SURVEY OF KANSAS TORT LAW

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Kansas appellate courts have decided nearly two hundred cases touching in some manner upon tort law in the five-year survey period. Space limitations dictate that we discuss only a small fraction of those cases. We will discuss primarily cases involving new doctrines or important developments of existing doctrines, a few cases that provide the opportunity to emphasize fundamental tort analysis, and some cases that we simply find interesting. One important topic is outside the scope of this survey—the series of cases applying state and federal constitutional law principles to the various legislative efforts at so-called "tort reform."

I. NEGLIGENCE

A. Duty and Standard of Care

1. The Basic Negligence Formula

The basic negligence formula involves a risk-utility analysis in which the risk inherent in a condition or activity is balanced against the utility of the condition or conduct and the burden necessary to eliminate or reduce the risk.[1] Two routine cases during the survey period demonstrate the application of these principles in ordinary "trip and fall" situations.

The established rule in Kansas is that a "slight" defect in a sidewalk that causes injury is not actionable.[2] Whether a defect is "slight" depends on an evaluation of the circumstances, such as "its location, the extent of the irregularity therein, its prior use and its use on the occasion in question."[3] In *Sepulveda v. Duckwall-Aico Stores, Inc.*,[4] the sidewalk immediately adjacent to de-

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1. *See* RESTATEMENT (SECOND) OF TORTS §§ 291-293 (1965).
2. *See* Taggart v. Kansas City, 156 Kan. 478, 134 P.2d 417 (1943).
3. *Id.*, Syl. ¶ 2.
4. 238 Kan. 35, 708 P.2d 171 (1985).

fendant's store had a sunken area "no more than one inch." This defect caused the plaintiff to trip and fall as she left the store. The trial court granted summary judgment for the defendant. The court of appeals reversed on two grounds: whether a sidewalk defect is "slight" is a question of fact for the jury; and a rule of nonliability based in part on the plaintiff's contributory negligence does not survive the adoption of comparative negligence in Kansas.[5] The supreme court reversed the court of appeals and affirmed the trial court on the ground that the sidewalk defect rule still has independent justification in a duty analysis even though other rationales might have influenced some prior cases.[6]

The *Sepulveda* court reasoned that "[t]o require a higher degree of care in street and sidewalk maintenance than the current 'reasonably safe for use' standard would make such public improvements financially prohibitive, particularly in this state where the wide variation in temperature causes much contraction and expansion of paving materials."[7] Although the result is sound, some clarification of the court's statement is appropriate. A sidewalk with only slight defects is not inherently in a "reasonably safe" condition. Defects, even though only "slight," create a clearly foreseeable risk of injury to pedestrians, who in many circumstances are reasonably distracted and unable to watch every step they take. It would be desirable in the abstract to maintain all sidewalks in a perfectly level condition and thus eliminate the risk of occasional trip and fall accidents. The risk becomes reasonable only when balanced against the countervailing consideration of burden on defendants. The court correctly noted that slight defects in paving materials are the natural result of the Kansas climate and that the cost of repairing all sidewalk defects would impose a substantial financial burden on parties responsible for sidewalk maintenance. Viewing this burden as outweighing the risk to pedestrians in cases in which the defect is "slight" is a reasonable legal conclusion.

In addition, the court's treatment of the "slight" defect issue as a question of law is also probably sound. Although legal conclusions based on the totality of circumstances are normally

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5. Sepulveda v. Duckwall-Aico Stores, Inc., No. 56101 (Kan. App. May 2, 1985) (unpublished opinion), *rev'd*, 238 Kan. 35, 708 P.2d 171 (1985).

6. The supreme court treated the plaintiff's possible contributory negligence as an additional, alternative basis for the rule of nonliability. *Sepulveda*, 238 Kan. at 40, 708 P.2d at 174. The court also noted that the sidewalk rule also applied to individuals and private corporations, thereby negating any concept of sovereign immunity as the true justification for the rule. *Id.* at 38, 708 P.2d at 173; *see, e.g.*, Roach v. Henry C. Beck Co., 201 Kan. 558, 442 P.2d 21 (1968); Pierce v. Jilka, 163 Kan. 232, 181 P.2d 330 (1947).

7. *Sepulveda*, 238 Kan. at 39, 708 P.2d at 174.

treated as question of fact for the jury, some judicial supervision is necessary to protect defendants from liability for defects that are only "slight." The one-inch depression in the sidewalk certainly was "slight" in terms of physical size,[8] and apparently the plaintiff did not have any evidence of other circumstances that would justify a different conclusion. There was no evidence of prior mishaps caused by the defect, and the plaintiff had previously used the sidewalk on many occasions without mishap. Although neither the mere physical size of the defect nor the absence of prior accidents might justify automatic characterization of any sidewalk defect as "slight," it does not seem unfair to put the burden on the plaintiff to identify those special circumstances that would justify a different conclusion.

Some confusion exists concerning the proper scope of the sidewalk defect rule. In *Sepulveda*, the supreme court cited with approval prior cases applying the rule to surface irregularities of an inch or less to substances other than the concrete surface of a sidewalk such as plywood sheets[9] and doormats.[10] The financial burden aspect of the risk-benefit analysis does not apply with equal force to these situations. This distinction was recognized in *Chambers v. Skaggs Companies, Inc.*,[11] in which the plaintiff customer in a store tripped and fell over goods temporarily left in an aisle after she selected an item from a nearby top shelf. The trial court entered judgment for the defendant notwithstanding the jury verdict, after a jury found the plaintiff forty percent at fault and the defendant sixty percent at fault. The court of appeals reversed and remanded for reinstatement of the jury verdict.

The court of appeals held that the sidewalk defect rule in *Sepulveda* is limited to sidewalk defects and does not apply to merchandise left in a store aisle.[12] The court correctly noted that the sidewalk defect rule is premised on the financial burden that would exist if parties responsible for sidewalks had to repair every slight imperfection.[13] The burden in keeping a store aisle free of merchandise is not as extensive.

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8. The court seemed to rely on prior cases for the assumption that imperfections up to three inches above or below the normal surface level could meet the characterization of "slight." *See* Slaton v. Union Elect. Ry. Co., 158 Kan. 132, 145 P.2d 456 (1944) (three-inch depression in brick road surface between streetcar tracks on a brick road); Taggart v. Kansas City, 156 Kan. 478, 134 P.2d 417 (1943) (three-inch "stepdown" in sidewalk).

9. *See Roach*, 201 Kan. at 560, 442 P.2d at 23-24.

10. *See Pierce*, 163 Kan. at 239-40, 181 P.2d at 336.

11. 11 Kan. App. 2d 684, 732 P.2d 801 (1987).

12. *Id.* at 685, 732 P.2d at 802-03.

13. *Id.*

The court correctly observed that the inapplicability of the sidewalk rule did not, standing alone, establish negligence by the store.[14] Viewed most favorably to the plaintiff, the evidence in *Sepulveda* showed that a store employee left the merchandise unattended in the aisle, that employees left merchandise unattended in the aisles in the past, and that the store had no policy prohibiting this practice. Because the dangerous condition was created by the store's own employees, the plaintiff did not have to prove that the store had notice of the dangerous condition.[15] The court's reinstatement of the jury's finding that the store was negligent is sound.

2. Limited Duty

a. Unborn Children

Because of advances in scientific knowledge and medical technology, married couples often seek medical advice to assist in family planning decisions. Special medical procedures are often utilized to implement those decisions. One legal issue that arises with greater frequency today is the scope of liability of medical professionals when negligent advice, testing, or procedures frustrate the family planning decisions of their patients.

In both *Byrd v. Wesley Medical Center*[16] and *Johnston v. Elkins*,[17] parents sought surgical intervention to prevent the conception of additional children. In *Byrd*, a tubal ligation was sought; the *Johnston* plaintiffs desired a vasectomy. In each case the doctor's negligent performance of the procedure resulted in pregnancy and the eventual birth of a healthy child. In both cases the parents brought a so-called "wrongful birth" or "wrongful pregnancy" action for damages caused by the doctor's negligence.[18]

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14. *Id.* at 685-86, 732 P.2d at 803.

15. *See* Little v. Butner, 186 Kan. 75, 81, 348 P.2d 1022, 1026-27 (1960). It should be noted that if another customer had placed the merchandise on the aisle floor, the plaintiff would have to prove the store's actual or constructive notice of the dangerous condition. *See* Carter v. Food Center, Inc., 207 Kan. 332, 485 P.2d 306 (1971).

16. 237 Kan. 215, 699 P.2d 459 (1985).

17. 241 Kan. 407, 736 P.2d 935 (1987).

18. Both phrases refer to claims brought by the parents. In a subsequent case, the court cites Continental Cas. Co. v. Empire Cas. Co., 713 P.2d 384, 392 (Colo. App. 1985), for the proposition that "wrongful pregnancy" is an action by the parents for negligence resulting in the birth of a healthy child and "wrongful birth" is an action by the parents for negligence resulting in the birth of a child with birth defects. *See* Bruggeman v. Schimke, 239 Kan. 245, 718 P.2d 635 (1986). Little importance should attach to these names. The important issue in each situation is the determination of the parents' recoverable damages when a doctor's negligence results in an unwanted birth.

In *Byrd*, the sole issue of damages was whether the parents could recover the costs of rearing the child to the age of majority. Courts have developed three approaches to this issue. First, a majority of courts have adopted the "no recovery" rule, denying any recovery for the costs of rearing the child.[19] Second, some courts have adopted the "benefits" rule, allowing full recovery of rearing costs, but offsetting the value to the parents of having a normal healthy child.[20] Third, one court has adopted the "full recovery" rule, allowing full recovery without any offset for the parents' benefits.[21] In affirming the trial court's grant of partial summary judgment for the defendant, the supreme court held that Kansas would adopt the no recovery rule. The court's rationale was that "[a]s a matter of public policy, the birth of a normal and healthy child does not constitute a legal harm for which damages are recoverable."[22]

Both the full recovery rule and the benefits rule find some support in traditional tort principles. In agreeing to provide medical services, the doctor has clearly incurred a duty to the parents. The failure to exercise reasonable care in performing the services is the breach of duty. The unwanted pregnancy is the damage caused by the breach of duty. The costs of raising the child are logically part of the natural and probable consequences of the breach of duty. Thus, the "full recovery" rule is consistent with basic negligence analysis. The "benefits rule" reflects the principle that a tortfeasor should receive credit in mitigation of damages when the wrongful act confers an actual benefit on the plaintiff.[23]

"Wrongful birth" or "wrongful pregnancy" cases do not involve unforeseeable or marginally foreseeable harm. A doctor knows that the parents' specific reason for the sterilization procedure is to prevent having additional children. Doctors are also aware that the cost of rearing a child today is substantial. Accordingly, a

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19. At least 18 states have adopted the "no recovery" rule. *See* cases cited in *Byrd*, 237 Kan. at 223-24, 609 P.2d at 465-66; *see also* Miller v. Johnson, 231 Va. 177, 343 S.E.2d 301 (1986); McKernan v. Aasheim, 102 Wash. 2d 411, 687 P.2d 850 (1984).

20. *See, e.g.*, University of Arizona v. Superior Court, 136 Ariz. 579, 667 P.2d 1294 (1983); Stills v. Gratton, 55 Cal. App. 3d 698, 127 Cal. Rptr. 652 (1976); Ochs v. Borelli, 187 Conn. 253, 445 A.2d 883 (1982); Jones v. Malinowski, 229 Md. 257, 473 A.2d 429 (1984); Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511 (1971). The primary difficulty with the "benefits rule" is that any measurement of the intangible value to the parents of having an additional child in the family is inherently speculative.

