SURVEY OF KANSAS LAW: TORTS

William Edward Westerbeke*  

During the survey period the Kansas appellate courts decided more than a hundred torts cases. A few of the more significant cases will be discussed here. Parts II and III of this Article will discuss certain developments in the areas of products liability and intentional torts, but the heavy emphasis herein will be on negligence law in recognition of the signal importance of the adoption of comparative negligence in Kansas.

I. NEGLIGENCE

Any analysis of negligence cases must presuppose agreement on certain broad principles deemed fundamental to negligence analysis. In the ensuing discussion this author will attempt to adhere to four broad principles. First, the concept of reasonable care under all the circumstances is essentially a shorthand description of a subtle process by which risk factors are balanced or weighed against social utility and burden factors. Accordingly, reasonable care cannot properly be determined solely by reference to factors on one side of the balancing process. Second, specific negligence rules tailored to fit specific situations should be deemed subordinate to the paramount standard of reasonable care. Third, rules that deviate from the reasonable care standard should exist only if clearly supported by strong public policy considerations. Fourth, defenses to negligence actions should be developed with reference to public policy considerations of loss allocation and distribution and not with reference solely to conceptual considerations.

A. Standard of Care

1. Compliance With Administrative Regulations

With the rapid growth in recent years of administrative regulation as a means of governing complex industrial activities in society, the legal effect of compliance with such regulations on negligence actions becomes an increasingly important matter. The Kansas Supreme Court considered the effect of administrative compliance in Jones v. Hittle Service, Inc. Propane gas had leaked from a defective underground pipe through two feet of earth into a storm cellar on a farm. Plaintiffs’ decedents died as the result of an explosion in the storm cellar when one of them lit a match. In an action against three manufacturers and a retailer, it was stipulated that the manufacturers had odorized the gas to the level of one pound of ethyl mercaptan per 10,000 gallons of gas as required by Kansas administrative regulation. In affirming a summary judgment in favor of the manufacturers on

*Associate Professor of Law, University of Kansas. B.A. 1964, Bowdoin College; M.A. 1968, Middlebury College; J.D. 1970, Stanford University.


4 KAN. ADMIN. REG. art. 22-8-2 (1978). There was some evidence that the manufacturers had odorized the gas to a level substantially in excess of the administrative standard. 219 Kan. at 641, 549 P.2d at 1396 (Fromme, J., dissenting). The majority opinion appears to have correctly disregarded such evidence, however, and reviewed the summary judgment solely on the basis of the parties’ stipulation.
the issue of the sufficiency of odorization, the supreme court held that compliance is (1) evidence of due care and (2) may be conclusive in the absence of special circumstances. The two parts of the holding should be examined separately. As to the first part of the holding, the court adopted section 288C of the Restatement (Second) of Torts as the basis for treating compliance merely as evidence of due care rather than as conclusive evidence of the absence of negligence. The rationale of section 288C is that statutes, ordinances, and regulations normally define minimum standards and thus compliance with them should not preclude an examination of all the circumstances in order to determine whether a reasonable person would have taken additional precautions. This part of the holding is sound in its recognition that any rule relating to compliance with a regulation should be consistent with and subordinate to the broader principle of reasonable care under all the circumstances.

Some confusion is created, however, by the second part of the court's holding that compliance with a regulation may be conclusive evidence of due care in the absence of special circumstances. While this holding would not preclude a finding of negligence when peculiar circumstances indicate the need for additional precautions even though the regulation substantially coincides with the standard of reasonable care in ordinary situations, the holding could be read as precluding a finding that a regulation is inadequate as a standard of reasonable care in ordinary situations. If so, the holding would seem unsound in that it would create an irrebuttable presumption that regulations establish the standard of reasonable care for ordinary situations and would permit recovery only in those cases in which plaintiff proves special circumstances sufficient to distinguish plaintiff's situation from ordinary situations. While many regulations may adequately represent the standard of reasonable care in ordinary situations, it cannot be fairly concluded that all regulations do so. Accordingly, the holding would represent an unwarranted abrogation of judicial control over the reasonable care standard to regulatory bodies. Fortunately, there are indications in Jones that the court did not intend to preclude challenges to the adequacy of regulations in ordinary situations. After reviewing plaintiffs' evidence and concluding that no special circumstances existed to distinguish the case from ordinary situations, the court then stated that "[n]either had there been an industry-wide or individual corporate experience showing that the legislative standard was inadequate." In addition, the court concluded that compliance with a regulation should have the same legal effect as compliance with industry custom, and the court had previously established that compliance with

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8 The court apparently assumed that compliance with administrative regulations would have the identical legal effect on both a negligence claim and a strict products liability claim. While the discussion in this section is limited to the negligence claim, it should be noted that the same analysis is not necessarily appropriate for determining whether a product is defective for purposes of strict products liability. See notes 195-201 and accompanying text infra.

9 Restatement (Second) of Torts § 288C (1965).

9 Id. Comment a at 40 (1965).


10 219 Kan. at 633, 549 P.2d at 1391.
industry custom is merely *some* evidence of reasonable care. The fact that an entire industry does something a certain way or a regulatory agency determines that an industry should do something a certain way would normally support an inference that the particular course of conduct constitutes reasonable care. The strength of this inference, however, is a function of all the evidence. If plaintiff cannot show that defendant should have appreciated unreasonable risks of harm in the particular course of conduct, then plaintiff has simply failed to satisfy the normal burden of proof. Thus, when the court stated that “a manufacturer should be able to rely on such standards in the absence of actual or constructive notice that they are inadequate,” its reasoning was compatible with the fundamental concept of reasonable care under all the circumstances.

2. Manufacturer's Duty to Warn

A second major issue in *Jones v. Hittle Service, Inc.* involved the duty of a manufacturer to warn remote consumers of the characteristics and dangerous propensities of the product. The three manufacturers in *Jones* sold propane gas in bulk to the retailer, who in turn supplied it to his customers. The manufacturers had no direct contact with the retailer's customers. In affirming a summary judgment in favor of the manufacturers, the court held that a manufacturer selling in bulk to a retailer owes no duty to warn remote consumers when he ascertains that the retailer is (1) adequately trained, (2) familiar with the properties and safe methods of handling the product, and (3) capable of passing on this knowledge to his customers. Unlike the seller of packaged goods who may transmit warnings on the labels of packaging, the seller of bulk goods has no similarly easy means of communicating with remote consumers. Although the court structured its holding in recognition of this practical distinction, it did so in a manner that not only obfuscates the special function of a duty to warn the consumer, but also deviates significantly from fundamental principles underlying the reasonable care standard.

In focusing the first two parts of its holding on the training and knowledge of the retailer, the court appears to have confused two separate aspects of reasonable care. The consumer may be foreseeably injured either by the retailer's improper handling of the product or by the consumer's improper response to situations involving the product. Even assuming *arguendo* a class of consumers so knowledgeable as to need no warnings, a reasonable bulk seller interested in injury avoidance would still distribute a product as dangerous as propane gas only through adequately trained and informed retailers. Conversely, assuming that situations will arise in the retailer's absence that can be safely handled only by adequately informed consumers, then the mere fact that the retailer is adequately trained and informed will serve no useful purpose in injury avoidance when such situations do arise. The two duties are largely separate and distinct in the sense that each is imposed in order to avoid injuries that might occur irrespective of the other. Therefore, any duty to warn the consumer is not satisfied merely by having adequately trained and informed retailers.

The third part of the court's holding requiring only that the retailer be "capable

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12 219 Kan. at 549 P.2d at 1380.
13 The court reversed the summary judgment in favor of the retailer on the ground that a question of fact existed about his duty to communicate an adequate warning to plaintiffs.
of passing on his knowledge to his customers."\(^{14}\) appears to forego the fundamental analysis inherent in the reasonable care standard in favor of a more mechanical and simplistic rule. A duty to warn remote consumers logically arises when the seller has reason to know that certain harms may be avoided by warning the consumer about certain characteristics of or dangers inherent in the use of the product. Thus, the seller should take those steps that are reasonable under all the circumstances to communicate such information to the consumer.\(^{15}\) Merely having trained and knowledgeable retailers capable of passing on information to consumers does not really address the more relevant issue whether the seller has taken reasonable steps to ensure that adequate warnings are in fact passed on by the retailer to the consumer. Rather, the court’s holding appears to leave such matters wholly to the individual judgment of the retailer.\(^{16}\) In Jones there was no showing that the manufacturers took any steps whatsoever to ensure that the retailer communicated any particular information to the customer, and the retailer testified only that he was “capable of passing on any information requested by his customers.”\(^{17}\) This approach would be reasonable only if one engaged in the undoubtedly faulty assumption that all customers would be sufficiently knowledgeable and concerned to ask the retailer all the proper questions about the product.

Finally, the court’s holding appears to assume that the distinction between packaged and bulk goods is the only variable relevant to the determination of reasonable care in such cases. Under fundamental negligence analysis the precautions against risk taken by an actor should be commensurate with the likelihood and gravity of the harm, but the court’s holding provides no apparent room for such analysis. Admittedly, the retailer is an easy conduit for a bulk seller to transmit information to the consumer, and in most cases reliance on the retailer may well be viewed as reasonable under all the circumstances. Nevertheless, the relative ease of a method of communication is not necessarily the full equivalent of reasonableness, and the fact that the easier method may constitute due care in most cases is not justification for holding as a matter of law that it constitutes due care in all cases. The weakness in the holding is demonstrated by the court’s cursory rejection of plaintiffs’ evidence that within the industry at least one bulk seller\(^{18}\) and several public utilities\(^{10}\) had undertaken the additional precaution of providing consumers with “scratch me”

\(^{14}\) 219 Kan. at 639, 549 P.2d at 1394 (emphasis added).

\(^{15}\) See Restatement (Second) of Torts § 388, Comment n at 308 (1965).

\(^{16}\) The court did indicate that bulk sellers have a duty to warn retailers of any dangers associated with the product. “If the product is sold in bulk, adequate warning to the vendee [retailer] is all that can reasonably be required.” 219 Kan. at 637, 549 P.2d at 1393. At no point, however, did the court suggest the existence of any duty of the bulk seller to ensure or even request that the retailer pass on such warnings to consumers. Since the ultimate purpose is the avoidance of injuries to consumers, such a duty should be imposed.

\(^{17}\) Id. at 639, 549 P.2d at 1395 (emphasis added).

\(^{18}\) The court dismissed this evidence on the rationale that “[n]egligence is not proved merely because someone later demonstrates that there would have been a better way.” Garst v. General Motors Corp., 207 Kan. 2, 21, 484 P.2d 47, 61 (1971) (quoting Dean v. General Motors Corp., 301 F. Supp. 187, 192 (E.D. La. 1969)). This rationale overlooks the fact that the issue in Jones was merely whether a genuine issue of material fact exists, not whether plaintiff had proved his case. More importantly, at least one bulk seller not only appreciated the importance of distributing such literature to remote consumers but also had the ability to do so, which suggests that the court’s heavy reliance on the infeasibility of such communication may have been overstated.

\(^{10}\) The court dismissed this evidence on the rationale that the public utilities had direct contacts with their customers. This distinction notwithstanding, the evidence was important in demonstrating that some sellers of gas were beginning to appreciate the desirability of taking additional precautions to better warn consumers about the dangers associated with gas.
literature designed to demonstrate the peculiar odor of a particular gas. These precautions would certainly give rise to a reasonable inference that some industry members consider these additional precautions an important aspect of injury avoidance. By rejecting this evidence and holding that as a matter of law a bulk seller using competent retailers owes absolutely no duty to warn consumers of any dangers, the court is encouraging the industry to forego innovations designed to avoid injuries to consumers. Accordingly, the court's holding should be viewed as inconsistent with both fundamental negligence analysis and sound public policy.

3. Custom

Kansas has developed an overly broad rule that custom contrary to existing law may not be used to establish or defeat an action, and evidence of such a custom is inadmissible. In *Ellis v. Skeeters* the court of appeals apparently recognized the inconsistency between this rule and the principle that negligence is the lack of reasonable care under all the circumstances. In this case plaintiff crashed into the side of defendant's pickup truck when defendant pulled out from the "side" road onto the straightaway at a "T" intersection not regulated by any "stop" or "yield" signs. Since defendant was the first to enter the intersection, he had the statutory right of way. Following a jury verdict for defendant, however, the trial court entered a directed verdict for plaintiff on the ground that the straightaway on which plaintiff was traveling was treated as a through street by custom in the community and therefore defendant should have yielded the right of way to plaintiff. The court of appeals reversed on the ground that the asserted custom was contrary to statutory law and could not be used to establish plaintiff's lack of contributory negligence.

This specific use of the custom rule would appear to reflect sound public policy. Statutory provisions governing highway usage have statewide effect, are made known to all Kansas drivers through a statewide licensing system, and promote highway safety for drivers traveling in any part of the state by permitting a degree of reliance on uniform provisions. If local custom were permitted to supersede these statutory provisions, drivers foreign to the community who are unaware of local custom would proceed in a manner less conducive to accident avoidance. Moreover, plaintiff's reliance on custom by approaching the intersection without reducing speed or keeping a proper lookout could be viewed as reasonable only if one engaged in

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20 One of the deceased apparently smelled the gas in the storm celler a few days prior to the accident, but she associated the odor with that of a dead mouse. Since the court held that a question of fact existed as to whether she had been adequately informed about the characteristics of propane gas, it cannot be said that such "scratch me" literature would not have prevented the accident.

21 The flexibility and uncertainty inherent in the reasonable care standard has the desirable characteristic of encouraging innovation in matters relating to accident avoidance. Conversely, when a rule of law fixes a rigid standard or, as here, shifts the primary burden of accident avoidance to other parties, then innovation is discouraged since parties achieve security from liability by merely complying with the rigid standard.


24 At the time of the accident the statutory right of way was governed by Act of March 14, 1968, ch. 218, § 18, 1968 Kan. Sess. Laws 420, 432 (repealed 1974), which provided, "The driver of a vehicle approaching an intersection shall yield the right-of-way to a vehicle which has entered the intersection from a different highway."

25 A "through highway" is one on which traffic has a preferential right of way and traffic entering from intersecting highways must yield the right of way in obedience to stop signs, yield signs, or other traffic control devices. See Kan. Stat. Ann. § 8-1475 (1975).

26 There was evidence from which the jury could have reasonably inferred that plaintiff approached the intersection at a speed slightly in excess of the 45 mile-per-hour speed limit and that although the
the faulty assumption that any person approaching the intersection from the side road would be familiar with the local custom. Accordingly, as applied to plaintiff's claim of no contributory negligence, the Kansas custom rule is fully compatible with the strong public policy of accident avoidance.

The same analysis, however, is not applicable to the question of defendant's negligence in *Ellis*. As a general proposition, a driver is entitled to assume that other drivers will obey the rules of the road unless he or she has knowledge to the contrary.27 Obviously, if one sees a driver approaching a stop sign at a high speed with no apparent effort to slow down, one may no longer reasonably assume that the driver will obey the law by stopping at the stop sign. The same reasoning should apply when one knows, as defendant knew in *Ellis*, that local drivers customarily treat a certain street as a through street and thus will not necessarily keep a careful lookout for or be prepared to yield the right of way to persons entering that street from adjoining streets. Thus, as the court of appeals noted in dictum, defendant's knowledge of the local custom would be relevant to the question of his exercise of reasonable care under all the circumstances. The court of appeals reached no conclusion on the admissibility of this evidence, however, perhaps because supreme court precedent has unequivocally held such evidence to be inadmissible.28 This precedent notwithstanding, the application of the custom rule to defendant's situation in *Ellis* is unsound. Admission of such evidence would in no manner legitimize the custom or otherwise undermine existing statutory law. It would merely permit consideration of defendant's actual knowledge of a heightened risk in the determination of reasonable care.29 If the evidence is held inadmissible, defendant is legally allowed to drive in an unreasonable manner by ignoring a known risk.30 Thus, the application of the custom rule in these situations both distorts the fundamental negligence formula and is clearly incompatible with the public policy of accident avoidance.

