

ARTICLE

Survey of Kansas Tort Law: Part I

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I. INTRODUCTION

The *Kansas Law Review* last published a survey of Kansas tort law twelve years ago.¹ In the intervening years, the Kansas Supreme Court and Kansas Court of Appeals have published nearly four hundred opinions relating to some aspect of tort law. Some topics received considerable attention from the courts, such as medical malpractice, the failure to act doctrine, comparative fault, retaliatory discharge, damages, governmental immunity, and statutes of limitation and repose. Other topics have received less frequent attention, but are nevertheless noteworthy. This survey cannot discuss all these opinions. Rather, it will concentrate on those individual opinions and trends in Kansas tort law that the authors consider most significant. Part I of the survey will discuss negligence cases and Part II will discuss intentional torts and other tort causes of action.

II. DUTY OF CARE

A. *Standard of Care*

The first element in a negligence action is the existence of a duty of care owed by the defendant to the plaintiff. Whether a duty exists is generally a question of law for the court,² while whether the defendant

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1. William E. Westerbeke & Reginald L. Robinson, *Survey of Kansas Tort Law*, 37 U. KAN. L. REV. 1005 (1989) [hereinafter Westerbeke & Robinson, 1989 Survey].

2. See, e.g., *P.W. v. Kan. Dep't of Soc. & Rehab. Servs.*, 255 Kan. 827, 833, 877 P.2d 430, 434 (1994) (holding that a police officer owes a duty to the public at large to preserve the peace); *Hackler v. Unified Sch. Dist. No. 500*, 245 Kan. 295, 299, 777 P.2d 839, 843 (1989) (stating that a school district does not have a duty to instruct its students to cross in front of school buses); *Fountain v. Se-Kan Asphalt Servs., Inc.*, 17 Kan. App. 2d 323, 330, 837 P.2d 835, 840 (1992) (concluding that a county has a duty to maintain its roads in a reasonably safe condition).

has breached that duty in a specific situation is generally a question of fact for the jury.³ In most negligence cases, the duty of care is to exercise reasonable care under all the circumstances, and courts usually use a risk-benefit analysis to determine whether conduct poses an unreasonable risk.⁴ Failure to take appropriate steps to eliminate or reduce the danger of an unreasonable risk constitutes negligence.

In some situations, courts will define the *absence* of a duty in terms of specific conduct.⁵ One good example is the slight defect rule, which in Kansas provides that reasonable care does not require repair of minor imperfections in the surface of sidewalks.⁶ The rule presupposes that constant repair and replacing of cement slabs in sidewalks, regardless of the magnitude of the imperfection, would be too burdensome to the party charged with responsibility to maintain the sidewalk in good condition.⁷ At the same time, a minor imperfection poses only a limited risk to persons using the sidewalk.⁸ Most people will negotiate a minor imperfection without incident, and the few who do trip or stumble will usually suffer minor injury at worst.

During the survey period, the courts confronted two questions: does the slight defect rule apply to private as well as public sidewalks, and is the rule absolute or variable with the circumstances? In *Barnett-Holdgraf v. Mutual Life Insurance Co.*,⁹ the plaintiff was walking on the sidewalk between two commercial buildings owned and operated by the

3. See, e.g., *C.J.W. v. State*, 253 Kan. 1, 7, 853 P.2d 4, 9 (1993) ("Whether the duty has been breached is a question of fact."); *Lay v. Kan. Dep't of Transp.*, 23 Kan. App. 2d 211, 214, 928 P.2d 920, 924 (1996) (holding that breach of duty is a question of fact).

4. See RESTATEMENT (SECOND) OF TORTS §§ 291-293 (1964) (stating that risk-benefit analysis should be used to determine what is reasonable care).

5. See *Dawson v. Griffith*, 249 Kan. 115, 122, 816 P.2d 374, 378-79 (1991) (stating that a driver owes no duty of care to be accurate when signaling to another driver the safety of executing some maneuver on the highway); *Hackler*, 245 Kan. at 299, 777 P.2d at 843 (holding that a school bus driver had no duty to wait until child crossed street before leaving location where child exited the bus); *Fountain*, 17 Kan. App. 2d at 333, 837 P.2d at 842 (holding that a highway contractor has no duty to reduce amount of dust created by its trucks during road repair project); *Nichols v. Cent. Merch., Inc.*, 16 Kan. App. 2d 65, 68, 817 P.2d 1131, 1133 (1991) (stating that a pharmacist has no duty to warn about side effects in drugs prescribed by doctor for patient); *Hodge v. Lanzar Sound, Inc.*, 25 Kan. App. 2d 592, 596, 966 P.2d 92, 96 (1988) (concluding that a driver confronted suddenly by an obstruction in the highway has no duty to trailing drivers to signal his intent to change lanes). But see *Saliba v. Union Pac. R.R. Co.*, 264 Kan. 128, 137, 955 P.2d 1189, 1195-96 (1998) (concluding that it is a jury question whether railroad breached its duty to adequately warn about an unusually dangerous railroad crossing).

6. *Sepulveda v. Duckwall-Alco Stores, Inc.*, 238 Kan. 35, 37-38, 708 P.2d 171, 173 (1985).

7. *Taggart v. City of Kansas City*, 156 Kan. 478, 480, 134 P.2d 417, 419 (1943).

8. *Id.* at 480-81, 134 P.2d at 419.

9. 27 Kan. App. 2d 267, 3 P.3d 89 (2000).

defendant.¹⁰ She was injured when she stepped into a slight hole or pockmark in the sidewalk between the two buildings. The sidewalk was private property owned by the defendant, and was scheduled for repairs that had not been performed as of the date of the accident. The hole or pockmark was at most one and one-half inches deep, and the depression of the sidewalk slab below the surface of the adjoining slab was approximately one-half inch. The plaintiff had not previously used this portion of the defendant's sidewalk. The court of appeals held that the slight defect rule applies to private as well as public sidewalks.¹¹

The court's decision is sound. Although some early cases implied that the slight defect rule was a less stringent application of negligence principles designed to protect municipal governments,¹² later cases extended the rule to private property owners.¹³ The risk-benefit analysis underlying the slight defect rule does not depend at all on the public or private nature of the sidewalk. Any justification based on the financial condition of municipal government is inappropriate. A party's wealth is irrelevant in negligence analysis. The risk of injury to users of the sidewalk in an unrepaired condition is compared with the burden of repairing or replacing cement slabs, and those risks and burdens are the same for both the public and private property owner.

The slight defect rule is not absolute, however. In certain circumstances, a landowner may incur liability for injuries caused by slight imperfections in or near sidewalks. *Lyon v. Hardee's Food Systems, Inc.*¹⁴ involved tree grates incorporated into the sidewalk in front of the defendant's restaurant.¹⁵ The defendant had recently painted the tree grates and replaced the rock underneath them. Although the defendant had intended all of the tree grates to be level with the surface of the sidewalk, one grate was inadvertently left elevated about two inches above the surface. The plaintiff tripped over it and was injured.¹⁶

The supreme court refused to apply the slight defect rule.¹⁷ The court drew a distinction between sidewalk defects created by a property owner's affirmative acts of negligence and those arising from weather

10. *Id.* at 267, 3 P.3d at 90.

11. *Id.* at 272, 3 P.3d at 93.

12. *Ford v. City of Kinsley*, 141 Kan. 877, 880-81, 44 P.2d 255, 257 (1935).

13. *Sepulveda v. Duckwall-Alco Stores, Inc.*, 238 Kan. 35, 38, 708 P.2d 171, 173 (1985); *Roach v. Henry C. Beck Co.*, 201 Kan. 558, 560, 442 P.2d 21, 24 (1968); *Pierce v. Jilka*, 163 Kan. 232, 239, 181 P.2d 330, 335 (1947).

14. 250 Kan. 43, 824 P.2d 198 (1992).

15. *Id.* at 43, 824 P.2d at 199.

16. *Id.* at 44, 824 P.2d at 199.

17. *Id.* at 52, 824 P.2d at 204.

conditions and the passage of time.¹⁸ Admittedly, the elevation of the defect was comparable to the elevation of sidewalk imperfections protected by the slight defect rule, and thus the risk to pedestrians was also comparable. However, the burdens are substantially different in the two situations. Courts view as substantial the financial burden in replacing cement slabs because of slight imperfections that develop over time as substantial.¹⁹ The same characterization is not appropriate when the property owner creates the defect by affirmative acts of negligence. In *Lyon*, the defendant placed too much rock under the grate, causing its elevated condition.²⁰ The dangerous condition could have been completely eliminated by simply lifting up the grate and removing the excess rock. Risk-benefit analysis provides two different results because the burden factor in the two situations differs.

One caution is appropriate. Courts must be careful to factor into the overall risk-benefit analysis any justification for the dangerous condition. In *Lyon*, it is important to note that not only could the defendant have easily and inexpensively eliminated the dangerous condition, but also the dangerous condition served no useful purpose. However, other similar imperfections might exist to protect against some other danger, such as a piece of plywood used temporarily to cover a hole in the sidewalk during a construction project,²¹ or a metal plate placed over a drain gutter across a sidewalk.²²

B. Medical Malpractice

1. Informed Consent

The doctrine of informed consent requires doctors to inform patients about the risks inherent in proposed medical treatment. Although Kansas courts first recognized the doctrine of informed consent in 1960,²³ until recently they had defined a doctor's duty only in general terms: that the doctor must not withhold any "facts which are necessary to form the basis of an intelligent consent by the patient to the proposed treatment."²⁴

18. *Id.*

19. *Taggart v. City of Kansas City*, 156 Kan. 478, 480, 134 P.2d 417, 418 (1943).

20. *Lyon*, 250 Kan. at 44, 824 P.2d at 199.

21. *Roach v. Henry C. Beck Co.*, 201 Kan. 558, 559, 442 P.2d 21, 22 (1968).

22. *Biby v. City of Wichita*, 151 Kan. 981, 983, 101 P.2d 919, 921 (1940).

23. *Natanson v. Kline*, 186 Kan. 393, 409-10, 350 P.2d 1093, 1106 (1960).

24. *Id.* at 407, 350 P.2d at 1104 (quoting *Salgo v. Leland Stanford Jr. Univ. Bd. of Trs.*, 317 P.2d 170, 181 (Cal. Ct. App. 1957)).

The courts addressed whether a doctor must inform patients about alternative treatments only in the negative admonition that a doctor has no duty to inform a patient of “infinitesimal, imaginative, or speculative” risks.²⁵ Finally, in *Wecker v. Amend*,²⁶ the court of appeals addressed whether and to what extent informed consent requires a doctor to inform a patient about the availability of and the risks inherent in alternative treatments, including the possibility of no treatment at all.²⁷

In *Wecker*, the plaintiff suffered excessive bleeding that eventually necessitated a total hysterectomy after laser surgery to remove a wart that might have been precancerous.²⁸ The defendant doctor had warned the plaintiff that laser surgery involved a small risk of excessive bleeding and possible infection, but did not inform her of alternatives to laser surgery or of the option of no treatment other than monitoring the condyloma. The trial court instructed the jury only that a physician has a duty to make reasonable disclosure about the nature and probable consequences of a proposed medical treatment and the known dangers inherent in the treatment.²⁹

The court of appeals held that the instruction was inadequate because it failed to require disclosure of the availability of and the risks inherent in alternative treatments, including no treatment at all.³⁰ The informed consent doctrine is grounded in the principle that each person should have autonomy over the choice of which medical treatments to undergo. A patient cannot intelligently determine whether a medical procedure is her best choice of treatment of a medical condition unless she is able to compare and contrast the risks and benefits inherent in other reasonable treatment options. Accordingly, information about *reasonable* alternative treatments, including no treatment at all, is simply “necessary to form the basis of an intelligent consent by the patient to the proposed treatment.”³¹

The Kansas courts are concerned, however, to exclude from jury consideration risks that are “infinitesimal, imaginative or speculative.” Kansas uses the objective standard of a reasonable person to determine whether the plaintiff, if fully informed, would have opted for some other

25. *Yeates v. Harms*, 193 Kan. 320, 333, 393 P.2d 982, 991 (1964).

26. 22 Kan. App. 2d 498, 918 P.2d 658 (1996).

27. *Id.* at 499, 918 P.2d at 660.

28. *Id.* at 499, 918 P.2d at 659-60.

29. *Id.* at 500-01, 918 P.2d at 660.

30. *Id.* at 503, 918 P.2d at 662.

31. *Natanson v. Kline*, 186 Kan. 393, 407, 350 P.2d 1093, 1104 (1960) (quoting *Salgo v. Leland Stanford Jr. Univ. Bd. of Trs.*, 317 P.2d 170, 181 (Cal. Ct. App. 1957)).

treatment.³² However, once the evidence establishes that an objective "reasonable person" would have opted for an alternative treatment, the plaintiff's subjective testimony concerning choice of treatment is relevant to, but does not control, the causation issue.³³ Thus, the trial court erred by not letting the plaintiff testify that she would have opted for no treatment at all if she had been fully informed about her choices.

2. Tort Reform Legislation

Since the 1970s, the Kansas legislature has enacted and amended a wide variety of statutes designed to "reform" medical malpractice. The legislature has considered such legislation necessary to ensure that affordable liability insurance remains available to Kansas health care providers. During the survey period, the Kansas courts were frequently called upon to interpret and apply various reform statutes.

a. Expert Witnesses

Medical malpractice cases raise a wide variety of issues concerning expert witnesses.³⁴ Generally, an expert witness is necessary to prove a breach of the standard of care in a medical malpractice case.³⁵ An exception exists when the medical procedure at issue is within the common knowledge of lay jurors. In *Schwartz v. Abay*,³⁶ the plaintiff had a back problem that caused pain to shoot down his leg.³⁷ The defendant doctor operated on the wrong disc in the plaintiff's back, removing sixty percent of a healthy disc. A subsequent operation

32. See *Funke v. Fieldman*, 212 Kan. 524, 537, 512 P.2d 539, 550 (1973) ("Whether a patient would have refused treatment or a medical procedure had the physician made adequate disclosure is to be determined objectively.").

33. *Id.*

34. Medical malpractice cases frequently involve evidentiary and procedural issues relating to the use of expert witnesses to prove a breach of the medical standard of care. See *Pope v. Ransdell*, 251 Kan. 112, 117-18, 833 P.2d 965, 971 (1992) (discussing the propriety of limiting the plaintiff to one expert after the plaintiff sought dismissal of first trial without prejudice); see also *Wilson v. Knight*, 26 Kan. App. 2d 226, 229, 982 P.2d 400, 403 (1999) (commenting on the admissibility of articles as learned treatises under Kansas Statutes Annotated section 60-460(cc)).

35. See, e.g., *Wilson*, 26 Kan. App. 2d at 229, 982 P.2d at 403 (holding that a medical treatise may be used to show that a failure to properly diagnose and treat an inflamed appendix constitutes a breach of a doctor's standard of care); *Heany v. Nibbelink*, 23 Kan. App. 2d 583, 586-87, 932 P.2d 1046, 1048 (1997) (holding that a physician who testifies only as a treating physician does not satisfy the plaintiff's obligation to provide expert testimony concerning the medical standard of care).

36. 26 Kan. App. 2d 707, 995 P.2d 878 (1999).

37. *Id.* at 711, 995 P.2d at 881.

apparently removed the damaged disc and succeeded in eliminating the leg pain. However, the patient's Functional Capacity Evaluations indicated that his capacity to return to physical labor was reduced from "medium" work to "light medium" work. He was terminated from employment because his employer could not provide him with a position appropriate for "light medium" work. In the ensuing medical malpractice action, the defendant admitted that he had breached the applicable standard of care, and the trial court granted summary judgment on the issue of liability. However, when the plaintiff then failed to offer any expert testimony to prove that the malpractice had caused his damage, the trial court granted summary judgment for the defendant and dismissed the action.³⁸

The supreme court reversed on the ground that a defendant's admission of malpractice makes the issue of damages resulting from that malpractice a matter of common knowledge.³⁹ Certainly, the defendant's admission of malpractice dispenses with the need for expert testimony to prove a breach of the medical standard of care. The court was also correct that the loss of sixty percent of a healthy disc constitutes damage and that the fact and measurement of damage is generally a question of fact for the jury. Nevertheless, the court's analysis seems incomplete. The requirement of expert testimony applies to causation as well as to the standard of care.⁴⁰ A lay juror would not necessarily know whether the "light medium" rating of the plaintiff's work ability was caused by the removal of part of a healthy disc, or whether it would have occurred in any event because of the defective disc. Expert testimony would help a lay juror understand which aspects of the plaintiff's post-operative condition are fairly attributed to the malpractice and which are not.⁴¹

The Kansas legislature was concerned about the qualifications of doctors testifying as expert witnesses in medical malpractice cases. One of the reform provisions, Kansas Statutes Annotated section 60-3412, restricts those who may qualify as expert witnesses in an attempt to eliminate the abuses associated with the so-called "professional expert

38. *Id.* at 708, 995 P.2d at 879.

39. *Id.* at 712, 995 P.2d at 881.

40. See *Sharples v. Roberts*, 249 Kan. 286, 291-97, 816 P.2d 390, 394-98 (1991) (holding that "[t]he rule requiring expert medical testimony in medical malpractice actions applies not only to the issue of negligence, but also to the issue of causation").

41. This criticism assumes that termination of the plaintiff's employment was a component of his alleged damages. However, analysis of the court's opinion is difficult because it does not set forth a detailed description of specific items of damage being claimed by the plaintiff. Moreover, the trial court would not admit into evidence the plaintiff's Functional Capacity Evaluations, which may have provided an evidentiary basis for finding a causal connection between the malpractice and the greater work restriction that led to the plaintiff's termination.

witness.” It provides in pertinent part:

In any medical malpractice liability action . . . in which the standard of care given by a practitioner of the healing arts is at issue, no person shall qualify as an expert witness on such issue unless at least 50% of such person’s professional time within the two year period preceding the incident giving rise to the action is devoted to actual clinical practice in the same profession in which the defendant is licensed.⁴²

A series of supreme court decisions have provided a pragmatic interpretation of the statute that subordinated the literal meaning of “same profession” to the underlying objective of preventing the use of so-called “professional witnesses.” Two cases held that an expert witness need not have the same medical specialty as the defendant. Thus, in *Wisker v. Hart*,⁴³ a general practitioner was allowed to testify about the standard of care of a surgeon, and a surgeon was allowed to testify about the standard of care of a general practitioner.⁴⁴ Likewise, in *Glassman v. Costello*,⁴⁵ a pathologist was allowed to testify about the standard of care of an obstetrician.⁴⁶ The court also took a pragmatic approach to its interpretation of the licensing requirement. In *Tompkins v. Bise*,⁴⁷ a dentist licensed by the State Dental Board testified as an expert witness about the standard of care of a plastic surgeon who performed oral surgery on the plaintiff’s jaw and was licensed by the Kansas Board of Healing Arts.⁴⁸ The dentist had a degree in medical dentistry, had trained for three additional years in oral and maxillofacial surgery, and was certified in oral and maxillofacial surgery. Despite the differences in certification and licensing, the expert in each of the three cases had training and experience in the medical treatment and procedures at issue in the claim against the defendant doctor.

The supreme court’s reasoning in all three cases was sound. The legislative history clearly indicates that the legislature intended to prevent the abuses associated with so-called “professional expert witnesses” who no longer were active in the actual practice of medicine. A more literal interpretation of “same profession” was rejected because a requirement that the expert practice the same specialty as the defendant

42. KAN. STAT. ANN. § 60-3412 (1994).

43. 244 Kan. 36, 766 P.2d 168 (1988).

44. *Id.* at 44, 766 P.2d at 174.

45. 267 Kan. 509, 986 P.2d 1050 (1999).

46. *Id.* at 515, 519, 986 P.2d at 1056, 1058.

47. 259 Kan. 39, 910 P.2d 185 (1996).

48. *Id.* at 41, 910 P.2d at 187.

appeared in an early draft but was omitted from the final version of the statute. The concern that professional experts lack ongoing experience is addressed by the fifty-percent requirement, and the concern that the professional experts' testimony lacks accuracy or reliability is addressed by requiring both the expert and the doctor-defendant to have had clinical practice in the same medical procedures. The trial court still decides whether an expert who has satisfied the requirement of section 60-3412 is in fact qualified to testify, and the jury still assesses the expert's credibility and the weight accorded to the expert's testimony.

In contrast to the pragmatic approach to "same profession" in the *Wisker-Tompkins-Glassman* line of cases, the court of appeals recently adopted a more literal interpretation of the "50% clinical practice" requirement. In *Endorf v. Bohlender*,⁴⁹ the plaintiffs' decedent died from an allergic reaction to antivenin administered in a hospital emergency room to treat a snakebite.⁵⁰ Dr. Bohlender was unfamiliar with treatment of snakebites and turned the decedent over to a more experienced doctor for treatment. Nevertheless, expert witnesses for the plaintiffs and for the antivenin manufacturer testified that Dr. Bohlender was at fault by not monitoring the treatment subsequently given to the decedent. One of the plaintiffs' two experts testified that he spent one-hundred percent of his time in "hands-on patient care."⁵¹ However, the plaintiffs' other expert spent only twenty-five percent of his time in clinical practice, and the record was silent about the time spent in clinical practice by the two experts for the manufacturer. All three experts spent professional time in teaching, as well as in research or administration.⁵²

The plaintiffs urged the court to view the expert's time spent testifying as the only professional activity not counting toward the fifty-percent clinical practice requirement. The court of appeals rejected this approach, and held that the fifty percent clinical practice requirement referred to actual clinical practice and did not include professional time spent in teaching, research, administration, and other non-clinical professional activities.⁵³ The court relied on the fundamental rule of statutory construction that the intent of the legislature governs. The legislature has in numerous situations distinguished between clinical practice and other non-clinical professional activities. The legislature is presumed to know the meaning that "clinical practice" has in the

49. 26 Kan. App. 2d 855, 995 P.2d 896 (2000).

50. *Id.* at 857-58, 995 P.2d at 899.

51. *Id.* at 865, 995 P.2d at 903.

52. *Id.* at 865-66, 995 P.2d at 903.

53. *Id.* at 866, 995 P.2d at 901.

profession and is presumed to have intended that meaning when it included that phrase in the statute. Certainly, a requirement of actual clinical practice as opposed to other professional activities is relevant to the objective of greater accuracy and reliability in the testimony of expert witnesses.

b. Abrogation of Medical Employer Vicarious Liability

The legislature enacted Kansas Statutes Annotated section 40-3403(h) in an attempt to reduce the cost of medical malpractice insurance by eliminating duplicative and arguably unnecessary coverage. The statute provides:

A health care provider who is qualified for coverage under the [health care stabilization] fund shall have no vicarious liability or responsibility for any injury or death arising out of the rendering of or the failure to render professional services inside or outside this state by any other health care provider who is also qualified for coverage under the fund. The provisions of this subsection shall apply to all claims filed on or after July 1, 1986.⁵⁴

In *Leiker v. Gafford*,⁵⁵ the supreme court indicated that the statute applies only to actions that arose after the effective date of the statute.⁵⁶ In *Martindale v. Tenny*,⁵⁷ however, the court held that interpretation to be clearly inconsistent with the unambiguous provision that the statute applied to claims "filed on or after" July 1, 1986.⁵⁸ The court then held that a written request to have a medical malpractice screening panel convened constitutes "filing" the claim for purposes of the date on which vicarious liability was abolished.⁵⁹

The statute abolishes vicarious liability of a health care provider only when the health care provider and its negligent employee are both qualified for coverage under the health care stabilization fund. In *Sharpley v. Roberts*,⁶⁰ one of the plaintiff's kidneys failed and had to be

54. KAN. STAT. ANN. § 40-3403(h) (1994). In *Bair v. Peck*, 248 Kan. 824, 811 P.2d 1176 (1991), the supreme court upheld this statute against claims that it violated the guarantees of equal protection, a right to jury trial, and due process in the state constitution. *Id.* at 834, 836, 844, 811 P.2d at 1185, 1186, 1191.

55. 245 Kan. 325, 778 P.2d 823 (1989).

56. *Id.* at 358, 778 P.2d at 846.

57. 250 Kan. 621, 829 P.2d 561 (1992).

58. *Id.* at 628, 829 P.2d at 566.

59. *Id.* at 633, 829 P.2d at 569.

60. 249 Kan. 286, 816 P.2d 390 (1991).

surgically removed.⁶¹ The plaintiff alleged that first Dr. Sharples and then Dr. Mau were negligent in not properly diagnosing and treating a kidney stone after the plaintiff complained about blood in his urine. Dr. Mau, who was a member of Urology Associates, died prior to the litigation and the plaintiff filed his action against Urology Associates rather than Dr. Mau's estate. The plaintiff alleged only vicarious liability, and not any independent claim of negligence, against Urology Associates. The supreme court held that section 40-3403(h) barred the vicarious liability action against Urology Associates.⁶²

The court reasoned that section 40-3403(c) obligates the fund to pay a judgment or settlement against a resident inactive health care provider. Section 40-3401(g) defines an inactive health care provider to include one whose coverage was not renewed because of death. Thus, the estate of Dr. Mau qualified for coverage under the fund. Accordingly, because all the preconditions of section 40-3403(h) were met, Dr. Mau's employer was not subject to vicarious liability.⁶³

c. Medical Malpractice Screening Panels⁶⁴

In medical malpractice claims, either party may file a memorandum requesting the district court to appoint a medical malpractice screening panel to review the claim, regardless of whether it is formalized by a petition. If a petition has been filed and neither party has requested a screening panel, the district judge may in his discretion order a screening panel.⁶⁵ Once the request is made, the court will appoint an attorney to chair the panel and each party will select one health care provider. A third health care provider will be selected by agreement of the parties⁶⁶ or, if they fail to agree, by the court.⁶⁷ The parties will then submit materials relevant to whether the defendant health care provider breached the relevant standard of care and, if so, whether the breach caused the patient's injury.⁶⁸ After meeting in camera to consider the materials, the

61. *Id.* at 288, 816 P.2d at 392-93.

62. *Id.* at 291, 816 P.2d at 394.

63. *Id.*

64. The provisions governing medical malpractice screening panels in the Public Health Chapter, Kansas Statutes Annotated sections 65-4901 to 65-4908, are substantially duplicated in the Civil Procedure Chapter, Kansas Statutes Annotated sections 60-3501 to 60-3509. The cases to date formally refer to the version of these statutes located in the Public Health Chapter. The survey will do the same.

65. KAN. STAT. ANN. § 65-4901 (1994 & Supp. 2000).

66. *Id.*

67. *Id.* § 65-4902.

68. KAN. STAT. ANN. § 65-4903 (1994).

panel will issue a report detailing its decision.⁶⁹ The report is not binding, but it may be admitted into evidence in any subsequent litigation.⁷⁰

When a screening panel is requested before the filing of a petition, the memorandum of request tolls the statute of limitations for the medical malpractice action. The limitations period commences running again thirty days after the panel has issued its written report.⁷¹ During the survey period, the supreme court twice addressed the operation of the tolling provision. In *Lawless v. Cedar Vale Regional Hospital*,⁷² a patient in the hospital's alcoholic treatment unit developed an alcohol-induced psychosis, and had to be restrained and medicated.⁷³ However, he had access to a cigarette lighter and suddenly lit his clothing on fire. He died the next day from his injuries. Fifty days before the expiration of the statute of limitations for a medical malpractice claim, the attorney for his heirs requested a medical malpractice screening panel. When the parties could not agree upon the third health care provider, the court appointed one to the panel. However, that member did not attend the meeting scheduled to discuss the claim and the panel issued a report based on the review of the two health care providers who attended. The report concluded that the hospital did not breach any duty owed to the decedent. The claimants filed survival and wrongful death claims based on medical malpractice 107 days after the panel issued its report.⁷⁴

The supreme court affirmed the trial court's dismissal of the action on the grounds of the statute of limitations. The court reasoned that a screening panel missing one of its three health care providers is not in compliance with the statute, but noncompliance rendered the panel's report only voidable, not void.⁷⁵ The claimants had not challenged the validity of the report in court within thirty days after the panel issued the report. Had they done so, the statute of limitations would have remained tolled until a proper panel was convened and issued a report. Failure to challenge the validity of the report meant that the tolling period ended thirty days after the report was issued, and fifty days thereafter the limitations period expired. The holding is somewhat harsh, because the statute provides no procedure controlling this situation. Nevertheless, an

69. KAN. STAT. ANN. § 65-4904(a) (1994 & Supp. 2000).

70. *Id.* § 65-4904(c).

71. KAN. STAT. ANN. § 65-4908 (1994).

72. 252 Kan. 1064, 850 P.2d 795 (1993).

73. *Id.* at 1065, 850 P.2d at 796.

74. *Id.* at 1064-65, 850 P.2d at 796.

75. *Id.* at 1070-72, 850 P.2d at 799-801.

attorney should appreciate that the limitations period could expire in this situation and therefore take steps to protect the client.⁷⁶

In other contexts, Kansas courts have held that tolling provisions do not extend time under a statute of repose. That view was limited in *See v. Hartley*,⁷⁷ where the supreme court held that the tolling authorized by the six-month savings statute is effective against a statute of repose if the initial complaint has been filed within the repose period.⁷⁸ This rationale raises doubt about the effectiveness of the tolling of a medical malpractice claim if the screening panel does not issue its report until after expiration of the four-year repose period for medical malpractice actions in Kansas Statutes Annotated section 60-513(c). In *Martindale v. Tenny*,⁷⁹ however, the court held that the motion to appoint a screening panel for a medical malpractice matter not yet formally filed constitutes a sufficient "filing" to determine whether the action was filed before or after the effective date of the abolition of vicarious liability in certain medical malpractice actions.⁸⁰ Similarly, a "filing" in the form of a request for a screening panel made prior to the expiration of the four-year medical malpractice statute of repose should presumably be effective against that statute of repose. This interpretation would also reinforce the underlying policy of encouraging parties to use screening panels before commencing formal litigation.

By statute, the costs of conducting a medical malpractice screening panel "shall be paid by the side in whose favor the majority opinion is written," but if the panel is unable to make a recommendation, the sides shall divide the costs.⁸¹ In *Johnson v. Mehta*,⁸² Johnson requested a screening panel in a dispute against a doctor and a hospital. The trial court required the plaintiff to prepay one-half of the costs (\$625) as a condition precedent to convening a panel.⁸³ The supreme court reversed, holding that the statute explicitly directs the assessment of costs and that the trial court has no discretion to allocate costs in a different manner. The court recognized that trial courts have inherent power to act to prevent abuse of legal process, but then noted that the plaintiff had not

76. Admittedly, an attorney might not anticipate the precise procedure to employ to continue the tolling period. However, having already prepared a submission of the case for the screening panel, the attorney should have little difficulty filing a medical malpractice action shortly after the panel issues its report.

77. 257 Kan. 813, 896 P.2d 1049 (1995).

78. *Id.* at 821, 896 P.2d at 1054-55.

79. 250 Kan. 621, 829 P.2d 561 (1992).

80. *Id.* at 633, 829 P.2d at 569.

81. KAN. STAT. ANN. § 65-4907(b) (1992).

82. 266 Kan. 1060, 974 P.2d 597 (1999).

83. *Id.* at 1062, 974 P.2d at 599.

abused the screening panel process in any manner.⁸⁴

C. *Legal Malpractice*

Legal malpractice, like medical malpractice, is a form of "professional negligence" that is evaluated by a professional standard of care. To establish a legal malpractice claim, a plaintiff (typically a former client of the defendant) must prove a breach of the professional standard of care and causation.⁸⁵ Occasional legal malpractice cases have been litigated in the Kansas courts, although for the most part there is nothing particularly unique or exceptional about the Kansas law that has developed in this area. Questions arising in this context have included the scope and nature of the attorney's duty, as well as the trigger date for the running of the statute of limitations on such claims.

*McConwell v. FMG, Inc.*⁸⁶ raised the question of a lawyer's duty to keep the client informed of developments concerning possible settlement of litigation. In this case, the clients alleged that the attorney failed to inform them of a substantial settlement offer made by the other side.⁸⁷ The court of appeals held that the situation created a jury question on the issue whether the lawyer had breached his professional duty to the client.⁸⁸ Although the court's holding makes sense in a general way, it obviously can create problems in the great variety of circumstances that might confront lawyers attempting to settle cases on behalf of their clients. For example, there may be a causation problem when a client, after the fact, asserts that it would have chosen a particular course of action had it known of a different settlement offer.

Another example is *Bergstrom v. Noah*,⁸⁹ a legal malpractice case that arose out of an initial antitrust suit the legal malpractice plaintiffs hired the defendant attorneys to pursue. The supreme court rejected the argument that a lawyer or firm has an absolute defense to liability if the action taken on the client's behalf is supported by probable cause.

84. *Id.* at 1064-65, 974 P.2d at 600.

