provider of the benefits.[79] All parties are represented by counsel, so overreaching or adhesion does not appear to be a problem. The contract might work better than a unilateral subrogation right, since counsel can negotiate contingencies that trigger subrogation reimbursement similar to those in K.S.A. 1988 Supp. 60-3805(a). Timing of the contract is important because pretrial discovery and negotiations with defendant may produce a settlement without need of the bilateral subrogation agreement.

Turning otherwise admissible benefits into benefits with a subrogation interest is one way to create inadmissible evidence.

There are pitfalls to these bilateral subrogation contracts. Such contracts are not advisable in cases where the jury may assess a significant portion of negligence to the plaintiff. It is not fiscally prudent to contract to give away additional portions of the damages if the plaintiff may have to absorb part of the liability because of comparative fault. Certainly in creating the bilateral subrogation contract, plaintiff can agree to make various levels of subrogation available to the subrogee depending on the jury's total award, the jury's assignment of negligence to the plaintiff, or a combination thereof.

If evidence of future collateral source benefits is allowed, defendant apparently has the burden of showing the present value of such benefits if the future economic loss is stated in terms of present value. This is an abnormal process especially when defendant has disclaimed liability and does not want to discuss damages except through cross examination of plaintiff's experts.

G. Request for Admission

Another way to avoid presenting collateral source evidence to the jury is to use a Request for Admission. If the claimant's benefits are fairly certain and claimant wants simply to offer five or ten years worth of paid premiums as the offsetting costs of the collateral source benefits, claimant can submit to defendant a Request for Admission.[80]

If defendant agrees to the figures requested to be admitted, then claimant can argue that such evidence need not go to the jury because none of the facts are in dispute. To allow a jury to hear undisputed collateral source evidence makes no more sense than allowing juries to hear evidence of negligence when negligence is stipulated and the only trial issue is damages. If the request is denied without a good reason and the jury returns the same numbers plaintiff requested be admitted, plaintiff can seek additional attorney fees and costs for having to prove that which should have been stipulated.[81]

H. Instructions

The new law changes the law of damages in Kansas, even though the award itself is not directly affected by a jury decision. The parties may seek instructions on this new law.

Instructions should make clear that the jury must not reduce damages because of collateral source benefits and that the court will make any reduction that is appropriate. The instructions should also note the collateral benefits introduced as evidence are the only ones that may be used to reduce the judgment and the jury should not concern itself with other payments plaintiff might have received or may receive in the future.

In some cases, it might be appropriate to explain that other payments plaintiff received will not be used to reduce the judgment because plaintiff is legally obligated to repay the provider from the judgment. The substance of the instruction would be similar to the P.I.K. instruction allowing the jury to know the consequence of a 50 percent determination of comparative negligence.[82]

Conclusion

K.S.A. Supp. 60-3801 *et seq.* add a major new dimension to personal injury cases. It may prove to be highly litigious reform, requiring many supreme court decisions to define its parameters. While the legislation appears to meet constitutional concerns in **Farley** that the rule change apply to all tort cases,[83] other uncertainties as well as added litigation costs arise. In comparison to previous legislative enactments on the subject, the new law meshes the collateral source economic theory with existing statutory law in a better comprehensive scheme but, as this article shows, not without questions. The problems raised herein indicate why common law courts left collateral source evidence outside the province of the jury in the first place. ■

It may prove to be highly litigious reform, requiring many supreme court decisions to define its parameters.

78. Ten states limit evidence of collateral sources paid to post-verdict hearings to the trial judge. Juries do not consider the evidence. See the statutory citations in footnotes 8 and 70 above for the following state collateral source statutes: Alaska, Colorado, Connecticut, Illinois, Michigan, Minnesota, Montana, Nebraska, New York and Utah.

79. Presumably, insurance regulations do not prohibit domestic health insurers from entering into bilateral contracts with private persons represented by counsel on terms that may be just to all parties. See footnote 45.

80. K.S.A. 60-236, or Federal Rule 36.

81. K.S.A. 60-237(c) or Federal Rule 37(c).

82. See Nail v. Doctor's Blg., 238 Kan. 65, 708 P.2d 186 (1985).

83. Curiously the statute is available for use to diminish damages by intentional, reckless or wanton tort-feasors when no other part of Kansas law benefits tort-feasors exhibiting more than ordinary negligence.

11-11

Kansas

March 30, 2005
Senator Vratil, Chair
Senate Judiciary Committee
SB 102

Good morning Chairman Vratil and Members of the Senate Judiciary Committee. My name is Ernest Kutzley and I am the Advocacy Director for AARP Kansas. AARP Kansas represents the views of more than 350,000 AARP members in the state of Kansas. Thank you for this opportunity to express our comments and opposition to SB 102 which would abolish the collateral source rule that protects victims in personal injury cases.

