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SURVEY OF KANSAS LAW: TORTS

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During the survey period the Kansas appellate courts decided more than one hundred torts cases. Not all of them can be discussed in this survey. Some will be discussed because they relate to major areas of relatively new development, such as comparative fault, products liability, and the Kansas Tort Claims Act. Others involve more limited, but important interpretations in well established areas of tort law. Finally, a few cases will be included simply because I found them to be interesting.

I. NEGLIGENCE

A. Standard of Care

1. Negligent entrustment

The doctrine of negligent entrustment imposes liability in negligence on an actor who creates an unreasonable risk of harm by supplying a chattel to another known by the actor to be incompetent by reason of youth, inexperience or otherwise to use the chattel safely.1 In *McCarty v. Muir* defendant father co-signed a loan to enable his seventeen-year-old emancipated son to buy a car.

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Five persons, including the son, were killed and another seriously injured in a two-car collision. The son was driving while intoxicated, and the car crossed the center line of a highway into the path of an oncoming vehicle. In the six months prior to the accident the son had been involved in four other vehicular accidents and had received three traffic citations for moving violations. Evidence indicated that the parents had reason to know of the son's propensity to drive while intoxicated. The father took no steps to prevent his son's further use of the car prior to the accident. Although reversing on other grounds, the Kansas Supreme Court held that competent evidence supported the jury verdict for plaintiffs on the theory of negligent entrustment.

The holding is essentially sound. Defendant's knowledge of his son's "incompetence" to drive was based on his knowledge of the son's prior acts of careless and reckless driving. The obvious problem in basing incompetence on prior acts is that careless or reckless driving in the past does not necessarily mean that future driving will also be careless or reckless. On the one hand, an actor exercising reasonable care would not entrust car to a person who was known to drive carelessly or recklessly with great frequency even though that person might drive carefully on occasion. Given the extraordinary number of deaths and injuries on the highway, the policy of accident avoidance supports the use of prior acts to prove "incompetence" in those cases. On the other hand, even the best drivers are probably guilty of occasional acts of careless driving, and the use of very limited and minor prior acts of careless driving to show "incompetence" could be viewed as an unreasonable interference with society's strong interest in mobility and transportation. In *McCart* the court defined negligent entrustment as "knowingly entrusting . . . an automobile to an incompetent or habitually careless driver" and defined incompetent driver as "one, who by reason of age, experience, physical or mental condition, or known habits of recklessness, is incapable of operating a vehicle with ordinary care."

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5 The supreme court held that the trial court erred in not submitting the issue of the father's and son's separate percentages of comparative fault to the jury. *Id.* at 621-24, 641 P.2d at 388-90. The supreme court also held that the district court failed to provide the jury with a sufficiently specific verdict form that did not require the jury to state separately the pecuniary and nonpecuniary loss for each wrongful death. See infra notes 350-55 and accompanying text.

4 230 Kan. at 621, 641 P.2d at 388.

5 Kansas first recognized prior acts as a proper basis for negligent entrustment in *Priestly v. Skourup*, 142 Kan. 127, 45 P.2d 852 (1935). *McCart*, however, is the first Kansas case in which the court enumerated a specific set of prior acts sufficient to support liability.

6 "Incompetence" to drive safely seems more understandable when a vehicle is entrusted to an intoxicated person or to a very young child. See, e.g., *Eurich v. Alkire*, 224 Kan. 236, 579 P.2d 1207 (1978); *Greenwood v. Gardner*, 189 Kan. 68, 366 P.2d 780 (1961). The problem, however, is illusory because the test is not truly whether the person is incompetent in the sense of being incapable of safe driving. Rather the issue in all negligent entrustment cases, including those based on prior careless or reckless acts, is whether operation of the vehicle by the person to whom it is entrusted will create a substantially greater risk of accident than exists when the vehicle is driven by a reasonably careful driver.


8 230 Kan. at 620, 641 P.2d at 387 (emphasis added).

9 *Id.* (emphasis added).
court’s emphasis on “habitual” careless or reckless driving\textsuperscript{10} seems to strike a reasonable and logical, albeit an unavoidably imprecise, balance between the competing policy considerations in the negligent entrustment cases based on knowledge of prior acts.

In Kirk v. Miller\textsuperscript{11} defendants’ husband and wife sold their old pickup truck to Miller for $400, part of which Miller was to pay in $50 installments. They executed an assignment of title to Miller, but because they finalized the sale on a Sunday, the assignment was not notarized at that time. Miller promised to have the assignment notarized the next day, but failed to do so. One month later Miller ran a stop sign and collided with plaintiffs’ car. Defendants’ liability insurance had lapsed six months prior to the sale, and Miller had not purchased liability insurance. At trial the jury found for plaintiffs on the theory that defendants had negligently entrusted their truck to Miller.\textsuperscript{12} The Kansas Court of Appeals reversed, holding inter alia that (1) there was no evidence that defendants knew or should have known that Miller was an incompetent driver, and (2) there was no evidence that defendants knew or should have known that Miller would not obtain liability insurance.\textsuperscript{13}

Although the result seems correct, two points merit comment. First, the court defined a defendant’s duty as whether he “knew or should have known” of the driver’s incompetence.\textsuperscript{14} The phrase “should know” describes a broad duty that includes reasonable care to discover whether or not the driver is incompetent.\textsuperscript{15} Prior Kansas cases have consistently used the standard “knows . . . or has reasonable cause to know.”\textsuperscript{16} Although the courts have never interpreted that specific language, it is essentially similar to the phrase “knows or has reason to know” used in the current Restatement definition of negligent entrustment.\textsuperscript{17} The phrase “reason to know” describes a narrow duty depen-

\textsuperscript{10} In the cases the supreme court alternates somewhat haphazardly between the phrases “habitually careless” and “habitually reckless.” No particular importance should attach to the different phrases. The focus should remain on the existence of a substantially increased risk of harm in a person’s driving habits, not on the specific characterization of those habits as careless or reckless. This increased risk is logically a function of both the dangerousness and the frequency of the driving habit. Thus, one who tends to drive while intoxicated or at breakneck speeds in populated areas need not do so as often as one who tends to forget to signal his intention to make a turn in order to have his driving habits qualify as presenting a substantially increased risk.

\textsuperscript{12} Id. at 505, 644 P.2d at 488.
\textsuperscript{13} Id. at 508, 644 P.2d at 490.
\textsuperscript{14} Id.
\textsuperscript{15} The phrase “should know” means that “the actor is under a duty to another to use reasonable diligence to ascertain the existence or nonexistence of the fact in question . . . .” Restatement (Second) of Torts § 12 comment a (1965).
\textsuperscript{17} Restatement (Second) of Torts § 390 (1965). The Kansas Supreme Court has relied on an earlier version of this Restatement section. See Priestly v. Skourup, 142 Kan. 127, 130, 45 P.2d 852, 854 (1935). It should be noted, however, that another Restatement section also applies to
dent upon facts actually known by defendant that would cause a reasonable person to infer the existence of the ultimate fact at issue or a high probability of its existence. For example, if defendant actually knows about the driver’s pattern of accidents and traffic citations, as in McCraty v. Muir, then defendant has “reason to know” that the driver is incompetent. If, however, defendant does not know about the accidents and citations, but could reasonably discover those facts, then defendant does not have “reason to know,” but he “should know,” that the driver is incompetent. The difference between these duties raises an important policy question for the Kansas courts, i.e., whether the “should know” standard should be adopted in order to promote greater accident avoidance or whether the “reason to know” standard should be retained in order to avoid unreasonable burdens on owners of automobiles in a highly mobile society.

Second, the holding in Kirk raises the novel question whether entrustment of a vehicle to an uninsured motorist should constitute negligent entrustment. The rationale of the doctrine is that entrustment of a vehicle to an incompetent driver creates an unreasonable risk that the driver will not operate the vehicle safely and thus will cause physical harm to himself or others. An uninsured motorist is not necessarily an incompetent motorist and is no more likely to cause an accident than an insured motorist. In that sense, the doctrine should not apply. Entrusting a vehicle to an uninsured motorist, however, does create an unreasonable risk that if the driver negligently causes an accident, he would be unable to satisfy any judgment rendered against him. Every vehicle in Kansas must have at least minimum liability insurance coverage, and the negligent entrustment and uses the phrase “knows or should know” to describe an actor’s duty. See Restatement (Second) of Torts § 308 (1965).

18 The phrase “reason to know” does not denote a duty to use reasonable diligence to discover the existence or nonexistence of a fact. Rather, the phrase merely means that “the actor has knowledge of facts from which a reasonable man . . . would either infer the existence of the fact in question or would regard its existence as so highly probable that his conduct would be predicated upon the assumption that the fact did exist.” Restatement (Second) of Torts § 12 comment a (1965).


20 Driving is so commonplace an activity in the United States that in the absence of information to the contrary, one would generally assume a normal adult to be competent to drive safely. Mere outward appearances will not necessarily reveal the incompetence of many drivers even though that incompetence could readily be discovered by reasonable investigation. Therefore, a duty to use reasonable diligence to ascertain whether a driver is incompetent would theoretically result in the entrustment of fewer vehicles to incompetent drivers and, in turn, fewer highway accidents.

21 For most people this burden would probably be minimal simply because most car owners lend their cars only to a small class of drivers who the owner knows sufficiently well that little, if any, investigation would be necessary. For commercial lessors of cars this burden would be more substantial because they are leasing to strangers, many of whom reside in distant locations. Yet this burden arguably is not unreasonable in light of the instant access to information possible in the modern computer era.

22 Sections 308 and 390 of the Restatement (Second) of Torts (1965) refer to “an unreasonable risk of harm” and “an unreasonable risk of physical harm.”

23 Kansas law requires every owner of a motor vehicle to have liability insurance covering the vehicle unless exempt or an approved self-insurer. Kan. Stat. Ann. § 40-3104(a) (1981). The liability insurance policy must state limits of liability for personal injury not less than $25,000 per person and $50,000 per accident, and for property damage not less than $10,000 per accident. Id. §
pursue of this requirement is to ensure at least minimum compensation for victims in highway accidents. Accordingly, public policy would support a judicially recognized variation of negligent entrustment in such uninsured motorist cases, although recovery might be limited to the amount of mandatory liability insurance.\textsuperscript{24}

2. \textit{Malpractice}

During the survey period two cases involved the standard of care applicable to nursing homes and the extent to which expert testimony is necessary to prove the existence and breach of that standard. In \textit{Juhnke v. Evangelical Lutheran Good Samaritan Society},\textsuperscript{25} an elderly patient in defendant's nursing home was injured when another patient intentionally pushed her to the floor. The other patient had been suffering progressive mental deterioration for more than a year before the occurrence and had developed a belligerent behavioral pattern that involved pushing, tripping, and hurting other patients. Defendant had actual knowledge of this belligerent behavioral pattern. The district court directed a verdict for defendant on the ground that plaintiff had failed to introduce expert testimony concerning the standard of care applicable to nursing homes in similar communities.\textsuperscript{26} The court of appeals reversed and remanded for a new trial on the ground that the factual question of defendant's negligence was not sufficiently complex to require expert testimony.\textsuperscript{27} Therefore, expert testimony was not required to satisfy the locality rule.

The result is unquestionably correct, and the first part of the court's rationale is sound. Expert testimony is usually required in medical malpractice cases because most of those cases involve complex technological and scientific matters beyond the common understanding of juries. This need for expert testimony relates to the general principle that in any case, medical or otherwise, the jury must have a sufficient evidentiary basis for understanding and deciding the issues. Thus, expert testimony is not required when an issue is within the common knowledge of the jury.\textsuperscript{28} In these cases the focus is on the factual complexity of an issue, not on the fact that the issue arises in a medical context. In \textit{Juhnke} the court correctly reasoned that a jury does not need expert

\textsuperscript{24} This problem of an uninsured driver is not likely to arise very often because the owner's own liability insurance policy must cover not only each named insured, but also any other person using the vehicle with the owner's consent. \textit{Id.} \textsuperscript{25} § 40-3107(b). Therefore, this special liability for entrusting a vehicle to an uninsured driver would apply only when the driver has no insurance or sells the vehicle to an uninsured driver. It is proper to limit this special liability to the amount of mandatory liability insurance because the only risk created by the entrustor's conduct is that persons injured by the uninsured motorist will not have the statutory minimum insurance protection.


\textsuperscript{26} \textit{Id.} at 745, 634 P.2d at 1134.

\textsuperscript{27} \textit{Id.} at 749, 634 P.2d at 1137.

\textsuperscript{28} This exception applies when "what is alleged to have occurred in the diagnosis, treatment, and care of a patient is so obviously lacking in reasonable care and the results are so bad that the lack of reasonable care would be apparent to and within the common knowledge and experience of mankind generally." McKnight v. St. Francis Hosp. & School of Nursing, 224 Kan. 632, 633, 585 P.2d 984, 986 (1978). \textit{See also} Webb v. Lungstrum, 223 Kan. 487, 490, 575 P.2d 22, 25 (1978); Funke v. Fieldman, 212 Kan. 524, 530, 512 P.2d 539, 545 (1973).
testimony to appreciate as a question of fact the unreasonableness of a nursing home’s failure to protect its patients from the known belligerent and harmful propensities of another patient.

The questionable part of the court’s rationale relates to the statement that the common knowledge exception obviates the need for expert testimony to prove community standards under the locality rule. Although the abstract proposition is sound, the locality rule should not apply to cases such as *Juhnke*. The locality rule defines a medical practitioner’s standard of care in terms of the care, skill, and diligence exercised in the same or similar communities. Its purpose is to protect medical practitioners in small rural communities that lack the specialists, staff, equipment, and other facilities available in large urban communities. If the medical judgment or procedure at issue is sufficiently simple and straightforward for a layman to appreciate the unreasonable danger, then it logically follows that none of the disadvantages of medical practice in a small rural community could justify a medical practitioner’s failure to appreciate that unreasonable danger.

Therefore, the applicability of the common knowledge exception should usually mean that expert testimony is not necessary to prove local community standards. In *Juhnke*, however, the alleged negligence did not involve a medical procedure or judgment, but rather a general duty to protect one person from the known belligerent propensities of another. Once the nursing home’s knowledge of the patient’s belligerent behavior is established, the question of negligence in failing to protect other patients does not differ significantly from any other situation in which a custodian fails to protect a person entrusted to his care. The locality rule should not be extended beyond medical judgments and procedures to general nonmedical

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*The Kansas courts have applied the common knowledge exception to matters such as allowing a patient in a greatly weakened condition to fall off a tilted X-ray table during treatment, McKnight v. St. Francis Hosp. & School of Nursing, 224 Kan. 632, 585 P.2d 984 (1978), leaving a foreign object inside a patient’s body after an operation, Rule v. Cheeseman, 181 Kan. 957, 317 P.2d 472 (1957) (sponge or gauze pad); Bernsden v. Johnson, 174 Kan. 230, 255 P.2d 1033 (1953) (metal disc), or gross failure to diagnose and treat a broken bone in the arm or leg, Stockham v. Hall, 145 Kan. 291, 65 P.2d 348 (1937) (ankle); McMillen v. Foncannon, 127 Kan. 573, 274 P. 237 (1929) (elbow). In none of these situations did the lack of specialists, staff, equipment, or other facilities available only in large urban areas contribute to the result.*

*The nursing home’s duty is twofold. First, a duty to protect the victim patient from the belligerent patient arises from the special relationship between the nursing home and the victim. See RESTATEMENT (SECOND) OF TORTS §§ 314A, 319 (1965). Second, a duty to control the belligerent patient in order to prevent harm to others arises from the special relationship between the nursing home and the belligerent patient. See RESTATEMENT (SECOND) OF TORTS §§ 315, 319 (1965). See generally infra notes 114-36 and accompanying text.*

*A nursing home would owe a duty of reasonable care to protect its patients from a slippery floor or a defective step, and expert testimony is unnecessary to establish that duty. Once the nursing home discovers the belligerent patient’s dangerous propensities, that patient becomes simply another dangerous condition from which the nursing home should protect the other patients. Expert testimony is wholly unnecessary, particularly since the nursing home apparently made no efforts at all to protect the other patients from the belligerent patient. As the Kansas Supreme Court once stated, the need for expert testimony to establish a medical standard of care “is not a judicial determination that the members of the medical profession have a monopoly on common sense.” McMillen v. Foncannon, 127 Kan. 573, 576, 274 P. 237, 238 (1929).*
conduct by medical practitioners,\textsuperscript{33} and the court should have held that the locality rule was inapplicable to the conduct involved in \textit{Juhnke}.

In \textit{Mellies v. National Heritage, Inc.},\textsuperscript{34} an elderly patient was transferred to defendant's nursing home after treatment in a hospital for a broken hip. Five weeks later a large decubitus ulcer, commonly known as a bed sore, was discovered on her hip, and she was transferred back to the hospital for treatment. Plaintiff brought an action against the nursing home for negligence in failing to prevent the development of bed sores or, alternatively, in failing to treat them properly.\textsuperscript{35} At trial plaintiff introduced medical treatises to show that bed sores are caused by sustained pressure on a portion of body tissue. Plaintiff also produced evidence that they can form on an immobilized patient in a few hours and that moisture contributes to their formation. Expert nursing testimony and a state regulation\textsuperscript{36} indicated that the nursing standard of care for preventing and treating bed sores in part consisted of repositioning immobilized patients every two hours and keeping their skin and bed linen clean and dry. Other evidence indicated that these measures had not been regularly followed.\textsuperscript{37} The district court directed a verdict for defendant on the ground that a medical doctor's expert testimony was necessary to show the proper medical treatment of bed sores and causation.\textsuperscript{38} The court of appeals reversed and remanded for a new trial. The court held that plaintiff had established a prima facie case of negligence because expert nursing testimony was sufficient to establish a nursing standard of care and treatise evidence was sufficient to establish causation.\textsuperscript{39}

The holding concerning the sufficiency of the expert nursing testimony seems sound as applied to the particular facts in \textit{Mellies}, but it should not be

\textsuperscript{33} Certainly no one would suggest that the locality rule should apply to nonmedical matters such as a doctor's failure to remove snow and ice from his walkway in anticipation of his invitees. \textit{See}, \textit{e.g.}, \textit{Rouse v. Fewin}, 8 Kan. App. 2d 428, 660 P.2d 81 (1983). The locality rule is in essence a departure from the general principle that compliance with local custom is normally only some evidence of due care. \textit{See Restatement (Second) of Torts} § 295A (1965). Courts should be reluctant to recognize deviations from the reasonable care standard unless sound public policy supports a deviation. \textit{See Gerchberg v. Loney}, 223 Kan. 446, 456, 576 P.2d 593, 601 (1978) (Prager, J., dissenting). The locality rule is supported by sound public policy only when it is strictly limited to those medical judgments and procedures to which locality factors are relevant. The protection of other patients from a belligerent patient is not properly a medical matter because the identical duty to protect a person arises in analogous nonmedical relationships such as common carrier-passerenger, innkeeper-guest, and invitor-invitee. \textit{See Restatement (Second) of Torts} § 314A (1965).


\textsuperscript{35} \textit{Id.} at 913, 636 P.2d at 219. The alternative pleading was necessary because some evidence in the case tended to show that some of the bed sores may have formed or started to form while the patient was in the hospital prior to her transfer to the nursing home.

\textsuperscript{36} \textit{Kan. Admin. Regs.} 28-39-6(E) (revised May 1, 1982) provided \textit{inter alia} that "[t]he position of bed residents shall be changed at least every two hours during the day and night" and that "[f]ontinent residents shall be checked at least every two hours and shall have partial baths and clean linens promptly each time the bed or clothing is soiled."

\textsuperscript{37} Hospital records and anecdotal evidence provided a reasonable inference that the nursing staff failed to reposition the patient regularly and keep her skin and bed linen clean and dry. 6 Kan. App. 2d at 915-16, 636 P.2d at 220-21.

\textsuperscript{38} \textit{Id.} at 912, 636 P.2d at 218.

\textsuperscript{39} \textit{Id.} at 920, 636 P.2d at 224.
broadly interpreted as eliminating the necessity of a medical doctor’s expert testimony in all cases of nursing malpractice. The more a particular case involves technologically or scientifically complex nursing procedures closely supervised by a medical doctor, the more a medical doctor’s expert testimony may be necessary to explain adequately the procedures and the applicable standard of care. The instant case, however, involves neither a complex nursing procedure nor any apparent close supervision by a medical doctor. Therefore, a jury should be quite able to understand the nature of the procedure and the applicable standard of care without the additional expert testimony of a medical doctor.

Although the court carefully noted the general applicability of the locality rule to a nursing home’s standard of care, Mellies seems to be an inappropriate case for the application of the locality rule. Not only does no justification appear to exist for any local departure from the practice of relieving pressure and keeping skin and bed linen clean and dry, but also these matters were governed by an administrative regulation of statewide application. Prior Kansas cases have recognized that the locality rule is not necessarily relevant in every medical malpractice case, and courts and counsel might consider using pretrial procedures to resolve the propriety of the locality rule whenever feasible. Otherwise, the locality rule will tend to be routinely included in medical malpractice instructions in cases such as Mellies when the rule is inappropriate, and the result will be unnecessary complexity and confusion.

The court correctly held that treatise evidence was sufficient to establish causation. The causal connection between sustained pressure and moisture and the resulting bedsores was relatively uncomplicated, although not a matter of common knowledge, and the treatises provided the jury with a perfectly clear and understandable explanation of causation. Although live expert testimony by a medical doctor may be tactically advantageous and sometimes even necessary in a particularly complex case, no sound reason exists for a rigid rule requiring a medical doctor’s expert testimony concerning causation in all cases. Rather, the district court must simply ensure that the expert evidence, regardless of form, provides the jury with a sufficient factual basis to decide the particular causation issue in a given case.

Unfortunately, the court attempted to buttress its causation holding by quoting an older Kansas case for the proposition that if there is evidence of

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40 Kan. Admin. Regs. 28-39-6(E) (revoked May 1, 1982). It should be noted that in Kansas, local custom contrary to positive state law is inadmissible as evidence to prove the absence of negligence. See Ellis v. Skeeters, 1 Kan. App. 2d 323, 564 P.2d 568 (1977). Although Ellis involved a violation of a state motor vehicle statute, the rationale should apply equally to a state nursing home regulation of statewide application.


42 In cases of this nature plaintiff should engage in discovery to determine which, if any, locality considerations are, in the defendant’s opinion, relevant to defendant’s standard of care. If defendant does not identify any relevant locality considerations, plaintiff should be able to eliminate the locality rule as a potential issue in the case at pretrial conference or by a motion in limine prior to trial.
negligent treatment and a bad result, the jury may infer causation. This proposition was unnecessary because the jury already had competent treatise evidence concerning causation and therefore would not have to rely on a mere inference. Moreover, the proposition reflects the generally discredited logic of \textit{post hoc ergo propter hoc}. An act of negligent treatment followed in time by a bad result does not necessarily give rise to a reasonable inference of causation. For example, if in \textit{Mellies} the patient had suffered a stroke instead of bedsores, a jury unaided by expert testimony could not reasonably infer a causal connection between moisture and sustained pressure on her hip and the subsequent stroke. The court should limit the inference approach to those cases in which the inference of causation would be reasonable in light of the other evidence in the case or the jury's common knowledge and understanding of causation.

In \textit{Allman v. Holleman} the supreme court confronted the relatively rare issue of a patient's contributory negligence in a medical malpractice action. In that case the patient complained to her doctor about sharp chest pains, and the doctor admitted her to a hospital for diagnostic tests. After six days of tests, exploratory surgery was finally performed, and a ruptured spleen was discovered and removed. While in intensive care after the surgery, the patient developed pulmonary edema, a respiratory problem that necessitated the insertion of an endotracheal tube in her throat to assist her respiration. Later in the day she struggled against the discomfort of the endotracheal tube and caused it to become dislodged. A doctor replaced the tube, but shortly thereafter the tube again became dislodged, and the patient became cyanotic and died. In a survival and wrongful death action against the hospital and certain doctors, the trial court instructed the jury on four allegations of the patient's contributory negligence: (1) her failure to read warnings accompanying her birth control pills, (2) her delay in seeking medical attention, (3) her failure to give a complete medical history, and (4) her causing the dislodging of the endotracheal tube. In reversing a verdict in which the jury found the patient forty percent at fault, the supreme court held that the trial court erred in instructing the jury on these allegations of contributory negligence.