85. *See, e.g.,* *Key v. Hein, Ebert & Weir, Chtd.*, 265 Kan. 124, 960 P.2d 746 (1998) (reversing summary judgement for defendant law firm for negligence in prosecuting false imprisonment case); *Rice v. Barker & Brunch, P.C.*, 25 Kan. App. 2d 797, 797-98, 972 P.2d 786, 786-87 (1998) (finding no legal malpractice claim where the plaintiff-client conceded that he would have been convicted even absent the attorney-defendant's alleged malpractice).

86. 18 Kan. App. 2d 839, 861 P.2d 830 (1993).

87. *Id.* at 843, 861 P.2d at 835.

88. *Id.* at 848-49, 861 P.2d at 838.

89. 266 Kan. 847, 974 P.2d 531 (1999).

Rather, the court concluded that the existence of probable cause to file the suit is only "a factor to be considered."⁹⁰ Nonetheless, the court held that the clients did not have a valid legal malpractice claim in this case, relying on the doctrine that attorneys do not commit legal malpractice through mere "errors of judgment." Noting that the legal experts for both sides disagreed on whether there was a legitimate basis for an antitrust claim under Kansas law, the supreme court concluded:

While the exception for an error in judgment in legal malpractice actions is a narrow one and should not be employed where the issue is settled and can be identified through ordinary research and investigative techniques, the exception applies in a case such as this, where the law is unclear, unsettled by case law and is an issue or issues upon which reasonable doubt may well be entertained by informed counsel.⁹¹

A sometimes tricky question is *when* a cause of action for legal malpractice accrues for statute of limitation purposes. In *Morrison v. Watkins*,⁹² for example, the Kansas Court of Appeals explained that, "[u]nder the continuous representation rule, the client's cause of action does not accrue until the attorney-client relationship is terminated."⁹³ Relying on *Pittman v. McDowell, Rice & Smith, Chartered*,⁹⁴ the court further observed that the purpose of the continuous representation rule is to benefit both the client and the attorney by allowing the attorney to attempt to correct or mitigate damages caused by an attorney error, while also permitting the client to refrain from discharging or suing the attorney immediately upon discovery of the error.⁹⁵ The court of appeals then concluded that the client's cause of action in this case did not accrue until the attorney ceased serving as a trustee towards the client, even though any allegedly erroneous legal advice occurred years earlier.⁹⁶

In a related context, the court of appeals in *Gansert v. Corder*⁹⁷ concluded that the attorney-client relationship terminates for limitations purposes on the day a client informs the attorney that the attorney is fired.⁹⁸ The court rejected the argument that a cause of action does not accrue until the district court formally grants an attorney's motion to

90. *Id.* at 875, 974 P.2d at 554.

91. *Id.* at 880, 974 P.2d at 557.

92. 20 Kan. App. 2d 411, 889 P.2d 140 (1995).

93. *Id.* at 417, 889 P.2d at 146 (citing *Pancake House, Inc. v. Redmond*, 239 Kan. 83, 87, 716 P.2d 575, 579 (1986)).

94. 12 Kan. App. 2d 603, 752 P.2d 711 (1988).

95. *Morrison*, 20 Kan. App. 2d at 417, 889 P.2d at 146.

96. *Id.* at 421, 889 P.2d at 148.

97. 26 Kan. App. 2d 151, 980 P.2d 1032 (1999).

98. *Id.* at 155, 985 P.2d at 1035.

withdraw from the case. Further, the supreme court has made clear that when a legal malpractice action involves claims arising out of litigation, the statute of limitations generally does not begin to run until the underlying litigation is resolved.⁹⁹ There may be an exception, however, for cases in which it becomes "obvious" to the malpractice plaintiff prior to the conclusion of the litigation that the attorney has committed malpractice.¹⁰⁰

Generally speaking, an attorney owes a duty only to the client, and not to others who may be affected by the attorney's actions or decisions on behalf of the client.¹⁰¹ Historically, the attorney's potential liability was limited by the concept of "privity" with the client. Some courts have held, however, that an attorney may owe a duty to a third party when that party is the intended beneficiary of work the attorney performs for the client, such as when the client retains the attorney to create a trust or draft a will in favor of specific beneficiaries known to the attorney.¹⁰² This is the one respect in which there was a notable development in legal malpractice law in Kansas since the last survey.

In *Pizel v. Zuspahn*,¹⁰³ the supreme court adopted a more expansive view of the parties to whom an attorney may owe an enforceable tort duty. In *Pizel*, two attorneys were sued by the potential beneficiaries of an inter vivos trust that the attorneys created for a client. The attorneys argued that the potential beneficiaries lacked privity and therefore had no malpractice claim against them. The supreme court held that privity is not necessarily required, declaring that whether a non-client has a malpractice claim against an attorney depends on the balancing of the following factors, which the court adopted from California law: (1) the extent to which the transaction was intended to affect the plaintiffs; (2) the foreseeability of harm to the plaintiffs; (3) the degree of certainty that the plaintiffs suffered injury; (4) the closeness of the connection between the attorney's conduct and the injury; (5) the policy of preventing future harm; and (6) the burden on the profession of the recognition of liability

99. *Dearborn Animal Clinic, P.A. v. Wilson*, 248 Kan. 257, 270, 806 P.2d 997, 1006 (1991).

100. *Id.*

101. See, e.g., *Nelson v. Miller*, 227 Kan. 271, 289, 607 P.2d 438, 451 (1980) (holding that an attorney cannot be held liable to his client's adversary); *Young v. Hecht*, 3 Kan. App. 2d 510, 514, 597 P.2d 682, 687 (1979) ("An attorney cannot, in the absence of special circumstances, be held liable for the consequences of his professional negligence to anyone other than his client.").

102. See, e.g., *Lucas v. Hamm*, 364 P.2d 685, 689 (Cal. 1961) (holding that an attorney can be held liable to beneficiaries of a will negligently drafted by the attorney).

103. 247 Kan. 54, 795 P.2d 42, *modified*, 247 Kan. 699, 803 P.2d 205 (1990).

under the circumstances.¹⁰⁴ Although this approach raises the possibility of significant new liability for attorneys, the reported decisions since *Pizel* do not suggest there has been a flood of legal malpractice claims brought by non-clients.¹⁰⁵

Finally, because of the unique quality of legal services, the personal nature of the attorney's duty to the client, and the confidentiality of the attorney-client relationship, the supreme court has held that legal malpractice claims are not assignable.¹⁰⁶

D. Proof of Negligence

1. Negligence Per Se

In Kansas, the doctrine of negligence per se appears to differ from the negligence per se doctrine recognized in every other state. In Kansas, the doctrine recognizes the creation of an individual cause of action from a criminal statute or administrative regulation. An individual cause of action does not arise from every statute or regulation, but only from those which were enacted or promulgated with legislative intent to create an individual cause of action as opposed to a statute or regulation intended merely to protect the safety or welfare of the public at large.¹⁰⁷ In every other state, the doctrine refers to the judicial process in negligence actions of taking a specific standard of care from a criminal statute or ordinance or from an administrative regulation that is in fact silent about issues of civil liability.¹⁰⁸

The Kansas version of the doctrine poses little difficulty when a statute or ordinance expressly provides that it shall not be the basis for an individual cause of action. For example, in *Watkins v. Hartsock*,¹⁰⁹ the

104. 247 Kan. at 67-68, 795 P.2d at 51; see also Mike Callahan, Comment, *Weakened Defenses to Nonclient Malpractice Claims or Jeopardizing Affordable Trusts*, 34 WASHBURN L.J. 599 (1995) (analyzing *Pizel*); John Mazurek, Note, *Liability of an Attorney to Third Party Beneficiaries for Legal Malpractice in Kansas: The Death of Privity*, 30 WASHBURN L.J. 501, 514-18 (1991) (discussing *Pizel* and other cases).

105. Only one reported case appears to have applied the multi-criteria balancing test adopted in *Pizel*, and even so, the court of appeals rejected a claim of liability by non-clients. See *Wilson-Cunningham v. Meyer*, 16 Kan. App. 2d 197, 201-05, 820 P.2d 725, 728-30 (1991) (applying *Pizel*).

106. *Bank IV Wichita v. Arn, Mullins, Unruh, Kuhn & Wilson*, 250 Kan. 490, 498-99, 827 P.2d 758, 764-65 (1992).

107. See *Greendale v. Bd. of County Comm'rs*, 241 Kan. 802, 804, 740 P.2d 606, 607-08 (1987) (affirming dismissal of terminated county employee's claim that commissioners violated state accounting rules).

108. See generally RESTATEMENT (SECOND) OF TORTS §§ 285, 288, 288A (1965) (setting out standards for applying legislative enactment as the standard of care).

109. 245 Kan. 756, 783 P.2d 1293 (1989).

plaintiffs' three-month-old child was killed in a two-car collision, and the defendant alleged that the plaintiffs were comparatively negligent in failing to secure the child properly in her child safety seat.¹¹⁰ The court rejected this defense because the version of the Child Passenger Safety Act in effect at the time of the accident provided: "Failure to employ a child passenger restraint system shall not constitute negligence *per se*."¹¹¹ Similarly, in *Jack v. City of Wichita*,¹¹² the plaintiff homeowners discovered that their home was built in a flood plain, causing them to suffer economic loss.¹¹³ They filed an action against the City of Wichita for alleged negligence in failing to comply with a city code requirement that the city review the developer's plans to ensure that homes in the subdivision would be reasonably safe from flooding.¹¹⁴ The court of appeals affirmed dismissal of this action because the Wichita Flood Damage Prevention Code expressly provided that it did not create any liability on the part of the city or any of its officers or employees.¹¹⁵

Conversely, little difficulty arises when a statute or ordinance reflects a legislative intent that its violation shall be the basis for civil liability. For example, in *Dietz v. Atchison, Topeka & Santa Fe Railway Co.*,¹¹⁶ the plaintiffs' decedent was killed in a truck-train collision when he drove his truck into a railroad crossing without complying with a regulation requiring a common carrier to first stop and then look and listen for oncoming trains.¹¹⁷ A statute expressly provided for an individual action for treble damages for harms suffered as the result of violations of regulations governing public utilities and common carriers.¹¹⁸ In dictum, the court of appeals opined that this statute would provide for comparative negligence *per se* based on a violation of the regulation, but concluded that comparative negligence was unnecessary

110. *Id.* at 757, 783 P.2d at 1294.

111. KAN. STAT. ANN. § 8-1346 (1991). In 1989, the Child Passenger Safety Act, Kansas Statutes Annotated sections 8-1343 to 8-1347, was amended to provide: "Evidence of failure to secure a child in a child passenger safety restraining system or a safety belt under the provisions of K.S.A. 8-1344, and amendments thereto, shall not be admissible in any action for the purpose of determining any aspect of comparative negligence or mitigation of damages." KAN. STAT. ANN. § 8-1345(d) (Supp. 2000).

112. 23 Kan. App. 2d 606, 933 P.2d 787 (1997).

113. *Id.* at 607, 933 P.2d at 789.

114. *Id.* at 610, 933 P.2d at 791.

115. *Id.* at 611, 933 P.2d at 792.

116. 16 Kan. App. 2d 342, 823 P.2d 810 (1991).

117. *Id.* at 344, 823 P.2d at 813.

118. KAN. STAT. ANN. § 66-176 (1992 & Supp. 2000); *Dietz*, 16 Kan. App. 2d at 346-47, 823 P.2d at 814-15.

because the decedent was the sole proximate cause of the accident.¹¹⁹

However, clear expressions of legislative intent in favor of a civil action based on a violation of a criminal statute or administrative regulation are rare, and courts occasionally attempt to find such an intent where none likely exists. Thus, in *Schlobohm v. United Parcel Service, Inc.*,¹²⁰ the plaintiff was injured when she tripped over a nearly three-inch high threshold in an entranceway that violated a city building code provision imposing a one-inch maximum elevation.¹²¹ The supreme court reversed the court of appeals's refusal to admit the code provision as evidence of negligence because the code provided that any penalty for violation of the code should not preclude any civil action.¹²² Such a provision is essentially unnecessary because it does not affirmatively authorize civil actions based on code violations and the general rule is that criminal or administrative liability does not preclude civil liability,¹²³ nor does it provide that any civil action may be based on a code violation.

The difficulty with the Kansas version of negligence per se becomes clear in cases in which the legislature is silent about what effect, if any, a particular criminal statute or ordinance or administrative regulation should have on civil liability. Without any legislative guidance, a court cannot fairly conclude that the legislature intended a statute, ordinance, or regulation to create an individual cause of action. Thus, in *Kansas State Bank & Trust Co. v. Specialized Transportation Services, Inc.*,¹²⁴ the supreme court refused to recognize an individual right of action created by a statute requiring school officials to report suspicions of child abuse, because the statute lacked any indication of a legislative intent to create such a right of action.¹²⁵

119. *Dietz*, 16 Kan. App. 2d at 347, 823 P.2d at 815. This dictum was unfortunate because it implied that Kansas Statutes Annotated section 66-176 would support a treble damages personal injury action, which is unprecedented not only in Kansas, but also in every other state in the country. Treble damage statutes of this nature have historically sought to provide a meaningful remedy for economic violations usually too minor to provide any incentive for private litigation. Thus, the Kansas statute was first enacted when the violations at issue were intrastate truck tariff violations, and other states had similar treble damage provisions for the violation of laws requiring the return of a tenant's security deposit, or for banks charging usurious interest. Courts should be careful to avoid dicta that may introduce unnecessary confusion into the law.

120. 248 Kan. 122, 804 P.2d 978 (1991).

121. *Id.* at 123, 804 P.2d at 979-80.

122. *Id.* at 127, 804 P.2d at 982.

123. For example, payment of a fine by a driver who commits the criminal violation of exceeding the speed limit on the highway would not immunize the driver against a negligence action by one who was injured by his negligence in driving at an excessive speed.

124. 249 Kan. 348, 819 P.2d 587 (1991).

125. *Id.* at 373, 819 P.2d at 604.

However, the supreme court's more recent decision in *Kerns v. G.A.C., Inc.*¹²⁶ may signal a shift to the more commonly accepted doctrine of negligence per se. In that case, a six-year-old child climbed over a five-foot-high chain-link fence to retrieve his cap and accidentally fell into a swimming pool that had been closed at the end of the summer season. Some muddy water and leaves had accumulated in the bottom of the pool, and the child nearly drowned and suffered serious injury.¹²⁷ Various city code ordinances regulated the condition and maintenance of swimming pools. While many of these ordinances did not apply to pools closed during the off-season, the court held that one ordinance prohibiting muddy or otherwise unclear water that could impair the ability to see a person underwater applied to a closed pool, and could be the basis for an instruction on negligence per se.¹²⁸

The court reasoned that the absence of an express legislative intent does not preclude creation of an individual right of action, because the ordinance clearly intended to protect a special class of persons, i.e., persons gaining access to a closed pool and requiring rescue.¹²⁹ The court implied that earlier in *Schlobohm* it had indicated that the intent of the statute to protect a special class of persons was sufficient to satisfy the legislative intent requirement for negligence per se.¹³⁰ However, *Schlobohm* did not employ as its rationale the protection of a special class of persons, but rather went further and found evidence of express legislative intent to create an individual right of action.¹³¹ Moreover, the ordinance in *Kerns*, which sought to protect persons in need of rescue from swimming pools as a special class of persons for purposes of negligence per se cannot be distinguished from the statute in *Specialized Transportation Services*, which sought to protect children from abuse, but was characterized by the court as a statute merely protecting the public at large.¹³²

Nevertheless, the *Kerns*-Restatement approach to negligence per se seems preferable to the traditional Kansas approach based on express

126. 255 Kan. 264, 875 P.2d 949 (1994).

127. *Id.* at 267, 875 P.2d at 954.

128. *Id.* at 281, 875 P.2d at 961-62.

129. *Id.* at 282, 875 P.2d at 962.

130. *See id.* (explaining that "[v]iolation of the ordinances by G.A.C. could support a claim of negligence per se. Two of the ordinances here . . . are analogous to those in *Schlobohm*, and the rationale of *Schlobohm* is sufficient to affirm the trial court on this issue.").

131. *Schlobohm v. United Parcel Serv., Inc.*, 248 Kan. 122, 127, 804 P.2d 978, 982 (1991).

132. *Kan. State Bank & Trust Co. v. Specialized Transp. Servs.*, 249 Kan. 348, 372-73, 819 P.2d at 587, 604 (1991).

legislative intent. The traditional Kansas approach seems largely unnecessary. This traditional approach is analogous to the approach used by courts to decide when an individual, implied cause of action may be based upon a public nuisance or on the violation of a federal statute. In both instances, the issue is framed as whether the legislature intended to provide an individual cause of action or merely to protect the general public. In both instances, the issue is whether a cause of action that previously did not exist should now be recognized. No special doctrine is needed for a state court to recognize a new statutory cause of action expressly created by the state legislature, or to honor a state legislative mandate that certain prescribed or proscribed conduct shall not give rise to an individual cause of action.

By contrast, the *Kerns-Restatement* approach is a mechanism that would bring more precision to negligence actions by incorporating into the requirement of reasonable care under all the circumstances a specific standard of conduct from a criminal statute or ordinance, or from an administrative regulation that is wholly silent about its impact on civil litigation. Under this approach, the court decides whether to take a standard from a statute, ordinance, or regulation.¹³³ The doctrine recognizes that legislative silence means that the legislature in all likelihood did not consider the potential impact of its legislation on negligence actions. Legislative intent is not entirely irrelevant in this process. In determining when courts should take a specific standard of care from a statute, ordinance, or regulation, courts have developed a three-part test: First, does the statute, ordinance, or regulation protect a particular class of persons, and is the plaintiff in that class? Second, does the statute, ordinance, or regulation seek to prevent a particular type of harm, which is the type of harm suffered by the plaintiff? Third, is the violation of the statute, ordinance, or regulation a proximate cause of the harm suffered by the plaintiff?¹³⁴

Viewed in this manner, negligence per se is simply a doctrine of judicial economy. For example, assume an accident was caused in part by a driver traveling at a speed in excess of the posted speed limit.

133. See RESTATEMENT (SECOND) OF TORTS § 285 (1965) (stating that "The standard of conduct of a reasonable person may be . . . (b) adopted by the court from a legislative enactment or administrative regulation which does not so provide . . .") (emphasis added).

134. For a good example of the application of this test, see *Stachniewicz v. Mar-Cam Corp.*, 488 P.2d 436, 438 (Or. 1971); see also *Restatement (Second) of Torts* § 288 (1965) ("the court will not adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose is found to be exclusively . . . (b) to secure to individuals the enjoyment of rights or privileges to which they are entitled only as members of the public . . .").

Under the generic reasonable care standard, the driver can introduce evidence to suggest that he is a skilled driver able to operate a vehicle safely at the higher speed. Under negligence per se that evidence would be excluded and the posted speed limit would define the upper limit of reasonable speed unless the driver has a specific, legally recognized excuse for his higher speed.¹³⁵

Finally, courts generally consider violations of licensing statutes inappropriate for negligence per se. Thus, in *Cullip v. Domann*,¹³⁶ a teenaged hunter was not negligent per se simply because he was hunting in violation of a statute that required him to pass a hunting safety course before hunting on the private land of another.¹³⁷ Otherwise, the hunter could have been held liable even though he had in fact acted in an entirely reasonable manner at all times.¹³⁸

2. *Res Ipsa Loquitur*

Res ipsa loquitur is a doctrine that permits the proof of negligence by circumstantial evidence. Traditionally, the elements of *res ipsa loquitur* have been (1) an accident that does not normally occur in the absence of negligence, (2) the defendant's exclusive custody and control over the instrumentality causing the injury, and (3) the plaintiff's absence of contributory negligence.

Whether an accident is one that normally would not occur in the absence of negligence appears to be initially a question of law for the court. In *Harmon v. Koch*,¹³⁹ the plaintiff was injured when his car collided with some calves that had escaped from the defendant's holding pens and wandered onto a road.¹⁴⁰ The court of appeals affirmed the trial court's finding that the defendant was not negligent in allowing the

135. In this hypothetical a valid excuse might be an emergency requiring him to transport a seriously injured person to the hospital. This excuse would not be available for the driver travelling at a higher speed for no reason other than personal preference, and when excused, the higher speed would still be subject to the standard of reasonableness under all the circumstances. For a listing of the recognized excuses to negligent actions, see *Restatement (Second) of Torts* § 288A (1965).

136. 266 Kan. 550, 972 P.2d 776 (1999).

137. *Id.* at 555-56, 972 P.2d at 782.

138. *Cullip* was further complicated by the fact that the unlicensed teenager was not the one who accidentally shot the plaintiff. Rather, he was simply one of a group of three teenagers hunting together at the time of the accident, and the plaintiff's theory was that the three teenagers should be jointly and severally liable under the concerted action doctrine. *Cullip*, 266 Kan. at 554, 972 P.2d at 781. For further discussion, see *infra* Part IV.B.

139. 24 Kan. App. 2d 149, 942 P.2d 669 (1997).

140. *Id.* at 150, 942 P.2d at 671.

calves to escape.¹⁴¹ The evidence showed that the cattle pens were built in the customary manner, that the calves were calm when left in the pens, that something apparently spooked the cattle, and that properly built pens will not necessarily hold cattle when cattle become spooked.¹⁴² The court of appeals affirmed the trial court's decision not to apply *res ipsa loquitur*.¹⁴³ Relying on a line of Kansas livestock cases, the court refused to view the escape of livestock as something that ordinarily results from negligence.¹⁴⁴

The second element of *res ipsa loquitur* is not satisfied when the cause of an accident is one of two or more equally likely occurrences, only one of which is within the defendant's control. In *Frans v. Gausman*,¹⁴⁵ the plaintiff's autistic child died following respiratory arrest during treatment at the defendant's dental office. The evidence suggested two possible causes of her respiratory arrest: it could have been caused by something done during dental treatment, which would support an inference of the defendant's negligence, or by the excessive codeine found in her body during an autopsy, which would indicate the defendant's innocence.¹⁴⁶ The court of appeals held that this uncertainty about the cause of the respiratory arrest justified the trial court's refusal to give a *res ipsa loquitur* instruction.¹⁴⁷

On the other hand, the mere possibility that something other than an instrumentality in the defendant's control may have caused the plaintiff's accident does not necessarily negate the applicability of *res ipsa loquitur*. In *Martin v. Board of Johnson County Commissioners*,¹⁴⁸ the plaintiff was sitting on a manhole cover in her yard while trimming weeds when the manhole collapsed.¹⁴⁹ The plaintiff fell into the manhole and was injured.¹⁵⁰ The county's expert witness conceded that the bricks in the manhole had deteriorated, but he also opined about the possibility of other causes of the collapse.¹⁵¹ The court correctly held that the mere possibility of other causes does not prevent the application of *res ipsa loquitur*.¹⁵² Otherwise, any suggestion of some other cause, regardless of

141. *Id.* at 152, 942 P.2d at 672-73.

142. *Id.* at 150-51, 942 P.2d at 671-72.

143. *Id.* at 153, 942 P.2d at 673.

144. *Id.* at 154, 942 P.2d at 673.

145. 27 Kan. App. 2d 518, 6 P.3d 432 (2000).

146. *Id.* at 518, 521-22, 6 P.3d at 437.

147. *Id.* at 526-27, 6 P.3d at 439.

148. 18 Kan. App. 2d 149, 848 P.2d 1000 (1993).

149. *Id.* at 151, 848 P.2d at 1003.

150. *Id.*

151. *Id.* at 161, 848 P.2d at 1009.

152. *Id.* at 159, 848 P.2d at 1008.

how unlikely or preposterous, would negate the doctrine. The issue is not whether other possible causes exist, but rather whether those other possible causes are likely enough to prevent an inference that the defendant's negligence caused the accident.

Finally, in both *Frans* and *Harmon* the court noted that the requirement that the plaintiff not be contributorily negligent must be modified to incorporate comparative negligence principles.¹⁵³ Similar comments trace back more than twenty years,¹⁵⁴ but the courts have never elaborated on this observation. The first two elements of *res ipsa loquitur* provide all that is needed for a circumstantial evidence test of negligence. The first element gives rise to an inference that somebody must have been negligent, and the second element gives rise to an inference that the defendant is the "somebody" who was negligent. The courts should simply delete the third element and leave the plaintiff's contributory negligence, if any, to an application of the comparative negligence statute.¹⁵⁵

E. Negligent Entrustment

In Kansas, the doctrine of negligent entrustment imposes negligence liability on one who has control over a dangerous instrumentality and entrusts it to another even though the entrustor knows or should know that the other is incompetent, habitually careless, or reckless. Although most cases involve entrustment of automobiles, the doctrine also applies to other dangerous instrumentalities.

Some confusion about the essence of the doctrine arose in *Mid-Century Insurance Co. v. Shutt*.¹⁵⁶ In that case, the insured parents' daughter was driving their automobile when she struck and seriously injured a young child. The parents' insurance policy limited payment to \$100,000 per occurrence, and the insurance company paid the \$100,000 policy limit in settlement of the claim against the daughter. Thereafter, the plaintiff sued the parents for negligent entrustment of the automobile to their daughter on the theory that the negligent entrustment of the automobile was a separate "occurrence" from the daughter's act of

153. *Frans v. Gausman*, 27 Kan. App. 2d 518, 526, 6 P.3d 432, 439 (2000); *Harmon v. Koch*, 24 Kan. App. 2d 149, 153, 942 P.2d 669, 673 (1997).

154. See *Arnold Assocs., Inc. v. City of Wichita*, 5 Kan. App. 2d 301, 309, 615 P.2d 814, 820 (1980) ("The requirement that the plaintiffs not be contributorily negligent must be modified today to incorporate the relevant comparative negligence principles.").

155. KAN. STAT. ANN. § 60-258a (1994).

156. 17 Kan. App. 2d 846, 845 P.2d 86 (1993).

negligent driving.¹⁵⁷ The court of appeals held that negligence and negligent entrustment are two separate legal theories, but that they combined into a single, sudden injury-causing event that was one "occurrence."¹⁵⁸

The court's holding was unnecessarily confusing. Negligent entrustment is simply a subcategory of negligence. There is a duty not to yield control of a dangerous instrumentality to one not capable of handling or using it carefully. Entrusting the instrumentality to an incompetent, reckless, or habitually careless person is a breach of that duty. When that person's handling or using the instrumentality in a reckless or careless manner proximately causes injury, the entrustor is liable for an act of negligence.¹⁵⁹ Thus, in *Shutt*, the plaintiff alleged two separate acts of negligence, one the entrustment by the parents and the other the driving by the daughter, but the two acts of negligence combined into one "occurrence" for purposes of insurance coverage.¹⁶⁰

The duty in a negligent entrustment case arises from the entrustor's control of the instrumentality and actual or constructive knowledge of the risk in entrusting it to an incompetent, reckless, or habitually careless person who would otherwise be unable to handle or use the instrumentality. Accordingly, in *Snodgrass v. Baumgart*,¹⁶¹ the court correctly held that one adult joint owner of an automobile cannot "entrust" it to the other adult joint owner, because each has a right of control over the instrumentality.¹⁶² Neither owner had a right of control that would authorize denying the use of the automobile to the other.¹⁶³

Finally, the duty in a negligent entrustment case is not breached by allowing the use of an automobile by one whose license to drive is restricted to certain uses. In *Davey v. Hedden*,¹⁶⁴ the defendant parents went on a trip, leaving their fourteen-year-old son Jon home unattended,

157. *Mid-Century Ins. Co. v. Shutt*, 17 Kan. App. 2d 846, 847, 845 P.2d 86, 87 (1993).

158. *Id.* at 851, 845 P.2d at 89.

159. *McCart v. Muir*, 230 Kan. 618, 623, 641 P.2d 384, 389 (1982).

160. 17 Kan. App. 2d at 850-51, 845 P.2d at 89. When the damages suffered in an accident exceed the maximum "per occurrence" coverage in a defendant's insurance policy, plaintiffs often try to define an injury as the culmination of a series of "occurrences" in an effort to avoid the maximum "per occurrence" limitation on insurance coverage. For examples of these efforts in Kansas and elsewhere, see *Wilson v. Ramirez*, 269 Kan. 371, 372-73, 2 P.3d 778, 781 (2000) (alleging five separate acts of negligence in a medical malpractice action, even though all acts related to a cancer misdiagnosis).

161. 25 Kan. App. 2d 812, 974 P.2d 604 (1999).

162. *Id.*, 974 P.2d at 607.

163. *Id.* at 816, 974 P.2d at 607-08; see also *Fletcher v. Anderson*, 27 Kan. App. 2d 276, 278-79, 3 P.3d 558, 561 (2000) (involving claim against driver's half-brother for alleged negligent entrustment of car to driver even though driver owned the car; case decided on other grounds).

164. 260 Kan. 413, 920 P.2d 420 (1996).

without specifically instructing him not to drive the family cars.¹⁶⁵ Jon let his friend Jason drive one of the parents' cars, and Jason then let another friend, Catherine, drive it. She lost control and hit a tree, seriously injuring Jason. Jon, Jason, and Catherine all had restricted licenses permitting them to drive only to school and to work. The supreme court affirmed a summary judgment in favor of the parents on Jason's negligent entrustment action.

The result is sound, although probably for the wrong reason. The majority of the court used a proximate cause rationale, holding that the minors' use of the car was an efficient cause that superseded any negligence of the parents in entrusting the car to their son.¹⁶⁶ The driver who caused the accident in *Davey* had consent from the immediate prior operator of the car, so any analogy to car theft is inappropriate.¹⁶⁷ Moreover, Kansas no longer views intervening criminal acts as automatically superseding.¹⁶⁸ Justice Larson's concurring opinion provides the better rationale. He found no negligent entrustment because there was no evidence that any defendant had knowingly entrusted the car to an incompetent or habitually careless driver.¹⁶⁹ All three minors had restricted drivers' licenses, which means that the law presumed them competent to drive a car. Although Catherine was not driving for an authorized purpose at the time of the accident, there was no evidence that

165. *Id.* at 415, 920 P.2d at 423.

166. *Id.* at 428, 920 P.2d at 430.

167. The supreme court relied on an analogy to *George v. Breisling*, 206 Kan. 221, 477 P.2d 983 (1970), in which the court held that when a defendant leaves the keys in the ignition of an unattended car, it is unforeseeable as a matter of law that a thief would steal a car, drive carelessly, and injure somebody. *Id.* at 227, 477 P.2d at 988. Yet the accident rate of thieves is 200 times that of lawful drivers. *Gaither v. Myers*, 404 F.2d 216, 222-23 (D.C. Cir. 1968). Moreover, there are nearly 200 reported opinions involving some variation of the key-in-ignition scenario. *See also* Cornelius J. Peck, *An Exercise Based Upon Empirical Data: Liability for Harm Caused by Stolen Automobiles*, 1969 WIS. L. REV. 909 (discussing studies and cases regarding stolen automobiles). No court has even explained how an accident scenario that happens over and over again with alarming frequency can be unforeseeable as a matter of law.

168. *See, e.g.,* *Long v. Turk*, 265 Kan. 855, 867, 962 P.2d 1093, 1100 (1998) (holding that son's criminal act of killing an individual did not cut off father's liability for negligent entrustment of the gun); *Siebert v. Vic Regier Builders, Inc.*, 253 Kan. 540, 548, 856 P.2d 1332, 1338 (1993) (holding that a business owner may be liable for negligence if he knew of the high risk of criminal activity); *Nero v. Kan. State Univ.*, 253 Kan. 567, 584, 861 P.2d 768, 780 (1993) (holding that a university could be liable for failing to prevent a student with a rape charge from attacking another student); *Kan. State Bank & Trust Co. v. Specialized Transp. Servs., Inc.*, 249 Kan. 348, 376, 819 P.2d 587, 606 (1991) (finding a school district negligent for failing to prevent bus driver from molesting student); *Citizens State Bank v. Martin*, 227 Kan. 580, 592, 609 P.2d 670, 679 (1980) (finding a bank could be liable for negligence for failing to prevent customer from using checks with erroneous magnetic bank codes).

169. 260 Kan. at 429, 920 P.2d at 431 (Larson, J., concurring).

she was not competent to drive the car. Accordingly, there was no negligent entrustment, and any issue concerning proximate cause was moot.

F. Dangerous Instrumentality

Closely related to negligent entrustment is the duty of the owner or possessor of a dangerous instrumentality to exercise reasonable care to prevent the instrumentality from getting into the possession of inappropriate persons. Negligent entrustment is premised on the incompetence or habitual carelessness of the specific individual to whom the instrumentality was entrusted, while the dangerous instrumentality doctrine is premised on the specific level of dangerousness of an instrumentality regardless of the individual characteristics of the particular user.

In *Long v. Turk*,¹⁷⁰ the defendant's seventeen-year-old son took the defendant's handgun from the home, drove around with it in his car, and shot through the window of another car, killing a passenger.¹⁷¹ The son was convicted of involuntary manslaughter. The gun and its hollow-point bullets were kept in a cabinet that the son had helped the defendant build. Some evidence indicated that the defendant had allowed his son to carry the gun on occasion for protection, and there was a dispute in the evidence whether the son had the defendant's permission to carry the gun on the day of the shooting. The decedent's mother brought a negligence action against the defendant for failing to keep the gun out of his son's possession.