Many Kansans, including many AARP members, purchase insurance to protect themselves and their families from unforeseen tragedies. AARP believes that SB 102 will punish Kansans for being prudent in insuring themselves against potential disasters.

- SB 102 reduces damage awards by the amount of collateral benefits received, this is a violation of public policy that encourages consumers to protect themselves, and has a chilling effect on their willingness to do so if they will ultimately lose the benefit of years of premiums paid to guarantee that benefit.

- Guilty defendants who would otherwise have to pay full damages are rewarded by any collateral damages paid to the plaintiff, and it is the plaintiffs who are punished for their prudence. This is not the role of the judiciary, to reward the guilty and deprive the aggrieved.

- Consumers lose money pursuant to SB 102 if their insurance proceeds are deducted from the award of damages, because their premiums have bought them nothing.

- Consumers who have valid claims may be discouraged from bringing them before the court because of the discretion of the trier of fact to reduce the award by the amount of insurance proceeds forthcoming.

We believe that it is unreasonable to suggest that the trier of fact, judge or jury, once they know of the existence of collateral source benefits, will *not* elect to determine the amount. This is the sole function of admissibility. It is also unconscionable and against public policy that the trier of fact *must* reduce the award by the collateral benefit even if, having considered the position of the parties and the totality of the circumstances, the trier of fact sees an inequity in doing so.

Therefore, we respectfully request that you not support SB 102 and repeal of the Kansas Collateral Source Rule.

555 S. Kansas Avenue, Suite 201 | Topeka, KS 66603 | 785-232-4070 | 785-232-8259 fax
Marie Smith, President | William D. Novelli, Executive Director and CEO | www.aarp.org

KANSAS COALITION AGAINST SEXUAL AND DOMESTIC VIOLENCE

220 SW 33rd Street, Suite 100 Topeka, Kansas 66611
785-232-9784 • FAX 785-266-1874 • coalition@kcsdv.org

To: Senate Judiciary Committee
Date: February 8, 2005
From: Sandy Barnett, Executive Director
Re: SB 102
Oppose

Dear Chairman Vratil and Members of the Senate Judiciary Committee:

The Kansas Coalition Against Sexual and Domestic Violence (KCSDV) is a non-profit organization whose members are the programs serving victims of sexual and domestic violence across the state.

In working with victims of sexual and domestic violence, advocates often focus on the issues of safety for the victim and accountability of the perpetrator. Whether the violence is sexual or domestic in nature, in order to feel whole again, it is important that victims feel there is full accountability for the violence. Full accountability includes holding the perpetrator/wrongdoer responsible for the violence, whether the damages are emotional or financial in nature.

The current collateral source doctrine in Kansas supports the victim by placing the full responsibility for full compensation for injuries on the person doing the harm. Any rule to the contrary would serve to negate Kansas's strong public policy of holding the perpetrator responsible. While this public policy is often apparent when one looks at the criminal side of this issue, it is equally important not to forget the civil side of this public policy equation. Full responsibility and full accountability is about bringing an end to sexual and domestic violence.

KCSDV urges this committee to retain current law in this area. We support full responsibility for the wrongdoings of the perpetrator and oppose SB 102 for these reasons.

Kansas Coalition Against Sexual & Domestic Violence
782-232-9784

Senate Judiciary
3-30-05
Attachment 13

Kansas AFL-CIO

2131 S.W. 36th St. Topeka, KS 66611 785/267-0100 Fax 785/267-2775

President
Ron Eldridge

Executive Secretary Treasurer
Jim DeHoff

Executive Vice President
Wil Leiker

Executive Board
Mike Brink
Kurt Chaffee
Jim Clapper
Robin Cook
Barbara Fuller
Rick Greeno
David Han
Jerry Helmick
Hoyt Hillman
Larry Horseman
Jim Keele
Lloyd Lavin
Jerry Lewis
Shawn Lietz
Pam Pearson
Dave Peterson
Emil Ramirez
Steve Rooney
Debbie Snow
Richard Taylor
Wilma Ventura
Betty Vines
Dan Woodard

WRITTEN OPPOSITION ON SB 102
To the Senate Judiciary Committee

By the Kansas AFL-CIO
March 30, 2005

For decades the Kansas AFL-CIO has protected the rights of the working men and women of Kansas. Whether the issue is access to health care; protection from toxic substances; or product liability, the AFL-CIO works hard to make the workplace safe and to improve the quality of life for Kansas workers.

