

MINUTES

SPECIAL COMMITTEE ON JUDICIARY

September 15-16, 2005
Room 123-S—Statehouse

Members Present

Senator John Vratil, Chairman
Representative Mike O'Neal, Vice Chairman
Senator Greta Goodwin
Senator Phil Journey
Senator Carolyn McGinn
Senator Kay O'Connor
Representative Paul Davis
Representative John Grange
Representative Mitch Holmes
Representative Patricia Kilpatrick
Representative Ann Mah
Representative Jason Watkins

Staff Present

Jerry Ann Donaldson, Kansas Legislative Research Department
Mike Heim, Kansas Legislative Research Department
Helen Pedigo, Revisor of Statute Office
Jill Wolters, Revisor of Statutes Office

Conferees

Anne Kindling, Kansas Association of Defense Counsel
Lew Ebert, Kansas Chamber of Commerce
Charles "Chip" Wheelen, Kansas Association of Osteopathic Medicine
Jim Clark, Kansas Bar Association
Bryan Smith, Kansas Trial Lawyers Association
Representative Lance Kinzer
Richard Levy, University of Kansas Law Professor
Rich Hayse, Kansas Bar Association
Jerry Palmer, Kansas Trial Lawyers Association
Donna Whiteman, Kansas Association of School Boards
Marlee Carpenter, Kansas Chamber of Commerce
Margaret Farley, Kansas Trial Lawyers Association
Jim Clark, Kansas Bar Association

**Thursday, September 15
Morning Session**

Topic No. 2—Collateral Source

Anne Kindling, Kansas Association of Defense Counsel, said justice would be served by the enactment of legislation allowing juries to learn of collateral source benefits in personal injury actions.

She said that the goal of damages in a lawsuit should be to compensate the plaintiff for the loss he or she suffered due to the defendant's negligence, not to compensate the plaintiff's attorney. The key is how to define the loss, the standard should not be the value of what the injury might be worth but the expenses the injured party incurred to repair the injured person's loss. When insurance covers some or all of the loss, this amount should be excluded from the amount awarded (Attachment 1).

Ms. Kindling said collateral source benefits would not include amounts paid by a third party who retains a lien or right of subrogation. She said that plaintiffs with insurance would have less monetary losses than plaintiffs without insurance. She said juries should not be told of the defendant's insurance because the goal of a damage award was to compensate the plaintiff for his or her loss, not to punish the defendant.

In both bills introduced into the 2005 Legislature, the jury would learn of collateral source benefits and the cost of obtaining those benefits. The jury then would determine what the net benefits were to the plaintiff.

Lew Ebert, Kansas Chamber of Commerce, said that Kansas should be concerned with the economic impact of lawsuits and how Kansas compares to other states. In the U.S. Chamber of Commerce Harris Survey, Kansas dropped from 9th to 16th last year in terms of favorable environment for business, not as result of anything that had happened in Kansas, but because of the other states' aggressive, pro-active approaches to their legal environment, many of whom have passed sweeping tort reform measures. He said that Kansas needs to be competitive so businesses will want to come to this state. The 2003 Update of U.S. Tort Costs estimates that tort costs are equivalent to a 5 percent tax on wages. The tort system cost was \$233 billion in 2002. He said that this translates to a "lawsuit tax" of \$809 per person (Attachment 2).

Chairman Vratil explained that subrogation is where an insurance company has a lien against a judgement for reimbursement of their out-of-pocket expenses. While KSA 60-3801(d) does not impede any claim for subrogation in Kansas; health insurance is not subject to subrogation because of a Kansas Department of Insurance regulation.

Charles "Chip" Wheelen, Kansas Association of Osteopathic Medicine, provided a historical review of the issue of collateral source. In the 1970s, the State of Kansas was confronted with a situation referred to as a "malpractice crisis." He said that the real problem was limited access to medical care due to the inability of physicians to purchase affordable medical malpractice insurance coverage.

In 1976, the Legislature enacted several laws which addressed the issue, including the Health Care Provider Insurance Availability Act, which created the Health Care Stabilization Fund. The Legislature also passed a limited number of tort reforms, including a collateral source rule, which was later ruled unconstitutional by the Kansas Supreme Court.