In reversing a summary judgment for the defendant, the supreme court held that a question of fact existed whether the defendant had exercised the "highest degree of care" to keep a dangerous instrumentality out of a minor's possession.¹⁷² The court reasoned that a person having possession or control of a dangerous instrumentality has a duty to take reasonable measures to keep it out of the possession of any person who should not possess or control it.¹⁷³ The defendant's son was such a person, because Kansas law prohibits minors from possessing

170. 265 Kan. 855, 962 P.2d 1093 (1998).

171. *Id.* at 856-57, 962 P.2d at 1094.

172. *Id.* at 864, 962 P.2d at 1099.

173. *Id.* at 860-61, 962 P.2d at 1096-97. The court referred to this duty as the "highest degree of care," but from the overall context of the court's opinion it seems unlikely that the court intended any departure from the traditional reasonable care standard by the phrase "highest degree of care." *Id.* at 860, 962 P.2d at 1096. In all likelihood, "highest degree" is simply a way to emphasize that the considerable dangerousness of a weapon requires more in the way of precaution in order to exercise reasonable care.

guns with barrels shorter than twelve inches. Moreover, the foreseeability of the son's improper use of the gun was a question of fact, and the son's intervening criminal act does not as a matter of law supersede the defendant's liability.¹⁷⁴

The holding is sound. Generally, a parent's duty to control a child's conduct requires knowledge of a propensity of the child to engage in specific misconduct, as opposed to knowledge simply that the child is incorrigible.¹⁷⁵ The trial court found no evidence of the defendant's knowledge of such a specific propensity.¹⁷⁶ The supreme court rejected this characterization of the case. The duty to keep certain handguns out of the possession of minors is not limited to the parent-child relationship, but is general. The defendant had a duty to keep the gun out of his son's possession even if he believed his son was able to use the gun responsibly, and he had a duty to secure the gun so that it would not fall into the possession of any minor child, not just his son.¹⁷⁷ In other words, the breach of duty was the defendant's failure to secure the gun, not his failure to control his child. If the objective of the law is to keep such guns out of the possession of minor children, then the obligation should logically extend to all minor children, not just to those other than the owner's own minor children.

The supreme court clarified and perhaps extended its holding in *Long* in *Wood v. Groh*,¹⁷⁸ in which the defendants' fifteen-year-old son used a screwdriver to force open his father's gun cabinet, removed an unloaded pistol and some ammunition, and then started drinking beer, first while target shooting and then at a party where the pistol accidentally discharged and wounded a friend.¹⁷⁹ The supreme court held that the trial court erred in not using the "highest degree of care" standard to govern the father's storage of an unloaded pistol.¹⁸⁰ The supreme court noted that a jury could find a failure to use the highest degree of care because the father stored the pistol and the ammunition in

174. Compare this approach to the foreseeability of an intervening criminal act with the majority's analysis of the issue in *Davey v. Hedden*, 260 Kan. 413, 920 P.2d 420 (1996), discussed in the preceding subsection.

175. *Mitchell v. Wiltfong*, 4 Kan. App. 2d 231, 234, 604 P.2d 79, 82 (1979); RESTATEMENT (SECOND) OF TORTS § 316 (1965).

176. *Long*, 265 Kan. at 865, 962 P.2d at 1099. There was some evidence that the defendant knew of at least one prior inappropriate use of the gun by his son. It is unclear whether one prior incident is sufficient to prove a propensity for improper use of the gun.

177. *Id.* at 864, 962 P.2d at 1098-99.

178. 269 Kan. 420, 7 P.3d 1163 (2000).

179. *Id.* at 422, 7 P.3d at 1166-67.

180. *Id.* at 434, 7 P.3d at 1173.

the same cabinet, the cabinet could be easily opened with a screwdriver, and the father knew his son had taken the pistol target shooting on other occasions.

The court's reasoning is unclear in one respect. The supreme court emphasized that an important difference exists between the reasonable care standard used by the trial court and the "highest degree of care" standard defining the duty to control dangerous weapons. Yet the court never explained how the "highest degree of care" differs from reasonable care. An examination of the "highest degree of care" standard in the high power line cases in Kansas seems to suggest that "highest degree of care" is simply another way to describe a reasonable care standard in which the heightened dangerousness of the instrumentality requires commensurately heightened precautions in order to satisfy reasonable care under all the circumstances.¹⁸¹ If that is in fact an accurate analysis, the use of a reasonable care standard in *Wood* would probably have been harmless error. If the "highest degree of care" is in fact a different standard, it is incumbent upon the court to explain *how* it differs from reasonable care in order to provide guidance to trial judges and attorneys handling such cases.

III. LIMITED DUTY

A. *Failure to Act*

It is a general rule of negligence law that no one has an affirmative duty to act for the protection of others. This doctrine, sometimes referred to as the "failure to act" or "nonfeasance" principle, is of course riddled with exceptions, such as when a special relationship exists either between the plaintiff and the defendant, or between the defendant and a third party who caused the plaintiff's injuries.¹⁸² Even when such a special relationship exists, the plaintiff must still establish that the defendant breached the duty created, i.e., that the defendant failed to

181. Westerbeke & Robinson, 1989 *Survey*, *supra* note 1, at 13-15.

182. See, e.g., *Wood v. Groh*, 269 Kan. 420, 432, 7 P.3d 1163, 1172 (2000) (acknowledging that parents may have a duty to control a minor child to prevent the child from intentionally or negligently harming others, but only when the parents know or should reasonably know of the necessity for exercising such control); *Cullip v. Domann*, 266 Kan. 550, 561, 972 P.2d 776, 785 (1999) (same); *Gragg v. Wichita State Univ.*, 261 Kan. 1037, 1045-47, 934 P.2d 121, 128-29 (1997) (recognizing that a special relationship between possessor of property and public invitee creates a duty of care); *Weroha v. Craft*, 24 Kan. App. 2d 693, 697-98, 951 P.2d 1308, 1312 (1998) (recognizing that a special relationship between the defendant as business owner and plaintiff as business invitee creates a duty of care if business owner knew of an unreasonable safety risk).

exercise reasonable care.¹⁸³

In several cases, the Kansas courts have had the opportunity to address the nature and scope of various state and private actors' duty to protect others from harm. Generally, the Kansas courts have been extremely reluctant to impose tort duties on either governmental or private actors to prevent citizens from harming one another. Thus, unless state actors have custody of a person,¹⁸⁴ the Kansas courts generally find no tort duty on the part of the governmental actors to prevent citizens from harming one another.¹⁸⁵ The Kansas courts also are generally reluctant to impose such duties on private actors,¹⁸⁶ except perhaps in the case of a property owner whose customers or tenants are harmed by the criminal conduct of third parties on the premises.¹⁸⁷

The Kansas courts are particularly reluctant to impose tort duties

183. See, e.g., *Hesler v. Osawatomie State Hosp.*, 266 Kan. 616, 630, 971 P.2d 1169, 1178 (1999) (assuming a special relationship existed, a doctor, nurses, and psychiatric hospital had no reason to believe a mental patient was dangerous to others when they released him to the custody of his parents for the weekend and he intentionally caused a car wreck that injured the plaintiff); *Washington v. State*, 17 Kan. App. 2d 518, 524, 839 P.2d 555, 559 (1992) (holding that prison officials owe a duty to protect inmates, but the state is not the insurer of inmates' safety and prison officials are liable only if they fail to exercise reasonable care).

184. See, e.g., *Jackson v. City of Kansas City*, 263 Kan. 143, 162-63, 947 P.2d 31, 44 (1997) (holding police liable for negligently permitting girlfriend in domestic dispute to slash boyfriend's throat after he had been arrested and handcuffed); *C.J.W. v. State*, 253 Kan. 1, 12, 853 P.2d 4, 12 (1993) (holding the Kansas Department of Social and Rehabilitation Services has a duty to protect juveniles in its custody); *Cupples v. State*, 18 Kan. App. 2d 864, 861 P.2d 1360 (1993) (holding that state has duty to use reasonable care to protect inmates in its prisons).

185. See, e.g., *Schmidt v. HTG, Inc.*, 265 Kan. 372, 390, 961 P.2d 677, 689 (1998) (holding that state department of corrections did not have duty to warn prospective or actual employers of parolee's criminal record); *Woodruff v. City of Ottawa*, 263 Kan. 557, 566-67, 951 P.2d 953, 959 (1997) (finding city immune from liability under the Kansas Tort Claims Act when officers who responded to disturbance at tavern did not arrest or restrain intoxicated patron who later drove away and caused serious injuries to the plaintiffs in an automobile accident); *Mills v. City of Overland Park*, 251 Kan. 434, 448, 837 P.2d 370, 380 (1992) (holding that city was not liable when officers responded to disturbance at tavern but did not arrest or take into custody intoxicated individual who later wandered out into a field, passed out, and froze to death). See generally David C. Kresin, *Protecting the Protectors: The Public Duty Doctrine*, 67 J. KAN. B. ASS'N, Oct. 1998, at 22.

186. See, e.g., *Klose v. Wood Valley Racquet Club, Inc.*, 267 Kan. 164, 168-72, 975 P.2d 1218, 1223-25 (1999) (finding no "special relationship" that would impose a tort duty on two tennis associations to protect a fourteen-year-old competitor in a tennis tournament with respect to potential dangerous conditions existing in the facilities where the tournament was played when the site itself was not owned or operated by the associations).

187. See, e.g., *Nero v. Kan. State Univ.*, 253 Kan. 567, 584, 861 P.2d 768, 780 (1993) (holding that a university may be liable for one student's rape of another student in a university dormitory because of university's role as landlord with respect to the dormitory, but not because the university has a general duty to control or protect its students); *Seibert v. Vic Regnier Builders, Inc.*, 253 Kan. 540, 549-50, 856 P.2d 1332, 1339-40 (1993) (finding that a store owner might be liable for criminal attack of third party on owner's customer in the parking garage of the business if such an attack was foreseeable under a "totality of the circumstances" test).

when the defendants are public officials. For example, in *P.W. v. Kansas Department of Social and Rehabilitation Services*,¹⁸⁸ the parents of two children who attended a day care center in Topeka sued the Kansas Department of Social and Rehabilitation Services (SRS) and the Kansas Department of Health and Environment (KDHE).¹⁸⁹ The parents alleged that one of the day care teachers had physically abused their children, and that SRS and KDHE had acted negligently by not revoking or suspending the day care center's license or taking other corrective actions that would have protected the plaintiffs' children.

Noting that the existence of a tort duty is a question of law, the supreme court considered and rejected four asserted bases for imposing a duty on SRS and KDHE. First, the court considered the *Restatement (Second) of Torts* section 315, which imposes a duty to control the conduct of a third person only when a special relationship exists between the defendant and the third party or between the defendant and the injured party.¹⁹⁰ The court concluded that neither KDHE nor SRS fit into any recognized special relationship categories under section 315.¹⁹¹ Second, the supreme court considered *Restatement (Second) of Torts* section 324A, which provides that one who undertakes to provide services to another which should be recognized as necessary for the protection of a third person has a duty to act reasonably.¹⁹² The court observed that a threshold requirement for liability under section 324 is that the defendant undertook to render services to the plaintiffs, and held that no such showing had been made in this case.¹⁹³ Third, the supreme court considered whether the doctrine of *parens patriae* imposed a duty on SRS and KDHE with respect to the children, but concluded that the doctrine only empowers, and does not impose an affirmative duty on, the

188. 255 Kan. 827, 877 P.2d 430 (1994).

189. *Id.* at 828-29, 877 P.2d at 432.

190. *Id.* at 832-33, 877 P.2d at 434; *see also Nero*, 253 Kan. at 584, 861 P.2d at 780 (finding that university had a duty to protect student raped by another student previously accused of rape when university placed latter student in co-ed dormitory in proximity to female students); *Robertson v. City of Topeka*, 231 Kan. 358, 363, 644 P.2d 458, 463 (1982) (holding that police officers' duty to preserve the peace is to public at large, not to particular individuals).

191. *P.W.*, 255 Kan. at 833, 877 P.2d at 434; *see also DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 197-98 (1989) (determining that state authorities had no constitutional duty to protect a child severely abused by his father when such authorities did not have the child in their custody and had no other special relationship to the child).

192. *P.W.*, 255 Kan. at 833, 877 P.2d at 435; *see, e.g., Honeycutt v. City of Wichita*, 251 Kan. 451, 464, 836 P.2d 1128, 1137 (1992) (holding that a school district owed no duty to a child struck by a train on his way home from school when the school district had not undertaken to provide transportation for the children from the school to home).

193. *P.W.*, 255 Kan. at 833-34, 877 P.2d at 435.

state to act on behalf of children.¹⁹⁴ Finally, the supreme court rejected the argument that the defendants had statutory duties to protect the children.¹⁹⁵

Similarly, in *Beshears v. Unified School District No. 305*,¹⁹⁶ the supreme court considered whether public school officials owed a tort duty to protect students from injuries resulting from an after-school fight that occurred off school premises.¹⁹⁷ Two students had been having some disagreements at school and decided to settle their differences with a fight in a rural area of the county after school. The plaintiff, one of the students, suffered a paralyzing neck injury in the fight. His claim against the school district was based on the facts that his opponent in the fight was a known troublemaker at school with an extensive disciplinary record, and that his opponent had informed school officials that he and the plaintiff were having a problem. There was no evidence, however, that school officials had any knowledge that the two students had planned a fight. On these facts, the supreme court concluded that the school officials had no duty to protect the plaintiff under either *Restatement* section 315 or 324.¹⁹⁸ The court easily concluded that, because the fight occurred after school and off school premises, school officials had neither the ability, the right, nor the duty to control the students' conduct.¹⁹⁹

Similar issues arise with respect to doctors—both private and state-employed—whose decisions may result in a third party harming another. For example, since the landmark decision in *Tarasoff v. Regents of the University of California*,²⁰⁰ courts have struggled to define whether and when psychotherapists owe a legal duty to third parties to protect them from the dangers presented by the therapists' mental patients.

194. *Id.* at 835, 877 P.2d at 436.

195. *Id.* at 837, 877 P.2d at 437; *see, e.g.*, *Brunei v. Kan. Dep't of Soc. & Rehab. Servs.*, 23 Kan. App. 2d 394, 399, 931 P.2d 26, 30 (1997) (concluding that there was no special relationship giving rise to a duty owed by SRS); *Beebe v. Fraktman*, 22 Kan. App. 2d 493, 497, 921 P.2d 216, 218 (1996) (rejecting claim that SRS had special duty to protect children); *see also* *Bradley v. Bd. of County Comm'rs*, 20 Kan. App. 2d 602, 607, 890 P.2d 1228, 1232 (1995) (holding that Butler County and the City of Andover were not liable for failure to warn an individual of an approaching tornado that eventually struck her home).

196. 261 Kan. 555, 930 P.2d 1376 (1997).

197. *Id.* at 559, 930 P.2d at 1380.

198. *Id.* at 561, 565, 930 P.2d at 1382, 1384.

199. *Id.* at 565-66, 930 P.2d at 1384-85; *see also* *Honeycutt v. City of Wichita*, 251 Kan. 451, 472, 836 P.2d 1128, 1142 (1992) (holding that school district owed no duty to a child struck by a train on his way home from school when the school district had not undertaken to provide transportation for the children from school to home).

200. 551 P.2d 334 (Cal. 1976).

Subsequent to *Tarasoff*, the supreme court in *Durflinger v. Artiles*²⁰¹ recognized a duty of care to protect third parties from the dangers presented by an *involuntary* mental patient in state custody.²⁰² In *Boulanger v. Pol*,²⁰³ the Kansas Supreme Court considered whether the duty recognized in *Durflinger* should be extended to cover situations involving *voluntary* mental patients.²⁰⁴

In *Boulanger*, the plaintiff's nephew attacked him with a shotgun, after the nephew left the defendants' mental treatment facility where he had been a voluntary patient. The plaintiff asserted that the defendants owed him a statutory duty not to release his nephew or, in the alternative, that the defendants had a special relationship with the nephew that justified the imposition of a duty. The supreme court easily rejected the statutory duty contention, observing that *Durflinger* applied only to the release of involuntary patients, a process that is governed extensively by Kansas statutes.²⁰⁵ The court pointed out that the statutes addressing the treatment of voluntary patients "are different,"²⁰⁶ and concluded that "[t]he cause of action for negligent release of an involuntary patient recognized in *Durflinger* does not apply to voluntary patients."²⁰⁷ The supreme court went on to reject imposition of a duty under section 315's "special relationship" concept. The court suggested (but did not decide) "that § 315 might be applicable under certain circumstances to the relationship between a psychiatrist and/or a mental health care facility and a voluntary patient,"²⁰⁸ but concluded that, on the undisputed facts, the "plaintiff was fully apprised of the danger"²⁰⁹ and, therefore, the defendants had neither a duty to warn the plaintiff nor a "duty to take any affirmative action to control [plaintiff's nephew] even if a special relationship under § 315 had been established."²¹⁰

The duty issue also arises in the context of ordinary medical

201. 234 Kan. 484, 673 P.2d 86 (1983).

202. See *Durflinger*, 234 Kan. at 499-500, 673 P.2d at 99-100. The court based its decision on the statutory requirements of the Kansas Treatment Act for Mentally Ill Persons, Kansas Statutes Annotated sections 59-2901 to -2944 (repealed 1996), and did not purport to impose any general, common law duty on psychotherapists with respect to all patients.

203. 258 Kan. 289, 900 P.2d 823 (1995).

204. *Id.* at 303, 900 P.2d at 833.

205. *Id.* at 298-300, 900 P.2d at 830-31.

206. *Id.* at 299, 900 P.2d at 830.

207. *Id.* at 303, 900 P.2d at 833; see also *Hokansen v. United States*, 868 F.2d 372, 375 (10th Cir. 1989) (reaching the same conclusion under Kansas law); *Mahomes-Vinson v. United States*, 751 F. Supp. 913, 918 (D. Kan. 1990) (addressing negligent release issue and reaching the same conclusion).

208. 258 Kan. at 304-05, 900 P.2d at 834.

209. *Id.* at 307, 900 P.2d at 835.

210. *Id.* at 307-08, 900 P.2d at 835.

treatment. For example, in *Calwell v. Hassan*,²¹¹ the patient consulted the defendant doctor, a neurologist, regarding her drowsiness and the doctor prescribed medication.²¹² One morning the patient suddenly fell asleep while driving to work, crossed the center line, and struck and injured two children riding their bicycles. The children filed a malpractice action against the doctor on the theory that he breached a duty to warn the patient not to drive a car in light of her sleep disorder. The doctor conceded that he never gave such a warning. The supreme court held that the doctor owed no duty to third persons, reasoning that (1) no Kansas case had ever recognized the doctor-patient relationship as a special relationship giving rise to a duty to third persons, (2) the court specifically rejected such a duty in *Boulanger v. Pol*,²¹³ (3) the only Kansas cases recognizing a duty to third persons under section 315 involved situations in which a custodian had a duty under section 319 to control an incarcerated person, and (4) there was no duty to warn the patient herself because she already knew that her drowsiness could make driving dangerous.²¹⁴

Nor did the court find a duty under the principle of *Restatement* section 324A.²¹⁵ First, the supreme court reasoned that one incurs a duty under section 324A when one undertakes to provide services to another only if through that undertaking one assumes a duty to the other or intends to render the services for the benefit of the other. The court then concluded that it was unwilling to impose a duty on the doctor to warn the patient about a danger that (a) was not created by the doctor's conduct or treatment and (b) the patient already understood.²¹⁶

The result under section 324A may be different if the defendant voluntarily undertakes to render services that the defendant should realize are necessary for the protection of others.²¹⁷ But the supreme court has held that friends depositing a drunken colleague near his

211. 260 Kan. 769, 925 P.2d 422 (1996).

212. *Id.* at 770-72, 925 P.2d at 424-25.

213. 258 Kan. 289, 308, 900 P.2d 823, 836 (1995).

214. 260 Kan. at 777-84, 925 P.2d at 428-32.

215. *Id.* at 789, 925 P.2d at 435.

216. *Id.* at 787, 925 P.2d at 433.

217. See, e.g., *Johnson v. Bd. of County Comm'rs*, 259 Kan. 305, 318, 913 P.2d 119, 130 (1996) (determining that an engineering firm that contracted with county to design and build a new bridge owed a duty to downstream property owners not to cause substantial injury to their property); *Cessna Aircraft Co. v. Metro. Topeka Airport Auth.*, 23 Kan. App. 2d 1038, 1043-44, 940 P.2d 84, 91-92 (1997) (determining that owner of airport hanger had assumed a duty to render protective services to subtenants); cf. *Gooch v. Bethel A.M.E. Church*, 246 Kan. 663, 673, 792 P.2d 993, 1000 (1990) (determining that the defendant must undertake to render the services "for another," and not just for its own benefit).

vehicle (which he then drives and causes a wreck),²¹⁸ or a company merely supplying equipment to a customer (which injures a third party delivering goods to the customer),²¹⁹ are not subject to the requirements of section 324A for creating a duty to third persons.

Section 323 of the *Restatement (Second) of Torts* parallels section 324A and recognizes a duty to the plaintiff arising from the defendant's undertaking to perform services for the plaintiff.²²⁰ In *Geiger-Schorr v. Todd*,²²¹ the plaintiff doctor argued that section 323 imposed a duty on her insurer and on the commissioner of insurance to warn her about the consequences of her failure to purchase "tail" coverage when she cancelled her malpractice insurance.²²² In rejecting that claim, the court of appeals held that section 323 applies only to cases of physical harm, i.e., personal injury or physical damage to property.²²³ In addition, the court noted that the insurer's agent who dealt with the plaintiff did inquire whether she wanted to purchase "tail" coverage.²²⁴

B. Negligent Infliction of Emotional Distress

Kansas recognizes an action for negligent infliction of emotional distress when the emotional distress results from, or is concurrent with, physical injury and when negligently caused emotional distress causes a resulting physical injury.²²⁵ In recent years, however, courts in Kansas and elsewhere have struggled to define rules governing emotional distress claims based upon a fear or anxiety about a possible future disease or medical condition resulting from a prior accident or exposure to a harmful substance.²²⁶

In *Tamplin v. Star Lumber & Supply Co.*,²²⁷ the plaintiff, a six-year-

218. See *McGee v. Chalfant*, 248 Kan. 434, 442, 806 P.2d 980, 985-86 (1991) (finding that, although the defendants knew of the drunkenness of their colleague, they had not undertaken a duty to stop him from driving).

219. See *Anderson v. Scheffler*, 248 Kan. 736, 742, 811 P.2d 1125, 1129 (1991) (holding that the duty to provide a safety grate was not undertaken).

220. See, e.g., *Chadwell v. Clements*, 18 Kan. App. 2d 84, 90-91, 847 P.2d 1344, 1349 (1993) (discussing section 323 of the *Restatement (Second) of Torts* generally).

221. 21 Kan. App. 2d 1, 901 P.2d 515 (1995).

222. *Id.* at 2, 901 P.2d at 516.

223. *Id.* at 8-9, 901 P.2d at 520.

224. *Id.* at 3, 901 P.2d at 517.

225. *Hoard v. Shawnee Mission Med. Ctr.*, 233 Kan. 267, 274, 662 P.2d 1214, 1219-20 (1983).

226. See generally Gregory L. Ash, Comment, *Toxic Torts and Latent Diseases: The Case for an Increased Risk Cause of Action*, 38 U. KAN. L. REV. 1087 (1990) (addressing tort reform with regard to delayed manifestation illnesses from exposure to toxic substances).

227. 251 Kan. 300, 836 P.2d 1102 (1992).

old child, suffered multiple skull fractures when struck by a falling roll of vinyl flooring material at the defendant's store.²²⁸ The accident caused her to develop diabetes insipidus, which results from damage to the pituitary gland's ability to produce the hormone vasopressin. This hormone permits the kidneys to retain proper amounts of water and avoid life-threatening dehydration. At trial, one of the plaintiff's expert witnesses testified that this condition posed a "very slight chance" that the plaintiff might experience developmental problems at puberty that could cause her to be infertile.²²⁹ The supreme court held that the trial judge erred in allowing the expert's testimony.²³⁰ The court concluded that an element of an emotional distress claim based upon fear of a future injury requires proof of "a reasonable fear that an existing injury will lead to the occurrence of a disease or condition in the future."²³¹

The court's holding properly focuses on the reasonableness of the plaintiff's fear, anxiety, or distress, rather than on the degree of certainty that the future disease or condition will in fact occur. Any requirement of certainty or probability of the future disease or condition would unrealistically ignore the serious emotional distress that can flow from less than probable risks of future harm. The court was primarily concerned with adopting a standard that would enable courts to weed out the frivolous and fraudulent claims from those with merit. Accordingly, the focus in the court's decision was on the exclusion of the remote, fanciful, and vague possibilities of future harm. Thus, in *Tamplin*, evidence of a "very slight chance" of future infertility, coupled with a lack of evidence of the child plaintiff's appreciation or even awareness of that slight chance, failed to satisfy the court's "reasonable fear" standard.

In one sense, *Tamplin* was less difficult because it clearly involved a prior physical injury that gave rise to the issue of reasonable fear. Exposure cases lacking a prior physical injury pose greater problems. For example, in *Reynolds v. Highland Manor, Inc.*,²³² the plaintiff inadvertently touched a used condom left by a prior guest under the bed in her motel room, and a search of the room revealed a second used condom.²³³ The plaintiff had a burn and some bloody cuticles on one hand, and she rushed to the hospital. However, the hospital's staff said it

228. *Id.* at 301, 836 P.2d at 1103.

229. *Id.* at 303, 836 P.2d at 1105.

230. *Id.* at 308, 836 P.2d at 1108. The court did not disturb the jury verdict in favor of the plaintiff, however, because the court found the error to be harmless. *Id.* at 309, 836 P.2d at 1109.

231. *Id.* at 308, 836 P.2d at 1108.

232. 24 Kan. App. 2d 859, 954 P.2d 11 (1998).

233. *Id.* at 859-60, 954 P.2d at 12-13.

could not test the condoms for the HIV virus that causes AIDS, and a doctor told her he could do nothing if she had been exposed to the virus. Over the next year, the plaintiff tested negative for the HIV virus four times. The court of appeals affirmed a summary judgment in favor of the defendant.²³⁴

First, the court held that the plaintiff failed to show that her contact with the condom caused her to suffer a physical injury naturally and proximately caused by her emotional distress.²³⁵ The court held that her allegations of general symptoms such as headaches, diarrhea, nausea, and stress were insufficient to satisfy the physical injury requirement. Moreover, the court held that in any event she failed to prove her contact with the condom caused these symptoms.²³⁶ Finally, the court concluded that there was no basis for any exception to the physical injury requirement for an emotional distress claim based on negligence.²³⁷

Second, the court held that plaintiff failed to satisfy the *Tamplin* requirement of a "reasonable fear" of contracting AIDS in the future.²³⁸ The likelihood of contracting AIDS is less than one percent in persons who have tested negative for the virus one year after contact with a potential source of infection. The court held that any fear of future disease based on this one-percent likelihood to be unreasonable.²³⁹

Finally, the plaintiff was unable to prove that she had actually been exposed to the HIV virus, and the court adopted the majority rule that in a fear of future disease case, the plaintiff must prove actual exposure to that disease.²⁴⁰ The reasoning is that fear of future disease case requires a "substantial probability" of contracting the disease, but AIDS cannot be contracted without actual exposure to the virus.²⁴¹

234. *Id.* at 859, 954 P.2d at 12.

235. *Id.* at 862, 954 P.2d at 14.

236. The court noted that the record contained other explanations for her physical symptoms. *Id.* at 863, 954 P.2d at 14. On this point, the court appeared to have weighed the evidence rather than viewed the allegations and evidence in the light most favorable giving the party against whom summary judgment was granted.

237. *Id.* at 864, 954 P.2d at 15. The requirement of physical injury in negligent infliction of emotional distress claims is unfortunately necessitated by the lack of other protections against fraudulent and frivolous claims. In intentional infliction of emotional distress cases, the requirement of extreme and outrageous conduct provides a strong inference that the resulting distress was both genuine and substantial. See William Edward Westerbeke, *Survey of Kansas Law: Torts*, 33 U. KAN. L. REV. 1, 53-55 (1984) [hereinafter Westerbeke, 1984 Survey] (discussing Kansas's requirements for intentional infliction of emotional distress claims).

238. *Reynolds*, 24 Kan. App. 2d at 864, 954 P.2d at 15.

239. *Id.*

240. *Id.* at 866, 954 P.2d at 16.

241. *Id.* at 866-67, 954 P.2d at 16. This rule parallels the Kansas rule in toxic exposure cases. See *Maddy v. Vulcan Materials Co.*, 737 F. Supp. 1528, 1533 (D. Kan. 1990) ("In cases claiming personal injury from exposure to toxic substances, it is essential that the plaintiff demonstrate that

One could quibble with each of the court's reasons. The court seemed to be improperly weighing evidence when it rejected the plaintiff's symptoms as satisfying the physical injury requirement. In addition, given the terrible consequences of AIDS, treating fear from a one percent likelihood of contracting the disease as per se unreasonable might be inconsistent with human reality. Finally, a substantial probability of contracting the disease is more demanding than the supreme court's test in *Tamplin* and is imposed as an independent requirement separate and apart from the requirement of a reasonable fear of future disease. Nevertheless, this more stringent approach may be necessary to prevent not only fraudulent and frivolous claims, but also a flood of claims if "possible exposure" were sufficient.

The "possible exposure" standard proposed by the plaintiff in *Reynolds* is in effect an attempt to return to the old impact rule rejected in *Grube v. Union Pacific Railroad*.²⁴² In that case, the plaintiff train engineer saw a car trapped on the railroad tracks and could not stop the train in time to avoid a collision. He saw the horrified look on the face of the driver prior to the collision. After the collision, he tried to help the occupants of the car, two of whom were badly injured and another of whom was dead.²⁴³ The plaintiff alleged that he then vomited and suffered emotional distress. The supreme court reversed a judgment in favor of the plaintiff.²⁴⁴

First, the court held that the plaintiff could not maintain a claim for observing grave danger to a third person. The claim arose under the Federal Employers' Liability Act (FELA),²⁴⁵ and the United States Supreme Court has held that the zone of danger test governs emotional distress claims arising from observing a situation of impending peril.²⁴⁶ Under this test, a plaintiff must be in the zone of physical danger, and the distress that he suffers must result at least in part from a fear for his own safety.²⁴⁷

Second, the court correctly rejected the plaintiff's attempt to

she was, in fact, exposed to harmful levels of such substances.").

242. 256 Kan. 519, 886 P.2d 845 (1994).

243. *Id.* at 521, 886 P.2d at 847-48.

244. *Id.* at 530, 886 P.2d at 853.

245. Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1994). For other FELA cases decided by Kansas courts during the survey period, see generally *Koser v. Atchison, Topeka & Santa Fe Railway*, 261 Kan. 46, 928 P.2d 85 (1996) and *Knowles v. Burlington Northern Railroad*, 18 Kan. App. 2d 608, 856 P.2d 1352 (1993).

246. *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 556 (1994).

247. *Id.*

circumvent the zone of danger requirement by reliance on the old "impact rule." The plaintiff claimed to have suffered an impact when, at the time of the collision, he was thrown against the console of the train's engine. The court noted that the plaintiff suffered no injury from this impact, and held that impact without injury is insufficient for an emotional distress claim.²⁴⁸ In essence, the plaintiff attempted to alter the theory of his action from a claim of directly caused emotional distress with resulting physical injury in the form of vomiting, into a claim of prior physical injury causing a contemporaneous or subsequent emotional distress. However, the court correctly held that a mere impact without any actionable physical injury is insufficient to satisfy the requirement of a prior physical injury.

C. Prenatal Injuries

In the modern era, tort law has recognized actions based on the various consequences of medical negligence affecting the birth of children. Prior to the survey period, Kansas had rejected the so-called "wrongful life" claim by a child born in an impaired condition against a doctor whose negligence did not cause the birth defects, but did cause the mother to be unaware of probable birth defects while she had the opportunity to abort.²⁴⁹ This claim posits as injury the notion that life in an impaired condition is worse than no life at all, which is simply not compatible with the value attributed to human life in our society. On the other hand, Kansas had recognized a "wrongful birth"²⁵⁰ or "wrongful pregnancy"²⁵¹ claim by the parents for malpractice that caused an unwanted pregnancy to occur, but limited that action in the case of a healthy child to the normal expenses in prenatal care, delivery, and postnatal medical care. The courts expressly rejected recovery of damages for the costs of rearing and educating a healthy child,²⁵² but left open the question of such damages in the case of a child with severe birth defects.

During the survey period the case of the child with severe birth

248. *Grube*, 256 Kan. at 529, 886 P.2d at 852.

249. *Bruggeman v. Schimke*, 239 Kan. 245, 254, 718 P.2d 635, 643 (1986).