4. Sudden Emergency

During the survey period the courts continued to take a restrictive attitude towards the "sudden emergency" jury instruction in routine collision cases.31 In *Bayer v. Shupe Brothers Co.*32 the supreme court upheld the trial court's refusal to give the instruction in a case in which plaintiff's car swerved and crashed in an attempt to avoid hitting a truck entering the highway. In *Crowley v. Ottken*33 the

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29 See, e.g., Restatement (Second) of Torts § 289, Comment m at 45-46, Illustrations 10 & 11, at 46 (1965).
30 During the past four years, I have observed that a substantial majority of drivers in Lawrence, Kansas, do not obey the legal requirement to signal their intention to turn while driving. Accordingly, I would be creating an unreasonable risk to myself and others if in my own driving I ignored this fact and proceeded on the assumption that Lawrence drivers would obey the law relating to such signals. Such conduct on my part should not suddenly be treated as reasonable once this practice of Lawrence drivers becomes so prevalent that it is characterized as a custom.
surpreme court upheld the giving of the instruction on the narrow ground of no showing of prejudice in a case in which the motorcycle on which plaintiff was riding as a passenger collided with a car that entered and then stopped in an intersection. In both cases one party tried to show a lack of negligence with a sudden emergency argument, and the other party tried to show contributory negligence by a failure to maintain a proper lookout. The court indicated in both cases that a "sudden emergency" is but one of the circumstances relevant to the question of ordinary care and therefore more properly a factual matter for closing argument than a legal matter for jury instructions.

On balance this approach seems quite sound, particularly if the issue is viewed as involving the proper definition of a party's "theory" of a case. A party is entitled to jury instructions on his or her theory of a case when there is competent evidence to support that theory, but the court is holding in essence here that the proper theory of such routine collision cases is the exercise of ordinary care under all the circumstances rather than the exercise of ordinary care in a sudden emergency. Conceptually, this approach appears to be more consistent with the basic legal definition of negligence as the failure to exercise ordinary care under all the circumstances. Pragmatically, this approach avoids the likelihood of jury confusion either by undue emphasis in the instructions on one circumstance or by unnecessarily voluminous instructions on every possible relevant circumstance. Accordingly, this approach should be encouraged and indeed extended to other jury instructions that simply emphasize one isolated aspect of ordinary care.

5. Duty to Keep a Lookout

During the survey period the courts dealt with a number of vehicle collision cases involving the duties of drivers and passengers to keep a proper lookout. With respect to drivers, one particularly troublesome problem concerns the duty to keep a lookout to the rear. The general rule in Kansas is that a driver should maintain a lookout for vehicles approaching from the rear "when the presence of such vehicle is known, or if he is intending to change his course." In Jones v. Spencer plaintiff intended to make a left turn from a high-speed highway onto a county road. As he neared the intersection he looked to the rear for approaching cars, signaled with his left turn blinker, pulled to the center of the highway, and then stopped to wait for a break in traffic so that he could execute his turn safely. While stopped in this position and watching the traffic approach from the opposite direction, he was struck from behind by a car negligently driven by defendant. The jury specifically found, inter alia, that plaintiff was contributorily negligent in failing to keep a lookout to the rear for other users of the highway. Although the jury also found that plaintiff failed to keep a lookout for other users of the highway and failed to keep his rear window unobstructed, both findings were related to and dependent upon the existence of plaintiff's duty to keep a lookout to the rear. In addition, the jury found that plaintiff obstructed the travel portion of the highway. The supreme court held that the prohibition against ob-

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37 Although the jury also found that plaintiff failed to keep a lookout for other users of the highway and failed to keep his rear window unobstructed, both findings were related to and dependent upon the existence of plaintiff's duty to keep a lookout to the rear. In addition, the jury found that plaintiff obstructed the travel portion of the highway. The supreme court held that the prohibition against ob-
reversed on the ground that under the circumstances of this case a motorist lawfully stopped to make a left turn has no duty to keep a lookout to the rear.

The *Jones* court appeared to interpret the phrase "intending to change his course" in the general rule governing the duty to look to the rear as being essentially limited to those situations in which the driver is contemplating an unexpected maneuver that, if executed, could endanger vehicles approaching from the rear. This interpretation is certainly more consistent with the basic negligence standard of reasonable care under all the circumstances than an inflexible duty to look to the rear whenever a driver intends to change course. Keeping a proper lookout is an important aspect of reasonable driver conduct, and there is no problem in the legal requirement that a driver be constantly vigilant. A driver has but one pair of eyes, however, and the direction and timing of where he or she looks should be determined by all of the circumstances in a given situation. In *Jones* plaintiff had stopped as far towards the center of the highway as possible, and no vehicle approaching from the rear would have passed him on his left side. Thus, no vehicle approaching from the rear would have been exposed to any sudden unexpected danger by plaintiff's commencing a left turn from his stopped position. The vehicles approaching from the opposite direction across whose lane of travel plaintiff intended to turn, however, could be exposed to danger. Therefore, as the court noted, his primary duty under these circumstances was to keep a proper lookout to the front for the approaching vehicles.88

Whereas a driver is legitimately required to be vigilant at all times, the problem with respect to a passenger focuses primarily on the special circumstances under which a duty to keep a lookout arises. For many years Kansas adhered to a strict rule imposing upon a passenger an affirmative duty equal to that of the driver to keep a lookout for trains when approaching a railroad crossing. Failure to do so constituted contributory negligence as a matter of law.89 In *Smith v. Union Pacific Railroad Co.*40 the supreme court abandoned that rule in favor of a general duty of reasonable care under all the circumstances. In that case driver and passenger were approaching a railroad crossing with which both were familiar at a slow speed in a truck carrying a load of pipe. The truck was struck by a train shortly after the passenger turned around in response to what he believed was the sound of pipe falling off the truck. In reversing a summary judgment in favor of the railroad, the supreme court noted that the strict railroad crossing rule was at variance with

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88 The court held alternatively that any breach of a duty to look to the rear under the circumstances of the case could not have been the proximate cause of the accident. Since the accident would have occurred even if plaintiff had been looking to the rear, the better explanation would have been that such a breach was not a cause-in-fact of the accident. The concept of proximate cause will be more accurately developed in the cases if limited to situations in which a defendant’s breach is a cause-in-fact of the accident; but liability is nevertheless not imposed for reasons of legal policy. See generally W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 42, at 244 (4th ed. 1971). If questions of cause-in-fact and proximate cause are treated together as one concept, the likely result will be confusion in the court’s analysis.


both the rules applied to similar cases in other jurisdictions\textsuperscript{41} and the rules applied to passengers in all other situations in Kansas.\textsuperscript{42} More importantly, the court recognized that the strict railroad crossing rule was inconsistent with the basic concept of reasonable care in the sense that common experience indicates that passengers could not realistically be expected to maintain the same constant lookout required of drivers.\textsuperscript{43}

Without question, the decision in Smith is a sound and indeed long overdue development.\textsuperscript{44} Reasonable care is always a function of the totality of circumstances, and the notice of potential danger given by a railroad crossing is merely one of many factors relevant to a proper analysis of reasonable care. Accordingly, the strict railroad crossing rule served the undesirable function of automatically shifting the burden of an accident from a negligent railroad to the passenger irrespective of the wrongfulness of the passenger's conduct. This type of rule should not exist in the absence of strong public policy reasons supporting such loss-shifting.

A common feature in all the passenger cases is the recognition that a passenger has absolutely no duty to keep a lookout and may fully rely on the skill and vigilance of the driver until certain conditions exist. Yet, in Smith, after recognizing that "reasonable care under all the circumstances" should be the fundamental concept in determining those conditions, the court created some unnecessary confusion by adopting a jury instruction that reliance by a passenger is proper "in the absence of knowledge of danger, or of facts which would give him such knowledge."\textsuperscript{45} First, this instruction does not accurately describe the holding in Smith since there the passenger had this knowledge, but was relieved of a duty to be vigilant because of other circumstances. Moreover, knowledge of danger is but one of the circumstances that should be relevant to the issue of reasonable care. Thus, the preferable instruction would seem to be the one proposed in Justice Kaul's concurring opinion, \textit{i.e.}, reliance is proper unless "a passenger has knowledge of danger and the circumstances are such that an ordinary person would speak out or take other positive action to avoid injury to himself."\textsuperscript{46} This statement of the standard more accurately reflects the intent of the court's overall opinion, is more consistent with the concept of reasonable care, and is less likely to confuse a jury.

Second, Justice Kaul's proposed instruction would also appear to be more appropriate in cases in which the passenger is aware of a situation of danger, is not

\textsuperscript{41} See, \textit{e.g.}, Hatcher v. New York Cent. R.R., 117 Ill. 2d 587, 162 N.E.2d 362 (1959); Frieder v. Lowden, 235 Iowa 640, 17 N.W.2d 396 (1945); Gorman v. Franklin, 117 S.W.2d 289 (Mo. 1938); Liabraaten v. Minneapolis, St. P. & S. Ste. M. Ry., 105 Minn. 207, 117 N.W. 423 (1908).

\textsuperscript{42} The general rule in Kansas is that a passenger may rely upon the vigilance or skill of the driver unless the passenger knows of a particular danger or knows that the driver is not vigilant or skillful. Miles v. West, 224 Kan. 284, 289, 580 P.2d 876, 882 (1978). This rule is recognized as simply an application of the fundamental standard of reasonable care under all the circumstances, McGlothlin v. Wiles, 207 Kan. 718, 721, 487 P.2d 533, 536 (1971), and thus is usually treated as a question of fact for the jury. See, \textit{e.g.}, Kelty v. Best Cabs, Inc., 206 Kan. 654, 481 P.2d 980 (1971); Beye v. Andres, 179 Kan. 502, 296 P.2d 1049 (1956).

\textsuperscript{43} 222 Kan. at 308, 564 P.2d at 518.

\textsuperscript{44} It should be noted that the demise of the strict passenger rule was inevitable once Kansas adopted comparative negligence. Even if a court ruled that a passenger was contributorily negligent as a matter of law, the jury would still have to determine the passenger's proportional share of causal negligence. In those cases in which the strict passenger rule was clearly inconsistent with the reasonable care standard, juries would undoubtedly assess only a de minimis share of causal negligence to the passenger even if instructed by the court that the passenger was contributorily negligent as a matter of law.

\textsuperscript{45} 222 Kan. at 310, 564 P.2d at 519.

\textsuperscript{46} \textit{Id.} at 311, 564 P.2d at 520 (Kaul, J., concurring).
otherwise preoccupied, but reasonably believes the driver to be capable of reacting to it. In *Miller v. Chicago, Rock Island & Pacific Railroad Co.*\(^{47}\) the driver and passenger were injured when their car was struck by a train at a crossing with which they were both familiar. Unlike the situation in *Smith*, however, the passenger was not otherwise preoccupied, but rather was watching for an approaching train. The court of appeals relied upon *Smith*, although without significant explanation, to uphold a jury verdict that in essence found contributory negligence by the driver, but not by the passenger. Since the passenger should have been just as capable as the driver of seeing or hearing the approaching train,\(^{48}\) the logical explanation for the holding would seem to be that the passenger was permitted to rely on the driver's vigilance so long as he believed the driver capable of properly responding to the situation.\(^{49}\) In *Crowley v. Ottken*\(^{50}\) plaintiff was injured when the motorcycle on which she was riding as a passenger collided with a car at a "Y" intersection in a wooded area. The supreme court upheld a jury verdict for defendant on the ground that the question of her contributory negligence was one of fact for the jury. Since there was evidence that plaintiff saw the car enter the intersection and the motorcycle was traveling at an excessive speed, the jury could have concluded that she should have warned the driver.\(^{51}\) Although the result could arguably have been based merely on her knowledge of danger, the explanation more compatible with the concept of reasonable care would be that her knowledge of danger coupled with her awareness of her driver's apparent inadequate response to the situation created circumstances in which "an ordinary person would speak out or take other positive action to avoid injury to himself."\(^{52}\)

Finally, with the adoption of comparative negligence, the question of which persons are owed a duty by the passenger becomes relevant for the first time in Kansas. The passenger's duty has traditionally functioned simply as a mechanism to deny any recovery to an injured passenger under the old rule of contributory negligence. A passenger has never been held liable to another merely for failing to keep a proper lookout.\(^{53}\) Indeed, some cases have described the passenger's duty


\(^{48}\) The passenger testified that he did look for an approaching train, and there was evidence from which the jury could have reasonably inferred that the passenger did see the light on the approaching train. *Id.* at 395, 396 P.2d at 28.

\(^{49}\) In *Miller* the jury instructions were in accord with the instructions approved by the majority in *Smith*. The result in *Miller*, however, appears to be more readily explained in terms of the instruction proposed by Justice Kaul in *Smith*.

\(^{50}\) 224 Kan. 27, 578 P.2d 689 (1978).

\(^{51}\) Under the specific facts of *Crowley*, it is not at all clear that a warning by the passenger could have been given in sufficient time to avoid the accident, and thus there is some doubt that her failure to warn was a cause-in-fact of the accident. Unfortunately, this issue was not raised and the facts are not set forth with sufficient specificity to enable any detailed analysis of this issue. Nevertheless, it should be noted that a vigilant passenger may well be able to warn the driver of danger, but only at a point in time too late to affect the driver's reaction to a situation. Courts should be careful to ensure that sufficient evidence of causation is introduced before submitting the issue of a passenger's contributory negligence to a jury.


\(^{53}\) A passenger may be held liable for the negligence of the driver when a special legal relationship exists between passenger and driver such as master-servant or principal-agent bringing the passenger within the doctrine of respondent superior, *see*, e.g., Halverson v. Blosser, 101 Kan. 683, 168 P. 863 (1917), or a joint venture, *see*, e.g., Sizemore v. Hall, 148 Kan. 233, 80 P. 1092 (1938). A passenger may also be held liable for his or her own negligence in entrusting the vehicle to an incompetent driver. *See*, e.g., Eureich v. Alkire, 224 Kan. 236, 579 P.2d 1207 (1978).
as simply a duty owed to himself or herself. The injury that the passenger seeks to avoid, however, will result from an accident that the passenger could have avoided by keeping a lookout and warning the driver; and in vehicle accidents it is quite likely that persons other than the passenger will also be injured. Therefore, there is an analytical basis for defining the passenger’s duty as one owed to others as well as to himself or herself. In multiparty accident cases it is quite possible under the comparative negligence statute that each party could be held liable to every other party and that a passenger could be obligated to pay to others more than allowed for his or her own injuries.

While such an affirmative passenger duty is conceptually consistent with the reasonable care standard, it could produce some unexpected and arguably unfair financial hardships on passengers. Certainly, any passenger legally obligated to assist the driver in the safe operation of a vehicle should be considered a “user” of the vehicle under any insurance policy covering the operation of that vehicle. While the driver may purchase what he or she deems to be adequate liability insurance, the passenger may well have had no opportunity to participate in or influence that decision. On the other hand, many passengers may have independent insurance coverage that would increase the total insurance coverage for the accident and thereby avoid the all too common problem of inadequately compensated plaintiffs. Accordingly, the court may be well advised to consider these policy ramifications before determining the precise scope and definition of the passenger’s duty.

6. Malpractice

During the survey period the supreme court took an important step away from the traditional “locality rule” and towards the recognition of national standards of care in medical malpractice cases. In Chandler v. Neosho Memorial Hospital plaintiff claimed that defendants’ negligent administration of excessive supplemental oxygen following her premature birth had caused her blindness. She sought to introduce the expert testimony of two professors of pediatrics from out-of-state medical schools that (1) the standard of care for the administration of supplemental oxygen to prematurely born infants in Chanute, Kansas, was the same for doctors and hospitals throughout the United States, (2) defendants failed to meet this standard of care, and (3) this failure caused plaintiff’s blindness. The trial court


45 Indeed, in such cases there will always be a risk of injury to the driver of the car in which the passenger is riding. Moreover, it may be expected that the sudden, unpredictable movements of other drivers or pedestrians would be the most common examples of what the courts contemplate in the cases as a “particular danger” giving rise to the passenger’s duty to warn. Accordingly, it would be quite unreasonable to assume that the passenger is the only person likely to suffer injury.

46 For example, in two car accident in which the jury might otherwise find each driver 50% causally negligent, the inclusion of the passenger’s causal negligence might produce the following result: passenger—20% causal negligence; passenger’s driver—40% causal negligence; and second driver—40% causal negligence. Now the passenger will be liable for 20% of each driver’s damages, and if one or both drivers suffer serious injury and the passenger is uninjured or only slightly injured, the passenger could easily be required to pay a substantial amount of damages.

47 The locality rule provides that the standard of professional medical care is to be measured by the professional care and skill possessed by others in the profession in the same or similar communities. See, e.g., Avery v. St. Francis Hosp. & School of Nursing, 201 Kan. 687, 695-98, 442 P.2d 1013, 1020-22 (1968).

excluded the testimony on the grounds that (1) although otherwise well qualified, neither witness had ever practiced in Chanute, in any nearby community, or in any similar community, and (2) as a matter of law the standard of care could not be the same throughout the United States. The trial court then directed verdicts for defendants on the ground that plaintiff failed to establish negligence and causation by expert testimony. In reversing on the rationale that the existence of a national standard of care is a question of fact for the jury to be established by expert testimony, the supreme court formally recognized for the first time the possible use of national standards of care in Kansas medical malpractice cases.