By the mid 1980s, the insurance environment was again a major problem. Insurance premiums were excessive, the number of physicians practicing in Kansas was declining, and there was limited access to medical care. The 1985 and 1986 Legislatures again responded by enacting

several tort reforms. Other professions and businesses also were experiencing large liability insurance costs.

In 1988, the Legislature enacted a package of tort reform measures that applied generally to all civil actions in which a plaintiff seeks damages for personal injury or death. It also enacted Article 38 of Chapter 60, *Kansas Statutes Annotated*, the collateral source rule. The rule required that the court reduce the amount of any judgement by the net amount of collateral source benefits received, but only in cases in which the plaintiff was seeking damages in excess of \$150,000. This threshold became the basis for a 1993 Kansas Supreme Court decision declaring the act unconstitutional. HB 2150 introduced in 2005 would delete the \$150,000 threshold and, hopefully, address the courts concern (Attachment 3).

Mr. Wheelen agreed that subrogation was an issue that needed to be addressed, but said that it was secondary to the need to enact a collateral source rule.

Jerry Slaughter, Kansas Medical Society; Kurt Scott, Kansas Medical Mutual Insurance Company; a representative of Kansas County Associations Multiline Pool; and Larry Magill, Kansas Association of Insurance Agents, provided written testimony in support of adopting a collateral source rule (Attachments 4-7).

Jim Clark, Kansas Bar Association, said the Bar Association opposed changes to the collateral source rule unless proponents could demonstrate a clear and convincing public need for such a change and could demonstrate a clearly defined public benefit (Attachment 8).

Bryan Smith, Kansas Trial Lawyers Association (KTLA), said there was not any clear problem that would be addressed by reenacting a collateral source rule. He said the real issue was a fairness issue. He questioned how many of the 36,000 Kansans who have been injured, have filed lawsuits, and have health insurance coverage would be affected by a collateral source law. He said KTLA believed in the jury system and fully trusted juries to make decisions. He said that allowing a tortfeasor to benefit from the fact that the plaintiff has insurance coverage was unfair (Attachment 9).

Sandy Barnett, Kansas Coalition Against Sexual and Domestic Violence; Sandi Raines, Mothers Against Drunk Driving; and Ernest Kutzley, American Association of Retired Persons, also supplied written testimony in opposition to any change in collateral source rule (Attachments 10-12).

Afternoon Session

Topic No. 13—Separation of Powers

Representative Lance Kinzer explained that SCR 1603 and HCR 5003, were almost identical concurrent resolutions. SCR 1603 would amend Article 2, Section 4, of the *Kansas Constitution* by adding language which states that the Executive and Judicial Branches have no authority to direct the Legislative Branch to make any appropriation of money. He said that the recent *Montoy* decision involving school finance represented a violation of separation of powers that exists between the legislative and judicial branches of government. He said that the Legislature was the only branch allowed to spend the state's money because legislators are accountable directly to the people. He said that the proposed concurrent resolutions would restore the proper balance to judiciary and the Legislature.

Representative Kinzer said two additional consequences were possible, if the court continued to exercise legislative power:

- The Court could rule that Article 6, Section 6, of the *Kansas Constitution* applied to Regent's institutions and require the Legislature to fund universities as the court directs; and
- Article 7, Section 1, which states "institutions for the benefit of mentally or physically incapacitated, and such other benevolent institutions as the public good may require, shall be fostered and supported by law," could be interpreted by the court to mandate that the state support the ever growing programs for disabled persons in a dollar amount set by the court.

Representative Kinzer stated that school finance litigation has occurred in many states and courts have proven by their actions that many remedies are available without directing a state legislature to appropriate a specific amount of money. He said the proposed constitutional amendment would change nothing of the law which is rightly understood. It merely would restore the proper balance between the Legislative and Judicial branches (Attachment 13).