21. *See* Bowman v. Davis, 48 Ohio St. 2d 41, 356 N.E.2d 496 (1976) (trial court judgment included cost of rearing the child, but Ohio Supreme Court did not address the issue because it was not properly raised on appeal).

22. *Byrd*, 237 Kan. at 225, 699 P.2d at 468.

23. *See* RESTATEMENT (SECOND) OF TORTS § 920 (1977).

court could legitimately conclude that full or partial recovery is appropriate. Yet tort law has never presupposed full recovery of every possible harm traceable to a defendant's conduct. Rather, in a wide variety of situations courts refuse for policy reasons to impose full liability on defendants for certain consequences of their wrongful conduct. A classic example involves the negligent driver who causes the death of a child pedestrian. Serious emotional harm to bystanders and to family members who learn about the accident after the fact is perfectly foreseeable. Yet all courts impose limitations on actions for emotional distress in such cases to prevent an infinity of actions and liability disproportionate to fault.[24]

In *Byrd*, the court did not identify the specific policy reasons that it relied upon to justify its decision. The court identified, without formally adopting, five reasons traditionally given in support of the no recovery rule: (1) a healthy child cannot constitute legal damage to the parent; (2) the benefits of joy, companionship, and affection outweigh the costs of rearing the child; (3) recovery would constitute a windfall to the parent and impose a burden disproportionate to the fault of the physician; (4) the child's subsequent learning of the litigation would cause emotional harm to the child; and (5) damages are speculative and some claims might be fraudulent.[25] The possibility of occasional fraudulent claims or occasional emotional harm to the child who later in life learns of the parents' damage claim are not persuasive reasons for denying recovery.[26] If the "benefits" rule were adopted, the offset of the value of the child's intangible benefits to the parents would be speculative. Full recovery of damages seems to impose a burden on the health care system that is not commensurate with the degree of fault in these cases. Yet the *Byrd* court probably relied on the broader policy that viewing a healthy child as a harm is incompatible with the moral consensus of a society that places a high value on both human life and the family unit.

The *Byrd* court limited its holding to cases involving normal healthy children, thus leaving open the more difficult issue of whether costs of rearing a child born with serious birth defects would be recoverable in a "wrongful birth" action. In that case, parents would often face extraordinary expenses for ongoing medical and educational costs. The *Byrd* court may have intentionally

24. *See, e.g.*, Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

25. *Byrd*, 235 Kan. at 221-22, 699 P.2d at 465.

26. The possibility of occasional fraudulent claims is not a valid basis for denying recovery in an entire category of otherwise legitimate claims. *See* Henry v. Bauder, 213 Kan. 751, 518 P.2d 362 (1974).

avoided relying on narrow specific policy reasons to preserve its options in a wrongful birth case involving serious birth defects.

In *Johnston*, the trial court granted summary judgment for the defendant, thereby denying recovery for any damages for "wrongful birth" of a healthy child. In reversing, the supreme court refused to grant the medical profession full immunity from the consequences of negligently performed sterilization procedures.[27] The court emphasized that *Byrd* only excluded recovery of the costs of rearing a child.[28] The court expanded the scope of nonrecoverable damages to include claims for future damages relating to the birth of the child such as emotional distress, loss of sleep, and anxiety about either financial matters or about time to care for the other children.[29] The court found that those damages were inextricably tied to the existence of the child and thus unrecoverable for the same policy reasons expressed in *Byrd*.[30] The court, however, allowed recovery of damages that were the natural and probable result of the negligence.[31] These damages included the expenses, pain, and suffering related to the negligent sterilization procedure; the expenses, pain, and suffering related to prenatal care, delivery, and postdelivery recovery; and the loss of consortium related to the sterilization procedure and the pregnancy.[32]

The Kansas Supreme Court thus has drawn a line between recoverable losses (related to the sterilization procedure and the pregnancy) and nonrecoverable losses (relating to the future existence of the child in the family unit). This line could affect damage determinations in future situations not foreseen in *Byrd* and *Johnston*. For example, the *Johnston* plaintiffs did not seek damages for loss of wages, or for medical complications related to the sterilization procedure or the pregnancy. Those items, however, seem directly related to the sterilization procedure and the pregnancy and thus should probably be recoverable if claimed in future cases. Recovery of these damages is not incompatible with the public policy that justifies denial of recovery of child-rearing costs.

Parents pursue "wrongful birth" claims for damages relating to the birth of a child; "wrongful life" refers to a claim brought by the *child*. In *Bruggeman v. Schimke*,[33] the plaintiff's parents sought genetic counseling after the mother gave birth to a child with

27. *Johnston*, 241 Kan. at 412-13, 736 P.2d at 939-40.
28. *Id.* at 411, 736 P.2d at 939.
29. *Id.* at 413, 736 P.2d at 940.
30. *Id.*
31. *Id.* at 412-13, 736 P.2d at 940.
32. *Id.*
33. 239 Kan. 245, 718 P.2d 635 (1986).

multiple birth defects. The defendants negligently advised the parents that the child's condition was not due to a known chromosomal or biochemical disorder. The parents then conceived the plaintiff, who was also born with multiple birth defects. The plaintiff's claim was not that defendants' negligence caused the birth defects,[34] but rather that their negligence caused his birth[35] and that life in his impaired condition was worse than no life at all. In affirming the trial court's dismissal of the claim, the supreme court followed the substantial majority of courts in refusing to recognize a "wrongful life" action because (1) the action contradicts the public policy that all human life has value and (2) damages would be speculative and unmeasurable.[36]

The child badly impaired by birth defects is undoubtedly in need of a "remedy," but arguably the legislature is better equipped than the courts to fashion the appropriate remedy.[37] The small minority of courts recognizing a "wrongful life" cause of action measure damages in terms of the plaintiff's extraordinary expenses for training and equipment needed to cope with the birth defects.[38] In these cases, negligence did not cause the birth defects; it only caused the birth itself by denying the parents the information needed to make an informed choice whether to have more children. Thus, the technical measure of damages would be the difference in value between life in an impaired condition and no life at all. This is not a rational measure of damages if human life is assumed to have value and nonexistence is assumed to have no value.

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34. When the defendant's negligence causes the child's birth defects, the child has a cause of action in which damages are measured by the difference between life without the birth defects and life with the birth defects.

35. The defendants' negligence caused the birth in the sense that their erroneous advice caused the parents to forego their option of avoiding conception of additional children.

36. *Bruggeman*, 239 Kan. at 254, 718 P.2d at 640.

37. Because the defendants in a wrongful life action did not cause the birth defects, a judicial remedy—with its duplication of damages under the collateral source rule—imposes a burden on defendants disproportionate to fault. A legislative remedy could factor into the equation the availability of state and federal programs for special education and rehabilitation services and other benefits for handicapped or disabled persons.

38. *See, e.g.*, Blake v. Cruz, 108 Idaho 253, 698 P.2d 315 (1984); Dorlan v. Providence Hosp., 118 Mich. App. 831, 325 N.W.2d 600 (1982); Procanik v. Cillo, 97 N.J. 339, 478 A.2d 755 (1984); Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 46 N.Y.S.2d 401 (1978); Speck v. Finegold, 497 Pa. 77, 439 A.2d 110 (1981). One court correctly noted that both the parents and the child have an interest in recovery of these extraordinary expenses, and thus, they are recoverable damages in either the parents' wrongful birth action or in the child's wrongful life action, but not in both actions. *Procanik*, 97 N.J. at 339, 478 A.2d at 755 (wrongful life action); *see also* Schroeder v. Perkel, 87 N.J. 53, 432 A.2d 834 (1981) (wrongful birth action).

b. Duty of Third Parties to Prevent Drunk Driving

The drunk driver has long been a major contributor to the annual carnage on American highways.[39] Yet for many years courts demonstrated considerable reluctance to impose responsibility on third parties who either supplied alcoholic beverages to those drivers or otherwise failed to prevent them from driving. Gradually courts have developed doctrines imposing liability on commercial suppliers of alcoholic beverages,[40] and in recent years some courts have extended those doctrines to social hosts.[41] Other courts have imposed liability on employers who failed to prevent drunk driving by employees.[42] During the survey period the Kansas Supreme Court repeatedly refused to impose liability on third parties who might have prevented drunk driving.

In *Ling v. Jan's Liquors*,[43] the plaintiff was severely injured in an accident in Kansas caused by an intoxicated minor driver who had purchased alcoholic beverage from a retail liquor store in Missouri. In affirming the trial court's dismissal of the action, the Kansas Supreme Court held that no cause of action exists in Kansas against a commercial vendor who in violation of state law sells alcoholic beverages to a minor whose drunk driving results in injury to another.[44] The court's rationale was essentially that

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39. HOUSE COMM. ON PUBLIC WORKS, ALCOHOL AND HIGHWAY SAFETY REPORT 1, 90th Cong., 2d Sess. (1968).

40. Fourteen states have "dram shop" laws imposing liability on commercial vendors of alcoholic beverages. Courts in twenty-eight states and the District of Columbia have abrogated the common law rule and recognized a cause of action against commercial vendors of alcoholic beverages. In states having no dram shop law, six states, including Kansas, continue to adhere to the common law rule of no liability for commercial vendors, and six states have not ruled on the topic. *See* cases and statutes listed in Ling v. Jan's Liquors, 237 Kan. 629, 648-51, 703 P.2d 731, 740-42 (1985).

41. *See, e.g.*, Kelly v. Gwinnell, 96 N.J. 538, 476 A.2d 1219 (1984); Wiener v. Gamma Phi Chapter of Alpha Tau Omega Fraternity, 258 Or. 632, 485 P.2d 18 (1971); Koback v. Crook, 123 Wis. 2d 259, 366 N.W.2d 857 (1985) (social host serving liquor to a minor guest).

42. *See, e.g.*, Chastain v. Litton Sys., Inc., 694 F.2d 957 (4th Cir. 1982), *cert. denied*, 462 U.S. 1106 (1983). Harris v. Trojan Fireworks Co., 120 Cal. App. 3d 157, 174 Cal. Rptr. 452 (1981); Romeo v. Van Waterloo, 117 Mich. App. 333, 323 N.W.2d 693 (1982); Clark v. Otis Eng'g Corp., 633 S.W.2d 538 (Tex. Ct. App. 1982), *aff'd*, 668 S.W.2d 307 (Tex. 1983).

43. 237 Kan. 629, 703 P.2d 731 (1985).

44. The court also held that the Missouri liquor store was subject to jurisdiction in Kansas for a negligent act that occurred in Missouri, but caused injury in Kansas, *id.* at 631-33, 703 P.2d at 733-34, and that Kansas law, as the law of the place of the injury, governs the action. *Id.* at 634-35, 703 P.2d at 735. The court was sharply divided. Chief Justice Schroeder was the only member of the court in the majority on three issues. Justices Holmes, McFarland, and Herd disagreed with the finding of jurisdiction. Justices Prager, Miller, and Lockett disagreed with the refusal to recognize a substantive cause of action.

(1) no cause of action existed at common law; (2) civil liability would be contrary to the intent of the Kansas Legislature; and (3) civil liability presents a difficult policy question best left to the legislature.

The court's reliance on common law is unpersuasive. First, the common-law rule was apparently limited to situations in which alcoholic beverage was sold to an able-bodied person, and thus it did not directly address the question of unlawful sales to minors.[45] More importantly, the common law rule was formulated prior to the invention of the automobile and the ensuing wide-scale slaughter on the highways caused by drunk drivers. As pointed out by the dissent, the function of the common law is not simply to maintain the status quo, but to develop and expand in response to the needs of modern society.[46] Modern society needs better deterrence of drunk driving and a better system for compensating victims of drunk driving.