The court's recognition that national standards of care undoubtedly exist in many areas of medical practice seems quite sound. As the court observed, various modern developments in the field of medicine have markedly reduced the disparity between urban and rural standards of care, which originally gave rise to the locality rule. To the extent that medical knowledge is readily available to all doctors and hospitals throughout the United States, the sound public policies of providing competent medical care and avoiding unnecessary injuries support a rule that motivates doctors and hospitals to obtain and use such knowledge. In addition, by treating the existence of a national standard of care as a question of fact, plaintiffs may avoid premature disposition of their claims due to either the reluctance of local medical experts to testify against their fellow practitioners or a showing that the local standard of care is below the standard established elsewhere throughout the United States. Finally, the development of sounder legal definitions fair to both sides in such cases may well result from a process by which doctors and hospitals are compelled to come forward in appropriate cases with specific evidence in support of a claimed "lesser community" standard, which would thereby provide in the context of a fully developed trial record the realistic parameters of geographic and other locality factors.

The more difficult question in Chandler involves the court's failure to modify

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48 Although not discussed in the supreme court's opinion, the trial court's exclusion of the expert testimony on the issue of causation was clearly erroneous. The causal relationship between blindness and the administration of excessive supplemental oxygen to prematurely born infants is simply a question of scientific fact that is not dependent upon the witnesses' familiarity with standards of care in small Kansas communities.

49 In Avey v. St. Francis Hosp. & School of Nursing, 201 Kan. 687, 442 P.2d 1013 (1968), the court did comment on various developments that have produced greater uniformity of medical care in modern society. The issue in Avey, however, was limited to the liberalization of the locality rule by consideration of "similar communities." No formal consideration was given to the adoption of national standards of care.

50 Advances in travel and communication, the ready access to medical journals and seminars, and statutes, regulations, and accreditation standards have all served to provide greater uniformity in the standard of medical care. Although not mentioned specifically by the court, perhaps one of the most important factors is the improvement and greater standardization of medical school training throughout the United States. See, e.g., Wiggins v. Fiver, 276 N.C. 134, ..., 171 S.E.2d 393, 396 (1970).


53 When a malpractice action is summarily terminated because plaintiff cannot establish the standard of medical care in the local community even though he or she has established the standard of medical care for the rest of the country, there is no opportunity to scrutinize the existence or sufficiency of any possible reasons why the local medical community is unable to perform at the same level as the rest of the country. As a result, the grounds for retaining substantial legal protection for local medical practices remains largely a matter of factual and legal speculation.
the formal definition of the medical standard of care. The court recognized that available medical facilities, equipment, and staff, and perhaps even certain medical practices, may in some cases be affected by geographic factors like population, altitude, and climate, and thus the court declined the opportunity to adopt formally a national standard of care for every area of health care. The retention of the reference to “similar communities” in jury instructions, however, arguably places undue emphasis on what the court described as “simply one of the factors to be considered” and might well result in undue confusion of the jury in its determination of the proper standard of care in a given case. This would seem to be particularly true in cases such as Chandler in which competent evidence could be introduced to support the existence of a national standard of care wholly unaffected by any locality factors. Nevertheless, the proper definition of the most effective medical standard of care is the subject of considerable debate, and it must be admitted that Chandler did not present the court with a record that fully and fairly focused the issue. Thus, the court’s cautious “wait-and-see” approach on the issue is not without merit, particularly since the court has shown in Chandler an awareness of the problem and a willingness to respond firmly to specific issues involving medical standards of care.

In medical malpractice cases expert testimony is ordinarily required to establish the applicable standard of care unless the medical practice at issue is within the “common knowledge” of lay persons. In Webb v. Lungstrum plaintiff suffered a severely lacerated forearm when his staple gun malfunctioned. Defendant physician did not take an x-ray of the forearm before rendering emergency treatment for severed tendons. As a result, defendant did not discover a metal fragment in plaintiff’s forearm, and plaintiff had to undergo two additional operations. Plaintiff alleged negligence in the failure to take an x-ray at the time of the original accident, but his expert witness testified he could not state that as a matter of sound medical practice an x-ray should have been taken at that time under all the circumstances of plaintiff’s accident. In affirming a summary judgment for defendant, the supreme court held that the common knowledge exception does not necessarily apply to cases in which a foreign object left inside a patient’s body after an operation was not placed there by the physician.

As a matter of both common sense and sound public policy, expert testimony

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65 The court left undisturbed the reference to “in the community or in similar communities under like circumstances” in the standard legal definition of the medical standard of care. See generally Pattern Instructions for Kansas 2d § 15.01 (1977).
66 223 Kan. at 4, 574 P.2d at 138.
67 In the “sudden emergency” cases the court has recognized the potential for juror confusion created by an instruction that unduly emphasizes only one of the many factors relevant to reasonable care. See notes 31-34 and accompanying text supra. The same reasoning is fully applicable in malpractice cases. Certainly an instruction based upon the locality rule would be most inappropriate in any case in which defendant failed to introduce any evidence tending to show that legitimate locality factors had an influence on the standard of medical care applicable to the specific case.
is not needed to show that physicians should be responsible for removing all harm-producing foreign objects that they knowingly place inside a patient’s body during an operation.71 Common knowledge is sufficient in these cases because the negligence consists of the failure to remove that which all parties would concede should have been removed. The situation is different, however, when the foreign object is inside the patient’s body as the result of an independent occurrence wholly unrelated to the conduct of the physician. In these cases the issue is whether the physician should have discovered its presence. If the only issue in Webb had been the foreseeability of a fragment’s being embedded in plaintiff’s forearm as the result of such an accident, expert medical testimony would probably have been unnecessary. The case had aspects of an emergency situation, however, because plaintiff had suffered severed tendons requiring prompt treatment. Considering all the circumstances of the case, the court properly held that defendant’s medical judgments were not within the common knowledge of lay persons.

In Simpson v. Davis72 defendant dentist dropped a metal reamer while working on plaintiff’s teeth when plaintiff, who was heavily anesthetized, apparently knocked the reamer out of his hand by a sudden movement of her head. The reamer fell into her throat, was swallowed, and had to be surgically removed. The injury could have been avoided if defendant had used a rubber dam, which is placed inside a patient’s mouth to catch any dropped instruments. In reversing a jury verdict for defendant with an opinion limited to the peculiar facts of the case, the supreme court held that plaintiff, although not unconscious, was so heavily anesthetized73 that she was rendered no more capable of contributory negligence than an unconscious patient. Unconscious patients are incapable of contributory negligence because of their inability to make voluntary movements,74 and the extension of this rationale to the peculiar facts of Simpson was certainly sound.

B. Limited Duties Owed by Landowners

The traditional invitee-licensee-trespasser classification system used in Kansas to describe persons entering the land of another is the basis for a set of special rules that permit landowners to deviate from the standard of reasonable care under all the circumstances.75 During the survey period the courts demonstrated a laudable willingness to expand the scope of the attractive nuisance doctrine, an exception to the classification system that requires the exercise of reasonable care for certain child trespassers and licensees. With respect to the general rules under the classification system and the question of reform of the classification system, however, the courts’ performance can only be viewed as disappointing.

1. The Attractive Nuisance Exception

A landowner owes a duty of reasonable care to child trespassers and licensees under the so-called “attractive nuisance” doctrine when the landowner (1) knows or should know of the likely presence of such children on the land, (2) knows or

73 On this particular occasion, nitrous oxide was administered to plaintiff for an unusually long period of time, apparently producing an effect similar to intoxication.
should know of some condition on the land that involves an unreasonable risk of bodily harm to children, and (3) the children either fail to discover the condition or are unable to appreciate the danger because of their youth.\textsuperscript{70} In two cases during the survey period the courts appear to have interpreted broadly the third part of this test. In \textit{Gerchberg v. Loney}\textsuperscript{77} plaintiff, a five-year-old boy, suffered third-degree burns on his legs when he tried to stamp out a grass fire that he started by playing with a smoldering incinerator left unattended in defendants' yard. Plaintiff was classified as a licensee because he was frequently permitted to play in defendants' yard. The trial court found the attractive nuisance doctrine inapplicable and directed a verdict in favor of defendants. The court of appeals reversed on the ground that whether the smoldering fire constituted an attractive nuisance was a question of fact for the jury. The dissenting judge argued that the attractive nuisance doctrine applied only to "latent" dangers and that prior Kansas cases had almost uniformly held fire not to be such a danger.\textsuperscript{78}

In many states certain so-called "common hazards" such as fire, heights, and pools of water have been held as a matter of law to be outside the scope of the attractive nuisance doctrine on the rationale that any child old enough to go about unattended should appreciate such common hazards.\textsuperscript{79} Although prior Kansas cases do appear to have treated fire as a patent hazard as a matter of law, this rigid approach to the problem seems unsound. Other hazards have not been treated in the same manner in Kansas,\textsuperscript{80} and the rigid approach permits no flexibility for the subtle variations in the facts of the cases.\textsuperscript{81} In addition, the rigid rule seems to ignore the almost uncontrollable fascination that young children have with fire\textsuperscript{82} and the highly unreasonable risks created by leaving fires unattended in a place where young children are expected to play. On balance, the better approach is to treat the child's appreciation of the danger as a question for the jury, and the court of appeal's decision is encouraging in this respect.

In \textit{Talley v. J & L Oil Co.}\textsuperscript{83} plaintiffs' decedent, a thirteen-year-old boy, drowned

\textsuperscript{70}The Kansas test has been patterned after \textit{Restatement of Torts} § 339 (1934). See, e.g., \textit{Brittain v. Cobbins}, 190 Kan. 641, 646, 378 P.2d 141, 145-46 (1963). The phrase "attractive nuisance," however, is a misnomer since the source of potential danger to the child does not necessarily have to possess either the characteristics of a nuisance or the capacity to entice the child onto the land.


\textsuperscript{78}See, e.g., \textit{Rose v. Board of Edu.}, 184 Kan. 486, 337 P.2d 652 (1959); \textit{Rhodes v. City of Kansas City}, 167 Kan. 719, 208 P.2d 275 (1949); \textit{Bruce v. City of Kansas City}, 128 Kan. 13, 276 P. 284 (1929). \textit{Cf. Carter v. Skelly Oil Co.}, 191 Kan. 474, 382 P.2d 277 (1963) (holding that a slush pit fire constituted an attractive nuisance). \textit{Carter} may be distinguishable on the grounds that (1) the fire occurred in a slush pit that itself was capable of constituting an attractive nuisance and (2) the child was neither a trespasser nor a licensee and thus the doctrine was technically inapplicable.

\textsuperscript{79}See \textit{W. Prosser, Handbook of the Law of Torts} § 59, at 371-72 (4th ed. 1971). In Kansas this approach has been applied by distinguishing between "latent" dangers and "patent" dangers, with the latter often being held outside the scope of the attractive nuisance doctrine as a matter of law. See, e.g., \textit{Brennan v. Kaw Constr. Co.}, 176 Kan. 465, 271 P.2d 253 (1954) (holding that the danger of falling from heights was a "patent" danger that a two-year-old child should have appreciated as a matter of law).

\textsuperscript{80}For example, while the dangers inherent in fires and heights have been treated as common or patent hazards, the danger of drowning in a pool of water has been held to be within the scope of the attractive nuisance doctrine. \textit{Compare Bartlett v. Heersche}, 204 Kan. 392, 462 P.2d 763 (1969) with \textit{Brennan v. Kaw Constr. Co.}, 176 Kan. 465, 271 P.2d 253 (1954).

\textsuperscript{81}For example, it may not be unreasonable in certain cases to hold that an older child should fully appreciate the danger in falling from heights. When the same result is applied to a two-year-old child, however, the court must be viewed as acting in a manner wholly incompatible with the intent and purpose of the patent danger rule. See, e.g., \textit{Brennan v. Kaw Constr. Co.}, 176 Kan. 465, 271 P.2d 253 (1954).

\textsuperscript{82}This "natural affinity for fires" was recognized in \textit{Carter v. Skelly Oil Co.}, 191 Kan. 474, 479, 382 P.2d 277, 281 (1963).

inside a large oil storage tank after passing out from lack of oxygen. The boy and three of his friends had climbed the outside ladder to the top of the tank, where they found a loose hatch cover over the opening to the inside of the tank. Decedent and one other boy climbed down the inside ladder a first time, then felt light-headed and climbed back out. The fatal accident occurred during decedent's second trip down inside the tank. Thus, it could easily be argued that decedent appreciated the danger of climbing inside the tank after he did so the first time and became light-headed as a result. Yet the supreme court treated this as a proper jury question, and since it was not clear that decedent fully appreciated the nexus between his light-headedness and the conditions inside the tank, this appears to have been a sound holding.

If the requirement of a lack of appreciation of danger were inherently logical, then perhaps a stricter judicial control over the requirement might have considerable merit. The attractive nuisance doctrine falls somewhat short of imposing a full duty of reasonable care on the landowner, however, and it is desirable only because it ameliorates some of the harsher effects of the general trespasser and licensee rules, which would preclude recovery by the child in many cases. Thus, the more that the threshold requirements of the doctrine are broadly and liberally interpreted, the more the doctrine will in practice approach the full reasonable care standard. For this reason alone, Gerchberg and Talley could be viewed as desirable holdings.

2. Duty Owed to Trespassers

In Frazee v. St. Louis-San Francisco Railroad Co., defendant's crew of four employees was engaged in switching operations at a location in Arkansas City, where they had seen children playing in the area on prior occasions. While one group of railroad cars was left standing on one track, the crew slowly moved another group of cars with a switch engine. Plaintiff, a nine-year-old boy, had both legs severed when he slipped in an attempt to climb aboard one of the moving cars. All four crew members were riding in the switch engine at the time, and none of them saw plaintiff prior to the accident. With three justices dissenting, the supreme court affirmed a summary judgment in defendant's favor on the grounds that (1) defendant had only the limited duty to avoid willful, wanton, or reckless injury to a trespasser once the trespasser is discovered, (2) defendant had no duty to fence off its tracks, and (3) child trespassers have no greater rights than adult trespassers. Had the majority engaged in a more careful and thorough analysis, it might well have concluded that summary judgment was inappropriate in this action.

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84 The court reversed a verdict in favor of plaintiffs, however, on the ground that the trial court erroneously refused to submit to the jury the question of the contributory negligence of the decedent or his parents. The court correctly distinguished between the decedent's inability to appreciate the specific danger for purposes of bringing his situation within the scope of the attractive nuisance doctrine and his ability to appreciate some general danger inherent in his conduct sufficient to raise the possibility of contributory negligence. See W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 59, at 373 (4th ed. 1971).

85 By definition, the attractive nuisance doctrine imposes a duty of reasonable care upon the landowner only in cases in which the child because of his or her youth is unable to discover the dangerous condition or appreciate the danger inherent in the condition. Thus, under the technical definition of the doctrine the landowner backing a car down his or her driveway who negligently does not see a trespassing child in the path of the car will not be liable for a resulting injury if the child was old enough to appreciate the danger of moving cars. That the landowner has reason to anticipate the presence of trespassing children in the driveway technically is irrelevant.


87 Chief Justice Patzer and Justices Owsley and Prager dissented without expressing the reasons for their dissent.
First, the duty owed to plaintiff once he was discovered was wholly irrelevant since plaintiff was never discovered. The issue should have been whether defendant had a duty to keep a lookout for plaintiff, and this requires an examination of the circumstances that give rise to a duty to keep a lookout. A railroad must keep a lookout at public crossings where persons are permitted to cross the tracks and would be classified as licensees. The rationale for this duty is that the railroad has reason to anticipate people being there and not simply that any people found there will be called licensees. It would then logically follow that if the railroad had particular reason to anticipate the presence of people at some other place, then a similar duty to keep a lookout should exist. Indeed, the majority quoted the following passage from a prior Kansas case that directly supports this proposition: “He [plaintiff’s decedent] was not in a place frequented by children or other persons, and hence the employees of the defendants had no reason to anticipate his presence at the place he was struck . . .” In Krause it was stipulated that defendant’s employees had seen children “playing in the area” on “prior occasions.” If given an opportunity to develop this point at a trial on the merits, plaintiff might have been able to show that defendant had reason to anticipate the presence of children at the place where the injury occurred. This approach would certainly be more compatible with concepts of reasonable care and injury avoidance. It is unfortunate that the court failed to perceive the correct issue and deal with it directly.