The collateral source rule of law is a fundamental doctrine of civil rights which has been in place in our state for more than 100 years. It is an important rule of law in the protection of workers and consumers. The collateral source rule is now at risk of being abolished as it applies to product liability and other civil tort cases. This is special interest legislation. It is bad for workers and consumers. A small special interest group wants to strip away the rights of individual Kansans' to hold wrongdoers accountable. Without the collateral source rule, the burden of compensation for injuries is unfairly shifted to the injured worker or consumer themselves.

The civil rights of Kansas workers and other consumers must not be compromised. The proposed change in law would benefit all the wrong people and would send the wrong signal to those who inflict harm on Kansas workers and consumers. Wrongdoers must be help accountable for their wrongdoing.

The AFL-CIO of Kansas opposes any attempt to repeal the collateral source rule.

JOHN VRATIL
SENATOR, ELEVENTH DISTRICT
JOHNSON COUNTY
LEGISLATIVE HOTLINE
1-800-432-3924
www.johnvratil.com

State of Kansas

Vice President
Kansas Senate

COMMITTEE ASSIGNMENTS
CHAIR: JUDICIARY
VICE CHAIR: EDUCATION
MEMBER: FEDERAL AND STATE AFFAIRS
ORGANIZATION, CALENDAR AND RULES
SENTENCING COMMISSION
INTERSTATE COOPERATION

Friday, March 25, 2005

SENATE JUDICIARY COMMITTEE MEMBERS:

Attached is information for the Confirmation Hearing on Ms. Paula S. Salazar for reappointment to the Crime Victims Compensation Board.

Please take time to review the attached background information on the nominee in preparation for the hearing scheduled for Wednesday, March 30, 2005, at 8:00 A.M. in Room 519-S.

PLEASE BRING THE ATTACHED INFORMATION WITH YOU TO THE HEARING, AS THERE MAY BE QUESTIONS REGARDING THE FURNISHED INFORMATION.

Nancy Lister
Senate Judiciary Committee Secretary

HOME
9534 LEE BLVD.
LEAWOOD, KS 66206
(913) 341-7559
jvratil@lathropgage.com

DISTRICT OFFICE
10851 MASTIN BLVD.
SUITE 1000
OVERLAND PARK, KS 66210-2007
(913) 451-5100
FAX (913) 451-0875

STATE OFFICE
STAT
TO
vr

Senate Judiciary
3-30-05
Attachment 15

Capitol Office
State Capitol, Room 356-E
Topeka, Kansas 66612-1504
(785) 296-2497

15th District Office
304 North Sixth Street
P.O. Box 747
Independence, Kansas 67301-0747
(620) 331-1800

Senator Derek Schmidt
Majority Leader

Committee Assignments
Chair: Confirmation Oversight
Vice-Chair: Assessment & Taxation
Organization Calendar & Rules
Member: Judiciary
Agriculture
Legislative Post Audit

Message Only (800) 432-3924
Fax: (785) 296-6718
e-mail: schmidt@senate.state.ks.us

March 25, 2005

TO: Nancy Lister, Committee Secretary

Attached is the paperwork for the candidate Paula S. Salazar as a member of Crime Victims Compensation Board who was assigned to your committee on March 25, 2005 for the confirmation process. Please schedule a hearing and vote on this reappointment prior to the end of veto session. (If there is a scheduling problem, please contact me.)

Please e-mail me judithg@senate.state.ks.us or call me 6-2497 on the day the committee renders its decision on the appointee.

Thanks for your cooperation. If you have any questions, call me at 6-2497.

Judy Glasgow
Secretary, Confirmations Oversight Committee

State of Kansas
Office of the Attorney General
CRIME VICTIMS COMPENSATION BOARD
120 S.W. 10th Avenue, 2nd Floor
Topeka, Kansas 66612-1597
PHONE: (785) 296-2359 FAX: (785) 296-0652

PHILL KLINE
ATTORNEY GENERAL

RITA L. NOLL, CHAIR
LOUIS JOHNSON
PAULA S. SALAZAR

March 22, 2005

Pat Saville
Secretary of the Senate
State Capitol
3rd Floor
Topeka, KS 66612

Dear Ms. Saville:

By this letter I am hereby submitting for confirmation by the Senate the re-appointment of Paula Suzanne Salazar to the Crime Victims Compensation Board, pursuant to K.S.A. 74-7303, such term to expire March 15, 2009. Ms. Salazar was originally appointed to the Board in 1997, and was reappointed in 2001. She has continued to faithfully serve the State of Kansas as a member of this board. Thank you for your consideration of this request.