Second, the rigid common-law rule is inconsistent with basic principles of modern tort law. Unlike intentional torts,[47] one common set of elements and general principles govern the negligence action and apply to the entire range of human conduct.[48] The basic standard is one of reasonable care to eliminate or reduce the foreseeable risks in any particular conduct.[49] The risk of highway accidents resulting from drunk driving is so well established that a reasonable person would refrain from supplying

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45. The majority relied on 45 AM. JUR. 2D *Intoxicating Liquors* § 553 (1969) for its statement of the common-law rule. As pointed out by Justice Lockett in his dissent, that section described the common law as providing no tort action for the sale of intoxicating liquor "to *ordinary able-bodied men*." *Ling*, 237 Kan. at 642, 703 P.2d at 743 (quoting 45 AM. JUR. 2D *Intoxicating Liquors* § 553 (emphasis in original)).

46. *Ling*, 237 Kan. at 643-44, 703 P.2d at 743-44.

47. Historically, each intentional tort developed separately with its own elements and specific requirements. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS §§ 13-20 (1965) (battery); *id.* §§ 21-34 (assault); *id.* §§ 35-45A (false imprisonment); *id.* §§ 46-48 (intentional infliction of emotional distress); *id.* §§ 157-164 (trespass to land); *id.* §§ 216-222 (trespass to chattels); *id.* §§ 222-242 (conversion).

48. *Id.* § 281.

49. *Id.* §§ 291-293. The existence of general principles does not mean that negligence actions will not have variations in specific areas of human conduct. For example, the actor's standard of conduct in any given area of activity may be defined by a statute that addresses civil liability, a statute that is silent on civil liability, a judicially developed special rule, or application of general rules to the specific facts of the case. *Id.* § 285. Nevertheless, there remains one cause of action for negligence with one common set of elements, regardless of whether the conduct involves driving an automobile, using machinery, engaging in sporting events, or selling alcoholic beverages to a minor.

alcoholic beverages to another in certain situations.[50] The majority's holding essentially declares that it is never unreasonable to supply another with alcoholic beverage.

The common-law rule reflected the strict view of proximate cause, that is, the proximate cause of the accident was the buyer's act of drinking the liquor, not the vendor's act of selling it.[51] At one time courts generally were reluctant to impose negligence liability on any person other than the one who most directly caused the injury. Over the years courts in Kansas and elsewhere have abandoned this rigid view of proximate cause by treating most foreseeability issues as questions of fact for the jury rather than questions of law for the court. The retention of the rigid proximate cause rule in the high-risk area of intoxicated driving simply is anomalous.

Third, the majority's finding of a legislative intent not to impose civil liability is equally unpersuasive. The former dram shop law was a purely statutory strict liability cause of action that required only causation, not fault.[52] Repeal of a strict liability statute does not logically demonstrate legislative intent to forbid judicial recognition of a negligence action.[53] Although bills to impose civil liability have failed to pass in the legislature,[54] the failure of a legislature to enact a particular provision usually is not considered an expression of a specific legislative intent on the subject matter.[55]

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50. A reasonable person would arguably refrain from serving alcoholic beverages to a minor, particularly in a situation in which the person realized that the minor would be operating a vehicle or to a visibly intoxicated adult in a situation in which the server knew the adult would be operating a vehicle.

51. *See, e.g.*, State v. Hatfield, 197 Md. 249, 78 A.2d 754 (1951).

52. The dram shop law created a cause of action for personal injury, property damage, and loss of economic support resulting from a person's intoxication "against any person who shall, by selling, bartering or giving intoxicating liquors, have caused the intoxication of such person . . . ." KAN. GEN. STAT. ch. 35, § 15 (1881). The statute did not require fault, only a causal connection between the providing of intoxicating liquors and the other person's intoxication. In addition, the statute was not limited to commercial vendors, but included any person who gave liquor to another. The dram shop law was repealed in 1949 in conjunction with legislative changes that followed from the repeal of the Kansas constitutional prohibition of the manufacture and sale of intoxicating liquors.

53. The dram shop law was overly broad in two respects: it contained no fault requirement and it included social hosts and other noncommercial suppliers. There is simply no authority for the proposition that repeal of such an overly broad statute constitutes an expression of legislative intent that the courts not recognize a more carefully tailored rule of liability for commercial vendors who negligently supply alcoholic beverages to another.

54. For a brief description of recent attempts to enact a new dram shop law, see *Ling*, 237 Kan. at 638-39, 703 P.2d at 737-38.

55. *See, e.g.*, Murphy v. City of Topeka, 6 Kan. App. 2d 488, 496, 630 P.2d 186, 192 (1981) (failure to enact a bill not evidence of legislative intent).

Finally, the Kansas Legislature has created a comprehensive system of regulating alcoholic beverages that is enforced by fines and criminal penalties, but contains no provisions imposing civil liability.[56] The majority concluded that the comprehensiveness of the regulatory system required judicial deference to the legislature on the issue of civil liability.[57] A simple example demonstrates the weakness of the argument. Kansas also has a comprehensive system of regulating the use of automobiles,[58] but nothing in that system provides a civil cause of action against the owner who turns over control of his vehicle to a visibly intoxicated person or to any other known incompetent driver. Under the majority's reasoning, the court should defer to the legislature the issue of civil liability for negligent entrustment of a motor vehicle. Yet for more than fifty years Kansas has judicially recognized the negligent entrustment cause of action.[59] A person needs two things to injure another on the highway by drunk driving—the vehicle and the intoxicating beverage. Kansas law now takes the anomalous position that it may be unreasonable to provide the vehicle, but it is not unreasonable to provide the beverage.

Another problem related to third-party responsibility for drunk drivers involves the responsibility of employers to take reasonable precautions to prevent drunk driving by employees. In *Meyers v. Grubaugh*,[60] an employee of a state agency became intoxicated while on the job and received permission from his supervisor to leave work early. While driving his own car on a public highway, the employee collided with the plaintiff's vehicle, seriously injuring the plaintiff. The plaintiff brought a negligence action against the state, alleging that the state negligently failed to control its employee and protect users of the highway.[61] In affirming a dismissal of the action against the state, the supreme court held that the

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56. Following repeal of the Kansas constitutional prohibition of manufacture and sale of intoxicating liquors, the legislature enacted the Kansas Liquor Control Act, a comprehensive act that regulated every aspect of liquor from its manufacture in the state or importation into the state until its eventual retail sale for use of consumption. *See generally* Tri-State Hotel Co. v. Londerholm, 195 Kan. 748, 408 P.2d 877 (1965).

57. *Ling*, 237 Kan. at 640-41, 703 P.2d at 739.

58. *See* KAN. STAT. ANN. ch. 8 (1982 & Supp. 1988).

59. *See, e.g.*, McCart v. Muir, 230 Kan. 618, 641 P.2d 384 (1982); Neilson v. Gambrel, 214 Kan. 339, 520 P.2d 1194 (1974); Upland Mut. Ins., Inc. v. Noel, 214 Kan. 145, 519 P.2d 737 (1974); Greenwood v. Gardner, 189 Kan. 68, 366 P.2d 780 (1961); Richardson v. Erwin, 174 Kan. 314, 255 P.2d 641 (1953); Priestly v. Skourup, 142 Kan. 127, 45 P.2d 852 (1935).

60. 242 Kan. 716, 750 P.2d 1031 (1988).

61. Although the action was against the state, the Kansas Tort Claims Act provides that a government entity shall be liable for the torts of its employees in the same manner as a private person. KAN. STAT. ANN. § 75-6103(a) (1984). Accordingly, the court correctly viewed the claim as though it were a claim against a private employer.

state did not owe the plaintiff a duty to control its employee because (1) the employee was outside the scope of his employment and (2) the state did not "undertake" to control the employee.

The court's analysis centers on the "failure to act" rules set forth in sections 314 to 324A of the *Restatement (Second) of Torts*. The general rule in section 314 is that an actor does not have a duty to take positive actions for the aid or protection of another in peril.[62] Given the obvious harshness of this rule, courts have created a variety of exceptions to it. Section 315 provides that a duty to act may arise by virtue of a "special relation" between the actor and either the injured person or a third person who is a danger to the injured person.[63] The employer-employee relationship is such a special relation.[64] Section 324B recognizes a duty to protect endangered or hurt employees,[65] and section 317 recognizes a duty to control employees for the protection of third persons.[66] Section 324A provides that a duty to act arises when the actor "undertakes" to render assistance. Once the actor undertakes to render assistance, the actor is liable for failing to carry through with reasonable care if this failure worsens the plaintiff's position.[67] In *Meyers*, the court held that these exceptions did not give rise to a duty to control the employee's conduct.

In finding the "special relation" exception inapplicable, the court relied on the rule in section 317 that an employer has no duty to control an employee who is *outside* the scope of employment unless the employee is on the employer's premises or using the

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62. RESTATEMENT (SECOND) OF TORTS § 314 (1965) ("The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action."). A classic example involves the actor who sees a blind man about to step into the street in front of on-coming traffic. The actor is not liable for failing to protect the blind man, even though the actor could easily and safely do so. *Id.* § 314 comment c, illustration 1.

63. *Id.* § 315.

64. *Id.* § 314A comment a.

65. *Id.* § 324B. Thus, an employer could be held liable in situations in which the employer realizes that the employee is impaired by lack of sleep or intoxication and nevertheless permits the employee to drive home from work in that condition. *See, e.g.*, McCarty v. Workmen's Compensation Appeals Bd., 12 Cal. 3d 677, 527 P.2d 617, 117 Cal. Rptr. 65 (1974) (intoxication); Robertson v. LeMaster, 301 S.E.2d 563 (W.Va. 1983) (lack of sleep).

66. RESTATEMENT (SECOND) OF TORTS § 317 (1965).

67. *Id.* § 324A. A classic example involves the actor who begins to rescue a person in distress, but then unreasonably delays or discontinues the rescue. If undertaking the rescue deprived the plaintiff of rescue efforts of a third person, or otherwise worsened the plaintiff's position, the actor is liable. *See, e.g.*, Zelenko v. Gimbel Bros., 158 Misc. 904, 287 N.Y.S. 134 (1935), *aff'd*, 247 A.D. 867, 287 N.Y.S. 136 (1936).

employer's chattel.[68] If the employee is within the scope of employment at all relevant times, the employer is liable under respondeat superior.[69] Conversely, there is no basis for holding an employer liable when an employee leaves work in a sober condition, becomes intoxicated, and eventually causes an accident.[70] That was not the situation in *Meyers*, however. The tortious conduct of an actor may occur at a different time and place than the eventual accident.[71] The employer's breach of duty in *Meyers* should have been examined at the time when the employee requested permission to leave work early. At that time the employee was still on the employer's premises and presumably the employer had both knowledge of the employee's condition and the ability to control his conduct.[72] Accordingly, the court's analysis of the "special relation" exception was incomplete and arguably erroneous.

The *Meyers* court also held that the state had no duty to act unless it made an "undertaking" to control its employee.[73] Although the court probably was correct that the mere granting of permission to leave work early did not constitute an "undertaking," the court erred by impliedly holding that a duty to act would arise only if the employer made an "undertaking" to control the employee as well as having a "special relation" with the employee.[74] The "special relation" and "undertaking" exceptions are

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68. *Meyers*, 242 Kan. at 720-21, 750 P.2d at 1035.

69. A few courts have used this doctrine to impose liability on employers whose employees caused injury to a third person while driving home in an intoxicated condition from employer-sponsored parties at which liquor was available. *See, e.g.*, Harris v. Trojan Fireworks Co., 120 Cal. App. 3d 157, 174 Cal. Rptr. 452 (1981); Romeo v. Van Waterloo, 117 Mich. App. 333, 323 N.W.2d 693 (1982).

70. In that situation the employee is outside employment at all relevant times, and there is no nexus between the employer and the wrongful conduct.