250. "Wrongful birth" refers to the parents' claim that a doctor's malpractice denied them the information necessary to decide whether to abort the pregnancy. *Bruggeman*, 239 Kan. 245, 718 P.2d 635 (1986) (citing *Cont'l Cas. Co. v. Empire Cas. Co.*, 713 P.2d 384 (Colo. Ct. App. 1985)).

251. "Wrongful pregnancy" refers to claims by parents that the doctor's malpractice negated their efforts to prevent pregnancy in the first instance. *Id.* For an example of a wrongful pregnancy case in Kansas, see generally *Johnston v. Elkins*, 241 Kan. 407, 736 P.2d 935 (1987).

252. *Byrd v. Wesly Med. Ctr.*, 237 Kan. 215, 225, 699 P.2d 459, 467 (1985).

defects reached the supreme court. In *Arche v. United States Department of the Army*,²⁵³ the court held that in a wrongful birth claim involving a severely and permanently impaired child, the parents may recover (1) the damages available in any wrongful pregnancy case relating to the mother's prenatal, delivery, and immediate postnatal medical expenses plus the husband's related loss of consortium,²⁵⁴ and (2) damages relating to the extraordinary medical and child-rearing expenses caused by the child's severe impairment during the child's minority or life expectancy, whichever is shorter,²⁵⁵ but not (3) any damages relating to the mental distress involved in giving birth to and rearing a severely impaired child²⁵⁶ or (4) any damages for extraordinary medical or support expenses after the child reaches the age of majority. The court also held that whether the damages are placed in a reversionary trust for the long-term protection of the child is a matter left to the discretion of the trial court.²⁵⁷

Cases like *Arche* pose difficult policy decisions for courts. Courts may consider the benefits of parenthood sufficient to justify not burdening the physician with the costs of raising and educating the healthy child, but that justification pales when compared with the ruinous financial burden most families would incur in raising and educating a severely impaired child. On the other hand, damages for mental distress simply do not satisfy any of the tests for bystander liability. Limitation of damages to the period of the child's minority seems harsh, but is legally correct because in Kansas, the parents have no legal obligation to care for the child past the age of majority. Expenses after that date may better be viewed as voluntary undertakings by the parents, and not damages caused by the physician. Because the child may be legally "on his own" after the age of majority, Justice Six's proposition that the damages be placed in a reversionary trust²⁵⁸ has considerable merit. Indeed, the majority did not reject such protection, but merely refused to require it in all cases, and left the matter to the discretion of trial judges.

253. 247 Kan. 276, 798 P.2d 477 (1990).

254. See *id.* at 277, 798 P.2d 478 (noting that Kansas wrongful pregnancy damages are limited to those losses incurred prior to and at the birth of a child).

255. *Id.* at 283, 291, 798 P.2d at 481, 486.

256. *Id.* at 283, 798 P.2d at 482.

257. *Id.* at 292, 798 P.2d at 487.

258. *Id.* at 292-95, 798 P.2d at 487-88 (Six, J., concurring).

D. Premises Liability

1. Persons Coming onto the Premises

Historically, Kansas has defined the duties of possessors of land by the classification of the person coming onto the land as a trespasser, licensee, or invitee.²⁵⁹ Although courts and commentators often refer to the duties of the owner of property, these duties in fact attach to the person with the right of immediate possession when the owner and possessor or occupier are not the same person. Thus, the duty to keep a private road-railroad intersection reasonably safe for travelers was owed by the railroad that retained possession and control of the crossing, not the company that owned the private road.²⁶⁰ Similarly, the duty to control a vicious dog to protect lawful visitors on premises was owed by the tenant who owned the dog and possessed the premises, not the landlord.²⁶¹

a. Invitee-Licensee Merger²⁶²

Over the years, Kansas has tended to retain some of the harsher aspects of the classification system and to reject developments occurring elsewhere throughout the country. For example, Kansas retained the restrictive rule that a possessor of land owes no duty to a trespasser or licensee other than to avoid injury through willful or wanton conduct.²⁶³ Almost every other state had imposed a duty of reasonable care concerning activities on the land and a limited duty to warn discovered trespassers and licensees about known latent dangers on the land.²⁶⁴ Not until 1986 in *Bowers v. Ottenad*²⁶⁵ did Kansas adopt a portion of the

259. William Edward Westerbeke, *Survey of Kansas Law: Torts*, 27 U. KAN. L. REV. 321, 334 (1979) [hereinafter Westerbeke, 1979 Survey].

260. *Rogers v. Omega Concrete Sys., Inc.*, 20 Kan. App. 2d 1, 6, 883 P.2d 1204, 1208 (1994).

261. *Colombel v. Milan*, 24 Kan. App. 2d 728, 732, 952 P.2d 941, 944 (1998); see also *Gragg v. Wichita State Univ.*, 261 Kan. 1037, 1051, 934 P.2d 121, 132 (1997) (holding the duty to provide security for visitors at a university on-campus holiday celebration belonged to the university that possessed and controlled the premises, not the corporate co-sponsors of the celebration).

262. See, e.g., Donald W. Giffin & Brian F. Stayton, *Landowners Beware: The Current Status of Premises Liability in Kansas*, 64 J. KAN. B. ASS'N, Jan. 1995, at 18, 19. See generally Michael Sears, Comment, *Abrogation of the Traditional Common Law of Premises Liability*, 44 U. KAN. L. REV. 175 (1994).

263. *Frazee v. St. Louis-S.F. Ry. Co.*, 219 Kan. 661, 665, 549 P.2d 561, 565 (1976).

264. See generally DAN B. DOBBS, *THE LAW OF TORTS* § 232, at 593 (2001); W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 58, at 396-99 (5th ed. 1984).

265. 240 Kan. 208, 729 P.2d 1103 (1986).

modern majority rule for cases involving injury to licensees.²⁶⁶

During the survey period, however, the supreme court handed down an opinion of paramount importance in the area of premises liability. In *Jones v. Hansen*,²⁶⁷ the plaintiff, a social guest in the defendant's home, walked into a dimly lit room to look at some paintings and fell down an open stairwell.²⁶⁸ As a social guest, the plaintiff was a licensee and would be entitled only to a warning about known latent dangers. The open nature of the stairwell would raise a serious question about whether it was a *latent* danger entitling the plaintiff to a warning. The court in essence merged the licensee category with the invitee category by holding that licensees, like invitees, should receive a full duty of reasonable care.²⁶⁹

The majority offered two broad reasons for its decision. First, it characterized the licensee rule as unrealistic, arbitrary, harsh, and unpredictable. The rule was unrealistic because people do not vary their conduct based on the status of the plaintiff. While this observation may be largely accurate, it may also be largely irrelevant. *Bowers* already applied the reasonable care standard to a landowner's *conduct*. At issue was the *condition* of the landowner's premises. The condition of premises will not vary according to a visitor's status.²⁷⁰ In any event, the former licensee rule was artificial, and produced harsh and unpredictable results. The dissent noted that *Bowers* had already remedied some of the harshness of the licensee rule.²⁷¹ Even after *Bowers*, however, the rule still protected the landowner who failed to discover an easily discoverable danger or to remedy a dangerous condition that reasonably called for repair rather than a mere warning. The dissent also characterized this change as an affront to stare decisis. But stare decisis is a rule of judicial restraint, not judicial rigor mortis. In order to have merit, the stare decisis argument must explain why the changes made in *Jones* somehow constitute a more unexpected, reckless, or irresponsible

266. In *Bowers*, the court held that the possessor owes licensees a duty of reasonable care with respect to activities on the premises. *Id.* at 222, 729 P.2d at 1113. However, the court retained the outdated rule that the possessor owes only a duty to avoid injury by willful or wanton conduct with respect to any dangerous condition of the premises. *Id.*

267. 254 Kan. 499, 867 P.2d 303 (1994).

268. *Id.* at 502, 867 P.2d at 305-06.

269. *Id.* at 509, 867 P.2d at 310.

270. This argument cuts in different directions. The occasional licensee will benefit when the shopkeeper repairs a condition in the premises that would pose a danger to his invitees. Conversely, the homeowner is not likely to do more than warn about dangerous conditions in the premises even though an occasional invitee might drop by to conduct some business.

271. *Id.* at 517-18, 867 P.2d at 315-16.

departure from precedent than the frequent other departures from precedent regularly occurring elsewhere in Kansas tort law.

Second, the majority considered the legal system perfectly capable of handling efficiently the application of the reasonable care standard to licensees. Juries are familiar with and able to apply the reasonable care standard, and an occasional difficult case does not justify the continued use of a manifestly unjust rule. The dissent predicted that the new licensee rule would result in lengthy jury trials and higher insurance premiums. Of course, any decision that replaces an inflexible standard with the reasonable care standard will cause some increase in jury trials, and any rule that allows additional plaintiffs to recover compensation will cause some increase in insurance premiums. To date, however, there is no empirical evidence of an increase in the frequency of jury trials or in premiums any greater than in other areas of tort law that are subject to the standard of reasonable care under all the circumstances.

Yet *Jones* is not entirely free of concerns. From a pragmatic perspective, there is some danger that a compassionate desire to compensate the injured may cause some courts and juries to treat too lightly questions about the burdens on homeowners to inspect for and repair dangerous conditions in the premises. Whereas newer housing may be largely in compliance with building codes, older housing is less likely to be in compliance. Repair of dangerous conditions may be beyond the financial ability of poorer citizens living in older housing.

b. Attractive Nuisance

The decision in *Jones* means that the attractive nuisance doctrine is no longer necessary in cases of child licensees. For example, in *Mozier v. Parsons*,²⁷² a child licensee drowned in the defendants' unfenced swimming pool.²⁷³ The court held that the attractive nuisance doctrine did not apply because the child was not a trespasser, the swimming pool did not lure the child onto the premises, and the pool did not constitute a nuisance. This holding demonstrates the harsh edge in traditional Kansas premises law, because in most states the doctrine applies to child licensees as well as to trespassing children,²⁷⁴ does not require luring the

272. 256 Kan. 769, 887 P.2d 692 (1995).

273. *Id.* at 770, 887 P.2d at 693. The court held that the invitee-license merger in *Jones* would not apply retroactively to accidents occurring prior to the date of the *Jones* decision. *Id.* at 771-72, 887 P.2d at 694; *see also* *Walters v. St. Francis Hosp. & Med. Ctr.*, 23 Kan. App. 2d 595, 598, 932 P.2d 1041, 1044 (1997) (applying the *Jones* analysis to conclude that the hospital had a duty of reasonable care).

274. RESTATEMENT (SECOND) OF TORTS § 343B, cmt. b (1965). Of course, after *Jones* the

child onto the premises,²⁷⁵ and requires only a condition of unreasonable danger, not a nuisance.²⁷⁶ After *Jones*, the issue would be simply whether the homeowner had exercised reasonable care to protect child licensees or invitees from the danger posed by the swimming pool.²⁷⁷

c. Slip and Fall Accidents on Business Premises

Liability for a dangerous condition not of the defendant's own making requires proof of the defendant's actual or constructive knowledge of the dangerous condition and a reasonable time to repair or correct it.²⁷⁸ In *Agnew v. Dillons, Inc.*,²⁷⁹ the defendant placed a strip of carpet on the ramp leading to the entrance to its store in order to provide additional traction for customers during an ice storm.²⁸⁰ However, the ice built up on the carpet, and the plaintiff slipped and fell while leaving the store. The court adopted the rule that a store has no duty to clear away snow and ice from the premises during a snow or ice storm or during a brief period of time after the storm stops. Because the plaintiff fell during or shortly after the end of the storm, the store did not breach a duty owed to him by failing to remove the ice. This rule has a certain pragmatic value in that a duty to constantly clean up snow and ice during a storm would expose businesses to endless second-guessing about how much cleaning is enough during a storm. However, summary judgment was probably inappropriate because there was a question of fact regarding whether the store was negligent in not having a handrail along the side of the ramp.²⁸¹

The handrail argument in *Agnew* may be an example of the "mode of

attractive nuisance doctrine will be necessary only in cases of child trespassers.

275. See RESTATEMENT (SECOND) OF TORTS § 339, cmt. b (1965) (providing that the luring requirement is now "generally rejected").

276. See RESTATEMENT (SECOND) OF TORTS § 339 (1965) (providing that the doctrine applies to unreasonably dangerous artificial conditions upon the land).

277. The claim might still fail because courts tend to exclude swimming pools from liability on the ground that the danger would be obvious to any child old enough to go about unsupervised. See RESTATEMENT (SECOND) OF TORTS § 339, cmt. j (1965) (discussing liability with regard to ponds).

278. The defendant is liable for negligence in creating a dangerous condition on the premises. For a decision creating an affirmative negligence exception to the slight defect rule governing public and private sidewalks, see *Lyon v. Hardee's Food Systems, Inc.*, 250 Kan. 43, 824 P.2d 198 (1992), discussed *supra* note 14 and accompanying text.

279. 16 Kan. App. 2d 298, 822 P.2d 1049 (1991).

280. *Id.* at 299, 822 P.2d at 1051.

281. *Id.* at 300, 822 P.2d at 1051.

operation” rule relied upon in *Jackson v. K-Mart Corp.*²⁸² In that case, the plaintiff was injured in a slip and fall accident when she stepped in some green liquid spilled on the aisle in the clothing section of the defendant’s store.²⁸³ The plaintiff was unable to prove the defendant’s actual or constructive knowledge of the presence of the liquid on the floor because she did not know who spilled it or how long it had been on the floor. However, there was evidence that somebody had seen a customer leading a child holding a can of avocado juice through the clothing section prior to the accident. Both the court of appeals and the supreme court agreed that the defendant could be held liable under the “mode of operation” rule because the defendant operated a cafeteria on the premises but did not prohibit customers from taking food and drink into the shopping areas of the store.²⁸⁴

Both the “mode of operation” rule and its application to these facts seem sound. The rule recognizes that a store should be deemed to have constructive knowledge of a dangerous condition created in part by the conduct of a third person because the third person’s conduct is a foreseeable consequence of the store’s choice of its mode of operation. Not prohibiting the taking of food and drink into the shopping areas creates the foreseeable risk of spills in areas in which other customers are regularly distracted while looking at or for particular merchandise. The store might not have had time to discover the spill, but the spill would not have occurred in the first instance had the store chosen a more reasonable mode of operating its business.

d. Criminal Assaults upon Invitees²⁸⁵

A difficult recurring issue involves the potential liability of the operator of premises to invitees injured by the criminal assaults of third persons on the premises. The general rule is that a business owes no duty to provide security for customers until the business is put on notice of a risk that is above and beyond the ordinary risk of criminal assault. The reasonable foreseeability of a criminal assault is less problematic when the business has actual prior knowledge of the alleged criminal propensity of the third person. Thus, in *Nero v. Kansas State*

282. 251 Kan. 700, 840 P.2d 463 (1992), *aff’g* 16 Kan. App. 2d 716, 828 P.2d 941 (1992).

283. *Id.* at 701, 840 P.2d at 464.

284. *Id.* at 710-11, 840 P.2d at 470.

285. See generally Donald W. Giffin & Brian F. Stayton, *Landowners Beware: The Current Status of Premises Liability in Kansas*, 63 J. KAN. B. ASS’N, Jan. 1994, at 20-21.

University,²⁸⁶ a male student had been charged with rape and was awaiting trial.²⁸⁷ The university moved his housing from a coed dormitory to an all-male dormitory. After the spring semester he moved into a coed dormitory, which was the only available student housing during the intersession period. While in that dormitory, he sexually assaulted a female student. The supreme court held that a university owes the same duty to its students as a private landlord owes to its tenants and found the facts sufficient to raise a jury question on the reasonable foreseeability of the assault.²⁸⁸

The cases are more difficult when the criminal assailant is a stranger to the business entity. In *Siebert v. Vic Regier Builders, Inc.*,²⁸⁹ the plaintiff was shot by a robber who accosted her in a shopping mall's underground parking lot.²⁹⁰ The shopping mall had experienced a number of other criminal acts in its above-ground parking lot directed against customers or their property. The plaintiff's claim would not have succeeded under the "prior similar incidents" test for reasonable foreseeability because none of the prior crimes at the mall had occurred in the underground parking lot. However, the supreme court held that under the "totality of circumstances" test, the owner of the shopping mall owed a duty to provide reasonable security for the protection of customers.²⁹¹

The holding seems reasonable. The trial court held that the plaintiff could not succeed under the "prior similar incidents" test because none of the prior robberies occurred in the location where the plaintiff was shot. Used in this manner, the "prior similar incidents" test seems too restrictive, and a consideration of the totality of the circumstances to prove reasonable foreseeability may be the balanced approach. Under this test, evidence concerning all types of prior crimes in the shopping mall, in the surrounding area, and in the community at large would be relevant to the reasonable foreseeability of a criminal assault.

The primary concern with the "totality of circumstances" test is whether it will expose the defendants to excessive and unavoidable liability, particularly when the premises are located in a high-crime area. This fear proved unfounded in *Gragg v. Wichita State University*.²⁹² In

286. 253 Kan. 567, 861 P.2d 768 (1993).

287. *Id.* at 569-70, 861 P.2d at 771-72.

288. *Id.* at 584, 861 P.2d at 782.

289. 253 Kan. 540, 856 P.2d 1332 (1993).

290. *Id.* at 541-42, 856 P.2d at 1333.

291. *Id.* at 549-50, 856 P.2d at 1339.

292. 261 Kan. 1037, 934 P.2d 121 (1997).

that case, the plaintiff's decedent and her companion were shot and killed in a university parking lot during an annual Fourth of July festivity held on campus and co-sponsored by the university and the local business community.²⁹³ Although the university was located in a high-crime area, the university had no knowledge of a specific third person who was likely to shoot the decedent, and had no knowledge of facts or circumstances that might indicate a likelihood of such a shooting. In addition, the university coordinated a security force of more than one hundred university and city police officers. The court held that as a matter of law the university did not owe a duty to the decedent or to her companion to protect them from an unanticipated attack.²⁹⁴

Similarly, in *Weroha v. Craft*,²⁹⁵ a customer was assaulted and robbed by an unknown assailant when he went to the men's room in a pinball arcade.²⁹⁶ The court of appeals affirmed a summary judgment in favor of the arcade. It reasoned that the arcade had not breached any duty owed to the customer because there had been no prior assaults on the premises, no patrons were drinking alcoholic beverages at the time, and there were no other considerations that would make the assault reasonably foreseeable under the totality of the circumstances. In addition, the court rejected the notion that a business catering to teenagers poses a greater risk of criminal activity²⁹⁷ or that the hiring of a part-time security officer on weekend evenings²⁹⁸ was by itself evidence of a foreseeable risk of criminal activity.

In both *Gragg* and *Weroha*, the assault was of a type that does in fact occur from time to time in our society. But in each case there was no reason to expect that the particular type of assault was more likely to happen on the defendant's premises than elsewhere in society. In *Gragg*, there was nothing to suggest that the university had any reason to believe that the security plan it had used successfully for the ten prior years would not again prove successful, or that the university should have been on notice to expect the particular type of assault that in fact occurred. In *Weroha*, there were no prior assaults or similar occurrences to provide a basis for anticipating any kind of criminal assault on the premises.

293. *Id.* at 1042, 934 P.2d at 127.

294. The use of more than one hundred police officers for security would indicate that the university had undertaken a duty to its patrons and guests, including the decedent. The better rationale was that the university did not breach its duty by failing to provide more security than it had provided in prior years.

295. 24 Kan. App. 2d 693, 951 P.2d 1308 (1998).

296. *Id.* at 694, 951 P.2d at 1309.

297. *Id.* at 694-97, 951 P.2d at 1310-11.

298. *Id.* at 700-01, 951 P.2d at 1313-14.

Liability under the facts of either *Gragg* or *Weroha* would tend to make businesses the insurers of their customers' safety.

e. Hospital Visitors

The merger of the invitee and licensee categories should simplify cases involving persons injured while visiting a patient in the hospital. In *Walters v. St. Francis Hospital & Medical Center, Inc.*,²⁹⁹ the plaintiff accompanied his fiancée to the hospital where she was being treated. A nurse asked him to hold his fiancée's hand while the nurse inserted a nasogastric tube into her.³⁰⁰ After the tube was successfully inserted on the second attempt, the plaintiff felt queasy, went into the hallway for fresh air, and then lost consciousness and fell to the floor, injuring his head. In affirming summary judgment in favor of the hospital, the court of appeals held that the hospital did not breach any duty owed to the plaintiff.³⁰¹

The court first held that premises law applies to dangers arising from activities on the premises as well as to dangers arising from the condition of the premises,³⁰² and that one who accompanies a patient to the hospital is an invitee and is entitled to reasonable care.³⁰³ In this case any negligence by the hospital would involve a failure to warn the plaintiff about certain dangers. However, the hospital did warn the plaintiff about the nature of the procedure involving the nasogastric tube, and the court concluded that the hospital owed no duty to warn about the risk of becoming queasy and fainting, because that risk is obvious or well-known.

While the result is arguably correct, the reasoning is somewhat confused. The court correctly rejected out-of-state decisions imposing a duty toward the visitor only when the visitor helps the hospital perform some medical procedure, such as helping restrain a patient during treatment.³⁰⁴ That distinction seems roughly intended to find some activity that would take the visitor outside the mere "guest" category used to define licensees. Instead, the court adopted an assumption of risk rationale that no duty is owed to a mere visitor who assumes the risk of

299. 23 Kan. App. 2d 595, 932 P.2d 1041 (1997).

300. *Id.* at 595-96, 932 P.2d at 1042.

301. *Id.* at 601, 932 P.2d at 1045.

302. *Bowers v. Ottenad*, 240 Kan. 208, 729 P.2d 1103 (1986); RESTATEMENT (SECOND) OF TORTS § 341A (1965).

303. RESTATEMENT (SECOND) OF TORTS § 332, cmt. g (1965).

304. *E.g.*, *O'Hara v. Holy Cross Hosp.*, 561 N.E.2d 18 (Ill. 1990).

seeing some unsettling medical treatment in the emergency room.³⁰⁵ This choice seems illogical and unnecessary if, as the court held, the hospital owed a duty to describe the nasogastric tube procedure, but not to warn of the obvious or well-known risk of becoming queasy and fainting. In essence, despite statements to the contrary, the court seemed to accept a duty to warn visitors, where appropriate. Viewing the risk as obvious or well-known does not deny the existence of a duty, but merely concludes that any duty to warn is satisfied by the obviousness or well-known nature of the risk. A duty to do more should arise in certain cases where the hospital might reasonably anticipate that observation of a particular medical procedure could cause a sudden adverse reaction in a visitor.³⁰⁶

2. Persons Deviating from Highway onto Premises

Persons who erect artificial conditions on their premises owe a duty of reasonable care to avoid any injury caused by that artificial condition to persons outside the premises. Persons using a public way who deviate briefly onto private premises as part of the "normal incidents of travel" have often been viewed as persons "outside" the premises who are owed a full duty of reasonable care, rather than as trespassers or licensees who are owed only a limited duty or no duty at all. In *Schrader v. Great Plains Electric Cooperative, Inc.*,³⁰⁷ a fourteen-year-old driver died in a rollover accident when she lost control of her car as the road changed from a paved to a gravel surface and hit a utility pole and guy wire located approximately twenty feet off the side of the road.³⁰⁸ The issue was whether the utility pole and guy wire were so close to the highway that they posed an unreasonable risk of harm to persons using the highway. In reversing a jury verdict against the utility company, the court of appeals held that a possessor of land is liable for harm to users of the highway only if some particularly dangerous road condition would make a collision with the artificial condition near the highway likely, and thus reasonably foreseeable.³⁰⁹

The court's reasoning was sound. The court noted that the record

305. *E.g.*, *Sacks v. Thomas Jefferson Univ. Hosp.*, 684 F. Supp. 858 (E.D. Pa. 1988), *aff'd*, 862 F.2d 310 (3d Cir. 1988).

306. See RESTATEMENT (SECOND) OF TORTS § 343A (1965) (stating that a possessor of land is not liable for harm caused to an invitee by a known or obvious danger unless she should anticipate harm despite such knowledge or obviousness).

307. 19 Kan. App. 2d 276, 868 P.2d 536 (1994).

308. *Id.* at 277, 868 P.2d at 537.

309. *Id.* at 280, 868 P.2d at 539.

contained no evidence of any conditions or circumstances that would make this location particularly dangerous.³¹⁰ There were no prior similar accidents at this location. The utility pole was not located on a curve or in a place of low visibility. The road had some ruts or “washboards” and some excessive loose gravel, but there was no evidence that these were permanent road conditions of which the utility company should have been aware. In this case there was only the general foreseeability that any car could at any time leave any road and collide with any nearby structure.³¹¹ The court is undoubtedly correct in rejecting an approach that would make the utility company a virtual insurer of all such accidents.³¹²

IV. MULTIPLE DEFENDANTS

Historically there have been three major categories of joint tortfeasors: (1) those whose independent acts of negligence or fault combine to produce a single indivisible injury; (2) those whose relationship makes one party vicariously liable for the actual fault of another; and (3) those who act in concert to cause harm to the plaintiff. During the survey period, the Kansas courts addressed an array of issues relating to all three categories of joint liability.

A. Independent Actors Causing Indivisible Injury

The Kansas comparative negligence statute abolished joint and several liability and replaced it with “proportionate” or “several” liability in which each tortfeasor is liable only for its own proportionate-fault share of the total damages.³¹³ Moreover, in order to allocate losses

310. *Id.* at 280-81, 868 P.2d at 539.

311. *Id.* at 282, 868 P.2d at 540.

312. A variation of premises liability involves the limited duty owed by landlords to tenants and third persons to protect against dangers on the leased premises under the immediate control of the tenant. During the survey period, the Kansas courts continued to restrict any duty owed by landlords to the narrowly-defined situations set forth in *Borders v. Roseberry*, 216 Kan. 486, 532 P.2d 1366 (1975). Thus, a landlord is not liable for failing to warn or otherwise protect the tenant from an obvious danger such as a piece of pipe projecting a few inches out of the ground, *Pate v. Riverbend Mobile Home Village, Inc.*, 25 Kan. App. 2d 48, 955 P.2d 1342 (1998), nor is a landlord liable to a third person for failing to make a tenant get rid of a dog that the landlord should have realized was vicious, *Colombel v. Milan*, 24 Kan. App. 2d 728, 952 P.2d 941 (1998). For a discussion of injuries not proximately caused by a landlord's failure to provide a tenant with hot water, see *Aguirre v. Adams*, 15 Kan. App. 2d 470, 809 P.2d 8 (1991), *infra* note 438.

313. KAN. STAT. ANN. § 60-258a(d) (Supp. 2000). Proportionate liability has been limited to tortfeasors whose fault was not intentional. *Sieben v. Sieben*, 231 Kan. 372, 378, 646 P.2d 1036,

among all responsible parties, a defendant may join other tortfeasors in the original action,³¹⁴ including immune, unknown, and unavailable tortfeasors.³¹⁵ Proportionate liability applies to those joint tortfeasors whose independent acts of nonintentional fault combine to cause a single indivisible injury to the plaintiff.

The Kansas Workers' Compensation Act immunizes employers from common law actions by injured employees.³¹⁶ The workers' compensation benefits constitute the employee's exclusive remedy against the employer. When the employee recovers a common law judgment against a third party, the employer traditionally has had a right of subrogation to recover the amount of workers' compensation benefits paid to the employee. However, when the employer is also at fault, the Act diminishes the right of subrogation "by the percentage of the recovery attributed to the negligence of the employer."³¹⁷

Thus, in *Brabander v. Western Cooperative Electric*,³¹⁸ the employee was injured by the combined negligence of his employer and a third party, and the employee recovered \$176,441.45 in workers' compensation benefits.³¹⁹ The jury found the employer 53% at fault, the third party 47% at fault, and the total damages to be \$327,876.46.³²⁰ The exclusive remedy provision barred recovery of the employer's 53% of the common law damages—\$173,774.52—and the employee recovered \$154,101.93 in common law damages from the third party.³²¹ The trial

1041 (1982). In addition, Kansas retains joint and several liability when the fault of a negligent tortfeasor combines with the fault of an intentional tortfeasor to cause the plaintiff's harm. See, e.g., *Gould v. Taco Bell*, 239 Kan. 564, 722 P.2d 511 (1986). For criticism of *Gould*, see Westerbeke & Robinson, 1989 *Survey*, supra note 1, at 1048-49. Kansas continues to apply joint and several liability in such cases. See *Kan. State Bank & Trust Co. v. Specialized Transp. Servs., Inc.*, 249 Kan. 348, 348-49, 819 P.2d 587, 590 (1991) ("Intentional acts of a third party cannot be compared with the negligent acts of a defendant whose duty it is to protect the plaintiff from the intentional acts committed by the third party."). For a discussion of this approach to negligence-intent combination cases under the new *Restatement (Third) of Torts: Apportionment of Liability*, see William E. Westerbeke, *Intentional Tortfeasors and the Assignment of Comparative Responsibility*, 10 KAN. J.L. & PUB. POL'Y (forthcoming 2001).

314. KAN. STAT. ANN. § 60-258a(c) (1994).

315. See *Brown v. Keill*, 224 Kan. 195, 207, 580 P.2d 867, 876 (1978) (holding that the fault of all parties to the occurrence which gave rise to the plaintiff's injuries is to be compared even though one or more cannot be fined formally or held legally responsible for his proportionate fault). During the survey period, the court of appeals held that even if a parent were to have immunity from an action by his child, the parent's fault could be considered for purposes of limiting a tortfeasor's liability to a proportionate-fault share of the total damages. *Fitzpatrick v. Allen*, 24 Kan. App. 2d 896, 905, 955 P.2d 141, 148 (1998).

316. KAN. STAT. ANN. §§ 44-501 to 44-5125 (1993).

317. KAN. STAT. ANN. § 44-504(d) (2000).

318. 248 Kan. 914, 811 P.2d 1216 (1991).

319. *Id.* at 915, 811 P.2d at 1217.

320. *Id.*

321. *Id.*

court then reduced the employer's \$176,441.45 subrogation interest by 53% to \$72,427.91, and subtracted it from the \$154,101.93 common law judgment, leaving the employee with only \$81,674.02.³²² In reversing, the supreme court interpreted the statute to require reduction of the subrogation interest by the employer's share of the common law liability—53% of \$327,876.46, or \$173,774.52, leaving the employer with a subrogation interest of \$2,666.93 (\$176,441.45 less \$173,774.52).³²³

The court's interpretation was correct. Under proportionate liability, the workers' compensation benefits paid to the employee become a legal substitute for the employer's share of the common law damages, and the employer has no subrogation interest at all until the amount of the workers' compensation benefits paid to the employee exceeds the amount of the employer's proportionate-fault share of the common law damages.

Although Kansas has adopted proportionate-fault allocation among tortfeasors, the total amount of damage governs jurisdictional limits based on damage amounts. In *Chavez v. Markham*,³²⁴ the supreme court held that the total damage suffered in an accident governs for purposes of a statute authorizing recovery of attorney's fees in motor vehicle accidents involving less than \$7,500 in damages.³²⁵ The plaintiff was injured when he stopped his truck on the highway to help an intoxicated driver who had crashed into a ditch and another intoxicated driver crashed into the plaintiff's truck.³²⁶ In a pretrial questionnaire, the plaintiff asserted total damages of \$42,499.99, of which he allocated \$35,000 to one defendant and \$7,499.99 to the other defendant along with a claim for attorney's fees. In rejecting the claim for attorney's fees, the supreme court reasoned that the total claimed damages of \$42,499.99 related to the single indivisible injuries suffered by the plaintiff in the collision.³²⁷ Accordingly, this amount governs even though proportionate liability might make one defendant legally liable for less than \$7,500 of those damages.³²⁸

The so-called "single action rule" generally requires that the comparative fault of all parties who contributed to an injury be

322. *Id.*

323. *Id.* at 918, 811 P.2d at 1219.

324. 256 Kan. 859, 889 P.2d 122 (1995).

325. *Id.* at 868, 889 P.2d at 127 (discussing KAN. STAT. ANN. § 60-2006 (1994)).

326. *Id.* at 860, 889 P.2d at 123.

327. *Id.* at 868, 889 P.2d at 127.

328. *Id.*

determined in a single action.³²⁹ Exceptions exist where a prior action did not involve any comparative fault determination³³⁰ or where jurisdiction or other factors not within a party's control prevented a comparison of the fault of all parties in the initial action.³³¹ However, in *Tersiner v. Gretencord*,³³² the plaintiff brought a federal court action under FELA for injuries caused by the negligence of both a railroad and a third party.³³³ The plaintiff lacked jurisdiction to maintain a negligence claim directly against the third party in the FELA action, but the railroad was able to bring the third party into the litigation as a cross-defendant for purposes of a comparative fault indemnity cross-claim.³³⁴ The state court then dismissed the plaintiff's subsequent claim in state court against the third party, and the court of appeals affirmed.³³⁵ The court of appeals reasoned that the comparative fault of all responsible parties was determined in the FELA action, including the cross-claim, because under FELA, the railroad was jointly and severally liable for all damage caused by the railroad and the third party.³³⁶ The holding is clearly sound for two reasons. First, a subsequent state court claim would simply relitigate the comparative fault of all the parties, and duplicative litigation is to be avoided when it is feasible and fair to do so. Second, the plaintiff was the master of his own destiny. If he had truly wanted to proceed directly against the third party, he could have voluntarily dismissed the FELA action in federal court and refiled the entire claim in state court.