Regarding the failure to read warnings and delay in seeking medical attention, defendants' rationale was that the patient experienced all the symptoms warned against in a package insert accompanying the birth control pills. Defendants then argued that one of these symptoms, abnormal blood clotting,
may have caused the ruptured spleen, and that the two-week delay in seeking medical attention contributed to the pulmonary problems necessitating the insertion of the endotracheal tube. The supreme court held that the failure to read warnings was not contributory negligence because: (1) she had a prescription for the birth control pills and people commonly do not read warnings, (2) since all conduct involves some risk, the patient was not negligent in ignoring a slight risk that is commonly disregarded, and (3) the causal connection between these acts and the patient’s death was too remote and speculative.60 In addition, the court held that any negligence involved either in the failure to read warnings or in the delay in seeking medical attention contributed only to her conscious pain and suffering, not to her death, and thus the failure of the instructions to make this distinction confused the jury.61

These holdings reach the correct result for the wrong reason. First, in other contexts the supreme court has recognized that failure to read and follow warnings is a proper basis for finding negligence,62 and no sound reason exists for a different rule governing warnings accompanying products so presumptively dangerous that they can be sold only by prescription. Second, the fact that many people do not read warnings63 is not a proper basis for holding as a matter of law that such conduct is not negligent.64 Although one is not negligent in ignoring a risk when countervailing considerations of benefit and burden outweigh the risk,65 a reasonable person would not ignore even a “slight” risk when, as in the case of reading a warning, no significant benefit or burden offsets the risk created by ignoring a warning.66 Yet, the risks identified in the package insert included some serious matters that cannot be fairly characterized by the court as “slight” as a matter of law.67 Finally, if the side effects of

60 Id.
61 Id. at 786, 667 P.2d at 301.
64 The general rule is that custom is a relevant factor in determining whether conduct is reasonable, but it is not controlling where a reasonable person would not follow the custom. See Restatement (Second) of Torts § 295A (1965). Courts should be careful to recognize that some customs "are the result of careful thought and decision, while others arise from the kind of inadvertence, neglect, or deliberate disregard of a known risk which is associated with negligence." Id. comment c.
65 See Restatement (Second) of Torts §§ 291-93 (1965).
66 A “slight” risk with no countervailing utility considerations is more likely to constitute negligence when the social value of the actor’s conduct is minimal and the social value of the interest to be protected is great. See id. §§ 292(a), 293(a). The social value of not reading warnings is minimal, and the social value of avoiding the health-related harms that the warnings seek to prevent is great.
67 According to the dissenting opinion, the package insert listed as possible side effects from the use of the pills “nausea, vomiting, abdominal cramps and bloating, change in weight, rise in blood pressure, depression, headache and nervousness . . . [and] abnormal blood clotting.” 233 Kan. at 789, 667 P.2d at 303 (Schroeder, C.J., dissenting). In addition, the Food and Drug Administration requires package inserts warning patients about the risks and benefits of using oral contraceptive drugs in order to provide for “the safe and effective use” of these drugs. See 21 C.F.R. § 310.501
the pills and the delay were a proximate cause of the patient's pain and discomfort prior to death, no logical reason supports the conclusion that these acts were not also a proximate cause of the death that followed as a natural consequence of the pain and discomfort.

The better rationale is that even if the patient's failure to read warnings and her delay in seeking medical attention\(^\text{**}\) were negligent, as a matter of law this negligence would not be a proximate cause of either the conscious pain and suffering or the death caused by defendants' malpractice. Defendants' malpractice consisted of an unreasonable delay in the proper diagnosis and treatment of the patient's medical condition. The patient's negligent acts created the medical condition that defendants undertook to diagnose and treat, but they did not contribute to the defendants' unreasonable delay in diagnosing and treating that condition.\(^\text{**}\) A medical professional does not guarantee immediate and perfect results when he undertakes to treat a person with a serious medical condition. When the medical problem is serious and complicated, some delay in making a proper diagnosis is consistent with the concept of reasonable care under all the circumstances. The medical professional should not be liable for any pain and suffering or other harm caused by that delay. A finding that the delay is unreasonable, however, is tantamount to finding that the negligence of the medical professional, not the pre-existing medical condition of the patient, is the cause of any pain and suffering or other harm attributable to the unreasonable portion of the delay. Before a patient may be found contributorily negligent in such a case, the patient's conduct must somehow be causally connected to the unreasonable portion of the delay in proper diagnosis. In Allman defendants did not demonstrate this causal connection.

Concerning the inadequate medical history, the evidence indicated that in ninety-nine percent of the cases a ruptured spleen is preceded by trauma. Although blood clotting from the use of birth control pills might possibly cause a spleen to rupture, the patient did not give her doctors a history of trauma. Without a history of trauma a doctor would not suspect a ruptured spleen. The supreme court held that (1) the jury was not entitled to infer contributory negligence from this circumstantial evidence without some direct evidence that the patient did in fact give an inaccurate medical history, and (2) even if she

\(^{\text{**}}\) The patient's delay in seeking medical attention presents a difficult issue of contributory negligence. Many factors influence a person's decision whether to seek medical attention: the person's opinion about the seriousness and likely duration of a medical problem, the person's tolerance of pain and discomfort, and the person's economic situation. Courts should carefully scrutinize the sufficiency of evidence before allowing juries to decide whether such highly individualized decisions by patients constitute contributory negligence. *But see* Vandergrift v. Fort Pierce Memorial Hosp., 354 So. 2d 398 (Fla. Dist. Ct. App. 1978), *cert. denied*, 362 So. 2d 1057 (Fla. 1978) (eight hour delay in seeking medical attention after suffering the "bends" while scuba diving constituted contributory negligence).

did give an inaccurate medical history, this would be a proximate cause of only her conscious pain and suffering, not her death.60

Three observations seem appropriate. First, failure to give an accurate medical history may properly be viewed as contributory negligence because it could contribute to the unreasonable delay in making a proper diagnosis.61 Second, since patients generally lack the medical knowledge to appreciate the relevance of their medical histories, a prerequisite to a finding of contributory negligence in this case should be a showing that the doctors asked the patient questions reasonably calculated to elicit information about any prior trauma.62 Finally, the circumstantial evidence seemed sufficient to create a jury question about whether the patient gave an inaccurate medical history. Since the court offered no explanation for this holding of insufficient evidence,63 it seems that the court substituted its judgment of the evidence for that of the jury.64

Finally, regarding the dislodging of the endotracheal tube, the evidence indicated that the patient was restless, that she was placed in restraints, and that it is normal for endotracheal tubes to become dislodged when a patient is restless and sweaty. The supreme court held that a patient in intensive care is not contributorily negligent in inadvertently removing life support equipment. The evidence recited in the majority and dissenting opinions is inadequate to determine the extent to which the holding is sound. The situation falls between two well-established rules. On the one hand, a patient may be contributorily negligent in failing to follow a doctor's instructions in the course of treatment.65 On the other hand, a patient is not contributorily negligent for mere involuntary reflex actions in the course of medical treatment.66 This rule is particularly

60 233 Kan. at 786, 667 P.2d at 301.
62 In Allman the facts in the majority opinion that the patient "indicated there had been no recent trauma to the abdominal area." 233 Kan. 781, 782, 667 P.2d 297, 298-99 (1983). Thus, the suggested prerequisite was apparently satisfied in this case.
63 In Kansas a cause of an accident may be established by circumstantial evidence if the party seeking to establish the fact negates other causes sufficiently to raise a reasonable inference for the jury. See infra note 251. In Allman the 99% statistical probability of a prior trauma apparently would meet that requirement, but perhaps the fact that defendants argued that the birth control pills may have caused the ruptured spleen caused the court to believe the prior trauma theory to be too speculative under all the circumstances.
64 The supreme court struggles at times in an effort to find error with respect to each of the four theories of the patient's alleged contributory negligence. Since the trial court submitted all four theories to the jury and the jury could have based its finding of contributory negligence on any one of those theories, the supreme court should grant a new trial if the trial court erroneously submitted any one of those theories to the jury. Unfortunately, the supreme court did not address this issue.
applicable when the patient is so heavily sedated or drugged that movements lack any voluntary or conscious quality. The rule should also apply to a conscious patient's reflex actions in response to sharp pain. In Allman it is unclear whether the patient was sedated or fully conscious while in intensive care. Nevertheless, the strong inference is that the struggling against the pain and discomfort of the tube was virtually a "reflex" action. One cannot strongly disagree with the court's holding even though in a technical sense the determination of whether the patient's movements were "reflex" or "voluntary" should be a question of fact for the jury.

3. Suppliers of electricity

In Wilson v. Kansas Power & Light Co. plaintiff was severely injured when he, his brother, and their employee were installing an irrigation system on an eighty-acre field and a thirty-foot-long aluminum irrigation pipe came into contact with defendant's overhead electrical lines. The electrical lines were twenty-three feet above the boundary of the field. The accident occurred when plaintiff raised a pipe on end in an attempt to dislodge something stuck inside the pipe. The evidence showed that defendant knew the brothers kept the pipes stacked beneath the electrical lines on the boundary of the field, that defendant knew of the practice of farmers to raise pipes on end to dislodge anything stuck inside the pipes, that defendant had actually considered the possibility of such an accident at this location, and that defendant knew about two similar prior accidents involving irrigation pipes. Plaintiff's expert testified that in his opinion defendant was negligent for failing to raise, relocate, insulate, or bury the electrical lines, for failing to provide warnings, and for failing to inspect the lines regularly. The supreme court reversed a jury verdict in favor of plaintiff on the ground that as a matter of law the evidence of defendant's negligence was insufficient.

At the outset, the majority opinion emphasized that a supplier of electricity is not an insurer against accidents and is merely subject to a negligence standard. The well established rule in Kansas is that a supplier of electricity must

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68 The logical inference is that a patient with an endotracheal tube in her throat while in intensive care following an operation is probably heavily sedated and not acting in a truly voluntary manner in struggling against the pain and discomfort of the tube. Since defendants have the burden of proving contributory negligence, they should have introduced evidence showing that the patient was not heavily sedated if that was in fact the case.


70 Defendant apparently considered the risk of irrigation pipe contact with overhead electrical lines to be substantial because it included a portrayal of this kind of an accident in one of its training films. Id. at 513, 657 P.2d at 552.

71 Id. at 515, 657 P.2d at 553. Justice Prager dissented on the ground that the evidence of negligence was sufficient to submit the issue to the jury. Id. at 516, 657 P.2d at 553-54.

72 Id. at 510-11, 657 P.2d at 549-50.
exercise the "highest degree of care" to protect against the dangers created by electrical lines. The Kansas cases have interpreted this standard as a negligence standard, not a strict or absolute liability standard. The phrase "highest degree of care," however, has some potential for confusion. The modern trend in tort law is to use the basic "reasonable care under all the circumstances" standard and to treat the great risk of death or serious injury from contact with electrical lines as a circumstance relevant to the precautions against injury that may be required for compliance with the reasonable care standard. Although the majority opinion quoted at length treatise material reflecting this modern analysis, the court unfortunately did not use this opportunity to hold that trial courts should use a "reasonable care" instruction in electricity cases.

The determination of negligence involves a risk-benefit analysis, i.e., whether the likelihood of injury and the gravity of injury if it occurs outweigh the utility of the conduct and the burden of taking precautions to avoid or reduce the risk of injury. The evidence clearly established the existence of a known substantial risk of death or serious injury at the accident site. However, the majority opinion held that the burden of raising, relocating, insulating, or burying the electrical lines was "unreasonable and unrealistic." This holding is arguably unsound. The majority made a fundamental error by basing its burden analysis on the fact that defendant had 12,000 miles of electrical lines in rural Kansas. The implication is that an affirmance of the jury's verdict would require defendant to alter the physical condition of all its rural electrical lines. This implication is erroneous. The National Electrical Safety Code establishes a twenty foot minimum altitude for electrical lines "absent special hazardous circumstances." The special circumstances in Wilson were defendant's knowledge of the stacking of thirty-foot-long pipes directly beneath the electrical lines and the general practice of raising irrigation pipes on end to remove obstructions. Accordingly, the burden factor should include only the cost of

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75 A jury could misinterpret "highest degree of care" as imposing a standard similar to strict liability for abnormally dangerous activities. A jury is more likely to understand correctly a "reasonable care" instruction pursuant to which the amount of precaution necessary in a situation must be commensurate to the degree of risk inherent in defendant's conduct.
77 232 Kan. at 510-12, 657 P.2d at 550-51.
79 232 Kan. at 514, 657 P.2d at 552.
80 Id. at 509, 657 P.2d at 549.
81 The repeated use of lengthy metal objects capable of reaching overhead electrical lines should constitute a "special hazardous circumstance." Only seven months before the decision in Wilson the supreme court upheld a jury finding of negligence for failure to raise or relocate overhead electrical lines where decedent was using a twenty-foot-long metal pole on a catwalk over a feedbin and the pole inadvertently came into contact with the electrical lines. See Pape v. Kansas Power & Light Co., 231 Kan. 441, 647 P.2d 320 (1982). The opinion in Wilson failed to mention the Pape
physically altering electrical lines in locations where those specific conditions exist. The majority opinion recites no evidence that these specific conditions are so widespread that defendant would be required to alter the physical condition of a significant portion of its 12,000 mile system of rural electrical lines.

Concerning defendant’s failure to provide warnings, the majority opinion reasoned that since plaintiff already knew about the danger inherent in coming into contact with the overhead electrical lines, warnings would not have prevented the accident. The traditional purpose of warnings is to provide information about an otherwise unknown danger so that the recipient of the warning is then able to avoid the danger. However, when a person is constantly exposed to a known danger, but the hurried or monotonous nature of the person’s activity may cause him to forget temporarily about the danger, a warning may prevent an accident by providing a constant reminder of the danger. The repeated assembly of a farm irrigation system is arguably a situation in which such a reminder warning could be a useful deterrent to careless accidents. Unfortunately, the majority opinion did not address the question of when, if at all, the failure to provide reminder warnings may constitute the basis for a finding of negligence.

Finally, the majority opinion correctly held that defendant’s failure to inspect its lines regularly was not a cause in fact of plaintiff’s injury. The purpose of inspections is to discover dangerous conditions that require some corrective action. In Wilson defendant already knew about the dangerous condition that arguably justified either physical alteration of the lines or reminder warnings. Accordingly, the trial court probably erred in submitting the failure to inspect to the jury as a possible basis of recovery.

B. Limited Duty of Care

1. Negligent infliction of emotional distress

Historically, courts have been reluctant to recognize a cause of action in negligence solely for the recovery of emotional distress unless plaintiff satisfies some special requirement intended to ensure the genuineness and seriousness of the emotional distress. In Kansas the general rule has been that plaintiff...
cannot maintain an action for negligent infliction of emotional distress unless the emotional distress "is accompanied by or results in physical injury to the plaintiff."\textsuperscript{87}

In \textit{Hoard v. Shawnee Mission Medical Center},\textsuperscript{88} six teenagers, including plaintiffs' daughter, were injured in a one-car collision, and ambulances took three of them to defendant hospital and three of them to another hospital. After police identified the teenagers, defendant informed plaintiffs about the accident. When plaintiffs arrived at the hospital, doctors were busy performing emergency medical procedures and plaintiffs were told they could not see their daughter until her condition stabilized. More than an hour later, defendant told plaintiffs that their daughter had died from massive head injuries. As they were leaving the hospital, defendant informed plaintiffs that the victim might not be their daughter. Plaintiffs returned to the hospital and confirmed that this was in fact true. Plaintiffs then went to the other hospital, where they found their daughter in critical condition with massive head injuries. Although she survived, she had extremely serious permanent injuries that required constant medical attention and a lengthy program of rehabilitation. Approximately six weeks after the accident, plaintiffs' physical health began to deteriorate, and for the next two years both parents required medical attention and occasional hospitalization for a variety of health problems.

The trial court granted summary judgment for defendant on plaintiffs' negligence claim on the ground that Kansas does not recognize a cause of action for negligent infliction of emotional distress.\textsuperscript{89} The supreme court affirmed, holding that (1) Kansas recognizes a cause of action for negligent infliction of emotional distress only when the emotional distress results directly, naturally, and in a short span of time in a physical injury, (2) plaintiffs' physical injuries did not result soon enough after the erroneous notification of death, (3) plaintiffs' reaction to their daughter's severe injuries was the principal cause of their health problems, not the erroneous notification of death, and (4) Kansas does not recognize an exception to the resulting physical injury requirement in cases of negligent notification of death.\textsuperscript{90}

In cases where negligence directly causes only emotional distress, the well established modern rule requires a resulting physical injury proximately caused by the emotional distress.\textsuperscript{91} The rationale for this requirement is that

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\textsuperscript{88} 233 Kan. 267, 662 P.2d 1214 (1983).

\textsuperscript{89} The trial court allowed plaintiffs to try the action on the theory of intentional infliction of emotional distress, but then directed a verdict in favor of defendant at the close of plaintiffs' case on the ground that defendant's conduct was not intentional or reckless nor extreme and outrageous. 233 Kan. at 273-74, 662 P.2d at 1219. The supreme court affirmed the directed verdict on the same ground, a holding that is hardly surprising since the evidence was probably inadequate to establish negligence, much less intentional or reckless conduct of an extreme and outrageous nature. See infra note 112.

\textsuperscript{90} 233 Kan. at 279-81.

\textsuperscript{91} See \textit{Restatement (Second) of Torts} §§ 313, 436 & 436A (1965); W. Prosser, \textit{Handbook on
courts and juries tend to lack the ability to assess accurately the existence and severity of alleged emotional distress, and thus a physical injury proximately caused by the emotional distress provides some assurance of the genuineness and seriousness of the emotional distress.\footnote{See Restatement (Second) of Torts § 496A comment b (1965).} Admittedly, this requirement is somewhat artificial because severe emotional distress can certainly exist without a resulting physical injury.\footnote{Curiously, most courts do not openly require that the emotional distress must be severe in a negligence action, even though it must be severe in an action based on intent or recklessness. Rather, courts apparently assume that if the emotional distress is only trivial or even ordinary in degree, it would probably not cause physical injury. In two states where courts have abolished the resulting physical injury requirement, the courts now require that the emotional distress must be "serious." See Molien v. Kaiser Found. Hosps., 27 Cal. 3d 916, 930, 616 P.2d 813, 821, 167 Cal. Rptr. 831, 839 (1980); Rodrigues v. State, 52 Haw. 156, 173, 472 P.2d 509, 520 (1970). The rationale for abolishing the physical injury requirement was that, as a test to guarantee genuine and serious emotional distress, it was both overinclusive and underinclusive. The requirement was overinclusive in cases where trivial or ordinary emotional distress caused a physical injury, and it was underinclusive in cases where serious emotional distress did not cause a physical injury, See Molien, 27 Cal. 3d at 928-29, 616 P.2d at 820, 167 Cal. Rptr. at 838.} The problem is primarily the absence of better alternatives. In cases of intentional infliction of emotional distress the extreme and outrageous quality of defendant's conduct provides the needed assurance of genuineness and seriousness,\footnote{See Restatement (Second) of Torts § 46 comment j (1965).} and thus a resulting physical injury is not required in those cases.\footnote{Id. comment k.} The conduct involved in ordinary negligence, however, does not necessarily have any quality or characteristic that logically suggests a great likelihood of real and serious emotional distress. Accordingly, in the absence of better methods of proving the genuineness and seriousness of emotional distress,\footnote{A few courts have suggested that the resulting physical injury requirement should focus more on the character of the injury as "one susceptible of objective determination" than on the "physical" versus "mental" nature of the injury. Thus, an objectively identifiable nervous disorder would constitute a "physical injury." See, e.g., Petition of United States, 418 F.2d 264, 269 (1st Cir. 1969); Wallace v. Coca-Cola Bottling Plants, Inc., 269 A.2d 117, 121 (Me. 1970). Three states do not require a resulting physical injury. See Molien, 27 Cal. 3d at 928, 616 P.2d at 820, 167 Cal. Rptr. at 838 (1980); Rodrigues, 52 Haw. at 173, 472 P.2d at 520 (1970); Todd v. Aetna Casualty & Sur. Co., 219 So. 2d 538, 542-43 (La. App. 1969).} the resulting physical injury requirement or some similar requirement may remain a practical necessity in negligent infliction of emotional distress cases.

In addition to requiring a physical injury that "directly" and "naturally" results from the emotional distress, the Hoard court also stated that the physical injury "must appear within a short span of time after the emotional disturbance."\footnote{233 Kan. at 279, 662 P.2d at 1222.} This "short span of time" requirement is both unsound and unnecessary. First, it is analytically unsound because it elevates a mere factor to a rigid element of the cause of action. The "direct" and "natural" requirement is logically related to the evidentiary function of the resulting physical injury requirement. A physical injury that a normal person would naturally suffer in response to a real and serious emotional distress reinforces the existence of real
and serious emotional distress. For example, a jury could readily appreciate that emotional distress from finding a slimy or decomposed foreign substance in a soft drink could cause the person to vomit.\textsuperscript{98} Moreover, in many cases a significant lapse of time between the emotional distress and the physical injury will tend to negate any inference that the former caused the latter. For example, vomiting six weeks after finding a slimy or decomposed foreign substance in a soft drink will not provide a sufficiently persuasive inference of causation. Nevertheless, a rigid requirement of a short span of time between the emotional distress and the physical injury is an unsound rule, particularly in an era when medical science is making substantial progress in the understanding of delayed physical and emotional reactions. If plaintiff satisfies all remaining requirements and the evidence of causation is persuasive, recovery of damages for negligent infliction of emotional distress should not be denied on the mere basis of a lapse of time before the emotional distress manifests itself or the physical injury occurs. The time element should be only a factor relevant to causation and not an independent requirement for all cases.

Second, the “short span of time” requirement was unnecessary to the court’s decision in the case. The affirmance was not based on the lapse of time per se, but on the court’s belief that the severity of their daughter’s injuries was “the major, if not sole, cause” of plaintiff’s emotional and physical health problems.\textsuperscript{99} Although some evidence tended to support a causal connection between the erroneous notification of death and plaintiffs’ health problems,\textsuperscript{100} the court considered this evidence too conjectural and speculative. If, however, plaintiffs’ daughter had not been injured and persuasive expert testimony demonstrated a causal connection between the erroneous notification of death and the subsequent physical injuries, then despite the lapse of time the evidence of causation would no longer have a speculative quality. In that situation, the relevant policy considerations provide no basis for dismissal of the action.\textsuperscript{101}

In lieu of an artificial and illogical “short span of time” rule, the better approach in \textit{Hoard} would be an outright recognition that in direct actions for emotional distress the court makes the initial determination of whether the evidence supports liability.\textsuperscript{102} The general rule in tort actions is that plaintiff’s


\textsuperscript{99} 233 Kan. at 279, 662 P.2d at 1222.

\textsuperscript{100} Plaintiffs’ experts testified that plaintiffs were suffering from “post traumatic stress disorder” and that the erroneous notification of death “significantly contributed” to the overall amount of stress that was causally related to plaintiffs’ various illness. \textit{Id.} at 271, 278, 662 P.2d at 1218, 1222.

\textsuperscript{101} The basic policy underlying the physical injury requirement is the need for some guarantee of the legitimacy and seriousness of the emotional distress claim. If that guarantee is present despite the lapse of time, the lapse of time provides no basis for denying the claim.

\textsuperscript{102} The court did recognize that when the evidence in support of a party’s claim is too conjectural and speculative, the sufficiency of the evidence is a question of law appropriate for summary judgment. 233 Kan. at 279, 662 P.2d at 1223. The court did not state, however, that in negligent infliction of emotional distress actions courts should make the initial determination of issues such as causation and the seriousness of the emotional distress. In reality, this approach provides the best explanation of the holding in \textit{Hoard}. 
theory of liability should be submitted to the jury if it is supported by any
competent evidence, and this rule reflects a general preference for jury
determination of factual questions. In direct actions for emotional distress, how-
ever, the general inability of courts and juries to determine accurately the exis-
tence, causation, and severity of emotional distress justifies greater judicial
supervision over these issues. This approach is already recognized in actions
for intentional infliction of emotional distress, where the court makes the in-
itial determination of the extreme and outrageous character of the conduct and
the severity of the emotional distress. No sound reason exists for imposing
less judicial supervision over comparable issues when the action is based on
negligence instead of intent.