71. In Ling v. Jan's Liquors, 237 Kan. 629, 632-33, 703 P.2d 731, 734 (1985), the court recognized that an actor's wrongful conduct of supplying alcoholic beverages can occur at the time of sale and the ultimate harm can occur later, at the time of the accident.

72. If at this time the employee is considered "within" employment, respondeat superior is applicable. See cases cited *supra* note 38. If the employee is considered "outside" employment, liability may attach if the employee is on the premises and the employer knows that the employee is controllable and of the need to control the employee. RESTATEMENT (SECOND) OF TORTS § 317 (1965). In *Meyers*, both the employer's knowledge of the employee's intoxication and his realization of his ability to control the employee would constitute factual questions inappropriate for summary judgment.

73. *Meyers*, 242 Kan. at 723, 750 P.2d at 1036.

74. The court relied on Clark v. Otis Engineering Corp., 633 S.W.2d 538 (Tex. App. 1982), *aff'd*, 668 S.W.2d 307 (Tex. 1983), to require both a special relation and an undertaking in the form of taking control over the employee. Section 317 does not, however, require any actual taking of control; it only requires that the employer "knows or has reason to know that he has the ability to control" the employee. RESTATEMENT (SECOND) OF TORTS § 317 (1965).

independent of each other, and either exception by itself constitutes a sufficient basis for liability. The court mistakenly relied on section 319 to require the existence of both exceptions to impose liability. Section 319 imposes upon one who takes charge of a person dangerous to others a duty to act.[75] This exception primarily requires hospitals and mental institutions to exercise reasonable care to prevent the escape of persons in their custody who have contagious diseases or violent tendencies that pose dangers to third persons.[76] This exception is not proper authority for requiring both a "special relation" and an "undertaking" as a prerequisite to liability.

Finally, *Theis v. Cooper*[77] combined the factual situations in *Ling* and *Meyers*. In that case, the employer beer distributorship maintained on its premises a hospitality lounge with free beer, soft drinks, and coffee for its customers and employees. It was common practice for employees to drink beer during work hours, although the employer posted a notice in the lounge urging employees to drink only in moderation. An employee consumed several beers in the lounge, became intoxicated, and then while driving home after work struck and killed a pedestrian. The employer was not aware of the employee's intoxication prior to leaving work, however, and the employee did not have a history of intoxication or drunk driving.

In response to a certified question from a federal court, the Kansas Supreme Court held that no cause of action exists. At the outset, the court held that the employer is not liable by reason of supplying alcoholic beverages.[78] In essence, the court reaffirmed the *Ling* rationale that as a matter of public policy the legislature, not the courts, should decide the scope of civil liability imposed on suppliers of alcoholic beverages. The court then reaffirmed the *Meyers* rationale that except in special circumstances an employer has no duty to control an employee outside the scope of employment when the employee has become intoxicated on the premises.[79]

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75. RESTATEMENT (SECOND) OF TORTS § 319 (1965).

76. *Id.* § 319 comment a, illustrations 1, 2. Because a hospital has no special relation with another until the other becomes a patient and is thus under the control of the hospital, "control" constitutes the basis for the "special relation," not an additional requirement of an "undertaking."

77. 243 Kan. 149, 753 P.2d 1280 (1988).

78. *Id.* at 155, 753 P.2d at 1284.

79. *Id.* at 155-56, 753 P.2d at 1284. In discussing *Meyers*, the court apparently altered the rule in two respects. First, it defined one special circumstance in which liability would exist as "when the employee is on the employer's premises, performing work for the employer, or using the employer's chattel." *Id.* at 150, 753 P.2d at 1280. Although adapted

Regardless of the criticism of *Ling* and *Meyers* for defining and applying the rules too narrowly, the court was correct in *Theis*. The basis of both commercial vendor and employer liability is negligence. If the supplier or employer had no knowledge of the employee's intoxication based on specific occurrences prior to the accident or on the employee's past history, the requisite knowledge element for negligence is not present.

The *Ling-Meyers-Theis* line of cases reflects the Kansas Supreme Court's narrow and restrictive attitude toward liability of third persons for failure to protect against drunk driving accidents. Given the magnitude of the drunk driving problem in modern society and the unpersuasive nature of the court's various reasons for nonliability, one must suspect the existence of some other explanation for these decisions. In partial explanation, any cause of action against a supplier of alcoholic beverages or an employer raises difficult problems of causation. For example, usually a tavern has a duty to refrain from selling additional alcoholic beverages once the customer becomes visibly intoxicated,[80] but at that point it is somewhat speculative whether any additional drinks, as opposed to previously consumed drinks, caused a subsequent driving accident.[81] A similar problem exists in *Ling*-type cases because it is not clear that a nineteen-year-old minor who buys alcoholic beverage while not intoxicated is any more likely to subsequently drink and drive than a twenty-one-year-old adult.[82]

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from RESTATEMENT (SECOND) OF TORTS § 317 (1965), that rule applies to employees outside the scope of their employment. Accordingly, it should apply when the employee is on the premises, but *not* performing work for the employer. Second, the court listed an "undertaking" as an alternative basis for liability, thereby implying that both a special relation and an undertaking are not necessary. Both changes may have been inadvertent and are in any event *dictum*.

80. Many states have alcoholic beverage control statutes that prohibit a tavern or liquor store from knowingly selling alcohol to a person who is already intoxicated. These statutes may impose civil liability directly or may define the vendor's duty under the negligence *per se* doctrine. *See, e.g.*, Ono v. Applegate, 62 Hawaii 131, 612 P.2d 533 (1980); Lopez v. Maez, 98 N.M. 625, 651 P.2d 1269 (1982); McNally v. Addis, 65 Misc. 2d 204, 317 N.Y.S.2d 157 (1970); Hutchens v. Hankins, 63 N.C. App. 1, 303 S.E.2d 584 (1983). A few courts impose a similar requirement in actions against employers of drunk drivers. *See, e.g.*, Cartwright v. Hyatt Corp., 460 F. Supp. 80 (D.D.C. 1978); Baird v. Roach, Inc., 11 Ohio App. 3d 16, 462 N.E.2d 1229 (1983); Dickinson v. Edwards, 105 Wash. 2d 457, 716 P.2d 814 (1986).

81. *See generally* Annotation, *Proof of Causation of Intoxication as a Prerequisite to Recovery Under Civil Damage Act*, 64 A.L.R.3D 882 (1975).

82. Yet recent federal legislation forcing states to raise the legal drinking age to twenty-one years of age was premised on the higher drunk driving accident rate in the eighteen to twenty-one age group. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 410(f)(2), 102 Stat. 4181 (1988).

Similarly, in actions against employers the difficult question involves the actual precautions that the employer must or may take to control the intoxicated employee who wants to drive home after work.[83] Yet similar difficult questions of causation and duty have not prevented judicial recognition of other causes of action.[84]

It may simply be that consumption of alcoholic beverages is so much a part of our heritage and culture that courts are reluctant to hold any person other than the drunk driver responsible for the consequences.[85] Fortunately, this cultural mental block is now changing, and courts and legislatures around the country are responding more forcefully to the problem. Unfortunately, at least in this one area of judicial development, the old saying about cultural changes coming to Kansas a few years later than elsewhere seems to be true.

c. Landowner's Duty

Kansas follows the traditional rules governing the duty that a landowner or possessor of land owes to persons entering the property. Under these rules, a landowner only owes a licensee or a discovered trespasser a duty to avoid injury by willful or wanton conduct.[86] In *Bowers v. Ottenad*,[87] the defendant homeowner was hosting a meeting of his gourmet cooking club. While the defendant was serving flaming Irish coffee, fumes from a bottle of alcohol ignited and created a fireball that severely burned the plaintiff. Because the plaintiff was a social guest, she was classified as a licensee.[88] The trial court instructed the jury that the defendant

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83. In some instances the employer may have a taxi or a sober employee take the intoxicated employee home and may actually attempt to prevent a visibly intoxicated employee from driving. *See, e.g.*, Chastain v. Litton Sys., Inc., 694 F.2d 957 (4th Cir. 1982), *cert. denied*, 462 U.S. 1106 (1983). It is not clear, however, how far the employer may go to prevent driving by the intoxicated employee who insists on driving home.

84. For an example of a cause of action with difficult causation problems, see Roberson v. Counselman, 235 Kan. 1006, 686 P.2d 149 (1984); *infra* notes 148-61 and accompanying text (loss of chance). For examples of similar control problems, see Durflinger v. Artiles, 234 Kan. 484, 673 P.2d 86 (1983) (decision to release mental patient); Mitchell v. Wiltfong, 4 Kan. App. 2d 231, 604 P.2d 79 (1979) (duty to control child).

85. Courts and legislatures have had similar difficulties imposing reasonable controls of the sale and use of firearms, which also are a part of our heritage and culture. As with liquor control, courts and legislatures are often reluctant to address the problem other than by increasing the criminal penalties for the immediate perpetrator of the injury. Alas, in Kansas the saying now is: "Guns *and booze* don't kill people; people kill people."

86. *See, e.g.*, Lemon v. Busey, 204 Kan. 119, 461 P.2d 145 (1969).

87. 240 Kan. 208, 729 P.2d 1103 (1986).

88. Traditionally, social guests in the home have been classified as licensees. *See* RESTATEMENT (SECOND) OF TORTS § 330 comment h (1965). Kansas has consistently followed this rule. *See, e.g.*, Zuther v. Schild, 224 Kan. 528, 581 P.2d 385 (1978); Duckers v. Lynch, 204 Kan. 649, 465 P.2d 945 (1970); Ralls v. Caliendo, 198 Kan. 84, 422 P.2d 862 (1967).

was liable only if his conduct was willful or wanton. The jury returned a verdict in favor of the defendant. The supreme court found error in the trial court's instruction and reversed. The supreme court held that a landowner who knows or should know of a licensee's presence on the premises owes the licensee a duty of reasonable care in the conduct of activities on the premises.[89]

Although the *Bowers* decision changed the traditional rule governing licensees, the Kansas Supreme Court refused to abolish the traditional classification system.[90] By limiting its holding to imposing a reasonable care standard on the specific conduct involved in the case, the court avoided wholesale disruption of the existing classification system.

The *Bowers* court distinguished between "passive" physical conditions of the premises and "active" conduct on the premises. This distinction is not the traditional "active-passive" indemnity doctrine that the court abolished after the adoption of the comparative negligence statute.[91] That doctrine, which related to loss allocation among multiple tortfeasors, distinguished between acts of commission and acts of omission in shifting the entire burden of accident losses from the less blameworthy tortfeasor to the more blameworthy tortfeasor.[92] The distinction in *Bowers* is between the physical condition of the premises and activities conducted on the premises. Under *Bowers*, an injury resulting from the dangerous condition of stairs on the premises would still be subject to the willful-wanton standard, whereas an injury resulting from the operation of a car in the landowner's driveway would be subject to the reasonable care standard.

This distinction is sound. In some situations, landowners may need protection from the uncertainties of a reasonable care standard. For example, many people own older houses that fail to comply with modern notions of reasonable safety in design or

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89. *Bowers*, 240 Kan. at 222, 729 P.2d at 1113.

90. *Id.* at 210-11, 729 P.2d at 1105. The court did not provide any analysis of its position other than to note that it had consistently refused to abolish the traditional system in favor of a reasonable care standard. *See, e.g.*, Britt v. Allen County Community Junior College, 230 Kan. 502, 507, 638 P.2d 914, 919 (1982); *Zuther*, 224 Kan. at 528-29, 581 P.2d at 386; Gerchberg v. Loney, 223 Kan. 446, 450-51, 576 P.2d 593, 597-98 (1978); Frazee v. St. Louis-S.F. Ry., 219 Kan. 661, 667, 549 P.2d 561, 565 (1976).