B. Concerted Action

The common law doctrine widely known as "concerted action" usually passes in Kansas under the name "civil conspiracy."³³⁷ The

329. *Mick v. Mani*, 244 Kan. 81, 92, 766 P.2d 147, 155 (1988); *Albertson v. Volkswagenwerk Aktiengesellschaft*, 230 Kan. 368, 634 P.2d 1127 (1981). For additional discussion of the single action rule, see *Westerbeke & Robinson*, 1989 *Survey*, *supra* note 1, at 1042-47, and James D. Griffin & Chris Reitz, *A Review of the Kansas Comparative Fault Act*, 63 J. KAN. B. ASS'N, June/July 1994, at 26, 27-28.

330. *Childs ex rel. Harvey v. Williams*, 243 Kan. 441, 757 P.2d 302 (1988); *Mathis v. TG&Y*, 242 Kan. 789, 751 P.2d 136 (1988).

331. *Anderson v. Scheffler*, 242 Kan. 857, 752 P.2d 667 (1988).

332. 17 Kan. App. 2d 551, 840 P.2d 544 (1992).

333. *Id.* at 551-52, 840 P.2d at 545.

334. *Id.* at 552, 840 P.2d at 545.

335. *Id.*, 840 P.2d at 546.

336. *Id.* at 554, 840 P.2d at 547.

337. Kansas courts recognize that the elements of civil conspiracy correspond to the elements of concerted action set forth in section 876 of the *Restatement (Second) of Torts* (1977). See, e.g., *Vetter v. Morgan*, 22 Kan. App. 2d 1, 8, 913 P.2d 1200, 1205 (1995) (stating that under Kansas law, "§ 876 of the Restatement corresponds to the theories of civil conspiracy").

elements of civil conspiracy are: "(1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds in the object or course of action; (4) one or more unlawful overt acts;" and (5) damages proximately caused thereby.³³⁸ A classic example is found in *Vetter v. Morgan*.³³⁹ In that case, two defendants drove alongside the plaintiff's van, which was stopped at a red light.³⁴⁰ The defendant passenger leaned through the window of his vehicle, screamed obscenities at the plaintiff, shook his fist at her, and verbally threatened to drag her from her van. As she then attempted to drive away, the defendant driver feigned swerving into her lane, causing her to run into the curb and suffer a minor injury. The two defendants had a common purpose of harassing and intimidating the plaintiff, which they accomplished by a series of acts that caused her to suffer apprehension for her physical safety and a minor physical injury.³⁴¹ Although each defendant performed different acts, each was liable for all harms caused by their concerted action.³⁴²

Some Kansas cases refer to concerted action or civil conspiracy cases by the label "joint venture" or "joint enterprise."³⁴³ The confusion is unfortunate. "Joint venture" or "joint enterprise" is generally a doctrine of imputed fault in which members of a group have an agreement to carry out a common lawful purpose for a shared pecuniary interest and each member of the group has an equal right of control of the venture or enterprise. Some agreement or tacit understanding among the actors to act tortiously toward the plaintiff is a required element in concerted action or civil conspiracy, but not in "joint venture" or "joint enterprise." In *George v. Capital South Mortgage Investments, Inc.*,³⁴⁴ multiple parties acted together for the purpose of passing on hidden charges to inflate mortgage charges to homebuyers.³⁴⁵ No damages were imputed to any party that participated innocently in the business activities.³⁴⁶

338. *State ex rel. Mays v. Ridenhour*, 248 Kan. 919, 927, 811 P.2d 1220, 1226 (1991).

339. 22 Kan. App. 2d 1, 913 P.2d 1200 (1995).

340. *Id.* at 2, 913 P.2d at 1202.

341. *Id.* at 8, 913 P.2d at 1206.

342. *Id.*

343. *E.g.*, *York v. InTrust Bank*, 265 Kan. 271, 962 P.2d 405 (1998); *Vetter v. Morgan*, 22 Kan. App. 2d 1, 7, 913 P.2d 1200, 1205 (1995).

344. 265 Kan. 431, 961 P.2d 32 (1998).

345. 265 Kan. at 433-34, 961 P.2d at 36-37.

346. *York v. InTrust Bank* is similar to *George*. There, multiple parties acted together to pass on hidden damages to individual home builders, but the court more accurately described the action as one for civil conspiracy. *York*, 265 Kan. at 295, 962 P.2d at 423. However, *York* also recognized a civil action for aiding and abetting that appears to add little, if anything, other than duplication to

The importance of recognizing clear differences between the various causes of action was demonstrated in *Cullip v. Domann*.³⁴⁷ In that case, three teenagers went hunting and one of them slipped, causing his rifle to accidentally discharge and injure another of them. The injured teenager filed concerted action and joint enterprise claims in an attempt to recover damages from the teenager who did not cause his rifle to discharge and injure the plaintiff. The court rejected the concerted action or civil conspiracy claim because the agreement was to go hunting, not to act tortiously toward anybody.³⁴⁸ The court considered but rejected the joint enterprise claim that the negligence of one member of a joint venture may be imputed to other members of the joint venture in claims for injury caused to a third party.³⁴⁹ Fault is not imputed to the other members of a joint venture when the injury is to one of the joint venturers.³⁵⁰

Finally, the courts have yet to address whether the proportionate liability provision of the Kansas comparative negligence statute will apply to concerted action or civil conspiracy claims. However, joint and several liability still applies to multiple intentional tortfeasors,³⁵¹ and there is some indication that the courts will also retain joint and several liability in concerted action cases. In *Boyle v. Harries*,³⁵² two officers and directors knowingly breached their fiduciary duty by directing favorable business contracts to another company in which they held an interest.³⁵³ The court of appeals held them jointly and severally liable on the rationale that the comparative negligence statute did not apply to breach of fiduciary duty.³⁵⁴ Unfortunately, the court's reasoning became confused in its focus on the indivisible nature of the harm. As discussed in the prior section, indivisible injury is not a basis for retaining joint and several liability.³⁵⁵ The basis for retaining joint and several liability is

the actions available against multiple tortfeasors acting together to harm the legal interests of another. 265 Kan. at 286, 962 P.2d at 416.

347. 266 Kan. 550, 972 P.2d 776 (1999).

348. *Id.* at 560, 972 P.2d at 784-85.

349. *Id.* at 559, 972 P.2d at 784.

350. *Id.*, 972 P.2d at 784.

351. See *Sieben v. Sieben*, 231 Kan. 372, 380, 646 P.2d 1036, 1042 (1982) (affirming with modification the trial courts' judgments against multiple intentional tortfeasors).

352. 22 Kan. App. 2d 686, 923 P.2d 504 (1996).

353. *Id.* at 688, 923 P.2d at 506.

354. *Id.* at 697, 923 P.2d at 511.

355. In all Kansas cases applying proportionate liability to multiple tortfeasors, the plaintiff's injury was "indivisible." *E.g.*, *Chavez v. Markham*, 256 Kan. 859, 866-67, 889 P.2d 122, 126-27 (1995). In a wrongful death action, death is clearly an indivisible injury, but the damages are allocated among negligent parties whose acts merely combined to cause the death. *E.g.*, *McCart v. Muir*, 230 Kan. 618, 622-23, 641 P.2d 384, 389 (1982).

the tacit agreement of the parties to act tortiously in breaching their fiduciary duty. A number of states with proportionate liability for independent tortfeasors have retained joint and several liability for concerted action claims in their statutes.³⁵⁶

C. Vicarious Liability

The doctrine of vicarious liability imputes the liability for one party's tortious conduct to another party, who may be innocent of any misconduct, because of the relationship between the two parties. *Respondeat superior* refers specifically to an employer's or master's vicarious liability for harms caused by the tortious conduct of an employee or servant acting in the scope of the employment.³⁵⁷ By contrast, an employer generally is not vicariously liable for harms caused by the tortious conduct of an independent contractor. During the survey period, the cases primarily involved two issues: the distinction between employees and independent contractors, and the applicability of exceptions to the rule of nonliability for the torts of independent contractors.

An employee is subject to the employer's control not only over the nature and quality of the finished task, but also over the manner of performing the task. An independent contractor contracts to do certain work for an employer, but he does so according to his own methods and the employer controls only the finished nature of the work.³⁵⁸ Thus, in *McCubbin v. Walker*,³⁵⁹ the defendants, owners of a small grocery store,

356. ARIZ. REV. STAT. ANN. § 12-2506(D) (West Supp. 2000); COLO. REV. STAT. ANN. § 13-21-111.5(4) (West 2000); IDAHO CODE § 6-803(5) (Michie 1998); MONT. CODE ANN. § 27-1-703(3) (1999); NEV. REV. STAT. § 41.141(5)(d) (2000); N.H. REV. STAT. ANN. § 507:7-e(I)(c) (1997); N.D. CENT. CODE § 32-03.2-02 (1997); WASH. REV. CODE ANN. § 4.22.070(1)(a) (West Supp. 2001).

357. Generally, the issue is the right of control, not actual control. However, in *Major v. Castlegate, Inc.*, 23 Kan. App. 2d 694, 935 P.2d 225 (1997), a young child was hit in the head by a thrown horseshoe as she ran through a horseshoe pit at a company picnic sponsored and funded by the employer. The court of appeals held that the company was not vicariously liable because it did not actually control the location of the various games and entertainments at the picnic. *Id.* at 698-99, 935 P.2d at 229. The court did not discuss whether the employer had the right of control over the details of the picnic as opposed to an actual exercise of control.

358. The appropriate relationship is not presumed, but must be established by evidence. Thus, in *Felix v. Turner Unified School District No. 202*, 22 Kan. App. 2d 849, 923 P.2d 1056 (1996), the plaintiff was injured when the driver of a school bus forced the plaintiff off the road. The court of appeals reversed a judgment for the plaintiff against the school district because the plaintiff did not introduce any evidence of an employment relationship and the court cannot presume the existence of the relationship from the mere fact that the driver was operating a bus owned by the school district. *Id.* at 852, 923 P.2d at 1059.

359. 256 Kan. 276, 886 P.2d 790 (1994).

hired Moser to trim some trees for thirty dollars, and Moser contracted with the plaintiff to help trim the trees in exchange for half of that amount. The plaintiff had no contact with defendants. The plaintiff suffered serious injury when he fell from a tree. Similarly, in *McConnell v. Music Stand, Inc.*,³⁶⁰ the owner of a music store contracted with Goods to have Goods collect past due accounts and repossess musical instruments.³⁶¹ Goods then represented himself to the plaintiff and his mother as a policeman and threatened to have people arrested unless they paid the account and returned a saxophone. In each case, the courts held that the tortfeasors were independent contractors, not employees.³⁶²

In each case, the courts looked primarily to the right of control over the manner of performing the work. The evidence indicated that Walker did not have the right to control the manner in which Moser and McCubbin trimmed the trees, and the store owner never purported to direct the manner in which Goods collected accounts or repossessed instruments. In addition, the court looked to other factors that suggested an independent contractor relationship. In each case, payment was not by the hour, but rather a specific amount for the completed job, i.e., thirty dollars for trimming the trees in *McCubbin* and thirty percent of accounts collected and twenty-five dollars for each instrument recovered in *McConnell*. Moreover, in both cases the contractor decided when to perform the work and, to the extent any equipment was needed, used his own equipment. In both *McCubbin* and *McConnell*, the courts correctly applied the traditional distinction between employees and independent contractors.³⁶³

Some cases seem to defy characterization. In *Mitzner v. State*

360. 20 Kan. App. 2d 287, 886 P.2d 895 (1994).

361. *Id.* at 287, 886 P.2d at 897.

362. *McCubbin*, 256 Kan. at 283, 886 P.2d at 795-96; *McConnell*, 20 Kan. App. 2d at 292, 886 P.2d at 901.

363. *McCubbin* raises one related issue. By characterizing the plaintiff as an independent contractor, the plaintiff was precluded from any recovery against the employer both in a common law tort action and in workers' compensation. In workers' compensation, however, Professor Larson in his treatise has suggested that independent contractor status was created to protect employers from lawsuits by injured third parties, not to limit the employer's obligation to the worker. Therefore, Larson has urged consideration of the "relative nature of the work" test to determine appropriateness of worker's compensation coverage. 1C A. LARSON, WORKER'S COMPENSATION §§ 43.51-43.52 (1980). That test might not have changed the result in *McCubbin*, but it could change the result in other cases in which eligibility for benefits, or an employer's obligation to fund coverage of certain worker benefits, depends on the employee-independent contractor distinction. For possible application of these tests to workers in the home siding installation industry, compare *Home Design, Inc. v. Kansas Department of Human Resources*, 27 Kan. App. 2d 242, 2 P.3d 789 (2000) (discussing unemployment compensation benefits), with *Kirkwood v. Industrial Commission*, 416 N.E.2d 1078 (Ill. 1981) (discussing workers' compensation).

Department of Social and Rehabilitation Services,³⁶⁴ a two-year-old foster child was injured when she drank from a bottle of bathroom cleanser left unattended by an older foster child who went to answer the telephone.³⁶⁵ The supreme court held that foster parents are not employees of the state because SRS lacks ongoing control.³⁶⁶ Yet the court was also careful not to characterize foster parents as independent contractors, because then in some cases one or more of the exceptions to the rule of independent contractor nonliability might apply to impose a financial burden on the state.³⁶⁷ In essence, the court probably reflected sound public policy by indicating that foster parents should not be vicariously liable for harms caused by others to their foster children. The decision excuses foster parents only from vicarious liability and is silent on when, if at all, the foster parent might be liable to the foster child for harms caused by the parent's actual negligent conduct.

An employer's lack of vicarious liability for the tortious conduct of an independent contractor is not without exceptions. One exception exists when the employer hires an independent contractor to perform an inherently dangerous activity. An inherently dangerous activity is one "involving a special danger to others which the employer knows or has reason to know to be inherent in or normal to the work, or which he contemplates or has reason to contemplate when making the contract"³⁶⁸ Historically, Kansas courts have not readily characterized many activities as "inherently dangerous," and to a great extent this trend continued in the survey period. Thus, the Kansas courts refused to characterize as inherently dangerous painting a floor in a manner that caused a plaintiff to slip and fall,³⁶⁹ trimming trees in a manner that caused a worker to fall from a tree,³⁷⁰ or building a masonry wall that collapsed onto a worker.³⁷¹ None of these activities had posed a meaningful risk of causing injury independent of the contractor's negligence.

364. 257 Kan. 258, 891 P.2d 435 (1995).

365. *Id.* at 259-60, 891 P.2d at 437.

366. *Id.* at 262-63, 891 P.2d at 438-39.

367. The court suggested that if forced to characterize the relationship, it might opt for "licensed" volunteer. *Id.* at 262, 891 P.2d at 438. However, the court did not attempt to define what, if any, immunity from liability might flow from such a characterization.

368. *Wilson v. Daytec Constr. Co.*, 22 Kan. App. 2d 401, 403, 916 P.2d 72, 75 (1996) (citing *Balagna v. Shawnee County*, 233 Kan. 1068, 668 P.2d 157 (1983)).

369. *Id.* at 405, 916 P.2d at 76.

370. *McCubbin v. Walker*, 256 Kan. 276, 297, 886 P.2d 790, 804 (1994).

371. *Dillard v. Strecker*, 18 Kan. App. 2d 899, 906, 861 P.2d 1372, 1378 (1993), *aff'd*, 255 Kan. 704, 877 P.2d 371 (1994).

Nevertheless, in *Falls v. Scott*,³⁷² the supreme court held that an independent contractor's operation of a brush hog mowing machine was an inherently dangerous activity.³⁷³ A landowner in a city location hired the independent contractor to clear brush, tall weeds, fence posts, and debris from a parcel of land adjacent to the plaintiff's property. The brush hog was not equipped with any safety devices and was thus able to throw objects a considerable distance. The employer of the independent contractor had earlier noticed the danger posed by the mowing machine and left the work site. Shortly thereafter, the brush hog threw a piece of wire a distance of eighty feet into the plaintiff's yard, hitting the plaintiff in the eye. Two points in the court's analysis are significant.

First, the court held that the characterization of the brush hog as inherently dangerous was a question of law for the court "when the facts are undisputed."³⁷⁴ The court will characterize activities as either inherently dangerous or not, and the jury may resolve factual disputes relating to the precise nature of the activity and the risks that it poses.³⁷⁵ Second, the characterization of the brush hog as "inherently dangerous" is contextual.³⁷⁶ The brush hog is not by its nature calculated to cause harm to its operator or to others, and use of the brush hog in other circumstances might not be inherently dangerous. In *Falls*, however, use of the brush hog became inherently dangerous because it was being used in a city location without any safety devices to prevent it from throwing objects great distances and the employer of the independent contractor appreciated the highly dangerous nature of the machine. This analysis expands "inherently dangerous" beyond just those few objects that are inherently dangerous in all contexts,³⁷⁷ but does so in a manner that should enable the court to prevent excessive use of the "inherently

372. 249 Kan. 54, 815 P.2d 1104 (1990).

373. *Id.* at 62, 815 P.2d at 1111.

374. *Id.* at 61, 815 P.2d at 1110-11.

375. This approach would parallel the approach to having courts decide which activities should be characterized as "abnormally dangerous" for purposes of strict liability for abnormally dangerous activities, *Restatement (Second) of Torts* §§ 519-520 (1977), and when words are characterized as "defamatory" for purposes of a defamation action. *Id.* § 614. When a legal characterization has serious consequences, courts should provide meaningful guidance about which activities qualify for those legal consequences.

376. *Falls*, 249 Kan. at 61, 815 P.2d at 1110.

377. The court distinguished between "dangerous instrumentality" or "dangerous per se" and "inherently dangerous." *Id.* at 58, 815 P.2d at 1108. A dangerous instrumentality is one that by its nature is calculated to cause harm, such as poisons, explosives, and firearms. *Id.*, 815 P.2d at 1109. Apparently, use of these instrumentalities may be inherently dangerous without regard to context. The court did not actually explain the legal consequence of characterizing an object as a dangerous instrumentality. Yet the context of the court's discussion about the distinction between a dangerous instrumentality and an inherently dangerous activity implied that use of a dangerous instrumentality automatically qualifies as an inherently dangerous activity. *Id.* at 58-59, 815 P.2d at 1108-09.

dangerous activity" characterization.

Another exception to the rule of nonliability for the torts of independent contractors exists when an employer entrusts work subject to a nondelegable duty to an independent contractor. For example, in *Dillard v. Strecker*,³⁷⁸ the plaintiff construction worker was employed by an independent masonry contractor and was injured when a masonry wall collapsed onto him.³⁷⁹ The owner had violated a provision in the local building code that required the owner to hire an independent building inspector to monitor the construction of the wall. In an action against the owner for common law damages, the injured worker asserted both the nondelegable duty and inherently dangerous activity exceptions.³⁸⁰

Both the court of appeals and the supreme court held that the nondelegable duty, if any, extended protection to innocent third parties, not to employees of the independent contractor.³⁸¹ The court of appeals held that building a masonry wall is not an inherently dangerous activity, but the supreme court held the issue moot because the exception protects only innocent third parties, not employees of the independent contractor.³⁸² The supreme court reasoned that the independent contractor's employees were already protected by workers' compensation, that workers' compensation insurance premiums were factored into the contract price, and that to permit a common law action against the owner would expose the employer of an independent contractor to a greater cost than if he had used his own employees to perform the work. This reasoning would apply equally to both exceptions to the rule of employer nonliability.³⁸³

The result in *Dillard* is not unfair under its specific facts. The plaintiff was covered by workers' compensation, and public policy considerations can fairly support an interpretation of the nondelegable duty exception to exclude such a covered worker. However, the trial court framed its grant of summary judgment for the defendant on the ground that the defendant did not owe a duty to an employee of an independent contractor. That rationale would arguably apply to the employee of an independent contractor who is not covered by workers' compensation. Thus, in *McCubbin v. Walker*,³⁸⁴ the plaintiff agreed to

378. 255 Kan. 704, 877 P.2d 371 (1994), *aff'g* 18 Kan. App. 2d 899, 861 P.2d 1372 (1993).

379. *Id.* at 705, 877 P.2d at 372.

380. *Id.* at 705, 877 P.2d at 371.

381. *Id.* at 719, 877 P.2d at 381.

382. *Id.* at 725, 877 P.2d at 385.

383. *Id.* at 712, 877 P.2d at 376-77.

384. 256 Kan. 276, 886 P.2d 790 (1994).

help an independent contractor trim the employer's trees.³⁸⁵ He was seriously injured when he fell from one of the trees. The total payment for the job was to be thirty dollars, divided equally between the independent contractor and the plaintiff. It was unlikely that workers' compensation protected this plaintiff. If the real reason for the holding in *Dillard* was to thwart attempted circumvention of workers' compensation in order to get a common law recovery, the holding should be so phrased. Otherwise, as may have been the case in *McCubbin*, unprotected workers will be automatically excluded in cases without any opportunity to determine whether a claim against the employer of the independent contractor might be appropriate.

D. Contribution and Indemnity

Before comparative fault, loss allocation between two tortfeasors had been by either contribution or indemnity. Contribution involved an equal sharing of the loss between two or more defendants who were actually at fault. Contribution did not exist at common law, and Kansas statutorily adopted a limited form of contribution in cases where both defendants were joint judgment debtors of the plaintiff.³⁸⁶ By contrast, indemnity involved a complete shifting of a loss from one defendant to another. Three different forms of indemnity existed. Express indemnity was a contractual agreement to make one party whole by shifting the loss to another party. Implied indemnity was noncontractual and based on equitable principles that a loss borne by an innocent but vicariously liable party should be shifted to a party who was actually at fault. Active-passive implied indemnity shifted a loss borne by a party whose fault was *de minimis* to a party whose fault was significant or substantial.

The right to implied indemnity arises when the indemnitee pays a liability that equitably should be borne by the indemnitor.³⁸⁷ Thus, in

385. *Id.* at 278, 886 P.2d at 792.

386. KAN. STAT. ANN. § 60-2413 (1994). Because contribution is a statutory remedy, not a common law remedy, the Kansas legislature acted constitutionally when it enacted a special immunity against any claim for contribution in favor of the public employees' retirement fund. *Kan. Pub. Employees Ret. Sys. v. Reimer & Assocs.*, 261 Kan. 17, 927 P.2d 446 (1996).

387. In *St. Paul Fire & Marine Insurance Co. v. Tyler*, 26 Kan. App. 2d 9, 974 P.2d 611 (1999), implied indemnity was not allowed against a nurse who actually caused the injury to the patient-plaintiff. She worked with a doctor, but was formally employed by his professional corporation. The medical malpractice action was erroneously brought against the doctor individually, who was technically her co-worker. The judgment was erroneously entered against and paid by the doctor. The court dismissed the doctor's implied indemnity claim because the doctor is not vicariously liable for the negligence of a co-worker. *Id.* at 19, 974 P.2d at 619.

Leiker v. Gafford,³⁸⁸ the plaintiff brought a medical malpractice action against a nurse anesthiologist based on his negligence and against his employer based on respondeat superior.³⁸⁹ The judgment was paid by the nurse anesthiologist, and an indemnity claim by the employer for attorneys' fees was dismissed because the employer never actually paid the underlying liability.³⁹⁰

The adoption of comparative fault has introduced some confusion into concepts of contribution and indemnity. In *Schaefer v. Horizon Building Corp.*,³⁹¹ a developer hired a subcontractor to grade a development site for new housing.³⁹² Subsequently, the plaintiffs purchased a house built on the site, and over the next few years the house suffered damage from settling because the house had been built over a landfill. The plaintiffs settled with the developer, who then sought to recover all or part of the settlement from the subcontractor in an indemnity action. The court of appeals held that the indemnity action was barred by the statute of limitations, which began to run when the plaintiffs' underlying action accrued.³⁹³

The holding is correct because it was in reality a comparative fault contribution action. Kansas has a contribution statute that allocates losses in equal shares, not by comparative fault shares, and only among parties to the original action.³⁹⁴ Accordingly, Kansas characterizes the action as implied comparative fault *indemnity* in order to circumvent the statutory restrictions on contribution actions. Kansas apparently justifies this harsh application of the statute of limitations by the perceived need to protect a party's interests under the proportionate liability system.³⁹⁵ In *Schaefer*, the trial court dismissed the developer's express and implied contractual indemnity claims for reasons not given in the opinion. Those claims would have been true indemnity claims, not a proportionate liability contribution claim disguised as an indemnity claim. Applying

388. 249 Kan. 554, 819 P.2d 655 (1991).

389. *Id.* at 555, 819 P.2d at 656-57.

390. *Id.* at 561, 819 P.2d at 660.

391. 26 Kan. App. 2d 401, 985 P.2d 723 (1999).

392. *Id.* at 401, 985 P.2d at 724.

393. *Id.* at 403, 985 P.2d at 725.

394. *See Ellis v. Union Pac. R.R. Co.*, 231 Kan. 182, 643 P.2d 158 (1982) (finding no claim for contribution in a comparative negligence action where a party was not found liable in the original action), *aff'd on reh'g*, 232 Kan. 194, 653 P.2d 816 (1982).

395. Under the Kansas comparative negligence statute, each defendant is liable for only his or her own proportionate fault share of the total damages. KAN. STAT. ANN. § 60-258a(d) (1994). When the plaintiff does not sue one of the tortfeasors within the limitations period, that tortfeasor is protected from suit by the statute of limitations. That protection should not be negated by an indirect action in indemnity for the same proportionate fault share of the damages.

the reasoning of *Leiker v. Gafford*,³⁹⁶ they would logically accrue only once the indemnitee actually incurred the underlying obligation.³⁹⁷

E. Settlement and Release

At common law, a release of one joint tortfeasor was considered to be a release of all joint tortfeasors. That rule gradually changed in response to a public policy in favor of settlement,³⁹⁸ and the pace of that change accelerated with the rapid and widespread adoption of comparative fault. Under the Kansas system of proportionate liability, each tortfeasor now is liable for only his or her proportionate share of the total damages, and a plaintiff's release of that tortfeasor would not logically affect the liability of other tortfeasors.³⁹⁹ One exception is that a release of an agent, who is an actual tortfeasor, will also release the principal who is merely vicariously liable for harm caused by the agent's tortious act.⁴⁰⁰ In *York v. InTrust Bank*,⁴⁰¹ the supreme court refused to extend that rule to cases in which the principal was independently at fault, not merely vicariously at fault, even if the fault were characterized as "passive" rather than "active."⁴⁰² This holding is sound. The adoption of comparative fault has eliminated the need for the illogical and confusing doctrine of "active-passive" negligence, and this distinction is not one that courts should willingly resurrect.

However, nothing prevents a plaintiff from agreeing to release additional parties or all parties in exchange for settlement of the plaintiff's claim. Accordingly, the legal effect of a boilerplate general release of "all other persons" remains a problem. In *Eggleston v. State Farm Mutual Automobile Insurance Co.*,⁴⁰³ the plaintiff's husband was killed in a two-car accident. She settled with the driver of the other car and signed a release of "[the driver] . . . and all other persons, firms,

396. 249 Kan. 554, 819 P.2d 655 (1991).

397. It is the authors' understanding that unpublished appellate decisions in Kansas have divided on the date of accrual of an express contractual indemnity action. If this understanding is accurate, then the Kansas courts should clarify at the first opportunity when true indemnity actions accrue.

398. Kansas courts continue to emphasize that strong public policy supports settlement of disputes. See *Bright v. LSI Corp.*, 254 Kan. 853, 858, 869 P.2d 686, 690 (1994) (finding a "strong policy that settlements are to be encouraged").

399. *Geier v. Wikel*, 4 Kan. App. 2d 188, 190, 603 P.2d 1028, 1030-31 (1979).

400. See *Atkinson v. Wichita Clinic, P.A.*, 243 Kan. 705, 707, 763 P.2d 1085, 1087 (1988) (holding that a medical malpractice plaintiff's settlement with a physician released the physician's clinic from liability as well).

401. 265 Kan. 271, 962 P.2d 405 (1998).

402. *Id.* at 284-85, 962 P.2d at 417.

403. 21 Kan. App. 2d 573, 906 P.2d 661 (1995).

corporations . . . of and from any and all claims . . . known and unknown . . . resulting from the occurrence [of the accident].”⁴⁰⁴ The plaintiff then filed an action for underinsured motorist benefits against her husband’s insurance carrier, the owners of the car he was driving, and their insurance carrier. The trial court held that action was barred by the release of “all persons.”⁴⁰⁵ The court of appeals affirmed on a rationale that the law favors settlement, courts should not look for ambiguity in contracts where common sense says none exists, and the plaintiff knew all the parties affected by the release at the time she signed it.⁴⁰⁶

The holding is troublesome for two reasons. First, it demonstrates the draconian results of signing a boilerplate release. Second, it is questionable whether a release should extinguish claims based on first party insurance. Most states, including Kansas, consider uninsured motorist coverage to be first party insurance.⁴⁰⁷ Presumably, courts would characterize underinsured motorist coverage in the same manner. First party insurance claims do not arise from another’s liability for an accident, but merely from the existence of the preconditions necessary for insurance coverage. The general release probably should not have released the carrier of the underinsured motorist coverage.

A few years later, the supreme court greatly restricted the unintended consequences of a general release. In *Luther v. Danner*,⁴⁰⁸ a father was driving his motorcycle with his son as a passenger when they collided with a truck, killing the father and injuring the son.⁴⁰⁹ The deceased’s own insurance company settled any claims that might have existed against it on behalf of the surviving spouse, who signed a general release with boilerplate language releasing all persons from any and all claims, known or unknown, that have accrued or may accrue in the future. The trial court relied on this general release to grant summary judgment in favor of the truck driver and his employer.⁴¹⁰

The supreme court reversed and remanded to determine whether the truck driver and his employer could rebut a presumption that the release affected only the two specifically identified parties, the deceased’s estate

404. *Id.* at 574, 906 P.2d at 662.

405. *Id.*, 906 P.2d at 662.

406. *Id.*

407. *Sturdy v. Allied Mut. Ins. Co.*, 203 Kan. 783, 785, 457 P.2d 34, 36 (1969); 9 LEE R. RUSS & THOMAS F. SEGALLA, *COUCH ON INSURANCE* § 122:5 (3d ed. 1995); 12 *Id.* § 171:14.

408. 268 Kan. 343, 995 P.2d 865 (2000).

409. *Id.* at 343, 995 P.2d at 866.

410. *Id.* at 344-45, 995 P.2d at 867.

and his insurance company.⁴¹¹ Courts in other states have adopted three rules governing the legal effect of boilerplate language in a general release. First, the flat bar rule views the boilerplate language as unambiguous and bars all other claims against all other tortfeasors.⁴¹² Second, the intent rule views the language as ambiguous and permits the parties to introduce parole evidence of the intent of the contracting parties. Finally, the specific identity rule presumes that the liability of any party not specifically identified in the release is not discharged by the release. The supreme court adopted a rebuttable presumption variation of the specific identity rule. The court reasoned that the flat bar rule was based on the antiquated common law conceptualism of the indivisibility of joint and several liability, while proportionate liability in comparative fault negated the indivisibility concept and is consistent with piecemeal settlement.⁴¹³

V. CAUSATION

Causation in a negligence action is comprised of two quite different elements: cause-in-fact and proximate cause. Cause-in-fact is primarily a factual determination whether an actor's breach of duty was in fact a cause of the injury or damage to another. Proximate cause is essentially a legal policy determination about whether the cause-in-fact was a substantial factor in producing the injury or damage.

A. Cause-in-Fact

The vast majority of cases involve only the limited inquiry of whether there was sufficient evidence to support a finding of cause-in-fact and related issues concerning burden of proof. In *Smith v. Milfeld*,⁴¹⁴ the plaintiff's hoarse voice condition after two heart surgeries was diagnosed as the result of damage to the left recurrent laryngeal nerve.⁴¹⁵ The plaintiff's expert witness was not allowed to testify that the injury was caused by one of six identifiable acts, because he did not know which specific act caused the injury. Each of the six acts would have

411. *Id.* at 352, 995 P.2d at 871.

412. Presumably the court of appeals followed the flat bar rule in barring all other claims in *Eggleston v. State Farm Mutual Automobile Insurance Co.*, 21 Kan. App. 2d 573, 906 P.2d 661 (1995).

413. The Kansas Supreme Court relied heavily upon the reasoning in *Hansen v. Ford Motor Co.*, 900 P.2d 952, 956 (N.M. 1995).

414. 19 Kan. App. 2d 252, 869 P.2d 748 (1993).