Finally, the Hoard court refused to recognize an exception to the resulting
physical injury requirement because Kansas precedents recognize such an ex-
ception only in cases involving negligent mishandling of corpses. No such
exception exists in cases involving negligent misdelivery of a message announc-
ing the death of a close relative. Additionally, plaintiffs' only authority rec-
ognizing a hospital's liability for negligent notification of death, a New York
case, was factually distinguishable. Three points merit discussion. First,
this holding was unnecessary because, again, the defect in plaintiffs' action was
the inadequacy of causation, not the absence of a physical injury. Second,
the cases involving the mishandling of corpses were in fact intentional tort
cases, and Kansas does not recognize any exceptions to the resulting physical

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is of such character that reasonable men in an impartial exercise of their judgment may reach
different conclusions, then the case should be submitted to the jury." Wilson v. Kansas Power &
104 See infra notes 312-13 and accompanying text.
705, 79 P. 654 (1905); West v. Western Union Tel. Co., 39 Kan. 93, 17 P. 807 (1888).
108 In Johnson evidence of the hospital's negligence was overwhelming. The supreme court's
attempt to distinguish Johnson on the basis of the virtually uncontroverted nature of the hospi-
tal's negligence in Johnson suggests another factor that probably influenced the court's overall
handling of the issues in Hoard, i.e., the apparent absence of any negligence by defendant. First,
the conduct of persons other than defendant caused the initial misidentification of the driver as
plaintiffs' daughter. Someone at the scene of the accident put the driver's purse in the ambulance
with plaintiffs' daughter, causing the police to misidentify her as the driver and eventually causing
the police to inform defendant that its patient was plaintiffs' daughter. Second, the driver's mas-
usive head injuries created an extreme emergency that justified defendant's refusal to interrupt the
medical treatment in order to verify the patient's identity. The risk to a patient's life clearly takes
priority over the risk to plaintiffs' emotional stability in cases of an error in the identification of
the patient.
109 The essence of the supreme court's holding was that the daughter's severe injuries and
lengthy rehabilitation program was the main, if not sole, cause of plaintiffs' emotional injuries as
well as physical injuries. Accordingly, in the court's view of the evidence, the erroneous notification
of death did not cause severe emotional distress or at least did not cause a quantum of severe
emotional distress that could be separated from the emotional distress caused by the daughter's
injuries.
110 In both Aldernam v. Ford, 146 Kan. 698, 72 P.2d 981 (1937), and Hamilton v. Individual
injury requirement in negligence cases. Third, whether the courts should recognize an exception to the resulting physical injury requirement depends on whether the purposes for that requirement are otherwise satisfied. Situations involving mishandling of corpses and negligent notification of death have an inherent guarantee of legitimacy of some emotional distress. These cases, however, lack any guarantee that the distress will regularly be sufficiently severe or that the distress is caused by defendant's conduct rather than by the death itself. In summary, the issue of whether Kansas should recognize any exceptions to the resulting physical injury requirement is complex and requires more thorough analysis. The facts of Hoard did not provide the supreme court with a good opportunity to address fully the parameters of this issue.

2. Failure to act

In Schmeck v. City of Shawnee plaintiff was severely injured in a collision between an automobile and the motorcycle on which she was a passenger. The accident occurred at an intersection when the driver of the automobile made a left turn into the path of the motorcycle that was approaching the intersection from the opposite direction. At the time of the accident the traffic control signals at the intersection did not have a separate left turn signal. More than a year prior to the accident, the city began an overall highway improvement project and requested the electric company to prepare a proposal for improved traffic control signals at the intersection. The electric company assigned the project to an unqualified employee who caused a major delay in the project by preparing in succession two inadequate proposals. The Kansas Department of Transportation properly rejected these two proposals, and the resulting delay prevented installation of the improved traffic control signals with a separate

Mausoleum Co., 149 Kan. 216, 86 P.2d 501 (1939), the supreme court recognized that plaintiff had a property right in the corpse and could recover damages for emotional distress based on the defendant's intentional interference with that property right. The cause of action in both cases was for trespass, and when plaintiff establishes the elements of any of the traditional intentional torts such as assault, false imprisonment, or trespass, then the courts permit damages for emotional distress as "parasitic" damages. See, e.g., Lonergan v. Small, 81 Kan. 48, 105 P. 27 (1909). In Clemm v. Atchison, T. & S.F. Ry. Co., 126 Kan. 181, 268 P. 103 (1928), plaintiff brought a negligence action against the railroad for emotional distress caused when the railroad temporarily misplaced her deceased husband's corpse. The supreme court required proof of a resulting physical injury.

The fact of emotional distress caused by matters relating to the death of a close relative is common knowledge, and thus, these exceptions to the resulting physical injury requirement are analogous to the common knowledge exception to the requirement for expert medical testimony in medical malpractice actions. See supra note 28 and accompanying text.

The mere fact that defendant's negligence has somehow aggravated the circumstances surrounding the death of a relative does not automatically ensure the severity of the emotional distress resulting from the aggravation. The degree or intensity of the emotional distress will undoubtedly depend on a variety of factors such as the closeness of the relationship, the expected or unexpected nature of the death, the precise nature of defendant's conduct, and the emotional stability of the plaintiff.

In cases involving the death of a close relative in which defendant's conduct has aggravated the emotional distress already present in the situation, the Hoard problem of determining which event caused what portion of plaintiff's total emotional distress will arise.

left turn signal until after plaintiff’s accident. In awarding plaintiff substantial damages, the jury found the driver 30% at fault for failing to yield the right-of-way and found the city and electric company 47.5% and 22.5% at fault respectively for failing to correct a highway defect. On appeal, the electric company contended that it owed only a contractual duty to the city and could not be liable in tort to plaintiff for mere nonfeasance. In affirming the jury verdict, the supreme court held that the electric company’s undertaking to prepare the traffic control signal proposal created a duty of reasonable care owed to plaintiff.\textsuperscript{118}

The electric company based its nonfeasance contention on the common law rule that a bystander owes no duty to render aid to a stranger in a position of peril.\textsuperscript{116} The obvious harshness of this rule\textsuperscript{117} led to the recognition of broad exceptions under which courts find a duty of reasonable care owed to the person in peril.\textsuperscript{118} One major exception involves the defendant’s undertaking to render aid to the person in peril.\textsuperscript{119} In order to establish cause-in-fact between the undertaking and plaintiff’s injury, courts require proof that the negligent performance of the undertaking increased the risk of harm to plaintiff or that plaintiff relied to his detriment on the undertaking.\textsuperscript{120} In addition, when defendant renders his undertaking to a person other than plaintiff, the causation requirement is also satisfied when defendant has undertaken to perform a duty that the other person owes to plaintiff.\textsuperscript{121} In Schmeck the city owed a duty to plaintiff to correct the highway defect, i.e., an inadequate traffic control signal. The electric company undertook the performance of that duty by preparing proposals for an improved traffic control signal. The electric company’s negligent preparation of those proposals caused a delay in the installation of the improved traffic control system beyond the date of plaintiff’s accident.\textsuperscript{122} Ac-

\textsuperscript{116} \textit{Id.} at 24-27, 651 P.2d at 596-98.
\textsuperscript{119} In addition to the exception based on defendant’s undertaking, courts have recognized exceptions where defendant negligently created the risk of harm, \textit{Restatement (Second) of Torts} § 321 (1965), where defendant innocently or negligently caused plaintiff’s injury and condition of helplessness, \textit{id.} § 322, where defendant has a special relation with plaintiff, \textit{id.} §§ 314A & 320, and where defendant has a special relation with a third person who poses an unreasonable risk of harm to plaintiff, \textit{id.} §§ 315-19.
\textsuperscript{120} \textit{See generally} W. Prosser, \textit{Handbook of the Law of Torts} § 56 (4th ed. 1971); \textit{Restatement (Second) of Torts} §§ 323-324A (1965).
\textsuperscript{122} Although the authorities do not explain these requirements in terms of causation, causation rather than duty appears to be the more logical rationale. For example, if X rows a boat toward Y, who is drowning, but then turns back to shore, X is not liable for Y’s death. If, however, X’s undertaking causes Z, another potential rescuer, to delay his rescue attempt until it is too late to save Y, then X’s termination of his undertaking has worsened Y’s peril and has caused Y’s death. Similarly, if X’s undertaking causes Y to abandon an overturned boat and swim towards X, then Y has relied to his detriment on X’s undertaking and X’s termination of his undertaking has caused Y’s death. \textit{See Restatement (Second) of Torts} § 323 comment c and § 324 comment g (1965).
\textsuperscript{121} \textit{See id.} § 324A.
\textsuperscript{122} The electric company’s preparation of the inadequate proposals constituted misfeasance, not mere nonfeasance. Accordingly, the court did not have to decide the more difficult issue of whether.
Accordingly, the supreme court's holding was a proper application of well established negligence principles.

A second major exception to the general "failure to act" rule is that a duty of reasonable care arises when a special relation exists between plaintiff and defendant.\(^{123}\) In *Hendrix v. City of Topeka*\(^{124}\) a former mental patient refused to leave the premises of a state mental hospital after the hospital refused his request for readmission. A police officer removed the patient from the premises, and later the patient froze to death in a nearby park. In *Robertson v. City of Topeka*\(^{125}\) an intoxicated trespasser was threatening to burn plaintiff's house and refused to leave the property. Plaintiff asked police officers to remove the trespasser. The police left the trespasser in the house and ordered plaintiff and his wife out of the house. The house burned a few minutes later. In both cases the trial court dismissed the action and the supreme court affirmed, holding *inter alia*\(^{126}\) that the police officers did not owe a duty of care to the individual.\(^{127}\)

Both holdings are analytically unsound. In both cases the court confused the question of whether the police officers owed a duty of reasonable care to the individual with the question of whether they breached their duty of reasonable care. Thus, in *Hendrix* the court emphasized the limited options available to the police officer once the hospital refused to admit the patient.\(^{128}\) In *Robertson* the court emphasized the absence of a clear-cut remedy and the short period of time in which to make a decision.\(^{129}\) Yet in each case the court relied

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\(^{124}\) 231 Kan. 113, 643 P.2d 129 (1982).


\(^{126}\) In both cases the court also held that the police officers were immune from liability. *Robertson*, 231 Kan. at 362-63, 644 P.2d at 462; *Hendrix*, 231 Kan. at 117, 643 P.2d at 134. For discussion of the immunity issue in *Robertson*, see infra notes 376-93 and accompanying text. I do not discuss the immunity issue in *Hendrix* because the case arose prior to the effective date of the Kansas Tort Claims Act. See Kan. Stat. Ann. §§ 75-6101 to -6118 (Supp. 1983).

\(^{127}\) *Robertson*, 231 Kan. at 263-64, 644 P.2d at 463; *Hendrix*, 231 Kan. at 119-23, 643 P.2d at 135-38.

\(^{128}\) 231 Kan. at 121-22, 643 P.2d at 137. Kan. Stat. Ann. § 59-2908(a) (1983) provides that a police officer may take into custody a person who he reasonably believes is mentally ill and dangerous to himself or others. The officer must take the person to a treatment facility for examination. If the examining physician does not believe that the person is mentally ill, the police officer must release him. In the fact situation in *Hendrix* this provision might provide the police officer with a sound argument that he did not breach his duty of reasonable care. The question, however, is normally one of fact for a jury to decide, and the court should not decide this issue as a matter of law on the basis of the allegations in plaintiff's petition before the parties have engaged in any discovery.

\(^{129}\) 231 Kan. at 362-63, 644 P.2d at 462. The court emphasized these facts in support of its holding that the police officers were engaged in a discretionary function that rendered them immune from liability. Yet, analytically, these facts suggest the argument that a person does not have to perform as well in an emergency situation, as opposed to a leisurely situation, in order to satisfy the reasonable care standard. See generally *Restatement (Second)* of *Torts* § 296 (1965). Again, this question is normally one of fact for a jury to decide, and the court should not decide this issue as a matter of law on the basis of the allegations in plaintiff's petition before the parties have
upon the rule that "the duty of a law enforcement officer to preserve the peace is a duty owed to the public at large, not to a particular individual." Although this rule may have its proper applications, it should not apply in situations where police officers exert their legal authority to direct and control the movements of a particular individual. This direction and control constitutes both an undertaking and a special relation that are each sufficient to create a duty of reasonable care owed to the individual. Once this direction and control exists, no sound reason exists to view the individual simply as a member of the general public. Prior Kansas cases and the Restatement (Second) of Torts recognize that a person having custody or control of another owes the other a duty of reasonable care. This principle should apply fully to the situations in Hendrix and Robertson.

3. Limited duties of possessors of land

Kansas adheres to the traditional invitee-licensee-trespasser classification system used to determine the duty of a possessor of land to a person entering upon the land. During the survey period three appellate decisions involved the distinction between invitee and licensee status. An invitee is a person who

engaged in any discovery.


131 See, e.g., Crouch v. Hall, 406 N.E.2d 303 (Ind. App. 1980), in which plaintiff alleged that if police had investigated a prior rape complaint more vigorously, they would have apprehended the rapist before he attacked plaintiff. In such a case no close nexus between the police officer and the victim exists in order to differentiate the victim from the public at large.

132 See Restatement (Second) of Torts §§ 323-324A (1965). In each case the police officers arguably left the person in a worse position. In Robertson police ordered plaintiff out of his home. Thus, plaintiff was unable to defend his home from the acts of the intoxicated trespasser who was threatening to burn the house. In Hendrix the record discloses only that the police officer removed the patient from the hospital at night in the middle of winter. Since the trial court dismissed the action prior to discovery, plaintiffs are entitled to the reasonable inference that the police officer left the patient in a worse position outside the hospital.

133 Section 314A(4) of the Restatement (Second) of Torts (1965) provides: "One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection is under a similar duty [of reasonable care] to the other."

134 The rule that a police officer does not owe a duty of reasonable care to the public at large is arguably sound when the alleged negligence of the police officer results in a harm that any member of the general public might suffer. See supra note 131. In such a situation the risk is common to the public at large. However, where the police officer exerts legal authority to direct and control the movements of a particular individual, the risk is not common to the public at large; it is unique to the individual. In Robertson the court noted that the general rule that no duty is owed to the general public applies only in the absence of "some special relation with or special duty owed to an individual." 231 Kan. at 363, 644 P.2d at 463. Unfortunately, the court did not analyze this statement carefully to identify the basic underlying principle of the limitation. If it had done so the court might have reached a different conclusion on the duty issue.

135 See, e.g., Bukaty v. Berglund, 179 Kan. 259, 294 P.2d 228 (1956). Bukaty involved the duty of care owed to an incarcerated prisoner, but the principle should apply equally to less formal forms of custody.

136 See supra note 133.

enters the premises pursuant to either a business purpose or a public invitation.\footnote{See Restatement (Second) of Torts § 332 (1965).} A licensee is a person who enters the premises merely with the possessor's consent.\footnote{See id. § 331.} This distinction is important because the possessor owes an invitee a duty of reasonable care\footnote{See, e.g., Lemon v. Busey, 204 Kan. 119, 122, 461 P.2d 145, 148-49 (1969).} but he owes a licensee only a duty to avoid injuring the licensee by intentional, willful, or reckless conduct.\footnote{Id.}

In \textit{Hanks v. Riffe Construction Co.}\footnote{Id. at 804-05, 658 P.2d at 1034.} plaintiff and her husband entered into a contract to purchase a house that the builder was constructing on land owned by the builder. The contract gave the purchasers a $400 credit against the purchase price for laying sod and performing certain clean-up chores during construction. The purchasers also inspected the house periodically during construction and occasionally complained about certain matters relating to workmanship. On one occasion they complained about the amount of insulation inside certain walls, and the builder gave them permission to install additional insulation. Plaintiff was putting additional insulation inside a wall when stacked sheetrock fell over and injured her leg. In reversing a summary judgment in favor of the builder, the supreme court held that plaintiff was an invitee because she was on the premises pursuant to business dealings with the builder arising from the construction contract.\footnote{Although these benefits might not in fact materialize in the course of the performance of a particular residence construction contract, the business or economic benefit test requires only that the invitee confer a potential benefit on the possessor. See Restatement (Second) of Torts § 332 comment f (1965). See, e.g., Campbell v. Waethers, 153 Kan. 316, 111 P.2d 72 (1941).} Accordingly, the \textit{Hanks} holding is consistent with the business benefit requirement for invitee status.

In \textit{Rouse v. Fewin}\footnote{8 Kan. App. 2d 428, 660 P.2d 81 (1983).} plaintiff's husband, a chiropractor, had an eye condition that prevented him from driving a car and from reading X-rays. He entered into a business arrangement with defendant doctor, who read the chiropractor's X-rays in return for a fee. On the day of the accident, plaintiff drove her husband to defendant's home to deliver some X-rays. Shortly after the chiropractor entered the house, defendant's wife came out and invited plaintiff to come in for a cup of tea. While walking from her car to the house, plaintiff slipped on snow-covered ice on defendant's driveway and fractured her wrist.\footnote{8 Kan. App. 2d 428, 660 P.2d 81 (1983).}
and elbow. In reversing a summary judgment in favor of defendant, the court of appeals held that plaintiff was an invitee because her presence on the premises was in part related to the business relationship between her husband and defendant.\textsuperscript{146}

Although plaintiff left her car and entered the premises solely in response to a social invitation, the court properly classified her as an invitee. The general rule is that persons who enter the premises on visits incidental to the business relations of the possessor and a third party are classified as invitees.\textsuperscript{147} This rule applies even though the visitors themselves do not enter the premises for the purpose of the possessor's business and even though their presence on the premises is not a matter of necessity for the third party.\textsuperscript{148} Thus, persons going to a railway station to meet an arriving passenger, persons going to a hotel for a social visit with a guest, and young children accompanying their parents into stores are invitees.\textsuperscript{149} In \textit{Rouse} plaintiff's husband was on the premises for a business purpose and was clearly an invitee. Plaintiff's entry onto the premises, while not a necessity, was incidental to her husband's business purpose.

In \textit{Britt v. Allen County Community Junior College}\textsuperscript{150} plaintiff was a sales supervisor for a company that sold nutritional, household, and skin care products. Defendant gave plaintiff permission to use its lecture hall without charge for a free public meeting at which plaintiff would promote her company's products and provide a speaker on the topic of good nutrition. Plaintiff arrived early at the lecture hall to set up display tables. She asked defendant's custodian to move a piano that was in the center of the room. While the custodian was moving the piano, it fell over and injured plaintiff's foot. In affirming a summary judgment in favor of defendant, the supreme court held \textit{inter alia}\textsuperscript{151} that plaintiff was a licensee, not a public invitee, and that Kansas does not recognize an "active negligence" exception to the duty owed to a licensee.\textsuperscript{152}

The court held that plaintiff was not a public invitee because she was not on the premises pursuant to the business purposes of defendant.\textsuperscript{153} The court reasoned that persons in organized groups using premises provided gratuitously by businesses or governmental agencies are generally considered licensees unless they confer on the possessor a "business, economic, pecuniary or commercial benefit."\textsuperscript{154} This reasoning wholly misconstrues the distinction between

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\textsuperscript{146} Id. at 430, 660 P.2d at 83.
\textsuperscript{147} See \textit{Restatement (Second) of Torts} § 332 comment g (1965).
\textsuperscript{148} Id.
\textsuperscript{149} Id.
\textsuperscript{150} 230 Kan. 502, 638 P.2d 914 (1982). Justices Prager and Herd dissented, arguing that Kansas should abolish the distinction between licensees and invitees and adopt a standard of reasonable care for the protection of all persons who enter the premises with the possessor's consent. \textit{Id.} at 510-11 (Prager, J., dissenting).
\textsuperscript{151} The supreme court also held that it would continue to adhere to its decision in \textit{Gerchberg v. Loney}, 223 Kan. 446, 576 P.2d 593 (1978), and would retain the traditional classification system. For a discussion of the court's reasoning in \textit{Gerchberg}, see \textit{Westerbeke, Survey of Kansas Law: Torts}, 27 KAN. L. REV. 321, 338-40 (1979).
\textsuperscript{152} Id. at 507-09, 638 P.2d at 919-20.
\textsuperscript{153} Id. at 508-09, 638 P.2d at 919-20.
\textsuperscript{154} Id. at 508, 638 P.2d at 919 (quoting \textit{Zuther v. Schild}, 224 Kan. 528, 529, 581 P.2d 385, 387 (1978)).
business invitees and public invitees. The essence of both business and public invitee status is that the invitation provides a basis for "an implied representation, assurance, or understanding that reasonable care has been used to prepare the premises."^155

Regarding business invitees, this implied representation derives from the business relationship between the parties. A business invitee may fairly expect that the premises are reasonably safe in return for the business or economic benefit that his presence confers on the possessor. A public invitee, however, is merely a person who enters the premises "as a member of the public for a purpose for which the land is held open to the public."^156 The public invitee need not confer any business or economic benefit on the possessor. Rather, the implied representation of reasonable care derives from the fact that the possessor holds the land open to the public and encourages the public to enter.

A difficult question arises, however, concerning whether plaintiff would be entitled to public invitee status even if the court used the proper test for public invitation. A public invitation requires more than mere permission for or tolerance of public use of the premises; it requires some indication that the possessor expects or desires public attendance. This expectation or desire is the basis for the implied representation of reasonable care. Since the meeting in Britt involved a speech on nutrition that would have an apparent educational purpose, a court could reasonably infer the requisite expectation of or desire for public attendance. Assuming that members of the public attending this meeting are public invitees, the question then becomes whether plaintiff should also be a public invitee. On the one hand, she was present not merely as a "member of the public," but for her own personal economic purposes. On the other hand, if the requisite expectation of or desire for public attendance exists, she could justifiably rely on the same implied representation of reasonable care upon which members of the public are entitled to rely. The latter view is preferable. Once the court determines that defendant owes a duty of reasonable care to members of the public, no apparent reason in logic or policy supports a denial of the same protection to plaintiff.

The "active negligence" doctrine provides that the possessor must exercise reasonable care for the protection of a licensee regarding any active operations on the premises. The rationale is clear. Whatever the justification for immunity from the consequences of the possessor's negligent maintenance of the physical condition of his premises, that justification does not support a simi-

^155 Restatement (Second) of Torts § 332 comment a (1965).
^156 Id.
^157 See id. § 332(2).
^158 See id. § 332 comment d.
^159 Id.
^160 See W. Prosser, Handbook on the Law of Torts § 60, at 379-80 (4th ed. 1971). "Active operations" is arguably a better name for the doctrine. The purpose of the doctrine is to distinguish between negligence based on the physical condition of the premises, such as stairs without a handrail, and negligence based on conduct in carrying on an activity, such as the operation of a machine or vehicle.
^161 The traditional rationale for the limited duty owed to a licensee is that since he enters the premises with mere permission of the possessor, he has no right to demand or expect that the
lar immunity from the consequences of negligent operation of vehicles and machinery on the premises.\textsuperscript{182} The doctrine would likely apply to the moving of a piano in a negligent manner.\textsuperscript{183} In \textit{Britt}, however, the supreme court refused to recognize the "active negligence" doctrine for two reasons: first, prior Kansas cases had rejected the doctrine;\textsuperscript{184} and second, with the advent of comparative negligence in Kansas, the "active negligence" doctrine is no longer sound.\textsuperscript{185} The court's reasoning is entirely without merit. Prior Kansas cases did recognize the doctrine,\textsuperscript{186} but the court followed dictum from an earlier decision based on a misreading of the prior cases.\textsuperscript{187} More importantly, however, the court misunderstood the doctrine. In holding that comparative negligence rendered the doctrine obsolete, the court relied on a prior decision abolishing the "active-passive indemnity" doctrine and creating a "comparative implied indemnity" doctrine.\textsuperscript{188} Both the "active-passive indemnity" and "comparative

premises be made safe for him. See W. Prosser, \textit{Handbook on the Law of Torts} § 60, at 375 (4th ed. 1971). If limited to the physical condition of the premises, the argument is not wholly without merit. Buildings, including private homes, last for many decades. Because of normal deterioration or the absence of safer and more modern designs, materials, or appliances, many older buildings have certain unsafe conditions that the possessor is willing or forced to accept for reasons of cost or otherwise. This situation may have particular relevance to the elderly living on low fixed incomes in older housing.

\textsuperscript{182} The rationale for a rule of limited liability for injuries caused by the physical condition of the premises does not carry over to injuries caused by active operations. For example, if defendant injures plaintiff by negligently backing up his automobile without looking, defendant is clearly liable if the injury occurs on a public street, in a shopping center parking lot, or in his neighbor's driveway. No reason exists to relieve defendant of liability when the accident occurs in his own driveway to a plaintiff who carries the label "licensee."

\textsuperscript{183} The evidence showed that the custodian knew the piano had handles for the purpose of pulling the piano when it had to be moved. He chose instead, however, to push the piano in an unreasonably dangerous manner. Appellant's Brief at 12. Moreover, at the time of the accident, plaintiff had her back turned to the custodian, and his dangerous act was not obvious to plaintiff. Therefore, he was also negligent in failing to warn plaintiff. See \textit{Restatement (Second) of Torts} § 341 comment c (1965).

\textsuperscript{184} 230 Kan. at 507, 638 P.2d at 919.