Second, in holding that defendant had no duty to fence off its tracks, the majority engaged in an erroneous analysis of the burden factor in the fundamental negligence formula. The broader issue here is whether the railroad should have taken some steps to reduce the risk of injury to others. The majority stated that “[n]othing short of the most pervasive and expensive security measure could ever prevent a person from running from a place of safety to the side of a railroad car and jumping on” and thus the burden of avoiding such injuries would be “insurmountable.”

In essence, the court held that the railroad has no duty to avoid any injuries because the burden of avoiding all injuries is too great. The clear error in this analysis is demonstrated by a simple analogy to automobile driving. The court’s holding would suggest that a driver no longer has a duty to exercise reasonable care in operating a vehicle because even if the driver did drive carefully, he or she could not ensure that a person who suddenly darted from a place of concealment directly into the path of the vehicle would not be injured. Proper negligence analysis requires only that an actor take those measures that reduce the risks inherent in a particular course of conduct

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89 Id. at 223, 173 P. at 347 (emphasis added). It is quite clear from a reading of Morris in its entirety that the quotation referred to locations at which the railroad had reason to anticipate the presence of a trespasser and not the more limited duty merely to look out for licensees at public crossings. See also Missouri Pac. Ry. v. Prewitt, 59 Kan. 734, 739, 54 P. 1067, 1068 (1898). Thus, the early Kansas cases clearly contemplated a duty to keep a lookout for trespassers in at least limited situations. The majority in Krause apparently failed to comprehend the significance of the quoted passage.
90 The majority simply ignored this analysis and noted that plaintiff was not a “known trespasser” and was not “a frequent or constant trespasser on the railroad’s right of way.” 219 Kan. at 664, 549 P.2d at 564. If by these comments the court meant that plaintiff was not a discovered trespasser, then again the court misunderstood the issue in the case. If it meant that the railroad had no reason to anticipate the presence of the specific plaintiff, then the court misunderstood the meaning of foreseeability as it is used in negligence actions, for it would be the foreseeable presence of children generally rather than of the specific plaintiff that would give rise to a limited lookout duty.
91 Id. at 666, 549 P.2d at 565.
commensurate with considerations of burden and social utility. Thus, in *Frazee* the issue really was whether the railroad could reasonably have been expected to take some steps to reduce the likelihood of an injury such as the one suffered by plaintiff. While fencing off its tracks in populated areas might be one possibility, the facts in *Frazee* suggest an even less burdensome precaution. All four employees were riding in the switch engine at the time of the accident, but since they were moving cars back and forth in one fixed location, there is no indication in the facts that it would have been unduly burdensome to ask one or more of the employees to remain outside to keep a lookout for children. Had they done so, they might have seen plaintiff approach and warned him to stay away. The majority's erroneous explanation of the burden factor prevented any consideration of this argument.

Finally, the court's holding that child trespassers have no greater rights than adult trespassers completely overlooks the possibility that railroad switching operations at a fixed location where children are known to play might come within the attractive nuisance exception to the general trespasser rules. This exception is the source of frequent litigation and should be well-known to the court. If the court can take judicial notice of the propensity of children to climb up large oil storage tanks, as it did in *Talley*, then it should be able to consider a similar propensity of children to play and climb on standing or slow-moving railroad cars. Certainly this propensity could be viewed as sufficiently raising a genuine issue of material fact and justifying a trial on the merits.

In summary, *Frazee* appears to demonstrate the extent to which unthinking and mechanical application of the trespasser rules permits an unduly substantial deviation from the standard of reasonable care. It has been said by another court in an analogous context that “[a]n exception to a rule will be declared by courts when the case is not an isolated instance, but general in its character, and the existing rule does not square with justice.” *Frazee* is not an “isolated instance” of injury resulting from railroad operations in or near populated areas, and thus it would be appropriate for the court to consider the rationale for its trespasser rules rather than merely applying them in mechanical fashion. While the seriousness of plaintiff's injury by itself admittedly does not provide a basis for recovery, it should at least entitle him to careful and thorough analysis of his claim by the highest court in Kansas.

3. Reform of the Classification System

Ever since the 1968 landmark decision of the California Supreme Court in

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*See note 1 and accompanying text supra.

224 Kan. at 216, 579 P.2d at 709.


At no point in its opinion did the court suggest any reason why railroads and other landowners should be relieved of the duty to exercise reasonable care under all the circumstances. Indeed, plaintiff's argument that the reasonable care standard should apply was cursorily dismissed simply by characterizing that approach as "the 'so called' modern rule." 219 Kan. at 667, 549 P.2d at 566. Since the court then merely listed the eight jurisdictions that had adopted the reasonable care standard for such cases, it appears that the court was unwilling to discuss the adoption of any new rules in this area, no matter how sound they may be and no matter how unsound the existing rules may be, until a larger number of other jurisdictions lead the way. It is truly unfortunate that the legal rights of accident victims in Kansas should be so heavily dependent on decisions of foreign courts.
Rowland v. Christian,97 courts throughout the country have been under increasing pressure to abolish the traditional invitee-licensee-trespasser classification system governing the duties owed by landowners to persons entering upon their land. In Gerchberg v. Loney,98 a sharply divided Kansas Supreme Court refused to replace the classification system with a general duty of reasonable care under all the circumstances.99 The majority based its holding on the grounds that (1) the classification system had its origin in the common law, (2) the classification system has been painstakingly developed over many years in Kansas, (3) the adoption of the reasonable care standard would permit juries to decide questions of foreseeability and burden in landowner cases, and (4) a majority of jurisdictions in the country have not yet discarded the classification system.

Each of these grounds seems wholly without merit. Neither a common law origin nor a history of painstaking development in the Kansas cases has ever deterred the court from adjusting rules of law perceived as incompatible with either fundamental negligence analysis or sound public policy.100 The jury system has always been a fundamental component of the legal system, and certainly if the most sophisticated medical,101 technological,102 and corporate103 decisions may be submitted to juries, then juries should be able to cope quite well with the risk and burden factors relevant to a homeowner's failure to clear snow and ice from her front steps prior to entertaining a group of social guests.104 Finally, while the opinions of other jurisdictions may be helpful in developing a careful analysis of issues, the number

99 The majority affirmed the holding of the appellate court that a smoldering incinerator could be found by a jury to constitute an attractive nuisance. See notes 76-82 and accompanying text supra. Accordingly, the court's opinion on the possible reform of the classification system was unnecessary to the disposition of the particular case. Justices Prager and Miller disagreed with the attractive nuisance holding and thus dissented, but each of them indicated a willingness to abolish at least the licensee-invitee distinction within the classification system. Justice Owseley agreed with the attractive nuisance holding, but in a concurring opinion indicated a willingness to abolish at least the licensee-invitee distinction. Justice Miller indicated that he would retain the trespasser rules. Justices Owseley and Prager expressed no specific opinion on the trespasser rules, but their dissents in Frazier might suggest that they favor complete abolition of the classification system and the adoption of the reasonable care standard in all landowner cases. See note 87 and accompanying text supra.
100 For example, governmental immunity had its origin in the common law and few areas of Kansas law have had a more painstaking development over the years. Yet commencing with Carroll v. Kittle, 203 Kan. 841, 457 P.2d 21 (1969) and continuing through the recent decision in Gorrell v. City of Parsons, 223 Kan. 645, 576 P.2d 616 (1978), the Kansas courts have demonstrated a strong commitment to adjusting rules of law deemed unsound and contrary to public policy. Unfortunately, in Gerchberg the majority spoke eloquently of the "thought, sweat and even tears" of Kansas scholars in developing the classification system, 223 Kan. at 450-51, 576 P.2d at 597, but failed to demonstrate a similar concern for the human suffering that has resulted from the denial of a legal remedy to persons injured by the lack of reasonable care of landowners. The latter concern should be more relevant in modern negligence analysis.
101 For example, the court saw no difficulty in permitting a jury to decide whether a doctor and hospital in Chanute, Kansas, had exercised due care in the administration of supplemental oxygen to a prematurely born infant. See Chandler v. Neosho Memorial Hosp., 223 Kan. 1, 574 P.2d 136 (1977) and text at note 58 supra.
103 See, e.g., Newton v. Hornblower, Inc., 224 Kan. 506, 582 P.2d 1136 (1978) (involving fiduciary duties of officers and directors in a complex shareholders' derivative action). While Newton involved a trial to the court without a jury, the parties could have elected to try the case to a jury.
104 See Zuther v. Schild, 224 Kan. 528, 581 P.2d 385 (1978). A typical jury, drawing upon its common understanding and appreciation of patterns of conduct in the community, will be far more adept at assessing the factors of foreseeability and burden in such cases than in any of the above-described situations.
of those opinions should never become a substitute for the exercise of independent judgment and analysis.

Indeed, the majority's reasons are wholly lacking in analytical and persuasive content, suggesting that the holding resulted more from uncertainty about the proper scope of any reform than from a strong commitment to the retention of the classification system. As the court noted, the jurisdictions that have adopted some reforms in this area are divided between those that have abolished the entire classification system and those that have abolished only the invitee-licensee distinction. A similar division appears to exist within the Kansas Supreme Court. While the three dissenting or concurring justices favored the abolition of the invitee-licensee distinction, one of them favored retention of the trespasser classification and the other two stated no firm opinion about the trespasser classification. Moreover, since the abolition of the classification system was not strictly in issue in the case,\textsuperscript{105} it is not clear whether even all the members of the majority are firmly committed to retention of the classification system. The issue underlying the reform movement is a substantial one and perhaps best stated as follows by Justice Prager:

A cardinal principle of tort law today is that \textit{all persons} should be required to use ordinary care under the circumstances to prevent others from being injured as the result of their conduct. Although it is true that some exceptions have been made to this general principle, no such exception should be made unless clearly supported by some sound public policy.\textsuperscript{106}

Quite simply, the classification system permits landowners to deviate substantially below the reasonable care standard, and as a result many persons suffering serious injuries go uncompensated. It is most regrettable that the majority in \textit{Gershberg} did not see fit to identify any public policy grounds for continuing to allow this substantial departure from the reasonable care standard.

\textbf{C. Evidence: Res Ipsa Loquitur}

\textit{Res ipsa loquitur} is a doctrine of circumstantial evidence that gives rise to an inference of defendant's negligence when (1) the occurrence was of the kind and nature that does not ordinarily occur in the absence of negligence, (2) the instrumentality causing the injury or damage was in the exclusive control of the defendant, and (3) the occurrence was not due to any contributory negligence of the plaintiff.\textsuperscript{107} Two cases were decided during the survey period in which this doctrine was found inapplicable. In \textit{Arterburn v. St. Joseph Hospital & Rehabilitation Center}\textsuperscript{108} plaintiff suffered a ruptured spleen while recuperating in defendant's hospital after an operation to relieve an ulcerous condition. He contended that the rupture was caused by a sudden drop in elevation of the head of a motorized hospital bed owned and maintained by defendant. Although his expert witness testified that this drop in elevation was the most likely cause of the rupture, other expert testimony indicated a number of other possible causes unrelated to any negligence by defendant.

\textsuperscript{105} See note 99 supra.

\textsuperscript{106} 223 Kan. at 456, 576 P.2d at 601 (emphasis in original).


The trial court submitted the case to the jury with general instructions on circumstantial evidence, but refused to give a *res ipsa loquitur* instruction. Although reversing the jury verdict for defendant because of an error in one of the circumstantial evidence instructions, the supreme court upheld the refusal to give a *res ipsa loquitur* instruction. The court emphasized that the doctrine is inapplicable to cases in which the instrumentality under defendant's exclusive control is not first shown to be the actual cause of the injury or damage.

In *Trent v. Sellers* plaintiff's bowling establishment was destroyed by a fire that started five minutes after defendants resurfaced the bowling alleys with a highly flammable lacquer. When the fire started neither defendant was near the point of ignition and a number of plaintiff's employees and customers were also present in the building. Although the fire resulted from the ignition of the lacquer vapors, it was not contended that mere use of such a highly flammable lacquer constituted negligence, and there was no direct evidence showing what caused the vapors to ignite. The court of appeals reversed the trial court's use of *res ipsa loquitur* to find defendants negligent, holding, *inter alia*, that at the time of ignition the lacquer was no longer an instrumentality under the exclusive control of defendants and the cause of ignition could be found only by speculation and conjecture.

While both decisions are technically correct, they also demonstrate the undesirability of the doctrine of *res ipsa loquitur*. As a doctrine of circumstantial evidence, the three part test simply mirrors in crude fashion the broad outline of a traditional negligence action. The first part permits an inference that plaintiff's injury was the result of someone's negligence; the second part permits an inference that defendant was the negligent party; and the third part requires an inference that plaintiff was not contributorily negligent. In any given case, however, these

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99 The trial court erroneously instructed the jury that the fact which plaintiff sought to prove by circumstantial evidence must be the only conclusion supported by this evidence. The supreme court correctly noted that circumstantial evidence does not have to rise to the degree of certainty that excludes every other reasonable hypothesis. It is the function of the jury to decide which reasonable conclusion to draw from circumstantial evidence when more than one reasonable conclusion is possible. Of course, since *res ipsa loquitur* is a doctrine of circumstantial evidence, the same principle is applicable in *res ipsa loquitur* cases, and the mere applicability of the doctrine does not compel a jury to find in favor of plaintiff.


11 Although this highly flammable lacquer was commonly used in the industry for resurfacing bowling alleys, this custom would not normally preclude a claim that the use of a product so easily ignited constitutes negligence. See note 11 and accompanying text supra. Plaintiff clearly indicated in his testimony, however, that he had no objection to defendants' use of the lacquer.

112 The court noted that ignition could have resulted from a wide variety of causes unrelated to any conduct of defendants. In addition, there were electrical outlets near the point of ignition, and plaintiff's employee was in control of the panel that controlled the electricity in the building.

113 The resurfacing had been completed and the defendants were engaged in loading their equipment into the truck when the fire started. Thus, there was a reasonable likelihood that the conduct of plaintiff's employee may have caused the ignition.

114 If the accident is one that normally does not occur in the absence of negligence, then the fact of its occurrence is circumstantial evidence in support of the proposition that someone has been negligent.

115 If the thing or instrumentality that caused the accident was in the exclusive control of the defendant, then this fact is circumstantial evidence in support of the proposition that defendant was the negligent party.

116 Since the second part of the test has already given rise to an inference that the defendant was negligent, the third part of the test should not be necessary simply to identify defendant rather than plaintiff as the negligent party. Rather, it would appear that the circumstances must negate any inference that plaintiff was also negligent, i.e., contributorily negligent. Therefore, this part of the test seems to have the effect of shifting to plaintiff, at least to some extent, the burden of showing an absence of contributory negligence and is thus inconsistent with the general rule that defendant has the burden of proving plaintiff's contributory negligence.
same inferences may be drawn by the trier of fact on the basis of general instructions on circumstantial evidence. Moreover, the strength or weakness of any of these inferences is solely a function of the totality of the evidence in a given case and should be wholly unaffected by a res ipsa loquitur instruction.\textsuperscript{117} In other words, these cases should be decided in the same manner irrespective of whether a res ipsa loquitur instruction is given in addition to the general instructions governing circumstantial evidence. Thus, had the fire in Trent started while defendants were still applying the lacquer, the court might have then considered the lacquer an instrumentality in the control of defendants. Nevertheless, the case should still be dismissed because under all the circumstantial evidence an inference of defendants' negligence could still be based only on speculation and conjecture.\textsuperscript{118}

The problem with a res ipsa loquitur instruction seems to be its heavy emphasis on "instrumentality," which tends to detract from the true issue of whether defendant was the negligent party, and thus it has the same potential for creating unnecessary juror confusion as does a "sudden emergency" instruction in a routine vehicle collision case.\textsuperscript{119} Placing undue emphasis on only one aspect of the total evidence may cause the jury to lose sight of the ultimate issue whether defendant was in fact the negligent party. The retention of res ipsa loquitur as a special doctrine would therefore seem to depend on its ability to serve some additional judicial function apart from concepts of mere circumstantial evidence. Yet developments in other areas of law appear to have eliminated the problems that were previously resolved by the use of res ipsa loquitur. The 1964 Code of Civil Procedure\textsuperscript{120} with notice pleading\textsuperscript{121} and more liberal discovery\textsuperscript{122} has largely eliminated the use of the doctrine as a mechanism to circumvent requirements for specific pleading of negligence\textsuperscript{123} or to force a defendant to come forward with evidence.\textsuperscript{124} The warranty provisions of the Uniform Commercial Code\textsuperscript{125} and the theory of product liability

\textsuperscript{117} For example, a number of jurisdictions have held res ipsa loquitur applicable in one-car accident cases in which the car crashed while traveling along an open highway. There is an inference of negligence since cars do not normally crash in such situations in the absence of negligence, and there is an inference that the driver was negligent since our common appreciation of vehicle use suggests that other possibilities such as mechanical failure are not as common as driver misconduct. The strength of these inferences, however, will undoubtedly vary depending upon other circumstances such as the width, contour, and design of the highway, weather conditions, visibility, the age and health of the driver, and the condition of the vehicle. In addition, the inference of passenger negligence would normally be viewed as insubstantial, but again this would vary if the passenger were a prisoner or mental patient being transported or simply a highly excitable person or a person subject to sudden fits. Thus, while res ipsa loquitur may define a series of inferences necessary for plaintiff's action, whether these inferences justify submission of the case to the jury and, if so, will result in a verdict in favor of plaintiff depends on all the evidence in the case. In these matters the sound discretion of a competent trial judge and the common sense of a jury cannot be adequately supplanted by a Latin phrase.