91. *See* Kennedy v. City of Sawyer, 228 Kan. 439, 618 P.2d 788 (1980). Unfortunately, in a prior case the court confused the active-passive indemnity doctrine with the active negligence exception to the limited duty owed to licensees. *See Britt*, 230 Kan. at 502, 638 P.2d at 914; Westerbeke, *Survey of Kansas Law: Torts*, 33 KAN. L. REV. 1, 25-28 (1984). The doctrinal confusion is evident in former Chief Justice Schroeder's dissenting opinion in *Bowers*. *See Bowers*, 240 Kan. at 225, 729 P.2d at 1115-16 (Schroeder, C.J., dissenting).

92. *See* RESTATEMENT (SECOND) OF TORTS §§ 341-342 (1965).

physical condition. The burden to upgrade this housing would often be onerous, especially for low-income owners.[93] This rationale, however, has no application to activities conducted on the premises. No conceptual or policy justification exists for permitting a landowner to cause injury by operating a vehicle on the premises in a manner that is negligent, but not willful or wanton. Sound legal principles require the operator of a vehicle in *any* location to exercise reasonable care to protect persons who might foreseeably be injured by careless operation of the vehicle. This does not change, even if the conduct occurs on the vehicle operator's land. Similarly, a person who injures another by negligently igniting a flammable substance normally would be liable under a reasonable care standard. Nothing in the nature of land ownership justifies a different rule when the injured person, as in *Bowers*, happens to be a social guest in the landowner's home.

In his dissent, former Chief Justice Schroeder argued vigorously that the *Bowers* holding violated the principle of stare decisis.[94] The majority, however, noted that a line of Kansas cases once recognized the active conduct exception for licensees but that later cases tended to ignore or confuse the exception without actually overruling it.[95] The majority properly clarified the confusion and inconsistency that had developed in the Kansas cases concerning the duty owed to licensees.[96]

Although *Bowers* unequivocally recognizes the active conduct exception, several questions about the exception remain unan-

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93. *See* Westerbeke, *supra* note 91, at 26-27 n.161.

94. *Bowers*, 240 Kan. at 225-28, 729 P.2d at 1115-17. (Schroeder, C.J., dissenting).

95. The active negligence doctrine was first recognized in Montague v. Burgerhoff, 150 Kan. 217, 92 P.2d 98 (1939). Since that case was decided, the doctrine has been mentioned favorably in some cases and ignored in others. *Bowers*, 240 Kan. at 213-22, 729 P.2d at 1107-13.

96. Indeed, the holding was more a clarification of what Kansas law has been for many decades rather than a change in existing Kansas law. Stare decisis should not mandate continued blind adherence to a rule that produces harsh and inequitable results incapable of justification on either conceptual or policy grounds. Tort law always has been primarily within the domain of the judicial branch, and courts have always had authority to clarify, refine, and adjust the rules of tort law to meet the needs and values of society. *See* Ling v. Jan's Liquors, 237 Kan. 629, 643-44, 703 P.2d 731, 743-44 (1985) (Lockett, J., dissenting). Kansas law is replete with instances in which the courts recognized new doctrines or major revisions of existing doctrines to meet the perceived needs of society. A few examples include the following: Gradual elimination of privity requirements in warranty law, followed by the adoption of strict liability in tort, Brooks v. Dietz, 218 Kan. 698, 545 P.2d 1104 (1976); the recognition of a cause of action for intentional infliction of emotional distress, Dawson v. Associates Fin. Servs. Co., 215 Kan. 814, 529 P.2d 104 (1974); the abolition interspousal immunity, Flagg v. Loy, 241 Kan. 216, 734 P.2d 1183 (1987); and the recognition of a cause of action for retaliatory discharge, *see infra* notes 265-339 and accompanying text.

swered. In some cases, determining what constitutes a condition of the premises rather than conduct on the premises will be difficult. For example, steep cellar stairs lacking a handrail are clearly a condition of the premises; a child's toy left on those stairs is probably conduct. In contrast, however, consider a burned-out light bulb over those cellar stairs: is the bulb a condition of the premises or the result of the owner's conduct in failing to discover and replace the bulb?[97] Cases probably will be better reasoned and results more equitable if courts consider the underlying rationale of the condition-conduct distinction in deciding close cases.[98]

Another unanswered question concerns the property owner's knowledge of existing dangers. The *Bowers* court limited the active conduct exception to cases in which the owner knows or should know of the licensee's presence on the premises.[99] Courts should liberally construe the "should know" component of this limitation. For example, in cases involving injury caused by negligent operation of a vehicle on the premises, little justification exists for distinguishing between the licensee who was specifically invited onto the premises and the neighbor who has ongoing permission to take a shortcut across the owner's premises. Each is a reasonably foreseeable victim of the negligent operation of the vehicle; each should be treated with reasonable care.

A final question concerns trespassers, to whom a landowner traditionally owes no duty. The *Bowers* court made no comment

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97. A light bulb is something that homeowners regularly replace. It lacks the characteristic of permanence that justifies the narrower standard of care for dangerous physical conditions on the premises. Yet the burden of replacing the bulb is no different and no more onerous than the burden of discovering and removing the child's toy. For examples in prior Kansas cases that would involve similar borderline situations under the active negligence doctrine, see Gerchberg v. Loney, 223 Kan. 446, 576 P.2d 593 (1978) (trash burning in incinerator); Lemon v. Busey, 204 Kan. 119, 461 P.2d 145 (1969) (unlocked door leading to roof of church); Ralls v. Caliendo, 198 Kan. 84, 422 P.2d 862 (1967) (water on floor, possibly from dog's water dish).

98. For example, in *Lemon*, 204 Kan. at 119, 461 P.2d at 145, a small child fell to her death from a church roof after gaining access to the roof through a door that had a lock, but that was left unlocked. Although not directly discussing the active negligence doctrine, the court alluded to the negligence as "*passive* negligence arising from the failure . . . to lock the door of the church building leading to the roof." *Id.* at 126, 461 P.2d at 151 (emphasis added). The court apparently used the word "passive" to imply an act of "omission" rather than to focus on the distinction between conduct and physical condition of the premises. Because the defendants could have prevented the harm without the need to change the physical condition of the premises, the situation should qualify as "active conduct." Use of an ordinary negligence standard in this situation does not impose any unfair burden on the defendant.

99. *Bowers*, 240 Kan. at 222, 729 P.2d at 1113.

about extending the active conduct exception to trespassers. The rationale underlying the licensee rule, however, should apply to *discovered* trespassers. Once a landowner discovers a trespasser's presence on the premises, the trespasser becomes a foreseeable victim of any active, negligent conduct.[100] Although landowners have certain legal rights against trespassers,[101] landowners do not have the unlimited right to injure trespassers.[102] The limited basis of the exception, however, does not necessarily apply to *undiscovered* trespassers.[103]

The *Bowers* case is a sound beginning to refining and modernizing the Kansas rules governing premises liability. The holding should not be viewed, however, as the solution to all the inequities in this area of Kansas law.[104]

A difficult question in premises law involves the duty owed to firefighters and police officers who are injured in the course of their employment as the result of a dangerous condition on the landowner's premises. In *Calvert v. Garvey Elevators, Inc.*,[105] the plaintiff fireman responded to a call for assistance concerning an anhydrous ammonia leak at the defendant's plant. The plaintiff was aware of the dangers of breathing ammonia vapors and wore special protective clothing and equipment while he and another fireman removed a victim from the area near the leak. The plaintiff then removed his mask to get a deep breath of fresh air, experienced the strong smell of ammonia, and became ill.

Calvert was a case of first impression in Kansas. The supreme court relied on the so-called fireman's rule and held that as a

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100. In Kansas, the landowner owes the same duty to discovered trespassers and licensees: to avoid injury by willful or wanton conduct. *See Lemon*, 204 Kan. at 119, 461 P.2d at 145.

101. For example, the landowner has the right to use reasonable force to remove a trespasser. *See* RESTATEMENT (SECOND) OF TORTS § 77 (1965).

102. The general rule in other jurisdictions is that the landowner owes a duty of reasonable care to known trespassers regarding activities conducted on the premises. *See* RESTATEMENT (SECOND) OF TORTS § 336 (1965).

103. The traditional rule that a landowner owes no duty to an undiscovered trespasser recognizes the right of a landowner to use the premises as he sees fit to the maximum possible extent. Although this rule has harsh and inequitable applications, *see* Westerbeke, *Survey of Kansas Law: Torts*, 27 KAN. L. REV. 321, 336-38 (1979) (discussing Frazee v. St. Louis-S.F. Ry., 219 Kan. 661, 549 P.2d 561 (1976)), any refinement should involve independent analysis rather than mere bootstrapping of the active conduct exception.

104. *Bowers* indicated that Kansas still applies the willful-wanton standard to licensee cases involving physical condition of the premises. That rule is harsher than the overwhelming majority rule, which is that the landowner has a duty to warn a licensee about any known latent dangerous condition of the premises. *See* RESTATEMENT (SECOND) OF TORTS § 342 (1965).

105. 236 Kan. 570, 694 P.2d 433 (1985).

matter of law the defendant breached no duty to the plaintiff. The fireman's rule provides that firefighters cannot recover for injuries suffered as a result of specific wrongs that required their presence in an official capacity and exposed them to a risk of harm. Under the rule, the firefighter cannot maintain an action based on the defendant's initial negligent act that caused the fire requiring the firefighter's presence.[106] In addition, the rule applies even though the defendant's conduct might constitute an abnormally dangerous activity,[107] which is often the case with chemical spills and fires.[108]

The fireman's rule, however, does not bar actions by firefighters against third parties for other tortious acts not related to the initial emergency or against the landowner for subsequent tortious conduct.[109] For example, a firefighter could maintain an action against a third party whose negligent driving injured the firefighter while he was traveling to the scene of the fire.[110] The firefighter could also maintain an action against the landowner for failing to warn about a latent danger known to the landowner or for any other subsequent negligence that increased the risk to the firefighter.[111]

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106. *Id.* at 576, 694 P.2d at 438.

107. *Id.* at 576-77, 694 P.2d at 439. The court's holding on this point was slightly unclear because the court emphasized that the fireman had special training related to anhydrous ammonia and had been warned by the defendant about the specific nature of the danger. Thus, it is not clear whether the court would apply the fireman's rule to a chemical spill or fire involving abnormally dangerous risks not known to the fireman. At least one court, however, has applied the fireman's rule to unknown risks arising out of a tanker truck spill of toxic pesticides. *See* Rowland v. Shell Oil Co., 179 Cal. App. 3d 399, 224 Cal. Rptr. 547 (1986). Although not discussed in *Calvert*, the fireman's rule probably would also apply to a claim based on strict liability for defective products when the product defect caused the emergency necessitating the firefighter's presence. *See, e.g.*, Armstrong v. Mailand, 284 N.W.2d 343 (Minn. 1979).

108. The storage of flammable or explosive chemical products is an activity that could readily fit within the doctrine of strict liability for abnormally dangerous activities. The fireman's rule frequently arises in cases involving fires, spills, or explosions of chemical products in chemical plants, tanktrucks, and railroad tankcars. *See, e.g.*, *Rowland*, 179 Cal. App. 3d at 399, 224 Cal. Rptr. at 547; Walker Hauling Co. v. Johnson, 110 Ga. App. 620, 139 S.E.2d 496 (1964); Marquart v. Toledo, P. & W. R.R., 30 Ill. App. 3d 431, 333 N.E.2d 558 (1975); Erickson v. Toledo, P. & W. R.R., 21 Ill. App. 3d 546, 315 N.E.2d 912 (1974); Langlois v. Allied Chem. Corp., 258 La. 1067, 249 So. 2d 133 (1971); *Armstrong*, 284 N.W.2d at 343; Bartels v. Continental Oil Co., 384 S.W.2d 667 (Mo. 1964).