\textsuperscript{185} Id. at 507-08, 638 P.2d at 919.

\textsuperscript{186} In \textit{Montague v. Burgerhoff}, 150 Kan. 217, 92 P.2d 98 (1939), defendant pushed a former employee through a doorway into plaintiff, knocking plaintiff down and injuring him. The court noted that plaintiff was at least a licensee on the premises, and that defendant normally owes only a duty to avoid injuring a licensee through willful or wanton conduct. \textit{Id.} at 223, 92 P.2d at 102. In holding that plaintiff's evidence stated a cause of action, the court observed: "In this case the basis of liability is not some claimed defect in the premises, but is the act of defendant in knocking the discharged employee against plaintiff in such a negligent manner as to injure plaintiff." \textit{Id.} at 224, 92 P.2d at 102. In \textit{Morris v. Atchison, T. & S. F. Ry.}, 198 Kan. 147, 160, 422 P.2d 920, 932 (1967), the court limited the "active negligence" doctrine to cases in which the possessor knew or should have known of the presence of the licensee at the time of the possessor's active negligence.

\textsuperscript{187} In \textit{Gerchberg v. Loney}, 223 Kan. 446, 447-48, 576 P.2d 593, 595-96 (1978), the supreme court held that a child licensee injured by a trash fire on defendant's premises could recover in negligence under the attractive nuisance doctrine. In dictum the court examined the "active negligence" doctrine defined in \textit{Montague}, 150 Kan. at 217, 92 P.2d at 98 and \textit{Morris}, 198 Kan. at 147, 422 P.2d at 920. The court erroneously described these cases as imposing liability for "active negligence" only when defendant's conduct is willful or wanton. 223 Kan. at 453, 576 P.2d at 599. In \textit{Britt} the court merely referred to its dictum in \textit{Gerchberg} for the proposition that Kansas does not recognize the "active negligence" doctrine. 230 Kan. at 507, 638 P.2d at 919.

implied indemnity” doctrines relate to loss allocation between tortfeasors; they have no relevance to the determination of the duty owed to a licensee. Plaintiff in Britt did not receive a fair hearing of her claim.

C. Defenses: Comparative Fault

1. Scope of comparative fault

Although the Kansas comparative negligence statute refers only to negligence actions, the Kansas courts have interpreted the scope of the statute broadly to encompass other forms of tort liability such as statutory liability, strict products liability, certain implied warranty actions, and certain nuisance actions. In two decisions during the survey period, however, the Kansas courts refused to apply the statute to breach of contract actions in which one or more of the parties was allegedly negligent in the performance of the contract.

In Broce-O’Dell Concrete Products, Inc. v. Mel Jarvis Construction Co., plaintiff Broce-O’Dell sued defendant Jarvis for payment due for concrete supplied by Broce-O’Dell to Jarvis for a grain elevator construction project. During construction the concrete had not set properly, and some of the concrete structure had to be torn down and replaced. Jarvis counterclaimed for the cost of tearing down and replacing the portion of the concrete structure on the ground that Broce-O’Dell had supplied defective concrete. In affirmaing a jury verdict in favor of Jarvis on its counterclaim, the court of appeals held that the district court properly refused Broce-O’Dell’s request to instruct the jury that Jarvis’ alleged contributory negligence was a partial defense under the comparative negligence statute. The court of appeals based its holding on two grounds: first, the comparative negligence statute does not apply to cases in which contributory negligence was not a defense prior to comparative fault; and second, the comparative negligence statute does not apply to cases involving simple economic loss as opposed to death, personal injury, or property damage.

The court of appeals’ first rationale followed the supreme court’s dictum in Arredondo v. Duckwall Stores, Inc. According to Arredondo, “[i]f contributory negligence or an analogous defense would not have been a defense to a [pre-comparative fault] claim, the comparative negligence statute does not ap-

109 Under the “active-passive indemnity” doctrine, the passive tortfeasor shifts the entire loss to the active tortfeasor. See, e.g., Russell v. Community Hosp. Ass’n, 199 Kan. 251, 428 P.2d 783 (1967). Under the “comparative implied indemnity” doctrine, the two tortfeasors share the loss on the basis of their proportionate fault. See, e.g., Kennedy, 228 Kan. at 460, 618 P.2d 803.


173 See id.


176 Id. at 759, 634 P.2d at 1144.

177 Id. at 759-60, 634 P.2d at 1144-45.

ply; if contributory negligence would have been a defense, the statute is applicable."\textsuperscript{179} Unfortunately, the Arredondo dictum is inconsistent with the well established interpretation that the purpose of the comparative negligence statute is to apportion losses on the basis of the proportionate fault of all parties to the injury-causing occurrence.\textsuperscript{180} Rather, the dictum reflects a much narrower philosophy of comparative fault as merely a limited device to negate the harshness imposed on plaintiffs by the former "all or nothing" system,\textsuperscript{181} and thus the dictum is not necessarily an accurate statement of Kansas law. The better rationale is that comparative fault principles should be limited to tort cases in which sound public policy favors the apportionment of losses among the parties over harsh "all or nothing" rules. These comparative fault principles are not necessarily appropriate in contract cases in which fault is not an essential ingredient of breach, rights and remedies are determined by bargaining rather than imposed by law, and well established and well accepted principles and rules already govern the nature and measure of damages.

The court's exclusion of actions involving simple economic loss from the comparative negligence statute is sound in some, but not necessarily all, contexts. In Kennedy v. City of Sawyer\textsuperscript{182} the supreme court recognized that implied warranty may sound in either tort or contract and therefore held that comparative fault principles would apply not only to strict product liability actions, but also "to those claims based on implied warranty in product liability cases."\textsuperscript{183} In Broce-O'Dell plaintiff tried to characterize defendant's counterclaim concerning defective cement as an implied warranty claim subject to comparative fault principles. The court of appeals held that an implied warranty claim for simple economic loss was not a "product liability" claim within the meaning of Kennedy. This aspect of the court's holding is sound because

\textsuperscript{179} Id. at 845, 610 P.2d at 1110 (emphasis in original).


\textsuperscript{181} Admittedly, the harshness of the former "all or nothing" system is most frequently identified with the complete defense based on plaintiff's contributory negligence. That same harshness also existed when the entire burden of loss was imposed on defendant through the doctrine of last clear chance even though plaintiff was also at fault, or when the entire burden of loss was imposed on defendant through the denial of contribution even though another tortfeasor's fault contributed to plaintiff's injury. See, e.g., Letcher v. Derricott, 191 Kan. 596, 383 P.2d 533 (1963) (last clear chance); Aliseke v. Miller, 196 Kan. 547, 412 P.2d 1007 (1966) (no common law right of contribution).

\textsuperscript{182} 228 Kan. 439, 618 P.2d 788 (1980).

\textsuperscript{183} Id. at 450-51, 618 P.2d at 797.
the recognized boundary between tort and contract in implied warranty cases is the line between death, personal injury, and property damage on the one hand and simple economic loss on the other hand. In other words, the character of the damage is used to determine whether the implied warranty action lies in tort or in contract, and thus the court’s reliance on the product liability analysis in *Kennedy* is in reality simply another way of stating the rule that comparative fault applies to tort actions, but not to contract actions.

Despite the equation of simple economic loss with contract in the implied warranty cases, some actions involving simple economic loss may be brought in tort or in both tort and contract. By its own language, the comparative negligence statute applies to “negligence resulting in death, personal injury or property damage,” the most common categories of tort damage. In *Broce-O’Dell* the court buttressed its reliance on the *Kennedy* implied warranty distinction by reference to this statutory language, thereby raising the unanswered question whether tort actions involving simple economic loss are also outside the scope of the comparative negligence statute. Although the issue is too complex for full discussion in this limited survey, two comments may be appropriate. First, to the extent that tort actions may properly be maintained for simple economic loss, an exclusion of those actions from the provisions of the comparative negligence statute does not appear to be supported by any public policy consideration. Second, if comparative fault is applied to simple economic loss tort actions, the choice between tort and contract becomes more important in those cases and courts and counsel should examine carefully the propriety of bringing simple economic loss actions in tort.

Although the Kansas courts have applied the comparative negligence statute to various forms of tort liability other than negligence, the courts held in a series of recent decisions that comparative fault will not be applied to reduce the liability of intentional tortfeasors. *Sandifer Motors, Inc. v. City of Roeland*

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168 Admittedly, a difficult policy question may exist about whether and under what circumstances tort law should encompass actions for mere economic or pecuniary loss. Once the decision is made to extend tort law to such actions, however, the policy of distributing tort losses on the basis of proportionate fault seems as applicable to such actions as to actions involving personal injury and property damages. Nothing in the nature of economic loss suggests that a return to “all or nothing” principles would be desirable.

169 In tort, comparative fault principles will govern loss allocation, whereas in contract, all or nothing contract measure of damages principles will govern loss allocation. If both tort and contract are available as alternative remedies, procedural complexities may arise. For example, defendant may join additional parties in the action for purposes of comparative fault loss allocation in the tort claim, but must wait until the conclusion of the contract claim to assert any subrogation claim against an additional party. See *Haysville U.S.D. No. 261*, 233 Kan. at 635, 666 P.2d at 192.
Park involved a private nuisance action in which debris from the city's
dump washed onto plaintiff's land during a heavy rain and clogged plaintiff's
drainage system, causing flood damage to plaintiff's warehouse. The court of
appeals held that plaintiff's contributory negligence would result in a propor-
tionate fault reduction of his recovery if the city negligently caused the dam-
age, but not if the city intentionally caused the damage. Sieben v. Sieben involved a personal injury and property damage action in which a corporation,
its president, and an employee were held jointly and severally liable for prop-
erty damage and a battery committed by the employee and a separate battery
committed by the president while they were acting in concert against plaintiff.
The supreme court held that intentional tortfeasors are jointly and severally
liable for all damages caused by their torts and are not entitled to an apportion-
ment of damages pursuant to the individual judgment provision of the
comparative negligence statute.

Although neither court provided a rationale for the exclusion of intentional
torts from comparative fault principles, both holdings are sound. Compara-
tive fault may be viewed as a more equitable system of loss allocation than the
former "all or nothing" system of imposing the entire burden of loss on one of
two negligent parties. Reducing plaintiff's recovery in proportion to his own fault is more equitable than imposing the entire burden of loss on either the contributorily negligent plaintiff or on the negligent defendant. Similarly, the allocation of loss on a proportionate fault basis among tortfeasors under the
individual judgment system is more equitable than the former rules that fre-
quently imposed the entire burden of loss on only one of the tortfeasors.

These equitable adjustments in loss allocation are not necessarily appropri-
ate in intentional tort cases, however. An intentional tort involves quantita-

198 Id. at 378-79, 646 P.2d at 1042. Although the Sieben decision did not mention the issue, an
intentional tortfeasor should probably also be denied the right to maintain a comparative implied indem-

199 In Sandifer Motors the court simply noted that the action did not involve a true intentional
nuisance, but rather only a nuisance based on negligent conduct. The court merely indicated without
analysis that "[i]n the case of a true intentional nuisance, where contributory negligence was
never a defense, it may well be argued that under comparative negligence fault should not be
compared." 6 Kan. App. 2d at 318, 628 P.2d at 248. In Sieben the court simply held that the
"comparative fault statute . . . has done nothing to change the common law rule of joint and
several liability for defendants in intentional tort actions" and then quoted a long treatise passage
on the traditional rationale for joint and several liability for all concurrent tortfeasors under the
"all or nothing" system. 231 Kan. at 378, 646 P.2d at 1041-42 (1982). Unfortunately, the treatise
passage did not relate at all to the rationale for why comparative fault should not apply to
intentional tort actions.

194 Prior to comparative fault, Kansas courts refused to recognize a general right of contribu-
tion in favor of the defendant who paid all of plaintiff's damages even though the fault of another
tortfeasor, who plaintiff did not sue, also contributed to the damages. See, e.g., Alseike v. Miller,
196 Kan. 547, 412 P.2d 1007 (1966). Contribution was allowed only when both tortfeasors were
sued by plaintiff and became joint judgment debtors of plaintiff. See KAN. STAT. ANN. § 60-2413(b)
(1983). Even in jurisdictions that recognized a general right of contribution, apportionment was on
an equal division basis rather than in proportion to the fault of the parties. See RESTATEMENT
(SECOND) OF TORTS § 886A comment h (1977).
tively and qualitatively the most culpable form of tortious conduct because the tortfeasor intends to cause the harm or knows with substantial certainty that the harm will occur. The person who intentionally injures plaintiff has no compelling equitable claim that the damages should be reduced in proportion to plaintiff's contributory negligence. Common law denied intentional tortfeasors the benefit of available loss allocation devices prior to comparative negligence and these tortfeasors certainly have no significant equitable claim to the generous defendant-oriented benefits of the individual judgment system. Although the scope of comparative fault principles should properly extend beyond negligence, the Kansas courts have correctly limited comparative fault to nonintentional forms of fault.

The exclusion of intentional tortfeasors from the benefits of the individual judgment system becomes complicated when the negligence of one tortfeasor combines with the intentional tort of another tortfeasor to produce a harm. In *Lynn v. Taylor* the intentional misrepresentation of two tortfeasors and the negligence of a third tortfeasor caused plaintiff's damages. The district court held all three tortfeasors jointly and severally liable for plaintiff's damages. On appeal, the intentional tortfeasors conceded that as between themselves, joint and several liability was proper, but argued that their liability should be reduced by an amount representing the negligent tortfeasor's proportionate fault. The court of appeals rejected this argument on the ground that negligence is incapable of comparison with intent, and therefore, all three defendants were properly held jointly and severally liable.

The result in *Lynn* is correct to the extent that it relates to the refusal to provide a proportionate fault reduction of the intentional tortfeasors' liabil-

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195 See Restatement (Second) of Torts § 8 (1965).
196 See Restatement (Second) of Torts § 886A comment j (1977). It should be noted, however, that some intentional torts are based on innocent mistake rather than on a true intent to cause harm, and these situations probably should be afforded the benefits of the comparative negligence statute. Id.
197 The Kansas comparative negligence statute, as written and interpreted, has a number of features that are harsher to plaintiffs than other forms of comparative fault. First, the 49% rule completely bars plaintiff from recovery if his fault is equal to or greater than defendant's fault. Kan. Stat. Ann. § 60-258a(a). Second, joint and several liability is abolished and replaced by an individual judgment system under which each defendant is liable only for his proportionate fault share of liability. This change shifts the burden of one defendant's insolvency to the plaintiff. See Brown v. Keill, 224 Kan. 195, 580 P.2d 867 (1978). Finally, a defendant may join immune, unknown, and unavailable parties for purposes of fault comparison and thereby shift to plaintiff the burden of the proportionate fault share of the damages attributable to those parties. Id.
198 The same equitable argument could conceivably justify similar treatment of reckless tortfeasors. Although not as blameworthy as intentional wrongdoing, recklessness is a form of tortious conduct substantially more blameworthy than mere negligence. See Restatement (Second) of Torts § 500 (1965). The conceptual merit of such an approach notwithstanding, the author is of the opinion that courts in Kansas and elsewhere have been unable in practice to clearly and consistently distinguish between recklessness and the more serious cases of negligence. The more practicable approach, therefore, would involve the same treatment of recklessness and negligence for comparative fault purposes. See Restatement (Second) of Torts § 886A comment k (1977).
200 Id. at 373, 642 P.2d at 135-36.
ity, but both the rationale of *Lynn* and its imposition of joint and several liability on the negligent tortfeasor are unsound. Indeed, the court made no effort to support its conclusion that negligence is incapable of comparison with intent, and the real explanation of the holding seems to lie elsewhere. The court noted that *Kennedy* had held negligence capable of comparison with strict liability and breach of implied warranty, but the court also noted that *Sandifer Motors* had refused to apply comparative fault principles to intentional tort cases. The opinion apparently assumes that the court was limited to a choice between *Kennedy*’s complete application of the individual judgment system and the complete application of joint and several liability in order to follow the principle in *Sandifer Motors*. In fact, no such limitation on the court’s choices existed. A third, and arguably preferable, choice involves a hybrid approach in which the intentional tortfeasors are jointly and severally liable for the total amount of damages, but the negligent tortfeasor is liable only for that portion of the total damages representing his proportionate fault. This approach is compatible with both the policy of denying intentional tortfeasors the benefits of comparative fault and the policy of limiting the liability of nonintentional tortfeasors to their proportionate fault share of the total damages. Sound public policy should support attempts to find reasonable accommodation between two important, but conflicting, principles of tort loss allocation before adopting the more severe approach of promoting one principle to the complete exclusion of the other. The proposed hybrid approach constitutes such a reasonable accommodation.

2. Plaintiff’s fault

The Kansas comparative negligence statute contains the so-called “forty-nine percent rule” of modified comparative negligence, *i.e.*, that a plaintiff whose fault was less than defendant’s fault recovers damages reduced in proportion to plaintiff’s fault, whereas a plaintiff whose fault is equal to or greater than the defendant’s fault is completely barred from recovery. Prior to the survey period the court of appeals adopted the aggregation rule which states that for purposes of applying the forty-nine percent rule, plaintiff’s fault is compared with the aggregate fault of all defendants rather than a separate

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201 This result is consistent with the policy of denying to intentional tortfeasors any of the equitable comparative fault benefits that were unavailable to them under the “all or nothing” system.

202 *Id.* at 373, 642 P.2d at 135 (citing 6 Kan. App. 2d 308, 317-18, 628 P.2d 239 (1981)).

203 For example, assume that a jury found the intentional tortfeasors 90% at fault, the negligent tortfeasor 10% at fault, and awarded $100,000 total damages. Plaintiff would be allowed to recover $10,000 from the negligent tortfeasor and the remaining $90,000 from the intentional tortfeasors, or alternatively, the entire $100,000 from the intentional tortfeasors.

204 Four states have an analogous hybrid provision in their comparative fault statutes. In each of these statutes, defendants are, as a general rule, jointly and severally liable, but the liability of any defendant whose fault is less than plaintiff’s fault is limited to his proportionate fault share of the damages. See La. Civ. Code Ann. art. 2324 (West 1979); Nev. Rev. Stats. § 41.141.3 (1979); Ore. Rev. Stats. § 18.485 (1983); Tex. Rev. Civ. Stat. Ann. art. 2212a(3)(a)(c) (Supp. 1984).

comparison with each defendant's fault.\textsuperscript{207} During the survey period the supreme court ratified the adoption of the aggregation rule and interpreted it broadly. Both Negley v. Massey Ferguson, Inc.\textsuperscript{208} and Pape v. Kansas Power & Light Co.\textsuperscript{209} involved employees killed in job-related accidents caused by the concurring fault of the employee, his employer, and a third party. In each case the employee's fault was less than the aggregate fault of his employer and the third party. The employee's fault, however, was greater than the fault of the third party, who was also the only tortfeasor subject to common law liability.\textsuperscript{210} In both cases the supreme court held that the aggregation rule applied to allow plaintiff to recover a proportionate fault share of the total damages from the third party.\textsuperscript{211}

These holdings were clearly correct. The forty-nine percent rule is a harsh and discriminatory rule that, for no sound reason, deviates from the fundamental premise of comparative fault by imposing on plaintiff the entire burden of an accident caused by the wrongful conduct of both plaintiff and defendant. The only possible rationale for the rule is that a plaintiff who is fifty percent or more responsible for his own injury should be deemed to be too culpable as a matter of law to qualify for the "equitable" remedy of a comparative fault recovery.\textsuperscript{212} The dubious merits of this rationale notwithstanding, the rationale would not apply to the situation in Negley and Pape where the employee's fault did not rise to this substantial level. Moreover, the third parties had no possible claim of unfair treatment because they received the full benefit of the individual judgment provision and paid only the limited share of the total damages that they would have paid even if the employers had been subject to common law liability.\textsuperscript{213}

3. Indemnity

During the survey period the supreme court decided two cases involving the impact of the comparative negligence statute on various indemnity doctrines. In Baker v. City of Topeka\textsuperscript{214} the city had a franchise agreement with a power

\textsuperscript{209} 231 Kan. 441, 647 P.2d 320 (1982).
\textsuperscript{210} In Negley the jury found one of the decedents 22% at fault, his employer 68% at fault, and a third party 10% at fault. 229 Kan. at 466, 625 P.2d at 474. In Pape the jury found decedent 36% at fault, his employer 27% at fault, and a third party 35% at fault. 231 Kan. at 442, 647 P.2d at 322. Thus, but for the joinder of immune parties for the purpose of comparing fault and the application of the aggregation rule, the 49% rule in the Kansas comparative negligence statute would have barred recovery in both cases.
\textsuperscript{211} 231 Kan. at 448-49, 647 P.2d at 325-26; 229 Kan. at 472, 625 P.2d at 477.
\textsuperscript{212} This possible rationale is suspect because a defendant who is more than 50% at fault in causing an injury is not similarly deemed so culpable that he should pay 100% of plaintiff's damages rather than be given the equitable remedy of a proportionate fault reduction of the damages. This discriminatory treatment of plaintiffs under the statute lacks a rational basis.
\textsuperscript{213} The situations in Negley and Pape are examples of the rare cases in which the joinder of immune parties operates to the benefit of plaintiffs. Without such joinder, plaintiffs in both of these cases would have been more at fault than the defendant and thus barred from recovery by the 49% rule.
\textsuperscript{214} 231 Kan. 328, 644 P.2d 441 (1982).
company (KP&L) in which KP&L agreed to (1) operate, maintain and repair the city's traffic signals and (2) hold the city harmless from any damages caused by KP&L's negligence. Plaintiff was severely injured when his motorcycle was struck by a car in an intersection with a malfunctioning traffic signal. Plaintiff brought a negligence action against various defendants, including KP&L and the city. Eventually, both KP&L and the city entered into separate settlement agreements with plaintiff, and each agreement provided that the settlement was only for damages attributable to the individual defendant's own negligence, and that plaintiff reserved the right to pursue his claim against any remaining defendants. Thereafter, the city sought to pursue its previously filed cross-claim for indemnity against KP&L. In affirming the district court's dismissal of the indemnity cross-claim, the supreme court held that first, the express contractual indemnity did not extend to damages caused by the city's own negligence, and second, a settlement based on the city's own negligence would not support an implied indemnity in favor of the city against KP&L.\footnote{Id. at 334-35, 644 P.2d at 445-46.} Both holdings are sound.

First, the supreme court correctly treated the express contractual indemnity question as a matter governed solely by principles of contract law and unaffected by the comparative negligence statute.\footnote{There are two general categories of indemnity. Express contractual indemnities are contracts and thus not within the scope of the comparative negligence statute. See supra notes 175-89 and accompanying text. Implied indemnities arise by implication of law and are governed by tort principles. See Restatement (Second) of Torts § 866B (1977).} The court relied on the well established contract principle that “[a]n exculpatory agreement is to be construed strictly and its terms are not to be extended to situations not plainly within the language employed.”\footnote{231 Kan. at 334, 644 P.2d at 446 (quoting Missouri Pac. R.R. v. City of Topeka, 213 Kan. 658, 518 P.2d 372 (1973)).} The indemnity provision in the franchise agreement clearly did not extend to the damages paid in the city's settlement agreement with plaintiff because the franchise agreement expressly limited indemnity to losses suffered by the city as the result of KP&L's negligence. The city's settlement agreement expressly related to damages caused by the city's own negligence.

Second, the court correctly held that the doctrine of implied indemnity did not apply in a situation in which both KP&L and the city had been negligent, and each of them had entered into separate settlement agreements with plaintiff based solely on the individual defendant's own negligence. Prior to comparative fault, Kansas courts recognized the doctrine of "active-passive" indemnity in cases in which the indemnitee had satisfied plaintiff's judgment and both the indemnitee and indemniteor had been negligent, but the indemnitee's negligence was merely "passive" and the indemniteor's negligence had been "active."\footnote{See, e.g., Russell v. Community Hospital Ass'n, 199 Kan. 251, 428 P.2d 783 (1967); City of Fort Scott v. Penn Lubric Oil Co., 122 Kan. 369, 252 P. 268 (1927); City of Topeka v. Central Sash & Door Co., 97 Kan. 49, 154 P. 232 (1916).} In that situation, indemnity was essentially a tort doctrine of "all or nothing" loss allocation reflecting a policy determination that the entire bur-
den of the loss should fall on the substantially more blameworthy tortfeasor.\textsuperscript{219} The comparative negligence statute abolished the “all or nothing” doctrine in favor of individual judgments based on each tortfeasor’s proportionate fault share of the total damages. A new doctrine of “comparative implied indemnity” applies, however, in those relatively rare cases in which, despite the individual judgment provision, one tortfeasor settles plaintiff’s entire claim without participation from the other tortfeasor, thereby creating an equitable claim for recovery of the other tortfeasor’s proportionate fault share of the settlement amount.\textsuperscript{220} In \textit{Baker} the city’s settlement agreement clearly indicated that the settlement amount related only to the city’s own share of the liability, and its settlement payment could not be fairly viewed as extending to part of KP&L’s share of the liability. Under these circumstances the city clearly did not satisfy the prerequisites for a comparative implied indemnity claim.