\textsuperscript{118} The various possible explanations for ignition would still have been applicable had one or both defendants been physically present at the place where the fire started. Unless there was some evidence that would permit a reasonable inference that the most likely cause of ignition was defendants' conduct, causation would still be a matter of speculation despite defendants' "exclusive control" of the lacquer. The proper ground for dismissing this case then would be the insufficiency of plaintiff's evidence in support of an essential element of the case, not simply the inapplicability of the doctrine of res ipsa loquitur.

\textsuperscript{119} See notes 31-34 and accompanying text supra.

\textsuperscript{120} KAN. CIV. PRO. STAT. ANN. §§ 60-201 to -269 (Vernon 1976 & Concannon Supp. 1978).

\textsuperscript{121} See id. § 60-208(a) (Vernon 1976).

\textsuperscript{122} See id. §§ 60-226 to -237.


\textsuperscript{125} KAN. STAT. ANN. §§ 84-2-313 to -315 (1965).
found in section 402A of the Restatement (Second) of Torts has eliminated its use as a mechanism to circumvent antiquated barriers to recovery in defective product cases. Since the third part of the *res ipsa loquitur* test reflects the old rule of contributory negligence as a complete bar to recovery, the adoption of comparative negligence will probably require at least some modification of the doctrine. The court would be well advised to reconsider the utility of the entire doctrine at this time.

D. Defenses

1. Comparative Negligence

In a series of recent cases the supreme court rendered its first interpretations of the Kansas comparative negligence statute, section 60-258a of Kansas Statutes Annotated. In *Brown v. Keill* and *Miles v. West* the court interpreted the provisions of subsection (d) governing the allocation of damages among multiple tortfeasors. Both cases involved plaintiffs wholly free of any contributory negligence who were injured as the result of the combined causal negligence of two tortfeasors, one of whom was immune because of a family relationship with plaintiff. The court held first that subsection (d) of the statute abolished joint and several liability and replaced it with a system of individual judgments based upon the proportional fault of the parties. The court then held further that immune, unavailable, or unknown tortfeasors could be deemed to be “parties” against whom “recovery is allowed” for the limited purpose of determining the proportional fault of an actual defendant. While the first part of the holding was expected and is compatible

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127 *See*, e.g., *Bradley v. Conway Springs Bottling Co.*, 154 Kan. 282, 118 P.2d 601 (1941). *See generally* *Escala v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 150 P.2d 436 (1944). In *Escala* the majority held that *res ipsa loquitur* was properly applied to find that the bottling company rather than the bottle manufacturer was the negligent party. In a now famous concurring opinion, Justice Traynor demonstrated that the proper analysis of the action was strict liability in tort for the sale of unreasonably dangerous products. The basic analysis in this concurring opinion became the basis more than two decades later for *Restatement (Second) of Torts* § 402A (1965).
128 Since the first two parts of the test create an inference of defendant’s negligence, the third part of the test is unnecessary for that purpose. Since plaintiff’s contributory negligence does not necessarily bar recovery under the comparative negligence statute, it would seem that the third part of the test is now incompatible with the law in Kansas governing a plaintiff’s claim based on defendant’s negligence. Should the court decide to retain the doctrine of *res ipsa loquitur*, it should delete the third part of the traditional test. The better approach, however, would be the abolition of the doctrine and reliance on the general rules of circumstantial evidence.
129 224 Kan. 195, 580 P.2d 867 (1976) [unless otherwise indicated, all sections hereinafter referred to are from Kansas Statutes Annotated].
131 Subsection (d) provides as follows:

Where the comparative negligence of the parties in any action is an issue and recovery is allowed against more than one party, each such party shall be liable for that portion of the total dollar amount awarded as damages to any claimant in the proportion that the amount of his or her causal negligence bears to the amount of the causal negligence attributed to all parties against whom such recovery is allowed.

132 In *Miles* the wife of one of the negligent drivers was barred from any recovery against her husband by interspousal immunity. See *Sink v. Sink*, 172 Kan. 217, 239 P.2d 933 (1952). Also, the minor child of one of the negligent drivers was injured in the accident, and the court assumed *arguendo* the existence of parent-child immunity for purposes of the case even though such an immunity has not been recognized in Kansas. In *Brown* one of the negligent drivers was the son of plaintiff, but the immunity issue was not raised because the other driver did not join the son in the action as permitted by subsection (c) of the statute.
133 *See*, e.g., *Davis, Comparative Negligence: A Look at the New Kansas Statute*, 23 Kan. L. Rev. 113, 123 (1974); Schwartz, *Comparative Negligence in Kansas—Legal Issues and Probable Answers*, 13
with the statutory language, the second holding is at substantial variance with the unambiguous portions of subsection (d).

By its clear language, subsection (d) was to become operative only when "recovery is allowed against more than one party," and once operative its system of individual judgments was to be based on the comparative fault of "all parties against whom such recovery is allowed." This language apparently contemplated total recovery for plaintiff, reduced, of course, by plaintiff's proportional degree of fault, to be paid by defendants who were actually parties, in proportion to their degree of fault. In reaching the decision, the court stated an overly broad legislative purpose of the statute that would preordain its holding. Finding the intent to be merely to "relate duty to pay to degree of fault," the court emphasized apportionment from defendant's perspective—how much should defendant pay—rather than from plaintiff's—how much should plaintiff receive. Armed with this "intent," the court then held that the fault of immune parties must be considered in subsection (d) determinations because otherwise a party "against whom . . . recovery is allowed" would pay an amount proportionally greater than his or her share of fault, and this result would contravene the previously determined "intent" of the statute. In effect, this decision transforms the phrase "recovery is allowed" into "recovery is allowed or would be allowed in the absence of immunity." In a case in which all defendants could be joined as parties, there is no difference in result between the court's interpretation and the clear language of the statute. When a tortfeasor cannot be joined because of some form of immunity, a settlement agreement, exclusion by workers' compensation, or unavailability, then a crucial distinction arises and the court's interpretation places the loss for the amount "due" from the nonparty tortfeasor on plaintiff rather than on defendant.

It is reasonably clear that despite the court's assertion that it was using rules of statutory construction to interpret the statute, it substituted its views of public policy and fairness for the allocation mechanism created by the statute. Probably a fairer result will be achieved by the court's approach in those cases in which one tortfeasor has settled with plaintiff or has paid workers' compensation benefits to

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185 The court initially indicated that the statute's intent was "to equate recovery and duty to pay to degree of fault." 224 Kan. at 203, 580 P.2d at 873-74. This seems to have been a fair representation of the broad intent of the statute since on the one hand subsection (a) provided that plaintiff's recovery should be reduced only in proportion to his or her degree of fault and on the other hand subsection (d) provided that "parties against whom . . . recovery is allowed" should pay only in proportion to their degrees of fault. The court, however, then eliminated from its definition of the statute's intent any purpose to reduce a plaintiff's recovery only in proportion to his or her degree of fault and redefined the statute's intent to merely "relate duty to pay to degree of fault." Id. (emphasis added).

186 In both Brown and Miles the court emphasized the unfairness of requiring one tortfeasor to pay the entire liability when the immune tortfeasor was substantially more at fault. See Brown v. Keill, 224 Kan. at 203, 580 P.2d at 874; Miles v. West, 224 Kan. at 286, 580 P.2d at 880. The court did not comment on the unfairness of shifting this burden to plaintiffs, many of whom will be wholly free of any fault, but this oversight may be explained by the specific situations that the court was considering. Both Brown and Miles involved "family immunity" situations, see note 133 supra, and the court may have perceived these cases as more appropriate for first-party insurance. In addition, the court specifically mentioned the hypothetical case in which plaintiff settled with one tortfeasor, and it is not inherently unfair to treat this settlement as full compensation for that tortfeasor's share of liability. The unfairness to plaintiffs is quite clear, however, when the Brown and Miles holdings are applied to other immunity situations. See note 138 and accompanying text infra.
plaintiff, and at least arguably so in family immunity cases if one views the family as a single economic unit. In these cases the settlement or payment of benefits properly could be viewed as representing that tortfeasor's individual share of the total damages, and the end result could be viewed as fully compatible with the intent of subsection (d). In cases in which a tortfeasor simply avoids any liability because of governmental immunity or because of being unknown or unavailable, there is no logical basis for asserting that it is fairer to place the loss occasioned by such immunity or unavailability entirely on plaintiff rather than apportioning it between plaintiff and defendant. Had the court simply limited its public policy approach to the specific problem of family immunity in *Brown* and *Miles* rather than hastily rendering a broad dictum applicable to many diverse situations, it would have increased the chances for a sound development of the comparative negligence statute over the long run.

A separate issue is whether plaintiff must first be found contributorily negligent before the comparative principles in subsection (d) are applied to multiple tortfeasors. In a rather confusing statement, the court in *Brown* held that these principles are to be applied “if plaintiff's fault is submitted for decision even though plaintiff is not found to be at fault.” This holding would appear to require that plaintiff's contributory fault not only be alleged but also be supported by evidence sufficient to warrant its submission to the trier of fact. Yet it seems quite clear that the court did not intend such a requirement. In *Brown* the only claim against plaintiff was based on a theory of imputed contributory negligence and could have been rejected as a matter of law. In addition, in *Miles* there was no attempt to assert a claim of contributory negligence against the minor plaintiff, but the court upheld the application of subsection (d) comparative principles to her recovery. Thus, it appears that subsection (d) will apply in any case involving two or more tortfeasors without regard to the presence or absence of a contributory negligence claim against plaintiff. Admittedly, the application of subsection (d) to cases involving nonnegligent plaintiffs removes the benefits of joint and several liability that would have been available to these plaintiffs under prior law, and a statutory provision preserving joint and several liability for the benefit of only nonnegligent plaintiffs could be justified by considerations of public policy. Nevertheless, the comparative negligence statute does not appear to provide for such a system, and the arguments for it are primarily the broader arguments for the retention of joint and several liability in all cases. Since the court already determined that subsection

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137 Before the court's interpretation of subsection (d) can be viewed as fair in workers' compensation cases, the employer's subrogation right against plaintiff's recovery from third parties must be abolished. See Kan. Stat. Ann. § 44-504(b) (Supp. 1978). Since the underlying rationale of that subrogation right rests on considerations akin to joint and several liability, the court should be able to make the appropriate adjustments judicially on similar grounds of statutory construction used to make the highway defect statutes compatible with the comparative negligence statute. See notes 147-49 and accompanying text infra. See also Kelly, 'Workers' Compensation,' 27 Kan. L. Rev. 377, 389-90 (1979).

138 At the time this survey was being prepared, a proposed bill to create a comprehensive torts claims act, which would abolish most governmental immunity in Kansas, was pending in the 1979 legislative session. See S. 76, Kan. Legis. (1979) (Comm. on Judiciary). If adopted, this torts claims act would substantially eliminate the unfairness of the court's interpretation of subsection (d) as applied to actions in which a governmental entity was one of the tortfeasors.

139 224 Kan. at 206, 580 P.2d at 875 (emphasis added).


141 For a detailed discussion of the arguments relating to the retention of joint and several liability, see American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978).
abolished joint and several liability, it would probably be sound to avoid reintroducing it in piecemeal fashion through artificial restrictions on the scope of subsection (d). At this point the issue seems more appropriate for legislative action.

The court's decisions relating to the joinder provisions of subsection (c) reflect some uncertainty. In Brown v. Keill the court held that a defendant need not formally join a nonparty tortfeasor in order to have that person's proportional fault considered in the subsection (d) comparative fault determination. In Brown the nonparty tortfeasor was plaintiff's son and thus perhaps immune from suit by plaintiff. Yet the holding was probably not due to any possible immunity since the court subsequently held in Wilson v. Probst that an immune party could not be dismissed from the action solely because of immunity if the party's fault were relevant to a subsection (d) determination. Most likely, the court simply recognized that it had to create an exception to the joinder provisions in order to implement its dictum in Brown that the fault of unavailable and unknown tortfeasors could also be considered in subsection (d) determinations. Nevertheless, this holding seems unnecessarily broad in that joinder, although feasible, is not required by the court's interpretation even in situations in which joinder would enable the resolution of all comparative negligence issues in a single action and thereby avoid the possibility of an unnecessary multiplicity of actions and inconsistent judgments. The court apparently recognized the importance of judicial economy in its holding in Ehrich v. Alkire that a comparative negligence claim between any two formal parties is barred unless raised in the original action. Thus, the holding in Brown probably would have been sounder if strictly limited to cases in which formal joinder was not feasible.

Despite a line of pre-comparative negligence cases holding the statutory liability for highway defects to be based solely on statute rather than on negligence, the court held in two cases that liability for highway defects is subject to the provisions of the comparative negligence statute. In Wilson v. Probst the court held that a state highway defect should be considered in a subsection (d) comparative fault determination. In Thomas v. Board of Trustees the court followed the rule of statutory construction that older statutes must be subordinated to newer statutes in holding that plaintiff's recovery should only be reduced in proportion to his causal negligence despite the statutory limitation of recovery in section 68-301 to a plaintiff "without contributing negligence on his part." Perhaps the more important point is that both cases reflect a willingness to interpret "causal negligence" broadly, which raises the possibility of expanding comparative negligence to other special forms of liability such as products liability. In Wilson the court showed little concern with reconciling the concepts of statutory liability and causal negligence.

142 See note 133 supra.
145 In essence, the court imposed mandatory cross-claims in comparative negligence actions even though the statutory rules of procedure unequivocally provide that cross-claims are permissive. KAN. STAT. ANN. § 60-213(g) (1976).
149 KAN. STAT. ANN. § 68-301 (1972).
Rather, it held that "highway defects claimed to have contributed to the occurrence [accident]" must be included in subsection (d) determinations in order to accomplish the intent of the statute to apportion liability on the basis of the "proportionate fault of all parties to the occurrence which gave rise to the injuries and damages." Product defects "claimed to have contributed to the occurrence" could readily be encompassed within the same reasoning. In *Thomas* the court sought to reconcile the two concepts of liability by describing highway defects as "in legal contemplation . . . negligence . . . as a matter of law." This reasoning could also apply to products liability if the court were to focus sharply on the tort policy considerations underlying the law of products liability. Whether such an extension will be made is far from clear, but it is a major comparative negligence issue expected to arise in the not too distant future.

In *Thomas v. Board of Trustees* the court held that the trial court may inform the jury of the legal effect of its findings, *i.e.*, that a less than fifty percent negligent plaintiff will be awarded a proportionate share of his or her damages, whereas a fifty percent or more negligent plaintiff will recover nothing. Treating the issue as a policy question, the court reasoned that this information might prevent distortion of findings on percentage of fault or amount of damages that might otherwise result from jury speculation about the legal effect of its findings. In reality, the holding seems to be a pragmatic recognition that juries having this information will be able to temper the harsh results that would otherwise frequently occur under the Kansas "less than fifty percent" modified form of comparative negligence. Since under prior law the jury was always instructed that a finding of contributory negligence would constitute a total bar to recovery, this holding could be viewed simply as a continuation of prior practice. But *Thomas* seems significant in the sense that the court expressed an unequivocal willingness to experiment with the comparative negligence statute when considerations of sound public and judicial policy make such experimentation appropriate.