415. *Id.* at 253, 869 P.2d at 749.

involved a breach of the doctor's standard of care. The court of appeals reversed, holding that in such a situation, the expert does not have to identify the specific cause of the injury, but only that the doctor's breach of his standard of care probably caused the injury.⁴¹⁶ Because all six possible causes involved a breach of the standard of care, the overall thrust of the evidence was that the doctor's breach of the standard of care caused the injury.

A few cause-in-fact cases cannot be determined under the traditional "but for" test on a purely factual basis. During the survey period, the Kansas courts further developed and applied the "loss of chance" doctrine. The loss of chance doctrine, currently limited to medical malpractice cases, is an exception to the rule that the plaintiff must prove by a preponderance of the evidence that the defendant's negligence caused the plaintiff's injury. Thus, if the defendant doctor's negligence reduces the decedent's chance of survival from 40% to 0%, it was more likely than not that the decedent would die, regardless of the quality of medical care provided. However, Kansas has recognized a loss of chance action in such a case because the loss of a 40% chance of survival is something of value, even if it is not necessarily the cause of the death.⁴¹⁷ In *Delaney v. Cade*,⁴¹⁸ the plaintiff was injured in an automobile collision.⁴¹⁹ She alleged that the defendants' failure to diagnose promptly her transected aorta, which had thrombosed, caused her to lose a 5-10% chance of avoiding permanent paralysis. In response to certified questions, the supreme court held that (1) the loss of chance doctrine applied to injury cases as well as to death cases,⁴²⁰ (2) the loss of chance must be substantial,⁴²¹ and (3) damages are the entire damages suffered as a result of the injury or death, but are to be in direct proportion to the loss of chance.⁴²²

Application of the doctrine to injury cases is probably sound,

416. *Id.* at 256, 869 P.2d at 751.

417. *Roberson v. Counselman*, 235 Kan. 1006, 1021, 686 P.2d 149, 160 (1984). "Loss of chance" relates to the issue of causation between an act of medical malpractice and the damage suffered by a patient and is thus a part of the underlying medical malpractice claim, not an independent legal claim separate and apart from the underlying medical malpractice claim. Accordingly, the medical malpractice and the resulting loss of chance constitute one claim for purposes of monetary limitations per "claim" or per "occurrence" in an insurance policy. *Wilson v. Ramirez*, 269 Kan. 371, 381, 2 P.3d 778, 785 (2000).

418. 255 Kan. 199, 873 P.2d 175 (1994).

419. *Id.* at 201, 873 P.2d at 177.

420. *Id.* at 211, 873 P.2d at 183.

421. *Id.* at 215, 873 P.2d at 185.

422. *Id.* at 218, 873 P.2d at 187.

although one might question whether the doctrine would be appropriate in cases involving ordinary as opposed to catastrophic injuries. The doctrine exists to protect the most vulnerable persons in society who, without such a doctrine, would have no protection against substandard medical treatment. The requirement of a substantial loss of chance is appropriate as a protection against trivial claims. The loss of chance doctrine represents a substantial departure from traditional causation principles, and therefore should be limited to the more serious claims.⁴²³

Measuring damages in direct proportion to the loss of chance is a logical and necessary limitation on the doctrine. For example, if a doctor's negligence reduces a 40% chance of survival to 0%, damages would be 40% of a wrongful death recovery. Viewed in a one-on-one context, the result is not entirely logical because it is more likely than not that the negligence played no role in the decedent's death. However, as applied to ten such cases, the total payments would equal four wrongful death recoveries from a medical community that statistically caused four of the ten deaths. Thus, the amount of total damages equals the harm actually caused, and the distribution of those damages among all ten claims is simply the best available solution when the identity of the four decedents whose deaths were caused by the malpractice cannot be known.⁴²⁴

In *Estate of Donnini v. Ouano*,⁴²⁵ the court held that the proportionate causation method of measuring damages would apply only in cases in which the plaintiff could not establish causation by a preponderance of the evidence because the loss of chance was 50% or less.⁴²⁶ In that case, the jury found that two doctors' negligence reduced the decedent's chance of surviving his cancer from 55% to 0%. The court held the jury findings established that it was more likely than not that the negligence caused the death, and therefore a full wrongful death recovery was appropriate. Initially, this interpretation seems inconsistent and unfair to the medical community. However, the court's adherence to the traditional view reflects the view that the loss of chance doctrine is a unique and limited policy-based exception to the traditional rules of causation, and not a doctrine of general application.

423. It should be noted that the proportionate causation approach to measuring damages probably eliminates any incentive for bringing claims involving either a less serious injury or a loss of a trivial chance of survival or cure.

424. For more detailed analysis of this allocation of damages, see Westerbeke & Robinson, 1989 Survey, *supra* note 1, at 1029-38.

425. 15 Kan. App. 2d 517, 810 P.2d 1163 (1991).

426. *Id.* at 522, 810 P.2d at 1168.

Finally, in *Dickey ex rel. Dickey v. Daugherty*,⁴²⁷ a severely ill patient with Adult Respiratory Distress Syndrome died during treatment when the defendant doctor inadvertently lacerated her pulmonary artery.⁴²⁸ The jury found that wrongful death damages were \$114,000 for pecuniary loss and \$270,000 for nonpecuniary loss, that the doctor was 100% at fault, and that the patient had a 30% chance of survival at the time of the treatment. The supreme court held that the damage amounts should be multiplied by the loss of chance before applying the then-existing \$100,000 cap on nonpecuniary loss in the wrongful death statute.⁴²⁹ This holding correctly reflects the proposition that the \$100,000 cap is not a limit on the amount of damage suffered, but only on the amount of damage that may be recovered.⁴³⁰

B. Proximate Cause

Proximate cause is primarily an issue of legal policy in which the determination is whether a defendant should be held responsible for a particular consequence resulting from a certain category of conduct. In practice, this determination may include a wide variety of considerations including the nature and character of the actor, the injured party, the specific conduct at issue, the relationships among the parties, patterns of insurance coverage, and broad societal concerns. However, rarely will courts openly discuss these considerations. Rather, if courts are inclined to permit liability, they will frame the issue as one of foreseeability and allow it to be submitted to the jury as a question of fact. If courts conclude that the defendant should not be held liable for such a consequence, they will simply characterize the consequence as unforeseeable as a matter of law.⁴³¹

For example, in *Lay v. Kansas Department of Transportation*,⁴³² the plaintiff was seriously injured when his car overturned after he failed to negotiate a curve on a county road.⁴³³ The curve approached an

427. 260 Kan. 12, 917 P.2d 889 (1996), *aff'g* 21 Kan. App. 2d 655, 905 P.2d 697 (1995).

428. *Id.* at 13, 917 P.2d at 890.

429. *Id.* at 15-16, 917 P.2d at 891.

430. For analogous holdings that apply comparative fault reductions before applying any damage caps, see *infra* Part VII.B.3.

431. Courts often use proximate cause analysis that focuses solely on the foreseeability of the particular harm to decide matters that might better be addressed under a duty analysis that would openly include additional factors such as the burden on the actor and the benefits of the conduct.

432. 23 Kan. App. 2d 211, 928 P.2d 920 (1996).

433. *Id.* at 212, 928 P.2d at 922.

intersection with a state highway which was under the Kansas Department of Transportation (KDOT)'s jurisdiction. Along the county road, KDOT had posted a "Stop Ahead" sign that was obscured by vegetation. The plaintiff sued KDOT, alleging that its negligence in permitting vegetation to obscure the sign contributed to his injuries. The court of appeals concluded that KDOT's duty was only to warn of the intersection ahead.⁴³⁴ Thus, KDOT had no duty with respect to any danger the curve in the county road presented to drivers. A dissenting judge pointed out that had the "Stop Ahead" sign not been obscured, the plaintiff might have slowed down when he saw it and avoided running off the road. The dissent further observed that one reason for the "Stop Ahead" sign was that the curve in the road made it difficult to see the intersection where the county road crossed the state highway. Thus, in the dissent's opinion, the issue of causation in this case should have been submitted to a jury.⁴³⁵

Usually the foreseeability of a risk should be a question of fact for the jury unless reasonable jurors could not disagree. Courts occasionally honor this rule in the breach. An example is *Major v. Castlegate, Inc.*,⁴³⁶ where the seven-year-old daughter of one of the defendant's employees was injured at the defendant's company picnic when she was struck in the head by a horseshoe while running through a horseshoe pit set up for the picnic.⁴³⁷ The plaintiff had been playing badminton adjacent to the horseshoe pit and was running across the horseshoe pit to engage in another picnic activity when she was injured. The court of appeals concluded that there was no liability, reasoning that this was not a case where someone playing badminton was struck by an errant horseshoe. Instead, the court concluded that someone being injured as a result of running through the horseshoe pit while players were tossing horseshoes was an unforeseeable event that the defendant had no duty to prevent or anticipate, and that the placement of the games in proximity to one another was not the proximate cause of the child's injuries.⁴³⁸

434. *Id.* at 216, 928 P.2d at 925.

435. *Id.* at 219-20, 928 P.2d at 926-27.

436. 23 Kan. App. 2d 694, 935 P.2d 225 (1997).

437. *Id.* at 696, 935 P.2d at 228.

438. *Id.* at 702, 935 P.2d at 231. The result may well be correct in *Major*, although it seems the unspoken rationale for the court's holding is the perception that the minor plaintiff was contributorily negligent and primarily at fault for her injuries. To say that it is unforeseeable as a matter of law to anticipate that young children playing games at a company picnic might run through adjacent areas in which games also are being played seems a stretch. This case easily could be viewed as presenting fact questions on proximate cause and comparative negligence which should have been resolved by a factfinder, rather than as a matter of law. See also *Aguirre v. Adams*, 15 Kan. App. 2d 470, 473, 809 P.2d 8, 10 (1991) (holding that the landlord's failure to provide hot

VI. DAMAGES

A. Actual Damages

Although problems in measuring compensatory damages in torts cases have always existed,⁴³⁹ modern tort doctrines such as comparative fault⁴⁴⁰ and loss of chance theory⁴⁴¹ have complicated the calculations. Further complications have arisen when statutory damages caps such as Kansas Statutes Annotated sections 60-1903(a),⁴⁴² 60-19a02,⁴⁴³ and 75-6105(a)⁴⁴⁴ are added to the situation.⁴⁴⁵

A fundamental question is what constitutes compensable damages. In *Leiker v. Gafford*,⁴⁴⁶ the estate of a decedent who died from medical malpractice sought and obtained damages for the decedent's "loss of enjoyment of life" and pain and suffering for the time the decedent was in a coma following the malpractice until her death.⁴⁴⁷ The supreme court held that "loss of enjoyment of life" is not a separate category of

water to tenant's bathtub was not a proximate cause of the tenant's toddler being burned in bathtub by hot water while the tenant was bringing water from her kitchen and was not supervising the child).

439. See, e.g., *Jones v. Sigg*, 261 Kan. 615, 623, 930 P.2d 1077, 1084 (1997) (stating that the jury did not render a "quotient," and therefore invalid, verdict (i.e., the jury agrees in advance to determine damages by having each juror specify an amount of damages and then divide the total sum by the number of jurors) where all jurors (except one) agreed on a fifty percent figure for damages as the appropriate award after discussion and negotiation); *Miller v. Miller*, 25 Kan. App. 2d 29, 32, 955 P.2d 635, 637 (1998) (holding that Kansas Statutes Annotated section 40-3117, which prohibits recovery of pain and suffering damages in automobile accident cases unless the plaintiff has suffered a "permanent injury within reasonable medical probability" requires not only a permanent injury, but also a serious or significant injury); *McBride v. Dice*, 23 Kan. App. 2d 380, 383, 930 P.2d 631, 633 (1997) (holding plaintiff-homeowners could not recover nonpecuniary, consequential damages for "inconvenience and discomfort" for the defendant's negligent termite inspection of their new home (the defendant inspected the wrong residence), but could have sought and recovered damages for the loss of the reasonable rental value of their residence and household furnishings during the time they were displaced from the home—a category of pecuniary damages they did not claim).

440. For a general discussion of comparative fault in Kansas, see James D. Griffin & Chris Reitz, *A Review of the Kansas Comparative Fault Act*, 63 J. KAN. B. ASS'N, June/July 1994, at 26.

441. See, e.g., *Delaney v. Cade*, 255 Kan. 199, 211, 215, 873 P.2d 175, 183, 185 (1994) (holding loss of chance doctrine applies to injury and death cases if the loss of chance is substantial).

442. There is now a \$250,000 cap on nonpecuniary damages in wrongful death cases, since a 1998 amendment that raised the limit from \$100,000.

443. This section places a \$250,000 cap on nonpecuniary damages in all personal injury actions.

444. This section places a \$500,000 cap (per occurrence) on damages against governmental employees and entities under the Kansas Tort Claims Act.

445. Scott M. Adam & Bruce Keplinger, *Our Statutory System for Actual Damages in Tort: Kansas in Wonderland?*, 63 J. KAN. B. ASS'N, Jan. 1994, at 18.

446. 245 Kan. 325, 778 P.2d 823 (1989).

447. *Id.* at 332, 778 P.2d at 830.

compensable damages in Kansas, but that it is essentially a subcomponent of general nonpecuniary damages for pain and suffering.⁴⁴⁸ The court further held that only pain and suffering which a plaintiff consciously experiences is compensable.⁴⁴⁹

For the most part, the damages cases the Kansas courts have decided since the last survey involve refinements of calculation methods and clarifying how certain compensable damages should be characterized (e.g., pecuniary versus nonpecuniary damages for statutory cap purposes). For example, in *Bright v. Cargill*,⁴⁵⁰ the Kansas Supreme Court applied the comparative fault reduction first, prior to applying the statutory cap on nonpecuniary damages.⁴⁵¹ In *Gann v. Joeckel*,⁴⁵² the court of appeals extended that approach to nonpecuniary damages in a wrongful death case, to which a different statutory cap applies.⁴⁵³ And, in *Dickey ex rel. Dickey v. Daugherty*,⁴⁵⁴ the supreme court applied the same approach to a "loss of chance" claim.⁴⁵⁵ The calculation method can make a significant difference, and plaintiffs generally will benefit from the approach the Kansas courts have adopted (apply comparative fault first to reduce any nonpecuniary award, then the statutory cap). A contrary approach would cap the award first, then determine comparative fault, generally ensuring that plaintiffs recover less than the applicable statutory cap on nonpecuniary damages.

In theory anyway, the calculation of pecuniary damages is objective and relatively straightforward, although there can be arguments over projections for future damages, discount rates, and so forth. For property damage, the general measure is the fair market value of the property (if destroyed) or the diminution in fair market value. Occasionally, however, an item of property may not have an easily measurable market value. In such circumstances, the Kansas courts have held that the factfinder must look to factors such as the cost of repair, the original value of the property, the loss of use damages, the special value of the property to the owner, the loss of expected profits, or the cost of replacement to determine the proper amount of damages.⁴⁵⁶

448. *Id.* at 340, 778 P.2d at 835.

449. *Id.*

450. 251 Kan. 387, 837 P.2d 348 (1992).

451. *Id.* at 417, 837 P.2d at 370; see KAN. STAT. ANN. § 60-19a02 (1994) (placing a general \$250,000 cap on nonpecuniary damages).

452. 20 Kan. App. 2d 136, 884 P.2d 451 (1994).

453. *Id.* at 141, 884 P.2d at 454; see KAN. STAT. ANN. § 60-1903(a) (Supp. 2000) (limiting nonpecuniary damages to \$250,000 in wrongful death actions).

454. 260 Kan. 12, 917 P.2d 889 (1996).

455. *Id.* at 16, 917 P.2d at 892.

456. See, e.g., *Kan. Power & Light Co. v. Thatcher*, 14 Kan. App. 2d 613, 616-17, 797 P.2d

Another damages problem is how to prove the amount of nonpecuniary damages, which are not objectively measurable. Generally, the Kansas courts require that the plaintiff present some "reasonable basis" for the factfinder to award a particular amount of compensatory damages.⁴⁵⁷ Such awards are then subject to "shocks the conscience" review by the court.⁴⁵⁸ As a procedural matter, Kansas courts have the authority to invoke either remittitur (when a court believes the damage award is excessive) or additur (when a court believes the award is inadequate).⁴⁵⁹

In *Wilson v. Williams*,⁴⁶⁰ the supreme court overruled the longstanding rule that plaintiffs' attorneys are prohibited from presenting to juries per diem or mathematical formula arguments for calculating nonpecuniary damages.⁴⁶¹ In this case, the plaintiff's attorney in closing argument had asked for specific amounts of nonpecuniary damages and then broken those numbers down into amounts per day based on the plaintiff's life expectancy.⁴⁶² The court of appeals reversed the resulting verdict in the plaintiff's favor, relying on *Caylor v. Atchison, Topeka & Santa Fe Railway Co.*,⁴⁶³ which held that such "per diem" or "formula" arguments by plaintiffs' attorneys are prohibited.⁴⁶⁴

But the Kansas Supreme Court reversed, overruling *Caylor*.⁴⁶⁵ The supreme court pointed out that the *Caylor* rule placed Kansas in a distinct minority position, since most states now permit such arguments to the jury.⁴⁶⁶ Furthermore, quoting at length from the dissenting opinion in *Caylor*, the court concluded that the better-reasoned position is to permit the use of mathematical formula and per diem comments and charts

162, 165 (1990) (valuing the damage to a thirty-five-year-old wooden utility pole as the cost of the replacement pole without reduction by depreciation) (citing *Airright Sales, Inc. v. Graves Truck Lines, Inc.*, 207 Kan. 753, 756, 486 P.2d 835 (1971)).

457. *E.g.*, *McKissick v. Frye*, 255 Kan. 566, 591, 876 P.2d 1371, 1389 (1994); *Wahwasuck v. Kan. Power & Light Co.*, 250 Kan. 606, 616, 828 P.2d 923, 930-31 (1992); *Smith v. Stevens*, 23 Kan. App. 2d 1013, 1014, 940 P.2d 68, 69 (1997).

458. *See, e.g.*, *Wahwasuck*, 250 Kan. at 619, 828 P.2d at 932-33 (finding a \$200,000 damage award for knee injury was not shocking in light of similar cases upholding awards twice as large); *Kohl v. Atchison, Topeka & Santa Fe Ry. Co.*, 250 Kan. 332, 342, 827 P.2d 1, 8 (1992) (finding an \$85,000 award was not shocking).

459. *Dixon v. Prothro*, 251 Kan. 767, 772, 840 P.2d 491, 494-95 (1992).

460. 261 Kan. 703, 933 P.2d 757 (1997).

461. *Id.* at 710, 933 P.2d at 761.

462. *Id.* at 704, 933 P.2d at 758.

463. 190 Kan. 261, 374 P.2d 53 (1962).

464. *Wilson*, 261 Kan. at 705, 933 P.2d at 758.

465. *Id.* at 710, 933 P.2d at 761.

466. *Id.* at 708, 933 P.2d at 760.

during arguments.⁴⁶⁷ The supreme court cautioned, however, that (1) expert testimony is not permitted on the issue of the amount of nonpecuniary damages and (2) trial courts should continue to expressly instruct juries that (a) there is no mathematical formula for determining nonpecuniary damages and (b) counsels' opening and closing arguments are not evidence.⁴⁶⁸

Because Kansas limits damages for nonpecuniary loss to \$250,000 in negligence and wrongful death cases⁴⁶⁹ but imposes no limitation on recovery of pecuniary loss, injured plaintiffs may have an incentive to characterize their losses as pecuniary rather than nonpecuniary in nature.⁴⁷⁰ For example, in *Shirley v. Smith*,⁴⁷¹ the defendant doctor negligently caused permanent damage to the plaintiff's bowel and bladder.⁴⁷² As a result, the plaintiff required catheterization four times a day for the rest of her life to empty her bladder. The procedure took an hour per day, although the plaintiff testified that she was able to do it herself in her "off time."⁴⁷³ A jury awarded her \$135,000 in damages for future pecuniary "loss of time."⁴⁷⁴ The court of appeals held that the plaintiff's "loss of time" was actually part of her nonpecuniary losses subject to the \$250,000 cap⁴⁷⁵ because she performed the catheterizations during her "off time."⁴⁷⁶

467. *Id.* at 709, 933 P.2d at 760-61.

468. *Id.* at 710, 933 P.2d at 761.

469. The Kansas courts have tended to construe the statutory caps broadly, to the benefit of defendants and the detriment of plaintiffs. *See, e.g.,* *Cott v. Peppermint Twist Mgmt. Co.*, 253 Kan. 452, 856 P.2d 906 (1993) (holding that a \$250,000 cap applies to all claims, including a breach of warranty claim, rather than just negligence claims); *Hoover v. Innovative Health of Kan., Inc.*, 26 Kan. App. 2d 447, 988 P.2d 287 (1999) (holding that a single \$250,000 cap applies to four different incidents, each of which caused nonpecuniary harm, when all four claims are asserted in a single lawsuit), *appeal denied*, 1999 Kan. LEXIS 766 (1999). In so doing, the Kansas courts have consistently rejected arguments that such caps interfere with the Kansas constitutional right to a remedy by due course of law. *See, e.g.,* *Samsel v. Wheeler Transp. Servs., Inc.*, 246 Kan. 336, 363, 789 P.2d 541, 558 (1990) (holding that the statutory cap does not violate the Kansas Constitution, including sections 5 and 18 of the Kansas Bill of Rights); *Samsel v. Wheeler Transp. Servs., Inc.*, 244 Kan. 726, 727, 771 P.2d 71, 72 (1989) (same). *See generally* Shannon M. Roesler, Comment, *The Kansas Remedy by Due Course of Law Provision: Defining a Right to a Remedy*, 47 U. KAN. L. REV. 655 (1999) (discussing the Kansas Supreme Court's interpretation of section 18 of the Kansas Bill of Rights).

470. *See, e.g.,* *Huffman v. Thomas*, 26 Kan. App. 2d 685, 994 P.2d 1072 (1999) (upholding award in excess of \$900,000 in pecuniary damages to the parents of an adult child in a wrongful death action based on medical malpractice).

471. 261 Kan. 685, 933 P.2d 651 (1997).

472. *Id.* at 687, 933 P.2d at 653.

473. *Id.* at 689, 933 P.2d at 654.

474. *Id.*

475. *Shirley v. Smith*, 22 Kan. App. 2d 424, 916 P.2d 730 (1996).

476. The court reasoned that "loss of time" relating to decreased earning capacity constitutes pecuniary loss, while injury and disfigurement not affecting earning capacity constitute

The supreme court disagreed, focusing on the *nature* of the activity, not on the time *when* it was performed.⁴⁷⁷ The plaintiff's time spent catheterizing herself was time spent performing a medical service necessitated by the doctor's malpractice. The fact that she could perform it herself did not alter its characterization as a medical service. In essence, the case was similar to one where the court held nursing services provided free of charge by the plaintiff's relatives were recoverable medical services.⁴⁷⁸ Thus, catheterization was a medical service with a reasonable economic value and should be treated as an economic loss despite the fact that she performed the service herself without charge during her leisure time.⁴⁷⁹

Since the last survey, several attempts were made to abrogate or modify the common law collateral source rule in Kansas.⁴⁸⁰ The collateral source rule—which generally holds that plaintiffs' damages may not be reduced by showing that some injuries already have been compensated by sources unrelated to the defendant, such as through health or disability insurance—has been a point of contention in Kansas for many years.⁴⁸¹ Ultimately all legislative attempts to modify or abrogate the common law rule have failed or been declared unconstitutional by the courts.⁴⁸²

In *Bates v. Hogg*,⁴⁸³ however, the court of appeals perhaps, in a very small way, chipped away at the rule. In *Bates*, the collateral source question was whether the plaintiff should be permitted to present evidence of the full charges her health care provider claimed when in fact her provider wrote off a portion of the charges and Medicaid paid the remainder.⁴⁸⁴ The trial court only permitted her to present evidence of the amount Medicaid actually paid. She contended that such a restriction violated the collateral source rule.⁴⁸⁵ The court of appeals disagreed,

nonpecuniary loss. *Id.* at 426, 916 P.2d at 733; see *Samsel v. Wheeler Transp. Servs., Inc.*, 246 Kan. 336, 352, 789 P.2d 541, 552 (1990) (discussing economic and non-economic damages).

477. See *Shirley*, 261 Kan. at 693, 933 P.2d at 657.

478. *Lewark v. Parkinson*, 73 Kan. 553, 555-56, 85 P. 601, 601-02 (1906).

479. *Shirley*, 261 Kan. at 693, 933 P.2d at 656-57.

480. See generally Christopher J. Eaton, Comment, *The Kansas Legislature's Attempt to Abrogate the Collateral Source Rule: Three Strikes and They're Out?*, 42 U. KAN. L. REV. 913 (1994) (discussing the Kansas legislature's battle with the Kansas Supreme Court in its failed attempts to abrogate the Kansas collateral source rule).

481. See, e.g., James Concannon & Ron Smith, *More Goo for Our Tort Stew: Implementing the Kansas Collateral Source Rule*, 58 J. KAN. B. ASS'N, Feb. 1989, at 19.

482. See Eaton, *supra* note 480 (discussing the legislature's three failed tries in eight years).

483. 22 Kan. App. 2d 702, 921 P.2d 249 (1996).

484. *Id.* at 704, 921 P.2d at 252.

485. *Id.*

concluding that the reasonable value of the plaintiff's medical damages was the amount Medicaid agreed to pay (and her health care provider agreed to accept).⁴⁸⁶

Finally, one federal case addressing the validity of the Kansas \$250,000 cap on nonpecuniary damages merits mention. In *Patton v. TIC United Corp.*,⁴⁸⁷ the Tenth Circuit rejected the novel argument that the Kansas statutory cap on nonpecuniary damages violates the Americans with Disabilities Act (ADA).⁴⁸⁸ Among other things, the ADA provides that no qualified individual with a disability "shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."⁴⁸⁹ The Tenth Circuit acknowledged that the plaintiff in *Patton*, rendered a paraplegic by the accident giving rise to the case, was a "qualified individual with a disability" under the ADA, but the court rejected the argument that the Kansas statutory cap denied him access to a "service, program or activity" of the State of Kansas by reason of disability.⁴⁹⁰ Without deciding whether a jury determination of nonpecuniary damages is a state "service, program, or activity" under the ADA, the Tenth Circuit concluded that the plaintiff was not denied meaningful access to such a determination because the statutory cap applies to *all* plaintiffs, not just the disabled.⁴⁹¹

B. Punitive Damages

In the late 1980s, the Kansas legislature enacted various statutory provisions to govern the consideration and imposition of punitive damages.⁴⁹² The Kansas statutes establish procedures for filing punitive damage claims, including that plaintiffs may not assert such claims in their original complaint but, rather, must make a special motion to the trial judge for permission to amend the complaint to include a claim for

486. *Id.* at 705, 921 P.2d at 253.

487. 77 F.3d 1235 (10th Cir. 1996).

488. *Id.* at 1246 (citing Americans with Disabilities Act of 1990 § 202, U.S.C. § 12132 (1994); see also Anthony L. DeWitt, *Enabling ADA Protection For the Disabled: How the ADA Impacts K.S.A. Section 60-19a02*, 5 KAN. J.L. & PUB. POL'Y 77 (1995) (arguing for and explaining why the passage of the Americans with Disabilities Act should preempt the \$250,000 cap imposed in personal injury cases).

489. 42 U.S.C. § 12132.

490. 77 F.3d at 1246 (citing 42 U.S.C. § 12131(2)).

491. *Id.*

492. See generally KAN. STAT. ANN. §§ 60-3701 to 60-3703 (1994 & Supp. 2000).

punitive damages.⁴⁹³ Such permission may be granted only if the trial judge concludes that the plaintiff is more likely than not to prevail on such a claim at trial, and the trial judge's decision is reviewed on appeal under an abuse of discretion standard.⁴⁹⁴ Importantly, the Kansas statutes require that the judge, rather than the jury, determine the amount of any punitive award.⁴⁹⁵

The statutes also impose a clear and convincing evidence standard of proof for establishing entitlement to such awards,⁴⁹⁶ set forth the factors the courts should consider in determining the amounts of punitive awards,⁴⁹⁷ and cap the amounts that may be awarded.⁴⁹⁸ The Kansas courts have upheld these statutes against constitutional challenge.⁴⁹⁹ Also potentially important in the punitive damages context are decisions of the United States Supreme Court addressing federal constitutional challenges to punitive awards.⁵⁰⁰

For the most part, the Kansas punitive damages cases since the last survey involve the application of the Kansas statutory scheme. For example, in *Fusaro v. First Family Mortgage Corp.*,⁵⁰¹ the Kansas Supreme Court considered the statutory procedures for asserting a claim for punitive damages.⁵⁰² In particular, Kansas Statutes Annotated section 60-3703 prohibits plaintiffs from including a claim for punitive damages in the complaint; rather, a plaintiff must move the trial court for permission to amend the complaint to add such a claim, and the trial court must make an initial determination regarding "probability" of

493. *Id.* § 60-3703; see also *George v. Capital S. Mortgage Invs. Inc.*, 265 Kan. 431, 438-46, 961 P.2d 32, 39-43 (1998) (discussing Kansas statutory procedures for making a punitive damages claim).

494. *E.g.*, *Moore v. Associated Material & Supply Co.*, 263 Kan. 226, 246-48, 948 P.2d 652, 665-66 (1997) (discussing and applying section 3703's procedures for amending complaint).

495. KAN. STAT. ANN. §§ 60-3701(a), 60-3702(a) (1994). Section 3701 applies to actions accruing between July 1, 1987 and July 1, 1988, while section 3702, which is essentially identical to section 3701, applies to actions accruing on or after July 1, 1988.

496. *Id.* §§ 60-3701(c), 60-3702(c); see also *Grove v. Orkin Exterminating Co.*, 18 Kan. App. 2d 369, 372, 855 P.2d 968, 971 (1993) (discussing standard of proof under section 3701).

497. KAN. STAT. ANN. §§ 60-3701(b), 60-3702(b).

498. *Id.* §§ 60-3701(e), (f), 60-3702(e), (f). For a discussion of the law governing punitive damages in Kansas generally, see Paul W. Rebein, *A Primer on Punitive Damages in Kansas*, 64 J. KAN. B. ASS'N, Nov. 1995, at 22.

499. *E.g.*, *Smith v. Printup*, 254 Kan. 315, 321-33, 866 P.2d 985, 991-98 (1993); *McConwell v. FMG of Kan. City, Inc.*, 18 Kan. App. 2d 839, 861-63, 861 P.2d 830, 845-47 (1993).

500. See, e.g., *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574-86 (1996) (finding an Alabama state law punitive award unconstitutionally excessive, and articulating three constitutional guideposts for evaluating punitive awards).

501. 257 Kan. 794, 897 P.2d 123 (1995).

502. *Id.* at 800, 897 P.2d at 128.

success on the claim before permission to amend may be granted.⁵⁰³ At the same time, Kansas Statutes Annotated section 60-3701(c) provides that, at trial, a plaintiff seeking punitive damages “shall have the burden of proving, by clear and convincing evidence” that such damages are warranted.⁵⁰⁴ One question in *Fusaro* was whether, in making the initial “probability” of success determination required under section 3703, the trial court should take into consideration the “clear and convincing evidence” standard that would apply at trial.⁵⁰⁵ The supreme court answered that question in the affirmative.⁵⁰⁶ Thus, in making the section 3703 determination, a trial court must determine whether there is a probability that the plaintiff will be able to establish at trial, by clear and convincing evidence, that punitive damages are warranted.⁵⁰⁷

Kansas Statutes Annotated section 60-3701(e) provides that the amount of any punitive award shall not exceed the lesser of (1) the highest annual gross income of the defendant during the five years prior to the act for which such damages are awarded or (2) \$5 million. Section 3701(f) provides that, in lieu of the limitation of section 3701(e), if the court finds that the profitability of the defendant’s conduct exceeds or is expected to exceed the cap imposed by section 3701(e), the court may impose a punitive award in an amount up to one and one-half times the amount of profit the defendant gained or is expected to gain as a result of the misconduct. In *Gillespie v. Seymour*,⁵⁰⁸ the supreme court considered and applied section 60-3701(f).⁵⁰⁹ The trial court invoked section 3701(f) after finding that the defendant’s highest annual gross income during the relevant five-year period under section 3701(e) was only \$865,851 and that the defendant’s profitability from the misconduct was the more than \$2.6 million in investments he obtained from the trust during the relevant time period.⁵¹⁰

503. KAN. STAT. ANN. § 60-3703 (Supp. 2000).

504. *Id.* (1994).

505. 257 Kan. at 801, 897 P.2d at 129.

506. *Id.*

507. See also *Calver v. Hinson*, 267 Kan. 369, 378, 982 P.2d 970, 977 (1999) (applying an abuse of discretion standard to the district court’s decision to permit the plaintiffs, pursuant to the Kansas Statutes Annotated section 60-3703 procedure, to assert a claim for punitive damages against one defendant, but not another); *George v. Capital S. Mortgage Invs., Inc.*, 265 Kan. 431, 438-46, 961 P.2d 32, 39-43 (1998) (discussing statutory procedures for asserting a punitive damages claim); *Moore v. Associated Material & Supply Co.*, 263 Kan. 226, 246-48, 948 P.2d 652, 665-67 (1997) (stating that the trial court must rule on a 60-3703 motion no later than the pretrial conference); *Sullwold v. Barcus*, 17 Kan. App. 2d 410, 412-17, 838 P.2d 908, 910-13 (1992) (same); *Glynos v. Jagada*, 249 Kan. 473, 486-87, 819 P.2d 1202, 1211-12 (1991) (same).