The Federal Employers’ Liability Act (FELA)\textsuperscript{221} is a federal compensation statute designed to protect employees of railroads engaged in interstate commerce. FELA imposes pure comparative fault in negligence actions by railroad employees against their employers\textsuperscript{222} and mandates joint and several liability against the railroad for damages caused by the concurring fault of the railroad and any third party.\textsuperscript{223} FELA does not provide for any right of contribution or indemnity in favor of the railroad against a third party. State tort law governs those matters. In \textit{Gaulden v. Burlington Northern, Inc.}\textsuperscript{224} plaintiff railroad employee brought a negligence action against the railroad and a truck driver for damages allegedly caused by their concurring acts of negligence, and the railroad filed a cross-claim for indemnity against the truck driver. Prior to the trial plaintiff settled with the truck driver for $50,000 in exchange for a so-called “Piercing release.” This agreement obligates the plaintiff to indemnify the settling tortfeasor against any subsequent recovery of contribution or indemnity by the non-settling tortfeasor from the settling tortfeasor. The district court granted summary judgment in favor of the truck driver on the railroad’s indemnity claim and refused to submit the issue of the truck driver’s proportionate fault to the jury. The jury found that plaintiff suffered $1,000,000 damages and was twenty-five percent at fault, and the district court entered judgment for $750,000 against the railroad.\textsuperscript{225}

The supreme court reversed on the ground that Kansas law entitled the railroad to maintain a comparative implied indemnity cross-claim based on the

\textsuperscript{219} See, \textit{e.g.}, Security Ins. Co. v. Johnson, 276 F.2d 182, 185 (10th Cir. 1960) (applying Kansas law).
\textsuperscript{221} 45 U.S.C. §§ 51-60 (1976).
\textsuperscript{222} Id. § 53.
\textsuperscript{223} 45 U.S.C. § 53 provides that the employer is liable for damages caused in whole or in part by the employer’s negligence with a reduction in proportion to the employee’s contributory negligence. No provision is made for a further reduction of the damages in proportion to the fault of any third parties. The employer’s right to contribution or indemnity from a third party is wholly dependent on state law. See, \textit{e.g.}, Eades v. Union Ry., 396 F.2d 798 (6th Cir. 1968), \textit{cert. denied}, 399 U.S. 1020 (1969).
\textsuperscript{225} Id. at 210, 654 P.2d at 388-89.
truck driver's proportionate fault share of the total damages in the original trial. In addition, the court noted that the cumulative effect of the railroad's provision of the "Pierrienger release" limited plaintiff's ultimate recovery to the railroad's proportionate fault share of the total damages. Consequently, the court ruled that on retrial plaintiff should simply be awarded an individual judgment based on the railroad's proportionate fault share of the total damages.

The first part of the court's holding appears sound. FELA's imposition of joint and several liability protects the employee's interest in full satisfaction of his judgment. Comparative implied indemnity promotes the Kansas policy of allocating losses on the basis of each party's proportionate fault while normally not interfering in any manner with FELA's employee protection policy. Admittedly, under the specific facts of Gaulden, comparative implied indemnity coupled with the indemnity provision of the "Pierrienger release" creates a risk that plaintiff might ultimately bear a portion of the loss attributable to the truck driver's fault. Nevertheless, this risk of less than full recovery was clearly contemplated by plaintiff and the truck driver in their settlement agreement and should be viewed simply as the price plaintiff pays for the benefits of the settlement agreement. Accordingly, this risk should not be deemed sufficient to negate the railroad's right to maintain a comparative implied indemnity action against the truck driver.

The second part of the court's holding is potentially inconsistent with FELA's joint and several liability requirement. The railroad's right to comparative implied indemnity is dependent upon a showing that the truck driver would have been liable to plaintiff under Kansas law. The forty-nine percent rule of the Kansas comparative negligence statute provides a potential defense to the truck driver even though the railroad is subject to pure comparative fault. If on retrial the jury finds plaintiff fifty percent or more at fault, the railroad would not be entitled to comparative implied indemnity from the truck driver. In turn the indemnity provision of the "Pierrienger release" would not operate to reduce plaintiff's ultimate recovery. In that situation a proportionate fault individual judgment against the railroad would violate FELA's joint and several liability requirement, and the proper procedure should be a

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226 Id. at 213-14, 654 P.2d at 391.
227 Id. at 215-16, 654 P.2d at 392.
228 For example, if the jury in Gaulden had also found the truck driver 25% at fault, the truck driver would pay a $250,000 comparative implied indemnity to the railroad, but would recoup the $250,000 from plaintiff pursuant to the contractual indemnity provision of the Pierrienger release. Thus, plaintiff will ultimately recover $550,000, of which the truck driver will have paid $50,000 in settlement and the railroad will have paid $500,000.
229 Using the figures in note 228 supra, plaintiff will ultimately recover $200,000 less than the jury awarded him. This $200,000 loss was the result of his voluntary settlement agreement with the truck driver, and no compelling reason exists to permit the plaintiff and the truck driver to increase by their own agreement the portion of the total liability ultimately borne by the railroad.
judgment against the railroad for the total amount of damages minus the sum of plaintiff's proportionate fault share of the damages and the amount paid by the truck driver in settlement.\textsuperscript{231}

4. Procedural problems involving joinder

The joinder provision of the Kansas comparative negligence statute contemplates the determination of all claims arising out of an injury-causing occurrence in a single action. In furtherance of this purpose, the statute provides for the joinder of additional parties in the original action.\textsuperscript{232} This novel provision is a dramatic departure from the traditional rules of civil procedure that leave plaintiff's original structuring of an action undisturbed and provide for the determination of issues concerning additional parties through the use of third party actions. During the survey period the Kansas courts experienced difficulty with the procedures applicable to the joinder provision.

In Ellis v. Union Pacific Railroad\textsuperscript{233} plaintiffs brought a negligence claim and three wrongful death claims against the railroad for damages relating to injuries suffered by the driver of an automobile and the deaths of his three passengers in an automobile-train collision. Before the statute of limitations expired the railroad formally joined three governmental entities as additional parties pursuant to Kansas Statutes Annotated Section 60-258a(c). The railroad served on the governmental entities a petition with a prayer that the railroad be dismissed from the action or, alternatively, that the railroad's liability be reduced in proportion to the fault of the governmental entities. The railroad did not affirmatively seek damages from the governmental entities, and plaintiffs never amended their petitions to seek damages from the governmental entities. After the statute of limitations expired, the railroad settled with plaintiffs, who in turn released all defendants, including the governmental entities. The railroad then sought to maintain an action for comparative implied indemnity against the governmental entities. However, the district court dismissed the action on the ground that no party had asserted a claim for damages against the governmental entities prior to the expiration of the statute of limitations. A sharply divided supreme court affirmed the dismissal.\textsuperscript{234}

The central issue in Ellis concerned the status of an additional party for-

\textsuperscript{231} For example, assume that the jury found plaintiff 50\% at fault, the railroad 25\% at fault, the truck driver 25\% at fault, and awarded $1,000,000 total damages. Assume also that the truck driver had previously entered into the same Pieringer release $50,000 settlement agreement with the plaintiff. If the railroad is liable for only its proportionate fault share of liability, or $250,000, then plaintiff receives a total of $300,000. If the railroad is liable for $500,000 and its comparative implied indemnity action against the truck driver fails because of the 49\% rule defense, then the railroad gets a credit for the $50,000 settlement and pays plaintiff $450,000.


\textsuperscript{234} The holding was originally a four-to-three decision with Justices Fromme, Holmes, and Herb dissenting. 231 Kan. at 182, 643 P.2d at 158. On rehearing the holding was affirmed by a four-to-three decision. District Judge William Clement served temporarily during Justice Fromme's illness and voted with the majority, while Justice Miller joined Justice Holmes and Herb in the dissent. 232 Kan. at 194, 653 P.2d at 816. As currently constituted, the court is divided three-to-three on the issue with Justice Lockett not yet expressing his views on the issue.
mally joined in the original action pursuant to Kansas Statutes Annotated Section 60-258a(c). In the majority opinion Chief Justice Schroeder held that an additional party, whether “formally” or “informally” joined, merely serves the purpose of limiting the original defendant's liability to his proportionate fault share of the total damages, and that a “formally” joined additional party is not subject to liability until a claim for monetary damages is asserted against him. Justice Herd, on the other hand, writing the primary dissent, argued that an additional party formally joined by service of process should be a party to the original action for all purposes, including liability for damages.

In choosing between these two positions a fundamental consideration is that any party to litigation should have clear and unequivocal notice that he is subject to a claim for damages. Justice Herd’s approach might satisfy this notice factor if joinder under Section 60-258a(c) had only one purpose, i.e., to make a tortfeasor not originally sued by plaintiff an additional defendant in the original action for all purposes. In that situation a motion for joinder and service of a copy of plaintiff’s petition on the additional party could be interpreted as sufficient notice that the additional party is subject to a claim for damages in the original action.

The joinder provision has been interpreted, however, as having multiple purposes. First, an additional tortfeasor may be “informally” joined, a procedure that is not truly a joinder, but merely a notice that defendant intends to assert the fault of the additional tortfeasor in order to limit defendant’s share of the damages. Second, an additional tortfeasor may be “formally” joined for the same limited purpose even though the additional tortfeasor is immune and clearly not subject to a claim for damages. Third, an additional tortfeasor may be “formally” joined for the purpose of being made an additional party subject to a claim for damages. Accordingly, the mere fact of joinder under Section 60-258a(c), even when made “formal” by service of process, does not necessarily provide notice that the additional party is subject to a claim for damages. Therefore, the majority’s insistence on an assertion of a claim for damages against the additional tortfeasor before the statute of limitations expires is a sound and sensible response to the uncertainty created by the court’s prior interpretations of the joinder provision.

231 Kan. at 190-92, 643 P.2d at 164-66.
231 Kan. at 192, 643 P.2d at 166-67 (Herd, J., dissenting).
237 See Brown v. Keill, 224 Kan. 195, 204-06, 580 P.2d 867, 874-75 (1978). The rationale in Brown was that since immune, unknown, and unavailable parties could be “joined” for the limited purpose of fault comparison, no useful purpose would be served by requiring a formal joinder procedure. As a result, the concept of joinder became reduced to little more than a generalized “notice” requirement that is often referred to in the cases as “informal joinder.” Joinder consisting of a summons and petition is referred to as “formal joinder.” See, e.g., Ellis, 232 Kan. at 196, 653 P.2d at 817 (1982) (Herd, J., dissenting).
238 See Wilson v. Probst, 224 Kan. 459, 581 P.2d 380 (1978). Although not necessary, certain limited discovery and trial advantages exist in the formal joinder of an immune party. For example, interrogatories and requests for admission may be served upon “any other party,” KAN. STAT. ANN. §§ 60-233, -236 (1983). A party’s deposition may be read at trial for any purpose. Id. § 60-232(a)(2).
239 See, e.g., Ellis, 231 Kan. at 182, 643 P.2d at 158 (claim for damages failed for lack of claim in petition for joinder).
Unfortunately, the majority opinion in Ellis adopts a procedure that is apparently more complicated and cumbersome than necessary to provide adequate notice of a pending claim for damages. To the extent that notice is the objective, an adequate procedure would require only a prayer in the joinder petition that the additional party be held liable for his proportionate fault share of the damages.\textsuperscript{240} Ellis seems to require, however, that in order to subject an additional party fully to liability, plaintiff must amend his petition to state a claim for damages in the original action against the additional party. In addition, defendant must state a comparative implied indemnity claim for damages against the additional party.\textsuperscript{241}

The requirement that plaintiff must amend his petition is based on dictum in Brown v. Keill that “[i]t is doubtful if the plaintiff in such a [joinder] case can be forced to make a claim against the added party.”\textsuperscript{242} This dictum appears unsound for two reasons. First, the court has repeatedly recognized that the purpose of the joinder provision is to prevent plaintiff from thwarting equitable loss allocation by suing only one of the tortfeasors.\textsuperscript{243} Second, the literal language of the joinder provision clearly contemplates that defendant can force an additional tortfeasor into the action as a party to plaintiff’s claim.\textsuperscript{244} Once the party gives adequate notice in the joinder petition, amendment of plaintiff’s petition to assert a claim for damages against the additional party serves no useful purpose. Any such requirement increases the likelihood that the running of the statute of limitations or a procedural error will prevent a complete proportionate fault allocation of loss.\textsuperscript{245}

\textsuperscript{240} A statement in the petition that the joined party may be liable for his proportionate share of the damages in all claims then pending in the action should constitute sufficient notice to make him a party defendant to all claims in the action.

\textsuperscript{241} Admittedly, this aspect of the court’s holding is subject to differing interpretations. The court emphasized that because none of the parties made a claim for damages against the joined parties, “neither the defendants nor the plaintiffs state a cause of action against the joined parties.” 231 Kan. at 190, 643 P.2d at 165. Read narrowly, Ellis might require only that somebody formally assert a claim for damages against the joined party within the period of the statute of limitations in order to make the joined party a party to the action for all purposes. If so, and if the plaintiffs in Ellis had acted accordingly, then perhaps defendants would not have been required to make a comparative implied indemnity claim against the joined parties within the same limitations period. Until the court clarifies this point, however, prudence would indicate that Kansas lawyers should make separate claims for comparative implied indemnity against co-defendants prior to the expiration of the statute of limitations governing plaintiff’s claim.

\textsuperscript{242} 224 Kan. 196, 206, 580 P.2d 867, 875 (1978).


\textsuperscript{244} Read literally, subsection (c) of the statute provides that “any party against whom a claim is asserted” may join any other person “as an additional party to the action.” Subsection (d) then provides that individual proportionate fault judgment shall be rendered when “the comparative fault of the parties is an issue and recovery is allowed against more than one party.” Kan. Stat. Ann. § 60-258a(c) & (d) (1983). This procedure refers only to defendants, and nothing in the statute suggests that plaintiff must follow additional procedures before the additional party is a party for all purposes. Since a purpose of the joinder provision is to prevent plaintiff from distorting the ultimate loss allocation by suing only one defendant, the suggestion that forcing a joined party to be a defendant to plaintiff’s claim without plaintiff’s consent lacks logical and statutory support. If plaintiff objects to being forced to sue the joined party, plaintiff is always free to release him.

\textsuperscript{245} The concept of “complete proportionate fault allocation of loss” should properly include the
The requirement that a defendant must assert a comparative implied indemnity claim against another defendant, whether originally in the action or subsequently joined, prior to the expiration of the statute of limitations on plaintiff's claim seems unsound on both conceptual and practical grounds. Conceptually, a comparative implied indemnity claim does not exist at the time plaintiff brings his action and only arises when defendant foregoes the protection of the individual judgment system by paying plaintiff's entire claim. Thus, the general notice requirement in Ellis probably provides a potential indemnitor with more protection than existed before comparative fault in Kansas. As a practical matter, the procedure will probably generate a flood of unnecessary paperwork because each defendant will now feel compelled to protect himself by filing contingent claims for comparative implied indemnity against every other defendant.

II. PRODUCTS LIABILITY

A. Warning Defects

In Mays v. Ciba-Geigy Corp., plaintiff, a roustabout with only a few weeks experience, was severely burned in a gas explosion and fire that occurred while he assisted in testing a fiberglass-to-steel pipe connection between a gas well and a separator. His employer Dale made the connection with fiberglass pipe, adapters, and epoxy glue manufactured by Ciba-Geigy. According to his deposition testimony, plaintiff was standing next to the separator when the pipe suddenly whipped up and ruptured approximately five feet from the connection. In his deposition, Dale testified that he was experienced in gas pipe line operations, that he did not read Ciba-Geigy's package insert warnings and instructions, and that he did not obtain and read an available Ciba-Geigy man-

limitation of a defendant's liability to his proportionate fault share of the damages. This concept should also encompass reasonable and fair procedures designed to facilitate to the maximum extent feasible plaintiff's actual recovery of that proportionate fault share of damages from each defendant. The multiple pleading requirement in Ellis is arguably an unnecessary procedure that will be a trap for the unwary and thus a barrier to actual recovery of the damages to which plaintiff is properly entitled.

44 The general rule is that an indemnity action accrues when the indemnitor's legal obligation, not at the time of the commission of the tort that results in plaintiff's claim against the indemnitee. See 41 Am. Jur. 2d Indemnity § 39 (1968).

45 Assuming that Kansas would have followed the general rule governing the accrual of indemnity actions, the statute of limitations for an active-passive indemnity claim prior to comparative fault would not have commenced until the indemnitee paid plaintiff's claim in the initial action. The indemnity action would have been a separate, successive action and could not have been time barred prior to the settlement of plaintiff's claim. The holding in Ellis departs from this traditional rule, apparently because procedurally under the joinder provision of the comparative negligence statute the indemnitors became parties to the initial action. This procedural change, however, does not necessarily support a departure from the traditional rule governing the accrual of indemnity actions.

46 In all likelihood this flood of contingent filings will result in a great amount of burdensome, expensive and unnecessary paperwork because in my opinion one tortfeasor will settle an entire claim on behalf of both himself and other nonsettling tortfeasors only in a small minority of the cases.

ual on fiberglass-to-steel pipe connections. In affirming a summary judgment in favor of Ciba-Geigy, the supreme court held *inter alia* that Ciba-Geigy did not owe a duty to plaintiff, as opposed to Dale, to warn about the dangers involved in the installation and testing of a highly specialized product.

The court’s holding appears theoretically sound. The purpose of warnings and instructions is to avoid injuries by providing users and consumers with adequate information concerning both the safe and proper use of the product and the product’s dangerous propensities. In most situations, the manufacturer should take steps reasonably calculated to communicate the warnings and instructions to the ultimate users and consumers, who are the persons most likely to be injured by the product and thus most in need of the warnings and instructions. In a few limited situations, however, the policy of accident avoidance is better promoted by communicating the warnings and instructions to an informed and skilled intermediate party rather than to the ultimate user or consumer. The best example is the prescription drug rule that requires a manufacturer of prescription drugs to communicate detailed warnings and instructions only to physicians. The rationale for the rule is that the process of determining the proper prescription drug for a patient’s individual medical condition requires a highly specialized judgment based on the medical training, knowledge, and skill possessed only by physicians.

The holding in *Mays* is clearly analogous to the prescription drug rule be-

\[250\] Id. at 41-42, 661 P.2d at 352.

\[251\] In addition to various procedural issues, the supreme court also held that no genuine issue existed regarding an alleged manufacturing defect. Plaintiff testified that he saw the pipe rupture about five feet from the connection, but he was the only eyewitness and he was uncertain on which side of the connection the rupture occurred. Ciba-Geigy manufactured the fiberglass pipe on one side of the connection, but not the steel pipe located on the other side. Thus, it was equally likely that the rupture occurred in pipe not manufactured by Ciba-Geigy. The supreme court held that a party seeking to show the existence of a defect by circumstantial evidence must negate other possible causes of the accident to an extent sufficient to warrant a reasonable inference that the alleged defect was the cause of the accident. Otherwise, any verdict would be based on mere speculation. *Id.* at 50, 661 P.2d at 354. While these principles seem sound, one might question whether summary judgment was a proper means of deciding such an issue at a time when the parties were apparently still conducting some discovery.

\[252\] Id. at 61, 661 P.2d at 365.


cause it recognizes the relative inability of low echelon unskilled employees to appreciate and make sound safety-related judgments based on warnings and instructions concerning highly specialized, technologically complex products that can be properly installed and operated only by highly skilled personnel. In such situations, the policy of accident avoidance is adequately served by communicating the warnings and instructions to the skilled person in charge of the actual installation and operation of the product.

More doubtful, however, is the propriety of applying this limited warning rule to the factual situation in *Mays* by summary judgment. Although the details of making a fiberglass-to-steel pipe connection may well be sufficiently specialized to justify limiting the reach of certain technological warnings and instructions to highly skilled persons, this fact should not automatically preclude the additional requirement that at least some warnings about less specialized matters be reasonably calculated to reach even unskilled employees. In *Mays* three of the alleged errors in the installation and testing of the pipe connection were the failure to backfill or pin the fiberglass pipe between connections prior to testing, the failure to test the system with a nonflammable substance, and the failure to turn off open flames on the separator and heater prior to testing. None of these matters seem to be sufficiently complex to justify the conclusion as a matter of law that warnings about them would not provide an ordinary unskilled worker with any increased ability to protect himself. Under the circumstances, a genuine issue of material fact existed about the feasibility of the manufacturer providing some general warnings about these dangers reasonably calculated to reach the unskilled workers. Thus, summary judgment on the warning issue was arguably inappropriate.

B. Design Defects

Perhaps the most difficult issue involving design defects in strict liability is the choice of test used to determine whether a product is "in a defective condition unreasonably dangerous to the user or consumer . . . ." Three basic tests have evolved in the case law. First, the consumer expectations test measures defectiveness by whether the product is "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." Second, the risk-benefit test measures defectiveness by the traditional process of balancing risk factors against benefit and utility factors. Third,

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356 An issue not addressed in *Mays* is whether Ciba-Geigy could have feasibly communicated to unskilled workers warnings attached to the product itself or on the product packaging. If these warnings are not feasible, the manufacturer may be forced to rely on an intermediate party to provide adequate warnings to remote users and consumers. See Jones v. Hittle Serv., Inc., 219 Kan. 627, 549 P.2d 1383 (1976). See also Weekes v. Michigan Chrome & Chemical Co., 352 F.2d 603 (6th Cir. 1965); Bryant v. Hercules, Inc., 325 F. Supp. 241 (W.D. Ky. 1970). In *Mays* the pipe installation and connection apparently involved many different parts, some of which Ciba-Geigy did not manufacture. The opinion fails to give the necessary facts to determine whether any of the Ciba-Geigy parts were of sufficient size to have adequate warnings attached to them.

357 *Restatement (Second) of Torts* § 402A (1965).

358 *Id.* comment i.

359 For a careful analysis of the risk-benefit theory in the context of strict liability, see Wade, *On
the so-called Barker hybrid test provides that a product is defective if it fails to pass either the consumer expectations test or the risk-benefit test.260 The pattern instructions used in Kansas are sufficiently ambiguous that they could encompass any test for defectiveness.

A product is in a defective condition if, at the time it leaves the (manufacturer's) (seller's) hands, it is in a condition which is unreasonably dangerous to the ordinary user.

A condition is unreasonably dangerous if it is dangerous when used in the way it is ordinarily used considering the product's characteristics and common usage.261

During the survey period the supreme court displayed confusion and inconsistency in dealing with the defectiveness issue.

In Lester v. Magic Chef, Inc.,262 plaintiff, a two-year-old girl, climbed onto the top of a gas stove to reach some cookies and accidentally turned on one of the gas burners when she brushed against a one-step control knob on the stove. The burner ignited her clothing, and she was severely burned. On several prior occasions her parents had turned on a burner by similarly brushing against one of the control knobs, and this evidence tended to show that the stove was not defective under the consumer expectations test. Since the parents knew the stove could accidentally turn on in this manner, they could not later claim that this characteristic of the stove violated their expectations about how safely the stove would perform in similar situations.263 The accident could have been easily prevented if the stove had been equipped with simple, inexpensive and readily available two-step control knobs,264 and this evidence tended to show that the stove was defective under the risk-benefit or Barker tests.265

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the Nature of Strict Tort Liability for Products, 44 Miss. L.J. 825 (1973).

260 See Barker v. Lull Eng'g Co., 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978). In addition to affording plaintiff the benefits of both the consumer expectations test and the risk-benefit test, Barker also shifted the burden of proof to defendant to prove under the risk-benefit portion of the test that "on balance the benefits of the challenged design outweigh the risk of danger inherent in such design." 20 Cal. 3d at 435, 573 P.2d at 458, 143 Cal. Rptr. at 239-40. In Lester v. Magic Chef, Inc., 230 Kan. 643, 641 P.2d 353 (1982), however, plaintiff's proposed Barker instruction did not request this shifting of part of the burden of proof to defendant.

261 See In re: Pattern Instructions for Kansas 2d (Civ.) § 13.21 (1977). The ambiguity lies primarily in the definition of "unreasonably dangerous" as "dangerous when used in the way it is ordinarily used." This test could apply to a latent undiscovered danger of the kind contemplated by the consumer expectations test, and it could also apply to an obvious or known danger of the kind contemplated only by the risk-benefit test. Moreover, the "dangerous in ordinary use" test could apply even to products normally not considered defective because even nondefective products may have dangers that can produce injury in ordinary use. This instruction is wholly inadequate in providing a jury any meaningful guidance.