109. *Calvert*, 236 Kan. at 576, 694 P.2d at 438-39.

110. The negligent driving of third parties arises more frequently in cases involving law enforcement officers, who are also subject to the "fireman's rule." *See, e.g.*, Steelman v. Lind, 97 Nev. 425, 634 P.2d 666 (1981).

111. The exception applies even though the latent condition existed prior to the fire. The essence of the exception is that the landowner knows of the latent condition of special

For instance, if the landowner misrepresented that chemicals stored in a burning building were nontoxic, the firefighter could recover for any injuries caused by the toxic chemicals.[112] In *Calvert*, the defendant informed the firefighter at the outset about the anhydrous ammonia leak, and the firefighter was aware of the special dangers associated with ammonia vapors. Accordingly, the fireman's rule barred the action because the only act of the defendant that could be called causally negligent related to the initial creation of the ammonia leak.

The *Calvert* court's rationale in applying the fireman's rule did not depend on the traditional landowner rules or the assumption of risk doctrine. The landowner rules are based on the relationship between the landowner and the person on the premises. Firefighters, however, do not necessarily enter the premises with the landowner's consent or to benefit the landowner.[113] Rather, firefighters enter pursuant to a privilege based on their public duty as safety officials.[114] Firefighters frequently enter the premises at unusual times or in locations not normally used by other persons entering the premises.[115] When responding to a dangerous emergency situation, firefighters cannot assume that the premises are safe.[116] Accordingly, firefighters cannot be classified as invitees, licensees, or trespassers.[117]

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danger but did not warn the firefighter, who did not know of its existence. *See, e.g.*, Johnson v. Miller, 371 N.W.2d 94 (Minn. Ct. App. 1985); *Bartels*, 384 S.W.2d at 667; Mahoney v. Carus Chem. Co., 102 N.J. 564, 510 A.2d 4 (1986); Clark v. Corby, 75 Wis. 2d 292, 249 N.W.2d 567 (1977). Of course, the landowner must be present or otherwise have an opportunity to provide a warning to the firefighter. *See, e.g.*, Pearson v. Canada Contracting Co., 232 Va. 177, 349 S.E.2d 106 (1986).

112. *See, e.g.*, Lipson v. Superior Court, 31 Cal. 3d 362, 644 P.2d 822, 182 Cal. Rptr. 629 (1982).

113. A licensee enters the land with mere consent, whereas an invitee enters the land with consent and under circumstances in which the invitee's presence provides a benefit on the landowner. Although the firefighter frequently receives the landowner's consent and confers a true benefit on the landowner, neither is necessary.

114. *See, e.g.*, KAN. STAT. ANN. §§ 31-137, -139 (1986).

115. Both the invitee and licensee rules presuppose entry on the premises within the scope of the landowner's consent concerning time and location. *See* RESTATEMENT (SECOND) OF TORTS §§ 332 comment 1, 342 comment b (1965). Firefighters are likely to enter the premises at times and in locations for which landowners would not normally give consent. *See* RESTATEMENT (SECOND) OF TORTS § 345 comment c (1965).

116. Invitees are entitled to reasonable care because they "enter[] upon an implied representation or assurance that the land has been prepared and made ready and safe for [their] reception." RESTATEMENT (SECOND) OF TORTS § 343 comment b (1965). This rationale is ill suited to persons who enter the premises in response to a dangerous emergency situation.

117. Kansas courts have always limited the assumption of risk doctrine to actions arising

Rather than relying on these more traditional doctrines, the *Calvert* court based its holding on public policy.[118] Confronting dangerous situations, according to the court, is inherent in the nature of the firefighter's work. Thus, because firefighters serve the public generally, compensation for injuries related to that employment should be spread to society as a whole through insurance-based compensation programs such as worker's compensation.[119]

Calvert's public policy rationale is not fully persuasive. The court's rejection of traditional doctrine states only what is not the basis for barring the claim. The inapplicability of the landowner rules means only that landowners cannot avoid responsibility for their negligent acts on the basis of the firefighter's status as a licensee or trespasser.[120] The inapplicability of assumption of risk means that no automatic common-law defense to the firefighter's action exists.[121] Simply making these doctrines inapplicable does not provide a rationale for prohibiting an injured firefighter from maintaining a common-law action for damages caused by the negligence of another.[122]

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out of a master-servant relationship. *See* Borth v. Borth, 221 Kan. 494, 561 P.2d 408 (1977). Accordingly, the doctrine would bar a claim by firefighters against their employers, but not a claim against third parties.

118. *Calvert*, 236 Kan. at 575-76, 694 P.2d at 438.

119. In recognition of the inherently dangerous nature of the employment and the special public benefit served by that employment, Kansas law provides a mechanism for more generous compensation benefit plans for firefighters than for other categories of workers. In Kansas, two percent of insurance premiums for fire and lightning insurance within the state is paid into a firefighters' relief fund to provide various benefits to firefighters. *See* Firefighters Relief Act, KAN. STAT. ANN. §§ 40-1701 to -1708 (1986 & Supp. 1988).

120. The characterization of a person as a licensee or trespasser normally limits the landowner's duty to the person to something less than the full standard of reasonable care. If a firefighter is not a licensee or trespasser, those limited duty rules simply cease to be a basis for denying the firefighter a right to sue a landowner for ordinary negligence.

121. Although contributory negligence might be a defense in many of these cases, the fireman's rule bars the firefighter's right to maintain a common-law claim even when the firefighter has not been contributorily negligent. Even if contributory negligence applied in some cases, it is only a partial defense under the Kansas comparative negligence statute. *See* KAN. STAT. ANN. § 60-258a(a) (Supp. 1988).

122. Ironically, despite rejecting the landowner rules and assumption of risk, the practical effect of the court's holding is to impose the burden of both assumption of risk and licensee status on the firefighter. The initial act of negligence creating the emergency is in essence a risk that the firefighter assumes by accepting employment. The landowner owes no duty to the firefighter other than to warn about known latent dangers or to avoid injuring the firefighter by active negligence after the firefighter arrives on the premises. This duty is essentially identical to the duty owed to any licensee.

The fireman's rule exceeds the limitations of worker's compensation by barring certain common-law actions against third parties. Worker's compensation provides a guarantee for limited, prompt, and certain compensation for injuries arising in the course of employment. This prompt compensation comes in exchange for the employee's foregoing the right to maintain common-law tort actions against the employer. Worker's compensation, however, does not bar an employee's right to maintain a common-law damages action against negligent third parties.[123] Thus, the fairness of the fireman's rule depends not on worker's compensation, but rather on the additional benefits available to Kansas firefighters. These additional benefits must be greater than ordinary worker's compensation benefits to justify barring negligence actions against third parties.[124]

The probable scope of the fireman's rule in Kansas raises two important issues. First, the fireman's rule cannot logically be limited to landowner situations, but should apply to any initial act of negligence creating the need for a firefighter's services. For example, the rule should apply equally to injuries suffered in fighting a vehicle fire on a public highway caused by negligent driving.[125] Second, although commonly called the "fireman's rule," the *Calvert* holding should logically extend the rule to police officers[126] and any other public servants[127] who face dangerous conditions as an inherent part of their employment and who receive special benefit programs in recognition of the inherently dangerous nature of their employment.

B. Causation in Fact

In a negligence action the plaintiff normally has the burden of proving by a preponderance of the evidence that the defendant's

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123. KAN. STAT. ANN. § 44-504(a) (Supp. 1988).

124. Unfortunately, the court did not address whether firefighters receive substantially more generous benefits than other workers. Indeed, one court applied the fireman's rule to volunteer firefighters who had little professional training and received little compensation for their services. *See* Baker v. Superior Court, 129 Cal. App. 3d 710, 181 Cal. Rptr. 311 (1982); *see also supra* note 119.

125. *See, e.g.*, Farmer v. Union Oil Co., 75 Cal. App. 3d 42, 141 Cal. Rptr. 848 (1977) (truck); Marquart v. Toledo, P. & W. R.R., 30 Ill. App. 3d 431, 333 N.E.2d 558 (1975) (railroad car); Armstrong v. Mailard, 284 N.W.2d 343 (Minn. 1979) (truck); Buchanan v. Prickett & Son, Inc., 203 Neb. 684, 279 N.W.2d 855 (1979) (truck).

126. The cases and commentators have treated the status of firefighters and police officers identically. *See* F. HARPER, F. JAMES, & O. GRAY, THE LAW OF TORTS § 27.14 at 259-70 (2d ed. 1986); W. PROSSER & W. KEETON, THE LAW OF TORTS § 61 at 429-32 (5th ed. 1984); RESTATEMENT (SECOND) OF TORTS § 345 (1965).

127. *See, e.g.*, Maltman v. Sauer, 84 Wash. 2d 975, 530 P.2d 254 (1975) (Army rescue helicopter crewman).

negligent act was a cause in fact of the plaintiff's injury.[128] Generally cause in fact is a question for the jury, but the court can take the issue from the jury in two situations. First, the court can rule that the evidence is too speculative for the jury to decide the causation issue.[129] Second, the court can rule as a matter of law that the negligent act was not a cause of the injury if the evidence shows that the injury would have occurred regardless of the defendant's negligence.[130] In this latter situation the "but for" test applies. The plaintiff has failed to show that "but for" the defendant's negligence the injury would not have occurred.

In *Roberson v. Counselman*,[131] however, the court recognized an exception to the normal requirement of proving causation. In that case the decedent visited the defendant chiropractor, complaining of pain in his left shoulder and left side, breathing difficulties, and an ache in his chest. Despite the decedent's long history of heart problems, the defendant diagnosed a neuromuscular problem, performed two chiropractic adjustments on the decedent, and failed to refer him to a medical specialist. That evening the decedent died of a heart attack. The plaintiff introduced evidence that the defendant was negligent in failing to refer the decedent to a medical specialist. The problem in the case, however, involved the evidence concerning causation. One expert testified that even with proper diagnosis and treatment by a medical specialist, the decedent had at best only a forty percent chance of survival and no chance of survival by the time the decedent had his heart attack. The other expert testified that the defendant's negligence increased the decedent's chance of mortality from nineteen percent to twenty-five percent, or conversely reduced his chance of survival from eight-one percent to seventy-five percent.[132] Accordingly, the trial court granted summary judgment for the defendant on the ground that the evidence, viewed most favorably to the plaintiff, failed to establish causation in fact. The supreme court reversed.

Under traditional causation principles the trial court was probably correct to dismiss the action. Neither expert's testimony

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128. *See, e.g.*, Little v. Butner, 186 Kan. 75, 79, 348 P.2d 1022, 1028 (1960); Kreh v. Trinkle, 185 Kan. 329, 340, 343 P.2d 213, 222 (1959).

129. *See, e.g.*, Baker v. City of Garden City, 240 Kan. 554, 557, 731 P.2d 278, 281 (1987).

130. *See, e.g.*, Jones v. Hittle Service, Inc., 219 Kan. 627, 633, 549 P.2d 1383, 1390-91 (1976) (no causation in fact when failure to provide additional odorant in propane gas would not have prevented the accident).

131. 235 Kan. 1006, 686 P.2d 149 (1984).

132. *Id.* at 1020-21, 686 P.2d at 159-60.

established "but for" causation. A reduction in chance of survival from forty percent to nothing means there was a sixty percent likelihood that the decedent would have died even with proper medical care. A reduction from eight-one percent to seventy-five percent means it was roughly seventy-five percent likely that the defendant's negligence did not cause the death.[133] In essence, both experts testified that as a matter of statistical probability the defendant's negligence was not the cause of the decedent's death.