2. Contributory Negligence

Conceptually, contributory negligence is governed by the same reasonable care principles that govern negligence, except that contributory negligence involves a breach of duty to oneself rather than to another. Over the years courts have developed numerous subtle mechanisms designed to ameliorate the harsher effects of the rule that contributory negligence constitutes a complete defense to a negligence

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132 224 Kan. at 463, 581 P.2d at 384 (emphasis added).
133 224 Kan. at 546, 582 P.2d at 277.
135 While the jury can readily temper the harshness of single injury cases such as *Thomas* by finding plaintiff only 49% causally negligent, it will be less able to produce fair results in multiple injury, multiparty cases. For example, suppose that driver *A* and driver *B* collide, that each suffers $10,000 damages, and that the jury is inclined to find driver *B* 60% causally negligent. If informed of the statute's legal effect, the jury may perceive that driver *A* will bear only $4,000 of the total $20,000 loss while driver *B* bears $16,000 of the total loss. In an effort to "temper" the harshness of this result, the jury may return a finding that the drivers were equally at fault, which would cause each to bear $10,000 loss. While this result may seem fairer, it simply means that both insurers now avoid any obligation to pay for any damages caused by their insureds and that each driver must personally bear the loss in the absence of any first-party insurance. Under the first finding of 40-60 causal negligence, driver *A* would bear $4,000 of his loss, driver *B* would bear his entire $10,000 loss, and driver *B*'s insurer would pay $6,000 compensation to driver *A*. Thus, the "fairest" result primarily benefits insurers, not accident victims.
claim.\textsuperscript{154} With the adoption of comparative negligence, however, amelioration mechanisms no longer serve their original purpose and may well function to distort proper negligence analysis. One such mechanism is demonstrated in Frewele v. McAloon,\textsuperscript{155} in which plaintiff was injured when he went from a position of safety to the rear of a flat-bed truck to attempt to prevent some boards from sliding off and injuring one of his employees. In affirming the trial court’s denial of defendant’s motion for a directed verdict, the supreme court held that plaintiff was not contributorily negligent because “[m]ere knowledge of the danger of doing a certain act without a full appreciation of the risk involved will not preclude a plaintiff’s recovery even though there may be added to the knowledge of danger a comprehension of some risk.”\textsuperscript{156}

This statement in Frewele is analytically unsound as a description of nonnegligent conduct in that it focuses solely on the actor’s lack of total appreciation of risk and ignores the fact that this conduct might be unreasonable under all the circumstances despite only limited appreciation of the risk. Rather than being a description of reasonable conduct, the statement is nothing more than a negation of the appreciation element in the doctrine of assumption of risk.\textsuperscript{157} A showing that a risk has not been assumed, however, is not necessarily the equivalent of a showing of no contributory negligence. In Frewele the plaintiff was not contributorily negligent because under all the circumstances it was not unreasonable for him to expose himself to some danger in order to attempt to prevent serious harm to another person.\textsuperscript{158} The ameliorating mechanism in Frewele was at one time undoubtedly desirable as a means of shifting the burden of an accident to a more blameworthy defendant rather than allowing a slightly negligent plaintiff to go without compensation. Such mechanisms cause confusion in negligence analysis, however, as demonstrated by Frewele, when the trial court’s action could be fully justified with proper negligence analysis. Now that comparative negligence is the law in Kansas, this description of contributory negligence should be discarded.

3. Assumption of Risk

In Kansas the doctrine of assumption of risk constitutes an affirmative defense to an employee’s negligence claim against an employer not covered by workers’ compensation.\textsuperscript{159} In George v. Beggs\textsuperscript{160} the court of appeals held that the doctrine is not abolished or modified by the adoption of comparative negligence. At the time of this holding, the supreme court had not yet rendered a comprehensive interpretation of the comparative negligence statute, and the holding in George should probably be viewed merely as an attempt to postpone a definitive analysis of the issue until

\textsuperscript{156} Id. at 302, 564 P.2d at 514. For other cases during the survey period in which the supreme court used the same rationale, see Stingley v. Interpace Corp., 223 Kan. 532, 534, 575 P.2d 526, 529 (1978); Smith v. Union Pac. R.R., 222 Kan. 303, 308, 564 P.2d 514, 518 (1977); and Brooks v. Dietz, 218 Kan. 698, 708-09, 545 P.2d 1104, 1112-13 (1976).
\textsuperscript{157} An essential requirement of assumption of risk is said to be plaintiff’s knowledge of the risk and appreciation of its magnitude. The courts have held, however, that assumption of risk is based upon implied contract and “venturesomeness,” not upon unreasonable conduct. See notes 165 & 166 infra.
\textsuperscript{158} The jury undoubtedly considered as circumstances relevant to plaintiff’s lack of contributory negligence both the brief period of time within which plaintiff had to make his decision and the potential risk of a greater harm had plaintiff not attempted to rescue his employee.
after such interpretation. The court of appeals made no significant attempt to analyze the issue and primarily relied on the supreme court's recent statement in *Borth v. Borth* that "[t]he doctrine of assumption of risk is still viable in Kansas." This statement, however, cannot be fairly read as an indication of the effect of comparative negligence on the doctrine because the injury in *Borth* occurred prior to the effective date of the comparative negligence statute, and the issue was simply not raised in *Borth*. If the court of appeals did intend to make a definitive analysis of the comparative negligence issue in *George*, its holding should be considered unsound.

There are two reasons why assumption of risk should be abolished as a separate doctrine. First, assumption of risk as developed in the Kansas cases is not supportable analytically as an affirmative defense separate and distinct from contributory negligence. In *Borth* a sixty-four-year-old employee generally experienced with cattle was injured in a holding pen when a Charolais cow became skittish and charged him. There was evidence that the employer negligently failed to provide him with a certain protective shield and negligently caused him to believe that Charolais cattle were docile, when in fact they tended to be more skittish than other breeds of cattle with which plaintiff was actually familiar. In addition, plaintiff had never before worked in a cattle holding pen. In reversing a jury verdict in favor of plaintiff, the supreme court chose to disbelieve all evidence tending to limit plaintiff's appreciation of specific risks and held that his actual knowledge of the general risk and his appreciation of its magnitude constituted assumption of risk as a matter of law.

The court, however, provided no satisfactory explanation of why the mere voluntary encountering of a known risk should constitute an affirmative defense to the negligence of another. The court quoted prior cases holding that such risks are impliedly assumed in a contract of employment, but this rationale is a pure legal fiction. In addition, the court quoted the traditional rubric that the essence of assumption of risk is "venturousness," but this word is simply another way of describing the voluntary encountering of a known risk and thus must be viewed as a circular argument. Had plaintiff been a nonemployee gratuitously assisting in these cattle operations, then the implied contract rationale would be unavailable and the inquiry would be whether he acted *reasonably under all the circumstances* in voluntarily encountering a known risk. His mere "venturousness" by itself would no more be the basis for an affirmative defense than it would if he had driven an automobile on a street covered with snow and ice with full knowledge and appreciation of the risks inherent in such driving. People encounter innumerable known risks in everyday life, but they are held contributorily negligent only when they do so in an unreasonable manner. Accordingly, assumption of risk appears to be an

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162 Id. at 499, 561 P.2d at 412.
163 The effective date of the Kansas comparative negligence statute was July 1, 1974. The injury in *Borth* occurred on January 26, 1971. The injury in *George* occurred on October 29, 1974.
164 The court's holding that plaintiff appreciated the magnitude of the risk seems questionable since there was competent evidence that plaintiff was unaware of the unusually skittish nature of Charolais cattle. Knowledge of a general risk should not necessarily mean appreciation of the magnitude of specific risks.
artificial doctrine with the sole function of discriminating against employees, and unless the court is able to provide substantial policy reasons for such discrimination, the doctrine should be abolished on this ground alone.

Second, assumption of risk in the Kansas cases has become almost hopelessly interwoven with traditional negligence concepts. While the cases frequently state that the doctrine with its use of an individualized subjective standard of actual knowledge is distinguishable from the objective reasonable person standard of contributory negligence, the cases frequently define the risks encompassed by assumption of risk as those actually known or those that the employee "by the exercise of reasonable observation and caution for his own safety... should have known...". This intermingling of the two defenses perhaps made little difference when both constituted a total bar to recovery, but with the adoption of comparative negligence this intermingling will undoubtedly lead to confused and inconsistent results.

In addition, as demonstrated in George, various considerations primarily relevant to an employer's lack of negligence have become incorporated in the assumption of risk defense to an employer's negligence. George involved a remarkably similar injury to an experienced ranch employee working in a cattle pen. The facts appeared to indicate no basis for a finding of negligence by the employer, however. There was no evidence of inadequate working facilities or procedures, and any failure to warn plaintiff of the particular danger was immaterial because plaintiff overheard other employees discuss the safest way to deal with the particular situation just before he suddenly entered the holding pen on his own initiative in an attempt to resolve the problem single-handedly. Technically, the employer's lack of negligence renders irrelevant the existence of any affirmative defense. Yet in assumption of risk cases these matters relating to an employer's duty to an employee tend to be incorporated into the definition of the risks that an employee assumes. Thus, the employer's duty to warn about risks is satisfied by limiting assumption of risk to ordinary risks that may be deemed already known by the employee and to "unusual" risks that are "obvious" to the employee. The employer's duty to provide adequate working facilities and procedures is satisfied by defining the ordinary risks of employment as those risks that exist "after the employer has done everything that he is bound to do for the purpose of securing the safety of his employees." The problem is that such subtle intermingling of concepts of defendant's lack of negligence and plaintiff's assumption of risk produces inconsistency in judicial analysis. For example, the factors discussed above could have easily been used in Borth to deny the applicability of assumption of risk, but this approach

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107 The discriminatory effect of the doctrine is particularly harsh in the sense that it singles out as its victims only those employees who are not protected by the Kansas Workers' Compensation Act, leaving them without any remedy for injuries caused by the negligence of their employers.
110 Id. at 73, 397 P.2d at 326.
112 Uhrig v. Shortt, 194 Kan. 68, 72, 397 P.2d 321, 325 (1964). The same concept would appear to underlie occasional holdings that the employer will not be liable if he "conducts his business in a manner conforming to the usage of others engaged in the same business under similar circumstances." Id. See also George v. Beggs, 1 Kan. App. 2d 356, 360, 564 P.2d 593, 597 (1977).
113 The risk could have been characterized as "unusual" because of both the employer's failure to provide protective shields and the highly skittish nature of Charolais cattle, and the risk could have been
would provide no greater assurance of a correct result than the approach actually used in Borth.\textsuperscript{174} In its current state the doctrine is a source of confusion that impedes careful and precise analysis of negligence actions. The vast majority of comparative negligence jurisdictions have either abolished the doctrine or subjected it to comparative principles.\textsuperscript{176} Kansas should do the same.

II. Products Liability

A. Strict Tort Liability

Perhaps one of the most significant policy decisions during the survey period was the adoption of strict tort liability as a remedy for personal injury or physical damage to property caused by defective products. In Brooks v. Dietz\textsuperscript{177} plaintiff, an experienced furnace retailer and repairman, suffered serious personal injuries in a propane gas explosion caused by a defective seal in the relay switch box in a furnace manufactured by defendant. Plaintiff had sold the furnace to a homeowner seven years earlier, and the accident occurred while plaintiff was attempting to repair a gas leak caused by the malfunction of the relay switch. The trial court held that plaintiff's implied warranty claim was barred by the commercial code's four year statute of limitations,\textsuperscript{178} but submitted the case to the jury on theories of negligence and strict tort as defined in section 402A of the Restatement (Second) of Torts.\textsuperscript{179} In affirming a jury verdict in favor of plaintiff, the supreme court recognized the superiority of strict tort over contract as the theoretical foundation of recovery for injuries caused by defective products. The court noted that Kansas had already developed a type of strict liability remedy based upon implied warranties that were not limited by any requirement of privity of contract,\textsuperscript{180} and it was clear that the public policy considerations concerning compensation were founded in tort rather than in contract.\textsuperscript{181}

The court's adoption of section 402A should be viewed as eminently sound. The scope of liability for injuries caused by defective products can now be developed with direct reference to fundamental tort principles unencumbered by the technical rules governing commercial transactions.\textsuperscript{182} At the same time, there should be no

\textsuperscript{174} Such a characterization would merely provide a basis for finding the employer negligent, but would not assist in determining whether the employee's conduct should constitute a defense to such negligence.

\textsuperscript{175} For a state by state analysis, see H. Woods, The Negligence Case: Comparative Fault app., at 421-595 (1978).


\textsuperscript{177} KAN. STAT. ANN. § 84-2-725 (1965).

\textsuperscript{178} RESTATEMENT (SECOND) OF TORTS § 402A (1965).


\textsuperscript{181} For example, the commercial code contains provisions relating to disclaimer of warranties and notice of defect, which are sound mechanisms for the regulation of commercial transactions. See KAN. STAT. ANN. §§ 84-2-316, -407 (1965). Although these issues never arose in a Kansas implied warranty case prior to the adoption of strict tort liability, courts in other jurisdictions frequently had to devise ways
need to distort sound commercial law principles in order to provide an adequate tort remedy to injured parties.\textsuperscript{182}

While it is expected that strict tort and implied warranty will be largely overlapping remedies in most defective product cases, one important result of recognizing the strict tort theory is the applicability of the two year tort statute of limitations running from the date of the accident.\textsuperscript{183} For example, in \textit{Brooks} plaintiff was able to recover even though the injury occurred seven years after the sale of the defective furnace. In addition, plaintiffs should also receive the benefit of the discovery rule in those cases in which the injury itself or the cause of the injury could not have been reasonably discovered within the two year limitations period.\textsuperscript{184} The rejection of contract as the theoretical basis for recovery, however, could logically support an argument that the four year commercial law statute of limitations running from the date of sale should no longer be available in what are now conceded to be tort cases.\textsuperscript{185} Perhaps the better view would be that implied warranty, with its four year statute of limitations, should remain as an alternative remedy so long as it is retained in its present statutory form.\textsuperscript{186} Nevertheless, with a split of authority in other jurisdictions and no Kansas decision clearly having addressed the issue,\textsuperscript{187} plaintiffs would be well-advised to initiate their claims within the two year torts limitations period whenever it expires prior to the four year warranty limitations period.

In \textit{Brooks} the court also held that while mere failure to discover a defect is not a defense, the form of contributory negligence that “consists of voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under
to circumvent such requirements in order to avoid denying a remedy to an injured party. See, e.g., Hampton v. Gehhardt’s Chili Powder Co., 294 P.2d 172 (9th Cir. 1961) (notice); Baker v. City of Seattle, 79 Wash. 2d 198, 484 P.2d 405 (1971) (disclaimer). Other courts finally confronted the issues directly and held that such commercial law requirements should not function to deny recovery to persons injured by defective products. See, e.g., Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 67, 377 P.2d 897, 27 Cal. Rptr. 697 (1962) (notice); Henningen v. Bloomingfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960) (disclaimer).
\textsuperscript{184} Id. § 60-513(b) (1976). \textit{See also} Hecht v. First Nat’l Bank & Trust Co., 208 Kan. 84, 490 P.2d 649 (1971).
\textsuperscript{186} In those jurisdictions that have specifically addressed the statute of limitations problem, the majority have adopted this position. \textit{See generally} Note, \textit{Torts—Strict Liability in Tort Adopted in Kansas}, 25 \textit{Kan. L. Rev.} 462, 470-71 (1977).
\textsuperscript{187} In cases involving personal injury or physical damage to property decided subsequent to the \textit{Brooks} decision, the supreme court apparently accepted the implied warranty basis of claim in one case, but did not need to address the question directly because plaintiff failed to show a defect in the product at the time it left the seller’s control. Farmers Ins. Co. v. Smith, 219 Kan. 680, 549 P.2d 1026 (1976). In another case, the court did not comment at all on the appropriate theory of a products liability claim because plaintiff had in any event failed to show a causal connection between the alleged defect and his injury. Wilcheck v. Doonan Truck & Equip., Inc., 220 Kan. 230, 552 P.2d 938 (1976). The remaining warranty cases involved express warranty claims that, unlike implied warranty, do not have the same overlap with strict tort. See Vuth v. Chrysler Motor Corp., 218 Kan. 644, 545 P.2d 371 (1976) (decided the same day as \textit{Brooks}); Scheuler v. Ascomo Transmissions, Inc., 1 Kan. App. 2d 525, 571 P.2d 48 (1977). In all of the above cases, both the sale of the product and the injury to person or property occurred prior to the date of the \textit{Brooks} decision. Thus, even if the statute of limitations issue had been properly focused in those cases, it is doubtful that the court would have required those plaintiffs to anticipate the adoption of strict tort liability and plead within the two year limitations period. Accordingly, the statute of limitations issue should be considered an open question in Kansas.
the name of assumption of risk" is a defense to a strict tort claim. Although this distinction had previously been recognized in Kansas in implied warranty cases, the holding nevertheless warrants two observations. First, this defense is wholly distinguishable from the harsher doctrine of assumption of risk used in Kansas employment cases in that the reasonableness of plaintiff's voluntarily encountering a known danger is a relevant consideration in a defective product case but not in an employment case. Accordingly, the employment cases involving the doctrine of assumption of risk should not be considered valid precedents in defective product cases.