263 Notice that this application of the consumer expectations test uses the parents' expectations, not the minor child's expectations. See infra notes 274-75 and accompanying text.

264 See, e.g., Magic Chef, Inc. v. Sibley, 546 S.W.2d 851 (Tex. Civ. App. 1977) (similar accident involving five-year-old girl could have been avoided by a two-step control knob at an additional cost of $1.50).

265 The obviousness of a danger is only one factor for consideration in risk-benefit analysis. If the risks inherent in the product still outweigh the benefits of the particular design despite the obviousness of the danger, a safer design should be adopted to eliminate or reduce those risks.
Plaintiff tried the action on alternative theories of strict liability and negligence. Regarding the strict liability claim, the trial court gave the jury a pure consumer expectations instruction rather than the ambiguous pattern instruction. The court also refused to instruct the jury on the Barker test. The jury then found the manufacturer not at fault and plaintiff’s parents each fifty percent at fault. In affirming the verdict, a sharply divided supreme court held that strict liability in Kansas is based on Section 402A of the Restatement (Second) of Torts. The court reasoned that the consumer expectations test is the only test for defectiveness recognized by Section 402A, and the ambiguous Kansas pattern instruction reflects the consumer expectations test.

The majority’s reliance on the Restatement is unpersuasive. Kansas judicially adopted strict liability because the problem of injuries caused by defective products is more realistically a matter for tort law rather than contract law and because greater product safety and more certain compensation of injured consumers were deemed desirable policy objectives achievable through strict liability. Thus, the question of the proper test for defectiveness should be a matter for judicial determination based on sound policy considerations and not simply a matter of blind allegiance to a Restatement provision drafted at a relatively early stage in the development of modern products liability law. Indeed, for this reason many jurisdictions that have adopted Section 402A have also recognized the risk-benefit test as an alternative test for measuring the defectiveness of a product’s design.

Justice Prager’s dissent recognized that from a policy perspective the consumer expectations test is too limited to deal adequately with the overall problem of product safety. With its focus on the consumer’s knowledge and appreciation of product dangers, the test is most effective in cases where injuries are caused by latent dangers unknown to the consumer. In two important respects, however, the test is inadequate.

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266 The instruction was taken verbatim from comment i to Section 402A of the Restatement (Second) of Torts (1965). The comment states: “A product is unreasonably dangerous if it is dangerous to an extent beyond that which would be contemplated by an ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.”

267 At the time of the accident, plaintiff’s mother was in the bathroom and her father was away from home. The supreme court noted, however, that some evidence in the record tended to show that certain maintenance on the stove, if performed, would have made accidental ignition more difficult. It is noteworthy that making ignition more difficult does not necessarily equate with prevention of the accident.

268 See Brooks v. Dietz, 218 Kan. 698, 545 P.2d 1104 (1976); Restatement (Second) of Torts § 402A comment c (1965).

269 When the Restatement adopted strict liability in 1965, the primary focus in products liability was on the problem of manufacturing defects; to a lesser extent the Restatement concerned warning defects. The Restatement paid virtually no attention to the problem of design defects. Indeed, the comments to Section 402A of the Restatement (Second) of Torts (1965) make no mention of design defects. See generally Keeton, Products Liability—Design Hazards and the Meanings of Defect, 10 Cumberland L. Rev. 293, 300-02 (1979).


First, the test is founded upon an unsound implied assumption that product dangers known to the ordinary consumer are not unreasonably dangerous. Knowledge of a danger gives the consumer some ability to avoid the danger, but does not necessarily mean that the manufacturer has achieved optimum product safety. Carelessness, forgetfulness, and boredom with routine and repetitive tasks are normal human characteristics, and the consumer’s constant exposure to a known danger creates a risk that sooner or later an injury will occur. If this risk is great and could be eliminated by the adoption of a simple, inexpensive, and readily available design change, as in *Lester*, then the failure to adopt the design change should render the product defective in order to promote the policy of accident avoidance. The risk-benefit test produces this result.

Second, the consumer expectations test is ineffective in dealing with the defectiveness issue in cases in which consumers lack well-defined expectations about product safety. In a society filled with increasingly complex mechanical, electrical, and chemical products, this problem affects all consumers. The problem is most pronounced, however, in cases involving young children. At very young ages, as in *Lester*, they wholly lack any meaningful ability to appreciate even the most obvious product dangers. Even at somewhat older ages, their expectations about product safety remain elementary. In addition, they lack the vigilance, concentration, and discipline necessary to protect themselves adequately when constantly exposed to known product dangers. With its focus on multiple factors relevant to product safety, the risk-benefit test is better suited to deal with these problems.

The flaw in the dissent’s position, however, is that in *Lester* the jury instructions did in fact contain the essence of the *Barker* hybrid test. The strict liability instructions covered the consumer expectations prong of the test, and the negligence instructions covered the risk-benefit prong of the test. While a difference in the scope of the risk-benefit test in negligence and in strict liability may exist in theory, that difference would not have affected the outcome in *Lester*. Plaintiff’s counsel could have argued to the jury, and the jury had

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- For example, the ordinary consumer is unlikely to have well-defined expectations about how well various parts of a vehicle will withstand an accident. See, e.g., Heaton v. Ford Motor Co., 248 Or. 467, 435 P.2d 806 (1967) (wheel separated from off-road vehicle after hitting rock five inches in diameter at highway speed). In order to prevent automatic denial of recovery in these cases, some courts have accepted less than persuasive “expert” testimony about consumer expectations. See, e.g., Turner v. General Motors Corp., 514 S.W.2d 497 (Tex. Civ. App. 1974) (car dealer allowed to testify about customers’ expectations that a car roof would not collapse in a roll-over accident). *See generally* Montgomery & Owen, *Reflections on the Theory and Administration of Strict Tort Liability for Defective Products*, 27 S.C.L. Rev. 803, 823 (1976).


- In cases involving very young children, courts might suggest that parents should constantly supervise and protect children as a rationale for using the parents’ expectations. This concept completely breaks down, however, in cases involving slightly older children who are not constantly supervised and who will regularly come into contact with various products that have substantial capacity for causing injury to children.

- Under the risk-benefit test for strict liability actions proposed by Professor Wade and fol-
the authority to decide, that the stove was defective if its design failed to pass either the consumer expectations test or the risk-benefit test. The traditional rule governing instructions on appeal is that error in an isolated instruction does not justify reversal if, considered as a whole, the instructions fairly state the law as applied to the facts of the case.\(^{277}\) Therefore, reversal arguably was unwarranted in Lester.

Accordingly, the real issue in Lester is more a question of procedure than of policy, i.e., should negligence and strict liability instructions be given separately, or should they be combined in a single, integrated set of instructions for a “product liability” claim? The majority opted for the former approach because a prior supreme court decision had held that the commingling of negligence principles into strict liability instructions was reversible error.\(^{278}\) The dissent recognized that the risk-benefit test is essentially a negligence test and urged the adoption of integrated “product liability” instructions because negligence and strict liability principles substantially overlap in the area of design defects.\(^{279}\) The dissent was probably correct that such integrated instructions would be more likely to apprise the jury of the governing law in a structured and understandable manner.

In Siruta v. Hesston Corp.,\(^{280}\) the supreme court cast considerable doubt on allowed by a number of courts, knowledge of the dangerous condition in the product is imputed to the manufacturer before weighing risks against benefits. See, e.g., Newman v. Utility Trailer & Equip. Co., 278 Or. 395, 564 P.2d 674, 675-77 (1977). See generally Wade, On the Nature of Strict Tort Liability for Products, 44 Miss. L.J. 825, 837-38 (1973). This test will produce a different result than risk-benefit analysis in negligence actions in which the manufacturer may avoid liability solely by persuading the jury that his failure to discover the dangerous condition was not negligent. In Lester, however, the manufacturer already knew about the danger inherent in a one-step control knob from earlier lawsuits. See, e.g., Magic Chef, Inc. v. Sibley, 546 S.W.2d 851 (Tex. Civ. App. 1977).


\(^{278}\) See Prentice v. Acme Mach. & Supply Co., 226 Kan. 406, 601 P.2d 1093 (1979). In Prentice the supreme court reversed a judgment in favor of plaintiff because the instruction erroneously included the negligence concept of “reasonable anticipation.” Since the purpose of strict liability is to spare a plaintiff the extra burdens of proving negligence, the Prentice holding is most confusing. The court should have characterized the error as harmless. The error that arguably did justify reversal in Prentice was the improper use of an employer-employee assumption of risk instruction instead of an assumption of risk instruction patterned after comment n to Section 402A of the Restatement (Second) of Torts (1965).

\(^{279}\) 230 Kan. at 658-60, 641 P.2d at 363-65 (Prater, J., dissenting). Justice Prager heavily relied on an analogy to the provisions of the Kansas Product Liability Act that merges strict liability, negligence, and all other theories of liability into a single “product liability claim” for certain limited purposes. See Kan. Stat. Ann § 60-3302(c) (1983). Justice Prager’s proposal seems eminently sound as a means of avoiding what otherwise would be the confusion of parallel sets of instructions when a plaintiff brings a claim under more than one theory of product liability.

\(^{280}\) 232 Kan. 654, 659 P.2d 799 (1983). Out of fairness I must disclose that I was involved in the preparation of the appellate briefs submitted on behalf of Hesston Corporation. On the one hand, I cannot guarantee that despite this personal involvement I am entirely without bias in favor of the view expressed in Chief Justice Schroeder’s lengthy, meticulous and brilliantly reasoned dissenting opinion. On the other hand, I have a detailed knowledge of the entire record on appeal and can attest that Chief Justice Schroeder’s dissenting opinion represents a factually accurate description of the evidence in the case.
the continued viability of *Lester*. In *Siruta* plaintiff, a farm foreman, had his left hand severed when it became caught between a belt and a roller in a large round hay baler. At the time of the accident, plaintiff was working alone in a field when he noticed that one or more of the baler’s belts and a half-formed bale had stopped turning. He dismounted the tractor without turning off the engine or disengaging the power take-off and stood approximately three feet from the front of the baler to look for the source of the problem. According to his testimony, the next thing he knew was that he was caught in the baler. He denied reaching into the moving parts of the baler, but otherwise claimed that he had no knowledge or recollection of how he became caught. At trial the parties suggested two theories of how the accident occurred. Plaintiff’s theory was that a belt broke, snapped outside the frame of the baler, grabbed his arm, and bullwhipped him into the baler. Defendant’s theory was that plaintiff reached inside the baler and was pulling on the belt just below the roller when his hand became caught between them. According to plaintiff’s expert, who used a so-called “hazard-risk” test for defectiveness, defendant defectively designed the baler under either theory of the accident, because it lacked a safety guard over the entire front of the baler that would have prevented both a belt from snapping outside the frame of the baler and plaintiff from reaching inside the baler. Neither party introduced any evidence of consumer expectations, and plaintiff’s expert testified that consumer expectations were wholly irrelevant to his analysis.

Concerning the defectiveness issue, the trial court refused defendant’s request for a risk-benefit instruction and simply used the Kansas pattern instructions. In affirming a jury verdict for plaintiff, Justice Prager’s majority opinion held *inter alia* that the testimony of plaintiff’s expert established a design defect and that the Kansas pattern instructions adequately apprised the jury of the meaning of defectiveness.

This holding is unsound. If *Lester* is still valid, the absence of any consumer expectations evidence would require reversal. If *Lester* is invalid and the risk-benefit test or the *Barker* test now governs defectiveness in Kansas, the trial court’s use of a consumer expectations instruction and denial of defendant’s request for a risk-benefit instruction would require reversal and remand for a new trial. Although the impact of *Lester* was a major issue on appeal in *Siruta*, the majority opinion wholly ignored the issue and never mentioned *Lester*. This result is clearly incompatible with the fundamental principles un-

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281 Id. at 662-63, 659 P.2d at 805-06. To date, no court in the United States has adopted the “hazard-risk” test used by plaintiff’s expert. The test is apparently similar to the risk-benefit test, but places greater emphasis on risk elements and plays down countervailing benefit considerations. Its source appears to be a trial manual written by a former president of the American Trial Lawyers Association. See D. ROBB, H. PHILO, & R. GOODMAN, LAWYER’S DESK REFERENCE §§ 22:2-22:4, at 950-51 (1971).

283 232 Kan at 668-69, 659 P.2d at 809.

285 As previously discussed, the pattern instruction on the meaning of “unreasonably dangerous” is hopelessly ambiguous and could cover any theory of defectiveness. See supra note 261. Nevertheless, the majority in *Lester* held that this instruction described the consumer expectations test of defectiveness.

284 See Appellant’s Brief at 36-39.
derlying the role of jury instructions in the litigation process. Nevertheless, since the court based the finding of a design defect in Siruta solely on risk-benefit evidence, the apparent explanation of the holding is that it reversed Lester and adopted either the risk-benefit test or the Barker test in lieu of the consumer expectations test. Yet the court’s reluctance to confront the issue directly suggests that the court has not rendered its final resolution of the design defect issue.

The patent danger rule provides that as a matter of law a manufacturer has no duty to alter the design of a product to eliminate a patent or obvious danger. In Siruta the court rejected the patent danger rule. Since the obviousness of a danger generally means that the danger does not violate an ordinary consumer’s reasonable expectations of product safety, the holding is arguably incompatible with the consumer expectations test for defectiveness and thus raises the same concerns about the fate of Lester after Siruta. Nevertheless, the patent danger holding is basically sound. The courts have always

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285 According to Justice Prager’s own dissent in Lester, the result he reaches in Siruta is a denial of principles of basic justice:

[B]asic justice would seem to require that all parties have the right to have the jury’s attention directed to all relevant factors for their consideration in determining whether the particular product was dangerously defective. The purpose of jury instructions is to inform the jury in such a way that its verdict will be based on a logical analysis of the evidence in the light of established legal principles. . . . Unless a jury is informed as to what factors should be considered in determining whether a product is unreasonably dangerous, there is really no guidance given to the jury at all.

230 Kan. at 657, 641 P.2d at 363 (Prager, J., dissenting). Unfortunately, in Siruta Justice Prager offers no explanation of why principles deemed fundamental to fair judicial process when an injured plaintiff seeks a new trial are not similarly fundamental when a manufacturer seeks a new trial.

286 An alternative explanation may be found in the unique procedures used in the Kansas Supreme Court. In that court a case is assigned at random to one of the justices. That justice reviews the briefs and the record and then at conference presents the case to the other justices, who have not necessarily made any independent evaluation of the case. See Kansas Bar Association, Kansas Appellate Practice, Ch. III at 5-6 (1978). Under this procedure a justice’s concurrence in the majority opinion, especially in factually complex cases, may be based on deference to the author of the opinion rather than full agreement with the substance of the opinion. Thus, the total absence of any mention of Lester in the majority opinion may be viewed as gaining a majority more through deliberate avoidance of a controversial issue than by attempting to clarify or correct Kansas law on the meaning of defectiveness. The unfortunate result of this process is that lawyers and trial judges have no rational guidance from the supreme court on the meaning of defectiveness, and the pattern instruction for defectiveness can now refer to any existing test for defectiveness.

287 Subsequent to the survey period the supreme court followed its holding in Lester by again adopting the consumer expectations test and rejecting the risk-benefit test for defectiveness. See Barnes v. Vega Indus., Inc., 234 Kan. 1012, 676 P.2d 761 (1984). Just as Siruta made no mention of Lester, Barnes made no mention of Siruta. Thus, the court has not yet eliminated the confusion from this line of cases.


289 See 232 Kan. 654, 659 P.2d 799 (1983). The Kansas Supreme Court has never directly addressed the issue, although some prior holdings were consistent with the patent danger rule. See, e.g., Stevens v. Allis Chalmers Mfg. Co., 151 Kan 638, 100 P.2d 723 (1940). In a case decided under Kansas law, the tenth circuit followed the patent danger rule. See Hartmen v. Miller Hydro Co., 499 F.2d 191 (10th Cir. 1974). The modern trend favors the abolition of the patent danger rule.
applied the patent danger rule to both negligence\textsuperscript{290} and strict liability\textsuperscript{291} actions. If \textit{Lester} remains valid, the consumer expectations test renders the patent danger rule largely redundant and unnecessary. Under the risk-benefit test—whether it is used only in negligence or also in strict liability—a product is unreasonably dangerous in design if the danger, despite its obviousness, still exposes the user or consumer to a significant risk of harm and the danger can be eliminated without undue burden by a feasible design change. Viewed in this manner, the patent danger rule is incompatible with the policy of accident avoidance. Unfortunately, this part of the \textit{Siruta} holding will probably be short-lived because the Kansas Product Liability Act has adopted the patent danger rule for all theories of products liability.\textsuperscript{292}

C. Proof of Defectiveness

A minority of courts follow the California rule in \textit{Ault v. International Harvester Co.}\textsuperscript{293} that evidence of subsequent remedial measures is admissible to prove defectiveness in a strict liability action even though that same evidence is by statute inadmissible to prove negligence or culpable conduct. In \textit{Siruta v. Hesston Corp.}\textsuperscript{294} the trial court admitted evidence of design changes in defendant’s subsequent models of large round hay balers for the purpose of proving defectiveness\textsuperscript{295} despite a statutory prohibition against admission of such evidence to prove negligence or culpable conduct.\textsuperscript{296} The supreme court discussed, but did not decide, the \textit{Ault} issue, and held that this evidence was admissible for the limited purpose of proving feasibility of design changes once defendant contested the feasibility of the design change proposed by plaintiff's expert.

Apparently, a majority of the court was unwilling to adopt the \textit{Ault} rule,\textsuperscript{297} and this decision is probably sound. Advocates of the \textit{Ault} rule advance two arguments. The first argument is that strict liability focuses on product condition, not manufacturer conduct. The argument overlooks the absence of any meaningful difference between strict liability and negligence in the overwhelming majority of design and warning defect cases.\textsuperscript{298} Moreover, if a manufac-


\textsuperscript{292} \textit{Kan. Stat. Ann.} § 60-3305(c) (1983). The inconsistency in the law relating to defectiveness from one supreme court decision to the next is again demonstrated by dictum in \textit{Mays v. Ciba-Geigy Corp.}, 233 Kan. 38, 661 P.2d 348 (1983). The supreme court stated that section 60-3305(c) of the Kansas Product Liability Act, “although enacted after the incident herein, states generally applicable rules of law,” thereby indicating that Kansas follows the patent danger rule despite the holding to the contrary two months earlier in \textit{Siruta. Id.} at 60, 661 P.2d at 365.

\textsuperscript{293} 13 Cal. 3d 113, 528 P.2d 1148, 117 Cal. Rptr. 812 (1975).


\textsuperscript{295} \textit{See Trial Transcript at 93-100, 343-45, 491; Appellants’ Brief at 13, 17, 48.}


\textsuperscript{297} In his dissent Chief Justice Schroeder criticizes the majority opinion’s adoption of the \textit{Ault} rule. 232 Kan. at 687, 659 P.2d at 820. This specific criticism suggests that perhaps an earlier draft of the majority opinion adopted the \textit{Ault} rule and that the majority subsequently deleted this holding from the final version of the majority opinion.

\textsuperscript{298} In design and warning defect cases strict liability differs in theory from negligence with respect to the manufacturer's knowledge of the risk inherent in the product. Under a negligence
turer's conduct in the initial design of the product is irrelevant, then his subsequent conduct in redesigning the product would logically be equally irrelevant. The second argument is that products are mass-produced and thus the admissibility of remedial conduct would not deter a needed design change that would eliminate the manufacturer's exposure to liability on all subsequently produced units. Yet this argument applies with the same force and reason to actions involving mass-produced products brought on a negligence theory. The essence of the argument is the mass-produced nature of the product, not the theory of the products liability action. In reality, Ault judicially created a general exception to the subsequent remedial measures statute, not a rule unique only to strict liability actions.

The feasibility exception is widely accepted and seems sound for two reasons. First, the evidence is admitted not to prove defectiveness, but to prove that an alternative safer design was technologically feasible. Thus, the evidence is technically not within the statutory prohibition and should be governed by general principles relating to the admission of evidence. Second, the exception reflects the concept of fundamental fair play in the litigation process. A question of credibility arises when a manufacturer, knowing that the proposed design change has already been incorporated into his product, claims that such a design change is not feasible. A rigid rule of inadmissibility in such situations would encourage and immunize insincere challenges to the feasibility of proposed design changes in these cases. The trial court can protect the in-

theory plaintiff must prove that the manufacturer knew or should have known about the risk, whereas under a strict liability theory courts and commentators frequently state in the abstract that knowledge of the risk is imputed to the manufacturer. See, e.g., Phillips v. Kimwood Mach. Co., 269 Or. 485, 525 P.2d 1033 (1974); Wade, On the Nature of Strict Tort Liability for Products, 44 Miss. L.J. 825, 834-38 (1973). This distinction is virtually nonexistent in practice, however. I have been unable to locate a single design defect case in which plaintiff prevailed on a strict liability theory that did not involve evidence sufficient to support a jury verdict for plaintiff on a negligence theory. In virtually all warning defect cases in which plaintiff has prevailed, plaintiff introduced competent evidence that the manufacturer knew or should have known of the risk. Only one court has specifically held that a manufacturer may be strictly liable for failure to warn about a risk that was scientifically undiscoverable at the time the product left the manufacturer's hands. See Beshada v. Johns-Manville Prod. Corp., 90 N.J. 191, 447 A.2d 539 (1982).

A traditional policy justification prohibiting the admission of evidence of subsequent remedial measures to prove negligence or culpable conduct is the concern that a defendant might not correct a dangerous condition involved in an accident if he thought that plaintiff could use evidence of the correction against him at a subsequent trial. See C. McCormick, Evidence § 275, at 666 (2d ed. 1972).

See, e.g., Smyth v. Upjohn Co., 529 F.2d 803 (2d Cir. 1975) (rejecting the mass-manufactured products exception in a negligence case).

See C. McCormick, Evidence § 275, at 667 (2d ed. 1972); Fed. R. Evid. 407 (recognizing an exception to prove “feasibility of precautionary measures, if contested”).

Plaintiff must prove that a safer design was technologically feasible at the time the product involved in the accident left the manufacturer's hands. See Restatement (Second) of Torts § 402A comment g (1977). That a manufacturer produced a safer design at a later date does not necessarily mean that the safer design was technologically feasible at the earlier date on which the product at issue left the manufacturer's hands. Whether this difference is actually important in a particular case will depend on various circumstances such as the length of time between the original design and the subsequent design, the complexity of the product, and changes in the scientific and technological state of the art relevant to the design.
terests of the manufacturer by advising the jury of the limited purpose for which it may hear the evidence,\textsuperscript{303} by requiring a reasonable correlation between the plaintiff's proposed design change and the manufacturer's subsequent design change,\textsuperscript{304} and by excluding the evidence altogether when its prejudicial effect is too great.

D. Plaintiff's Fault

In Forsythe v. Coats Co.\textsuperscript{305} the supreme court indicated in dictum that under comparative fault principles plaintiff's damages in a strict liability action would be reduced in proportion to plaintiff's assumption of risk, unreasonable use of the product, and contributory negligence.\textsuperscript{306} In Siruta v. Hesston Corp.\textsuperscript{307} the supreme court apparently followed the Forsythe dictum in a situation in which plaintiff's fault may have been mere contributory negligence. In that case the jury found plaintiff thirty-four percent at fault when his arm became caught in the moving parts of a hay baler. The accident occurred either because a belt on the baler broke, grabbed plaintiff, and pulled him into the baler, or because plaintiff reached inside the baler near the moving parts. If plaintiff reached inside the baler, his conduct would properly be characterized as assumption of risk because he knew of the danger involved in this conduct. If a broken belt grabbed plaintiff, his conduct would be mere contributory negligence and not assumption of risk because he did not know of that particular danger. In affirming the verdict, the supreme court held that competent evidence supported either explanation of the accident and that the comparative fault reduction of plaintiff's damages was proper, thereby impliedly approving the Forsythe dictum.\textsuperscript{308}

The development reflected by Forsythe and Siruta is sound. Although prior

\textsuperscript{303} The supreme court refused to afford Hesston this basic protection in Siruta. The trial court accepted the Ault rule and admitted the evidence of subsequent remedial measures to prove defectiveness, and therefore no occasion for a limiting instruction existed. The majority opinion overlooked these facts.