The supreme court reversed, recognizing the "loss of chance" cause of action applicable when a doctor's negligence eliminates or substantially reduces a patient's chance of survival. The court based its holding on both conceptual and policy grounds. First, the court held that the "substantial factor" test rather than the often-criticized "but for" test is the proper test for causation.[134] Second, the court noted that this approach is necessary to provide critically ill patients with legal protection against negligent medical treatment.[135] Although the court may have reached a desirable result, its reasoning on the causation issue is unclear, and its explanation of the "loss of chance" cause of action is incomplete.

The court formally recognizes the "substantial factor" test of causation in lieu of the "but for" test, but does not provide a rational explanation for the holding. The criticism of the "but for" test focuses on its inadequacy in two situations. The first is the "merging fires" case.[136] Assume that two separate fires, one started negligently and one started innocently, combine and spread to and destroy the plaintiff's property. If each fire was sufficiently large to destroy the plaintiff's property by itself, the plaintiff cannot establish "but for" causation. With respect to each fire, the plaintiff cannot claim that but for that fire the plaintiff's property would not have been destroyed.[137] If one or both fires resulted from negligence, the "but for" test puts a seemingly unfair burden on the plaintiff. Courts avoid this result by imposing liability if a fire was a "substantial factor" in causing the damage.

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133. If the plaintiff's 19% likelihood of dying with proper medical care increased to 25% as a result of the malpractice, there was roughly a 25% chance that death was the result of the 6% additional likelihood of death and a 75% chance that it was the result of the pre-existing 19% likelihood.

134. *Roberson*, 235 Kan. at 1010-13, 686 P.2d at 152-53.

135. *Id.* at 1021, 686 P.2d at 160.

136. *See* Anderson v. Minneapolis, St. P. & S. St. M. R.R., 146 Minn. 430, 179 N.W. 45 (1920); RESTATEMENT (SECOND) OF TORTS § 432(2) (1965).

137. If the merging of the two fires was necessary to produce a fire large enough to cause the ultimate harm, the "but for" test is satisfied: "but for" each fire, the harm would not have occurred.

This should be viewed not as a true determination of causation in fact, but more as a departure from traditional views for purposes of producing an equitable result.[138] Moreover, it does not apply to the loss of chance situation. If the decedent's pre-existing medical condition is one "fire" and the negligence that reduces the decedent's chance of survival is the "other" fire, it cannot be argued that the malpractice "fire" by itself would have produced the harm.[139]

The second situation involves intervening act cases in which a prior act of negligence is technically a cause in fact even though its connection with the ultimate harm seems remote. In other words, a plaintiff might show that "but for" the defendant's negligence, the injury would not have occurred, but legal causation still might not exist because the defendant's negligence lacked a sufficient nexus with the injury in comparison with other causes. Older cases usually denied recovery in these situations on the basis of a lack of "proximate cause."[140] The Restatement (Second) of Torts, however, combines the cause in fact and proximate cause concepts into a single "legal cause" test:

> The actor's negligent conduct is a legal cause of harm to another if
> (a) his conduct is a substantial factor in bringing about the harm, and
> (b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm.[141]

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138. The Restatement recognizes that this situation constitutes an exception to the general requirement of "but for" causation. *See* RESTATEMENT (SECOND) OF TORTS § 431 comment a (1965). In other situations courts occasionally have adjusted causation rules to prevent seemingly unfair results. *See, e.g.*, Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 1 (1948) (shifting burden of proof from innocent plaintiff to two tortfeasors, one of whom caused the harm); Wooderson v. Ortho Pharmaceutical Corp., 235 Kan. 387, 409-11, 681 P.2d 1038, 1057-58, *cert. denied*, 469 U.S. 965 (1984) (recognizing a presumption of causation in strict liability actions based on defective product warnings).

139. The loss of chance doctrine is also not analogous to the "thin skulled man" doctrine. That doctrine imposes liability for an unusual harm that results from the combination of a defendant's seemingly minor impact against a plaintiff and the plaintiff's unusual sensitivity or pre-existing condition. In those cases the plaintiff still must prove causation in fact, and the doctrine relates to scope of duty or "proximate cause." *See, e.g.*, Bartolone v. Jeckovich, 103 A.D.2d 632, 481 N.Y.S.2d 545 (1984); McCahill v. New York Transp. Co., 201 N.Y. 221, 94 N.E. 616 (1911).

140. For example, one who leaves the key in the ignition of a vehicle that is stolen is technically a cause in fact of injuries caused by the negligent driving of a thief. Assuming the thief lacked the tools and knowledge to steal the vehicle without ready access to the key, the ultimate injury could not have happened "but for" the act of leaving the key in the ignition. Nevertheless, courts consider the act of leaving the key to be merely an "indirect or remote cause" of the eventual injury. *See, e.g.*, George v. Breising, 206 Kan. 221, 227, 477 P.2d 983, 988 (1970).

141. RESTATEMENT (SECOND) OF TORTS § 431 (1965).

The incompleteness of the "but for" test, however, does not negate its usefulness as a test of exclusion.[142] If a plaintiff cannot establish under the "more likely than not" standard of proof that the harm would not have occurred "but for" the defendant's negligence, cause in fact does not exist.[143] Accordingly, no question of significant factor or proximate cause arises. This situation existed in *Roberson*. Because under either expert's testimony it was more likely than not that the decedent would have died even with proper medical care, it follows that more likely than not the defendant's negligence was not a cause in fact of the decedent's death.[144] Proper use of the "substantial factor" would not alter that conclusion.

Several courts nevertheless have recognized a cause of action in this situation for reasons of public policy and fundamental fairness.[145] In any individual case a patient who does not have better than a fifty percent chance of survival automatically fails the "but for" test. Thus, the technical application of that standard for causation would leave all such patients without legal recourse for negligence that eliminated or reduced their limited chances for survival. Denial of all these claims seems fundamentally unfair.

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142. By "test for exclusion" we mean that the "but for" test works well to determine when causation in fact does *not* exist, as opposed to a test sufficient to determine in all cases when legal causation does exist.

143. The Restatement recognizes this point in its comments on the meaning of the "substantial factor" test:

> In order to be a legal cause of another's harm, it is not enough that the harm would not have occurred had the actor not been negligent. Except as stated in § 432 (2) [the "merging fires" rule], *this is necessary, but it is not of itself sufficient*. The negligence must also be a substantial factor in bringing about the plaintiff's harm.

RESTATEMENT (SECOND) OF TORTS § 431 comment a (1965) (emphasis added); *see also id.* § 432(1).

144. In other words, it was more likely than not that the decedent would have died even with proper medical treatment. The likelihood was 60% according to one expert and more than 75% according to the other.

145. *See, e.g.*, Bell v. United States, 854 F.2d 881 (6th Cir. 1988); Jeanes v. Milner, 428 F.2d 598 (8th Cir. 1970); Mays v. United States, 608 F. Supp. 1476 (D. Colo. 1985), *rev'd*, 806 F.2d 976 (10th Cir. 1986), *cert. denied*, 482 U.S. 913 (1987); Thompson v. Sun City Community Hosp., Inc., 141 Ariz. 597, 688 P.2d 605 (1984); Sanders v. Ghrist, 421 N.W.2d 520 (Iowa 1988); DeBurkarte v. Louvar, 393 N.W.2d 131 (Iowa 1986); Kallenberg v. Beth Israel Hosp., 45 A.D.2d 177, 357 N.Y.S.2d 508 (1974), *aff'd*, 37 N.Y.2d 719, 337 N.E.2d 128, 374 N.Y.S.2d 615 (1975); McKellips v. St. Francis Hosp., 741 P.2d 467 (Okla. 1987); Herskovits v. Group Health Coop., 99 Wash. 2d 609, 664 P.2d 474 (1983). The "harshness" of the traditional rule was best demonstrated in cases in which the plaintiff's even chance of survival failed to satisfy the "more likely than not" standard. *See, e.g.*, Gooding v. University Hosp. Bldg., Inc., 445 So. 2d 1015 (Fla. 1984); Cooper v. Sisters of Charity, Inc., 27 Ohio St. 2d 242, 272 N.E.2d 97 (1971).

For example, assume ten cases in which (1) each patient had only a forty percent chance of survival, (2) the doctor was negligent, and (3) the patient died. If the cases are examined only on an individual case-by-case basis, each plaintiff is unable to establish causation in fact. Yet statistically, the doctors' negligence is a cause of death in four of the ten cases.[146] Thus, when the proposition is applied to a group of cases, fairness—coupled with the public policy of providing legal protection for the seriously ill—suggests that some cause of action might be appropriate.[147]

Three important issues in "loss of chance" causes of action are the determination of a "substantial" loss of chance, the measurement of damages, and the extension of the "loss of chance" theory beyond medical malpractice. The *Roberson* opinion contains detailed descriptions of numerous "loss of chance" cases from other jurisdictions. Unfortunately these cases' analyses of the cause of action frequently conflict,[148] and the *Roberson* opinion never indicates whether it agrees or disagrees with any of these cases. Accordingly, some comment is appropriate.

Although the test adopted in *Roberson* requires that the loss of chance of survival be "substantial," the expert testimony in that case demonstrates the confusion inherent in that requirement. The court implied that the increase in the decedent's chance of dying

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146. Causation in fact is an absolute concept. The malpractice either caused the death or it did not. It cannot cause 40% of a single death. "Partial causation," like "partial pregnancy," is not a viable analytical option.

147. The fairness argument depends on the validity of statistical evidence. One suspects that in most medical situations there are simply too many individual variables based on the patient's unique medical situation and other factors to measure the likelihood of survival in terms of a specific percentage. The extreme variation in the statistical testimony of the plaintiff's two experts in *Roberson* is a good example. We caution courts to supervise carefully expert testimony in this area and insist upon a proper foundation for any expert opinion about statistical chances of survival.

148. Some of the cases cited in *Roberson* did not present the difficult causation question because there was general testimony from which a jury could infer that the decedent had a better than even chance of recovery prior to the doctor's negligence. These cases simply held that a jury question existed whether the negligence was more likely than not the cause of the death. *See, e.g.*, Daniels v. Hadley Memorial Hosp., 566 F.2d 749 (D.C. Cir. 1977); Clark v. United States, 402 F.2d 950 (4th Cir. 1968); Hernandez v. Clinica Pasteur, Inc., 293 So. 2d 747 (Fla. Dist. Ct. App. 1974). Other cases explained the loss of chance theory in terms of the increased risk necessary in an "undertaking" situation sufficient to create a duty to act under RESTATEMENT (SECOND) OF TORTS § 323 (1965). *See, e.g.*, Hicks v. United States, 368 F.2d 626 (4th Cir. 1966); Thomas v. Corso, 265 Md. 84, 288 A.2d 379 (1972); Jones v. Montefiore Hosp., 494 Pa. 410, 431 A.2d 920 (1981). That doctrine, however, relates to duty, not causation. Only one case cited in *Roberson* clearly involved a patient who had less than an even chance of survival prior to the doctor's negligence. *See Kallenberg*, 45 A.D.2d at 177, 357 N.Y.S.2d at 508.

from nineteen percent to twenty-five percent was substantial because it was approximately a thirty percent increase.[149] Viewed another way, however, the negligence merely caused a six percent decrease in his chance of survival. The court's lack of guidance on this question of "substantiality" opens the door to considerable gamesmanship by counsel with the potential for inconsistent results. For example, as a matter of common sense a one percent decrease in chance of survival normally would seem "insubstantial" and probably statistically invalid. Yet at the extremes, the one percent loss of chance may be characterized as substantial. A decrease of chance of survival from one percent to zero percent is a one hundred percent loss of chance of survival, and a decrease of chance of survival from ninety-nine percent to ninety-eight percent is a one hundred percent increase in the chance of dying.[150] On the other hand, a one percent decrease in chance of survival from fifty percent to forty-nine percent is only a two percent loss of chance of survival. Accordingly, "substantiality" of the loss of chance is a meaningless concept unless it is measured in comparison to a one hundred percent likelihood of survival rather than merely as a ratio of the decedent's chance before and after the defendant's negligence. In *Roberson*, for example, the loss of chance was substantial because it was a straight forty percent loss, not because it was a one hundred percent loss of the remaining forty percent chance of survival. By leaving the question of "substantiality" to the jury without judicial supervision,[151] the court has created the potential for arbitrary and inconsistent results.