508. 255 Kan. 774, 877 P.2d 409 (1994).

509. *Id.* at 785, 877 P.2d at 417.

510. *Id.*

The supreme court affirmed the district court's award of punitive damages.⁵¹¹ The defendant argued that his profit was not the total amount he received from the trust (which was the figure the district court used) but, rather, his gain less his expenditures, which he alleged only totaled approximately \$632,000, considerably less than his highest annual gross income.⁵¹² The supreme court, however, held that "profit" as used in section 60-3701 has a broader meaning than simply gain minus expenditures.⁵¹³ The court observed that "[t]o hold otherwise could lead to incongruous results. As the plaintiffs point out, under Seymour's theory, had Seymour gambled away all the Trust moneys in Las Vegas, he could argue he had no profit at all—despite the Trust's huge loss of funds."⁵¹⁴

The definition of "profit" the supreme court adopted for purposes of applying section 3701(f) is neither compelled by the plain language of the statute, nor probably by legislative intent. Certainly, as the court acknowledges, the dictionary meaning of "profit" suggests the conventional gain minus expenses formulation utilized in the accounting context.⁵¹⁵ In products liability cases in particular, the court's definition may permit trial courts to find "profit," for example, by measuring only the defendant's total revenue from sales of the product, where no traditional method of accounting would recognize a "profit" (sales revenue minus expenses of manufacturing, marketing, etc.). Nor is the court's example of the defendant gambling away money received very compelling. A company would still have made a "profit" in an accounting sense from the sale of a product even if the president gambled away the proceeds or armed robbers stole the money from the company. The problem with the court's gambling hypothetical is that gambling is not an "expenditure" that is in any way related to the gains the defendant received in terms of investments made by the trust. Thus, the problem posed by the court is a straw man that has no relevance if the court were to adopt a conventional definition of "profit."

Another case applying the statutory standards is *Smith v. Printup*,⁵¹⁶ which involved a fatal automobile accident.⁵¹⁷ In concluding that the trial court did not err in setting the amount of punitive damages, the

511. *Id.*

512. *Id.* at 784-85, 877 P.2d at 416.

513. *Id.* at 785, 877 P.2d at 417.

514. *Id.* at 784, 877 P.2d at 416.

515. *Id.* at 783-84, 877 P.2d at 416.

516. 262 Kan. 587, 938 P.2d 1261 (1997).

517. *Id.* at 589, 938 P.2d at 1265.

supreme court declared that a trial court may, but is not required to, consider the plaintiff's attorneys' fees and litigation expenses, but that evidence of the plaintiff's financial position is irrelevant to the proper amount of a punitive award.⁵¹⁸

It is a common rule in many jurisdictions, including Kansas, that punitive damages may not be awarded absent an award of actual (i.e., compensatory) damages.⁵¹⁹ The Kansas courts have held, however, that, even in the absence of an award of actual damages, punitive damages may be awarded incidental to equitable relief.⁵²⁰ The question in *Golconda Screw, Inc. v. West Bottoms Ltd.*,⁵²¹ was whether a plaintiff may seek punitive damages in a fraudulent conveyance case brought pursuant to Kansas Statutes Annotated section 33-102 in which no actual damages were awarded.⁵²² The defendant argued that such damages are not authorized by the statute, while the plaintiff countered that they need not be expressly authorized in order to be recoverable.⁵²³ The court of appeals agreed with the plaintiff, observing that because punitive damages are not compensatory and were not a remedy at common law, they need not be expressly authorized by a particular statute in order to be recoverable under that statute.⁵²⁴

Although the *Golconda* opinion is short on explanation for the result it reaches, the conclusion that punitive damages are available in fraudulent conveyance cases is eminently supportable. The very nature of such cases involves a fraudulent act on the part of the defendant, precisely the type of intentional and willful conduct that punitive damages ought to punish, if they are to be permitted at all. Nor would it be wise to adopt the proposition that punitive damages are precluded under any statute that does not expressly authorize such damages in connection with the cause of action it creates. Most statutes recognizing causes of action do not expressly authorize punitive damages; rather, the norm appears to be that the legislature mentions punitive damages only when it intends to preclude their recovery.⁵²⁵

518. *Id.* at 601-03, 938 P.2d at 1273-74.

519. *E.g.*, *Wilkinson v. Shoney's, Inc.*, 269 Kan. 194, 208, 4 P.3d 1149, 1160 (2000); *Enlow v. Sears, Roebuck & Co.*, 249 Kan. 732, 740, 822 P.2d 617, 624 (1991); *McConwell v. FMG of Kan. City, Inc.*, 18 Kan. App. 2d 839, 860, 861 P.2d 830, 845 (1993).

520. *Capitol Fed. Sav. & Loan Ass'n v. Hohman*, 9 Kan. App. 2d 217, 217, 675 P.2d 384, 385, *aff'd*, 235 Kan. 815, 682 P.2d 1309 (1984).

521. 20 Kan. App. 2d 1002, 894 P.2d 260 (1995).

522. *Id.* at 1004-05, 894 P.2d at 264.

523. *Id.* at 1005, 894 P.2d at 264.

524. 20 Kan. App. 2d at 1007, 894 P.2d at 265.

525. *See, e.g.*, Kansas Tort Claims Act, KAN. STAT. ANN. § 75-6105(c) (1997) ("A governmental entity shall not be liable for punitive or exemplary damages.").

Most of the remaining Kansas punitive damages decisions since the last survey are fact-specific, but even so, one drunk driving case merits mention. In *Reeves v. Carlson*,⁵²⁶ the defendant drove his employer's truck into the front of plaintiff's home after he failed to turn or stop as he approached a "T" intersection on a cloudy, damp night.⁵²⁷ The defendant had been drinking for several hours, and his blood alcohol level following the accident was .217. The jury awarded the plaintiff compensatory damages of slightly over \$10,000 and determined that an award of punitive damages was warranted.⁵²⁸ The trial court then awarded \$10,000 in punitive damages.⁵²⁹

The supreme court first concluded that a punitive damage award was appropriate.⁵³⁰ The court discussed what constitutes "wanton" conduct sufficient to justify an award of punitive damages, and whether the defendant's conduct had crossed that threshold.⁵³¹ The court rejected the defendant's argument that he never intended to hurt anyone, concluding that the defendant's awareness of his extremely intoxicated state and his decision to drive his employer's large truck at night on wet streets were sufficient to support the jury's determination that he acted wantonly.⁵³² The court also rejected the argument that the defendant could not have anticipated the type of accident that occurred—driving into a house—concluding that his wanton act was the decision to drive at all under circumstances in which some type of collision was likely.⁵³³

The Kansas Supreme Court also rejected the defendant's argument that the punitive award was excessive.⁵³⁴ Observing correctly that punitive awards are never automatic nor compelled as a matter of law, and discussing both the statutory procedure for making punitive awards and the statutory factors the trial judge is to consider, the court easily concluded that \$10,000 was not an excessive award. The court pointed out that subsequent to this accident the defendant had committed and was

526. 266 Kan. 310, 969 P.2d 252 (1998).

527. *Id.* at 311-12, 969 P.2d at 254-55.

528. *Id.* at 312-13, 965 P.2d at 255.

529. *Id.* at 313, 969 P.2d at 255.

530. *Id.* at 316, 969 P.2d at 257.

531. *Id.* at 313-16, 969 P.2d at 256-57.

532. *Id.* at 314-15, 969 P.2d at 256; *see also* *Moyer v. Allen Freight Lines, Inc.*, 20 Kan. App. 2d 203, 885 P.2d 391 (1994) (upholding verdict because credible evidence suggested the defendant may have fired the plaintiff for following safety rules and, if so, the jury could find punitive damages were warranted); *Ceretti v. Flint Hills Rural Elec. Coop. Ass'n*, 251 Kan. 347, 837 P.2d 330 (1992) (upholding an award of punitive damages against a utility enterprise).

533. *Reeves*, 266 Kan. at 315-16, 969 P.2d at 256-67.

534. *Id.* at 318, 969 P.2d at 258.

convicted of another, unrelated DUI offense—and that the trial court had not abused its discretion in choosing that amount.⁵³⁵

For public policy reasons, the courts of some jurisdictions, including Kansas, have held that a defendant cannot insure against liability for punitive damages.⁵³⁶ One question that has arisen, however, is whether that same rule should apply when an employer has been held liable for punitive damages for the tort of an employee on a vicarious liability theory. In *Kline v. Multi-Media Cablevision, Inc.*,⁵³⁷ the supreme court largely abolished the concept of vicarious liability of employers for punitive damages.⁵³⁸ Answering a certified question from the United States District Court, the supreme court responded that a corporation is not liable for punitive damages for an employee's tortious acts committed within the scope of employment unless the corporation (a) authorized the act; (b) recklessly employed an unfit employee; (c) ratified or approved the act; or (d) the employee was acting in a managerial capacity.⁵³⁹ The following year, the legislature enacted a statute that provides as follows:

It is not against the public policy of this state for a person or entity to obtain insurance covering liability for punitive or exemplary damages assessed against such insured as the result of acts or omissions, intentional or otherwise, of such insured's employees, agents or servants, or of any other person or entity for whose acts such insured shall be vicariously liable, without the actual prior knowledge of the insured.⁵⁴⁰

Then, in 1987, the legislature enacted Kansas Statutes Annotated section 60-3701(d)(1), which provides that punitive damages may not be awarded against a principal or employer for acts of an agent or employee “unless the questioned conduct was authorized or ratified by a person expressly empowered to do so on behalf of the principal or employer.”⁵⁴¹ This statutory rule appears to narrow even the liability rule the supreme

535. *Id.* at 317-18, 969 P.2d at 258.

536. *See, e.g., St. Paul Surplus Lines Ins. Co. v. Int'l Playtex, Inc.*, 245 Kan. 258, 272, 777 P.2d 1259, 1269 (1989) (ruling that public policy precludes insuring against punitive damages); *Guarantee Abstract & Title Co. v. Interstate Fire & Cas. Co.*, 228 Kan. 532, 535, 618 P.2d 1195, 1198 (1980) (same); *Koch v. Merchs. Mut. Bonding Co.*, 211 Kan. 397, 404-05, 507 P.2d 189, 195-96 (1973) (holding that public policy requires the defendant, not the surety, to pay punitive damages award).

537. 233 Kan. 988, 666 P.2d 711 (1983).

538. *Id.* at 994, 666 P.2d at 716.

539. *Id.*, 666 P.2d at 716.

540. KAN. STAT. ANN. § 40-2,115(a) (2000).

541. KAN. STAT. ANN. § 60-3701(d)(1) (1994).

court adopted in *Kline*.⁵⁴²

The supreme court considered the interaction of *Kline* and these statutory provisions in two more recent cases that raised insurability issues. In *Hartford Accident & Indemnity Co. v. American Red Ball Transit Co.*,⁵⁴³ an insurance company providing liability coverage for a driver who caused an accident and the company to whom the driver was “leased out” refused to pay the punitive damage awards on the ground that doing so would be contrary to Kansas public policy.⁵⁴⁴ The Kansas Supreme Court agreed with the insurance company, pointing out that under Kansas law, specifically section 60-3701(d)(1), corporations and employers are liable for punitive damages arising from the acts of employees only if a person has authorized or ratified the employee’s act and is expressly empowered to do so.⁵⁴⁵ In other words, under section 3701(d)(1), employers cannot be held vicariously liable for punitive damages liability arising from the torts of their employees, and section 40-2,115 is a nullity under current Kansas punitive damages law.

The other case, *Flint Hills Rural Electric Cooperative Ass’n v. Federated Rural Electric Insurance Corp.*,⁵⁴⁶ likewise concluded that an insurance policy that purported to cover liability for “all sums,” ostensibly including punitive damages liability, would be void as against Kansas public policy with respect to punitive damages imposed on a corporation or employer under section 60-3701(d)(1).⁵⁴⁷ Although the court emphasized that public policy in Kansas will not preclude corporations or employers from insuring against punitive damages liability if such liability arises only by virtue of vicarious liability principles, that situation appears unlikely to arise—indeed, it seems impossible—under Kansas law at this time.⁵⁴⁸ In this case, however, the

542. See *Hartford Accident & Indem. Co. v. Am. Red Ball Transit Co.*, 262 Kan. 570, 584, 938 P.2d 1281, 1292 (1997) (observing that “K.S.A. 60-3701 narrowed our holding in *Kline*”); see also *Lindsey v. Miami County Nat’l Bank*, 267 Kan. 685, 691, 984 P.2d 719, 723 (1999) (Kansas Statutes Annotated section 60-3701(d)(1) provides that punitive damages may not be awarded against an employer for the acts of an employee unless the employer authorized or ratified the employee’s conduct.); *Rothwell v. Werner Enters., Inc.*, 859 F. Supp. 470, 476 (D. Kan. 1994) (same).

543. 262 Kan. 570, 938 P.2d 1281 (1997).

544. *Id.* at 574, 938 P.2d at 1285.

545. *Id.* at 586, 938 P.2d at 1293.

546. 262 Kan. 512, 941 P.2d 374 (1997).

547. *Id.* at 523, 941 P.2d at 381.

548. See *Hartford Accident & Indem. Co. v. Am. Red Ball Transit Co.*, 262 Kan. 570, 585, 938 P.2d 1281, 1292 (1997) (stating that “[t]he provisions of K.S.A. 40-2,115(a) do not apply” to any punitive award made against a corporation or employer under Kansas Statutes Annotated section 60-3701(d)(1)).

court pointed out that the defendant in the underlying action was directly liable, not vicariously liable, because the defendant's managerial employee ignored warnings about a dangerously low power line strung across part of a lake.⁵⁴⁹ Thus, the court concluded that the insurance policy violated Kansas public policy to the extent it purported to cover an employer's direct liability for punitive damages.

The bottom line from these cases is that the only basis for imposing punitive damages on corporations or employers for liability arising from the conduct of their employees is now the authorization or ratification provision of section 60-3701(d)(1), also known as the "complicity rule." There no longer is any vicarious liability of employers for punitive damages. For that reason, section 40-2,115, which permits corporations or employers to insure against punitive awards imposed on a vicarious liability basis, is now a dead letter. Such insurance is useless in Kansas because such liability will never arise under current law. Essentially, corporations and employers in Kansas now have much more limited liability for punitive damages arising from the conduct of employees, but if such liability is imposed, it cannot be covered by insurance. Finally, at the federal level, there have been repeated efforts to constitutionalize the law of punitive damages, primarily by defendants contending that the Due Process Clause of the Fourteenth Amendment to the United States Constitution limits the circumstances in which states may impose punitive damages and the amounts that may be imposed.⁵⁵⁰ In *BMW of North America, Inc. v. Gore*,⁵⁵¹ the Supreme Court for the first time found a state punitive damages award to be constitutionally excessive.⁵⁵² The Court clarified that federal due process principles impose substantive limits on both the circumstances in which punitive damages may be awarded and the size of such awards. Moreover, the Court identified three constitutional "guideposts" that govern the determination whether a particular punitive award is unconstitutionally excessive.

549. See *Cerretti v. Flint Hills Rural Elec. Coop. Ass'n*, 251 Kan. 347, 369, 837 P.2d 330, 346 (1992) (discussing the underlying facts and affirming punitive damage award).

550. See, e.g., *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 466 (1993) (acknowledging that due process applies but rejecting the claimed violation); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 15 (1991) (same); see also *Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 260 (1989) (rejecting an argument that the Eighth Amendment's prohibition on "excessive fines" applies to punitive damage awards made to private plaintiffs). For an argument that the Court got it wrong in *Browning-Ferris* and that the Eighth Amendment prohibition on excessive fines makes more sense than the Due Process Clause as a constitutional limit on punitive damages, see Stephen R. McAllister, *A Pragmatic Approach to the Eighth Amendment and Punitive Damages*, 43 U. KAN. L. REV. 761 (1995).

551. 517 U.S. 559 (1996).

552. *Id.* at 585-86.

First, a reviewing court must evaluate the degree of reprehensibility of the defendant's conduct. Second, the court must compare the actual or potential harm the plaintiff suffered to the size of the punitive award (this is the ratio concept). Finally, a reviewing court must examine the punitive award in light of the civil penalties that are legislatively authorized for the defendant's conduct or that have been imposed in comparable cases.⁵⁵³

VII. DEFENSES

A. *Contributory Negligence*

A difficult issue in both medical and legal malpractice involves the circumstances under which patients and clients of professionals may be contributorily negligent in causing in part the injury or harm resulting from the professional person's malpractice.⁵⁵⁴ The cases have divided. In *Huffman v. Thomas*,⁵⁵⁵ the decedent was seriously injured when he was pinned beneath a pickup truck that fell off the hydraulic lift at a transmission shop.⁵⁵⁶ He was taken to the hospital emergency room and underwent some tests, but died more than five hours later while waiting to go into surgery.⁵⁵⁷ The negligence of two doctors and the medical center was based on the long delay waiting for surgery. The court of appeals held that the trier of fact could not reduce the judgment against the medical defendant by any contributory negligence of the decedent in causing the truck to fall off the lift.⁵⁵⁸

Patients seek doctors when they are injured or ill, and clients seek attorneys when they have problems. Whether the medical or legal problem is caused by the patient's or client's contributory negligence, by the fault of a third party, or by pure accident prior to the professional services is irrelevant. The doctor and the lawyer take the patient and the client as they find them, and each has a duty to use his training, knowledge, and skill to correct the problem as best possible under the

553. For an analysis criticizing the Court's decision in this case, see Jim Davis II, Note, *BMW v. Gore: Why the States (Not the U.S. Supreme Court) Should Review Substantive Due Process Challenges to Large Punitive Damage Awards*, 46 U. KAN. L. REV. 395 (1998).

554. For a prior discussion of this issue, see the discussion of *Allman v. Holleman*, 233 Kan. 781, 667 P.2d 296 (1983), in Westerbeke, 1984 *Survey*, *supra* note 237, at 9-13.

555. 26 Kan. App. 2d 685, 994 P.2d 1072 (1999).

556. *Id.* at 686, 994 P.2d at 1074.

557. *Id.* at 687, 994 P.2d at 1074-75.

558. *Id.* at 691, 994 P.2d at 1077.

circumstances. Any prior act of contributory negligence that merely creates the occasion for professional services is not a proximate cause of subsequent malpractice by the professional.⁵⁵⁹

The holding is sound. The court of appeals distinguished the holdings in *Wisker v. Hart*⁵⁶⁰ and *Cox v. Lesko*,⁵⁶¹ each of which involved subsequent contributory negligence by a patient that contributed to the lack of success of the doctor's treatment.⁵⁶² In *Wisker*, the patient engaged in strenuous activity contrary to his doctor's explicit instructions.⁵⁶³ In *Cox*, the patient failed to follow her doctor's instructions to participate in physical therapy to rehabilitate her shoulder after an operation.⁵⁶⁴ In both cases, the supreme court held that the negligence of the patient could constitute contributory negligence sufficient to either reduce or bar the claim of malpractice by a doctor.

However, the situation in *Huffman* was quite different. In professional malpractice cases, not every negligent act by the patient or client would qualify as contributory negligence sufficient to bar or reduce the plaintiff's recovery from the doctor or lawyer. For example, negligent driving that injures a driver and involves him in a lawsuit by another person injured by his negligent driving gives rise to his need for both medical and legal services. The prior act of negligence creates the condition for which the professional services are needed, but is not negligence that contributes to any harm caused by the professional person's subsequent failure to provide adequate services. However, once the doctor or lawyer commences delivery of professional services and instructs the patient or client to take certain steps to make the professional services effective, the patient or client comes under a duty to protect himself by following those instructions. In each case, subsequent acts of negligence by the patient or client combined with some negligence of the professional person to render the professional services wholly or partially ineffective.⁵⁶⁵

559. Of course, the physical harm or legal difficulty resulting from that earlier negligence may limit the quality of the result that may be reasonably expected from the doctor's or lawyer's services.

560. 244 Kan. 36, 766 P.2d 168 (1988).

561. 263 Kan. 805, 953 P.2d 1033 (1998).

562. *Huffman*, 26 Kan. App. 2d at 689, 994 P.2d at 1076. The same issue may arise in the context of a legal malpractice action. In *Pizel v. Zuspänn*, three brothers who were trustees of their uncle's inter vivos trust failed to take appropriate steps to protect the trust property by not reading or otherwise understanding the trust agreement and by not accepting and managing the trust property. 247 Kan. 54, 795 P.2d 42, *modified*, 247 Kan. 699, 803 P.2d 205 (1990).

563. 244 Kan. at 39, 766 P.2d at 171.

564. 263 Kan. at 807, 953 P.2d at 1036.

565. Both cases depended heavily on the particular facts of the case. There is a suggestion in *Pizel* that the trust agreement was not written or explained in a manner understandable to a lay person. 252 Kan. 384, 389, 845 P.2d 37, 41 (1993). It is well established that contributory

In *Cox v. Lesko*,⁵⁶⁶ the supreme court also held that the patient's failure to follow the doctor's instructions constituted contributory negligence, rather than a failure to mitigate damages.⁵⁶⁷ The court of appeals had characterized the patient's failure to participate regularly in physical therapy as a failure to mitigate damages already caused by a negligent shoulder operation.⁵⁶⁸ Although the supreme court did not explain its holding clearly, the holding is probably sound because the patient was at fault by not following instructions. Failure to mitigate damages applies where a defendant's negligent conduct has created a condition of danger and the plaintiff's decision to forgo a particular treatment that might more fully correct the condition is not necessarily culpable, but simply an exercise of personal choice or autonomy.⁵⁶⁹ More pragmatically, because mitigation of damages is not a fault doctrine, its application could only reduce recovery, not completely bar it.⁵⁷⁰

B. Comparative Fault

1. Scope of the Comparative Fault Statute

The Kansas comparative negligence statute, Kansas Statutes Annotated section 60-258a, was adopted in 1974. In plaintiff versus defendant comparisons, Kansas has adopted the so-called forty-nine percent rule of modified comparative negligence, i.e., a plaintiff is no longer barred from recovery by contributory negligence so long as the

negligence for failure to take precautions against a danger does not exist in a warning case in which the defendant failed to provide an adequate warning *and* as a result the plaintiff was unaware of the danger. It is not clear from the facts of the case whether this rationale might have applied to one or more of the trustees.

566. 263 Kan. 805, 953 P.2d 1033 (1998).

567. *Id.* at 819, 953 P.2d at 1042.

568. *Cox v. Lesko*, 23 Kan. App. 2d 794, 797, 935 P.2d 1086, 1089 (1997), *aff'd*, 263 Kan. 805, 953 P.2d 1033 (1998).

569. For example, in *Zimmerman v. Ausland*, 513 P.2d 1167 (Or. 1973), the plaintiff refused to undergo a simple, inexpensive, and reasonably safe knee operation that would have prevented any permanent damage to his knee. *Id.* at 1169. While the plaintiff had the right to forgo the operation and was not "negligent" in doing so, he could not fairly recover damages for permanent injuries that he could have reasonably mitigated. *Id.*

570. In *Cox*, the jury found the plaintiff seventy percent at fault and the doctor thirty percent at fault for the failure of her treatment. 263 Kan. App. 2d at 806, 935 P.2d at 1035. Under the forty-nine percent rule of modified comparative fault in Kansas, the plaintiff was completely barred from recovery. KAN. STAT. ANN. § 60-258a(a) (1994). If her conduct were instead viewed as a failure to mitigate damages, a partial recovery would have been appropriate.

plaintiff's negligence is less than the fault of the defendant(s).⁵⁷¹ In multiple defendant comparisons, the statute creates a system of proportionate liability and permits joinder of additional parties so that the fault of all responsible parties may be compared.⁵⁷² Although worded as a comparative *negligence* statute, the Kansas courts have interpreted the statute to encompass virtually all forms of fault that are less culpable than intentional wrongdoing.⁵⁷³ Originally, the statute applied only in cases of death, personal injury, or property damage,⁵⁷⁴ but in 1987, the legislature amended the statute to extend it to tort actions involving economic loss. Subsequent cases have held that the 1987 amendment is substantive and does not apply retroactively.⁵⁷⁵ Thus, the plaintiff's contributory negligence in an economic loss tort action accruing prior to 1987 was a complete defense.⁵⁷⁶

2. Reduction of Recovery in Proportion to the Plaintiff's Fault

a. Nonuse of Seat Belt and Child Safety Seat

In *Watkins v. Hartsock*,⁵⁷⁷ a three-month-old-child was killed in a two-car accident, but the trial court refused to allow the defendant to show for purposes of comparative fault that the parents had improperly placed the child in a child safety seat as required by the Child Passenger Safety Act.⁵⁷⁸ In affirming, the supreme court held that the legislative intent was to prevent any violation of the Act from being the basis for negligence by the parents or guardian of a child. One section of the Act specifically provided that its violation "shall not constitute negligence *per se*."⁵⁷⁹ Although the wording is somewhat unusual, the court

571. KAN. STAT. ANN. § 60-258a(a).

572. *Id.* § 60-258a(c), (d).

573. See, e.g., *Sieben v. Sieben*, 231 Kan. 372, 378, 646 P.2d 1036, 1041 (1982) (intentional fault not compared); *Kennedy v. City of Sawyer*, 228 Kan. 439, 452, 618 P.2d 788, 798 (1980) (strict products liability compared), *rev'd*, 228 Kan. 439, 618 P.2d 788 (1980); *Wilson v. Probst*, 224 Kan. 459, 462, 581 P.2d 380, 384 (1978) (statutory liability compared); *Mills v. Smith*, 9 Kan. App. 2d 80, 82, 673 P.2d 117, 120 (1983) (strict liability for wild animals compared).

574. *Fed. Sav. & Loan Ins. Corp. v. Huff*, 237 Kan. 873, 878-79, 704 P.2d 372, 377 (1985).

575. *Pizel v. Zuspahn*, 247 Kan. 699, 701, 803 P.2d 205, 206-07 (1990); *Wichita Fed. Sav. & Loan Ass'n v. Black*, 245 Kan. 523, 543-44, 781 P.2d 707, 721 (1989).

576. See *Pizel v. Whalen*, 252 Kan. 384, 392, 845 P.2d 37, 44 (1993) (stating that pre-1987 contributory negligence of trustees of an inter vivos trust would completely bar any legal malpractice recovery against the attorney who drafted the trust agreement).

577. 245 Kan. 756, 783 P.2d 1293 (1989).

578. *Id.* at 757, 783 P.2d at 1295; Child Passenger Safety Act, KAN. STAT. ANN. § 8-1345(d) (1991 & Supp. 2000).

579. KAN. STAT. ANN. § 8-1346 (1991).

reasoned that the Act was intended to parallel the statutory inadmissibility of evidence of nonuse of a seatbelt to prove comparative fault.⁵⁸⁰ The court's interpretation of the intent of the Child Passenger Safety Act is clearly correct.

Kansas Statutes Annotated section 8-2504(c) provides that evidence of nonuse of a seatbelt "shall not be admissible in any action for the purpose of determining any aspect of comparative negligence or mitigation of damages."⁵⁸¹ This statute does not bar evidence of nonuse of a seatbelt for other purposes. Thus, evidence of nonuse of a seatbelt may be admissible when relevant to prove some other issue such as the nondefectiveness of a car's steering mechanism⁵⁸² or the nondefectiveness of the car's seat design.⁵⁸³

b. Application to Young Children

Children generally are not held to an adult standard of care, but rather to the standard of a child of "like age, intelligence, and experience under like circumstances."⁵⁸⁴ Prior to the introduction of comparative fault, courts in Kansas and elsewhere further protected children by holding that children under seven years of age were generally incapable of contributory negligence. In *Honeycutt v. City of Wichita*,⁵⁸⁵ a child who was six years and four months old had his legs severed at a railroad crossing when he fell while running alongside a train, trying either to touch or climb aboard it.⁵⁸⁶ The child had been repeatedly warned by his family and teachers to stay away from trains and to obey the school safety patrol.⁵⁸⁷ In reversing a partial summary judgment in favor of the child, the supreme court held that whether a child of tender years is contributorily negligent is a question of fact for the jury.⁵⁸⁸

The court viewed the issue as simply a choice between two long standing approaches: the "Illinois rule," treating children under seven years of age as incapable of contributory negligence as a matter of law;⁵⁸⁹

580. *Id.* § 8-2504(c) (1991).

581. *Id.*

582. *Floyd v. Gen. Motors Corp.*, 25 Kan. App. 2d 71, 73, 960 P.2d 763, 765 (1998).

583. *Gardner v. Chrysler Corp.*, 89 F.3d 729, 734 (10th Cir. 1996) (applying Kansas law).

584. RESTATEMENT (SECOND) OF TORTS § 283A (1965).

585. 247 Kan. 250, 796 P.2d 549 (1990).

586. *Id.* at 251, 796 P.2d at 551.

587. *Id.*

588. *Id.* at 264, 796 P.2d at 559.

589. *Id.* at 252, 796 P.2d at 551; *see, e.g., Toney v. Marzariegos*, 519 N.E.2d 1035, 1038 (Ill. App. Ct. 1988) (discussing the rule in Illinois and its current status). A child's incapacity for

and the "Massachusetts rule," treating the question of contributory negligence by such children as raising a question of fact for the jury.⁵⁹⁰ Although no Kansas cases have ever used contributory negligence to bar a child under nine years of age from recovery, the Kansas cases reflect some doctrinal confusion. A survey of Kansas cases over more than a century reflected uncertainty on the issue, with some cases treating the issue as one of fact,⁵⁹¹ others treating it as one of law,⁵⁹² and yet others being unclear and ambivalent on the question.⁵⁹³ The court simply held that the Kansas cases were consistent with the Massachusetts rule, that the question-of-fact approach was less arbitrary, and that the special child's standard of care would permit juries to recognize fully the different abilities of children in different age groups.⁵⁹⁴

The result is probably sound. Even though in many cases children under seven years of age would be incompetent to appreciate and protect themselves from some of the more complex dangers in society, such young children are arguably able to appreciate certain simple and common dangers, such as running into the street without first looking for oncoming cars. The question of fact approach allows courts and juries to consider these differences.

However, the court failed to appreciate the importance of comparative fault to this issue. A fundamental principle in the traditional "all or nothing" system of tort loss allocation is that a lesser fault is not a defense to a greater fault. Thus, contributory negligence was not a defense to intentional⁵⁹⁵ or reckless wrongdoing;⁵⁹⁶ nor was it available

negligence below the age of seven probably was an extension of the old common law rule concerning the age below which a child was deemed legally incapable of committing a crime. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 32, at 179-81 (5th ed. 1984).

590. *Honeycutt*, 247 Kan. at 252, 796 P.2d at 551; see, e.g., *Peterson v. Taylor*, 316 N.W.2d 869, 873 (Iowa 1982) (stating that the majority rule is to send the question of child's capacity to the jury).

591. See, e.g., *Weber v. Wilson*, 187 Kan. 214, 220, 356 P.2d 659, 664 (1960) (stating "there is no precise age at which a child may be said, as a matter of law, to have acquired such knowledge and discretion as to be held accountable for all his actions"); *Bellamy v. Kan. City Rys. Co.*, 108 Kan. 708, 711-12, 149 P. 1104, 1107 (1921) (stating that children are not liable as a matter of law "to the disabling effects of contributory negligence").

592. See, e.g., *Gerchberg v. Loney*, 223 Kan. 446, 449, 576 P.2d 593, 596-97 (1978) (stating that under the law a child can be conclusively incapable of contributory negligence), *overruled on other grounds by Bowers v. Ottenad*, 240 Kan. 208, 719 P.2d 1103 (1986).

593. See, e.g., *Farran v. Peterson*, 185 Kan. 154, 160, 342 P.2d 180, 185 (1959) (stating that charging a seven-year-old girl with contributory negligence "would be exceedingly difficult to do").

594. *Honeycutt*, 247 Kan. at 264, 796 P.2d at 559.