Richard Levy, University of Kansas Law Professor, said that SCR 1603 contained three distinct components:

- The "Executive and Judicial branches shall have no authority to direct the Legislature to make any appropriation of money." He said that this provision would not prevent the Kansas Supreme Court from declaring a specific level of funding or from declaring a funding formula for schools unconstitutional. The language would still allow the court to close schools if the Legislature did not appropriate a specific dollar amount.
- The Executive and Judicial branches shall have no authority to "redirect the expenditure of funds appropriated by law." The State of Kansas can be held liable for monetary damages in tort or contract suits or subject to judicial orders that require expenditure of funds. Some state agencies, when found liable to pay such damages awards, pay the award out of the agency's funds. There would be some concern as to whether this kind of payment would constitute redirecting an appropriation in violation of SCR 1603.
- The proposed amendment also provides that "any existing order directing the legislative branch to make an appropriation of money shall be unenforceable." This provision would not apply to those funds already appropriated to satisfy the Kansas Supreme Court for this academic year. It is possible that the Court could declare such an appropriation statute unconstitutional (Attachment 14).

He said that it was a fair argument that there was no judicially enforceable right under Article 6, that the Court placed too much reliance on the Augenblick & Meyers Study, and, that it was a mistake not to allow the Legislature to appear before the court on the issue.

Mr. Levy suggested the Legislature consider passing a concurrent resolution which would state clearly the separation of powers disagreement it has with the Court. It could state, for example, "when the Legislature appropriated the money it was not acknowledging that the court knowingly had the authority to order an appropriation of money."

He strongly advised the Legislature to develop a report to accompany any school finance bill it passes during the next legislative session. The report should identify reasons why the Legislature is accepting or rejecting a study, and how it believes it is responding to the court's criteria. This

report could become an official record of the Legislature and if the court should choose again not to let the Legislature appear, they would have the report because it would be part of the official legislative record.

Rich Hayse, Kansas Bar Association, opposed both HCR 5003 and SCR 1603 because they would restrict judicial power in deciding cases according to the facts, the law, and the constitutional principles applicable to those facts ([Attachment 15](#)).

Jerry Palmer, KTLA, urged the Legislature not to amend the *Kansas Constitution* at this point and wait until the school finance case is over before doing anything ([Attachment 16](#)). He said the *Montoy* decision had sparked a constitutional crisis.

Donna Whiteman, Kansas Association of School Boards, stated she was opposed to both of the proposed concurrent resolutions, due to the following:

- Changes to the *Kansas Constitution* should be carefully considered to make sure they do not create more problems than the changes were meant to address.
- The proposed language could create mischievous opportunities for other state agencies when dealing with their budgets.
- The proposed language has the potential to upset the separation of powers. It may prevent the Legislature from being challenged by citizens for its actions.
- If the Kansas Court cannot provide a remedy for challenges for legislative acts, it may force plaintiffs into federal court ([Attachment 17](#)).

Professor Jeffrey Jackson, Washburn University School of Law, provided written testimony addressing consequences of HCR 5003 and SCR 1603 ([Attachment 18](#)).

Friday, September 16 Morning Session

Topic No. 12—Attorney Fees and Settlement Offers (SB 420)

Marlee Carpenter, Kansas Chamber of Commerce, supported the idea of attorney fees shifting if a party fails to accept an offer, because this would encourage settlements and provide for faster justice for many Kansans. She said that Michigan, Florida, and Georgia have enacted cost shifting statutes that include attorney fees ([Attachment 19](#)).

Margaret Farley, KTLA, appeared in opposition to any proposal that would favor a “loser pays” system requiring the losing party in a lawsuit to pay the prevailing party’s attorney fees and costs. She said this idea would be a deterrent to anyone who was unable to risk significant financial loss. It would prevent the average person from accessing the courts ([Attachment 20](#)).

Representative O’Neal said that the proposed legislation would encourage settlement in those cases where a settlement should happen and would only penalize those parties where there was an error in judgement regarding the valuation of the case. He said that there are clients who could pay if they lose and those who could not. He favors the idea of encouraging settlements.

Jim Clark, Kansas Bar Association, said the proposal was an effort to depart from the current American system (Attachment 21).

The hearing on Topic No. 12 was closed.

Senator O'Connor made the motion to approve minutes from the August 24 and 25 meeting with corrections. Representative Davis seconded the motion. Representative O'Neal requested rewording, on page 7, Topic No. 9, "the state should spend more money on drug education" so the minutes did not imply the state would be supporting drug usage. The motion carried.

The Committee then reviewed final reports and bills on the following topics.