Please contact Frank Henderson, Jr., Executive Director of the Board, should you have any questions. He can be reached at 296-2359.

Very Truly Yours,

PHILL KLINE
ATTORNEY GENERAL

Senate Confirmation Information Summary

Prepared and Submitted to the Senate Confirmation Oversight Committee

Appointee: **Paula S. Salazar**

Appointment date: **3/15/05**

Position: **Member, Crime Victims Compensation Board**

Term of **4** years. Term Expires: **3/15/09**

Statutory Authority: K.S.A. **74-7303**

➢ Statutory geographic representation requirement/restriction of entire entity (indicate any that apply): **N/A**

- ☐ Congressional District ______
- ☐ County ______ Size Requirements (if any) ______
- ☐ Other, specify ______

➢ Statutory political party affiliation requirement/restriction of entire entity

No more than **2** members from the same political party.

➢ Statutory industry/occupation requirements/restrictions of entire entity (specify):

Chariperson must be regularly admitted to practice law in Kansas.

Composition:

Member Name	County of Residence	Cong. Dist.	Party	Occupation/ Industry	Term Expires
Paula S. Salazar	Sedgwick	4th	I	Licensed Psychologist	3/15/05
Louis J. Johnson	Wyandotte	3rd	I	Law Enforcement	3/15/06
Rita L. Noll	Morris	2nd	R	Attorney	3/15/08
Appointee (named above)					

- Incumbent who will be succeeded by this appointee

Prepared by: Frank S Henderson, Jr

Title: Executive Director, CVCB

15-4

APPOINTMENTS QUESTIONNAIRE

Office of Attorney Phill Kline

Please complete and return this form to the Attorney General's Office.

Attach additional sheets if necessary.

Name: PAULA S SALAZAR

Home Address: 3334 N CHARLES

City, State, Zip: WICHITA KS 67204

Business Address:

City, State, Zip:

Home Phone: (316) 831 0240 Business Phone:

Party Affiliation: IND Place of Birth: LA JUNTA, CO

KBI Check: ______NA _____In Process _____Complete

Appointed as:

Appointment Date: Expiration Date:

Term Length: Statutory Authority:

Salary: Predecessor:

Statutory Requirements:

BACKGROUND

1. List high school, college, or other education institutions attended along with the date attended and degree conferred.

Education Institution	*Dates*	*Degree*
LA JUNTA HIGH GRAD '83 / OTERO JR COLLEGE		GRAD 85
KANSAS NEWMAN COLLEGE	GRAD 89	
WICHITA ST. UNIVERSITY	GRAD 96	

2. List memberships in business, trade and professional organizations for the past 10 years.

Organization	*Dates*
HISPANIC COALITION	'98 PRESENT

3. List any civic activities you have been involved in during the past five years.

Organization or Group	*Dates*
VOLUNTEER @ SUNRISE CHRISTIAN ACADEMY	2005

15-5

4. List any positions held, including positions you have been elected or appointed to, with a foreign, federal, state or local government entity along with the dates of service.

Position	Government Entity	Dates

OTHER THEN CVCB

5. List any lobbying activities you have been involved in during the past five years. This includes activities as a registered lobbyist activities for which you were compensated.

Group	Compensation (yes/no)	Dates
NONE		

6. List experience or interest which qualify you for the position to which you have been appointed.

LICENSURE AS THERAPIST. SINCE 96.

7. Summarize business and professional experience.

WORKED c̄ CHILDREN/YOUTH SINCE 1990/AS MENTAL HEALTH PROVIDER (SINCE 1993). EXPERIENCE c̄ RESIDENTIAL (LEVEL VI) FACILITIES IN KS.

8. List any service in the United States military. Include dates of service, branch, date and type of discharge.

Branch	Discharge	Dates

9. Provide details of any conviction for violation of any federal, state, county or municipal law, regulation or ordinance (excluding traffic violations for which a fine of $100 or less was imposed).

NONE

10. List and provide details of any interests that may present a conflict of interest for this position.

NONE

I, PAULA S SALAZAR, declare that this questionnaire is true, correct and complete to the best of my knowledge.

[signature] 3/11/05

Signature Date

From: Nancy Lister
To: judithg@senate.state.ks.us
Subject: Confirmation on reappointment of Paula S. Salazar

Judy-

The Senate Judiciary Committee met this morning, March 30, 2005, and voted to favorably recommend the reappointment of Paula S. Salazar for another term serving as a member of the Crime Victims Compensation Board.

Please let me know if you need any other information.

Nancy Lister
Sen.Jud. Com. Secty.
6-6817