\textsuperscript{304} Unfortunately, the supreme court also refused to afford Hesston this basic protection. Plaintiff's expert proposed a guard that would cover the entire front of the baler to prevent a belt from coming outside the baler and to prevent plaintiff from reaching in the baler. Hesston contested the feasibility of this design because it impaired visibility into the front of the baler, which is important to the process of starting a new bale. Hesston also challenged the feasibility of this guard on the ground that it prevented access to the front of the baler, which is necessary for maintenance when the baler is not running. The design changes on Hesston's subsequent models did not guard the entire front of the baler. Hesston added a more solid frame up the sides and across the top of the front of the baler and also thicker belts with stronger splices, but the front of the baler was still completely open. An operator could still reach inside the baler, and if the belts can in fact snap outside the frame of a baler, then this occurrence is also still possible. The majority opinion overlooked these facts.


\textsuperscript{306} 230 Kan. at 557, 639 P.2d at 46.


\textsuperscript{308} Id. at 663-65, 659 P.2d at 806-07.
to comparative fault, assumption of risk was the only defense to a strict liability action,\textsuperscript{309} no sound reason supports an exclusion of product misuse and contributory negligence as partial defenses once comparative fault principles are applied to strict liability actions. These forms of fault would be partial defenses to a product liability action based on negligence. In addition, no policy of tort law supports the idea that a manufacturer should be treated more harshly in matters of loss allocation when he is theoretically without fault than when he is at fault.\textsuperscript{310}

III. Other Tort Causes Of Action

A. Intentional Infliction of Emotional Distress

In an action for intentional infliction of emotional distress\textsuperscript{311} the court makes the initial determination of whether the evidence is sufficient to show that the conduct is "extreme and outrageous"\textsuperscript{312} and that the emotional distress is "severe."\textsuperscript{313} In Gomez v. Hug\textsuperscript{314} plaintiff, an employee at a county fairgrounds, testified at his deposition that defendant, a county supervisor, confronted plaintiff in an administrative office at the county fairgrounds, and that defendant engaged in a five-to-fifteen minute tirade directed at plaintiff. This tirade consisted of ethnic insults, obscenities, threats, and other abusive language accompanied by pounding on a table and shaking his fist at plaintiff in a threatening manner. Plaintiff also testified that defendant had been making similar ethnic insults to him for several days prior to this outburst. In reversing a summary judgment in favor of defendant, the court of appeals held that plaintiff's testimony was sufficient to create a jury question on the issue of extreme and outrageous conduct.\textsuperscript{316}

The Restatement (Second) of Torts defines extreme and outrageous conduct as conduct "beyond all bounds of decency . . . and utterly intolerable in a civilized community."\textsuperscript{317} This stringent test serves two purposes. First, it limits direct actions for emotional distress to only the most serious cases in which the inference of severe emotional distress is particularly strong.\textsuperscript{317} Second, it pre-

\textsuperscript{309}See Brooks v. Dietz, 218 Kan. 698, 545 P.2d 1004 (1976); Restatement (Second) of Torts § 402A comment n (1965).

\textsuperscript{310}For a more comprehensive discussion of this issue, see generally Westerbeke & Meltzer, supra note 305.


\textsuperscript{312}Restatement (Second) of Torts § 46 comment h (1965). See, e.g., Dawson, 215 Kan. at 824, 529 P.2d at 113.


\textsuperscript{314}7 Kan. App. 2d 603, 645 P.2d 916 (1982).

\textsuperscript{315}Id. at 610-11, 645 P.2d at 922.

\textsuperscript{316}Restatement (Second) of Torts § 46 comment d (1965).

\textsuperscript{317}The "extreme and outrageous" test also serves an evidentiary purpose because the more extreme and outrageous the conduct, the more confident courts will be in a finding that the resulting emotional distress is severe. See id. comment j.
vents the flood of rather trivial and sometimes fraudulent litigation that would occur if a judicial remedy were available for every emotional upset in a crowded and complex society. Accordingly, racial and ethnic insults are not automatically actionable even though they are totally reprehensible. Although the conduct in Gomez presents a close and perhaps marginal case under this stringent test, two factors tend to support liability. First, the repetitive and deliberately harassing nature of the ethnic insults over a two or three day period strengthens the inference of severe emotional distress and negates the existence of the kind of one-time spontaneous outburst that is unfortunately a part of human nature. Second, defendant was abusing his position as a county supervisor that gave him power to affect plaintiff’s interests, a situation in which the relative helplessness of plaintiff’s position and his inability to resist effectively strengthens the inference of severe emotional distress. Accordingly, the Gomez holding is probably sound.

In Roberts v. Saylor defendant doctor had previously spoken in a harsh and critical manner to plaintiff when he refused to assist her in her malpractice action against another doctor. In fact, for a brief period plaintiff maintained a lawsuit against defendant because of this refusal. Later, while plaintiff was lying on a hospital gurney in a preoperation room prior to her hernia operation, plaintiff testified at her deposition that defendant saw her, walked up to her, and said: “I don’t like you. I don’t like you. I wanted you to know that before you went in there.” She also testified that as a result of this incident she was scared about going into surgery and that afterwards she remained nervous and upset. However, the evidence provided no indication that the incident created any need for medical or psychiatric treatment or medication or that plaintiff was unable to function in a normal manner. The court of appeals reversed a summary judgment in favor of defendant, and the supreme court reversed the court of appeals, holding that the evidence was insufficient to show either extreme and outrageous conduct or severe emotional distress.

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318 Id. comment d.
320 The Kansas courts have rejected liability for intentional infliction of emotional distress in cases involving one-time spontaneous outbursts of anger, frustration or carelessness. See, e.g., Hallahan v. Horn, 232 Kan. 531, 536-37, 657 P.2d 561, 566-67 (1983) (carelessly made defamatory statement); Wiehe v. Kuksal, 225 Kan. 478, 482-83, 592 P.2d 860, 863-64 (1979) (spontaneous outburst in boundary dispute); Bradshaw v. Swagerty, 1 Kan. App. 2d 213, 563 P.2d 511 (1977) (spontaneous outburst out of apparent frustration by attorney discussing a collection matter with a debtor). These sudden outbursts reflect the “rough edges of our society” and “irascible tempers . . . blow[ing] off relatively harmless steam,” and they should not give rise to a judicial remedy every time they result in somebody’s hurt feelings. See Restatement (Second) of Torts § 46 comment d (1965). When the conduct is repetitive, it assumes a more deliberate character and the cumulative effect of the conduct is more likely to produce severe emotional distress. In such cases courts tend to be more predisposed to the imposition of liability. See, e.g., Dawson v. Associates Fin. Servs. Co., 215 Kan. 814, 529 P.2d 104 (1974) (a series of harassing telephone calls to plaintiff debtor and to her parents in an attempt to collect a debt).
321 See Restatement (Second) of Torts § 46 comment e (1965).
323 Id. at 291, 637 P.2d at 1178.
324 Id. at 290, 637 P.2d at 1177.
325 Id. at 295-96, 637 P.2d at 1180-81.
Both parts of this holding seem sound. First, even though the incident occurred under circumstances in which defendant had reason to know that plaintiff might be particularly susceptible to emotional distress,\textsuperscript{326} the incident nevertheless lacked the intensity, duration, and other characteristics normally associated with extreme and outrageous conduct. Second, the lack of any medical treatment coupled with only vague and indefinite assertions of nervousness and upset provide no evidentiary basis for a conclusion that her emotional distress was severe.\textsuperscript{327} This limited evidence necessarily requires speculation and conjecture in order to find that the emotional distress was severe—precisely why the court should make the initial determination of this issue.

B. Defamation

In \textit{Gobin v. Globe Publishing Co.},\textsuperscript{328} plaintiff brought a defamation action based on a news story that defendant newspaper published. The story erroneously stated that plaintiff had pled guilty to a criminal charge of cruelty to animals. Prior to trial plaintiff moved for an order \textit{in limine} to exclude from evidence any reference to various prior criminal charges brought against plaintiff and to a prior civil action involving an automobile collision.\textsuperscript{329} Although the pretrial order had listed damage to reputation, loss of income, and emotional distress as items of damage claimed by plaintiff, plaintiff's counsel stated in support of the motion \textit{in limine} that, at trial, damages would be claimed only for emotional distress and not for damage to reputation or loss of income. The district court sustained the motion, and plaintiff tried the case on the theory of

\textsuperscript{326} Conduct otherwise not extreme and outrageous may acquire an extreme and outrageous character from defendant's knowledge of plaintiff's particular susceptibility to emotional distress. \textit{See}, e.g., \textit{Dawson v. Associates Fin. Servs. Co.}, 215 Kan. 814, 529 P.2d 104 (1974) (debt collector made a series of harassing telephone calls to plaintiff and her parents, apparently with knowledge that plaintiff had become disabled with multiple sclerosis). \textit{See also Restatement (Second) of Torts} § 46 comment f (1965). A doctor should realize that a patient about to undergo an operation may well be particularly susceptible to emotional distress. Nevertheless, knowledge of plaintiff's susceptibility does not automatically make unkind conduct extreme and outrageous. "[M]ajor outrage is essential to the tort; and the mere fact that the actor knows that the other will regard the conduct as insulting, or will have his feelings hurt, is not enough." \textit{Id.}

\textsuperscript{327} Although case law does not require bodily harm as an element of an action for intentional infliction of emotional distress, the existence of bodily harm causally connected to severe emotional distress may be important evidence of the existence of severe emotional distress. \textit{See}, e.g., \textit{Dawson v. Associates Fin. Servs. Co.}, 215 Kan. 814, 529 P.2d 104 (1974) (evidence showing that deterioration of physical condition of plaintiff with multiple sclerosis may be caused by stress is relevant to the issue of severe emotional distress). \textit{See also Restatement (Second) of Torts} § 46 comment k (1965).


\textsuperscript{329} Plaintiff had previously been criminally charged at various times with negligent homicide, attempted theft of hogs, and conspiracy to sell controlled substances, and had been subjected to criminal charges by court-martial while in the military service. In a prior decision, the supreme court had held that defendant was entitled to examine plaintiff's character witnesses about these criminal charges in order to determine their effect, if any, on plaintiff's reputation. \textit{See Gobin v. Globe Publishing Co.}, 229 Kan. 1, 620 P.2d 1163 (1980).
defendant's negligence in publishing a false story about plaintiff. The jury returned a $100,000 verdict in plaintiff's favor.

The supreme court reversed the judgment on the ground that damage to reputation is an essential element of a defamation action. The court's rationale was simply that the treatises and prior Kansas cases defined defamation as a cause of action intended to protect plaintiff's interest in reputation. The court also reasoned that Kansas law has traditionally viewed damages for emotional distress as "parasitic damages" recoverable only after the establishment of damage to reputation. Stated in this manner, the court based its rationale on the conceptual definition of defamation plus a rather generalized application of stare decisis.

In his dissent, Chief Justice Schroeder primarily criticized the stare decisis analysis of the majority opinion. He correctly noted that first, despite generalized statements in the treatises and cases, only three jurisdictions had actually addressed the narrow issue raised in Gobin. Second, prior Kansas cases involving the doctrine of libel per se had allowed recovery without actual proof of damage to reputation. Third, the recovery of damages only for emotional distress is not incompatible with the first amendment limitations on state defamation actions.

The correctness of these points, however, does not resolve the issue. Libel per se did not eliminate damage to reputation as an element of defamation, but merely relieved plaintiff of the burden of introducing evidence of actual damage to reputation. More importantly, nothing in the doctrine of libel per se would have justified denying to defendant the right to introduce evidence

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530 In Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), the United States Supreme Court held that (1) defamation actions brought by private persons may not be based on strict liability, (2) private persons may recover actual damages if defendant was negligent in making the defamatory statement, and (3) presumed damages and punitive damages are constitutionally invalid unless defendant published the statement with knowledge of its falsity or with reckless disregard of whether it was true. In Gobin v. Globe Publishing Co., 216 Kan. 223, 531 P.2d 76 (1975), the supreme court adopted the Gertz standards for defamation actions brought by private persons and held that plaintiff was a private person.

531 232 Kan. at 7, 649 P.2d at 1243.

532 Id. at 7-10, 649 P.2d at 1244-45 (Schroeder, C.J., dissenting).


536 Logically, the doctrine of libel per se presupposes that damage to reputation is an element of a defamation action. The rationale of the doctrine is that damage to reputation would naturally and proximately flow from libel because of the wider audience and greater permanence of written or printed defamation. See W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 112, at 763-64 (4th ed. 1971).
relevant to plaintiff’s lack of good reputation. The United States Supreme Court has not required that damage to reputation be an essential element of defamation, but neither has it required states to allow defamation actions based solely on emotional distress. Rather, the definition of the actual damages required in defamation actions has been left to the development of state tort law. Accordingly, the issue actually involved in Gobin is whether a requirement of damage to reputation is supported by sound public policy in Kansas tort law. Neither the majority opinion nor the dissent adequately addressed that issue.

On balance, the rule adopted by the majority opinion appears to reflect the sounder public policy for two reasons. First, emotional distress in a defamation case is logically related to the concept of damage to reputation. Plaintiff’s awareness that his reputation in the community has been damaged is the basis for the emotional distress. The better plaintiff’s reputation prior to the defamation, the greater the emotional distress that would be expected as the natural and proximate consequence of the defamation. Therefore, requiring proof of damage to reputation would provide a more accurate and logical basis for measuring the amount of emotional distress, and not requiring proof of damage to reputation would introduce an unnecessarily large element of speculation into the measurement of damages.

Second, defamation actions brought solely to recover for emotional distress without proof of damage to reputation would create a direct cause of action for infliction of emotional distress without the limitations on such actions that the courts have determined reflect sound public policy. For example, if this action had been brought for intentional infliction of emotional distress without resort to the law of defamation, plaintiff would have to prove both that the conduct was extreme and outrageous and that he suffered severe emotional distress. Indeed, when another litigant raised this issue in a subsequent case, the supreme court held that a defamatory statement about a plaintiff suspected of murdering his own child did not satisfy the “extreme and outrageous” requirement. Moreover, if plaintiff’s reputation is already so bad that it cannot be

\footnote{In Gobin v. Globe Publishing Co., 229 Kan. 1, 620 P.2d 1163 (1980), the supreme court held that defendant could introduce evidence relevant to plaintiff’s lack of good reputation. Nothing in the analysis of this issue would have been significantly different if the issue had arisen prior to the restriction imposed on the doctrine of libel per se by Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).}


\footnote{The supreme court has expressed its reluctance to permit jury determination of direct actions for emotional distress where the damages would involve speculation. See, e.g., Hoard v. Shawnee Mission Medical Center, 233 Kan. 267, 277-79, 662 P.2d 1214, 1221-23 (1983). If the emotional distress caused by a negligent and false notification of the death of a daughter is too speculative to merit recovery, no compelling reason exists to characterize as less speculative the emotional distress caused by a negligent and false report that law enforcement authorities charged plaintiff with cruelty to animals.}

\footnote{See supra notes 311-13 and accompanying text.}

further damaged to any meaningful extent, then “severe” emotional distress would not logically be the natural and proximate result of a defamatory statement. The absence of these limitations in defamation actions is justified only by first accepting that as a matter of public policy the law affords special protection to an individual’s interest in good reputation and then recognizing that emotional distress is a natural and proximate result of damage to that reputation. Accordingly, the majority opinion’s rule in Gobin is sound because it limits liability for defamation to those cases most clearly entitled to the special protections of defamation law and leaves direct actions for recovery of emotional distress to the general law of intentional and negligent infliction of emotional distress.

In Hanrahan v. Horn, plaintiffs were parents whose minor son disappeared and was found murdered ten days later. Approximately seventy news stories about the case appeared in the local newspapers during the three month period following the murder. One month after the murder defendant was teaching a prelicensure class for prospective realtors and announced in class that the police had taken the father of the murdered child into custody as a suspect, a statement that was totally false. In granting summary judgment in favor of defendant, the district court found that plaintiff was a public figure and that the statement was not made with malice, i.e., with knowledge of its falsity or with reckless disregard of whether it was true. In reversing, the supreme court left the finding of no malice undisturbed, but held that plaintiff was a private person, not a public figure.

This holding is consistent with the United States Supreme Court’s standards governing public figures and private persons. Plaintiffs did not call for changes in the manner in which the police conduct homicide investigations or otherwise attempt to draw attention to themselves in creating some public con-

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342 The emotional distress suffered by a person whose reputation is already bad would be analogous to the “mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities” that are not compensable under the tort of intentional infliction of emotional distress. See Restatement (Second) of Torts § 46 comment d (1965).


344 The supreme court also held that defendant did not have a qualified privilege to make the defamatory statement. A qualified privilege exists when the defamatory statement is “made in good faith on any subject matter in which the person communicating has an interest, or in reference to which he has a duty . . . if made to a person with a corresponding interest or duty.” 33 Am. Jur. Libel and Libel § 126, at 124 (1941), adopted as Kansas law in Faber v. Byrle, 171 Kan. 38, 42, 229 P.2d 718, 721 (1951). See also Senegles v. Security Benefit Life Ins. Co., 217 Kan. 438, 443, 536 P.2d 1358, 1363 (1975). Clearly, the teacher and students in a realtor’s prelicensure class lack the requisite interest in the murder investigation, and this holding by the court is correct.

troversy. Rather, their only public involvement in the matter related to efforts to find their son during the ten day period before the police discovered his body. Generally, mere association with a matter of public interest is not sufficient to render a person a public figure. In Hanrahan plaintiffs were best characterized as private persons who were merely associated with a matter of public interest rather than public figures who were attempting to influence public controversies. While Kansas is, of course, free to depart from the United States Supreme Court standards and extend public figure status to persons who are merely associated with matters of public interest, nothing in Hanrahan provides a compelling reason to do so.

C. Wrongful Death

The imputation of a decedent’s fault to a wrongful death plaintiff under the comparative negligence statute and the $25,000 limitation on recovery of nonpecuniary loss have necessitated some changes in the manner in which juries return verdicts in wrongful death actions. In McCart v. Muir the jury awarded to three pairs of parents damages for the wrongful deaths of their children in a two-car collision. One of the verdicts gave two parents a single award of $100,000 for the wrongful deaths of their two children, but none of the verdicts separated the damages for pecuniary and nonpecuniary loss. In reversing, the supreme court held that first, a jury must state separately the damages for each wrongful death and, for each wrongful death, state separately the damages for pecuniary loss and nonpecuniary loss. Second, the comparative fault of a decedent, if any, should reduce the total amount of nonpecuniary loss prior to the application of the $25,000 limit on recovery of nonpecuniary loss.

346 Public figures fall into two categories. First, a person “may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts.” Gertz, 418 U.S. at 345. Second, a person who “voluntarily injects himself or is drawn into a particular public controversy . . . becomes a public figure for a limited range of issues.” Id. This latter category of public figure requires more than mere association with a newsworthy event; it requires some element of “special prominence in the resolution of public questions.” Id., at 351. See also Wolston v. Reader’s Digest Ass’n, Inc., 443 U.S. 157, 164-68 (1979); Time, Inc. v. Firestone, 424 U.S. 448, 453-55 (1976).


348 See supra note 338.

349 Nothing in Hanrahan supports the proposition that the fear of “chilling” robust and uninhibited debate of public issues requires the adoption of the more demanding actual malice standard for cases involving private persons. Defendant’s interest in repeating mere gossip of such an obviously defamatory nature is de minimis and simply does not raise the kind of serious first amendment concerns that are raised in cases such as Time, Inc. v. Firestone, 424 U.S. 448 (1976).


351 See id. § 60-1903 (1983).


353 Id. at 628-29, 641 P.2d at 392.

354 Id. at 629-31, 641 P.2d at 392-94. A simple example demonstrates the practical significance of this holding. Assume that a jury finds plaintiff 40% at fault and $50,000 total nonpecuniary loss. If
Both holdings are clearly sound. First, the requirements for specificity in wrongful death verdicts are simply pragmatic rules that provide for effective judicial supervision of verdicts. Since the wrongful death statute limits recovery of nonpecuniary loss, but not pecuniary loss, common sense dictates that the pecuniary and nonpecuniary loss be stated separately for each wrongful death. Otherwise, a court could not determine whether the amount of nonpecuniary loss exceeded the $25,000 limit whenever a jury returned a general verdict in excess of $25,000.

Second, the comparative fault holding gives maximum effect to the policies underlying the comparative negligence statute and the $25,000 limitation upon recovery of nonpecuniary loss in wrongful death actions. One purpose of the comparative negligence statute is the elimination of the complete defense of contributory negligence in addition to allowing plaintiff to recover damages reduced only in proportion to his own fault. The amount of damages after this proportionate fault reduction represents the amount of compensation to which plaintiff is entitled. The $25,000 limitation upon recovery of nonpecuniary loss is simply a limitation on allowable recovery and not a measure of compensation. Therefore, the purpose of the limitation is not violated if the total amount of nonpecuniary loss is first reduced in proportion to plaintiff's fault and then the remaining amount of nonpecuniary loss is subjected to the $25,000 limitation. Arbitrary limitations upon recoverable damages are generally considered harsh and are disfavored in tort law, and thus, these limitations should be narrowly construed.

IV. IMMUNITIES AND OTHER LIMITATIONS ON LIABILITY
A. INTERSPOUSAL IMMUNITY

In Kansas the judicially-created doctrine of interspousal immunity prohibits tort actions by one spouse for personal injuries caused during marriage by the other spouse. In 1965 the supreme court held in Fisher v. Toler that interspousal immunity applies only if the $25,000 limit is applied first, the nonpecuniary loss is reduced to $25,000 and then reduced further by 40% to $15,000. If the comparative fault 40% reduction is made first, the $50,000 nonpecuniary loss is reduced to $30,000 and then further reduced to the $25,000 limit on nonpecuniary loss. The latter sequence allows plaintiff a larger recovery.

Prior to the 1975 amendment of the wrongful death statute, the statute had always imposed a limit on the total amount of recovery, including both pecuniary and nonpecuniary losses. For a history of this limitation provision, see McCart v. Muir, 230 Kan. 618, 626-29, 641 P.2d 384, 391-92 (1982).


194 Kan. 701, 401 P.2d 1012 (1965). In Fisher the husband tried to kill his wife by ramming his car three times into the car that his wife was driving. The supreme court held that she could not sue him for the injuries she suffered because such a lawsuit would interfere with the couple's marital harmony. The court's analysis does not tell us much about the rationale for interspousal immunity, but it tells us a great deal about the rationale for judicial immunity.
spousal immunity applied to intentional tort claims as well as to negligence claims. In two recent cases, however, the supreme court overruled *Fisher* and recognized an intentional tort exception to interspousal immunity.

In *Stevens v. Stevens*[^3] two children brought a wrongful death action against their stepmother, who had shot and killed their father. The stepmother moved to dismiss the action on the ground of interspousal immunity because the wrongful death statute restricts recovery to cases in which decedent could have recovered if he had lived.[^31] The district court held that the wrongful death action could be maintained regardless of whether the shooting had been negligent or intentional.[^32] The court reasoned that with the death of the husband, marital harmony could no longer be preserved, and thus, the public policy rationale of interspousal immunity was inapplicable in the case. In affirming in part and reversing in part, the supreme court decided “to retain the doctrine of interspousal immunity for injuries and death resulting from negligent or even reckless acts and to carve an exception as regards willful and intentional torts.”[^33] Accordingly, the court held that on remand the children could prevail only if they proved that the shooting had been committed intentionally.