Topic Number 10—Uniform Real Property Electronic Recording Act (URPERA). Staff reviewed the Committee report which recommended that URPERA be enacted by the State of Kansas and that an 11 member commission be appointed to promulgate standards with the implementation of the law.

Chairman O'Neal made the motion to adopt the Committee report. Representative Davis seconded the motion. The motion carried.

Staff then reviewed the bill draft on this topic. *A motion was made by Chairman O'Neal to approve and request the introduction of the proposed bill in the Senate. Representative Davis seconded the motion. The motion carried.*

Topic Number 9—Unlawful Drug Use. Staff reviewed the Committee report which recommends that no legislation be passed which would expand the crimes of unlawful possession of controlled substances to include ingestion or injection of drugs. There may be unintended consequences to such legislation. *Senator Journey made the motion to approve the draft report. Representative Davis seconded the motion. The motion carried.*

Topic No. 8—Residential Arrangements for Children (SB 61). Staff reviewed the Committee report and bill draft. The bill would amend KSA 60-1610 to specify that a parenting plan shall be adopted based upon the best interest of a child. Other types of residency arrangements listed in current law would be deleted, while non-parental residency would still be available to the courts. *Representative Davis made the motion to adopt and approve the draft report. Representative O'Neal seconded the motion. The motion carried.* Representative Watkins asked to be recorded as voting no.

Senator Journey made the motion to approve and authorize introduction of the proposed bill in the House. Representative Grange seconded the motion. The motion carried. Representative Watkins asked to be recorded as voting no.

Topic No. 2—Collateral Source

The Committee discussed whether to include the issue of subrogation in the Committee report as an alternative to collateral source. The consensus was that these are two separate issues and needed to be dealt with as such. It was noted that the Committee held hearings on the issue of subrogation and had not heard from the Kansas Insurance Department on the subject. The charge of the Committee was to make recommendations on the issue of collateral source, not subrogation.

Chairman Vratil suggested that the Committee report reflect that while subrogation was not the charge of the Committee, the Committee believes that the issue of subrogation and health insurance benefits warrants further study by the Legislature.

The report should note the Committee was somewhat divided on the issue of collateral source.

Representative O'Neal made the motion to have a bill be introduced that would be consistent with the Judiciary Conference Committee report from the 2005 Legislative Session, on collateral source, with a three-year sunset provision and have the bill introduced in the Senate. The motion was seconded by Representative Watkins. The motion carried.

Topic No. 13—Separation of Powers

Several Committee members said that the *Montoy* case was the tip of the iceberg in regard to the judiciary requiring the Legislature to appropriate specific amounts of money. They said that if the issue of separation of powers was not addressed, there would be other cases where the Court orders the Legislature to appropriate moneys.

Chairman Vratil directed staff to draft a report that reflects the fact that the Committee received extensive and excellent testimony from both sides of the issue. The Committee acknowledged their concerns about an impending constitutional confrontation and a need for legislation to resolve that confrontation. The report also should reflect that the Legislature controls the purse strings. In dealing with limited funds, the Legislature needs to continue to direct moneys to budgets and should not be threatened by the courts. The Committee specifically recommended that various committees of the Legislature continue to consider constitutional amendments to address these concerns.

Topic No. 12—Attorney Fees and Settlement Offers (SB 420)

Chairman Vratil suggested that the Committee consider Georgia's statute where if a verdict is 10 percent more or less than the settlement, the attorney fees would be paid by the loser.

Senator Journey and Representative Mah both indicated that they believed there was no need for a change in the law. Representative Watkins favored a change. Representative Holmes said the idea of a sliding scale had merit. Representative O'Neal said that perhaps a bill could be drafted where the person rejecting a reasonable settlement offer would pay more of the court costs. Representative Davis said the topic was important and merited more discussion. He also noted that the American rule that each party pay their own attorney fees was being eroded by statutes. He said a search was conducted of Kansas statutes and revealed 189 instances of attorneys fees shifting to the loser.

Senator Vratil said that it was the consensus of the Committee that no specific recommendation on this topic be made. The report should reflect the Committee's concern about frivolous lawsuits and efforts to make the court system more efficient and eliminate backlogs.

Prepared by Cindy O'Neal
Edited by Mike Heim

Approved by Committee on:

October 21, 2005

(date)