Second, Brooks illustrates the latitude that the court is willing to allow a jury finding on the issue of reasonableness in defective product cases. There was no doubt that plaintiff fully appreciated the danger involved in entering a gas-filled basement containing a water heater with a burning pilot light, yet he entered the basement a second time in order to extinguish the pilot light. The jury verdict in his favor can only be interpreted as a finding that his voluntarily risking serious personal injury or death in order to rescue the homeowner's property was reasonable under all the circumstances. This is a conclusion with which many would undoubtedly disagree, and in other contexts the court has not hesitated to overturn such jury findings. Moreover, while most courts have treated rescuers favorably in both negligence and strict tort cases, a number of courts have refused to do so when the rescuer has risked serious personal injury merely to save the property of another. Since reasonable minds could differ on the characterization of plaintiff's conduct, however, a decision by the court to deny him any recovery as a matter of law would raise serious questions. The problem seems to lie in the inflexibility of the two alternatives—to either allow full recovery or deny any recovery—and neither choice is very palatable. Thus, Brooks may well illustrate the desirability of extending comparative principles to strict tort cases.

In Jones v. Hitte Service, Inc. plaintiffs' negligence and strict tort claims were based in part on the allegedly inadequate odorization of propane gas even though the manufacturers had odorized the gas to the level required by the applicable administrative regulations. The supreme court concluded that compliance with these regulations "is evidence of due care and that the conforming product is not defective" and that these regulations may be relied upon "in the absence of actual or constructive notice that they are inadequate." This common focus on the sellers' notice of adequacy of the administrative standard in deciding both the negligence and defect issues might imply that defect analysis in strict tort cases is to be governed by the

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188 Restatement (Second) of Torts § 402A, Comment n at 356 (1965).
196 Id. at 632, 549 P.2d at 1390. See text at notes 15-16 supra.
same principles that govern negligence analysis. Such a broad interpretation of Jones, however, is neither necessary nor desirable.

The analytical approach to defect has proven to be one of the most complex and unsettled issues in the developing field of strict tort liability. Section 402A defines “defect” in terms of product condition and consumer expectations. Thus, a defective product is “any product in a defective condition unreasonably dangerous to the user or consumer or to his property,”197 and a defective condition is “a condition not contemplated by the ultimate consumer which will be unreasonably dangerous to him.”198 Courts in other jurisdictions, however, have disagreed on the extent to which the traditional risk-benefit analysis of negligence law is relevant in defect analysis, and this disagreement is reflected in the split of authority on such matters as the meaning and usage of the phrase “unreasonably dangerous”199 and the feasibility of a consumer expectations test in design defect cases.200 None of these disputed matters were relevant to the resolution of the defect issue in Jones, however. The function of the odorant was to give an otherwise odorless gas a smell that could warn the consumer of a gas leak. Since one of the decedents smelled the odorant prior to the explosion, any defect would appear to relate not to the level of odorization, but rather to the warnings necessary to enable the consumer to associate the odor with a gas leak.201 In the developing field of strict tort liability, sound judicial policy should require precise delineation of issues and narrow holdings on a case by case basis. Since Jones did not provide an appropriate situation for a thorough defect analysis, it should be limited to its particular facts and not be viewed as a broad holding on the relationship between defect analysis and negligence analysis.

B. Express Warranty

In Scheuler v. Aamco Transmissions, Inc.202 plaintiff’s decedent purchased a rebuilt transmission for his car from defendant’s franchisee and received a written warranty “against any defects of material and workmanship for the lifetime of the car.”203 Defendant’s name, product, and service were advertised both nationally and locally, and both the franchisee’s place of business and the warranty displayed only defendant’s name and not the franchisee’s separate identity. A few days later decedent left the car standing in his driveway with the motor running and the gear in the “park” position. Suddenly, the gear slipped into the “reverse” position, and the car started moving. Decedent was run over by the car as he tried to reach inside to turn off the ignition, and after his wife had rushed to his aid, the car turned in a circle and ran over both of them. The court of appeals affirmed a jury verdict in favor of plaintiff on the basis of breach of express warranty.

First, the court held that defendant’s advertising could provide the basis for an express warranty to a remote consumer. Under the specific facts of Scheuler the

197 Restatement (Second) of Torts § 402A (1965).
198 Id. Comment g at 351.
201 See notes 13-21 and accompanying text supra.
203 Id. at 527, 571 P.2d at 50.
advertising could have been narrowly viewed as necessary only to show that the name Aamco on the written warranty referred to defendant franchisor and not merely the local franchisee. The court, however, adopted the broader rule followed in many jurisdictions that advertising directed at remote consumers may by itself create express warranties. This rule certainly seems logical. The seller expressly warrants the product, not merely because it has engaged in advertising, but rather because it has made affirmations of fact or promises about the quality or performance of the product in the advertising. If a seller may expressly warrant a product by making affirmations of fact or promises about its quality or performance in face-to-face dealings with the buyer, then there would seem to be no sound reason to treat differently the same substantive statements when made in the form of advertising to many potential buyers. In each case the buyer may rely on the statements in purchasing or using the product. Similarly, the court's refusal to require privity reflects a sound appreciation of modern merchandising methods. Buyers may frequently purchase a particular product on the basis of affirmations of fact or promises contained in the remote seller's advertising but not repeated by the retailer. If privity were required, the buyer might have no remedy when the product lacks the quality or performance capabilities promised in the remote seller's advertising. Since the Kansas courts have not seen fit to impose a privity requirement in express warranty cases involving other forms of communication to the remote buyer or user, there would appear to be no sound reason to do so in advertising cases.

Second, the court in Scheeler held that plaintiff did not have to prove the existence of a specific defect in the transmission to show a breach of express warranty. The concept of defectiveness primarily describes a product condition below the minimum level of safety or merchantability imposed by operation of law in strict tort and implied warranty actions respectively. As a matter of public policy the product must meet these minimum levels irrespective of any statements made by the seller. In competitive markets, however, sellers will frequently promote sales of their products by claims of quality or performance in excess of the minimum levels imposed by law. If plaintiff were required to prove a specific defect, then the seller of a product meeting the minimum levels imposed by law could avoid any responsibility when the product lacked the claimed additional qualities or performance capabilities upon which the buyer relied in purchasing or using the product, and this would be tantamount to a legal license to induce sales through misrepresentation. Therefore, the court's holding on this point must be viewed as sound.

The statutory future performance exception to the warranty four year statute of limitations applies when an express warranty "explicitly extends to future performance

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206 It should be noted that reliance is no longer a technical requirement for an express warranty. Nevertheless, the seller's statements may be a substantial factor in the decision to purchase the product or in the manner in which the product is used. See, e.g., Huebert v. Federal Pac. Elec. Co., 208 Kan. 720, 494 P.2d 1210 (1972) (reliance on representation caused injury to electrician repairing the product).
of the goods and discovery of the breach must await the time of such [future] performance. . . .”\textsuperscript{209} In \textit{Voth v. Chrysler Motor Corp.}\textsuperscript{210} plaintiff attempted to bring within the scope of this exception a one year express warranty that his new car was safe to drive with the windows closed and the air conditioner or heater operating.\textsuperscript{211} He alleged suffering lead poisoning as the result of inhaling gas fumes that entered the inside of the car while the air conditioner was being operated. His action for breach of express warranty was filed within four years after discovery of the defect, but nearly five years after purchase of the car. Although the supreme court held that the future performance exception did not apply to this situation, its precise rationale and the scope of its holding are unclear. It found a two-part requirement in the statute—(1) that the warranty must explicitly extend to future performance and (2) that discovery of breach must await such future performance—and seemed to suggest that both parts were not met in this case. This lack of clarity appears to result largely from the attempt to determine the application of the limitations period on the basis of the inherently artificial distinction between “present” and “future” performance.

In a sense, every express warranty provides that the product will either remain in a certain condition or perform at a certain level for some period of time, and thus every express warranty has some element of future performance. Moreover, the buyer will never know whether the product has performed as warranted until the period of future performance expires. At the same time, it is equally clear that the commercial code contemplates that the statute of limitations normally will run from the date of tender of delivery “regardless of the aggrieved party's lack of knowledge of the breach.”\textsuperscript{212} Thus, the basic rule and the future performance exception are inherently incompatible. The rationale for the exception would seem to arise from considerations of public policy and common sense. For example, an express warranty of product performance for one year, as in \textit{Voth}, is no less related to future performance than a similar warranty for a ten year period. In the latter situation the warranty extends well beyond the normal limitations period, and it would seem quite unfair and unnecessary to require the buyer to commence any action for breach within the first four years of the ten year period. In such a case, the future performance exception should apply not because the warranty “explicitly”\textsuperscript{213} extends to “future performance,” but rather because enforcement of the four year limitations period would effect a substantial injustice to the buyer. With respect to the one year express warranty situation, however, it is not necessarily unfair to require the buyer to bring any action for breach within the normal limitations period. At the very least, the buyer would still have three years after


\textsuperscript{210} 218 Kan. 644, 545 P.2d 371 (1976).

\textsuperscript{211} The warranty provided only for repair or replacement of defective parts, but the court accepted plaintiff's broader interpretation for purposes of argument. \textit{Id.} at 647, 545 P.2d at 374-75. This approach may have caused some confusion in the court's later analysis, however, when the court noted that warranties for mere repair and replacement tend to be treated as warranties for "present" performance. \textit{Id.} at 651-52, 545 P.2d at 378. Having accepted plaintiff's broader characterization, the court was unable to rely directly on this narrow point, and it is unclear to what extent this affected the court's analysis.


\textsuperscript{213} The court emphasized that "explicitly" should require a clear and unambiguous expression of future performance. A one year warranty of performance, however, would seem to be just as explicit for one year's future performance as a ten year warranty of performance would be for ten year's future performance, but neither warranty explicitly makes any statement with respect to the running of the limitations period.
the end of the period of future performance to commence an action. Although the
foregoing reasoning would provide a rational explanation of Voth, it is not clear
that this was part of the court's thinking.

The court's discussion of the second part of the future performance exception
seems particularly confusing. Some cases and commentators have suggested that
the statute of limitations should not run until the buyer has the ability to ascertain
whether a breach has occurred i.e., until the breach is discoverable. Thus, the limita-
tions period would not commence until winter with respect to a furnace sold in the
summer or until the growing season with respect to seed sold in the off-season.

Although the court noted the criticism that has been directed at this interpreta-
tion of the future performance exception, it did not clearly disapprove the interpreta-
tion. Rather, it apparently distinguished the situation in Voth on the ground that any
person purchasing a car in Kansas in the month of August will not have to wait
long for an opportunity to test the air conditioner. Yet, did the court mean to imply
that the future performance exception would apply if the car had been purchased
in January? If so, it would be most difficult to explain why the inability to dis-
cover the breach would meet the exception whereas a one year warranty of perform-
ance would not.

In summary, although Voth does little to provide a definitive interpretation of
the future performance exception, there are indications that the court favors a narrow
and restrictive interpretation. With the adoption of strict tort liability and the
availability of the discovery rule, it cannot be argued that an expansive interpreta-
tion is needed to provide personal injury victims an adequate remedy. Therefore,
the future performance exception should be developed primarily in accordance with
the public policy considerations of pure commercial transactions rather than with
a view solely toward individual compensation.

III. INTENTIONAL TORTS

A. DEFAMATION

The defamation cases arising during the survey period primarily involved the
definition and scope of privileges to publish defamatory statements. In Sampson v.

\footnote{Since the court already found that the warranty did not extend to future performance, discussion of
the second part of the test—that discovery of breach must await the future performance—would seem
unnecessary and constitute mere dictum.}

\footnote{See Perry v. Augustine, 37 Pa. D. & C2d 316, 3 UCC Rep. 735 (1965).}

\footnote{See Comment, The Sales Statute of Limitations in the Uniform Commercial Code—Does It Preclude
Prospective Implied Warranties?, 37 Fordham L. Rev. 247, 249 (1968).}

\footnote{Such an approach would seem wholly inconsistent with the intent of the commercial code to
interject some measure of uniformity into the limitations period for commercial transactions. For
example, every new automobile sold with both a heater and an air conditioner would require some extension
of the four year limitations period since one component is normally used in summer and the other in
winter. The damage to the uniformity of the limitations period sought by the commercial code, which
full recognition of this approach would produce, should not be permitted without full consideration of
all relevant public policy considerations. The statute of limitations for commercial transactions should
turn on something more precise and predictable than the vagaries of local weather conditions.

\footnote{At least one court has treated a one year express warranty similar to the warranty in Voth as ex-
tending to future performance and thus extending the limitations period. See Dennin v. General Motors
Corp., 78 Misc. 2d 451, 458, 335 N.Y.S.2d 668, 670 (1974).}

\footnote{While the refusal to apply the future performance exception in Voth did function to deny plaintiff
a remedy, plaintiff waited nearly four years after discovery of his injury and its cause before initiating
the action. Since there is no suggestion of any sound reason for this delay, it cannot be said that Voth
presents a compelling case for liberal interpretation for the future performance exception in order to
provide personal injury victims with a needed remedy.}
The prosecutor in closing argument in a prior criminal trial had referred to plaintiff as being corrupt and a liar. Although Kansas has long recognized an absolute privilege for statements made in judicial proceedings, this privilege has been described as applying to statements made in "reference to the cause under consideration." Plaintiff contended that the prosecutor's remarks were irrelevant and thus not absolutely privileged. The court of appeals held that the prosecutor's remarks were relevant because they concerned the credibility of the witness, but did not decide whether the absolute privilege is limited by such a relevancy test. This narrow decisional basis in Sampson seems pragmatically sound. Attacks on the credibility of parties and witnesses are inherent in the adversary system, and even the well-prepared trial attorney will be forced on occasion to respond hastily to sudden developments in the courtroom and perhaps make a statement with malice, i.e., with reckless disregard of truth or falsity. While abuses might result from liberally treating all attacks on credibility as relevant, no matter how malicious, plaintiff's problem appears to be more a function of the absolute privilege itself than of the broad definition of relevance used by the court of appeals.

The purpose of the absolute privilege for attorneys is to encourage the vigorous performance of their courtroom duties uninhibited by the threat of defamation actions. It is undoubtedly more difficult, however, for an attorney to avoid making an irrelevant statement than to avoid making a malicious statement, and therefore a relevance exception would seem to cause the very evil that the general rule seeks to avoid—inhibition of courtroom performance. A carefully circumscribed limitation that provides a remedy for malicious statements without unduly sacrificing the underlying objectives of the absolute privilege would undoubtedly be a desirable objective, but such a development must await an appropriate case.

The courts have shown no inclination, however, to expand the scope of absolute privileges beyond narrowly defined judicial, legislative, and executive proceedings. In a prior case an affidavit filed under oath in proceedings pending before the Interstate Commerce Commission had been treated as an absolutely privileged statement made in a quasi-judicial proceeding. Nevertheless, the supreme court in Schulze v. Coykendall refused to treat as absolutely privileged a citizen's complaint to a

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221 An absolute privilege for statements made in judicial proceedings, specifically including statements made by counsel, was recognized at least as early as 1881 in Kansas. See Kirkpatrick v. Eagle Lodge, 26 Kan. 384, 390, 40 Am. Rep. 316, 318-19 (1881).

222 See, e.g., Latimer v. Oyler, 108 Kan. 476, 480, 196 P. 610, 612 (1921). At least two cases clearly expressed the view that the absolute privilege would be limited to statements relevant to the judicial proceedings. See Weil v. Lynds, 105 Kan. 440, 442-43, 185 P. 51, 52 (1919); Klover v. Rugh, 99 Kan. 752, 753-54, 162 P. 1179, 1179-80 (1917). No case, however, has defined the scope or meaning of relevance for purposes of such an exception.

223 Malice exists when "the publication was made with knowledge that the defamatory statement was false or with reckless disregard of whether it was false or not." Schulze v. Coykendall, 218 Kan. 653, 661, 545 P.2d 392, 399 (1976) (emphasis added). It is quite conceivable that the second part of this test might frequently apply to statements made in arguing objections to evidence, in cross-examining witnesses, and in closing argument whenever the attorney, without full knowledge of the facts, suggests what facts or inferences might follow from certain evidence.