In *Ebert v. Ebert*[^34] the supreme court expanded upon its holding in *Stevens*. In that case the wife brought both an action for divorce and an action for personal injuries allegedly caused by numerous beatings intentionally inflicted by her husband while in a drunken rage.[^35] The supreme court held that *Stevens* would apply retroactively and that the intentional tort exception applies to non-fatal injury cases as well as to death cases.[^36]

Although the recognition of an intentional tort exception in *Stevens* and *Ebert* may be viewed as a desirable development partially mitigating the harshness of interspousal immunity, two comments are appropriate. First, the recognition of only the narrow intentional tort exception and the rejection of the broader deceased spouse exception in *Stevens* is illogical and unsound. The stated rationale of interspousal immunity in Kansas is that personal injury tort actions between spouses tend to disrupt marital harmony.[^37] In both *Stevens*

[^31]: *Stevens* involved an interlocutory appeal brought prior to any factual or legal determination of whether the shooting was done negligently or intentionally. The supreme court noted that the petition sufficiently alleged negligence and intent. *Id.* at 727, 647 P.2d at 1347.
[^32]: *Id.*
[^33]: *Id.* at 729, 647 P.2d at 1348. Although the term “willful” is usually treated in the Kansas cases as synonymous with the terms reckless and wanton, it is used as synonymous with intentional in *Stevens*. The description of the *Stevens* exception as “willful and intentional” should not be viewed as broadening the scope of the exception beyond intentional wrongdoing. If anything, this use of “willful” might arguably narrow the scope of the intentional tort exception. See infra note 372.
[^35]: The injuries alleged in *Ebert* were substantial and included broken bones and facial lacerations. *Id.* at 504, 656 P.2d at 767.
[^36]: *Id.* at 504-05, 656 P.2d at 768.
[^37]: See Guffy v. Guffy, 230 Kan. 89, 93-95, 631 P.2d 646, 649-50 (1981); Sink v. Sink, 172 Kan. 217, 219, 239 P.2d 933, 934 (1952). Nothing in the Kansas cases indicates that the court has relied on any professional studies, expert witnesses, or other evidentiary material in support of this de-
and Ebert the court justified the intentional tort exception on the ground that in intentional tort cases "peace and harmony in that home has been so damaged that there is little danger that it will be further impaired by maintenance of an action for damages."368 By following this rationale with the conclusion that the children in Stevens could not maintain the wrongful death action if the shooting had been negligent or reckless, the supreme court has reached the anomalous conclusion that interspousal immunity does not apply in cases where there is only a little marital harmony left to preserve, but that it does apply to cases where there is absolutely no marital harmony left to preserve. If preservation of marital harmony is the real reason for interspousal immunity in Kansas, then the court should recognize the deceased spouse exception. If preservation of marital harmony is not the real reason for interspousal immunity in Kansas,389 then the court should be more candid and identify its true reasons for the doctrine.

Second, the Kansas courts should narrow the scope of the intentional tort exception by adopting a broad privilege based on the nature of the marital relationship. Although the traditional doctrine of consent already provides part of the necessary limitation,370 the Restatement notes that the "concept of consent to an intentional physical contact carries a much broader scope of application within the marital relationship than it does for other parties."371 The supreme court previously rejected the Restatement approach of totally abrogating interspousal immunity and substituting in its place a privilege based on the marital relationship.372 With the subsequent recognition of the intentional tort exception, however, the court should now adopt the privilege portion of the Restatement approach.

termination. The cases do not indicate why property actions between spouses do not similarly disrupt marital harmony. See, e.g., Green v. Green, 34 Kan. 740, 10 P. 156 (1886); Helm v. Helm, 11 Kan. 25 (1873). Nor do the cases indicate why personal injury tort actions based on torts committed prior to marriage, but maintained during marriage, do not similarly disrupt marital harmony. See, e.g., O'Grady v. Potts, 193 Kan. 644, 393 P.2d 285 (1964). In recent years other courts have carefully examined the marital harmony rationale and found it unpersuasive. See Note, supra note 358, at 620-21.

368 Ebert, 232 Kan. at 504, 656 P.2d at 766-67; Stevens, 231 Kan. at 728, 647 P.2d at 1348.

369 Courts have suggested a variety of reasons for the existence of interspousal immunity, and one of the most significant reasons is the fear of collusive or fraudulent actions. See generally W. Prosser, HANDBOOK ON THE LAW OF TORTS § 122, at 862-63 (4th ed. 1971). In Henry v. Bauder, 213 Kan. 751, 518 P.2d 362 (1974), the supreme court held the Kansas guest statute, KAN. STAT. ANN. § 8-122b (1964), unconstitutional on the ground that the fear of collusive or fraudulent actions was insufficient to constitute a rational basis for the guest statute under the Equal Protection Clause of the fourteenth amendment to the United States Constitution. Accordingly, the true rationale for interspousal immunity in Kansas remains a mystery.


371 Id. § 895F comment h.

372 See Guffy v. Guffy, 230 Kan. 89, 93, 631 P.2d 646, 649 (1981). In Stevens v. Stevens, 231 Kan. 726, 728-29, 647 P.2d 1346, 1348 (1982), the supreme court indicated that the exception to interspousal immunity applied to "willful and intentional torts." The desired exclusion of merely technical intentional torts between spouses could be achieved by interpreting "willful" as a separate element of the intentional tort exception to interspousal immunity. The better approach, however, would be the adoption of the privilege portion of the RESTATEMENT (SECOND) OF TORTS § 895F (1977).
B. Governmental Immunity

In 1979 the legislature enacted the Kansas Tort Claims Act.\textsuperscript{373} The Act recognizes open-ended liability of governmental entities for torts committed by their employees.\textsuperscript{374} However, the Act also enumerates seventeen specific exceptions to liability.\textsuperscript{375} Therefore, the effectiveness of the Act as a remedy for persons injured by the tortious conduct of governmental employees will depend to some extent on the breadth or narrowness with which the courts interpret those exceptions. During the survey period the supreme court decided cases involving four of those exceptions.

1. Discretionary function

The tort claims act provides immunity from liability for "any claim based upon the exercise or performance or failure to exercise or perform a discretionary function or duty on the party of a governmental entity or employee, whether or not the discretion be abused."\textsuperscript{376} This discretionary function exception is perhaps the most important exception to liability in the tort claims act because it may influence the definition and scope of all or most of the other exceptions to liability in the Act.\textsuperscript{377}

In *Robertson v. City of Topeka*\textsuperscript{378} plaintiff alleged that he called police to his house, informed them that an intoxicated trespasser refused to leave the premises and was threatening to burn down plaintiff's house, and requested the police officers to remove the intoxicated trespasser from the house. Rather than removing the intoxicated trespasser, the police officers ordered plaintiff and his wife to leave their house. Approximately fifteen minutes later, the house burned. There were no allegations that plaintiff or his wife were engaged in any unlawful conduct that justified their removal from their house. On the basis of these allegations and before the parties engaged in discovery, the trial court dismissed the action. A sharply divided supreme court affirmed on the ground that the police officers were engaged in a discretionary function.\textsuperscript{379}

\textsuperscript{374} Kan. Stat. Ann. § 75-6103(a) (Supp. 1983) provides:
Subject to the limitations of this act, each governmental entity shall be liable for damages caused by the negligent or wrongful act or omission of any of its employees while acting within the scope of their employment under circumstances where the governmental entity, if a private person, would be liable under the laws of this state.

This open-ended provision for liability, subject only to specific limitations, means that liability is the rule and immunity is the exception. See Carpenter v. Johnson, 231 Kan. 783, 784, 649 P.2d 400, 402 (1982).
\textsuperscript{376} Id. § 75-6104(d).
\textsuperscript{377} Following the list of specific immunities, section 75-6104 provides: "The enumeration of exception to liability in this section shall not be construed to be exclusive nor as legislative intent to waive immunity from liability in the performance or failure to perform any other act or function of a discretionary nature." Id. § 75-6104 (emphasis added). One possible interpretation of this language is that it limits all or most of the specifically enumerated immunities to discretionary acts.
\textsuperscript{379} Id. at 362-63, 644 P.2d at 462. Justices Fromme, Prager, and Holmes dissented on the grounds that the majority opinion interpreted discretionary function too broadly and that the trial
The supreme court rejected the “planning level-operational level” test for discretionary function because that test focuses on the status of the governmental employee rather than on the character of his act. Instead, the court adopted the “nature and quality” test set forth in *Downs v. United States*, i.e., whether the act “is of the nature and quality which Congress intended to put beyond judicial review.” In *Downs* an FBI agent’s negligent handling of an airplane hijacking situation caused plaintiffs’ injuries. The agent’s negligence consisted of his failure to follow specific procedures governing hijacking situations set forth in an FBI handbook. The federal court held that the agent’s acts were not of “the nature and quality” necessary for a discretionary function. The court reasoned that the mere exercise of some judgment cannot be the test for a discretionary function because “[j]udgment is exercised in almost every human endeavor.” Rather, a discretionary function must involve some element of policy formulation. The relevance of the FBI handbook was that the FBI had already made the policy determination about the proper procedures in hijacking situations, and thus the agent was not making policy in responding to this particular hijacking situation.

Unfortunately, the Kansas Supreme Court misunderstood the relevance of the policy formulation requirement and erroneously considered this requirement to be an improper return to the “planning level-operational level” test that it had previously rejected as unsound. In *Downs* the requirement of policy formulation was an attempt to focus on the “nature and quality” of the act, not on the actor’s status or level of employment within government. The more that a judgment involves the making of policy, the more it is of a “nature and quality” that courts recognize as inappropriate for judicial review. For example, a decision to concentrate police patrols in high crime neighborhoods reduces the number of patrols in other neighborhoods and thereby decreases the deterrence of criminal acts in those other neighborhoods. Traditional negli-

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380 *Id.* at 361, 644 P.2d at 461. Under this test employees working at a “planning level” of government are engaged in a discretionary function, while employees working at a lower echelon “operational level” of government are not. The weakness of this test is that it focuses on the overall nature of the employee’s job rather than on the specific act that allegedly caused a plaintiff’s harm. The test would also exclude from the protection of the discretionary function immunity operational level employees who are actually engaged in a discretionary function at the time of the injury. See generally 2 L. Jayson, *Personal Injury: Handling Federal Tort Claims* § 249.07 (1983). Moreover, the test would be particularly unworkable in a sparsely populated state such as Kansas. In numerous small Kansas communities with only a small number of governmental employees, employees’ jobs will be diverse in nature and not susceptible to simple classifications such as “planning level” or “operational level.” Those classifications are useful, if at all, only in the context of large, rigidly structured governmental agencies.

381 522 F.2d 980 (6th Cir. 1975).
382 *Id.* at 997.
383 *Id.* at 995.
384 *Id.*
385 The supreme court stated: “The [Downs] court determined the intent of the federal act to be protection at the policy formulation level.” 231 Kan. at 361, 644 P.2d at 461 (emphasis added). In fact, the court in *Downs* rejected the “planning level-operational level” test as “not a sufficient test.” 522 F.2d at 996-97.
gence concepts are largely ineffective in evaluating whether such a decision is "negligent"; a court or jury would essentially substitute its judgmental values for those of the original decision-maker. This absence of effective decision-making devices renders a judicial determination not only a conjectural second-guessing of the challenged decision, 386 but also an unduly offensive judicial intrusion into the affairs of another branch of government. 387

At the other extreme, many decisions involving difficult judgments are nevertheless appropriate for judicial review. For example, a police officer responding to an emergency call and approaching a slow moving vehicle below the crest of a hill must decide whether to pass the vehicle in a dangerous manner and risk an accident or to slow down and risk some increased harm at the scene of his emergency call. Although the decision may involve a difficult and spontaneous exercise of judgment, traditional negligence concepts are effective in evaluating the reasonableness of the decision under all the circumstances. 388 This situation should not be within the discretionary function exception. Yet without the element of policy formulation or some similar factor, a court has no analytical mechanism for distinguishing between those acts that involve a true discretionary function and those that are appropriate for judicial review.

The Kansas Supreme Court did not attempt to identify any factor that distinguishes an ordinary exercise of judgment common to "almost every human endeavor" and an exercise of judgment that by its "nature and quality" is beyond judicial review. The court concluded that the police officers were engaged in a discretionary function because (1) the police department had not established specific guidelines for police conduct in this situation, 389 (2) the police had no clear-cut remedy and only a short period of time in which to make a decision, 390 and (3) the police officers should have authority to act in such a

386 The more that well established standards exist to provide guidance for a decision, the less that the decision is truly discretionary and the more that it is appropriate for judicial review. See, e.g., Carpenter v. Johnson, 231 Kan. 783, 649 P.2d 400 (1982) (detailed recommendations in the Manual on Uniform Traffic Control Devices for the placement of highway warning signs rendered the decision whether to provide a warning about a certain highway condition non-discretionary).

387 See 2 L. Jayson, supra note 380, § 245, at 12-4 to 12-6.


389 Some doubt exists whether the record contained this fact. Neither party includes the fact in the statement of facts in the briefs. The only hint that such guidelines did not exist is a statement made in the argument portion of the city's brief that guidelines covering this situation would not be feasible. See Appellee's Brief at 6. This minor point demonstrates the desirability of discovery before deciding such an issue as a matter of law. Perhaps discovery would reveal that the Topeka Police Department gives its officers some training or other guidance on the proper handling of domestic disputes and similar disturbances.

390 The court is apparently drawing inferences favorable to defendants in a situation in which plaintiff is entitled to all reasonable inferences. The record contains no facts indicating that the police could not have verified plaintiff's address in fifteen minutes. The record contains no facts explaining why one of the three police officers could not have remained with the intoxicated trespasser until the police ascertained the identity of the owner of the premises. The record does not
situation without the threat of potentially large tort judgments against the city. These reasons are not persuasive. The first two reasons effectively give police officers absolute immunity for any decision that requires thinking unaided by specific guidelines in a police manual. The third reason is inconsistent with prior Kansas cases that hold a police officer personally liable for the consequences of his acts in some situations. If the threat of personal liability would not unduly inhibit a police officer’s proper performance of duty, then the threat of the city’s liability will certainly not inhibit his performance. The court’s holding wholly fails to achieve any reasonable balance between the legitimate needs of government and the protection of injured citizens.

2. Judicial function

In *Cook v. City of Topeka* plaintiff failed to appear for trial of a traffic violation. The municipal court judge ordered forfeiture of her bond and the issuance of a bench warrant. Approximately one week later plaintiff appeared, pleaded guilty to the traffic violation, and paid her entire fine to the clerk’s office. The clerk, however, failed to notify the police department to return the bench warrant. A few weeks later county sheriff’s officers arrested plaintiff on the bench warrant. In reversing the trial court’s dismissal of plaintiff’s false arrest action, the supreme court held that the clerk’s failure to withdraw the bench warrant was a ministerial act not exempt from liability under the judicial function exception in the tort claims act.

The holding is sound. The tort claims act provides immunity from liability for damages resulting from a judicial function without any apparent limitation on or qualification of “judicial function” in the statutory language. Nevertheless, both legislative intent and precedent support the proposition that in the context of governmental immunity the term “judicial function” does not include ministerial acts. Moreover, none of the policies underlying the immu-

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even state that the intoxicated trespasser started the fire; it states only that fifteen minutes later the house burned. Accordingly, the position of the dissenting justices about the prematurity of the dismissal is sound.


382 *See, e.g.,* Bradford v. Mahan, 219 Kan. 450, 548 P.2d 1223 (1976) (police officer has only a qualified privilege to commit defamation).

383 The court’s definition of discretionary has the potential to encompass virtually all negligent acts. If that result occurs, then immunity will be the rule and liability the exception. This result would be contrary to the purpose of the tort claims act. *See supra* note 374.


385 *Id.* at 339, 654 P.2d at 958.

386 The statute provides in pertinent part: “A governmental entity or an employee acting within the scope of his or her employment shall not be liable for damages resulting from: . . . (b) judicial function.” KAN. STAT. ANN. § 75-6104 (Supp. 1983). *But see supra* note 377 and accompanying text.

387 The parallel exception for the legislative branch of government provides: “Legislative functions, including, but not limited to, the adoption or failure to adopt any statute, regulation, ordinance or resolution.” KAN. STAT. ANN. § 75-6104(a) (Supp. 1983). The court reasoned that the legislature intended to exclude some acts of legislative branch employees and that therefore the same intent applies to the judicial function exception. 232 Kan. at 337, 654 P.2d at 957.

nity for judicial functions support immunity for ministerial acts. Ministerial acts are routine tasks that involve "no special discretion, judgment or skill," and the court distinguished ministerial acts from discretionary judicial functions. Accordingly, ministerial acts are clearly appropriate for judicial review, and the fear of tort judgments against the city will not deter judicial employees from the uninhibited performance of these tasks.

3. Enforcement of a law

In Lantz v. City of Lawrence the city sent a notice to plaintiffs that weeds on plaintiffs’ property constituted a public nuisance under the city’s weed abatement ordinance. The notice also informed plaintiffs that if they did not mow the weeds within five days, a city crew would mow the weeds. Plaintiffs failed to do so. The city sent a crew but plaintiff chased them off the property with a pellet gun. Subsequently a second crew arrived to mow the weeds, and plaintiffs left to consult a lawyer. While plaintiffs were away from the property, the crew cut the weeds with weed trimmers and cut down sixty-three trees with chain saws. In reversing a summary judgment in favor of the city, the supreme court held that the city was not immune under the “enforcement of a law” exception in the tort claims act.

The supreme court held that a governmental employee may be liable for negligence or other wrongful conduct when his actions are outside the purview of the law that he claims to be enforcing. In Lantz the city ordinance made no mention of trees, and thus the city employees were not enforcing the ordinance when they cut down plaintiffs’ trees. Their actions were outside the purview of the ordinance. The result is correct, but the reasoning is probably unsound. A simple “within versus outside the purview of the law” test will provide sound results only in the simplest cases. In the majority of cases this test will be ineffective and probably counterproductive.

In support of its holding, the court discussed with apparent approval two foreign decisions involving similar immunity provisions. These cases demonstrate the weakness of the court’s test. In one case the Oklahoma Court of Appeals held that a police officer may be liable for an invalid arrest even

399 232 Kan. at 338, 654 P.2d at 957 (quoting BLACK’S LAW DICTIONARY 1148 (4th ed. rev. 1968)).
400 In Robertson v. City of Topeka, 231 Kan. 358, 654 P.2d 458 (1982), the supreme court apparently interpreted discretionary function so broadly that it may encompass any act other than a purely ministerial act. See supra notes 389-93 and accompanying text. If in subsequent cases, however, the court narrows the definition of discretionary function to decisions having some element of policy formulation, then discretionary may have one meaning for purposes of the discretionary function exception and another meaning for the judicial function exception. Sound public policy may support the exclusion of only ministerial acts from the judicial function exception, whereas the same approach is not desirable under the discretionary function exception.
401 A ministerial duty is a task prescribed by statute or done under the authority of a superior. 232 Kan. at 338, 654 P.2d at 957. The court clerk will subject the city to tort judgments only when he fails to perform the task at all or when he performs the task incorrectly. Thus, the fear of tort liability, if it exists at all, should motivate the clerk to perform the task correctly; it cannot inhibit the clerk’s performance of the task.
403 Id. at 497, 657 P.2d at 543.
404 Id.
though she made the arrest in an attempt to enforce the law against driving while intoxicated. In the other case the Indiana Supreme Court indicated that a police officer who collides with and injures an innocent motorist while engaged in a high-speed chase after a traffic violator might be liable if the circumstances of the chase were sufficiently outrageous. In both cases the police officers were attempting to enforce a law, but they did so in an allegedly negligent or wrongful manner. Thus, the question becomes whether the enforcement of a law in a negligent or wrongful manner is immune under the "enforcement of a law" exception. For example, assume that in Lantz the city employees were mowing weeds within the purview of the ordinance and as a result of an employee’s negligence some gasoline spilled from a mower, started a fire, and burned down plaintiff’s house. The employee’s actions were for the purpose of mowing weeds within the purview of the ordinance, but no sound reason supports immunity in this situation.

The better analysis should involve two basic inquiries. First, what desirable objective could this immunity provision promote? Second, what unnecessary and counterproductive uses of this immunity provision should courts avoid? Regarding the first inquiry, a desirable objective of the immunity provision is the protection of governmental entities and employees who do exactly what the law authorizes. Thus, if in Lantz the employees had mowed only the weeds, they would not be liable for trespass on plaintiffs’ property. In addition, they would not be liable for trespass even if a court later held the ordinance invalid or unconstitutional. The court could achieve this result by reading an “exercising due care” clause into the immunity provision. Regarding the second inquiry, an unnecessary and counterproductive use of the immunity provision is the protection of governmental entities and employees who do what the law authorizes in a negligent or wrongful manner. A major purpose of the tort claims act is to provide a remedy to citizens injured by the tortious conduct of government. The court would substantially undermine this purpose if it interpreted the “enforcement of a law” provision to immunize government from

406 Seymour Nat'l Bank v. State, 442 N.E.2d 1223, aff'd on rehearing, 428 N.E.2d 203 (Ind. 1981). The court held that the police officer was immune because he was enforcing a law at the time of the high-speed chase. In response to the argument that the holding granted absolute immunity for all acts of police officers, the court indicated in its opinion on rehearing that intentional, willful, or wanton acts of police officers would not be immune.
407 In both Roberts and Seymour National Bank the courts indicated that when a police officer's conduct is sufficiently wrong, he is no longer acting within the scope of his employment and is therefore not immune. This approach is undesirable. If immunity and scope of employment end at the same point, the governmental entity would never be liable for the acts of the employee. This result is incompatible with the purpose of the Kansas Tort Claims Act. See Kan. Stat. Ann. § 75-6103(a) (Supp. 1983). In addition, in both cases the courts indicated that intentional, willful, or wanton conduct probably is the point at which immunity and scope of employment end. If so, the result is that all negligent acts committed in the course of enforcing any law are immune. Again, this result is incompatible with the broad remedial purpose of the Kansas Tort Claims Act.
408 The analogous immunity provision in the Federal Tort Claims Act is limited to situations in which the employee is "exercising due care." See 28 U.S.C. § 2680(a) (1976). The purpose of the federal "enforcement of a law" provision is to prevent litigants from using federal tort claims as a means of testing the constitutionality or legality of laws or regulations. 2 L. Jayson, supra note 380, § 245, at 12-6.
liability for all harms caused in the negligent enforcement of any law. In those
negligent or wrongful "enforcement of a law" situations in which public policy
supports immunity, one or more other exceptions in the tort claims act will
invariably provide not only the necessary protection, but also the better ana-
lytical basis for immunity. Accordingly, the court should reconsider its in-
terpretation of the meaning and purpose of the "enforcement of a law" exception
in the tort claims act.

4. The traffic signing exception

The "traffic signing" exception in the tort claims act provides immunity
from liability for damages resulting from:

the malfunction, destruction or unauthorized removal of any traffic or road
sign, signal or warning device unless it is not corrected by the governmental
entity responsible within a reasonable time after actual or constructive no-
tice of such malfunction, destruction or removal. Nothing herein shall give
rise to liability arising from the act or omission of any governmental entity
in placing or removing any of the above signs, signals or warning devices
when such placement or removal is the result of a discretionary act of the
governmental entity.

The first sentence in this exception relates to the repair and replacement of
existing traffic control devices. This provision is not a true immunity; it merely
states that a negligence standard governs liability. The second sentence in
this exception relates to the initial determination to place a traffic control de-
vice at a location where such a device had not previously existed, or to remove
permanently a traffic control device from a location where the device had pre-
viously existed. This provision suggests that some, although not necessarily all,
of these determinations may be discretionary acts that are immune.

In Carpenter v. Johnson plaintiff was injured when the automobile in
which he was a passenger went off a curve in the road and crashed into an
embankment. Prior to this accident neither the state nor the county had ever
erected a traffic sign warning about this curve in the road. In reversing the trial
court's dismissal of the action, the supreme court held that the state and the
county were not immune from liability under the "traffic signing" exception.

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409 Consider, for example, the high-speed police chase in Seymour Nat'l Bank, 422 N.E.2d at
1223. Some doubt exists whether police officers should always be immune in such situations. A
better analysis is more likely under the discretionary function exception. That exception permits
careful consideration of all factors relevant to when immunity should and should not exist. Alter-
is preferable to the "enforcement of a law" exception because it permits a holding limited to the
unique problems involved in police enforcement of certain laws. The holding would not require a
similar immunity for a city employee mowing somebody's weeds.


411 This provision merely limits liability for failure to maintain or repair traffic control devices to
those situations in which the governmental entity discovers or should discover the need for main-
tenance or repair and then fails to do so in a reasonable time. The only purpose for this provision
is to prevent the imposition of strict liability for highway defects relating to traffic control devices.


413 Id. at 790, 649 P.2d at 405-06.
Under Kansas law, state and local authorities must place traffic control devices in accordance with the standards and specifications set forth in the Manual on Uniform Traffic Control Devices for Streets and Highways.\footnote{Id. at 787, 649 P.2d at 403-04. Kan. Stat. Ann. § 8-2003 (1982) requires the secretary of transportation to adopt a manual and specifications for a uniform system of traffic control devices in Kansas. The secretary adopted the Manual on Uniform Traffic Control Devices for Streets and Highways published by the United States Department of Transportation. State and local authorities “shall place and maintain such traffic control devices” in accordance with the manual and specifications. Kan. Stat. Ann. §§ 8-2004 & -2005 (1982).} The manual indicates that the decision to place a warning sign at a particular location involves discretion.\footnote{231 Kan. at 787-88, 649 P.2d at 404.} Therefore, the supreme court drew a distinction between mere professional judgment and governmental discretion. In those situations in which the manual provides detailed standards, the decision about the placement of a warning sign involves mere professional judgment.\footnote{Id. at 788, 649 P.2d at 404.} The court reasoned that the legislature did not intend to put such professional judgments beyond judicial review. The court’s reasoning is sound.