595. See, e.g., *Eckerd v. Weve*, 85 Kan. 752, 755, 118 P. 870, 871 (1911) (willful assault and battery).

596. See, e.g., *Elliott v. Peters*, 163 Kan. 631, 636, 185 P.2d 139, 143 (1947) (wantonness); *Atchison, Topeka & Santa Fe Ry. Co. v. Baker*, 79 Kan. 183, 185-86, 98 P. 804, 805 (1908) (reckless and wanton misconduct).

to a defendant who failed to take advantage of the last clear chance to avoid injury to a contributorily negligent plaintiff⁵⁹⁷ or who violated a safety statute intended to protect a class of plaintiffs from their own relative inability to protect themselves.⁵⁹⁸ In the same vein, even when a child under seven years of age is technically capable of contributory negligence, the culpability of the child in the vast majority of cases will probably be less than the culpability of the negligent adult who injured the child. In such cases, a complete bar from any recovery would constitute an unacceptably harsh burden on young children. However, under comparative fault the child's contributory negligence in these cases would constitute not a complete bar, but only a small reduction in damages. The child would be completely barred from recovery only in the rare case where the young child's fault equals or exceeds the defendant's fault.⁵⁹⁹

c. Application to Rescue Doctrine

An actor who undertakes to rescue a person in a position of peril will not be barred from recovery in a negligence action against a defendant whose negligence created the situation of peril, unless the rescuer's fault rises to the level of recklessness or foolhardiness.⁶⁰⁰ In *Bridges v. Bentley*,⁶⁰¹ the plaintiff was severely injured when he was hit by a truck after the plaintiff stopped on the side of the highway to render assistance at an earlier vehicular accident.⁶⁰² The supreme court rejected the defendant's proposition that the adoption of comparative fault means the court should now abrogate the rescue doctrine.⁶⁰³

The court reasoned simply that, as stated previously in other Kansas cases, the adoption of comparative fault did not "create any new duties."⁶⁰⁴ This analysis seems incomplete. The rescue doctrine consists

597. See, e.g., *Letcher v. Derricott*, 191 Kan. 596, 603, 383 P.2d 533, 539 (1963) (stating that application of the last clear chance doctrine allows recovery despite the plaintiff's contributory negligence).

598. See, e.g., *Parman v. Lemmon*, 119 Kan. 323, 325, 244 P. 227, 228 (1925) (violating protective laws constitutes negligence because the plaintiff cannot protect himself).

599. Kansas has the forty-nine percent rule of modified comparative fault. KAN. STAT. ANN. § 60-258a(a) (1994).

600. See generally W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 44, at 307-09 (5th ed. 1984).

601. 244 Kan. 434, 769 P.2d 635 (1989).

602. *Id.* at 435, 769 P.2d at 637.

603. *Id.* at 439, 769 P.2d at 639-40.

604. *Akins v. Hamblin*, 237 Kan. 742, 749, 703 P.2d 771, 776-77 (1985) (discussing the effect of the comparative negligence statute on the duty owed by passengers to other passengers or third

of two basic rules, both of which are designed in theory to encourage rescue attempts by those who have no legal obligation to rescue. First, the rescue is deemed foreseeable, thereby creating a duty of reasonable care owed to the rescuer by one whose initial act of negligence created the condition of danger that gave rise to the need for rescue. Second, the rescuer will be barred by his own conduct only when it rises to the level of recklessness or foolhardiness.⁶⁰⁵ The need for this limitation is perhaps debatable. The emergency doctrine would ordinarily provide the rescuer with a substantial buffer against contributory negligence, and under comparative fault, any fault attributed to a rescuer would undoubtedly be minimal in cases not involving reckless or foolhardy conduct. Nevertheless, society has an interest in encouraging rescue attempts even when the likelihood of success seems low, and some juries might encounter difficulty in meshing such a rescue effort with traditional notions of contributory negligence. Accordingly, the court's holding is justifiable because it adopts a bright-line rule to provide more rigid and certain legal protection for the rescuer.⁶⁰⁶

3. Application of Comparative Fault to Statutory Damage Caps

During the survey period, Kansas courts applied the comparative fault statute to statutory caps on nonpecuniary damages in two cases.⁶⁰⁷ In *Bright v. Cargill, Inc.*,⁶⁰⁸ the jury awarded the plaintiff employee in excess of \$1,600,000 in nonpecuniary damages and allocated fault 40% to defendant LSI and 60% to the plaintiff's statutory employer Cargill, which was immune under the exclusive remedy provision of the Kansas Workers' Compensation Act.⁶⁰⁹ The supreme court held that the trial court correctly allocated 40%, or approximately \$657,000 of the total nonpecuniary damages to LSI, and then further reduced it to \$250,000,

parties); see also *M. Bruenger & Co. v. Dodge City Truck Stop, Inc.*, 234 Kan. 682, 687, 675 P.2d 864, 869 (1984) (stating that the comparative negligence (fault) statute does not affect the law of bailments); *Britt v. Allen County Cmty. Junior Coll.*, 230 Kan. 502, 505, 638 P.2d 914, 917 (1982) (stating that the comparative negligence statute did not affect the duty owed by a landowner to those entering his property); *Schmeck v. City of Shawnee*, 232 Kan. 11, 32, 651 P.2d 585, 601 (1982) (holding that the comparative negligence statute does not change the city's duty to maintain streets in a reasonably safe condition); *Taplin v. Clark*, 6 Kan. App. 2d 66, 69, 626 P.2d 1198, 1201 (1981) (concluding that the comparative negligence statute does not change the duties owed by drivers to passengers).

605. *Brock v. Peabody Coop. Equity Exch.*, 186 Kan. 657, 659-71, 352 P.2d 37, 39-40 (1960).

606. *Bridges*, 244 Kan. at 439, 769 P.2d at 639-40.

607. An analogous issue arises in the so-called "loss of chance" cases. See *supra* Part V.

608. 251 Kan. 387, 837 P.2d 348 (1992).

609. *Id.* at 390, 415, 837 P.2d at 368-69; KAN. STAT. ANN. § 44-501(b) (2000).

the amount of the general statutory cap on nonpecuniary damages.⁶¹⁰ In *Gann v. Joeckel*,⁶¹¹ the court of appeals held that the then-existing \$100,000 cap on nonpecuniary damages in the wrongful death statute is applied *after* any reduction of the total nonpecuniary damages to reflect the decedent's or the plaintiff's comparative fault.⁶¹² Thus, if a jury found the total nonpecuniary damages to be \$500,000 and the plaintiff 40% at fault, the \$500,000 would first be reduced by 40% to \$300,000 pursuant to the comparative fault statute, and then to \$100,000 pursuant to the wrongful death statute.⁶¹³ Both decisions are clearly correct. The sequence of computations was mandated in both statutes,⁶¹⁴ is consistent with the application of comparative fault in other statutory cap cases in Kansas,⁶¹⁵ and reflects the rationale that statutory caps are merely limits on the amount of nonpecuniary damages recoverable, not a determination of the amount of nonpecuniary damages suffered.⁶¹⁶

C. Assumption of Risk

1. Express Assumption of Risk

Express assumption of risk refers to an agreement by contract or otherwise between two parties that one of them agrees to assume certain risks of harm or injury rather than look to the other party for redress.⁶¹⁷ Traditionally, two issues govern express assumption of risk: first, whether the agreement between the parties clearly and unambiguously provides that a party has assumed a specific risk; and second, whether that limitation of liability is contrary to public policy.⁶¹⁸ In *Danisco*

610. *Bright*, 251 Kan. at 415-17, 837 P.2d at 368-70. If the computations were made in reverse order, as urged by LSI, the nonpecuniary damages would be reduced first to \$250,000 and then further reduced by sixty percent to \$100,000.

611. 20 Kan. App. 2d 136, 884 P.2d 451 (1994).

612. *Id.* at 139, 884 P.2d at 453; KAN. STAT. ANN. § 60-1903(a) (1994). The statutory cap was raised to \$250,000 in 1998. KAN. STAT. ANN. § 60-1903(a) (Supp. 2000).

613. If the computations were made in reverse order, the nonpecuniary damages would be limited to \$100,000 and then further reduced by forty percent to \$60,000.

614. KAN. STAT. ANN. § 60-1903(b) (Supp. 2000); KAN. STAT. ANN. § 60-19a01(d) (1994).

615. *See, e.g., Benton v. Union Pac. R.R. Co.*, 430 F. Supp. 1380, 1386 (D. Kan. 1977) (explaining that the jury must first decide damages which, if they exceed \$50,000, will be then limited by the statutory cap); *McCart v. Muir*, 230 Kan. 618, 629-31, 641 P.2d 384, 391 (1982) (holding that the percentage of causal fault is considered only after the jury has awarded damages).

616. *Bright v. Cargill, Inc.*, 251 Kan. 387, 417, 837 P.2d 348, 369 (1992).

617. RESTATEMENT (SECOND) OF TORTS § 496B (1965).

618. *See id.*, cmts. c, d, e; DAN B. DOBBS, THE LAW OF TORTS § 213 (2000).

Ingredients USA, Inc. v. Kansas City Power & Light Co.,⁶¹⁹ a series of power outages caused a customer of the defendant utility's electricity to lose productivity and suffer certain economic losses.⁶²⁰ However, the Kansas Corporation Commission (KCC) approved two rules in the utility's tariff: one that provided that the utility shall not be liable "for any damages occasioned by any irregularity or interruption of electric service," and another that provided the utility "shall not be considered in default of its service agreement with the customer and shall not otherwise be liable for any damages occasioned by any irregularity or interruption in electrical service."⁶²¹ A list of possible external causes of service interruption for which the utility would not be liable for damages did not include the utility's own fault as one of those causes.⁶²²

In answer to certified questions, the supreme court held that the exculpatory agreement would immunize the utility from liability for ordinary negligence, but not for willful or wanton conduct.⁶²³ At the outset, the court reaffirmed that the power of the KCC to impose reasonable rules and regulations impliedly gives the utilities the power to limit their liability, subject to KCC approval, that some limitation on liability is appropriate in order to keep the utility's rate reasonable, and that the courts have the power to review the reasonableness of those tariffs.⁶²⁴ The court then concluded that only a limitation on liability for ordinary negligence, not willful or wanton conduct, was necessary and appropriate to keep utility rates reasonable.⁶²⁵ Finally, the court held that the attempted overbreadth of the limitation of liability could be cured by refusing to apply it to willful or wanton misconduct, rather than by complete invalidation of the tariff.⁶²⁶

The result seems consistent with the general trend of cases around the country. However, a couple of observations might be appropriate. First, an express assumption of risk will not be enforced if against public policy, and generally an express assumption of risk designed to protect a public utility from liability for harm to members of the public is viewed as contrary to public policy.⁶²⁷ Second, courts generally construe express assumption of risk provisions in standardized agreements strictly against

619. 267 Kan. 760, 98 P.2d 377 (1999).

620. *Id.* at 762, 986 P.2d at 379-80.

621. *Id.* at 763, 986 P.2d at 380.

622. *Id.*

623. *Id.* at 772, 986 P.2d at 385.

624. *Id.* at 768, 986 P.2d at 383.

625. *Id.* at 772, 986 P.2d at 385.

626. *Id.* at 773, 986 P.2d at 386.

627. RESTATEMENT (SECOND) OF TORTS § 496B, cmts. e, g (1965).

the drafter of the agreement and do not construe them to exclude liability for harms caused by the drafter's own intentional, reckless, or negligent misconduct, unless it is clearly expressed in the agreement.⁶²⁸ The tariff does not specifically identify the utility's own fault for interruption of electric service as within the scope of the assumption of risk, and the detailed enumeration of causes "beyond the Company's control" might mislead a consumer to assume the utility was not excluding liability for its own fault. The considerations that appear to justify the court's holding in *Danisco Ingredients* are: (1) the customer was a large business customer, not an ordinary consumer; and (2) the harm was economic loss rather than personal injury or even property damage. Historically, courts have been reluctant to extend liability for negligence to mere economic loss. Accordingly, approval of an express assumption of risk applicable to economic losses caused by negligence is not significant interference with the right of consumers.

2. Implied Assumption of Risk

The common law doctrine of implied assumption of risk refers to assumption of risk implied from the parties' conduct, rather than expressed in their agreement. In Kansas, the courts have viewed this doctrine as based on an implied agreement in a contract of employment that the employee assumes the ordinary risks of the employment. As a result, Kansas courts have not expanded the doctrine to harms occurring outside the employment relationship. During the survey period, Kansas courts reaffirmed prior holdings that assumption of risk is still a separate defense that is not subject to comparative fault.⁶²⁹ In *Tuley v. Kansas City Power & Light Co.*,⁶³⁰ emissions from the defendant's coal-burning power plant combined with natural moisture in the air to form an acid that damaged employees' cars parked in a company parking lot.⁶³¹ The defendant had posted a notice that emissions from the plant could damage cars and that employees used the parking lot at their own risk.⁶³² The supreme court held that assumption of risk remains a separate

628. *Id.* cmt. d (1965).

629. *Jackson v. City of Kansas City*, 235 Kan. 278, 305, 680 P.2d 877, 899 (1984); *Borth v. Borth*, 221 Kan. 494, 499-501, 561 P.2d 408, 412-14 (1977); *see also* *Westerbeke*, 1979 *Survey*, *supra* note 259, at 348-51 (discussing reasons for abolishing assumption of risk as a separate defense).

630. 252 Kan. 205, 843 P.2d 248 (1992).

631. *Id.* at 206, 843 P.2d at 250.

632. *Id.* at 208, 843 P.2d at 251.

defense not subject to comparative fault and that it applies to property damage as well as to personal injury.⁶³³

The criticism of assumption of risk as a separate doctrine has been set forth in a prior survey.⁶³⁴ In brief, the doctrine generally bars two categories of claims: those in which the defendant did not breach any duty owed to the plaintiff,⁶³⁵ and those in which the plaintiff was contributorily negligent. The first category involves no violation by the defendant and thus requires no defense, and the second should be subject to comparative fault. Yet the Kansas courts continue to assume the doctrine is contractual in nature, and is based on an implied term in every employment contract that the employee voluntarily accepts all normal and ordinary risks in the employment. However, if one accepts the defense as legitimate, then its extension to property damage seems appropriate. If an employee can impliedly agree to risk his person, he should also be able to impliedly agree to risk his property.

Numerous Kansas cases have held that the assumption of risk defense is not available when the employer breaches his duty to provide the employee with a safe workplace and safe tools and equipment unless the workman knew or should have known of the dangerous condition.⁶³⁶ In *Smith v. Massey-Ferguson, Inc.*,⁶³⁷ a part-time farm employee severely injured his hand in the moving parts of a combine.⁶³⁸ At the time of the accident, the employee had started the combine and was checking it out before using it, and there was a dispute in the evidence about whether he intentionally reached into the moving parts or inadvertently came into contact with them. After a comparative fault verdict in favor of the employee, the supreme court held that the trial court properly submitted the assumption of risk issue to the jury.⁶³⁹ The trial judge instructed the jury to determine whether the employer had breached its duty to provide safe tools and equipment, and, in the absence of assumption of risk, to determine whether the employee was contributorily negligent for purposes of a comparative fault loss allocation.

633. *Id.* at 210-11, 843 P.2d at 252-53.

634. See Westerbeke, 1979 Survey, *supra* note 259, at 348-51.

635. Some Kansas cases have suggested that the assumption of risk defense applies only when the defendant is completely free of any negligence. See *Jackson v. City of Kansas City*, 235 Kan. 278, 305, 680 P.2d 877, 899 (1984). The supreme court has subsequently characterized *Tuley* as a case involving no duty owed to the employees. See *Smith v. Massey-Ferguson, Inc.*, 256 Kan. 90, 107, 883 P.2d 1120, 1131 (1994).

636. See, for example, *Fishburn v. International Harvester Co.*, 157 Kan. 43, 46, 138 P.2d 471, 474 (1943) and cases cited therein.

637. 256 Kan. 90, 883 P.2d 1120 (1994).

638. *Id.* at 91, 883 P.2d at 1122.

639. *Id.* at 107-08, 883 P.2d at 1132.

This holding may sound the death knell of a meaningful assumption of risk defense. If, as *Smith* seems to hold, the employer's negligence in matters of workplace safety will negate the assumption of risk defense, then assumption of risk will apply only in cases in which the employer would win in any event on a "no breach of duty" rationale. Moreover, the holding brings comparative fault into these workplace injury cases by allowing the jury to find contributory negligence in lieu of assumption of risk. Comparative negligence applies when the defendant employer is negligent and the employee is contributorily negligent. Moreover, when the first of these two prerequisites is satisfied, the employer may not assert assumption of risk. The practical effect is that comparative fault will apply to all proper cases, despite apparently contrary statements in earlier assumption of risk decisions.

D. Statutes of Limitation and Repose

Statutes of limitations and repose have been the subject of numerous Kansas torts cases since the last survey. In tort actions, as well as other kinds of actions, limitations periods are sometimes dispositive of otherwise potentially meritorious claims. The relevant Kansas statutes of limitations include Kansas Statutes Annotated sections 60-513 and 60-514. Section 60-513 generally provides a two-year limitations period for negligence and wrongful death claims, and allows for tolling under a discovery rule.⁶⁴⁰ Section 60-514 imposes a one-year limitations period for several intentional torts.⁶⁴¹ Some statutes apply to particular types of actions, and some Kansas statutes contain repose periods in addition to limitations periods.⁶⁴² For example, section 60-513(b) provides that certain causes of action, including those sounding in negligence, "shall not be deemed to have accrued until the act giving rise to the cause of action first causes substantial injury . . . but in no event shall an action be commenced more than 10 years beyond the time of the act giving rise to the cause of action."⁶⁴³ The latter provision is a statute of repose.

Statutes of limitation typically begin to run at the time of some triggering event, such as the event that results in an injury, but may be

640. KAN. STAT. ANN. § 60-513 (1994).

641. *Id.* § 60-514.

642. Sometimes the Kansas legislature has created special exemptions from Kansas Statutes Annotated section 60-513(b), the general statute of repose. *See, e.g., id.* § 60-523 (childhood sexual abuse actions); *id.* § 60-524 (Dalkon Shield actions); *id.* § 60-3303(c)-(e) (product liability actions involving latent diseases).

643. *Id.* § 60-513(b).

tolled if the injury is not reasonably discoverable until some later time. Statutes of repose, on the other hand, place an absolute outer limit on a defendant's potential liability. They typically extinguish any possible claim at a specified time after a concrete event, such as the initial sale of a product, even if the claim has not yet accrued or is not discoverable by the plaintiff. Typical issues that arise under these statutes include questions of when a claim *accrued* to start the statute running,⁶⁴⁴ when a plaintiff should have *discovered* that a potential claim existed,⁶⁴⁵ how to deal with issues such as the plaintiff's *minority* or *disability* at the time a claim arises,⁶⁴⁶ whether a limitations period is an absolute bar (a statute

644. See, e.g., *Kan. Pub. Employees Ret. Sys. v. Reimer & Koger Assocs.*, 262 Kan. 110, 117, 936 P.2d 714, 720 (1997) (accrual of legal malpractice claim; providing that statutes of limitations generally do not run against the sovereign as a plaintiff unless the relevant statute expressly so provides); *Crockett v. Medicalodges, Inc.*, 247 Kan. 433, 441-42, 799 P.2d 1022, 1028 (1990) (providing that the limitations period for wrongful death claims grounded in medical malpractice starts to run when the malpractice that caused the death becomes reasonably ascertainable); *Voth v. Coleman*, 24 Kan. App. 2d 450, 451-53, 945 P.2d 426, 428-29 (1997) (providing that the statute of limitations applicable to malicious prosecution actions accrues when the "time for appeal" of the prior action has passed, and that time does not expire until the time for filing a discretionary petition for review passes); *Bick v. Peat Marwick & Main*, 14 Kan. App. 2d 699, 706-07, 799 P.2d 94, 99 (1990) (providing that the limitations period for accounting malpractice claim against tax preparer did not begin running until the IRS audited the plaintiff and assessed penalties, rather than running from the date the return was filed, as the preparer contended).

645. See, e.g., *Moon v. City of Lawrence*, 267 Kan. 720, 727-28, 982 P.2d 388, 394-95 (1999) (addressing when the defendant's act first caused "substantial injury," causing the plaintiff's claim to accrue); *Isnard v. City of Coffeyville*, 260 Kan. 2, 4, 917 P.2d 882, 885 (1996) (determining when injury and nature of claim were reasonably ascertainable); *Johnson v. Bd. of Pratt County Comm'rs*, 259 Kan. 305, 320, 913 P.2d 119, 131 (1996) (same); *Jones v. Neuroscience Assocs.*, 250 Kan. 477, 488, 827 P.2d 51, 59 (1992) (holding that plaintiff's medical malpractice claim accrued when the fact of injury was first reasonably ascertainable); *Dearborn Animal Clinic, P.A. v. Wilson*, 248 Kan. 257, 263, 806 P.2d 997, 1102 (1991) (same); *Kelley v. Barnett*, 23 Kan. App. 2d 564, 568, 932 P.2d 471, 474 (1997) (determining date on which injury was reasonably ascertainable); *LaBarge v. City of Concordia*, 23 Kan. App. 2d 8, 18-19, 927 P.2d 487, 494 (1996) (holding that date of injury was reasonably ascertainable); *Bryson v. Wichita State Univ.*, 19 Kan. App. 2d 1104, 1106-07, 880 P.2d 800, 802-03 (1994) (interpreting and applying Kansas Statutes Annotated section 60-513(b), which tolls the running of the statute of limitations until the act giving rise to the cause of action first causes substantial injury or the injury becomes reasonably ascertainable). Statutes of limitation and repose might also be tolled on the grounds of fraudulent concealment or equitable estoppel. See, e.g., *Robinson v. Shah*, 23 Kan. App. 2d 812, 827, 936 P.2d 784, 795 (1997). Tolling may also occur because the defendant has absconded from the state and cannot be found. *Slayden v. Sixta*, 15 Kan. App. 2d 625, 628-29, 813 P.2d 393, 396 (1991).

646. In Kansas, the statute of limitations for certain actions, including tort actions, may be tolled for any plaintiff having the "disability" of minority, incapacitation, or imprisonment at the time of accrual or during the period in which the statute is running. KAN. STAT. ANN. § 60-515(a) (1994). The person then has one year from the removal of the disability to commence an action. *Id.* If the person dies while under disability, the person's representative has one year to commence an action. *Id.* § 60-515(b). For cases dealing with these and other related statutes, see, for example, *Birtz v. Williams*, 262 Kan. 769, 776, 942 P.2d 25, 30 (1997) (determining that drug-induced, semi-comatose state during medical treatment qualifies as "incapacitation" that tolls the statute of limitations); *Bonin v. Vannaman*, 261 Kan. 199, 201-02, 929 P.2d 754, 759 (1996) (discussing medical malpractice committed against a child who sues after reaching adulthood); *Ripley v.*

of repose) or subject to accrual, discovery and tolling questions (a statute of limitations),⁶⁴⁷ and "savings" statutes that make an otherwise untimely claim timely in various procedural or other circumstances.⁶⁴⁸

The supreme court has "distinguished a statute of repose from a statute of limitations in the following terms: The former bars a cause of action after a set period of time even if it has not yet accrued; the latter bars an action within a set period of time after the action accrues."⁶⁴⁹ In *Davidson v. Denning*,⁶⁵⁰ the Kansas Court of Appeals distinguished between statutes of repose and statutes of limitations as follows:

A statute of repose limits the time during which a cause of action can arise and usually runs from an act of the alleged tortfeasor. It abolishes the cause of action after the passage of time, even though the cause of action may not yet have accrued. By contrast, a statute of limitations extinguishes the right to prosecute an accrued cause of action after a period of time. The two-year period of K.S.A. 60-513(a) is a statute of limitations. The 10- and 4-year periods of K.S.A. 60-513(b) and (c) are statutes of repose.⁶⁵¹

The Kansas cases of the past several years address statute of limitations and repose issues in a variety of circumstances, but for the

Tolbert, 260 Kan. 491, 494, 921 P.2d 1210, 1213 (1996) (Kansas Statutes Annotated section 60-515(a) statute of repose in context of adult plaintiff's claim for childhood sexual abuse); Shirley v. Reif, 260 Kan. 514, 516, 920 P.2d 405, 407-08 (1996) (same); Bulmer v. Bowling, 27 Kan. App. 2d 376, 376-77, 4 P.2d 637, 637 (2000) (discussing legal disability in the case of an incarcerated individual); and Swartz v. Swartz, 20 Kan. App. 2d 704, 705, 894 P.2d 209, 211 (1995) (same as Ripley).

647. See, e.g., Klose v. Wood Valley Racquet Club, Inc., 267 Kan. 164, 168, 975 P.2d 1218, 1222 (1999) (applying the ten-year statute of repose); Davidson v. Denning, 259 Kan. 659, 678, 914 P.2d 936, 948 (1996) (holding that the discovery rule in Kansas Statutes Annotated section 60-513(b) and (c) applies to wrongful death actions); See v. Hartley, 257 Kan. 813, 823, 896 P.2d 1049, 1055-56 (1995) (holding that the four-year time limit of Kansas Statutes Annotated section 60-513(c) could be avoided either by application of the savings provision of section 60-518 or the tolling provision for medical malpractice cases in section 65-4908); Gilger v. Lee Constr., Inc., 249 Kan. 307, 314, 820 P.2d 390, 396 (1991) (holding that statutes of repose did not bar suit because they did not begin running from date the defendant negligently installed furnace, but from date furnace first caused harm to the plaintiffs); Morrison v. Watkins, 20 Kan. App. 2d 411, 422-23, 889 P.2d 140, 149 (1995) (statutes of limitations and repose in legal malpractice context).

648. See, e.g., Goldsmith v. Learjet, Inc., 260 Kan. 176, 193, 917 P.2d 810, 820 (1996) ("savings" provision in Kansas Statutes Annotated section 60-518); Clanton v. Estivo, 26 Kan. App. 2d 340, 343, 988 P.2d 254, 256 (1999) (interpretation of the 60-518 "savings" provision following multiple filings and dismissal of the original suit); Taylor v. Int'l Union of Elec. Workers, 25 Kan. App. 2d 671, 675, 968 P.2d 685, 689 (1998) (same); see also Steven C. Day, *Pitfalls on the Road to Salvation: The Kansas Saving Statute*, 59 J. KAN. B. ASS'N, Sept. 1990, at 19 (discussing the limitations and exceptions to the Kansas savings statute).

649. Klose, 267 Kan. at 168, 975 P.2d at 1222.

650. 21 Kan. App. 2d 225, 897 P.2d 1043 (1995), *rev'd*, 259 Kan. 659, 914 P.2d 936 (1996).

651. *Id.* at 232, 897 P.2d at 1048.

most part the decisions are very fact- or context-specific, and they do not create new law. We have cited many of these cases in the preceding footnotes and have discussed some in other sections of the survey. Due to space constraints and the particularized nature of most of these cases, we will discuss only a few of these cases in any detail here.

In Kansas the so-called "savings statute" permits a plaintiff to file a new action within six months of the dismissal of any action that was "commenced within due time" and was dismissed "otherwise than upon the merits."⁶⁵² Dismissal of the original action for failure to state a claim is a dismissal on the merits, and therefore the savings statute does not permit a refiling past the original limitations period.⁶⁵³ Moreover, the statute permits only one additional six-month period. Thus, in *Clanton v. Estivo*,⁶⁵⁴ the plaintiff voluntarily dismissed her medical malpractice action against the defendant doctor and the Health Care Stabilization Fund in order to delay a scheduled trial.⁶⁵⁵ After refiling the action within the six-month period, she failed to serve the new summons and complaint on the Fund. Accordingly, while retaining a scheduled trial date, she dismissed the action a second time and immediately refiled it in order to serve both the defendant doctor and the Fund. However, this second refiling was not within the initial six-month period allowed for refiling after the first dismissal. The court of appeals held that the savings statute allows only one six-month extension within which to refile a dismissed action. A second dismissal and refiling would have to occur within the original six-month extension in order to be timely. Therefore, the action was barred because the third filing was beyond the six-month period authorized by the savings statute.⁶⁵⁶

The rule is that the second action filed pursuant to the savings statute must be "substantially similar" to the original action that was dismissed. In *Taylor v. International Union of Electronic Workers*,⁶⁵⁷ the plaintiff brought an action against a labor union and four individual defendants for defamation and tortious interference with prospective economic advantage in Sedgwick County District Court and voluntarily dismissed

652. KAN. STAT. ANN. § 60-518 (1994).

653. *Rogers v. Williams, Larson, Voss, Strobel & Estes*, 245 Kan. 290, 293-94, 777 P.2d 836, 839 (1989); *see also* *Murphy v. Klein Tools, Inc.*, 935 F.2d 1127, 1128-29 (10th Cir. 1991); *Taylor*, 25 Kan. App. 2d at 675, 968 P.2d at 689 (holding that the district court's dismissal on the basis of the action being time-barred was a dismissal on the merits, and therefore, the savings statute did not save the action).

654. 26 Kan. App. 2d 340, 988 P.2d 254 (1999).

655. *Id.* at 341-42, 988 P.2d at 255-56.

656. *Id.* at 344, 988 P.2d at 257.

657. 25 Kan. App. 2d 671, 968 P.2d 685 (1998).

it.⁶⁵⁸ The plaintiffs then refiled the action in Saline County District Court after expiration of the statute of limitations, but within the six-month period in the savings statute. The court of appeals held that the refiled action was untimely and was not protected by the savings statute.⁶⁵⁹ The court reasoned that it was not “substantially similar” to the original action because in the refiled action, the plaintiff’s wife was added as an additional plaintiff and the four individual defendants were dropped from the action, leaving the labor union as the only defendant.⁶⁶⁰

The application of the “substantially similar” standard in *Taylor* is not persuasive. The remedy for improperly trying to add a new plaintiff is to delete that plaintiff, not to dismiss the entire action. Dropping four of the five original defendants does not legally prejudice the labor union defendant, and requiring the continuation of litigation against the individual defendants even though the plaintiff no longer believes the claim against him is legitimate conditions the use of the savings statute upon court-ordered malicious prosecution. The holding would be sound if the plaintiff had sought to add new defendants who were first brought into litigation after the statute of limitations had expired.⁶⁶¹ No policy consideration justifies barring use of the savings statute when some, but not all, of the defendants are dropped from the refiled action.

A difficult issue is whether the savings statute will permit refiling of an action after the expiration of a statute of repose. In *See v. Hartley*,⁶⁶² the plaintiff suffered injury as the result of a vasectomy performed by the defendant.⁶⁶³ A medical malpractice screening panel requested by the plaintiff tolled the statute of limitations on the plaintiff’s medical malpractice action. After the panel issued its recommendations, the plaintiff filed his medical malpractice action. The plaintiff later dismissed the medical malpractice action and then refiled it within the six-month period authorized in the savings statute. However, the refiling occurred after the four-year statute of repose for medical malpractice actions had expired,⁶⁶⁴ and some Kansas cases appear to hold that a

658. *Id.* at 675, 968 P.2d at 689.

659. *Id.* at 677, 968 P.2d at 690.

660. *Id.*

661. Rule 15(c) of the Federal Rules of Civil Procedure and Kansas Statutes Annotated section 60-215(c) stringently limit addition of new defendants after the expiration of the statute of limitations by attempting to amend a complaint and have it relate back to the date of the original complaint.

662. 257 Kan. 813, 896 P.2d 1049 (1995).

663. *Id.* at 813-14, 896 P.2d at 1050.

664. *Id.*

statute of repose cannot be tolled.⁶⁶⁵ Nevertheless, the supreme court held that once an action is timely filed before expiration of any statute of repose, the statute of repose will not bar any tolling or savings provisions employed thereafter.

The court's decision is sound. In recent years, courts have characterized statutes of limitation as procedural, and thus subject to tolling, while they characterize statutes of repose as a substantive definition of a time beyond which no action exists, and thus not subject to tolling. Yet the supreme court recognized that this procedural-substantive distinction was not so rigid that it would prevent the implementation of any other lapse-of-time policy. The real purposes of a statute of repose are to prevent unfair loss of evidence and to ensure the availability of affordable insurance by limiting the outer time limit within which claims may be initiated. The purpose of the saving statute is to permit the continuation of a claim that has been dismissed for reasons not on the merits. Because the plaintiff filed the original medical malpractice claim within the four year repose period, the action did exist and none of the evils attributed to long-delayed claims will arise.⁶⁶⁶ The dismissal and refiling of the claim within the time permitted by the savings statute does not substantially prejudice any rights or legitimate interests of the defendant.

665. *See, e.g., Bonin v. Vannaman*, 261 Kan. 199, 211, 929 P.2d 754, 765 (1996) (holding that a defendant's continuing fraudulent concealment of his medical malpractice does not toll the running of the eight-year statute of repose in Kansas Statutes Annotated section 60-515 for claims accruing during minority).

666. Some language in *See* suggests that the statutory tolling effected by the convening of a medical malpractice screening panel will also extend the four-year repose period for medical malpractice actions. 257 Kan. at 822, 896 P.2d at 1055 ("the language 'shall toll any applicable statute of limitations' in K.S.A. 65-4908 should be construed broadly to include any time limitation, regardless of whether it be denominated a statute of limitations or a statute of repose"). Certainly, tolling in order to encourage participation in a form of alternative dispute resolution of medical malpractice claims is completely consistent with public policy concerning judicial economy. Nevertheless, a word of caution is appropriate. The plaintiff filed the action in *See* four days prior to expiration of the four-year repose period applicable to the medical malpractice claim. Accordingly, statements in *See* that the tolling provision in Kansas Statutes Annotated section 65-4908 applies to the medical malpractice statute of repose are merely dicta.