224 An additional complication arises because in the context of trial proceedings relevance is a multifaceted concept reflecting not only the actual nexus between a given fact and the subject matter of the proceedings but also pragmatic considerations of judicial policy such as expediting proceedings through control over the quality and quantity of evidence.


local school board about an elementary school principal's allegedly unprofessional conduct, even though the school board subsequently held a hearing, apparently found at least part of the statement to be true, and reprimanded the principal. The court could have narrowly grounded its holding on the basis that the statement was made prior to the initiation of the school board hearing, but instead it appears to have based its holding on the broader proposition that a school board disciplinary hearing does not constitute a quasi-judicial proceeding.\footnote{227}

In \textit{Bradford v. Mahan}\footnote{228} plaintiff alleged that defendant police officer falsely and maliciously filed an accident report stating that alcohol consumption was a factor contributing to plaintiff's one-car accident and that defendant maliciously refused to administer a chemical test to determine plaintiff's blood alcohol content, which would have enabled plaintiff to prove the falsity of the accusation. The supreme court took notice of the federal rule granting an absolute privilege to the communications of public officials engaged in investigatory matters,\footnote{229} but held that this rule would not serve the best interests of the people of Kansas and therefore these communications are entitled only to a qualified privilege in Kansas, unless the communication is made in the course of a judicial or legislative proceeding. When there is a qualified privilege, plaintiff has the burden of proving that defendant acted with malice, and the court felt that this provided sufficient protection for the police while allowing some redress for citizens.

Neither decision provides any clear line of demarcation for when an absolute rather than a qualified privilege is applicable. While in each case the court indicated that absolute privileges are provided "not so much for those engaged as for the promotion of the public welfare,"\footnote{230} this approach would appear to state a conclusion rather than a distinction capable of reasonably precise application in any given situation. For example, in \textit{Schulze} the court recognized a "public interest in school matters,"\footnote{231} and certainly the communications of police officers engaged in investigatory matters are also in the public interest. Moreover, although the court recognized that the public school employee and the citizen being investigated should have at least limited legal redress for false and malicious statements injurious to their interests in reputation and privacy, the same would seem to be true of the witness compelled by legal process to participate in a judicial proceeding.

In reality, \textit{Schulze} and \textit{Bradford} are probably best viewed as reflecting a sound judicial policy of recognizing only a qualified privilege in most situations and limiting absolute privilege to a small category of narrowly defined situations perceived as involving substantially heightened considerations of public welfare. The court's approach focuses on the need to balance the public's interest in uninhibited pursuit...
of certain activities against the individual's interest in the preservation of reputation and privacy. Thus, a qualified privilege is preferable in most situations because it should deter the more serious abuses of privileged positions and permit compensation of some injuries to reputation and privacy but at the same time provide through the malice requirement substantial protection for legitimate communications in the public interest. Although any activity undertaken in the public interest might arguably be "chilled" by the fear of vexatious litigation, the extent of this chilling effect seems to be largely a matter of speculation. It is expected that in future cases a substantial showing of the insufficiency of a qualified privilege will be required before any expansion of the scope of absolute privileges is permitted.

In Kansas a qualified privilege is recognized when a 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." In Dobbyn v. Nelson, plaintiff, a library employee, sued a librarian, the library director, and his assistant. The librarian had submitted a written report to the director concerning student complaints about plaintiff's uncooperative attitude toward students using the library, and the library director and his assistant subsequently used the report to defend a salary grievance filed by plaintiff. None of the defendants had conducted an investigation to determine the truth of the complaints. Plaintiff contended that a lack of "good faith" was demonstrated by both their negligence in failing to investigate the complaints and their alleged ill will towards plaintiff. The court of appeals affirmed a summary judgment in favor of defendants.

First, the court held that unless defendants acted with knowledge of falsity or reckless disregard of truth or falsity, any lack of reasonable care to investigate the truth of the complaints would not defeat their qualified privilege. This aspect of the court's opinion is clearly sound. Plaintiff's contention that negligence defeats a qualified privilege is inherently inconsistent with the well-established rule in Kansas that a qualified privilege is defeated by "malice," narrowly defined as knowledge of falsity or reckless disregard of truth or falsity. Moreover, acceptance of plaintiff's contention would render the concept of qualified privilege virtually meaningless because the Gertz decision of the United States Supreme Court eliminated

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230 Absolute immunity for statements made in judicial and legislative proceedings has traditionally been justified on the basis of a perceived need to enable "members of the legislature, judges of courts, jurors, lawyers and witnesses [to] speak their minds freely and exercise their respective functions without incurring the risk of a criminal prosecution or an action for recovery of damages." Sampson v. Rumsey, 1 Kan. App. 2d 191, 194, 563 P.2d 506, 509 (1977). See also Harpe v. Joseph, 94 Kan. 18, 20, 145 P. 822, 823 (1915). See also Imler v. Pachtman, 424 U.S. 409, 427-28 (1976). Since absolute immunity has always been applied to these proceedings, however, there has been no actual experience that demonstrates the validity of this rationale. Whatever its merits in the context of judicial and legislative proceedings, such a speculative rationale should not be used to expand the scope of absolute immunity to other areas of activity until something more than mere speculation demonstrates the need for additional protection beyond that provided by a qualified privilege.


for all practical purposes the common law approach of treating defamation as a strict liability tort and required at least a showing of negligence as part of plaintiff’s prima facie case.\textsuperscript{238}

Second, the court apparently attributed no independent significance to plaintiff’s assertion that defendants were motivated by ill will towards her. Although the definition of qualified privilege used in Kansas provides that the communication must be “made in good faith,” the court examined only facts relating to defendants’ respective interests in the proper operation of the library in order to determine that they were entitled to a qualified privilege. The court seemed to treat plaintiff’s allegations of ill will as relevant only to the issue of defendants’ knowledge of falsity or reckless disregard of truth or falsity and found them insufficient to create a question of fact with respect to knowledge or reckless disregard.

In summary, the Kansas courts appear to approach issues of qualified privilege in a two-step process. First, the creation of a qualified privilege is based on an examination of the objective characteristics of a situation in order to determine the sufficiency of the respective interests of the parties in a given communication. Second, abuse of a qualified privilege is examined in terms of malice, \textit{i.e.}, whether it was made with knowledge of falsity or reckless disregard of truth or falsity.\textsuperscript{239} The phrase “made in good faith” in the formal Kansas definition of qualified privilege seems inaccurate in the context of the approach actually being used by Kansas courts. With respect to both of plaintiff’s contentions in \textit{Dobbyn}, the court simply equated “made in good faith” with “not made with malice.” This inaccuracy in the formal definition of qualified privilege undoubtedly resulted because the definition was formulated prior to the constitutional developments of the past fifteen years that dramatically changed many aspects of the common law of defamation.\textsuperscript{240} The rules governing qualified privilege in sections 593 through 612 of the Restatement (Second) of Torts\textsuperscript{241} both incorporate these constitutional developments and are consistent with the Kansas approach to date. The courts might be well-advised to consider these rules as appropriate references in future qualified privilege cases.

\textsuperscript{238} In \textit{Gertz} the court held that “so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.” \textit{Id.} at 347. While this holding arguably might permit strict liability in defamation cases not brought against persons within the broad meaning of “press,” maintenance of such a dual standard would create innumerable practical difficulties for courts, and it is not expected that many states will opt for such an approach. In addition, there have been indications that the United States Supreme Court rejects the notion that the first amendment rights of the “press” are superior to those of ordinary citizens. \textit{See, e.g.}, \textit{Houchins v. KOED}, Inc., \textit{et al.}, U.S., 98 S. Ct. 2588 (1978). \textit{Zurcher v. Stanford Daily}, 436 U.S. 547, 563-67 (1978); \textit{Branzburg v. Hayes}, 408 U.S. 665, 683-85 (1972). At the same time, the \textit{Gertz} decision did not leave the states with an entirely free hand in using a negligence standard in defamation cases, for the Court required a malice standard whenever punitive or “presumed” damages are sought against even a private person. 418 U.S. at 349-50. Thus, in those states decide that require malice in all defamation actions in order to avoid the difficulties of distinguishing between “public” persons and “private” persons, \textit{see, e.g.}, \textit{Time, Inc. v. Firestone}, 424 U.S. 448 (1976), the concept of qualified privilege would become meaningless. There is no indication to date, however, that the Kansas courts are inclined to adopt this approach.

\textsuperscript{239} This approach was followed with respect to qualified privileges in both the \textit{Bradford} and \textit{Schulze} decisions. \textit{See Bradford v. Mahan}, 219 Kan. 450, 455-56, 548 P.2d 1223, 1228-29 (1976); \textit{Schulze v. Coykendall}, 218 Kan. 653, 659-61, 545 P.2d 392, 398-99 (1976).

\textsuperscript{240} The phrase “made in good faith” was adopted in Kansas from a description of qualified privilege appearing in a 1941 summary of state defamation law. \textit{See 33 AM. JUR Label and Slander} § 126, at 124 (1941). In 1964 the United States Supreme Court rendered the first in a series of decisions imposing restraints of the scope of common law defamation in order to protect first amendment interests. \textit{See New York Times Co. v. Sullivan}, 376 U.S. 254 (1964).

\textsuperscript{241} \textit{Restatement (Second) of Torts} §§ 593-612 (1976).
B. Invasion of Privacy

In the area of privacy the Kansas courts were primarily occupied during the survey period with cases involving the form of invasion of privacy known as "intrusion upon seclusion," which protects a person's private places and affairs from intrusions of a nature highly offensive to a reasonable person. Since this tort provides legal protection against only those intrusions that are "substantial" or "highly offensive to the ordinary reasonable man," it appears that the initial determination whether a defendant's conduct may constitute a substantial intrusion upon seclusion will be made by the court. Thus, in *Froelich v. Werbin* the supreme court affirmed the trial court's determination that as a matter of law defendant's obtaining a sample of plaintiff's hair from a discarded hospital bandage in an attempt to ascertain whether plaintiff was the homosexual partner of a party to a pending lawsuit did not constitute a substantial intrusion. Similarly, in *Vespa v. Safety Federal Savings & Loan Ass'n* a banker's entry into plaintiff's home to discuss in an arguably rude and insensitive manner a mortgage foreclosure, which was a matter of public record, was not a substantial intrusion as a matter of law.

While one may always disagree with a given value judgment made in the course of these initial determinations, a certain degree of judicial control seems both unavoidable and desirable. It is unavoidable because this tort has no easily identifiable, objective characteristic to promote self-selection of cases involving "substantial" intrusions. In this sense the tort is analogous to the tort of intentional infliction of emotional distress, for which it has been recognized that courts must make the initial determination whether the circumstances show "extreme and outrageous conduct." Since both torts seek to provide a remedy for the more serious interferences with another's interest, but also seek to avoid providing a remedy in less serious cases, the need for judicial control over the application of an essentially quantitative test becomes quite apparent. More importantly, the limitation to only substantial
intrusions is desirable as a mechanism to create a balance between privacy interests and the myriad other interests that may be expected to collide with privacy interests in a complex society. Thus, judicial control over the meaning of “substantial” on a case by case basis enables the courts to continuously adjust and refine this balance.\textsuperscript{280}

In another intrusion upon seclusion case, \textit{Monroe v. Darr},\textsuperscript{281} sheriff’s deputies entered plaintiff’s apartment when he was sleeping and woke him up while pointing a shotgun directly at him. An hour earlier the deputies had received from an assault victim a vague description of the assailant’s car and then observed a similar car outside plaintiff’s apartment building. They entered plaintiff’s apartment with the manager’s key after receiving no response to their loud knocking. The supreme court reversed a directed verdict in favor of defendants.\textsuperscript{282}

First, the court rejected the trial court’s finding that plaintiff had not introduced any evidence of actual damage caused by the invasion of privacy. Plaintiff introduced no expert medical testimony, but he and his wife testified that he suffered sleeplessness, nervousness, feelings of anxiety and insecurity, and increased asthma attacks as a result of the deputies’ actions. In finding this evidence sufficient to create a jury question on the amount of damage suffered, the court relied on the rule that in privacy actions plaintiffs need not prove the amount of damages with precision\textsuperscript{283} and held that expert medical testimony was not required to prove anxiety and suffering. This approach to this issue is probably sound. As the court noted, this tort provides compensation primarily “for injured feelings or mental suffering.”\textsuperscript{284} The amount of damages for these harms would seem no more capable of precise proof and measurement than the damages commonly awarded for pain and suffering in routine accident cases, but in both situations once the fact of injury is established, the preferable approach is to permit the jury to determine the amount of damages to the best of its ability and then have the court protect the integrity of the process through the use of rules relating to excessive verdicts. In addition, there would seem to be no reason to require expert medical testimony when the injuries are general in nature but within the common knowledge and appreciation of a lay jury. Since a reasonable person would be expected to incur some mental suffering when suddenly awakened with a shotgun pointed at his or her face, there would seem to be no need to reinforce the jury’s appreciation of this fact with expert medical testimony. At the same time, when plaintiff seeks to show a form of damage not within the common appreciation of lay persons—for example, an

\textsuperscript{280} While judicial control is to some extent necessary, the courts should be careful not to entirely usurp the function of the jury. Rather, they should simply exercise sufficient control to prevent those cases that cannot properly constitute substantial intrusions from reaching the jury. In addition, there is some indication that courts should not decide the substantiality issue on bare pleadings or discovery depositions, but should provide the opportunity for a full evidentiary hearing whenever the issue is at all in doubt. \textit{See, e.g.}, Froelich v. Werbin, 219 Kan. 461, 465, 548 P.2d 482, 485 (1976). Although not at the present required by the court, this procedural safeguard against premature dismissal of plaintiff’s claims seems to be sound. Although of lesser importance, judicial control is also desirable to prevent vexatious litigation and the threat of jury trials to coerce nuisance settlements.\textsuperscript{281} 221 Kan. 281, 559 P.2d 322 (1977).

\textsuperscript{282} The court affirmed, however, the trial court’s dismissal of plaintiff’s claim for punitive damages because the record disclosed no facts upon which a finding of malice could be based. \textit{Id}. at 283-85, 559 P.2d at 326.


increase in asthma attacks caused by an invasion of privacy, as claimed in *Monroe*—then medical testimony would seem to be necessary.

Second, the court rejected the trial court's finding that the deputies were privileged to intrude upon plaintiff's seclusion because they had probable cause to enter his apartment. Without deciding the question of probable cause, the court found that there were no exigent circumstances to justify a warrantless search of the apartment. Had the court limited its analysis to this narrow point, there would be no significant dispute with its holding. The United States Supreme Court has repeatedly held that the interest in law enforcement requires privacy interests to yield to lawful searches.\textsuperscript{266} The court, however, went a step further and held that "[c]entry into a private home or apartment by police officers constitutes an invasion of the right of privacy of the members of the family residing there and unless justified by legal privilege gives rise to a cause of action for breach of privacy."\textsuperscript{268} In essence, therefore, the court held that every police entry into a private home, no matter how innocuous, constitutes an actionable invasion of privacy if the entry violates the provisions of the fourth amendment to the United States Constitution. This holding is overly broad and raises a serious question about the relationship between the tort of invasion of privacy and the fourth amendment.

The fourth amendment prohibits all unreasonable searches in order to provide maximum protection for citizens' constitutional rights, whereas an intrusion upon seclusion is actionable only when it is substantial or highly offensive. Any presumption that every unreasonable search in violation of the fourth amendment constitutes a substantial or highly offensive intrusion upon seclusion simply overlooks the different balances of competing interests inherent in the two areas of law as well as the different tests involved. Even if a police search were not legal under the fourth amendment, which often turns on a mere "technicality," it does not follow that the invasion of privacy would always be substantial. Of course, it is possible to reach the court's broad holding by concluding that all intrusions by the police are inherently substantial or highly offensive. There seems to be no good reason, however, to formulate per se rules in this area and confound traditional tort analysis, which is based on all the facts and circumstances of a given case. *Monroe* involved an extreme set of circumstances that raise no serious question whether the intrusion was substantial, and the court's conclusion is probably sound if limited to the facts of the case. In future intrusion cases involving fourth amendment violations, however, the court should require plaintiff to establish a substantial intrusion upon seclusion and not simply assume that a fourth amendment violation constitutes such an intrusion.


\textsuperscript{268} 221 Kan. at 287, 559 P.2d at 328.