Second, the court did not discuss the measure of damages in loss-of-chance cases. In cases involving a decrease in chance of survival of fifty percent or less,[152] damages should be measured in proportion to the loss of chance rather than the full amount

149. *Roberson*, 235 Kan. at 1020-21, 686 P.2d at 159-60.

150. These impressive sounding characterizations simply conceal the extraordinarily speculative nature of evidence of causation in these cases.

151. *Roberson*, 235 Kan. at 1021, 686 P.2d at 159-60. In other situations in which "substantiality" of harm is an element of the cause of action, courts have reserved some power of judicial supervision over the issue. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 46 comments h, j (1965) (court makes initial determination whether conduct is "extreme and outrageous" and emotional distress is "severe" in action for intentional infliction of emotional distress).

152. In discussing cases involving a 50% or less loss of chance, the courts usually have referred to cases in which the plaintiff had only a 50% or less chance of survival prior to the malpractice. *See* cases listed in *supra* note 145. This category logically should include, however, not only the patient whose 40% chance of survival was reduced to 0%, but also the patient whose 60% chance of survival was reduced to 20%. In each case, it is more likely than not that the malpractice did not cause the death.

normally awarded for wrongful death.[153] Although courts sometimes say that the negligence caused the loss of chance rather than the death itself,[154] the explanation probably lies more in common sense and fairness than in conceptualisms. Assume, for example, ten cases, each involving a forty percent loss of chance and a normal wrongful death value of 100,000 dollars per decedent. Statistically, the negligent acts caused four deaths, or a total 400,000 dollars in damages, and did not cause, in whole or in part, the other six deaths. Because the identity of the four cases with proper causation cannot be determined,[155] the most equitable allocation of damages would be 40,000 dollars in each case.[156] This approach awards damages against the medical industry in proportion to harm caused by the industry's negligence, provides reasonable deterrence against negligent medical treatment of the critically ill, and largely resolves the problem of determining when a loss of chance is "substantial."[157]

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153. The seminal article proposing proportionate allocation of damages is King, *Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 YALE L.J. 1353 (1981). A few courts have adopted this general approach to damages. *See, e.g.*, Mays v. United States, 608 F. Supp. 1476 (D. Colo. 1985); DeBurkarte v. Louvar, 393 N.W.2d 131 (Iowa 1986); McKellips v. St. Francis Hosp., Inc., 741 P.2d 467 (Okla. 1987). Other courts permit a full wrongful death recovery even though the patient lost less than a 50% chance of survival. *See, e.g.*, Jeanes v. Milner, 428 F.2d 598 (8th Cir. 1970); Kallenberg v. Beth Israel Hosp., 45 A.D.2d 177, 357 N.Y.S.2d 508 (1974), *aff'd*, 37 N.Y.2d 719, 337 N.E.2d 128, 374 N.Y.S.2d 615 (1975).

154. *See, e.g.*, O'Brien v. Stover, 443 F.2d 1013 (8th Cir. 1971); James v. United States, 483 F. Supp. 581 (N.D. Cal. 1980); Herskovits v. Group Health Coop., 99 Wash. 2d 609, 619, 664 P.2d 474, 479 (1983) (Pearson, J., concurring).

155. This analysis can identify only the number of deaths caused by the malpractice affecting a larger group of patients who are similarly situated, not the identity of the specific patients whose deaths were caused by the malpractice.

156. One court has used similar analysis in approving a class action settlement in the "Agent Orange" litigation. The evidence was that "Agent Orange" could cause various diseases, all of which occur in the population at large in lesser frequency than they occurred to Vietnam veterans exposed to "Agent Orange." Thus, as a statistical matter, some veterans incurred the diseases from other causes and some from exposure to "Agent Orange," but the identity of each group could not be determined. The court decided that a settlement awarding less than full recovery to all exposed veterans was more equitable than a largely futile attempt to determine which subgrouping of veterans actually suffered disease or death from their exposure to "Agent Orange." *See In re* "Agent Orange" Product Liab. Litig. MDL No. 381, 597 F. Supp. 740 (E.D.N.Y. 1984).

157. As a practical matter, the proportionate causation approach will largely deter attorneys from bringing the marginal cases involving only a slight decrease in chance of survival. For example, filing a claim for a 5% decrease in chance of survival is probably not cost efficient for a lawyer on a contingency fee. In these cases the lawyer is perhaps better equipped than a jury to decide the "substantiality" issue.

Traditionally, plaintiffs recovered the full wrongful death value in any case in which it was more likely than not that the medical negligence caused the death. With the adoption of the loss-of-chance theory, the same fairness rationale arguably would support the use of the proportional allocation of damages in medical negligence cases involving a greater than fifty percent loss of chance. Assume again ten cases, each involving a sixty percent loss of chance and 100,000 dollars wrongful death damages. Under the traditional approach, each case would result in an award of 100,000 dollars, for an aggregate total of 1,000,000 dollars. Yet statistically, the negligent acts actually caused only six deaths, or a total of 600,000 dollars in damages. The majority of loss-of-chance cases, however, have retained the traditional full recovery approach.[158] Whether this full recovery approach remains sound may depend on whether the loss-of-chance doctrine is viewed as a limited special rule necessary simply to provide an exceptional remedy for a unique problem, or as a fundamental change in the judicial analysis of causation in fact in tort actions.[159]

Finally, the question arises whether the proportional loss-of-chance theory should extend beyond medical malpractice cases. One court has refused to extend the theory to legal malpractice,[160] but another court used a rationale similar to the proportional allocation theory to justify a settlement in an increased risk of cancer class action involving exposure to "Agent Orange."[161] Proportional allocation of damages probably should be limited to special categories of cases involving both an analogous causation problem and a strong equitable basis that justifies the fashioning

158. *See, e.g.*, McBride v. United States, 462 F.2d 72 (9th Cir. 1972); Hicks v. United States, 368 F.2d 626 (4th Cir. 1966); Hamil v. Bashline, 481 Pa. 256, 392 A.2d 1280 (1978); Clark v. Ross, 284 S.C. 543, 328 S.E.2d 91 (S.C. Ct. App. 1985). Note, however, that most of these cases predate any serious judicial consideration of the proportionate allocation theory.

159. Probably a large percentage of medical treatments and conditions occur with sufficient frequency to be reducible roughly to a before and after chance of survival. Accordingly, the proportionate causation theory arguably could apply to medical malpractice litigation in general. On the other hand, courts could define the doctrine as a special remedy that is necessary and appropriate only for the protection of persons whose limited chance of survival would automatically bar recovery under traditional causation rules. The *Roberson* opinion did not indicate how the court might approach other possible applications of the doctrine.

160. *See* Daugert v. Pappas, 104 Wash. 2d 254, 704 P.2d 600 (1985) (lawyer's failure to file timely petition for review with appellate court). *But see* Hake v. Manchester Township, 98 N.J. 302, 486 A.2d 836 (1985) (loss-of-chance theory applicable to policeman's failure to use CPR).

161. *See supra* note 156.

of a unique remedy. The answer to this and other loss-of-chance questions, however, will have to await a more careful and thorough analysis of the cause of action by the supreme court.

C. Defenses

1. Comparative Fault

a. Scope of the Statute

In 1987 the Kansas Legislature expanded the scope of the comparative negligence statute. Formerly the statute applied only to cases involving "death, personal injury or property damage,"[162] but the amendment added "economic loss."[163] This change should not mean that comparative fault principles apply to any action involving mere economic loss, but only to any nonintentional tort action[164] that allows recovery for economic loss.

For example, an action for breach of the implied warranty of merchantability may encompass personal injury, property damage, or economic loss.[165] Prior to the amendment, the supreme court held that the comparative negligence statute applied to implied warranty actions that involve personal injury or property damage, but not those that involve economic loss.[166] The distinction was based on the dividing line between tort and contract, not on the exclusion of economic loss from the original version of the statute. Implied warranty actions for personal injury and property damage are essentially tort actions despite their formal contract basis[167] whereas nearly all states, including Kansas, characterize implied warranty actions for economic loss as purely contractual.[168] Accordingly, the comparative negligence statute still should not apply to an implied warranty action involving only economic loss. On

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162. KAN. STAT. ANN. § 60-258a (1983).

163. *Id.* § 60-258a (Supp. 1988).

164. The statute has been interpreted to cover virtually all nonintentional tort causes of action. *See* Westerbeke, *supra* note 91, at 28. The Kansas courts, however, have not yet decided whether recklessness is within the scope of the statute.

165. *See* KAN. STAT. ANN. §§ 84-2-714 (direct economic loss), -715(1) (incidental economic loss), -715(2)(a) (consequential economic loss), -715(2)(b) (personal injury and property damage) (1983).

166. *See* Kennedy v. City of Sawyer, 228 Kan. 439, 450-51, 618 P.2d 788, 797 (1980).

167. *See* Brooks v. Dietz, 218 Kan. 698, 545 P.2d 1104 (1976).

168. *See* Seely v. White Motor Co., 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965); *see also* Professional Lens Plan, Inc. v. Polaris Leasing Corp., 238 Kan. 384, 710 P.2d 1297 (1985); *Kennedy*, 228 Kan. at 439, 618 P.2d at 788 (1980).

the other hand, certain tort actions such as negligent misrepresentation may encompass economic loss. The amendment makes clear that in those cases the comparative negligence statute applies.

b. Plaintiff's Fault: The Forty-Nine Percent Rule

Subsection (a) of the comparative negligence statute adopts the "forty-nine percent rule" that a plaintiff can recover a proportionate fault share of damages only if the plaintiff's fault is less than the defendant's fault.[169] Thus, if the jury finds the plaintiff and the defendant each fifty percent at fault, the plaintiff recovers nothing. This rule is particularly harsh given the natural tendency of juries to divide the fault evenly in close cases. In an early comparative fault opinion, the supreme court accordingly held that a trial court could instruct the jury on the legal effect of its allocation of fault.[170] As a result, allocations of fault that otherwise might be fifty percent for each party tend to become forty-nine percent for the plaintiff and fifty-one percent for the defendant.[171]

In *Nail v. Doctor's Building, Inc.*,[172] the trial court gave the jury the pattern instruction on comparative fault, but deleted the statement concerning the legal effect of the jury's allocation of fault. The plaintiff did not object to this instruction at trial, and the jury apportioned the fault evenly. The plaintiff argued on appeal that despite her lack of objection, failure to give the instruction was clearly erroneous and thus reversible error.

The court's analysis was contextual, but its holding was absolute. The trial judge in *Nail* instructed the jury that after it determined the allocation of fault, the court would reduce the plaintiff's recovery in proportion to her fault.[173] The supreme court considered this instruction misleading absent an explanation that the plaintiff could recover a proportionate fault share of damages only if her fault were less than the defendant's. In other words, the legal effect instruction was necessary to clarify the prior instruction. A

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169. KAN. STAT. ANN. § 60-258a(a) (Supp. 1988). When more than one defendant is present in the action, the court compares the plaintiff's fault with the aggregate fault of all defendants for purposes of applying the 49% rule. *See, e.g.*, Pape v. Kansas Power & Light Co., 231 Kan. 441, 647 P.2d 320 (1982); Negley v. Massey Ferguson, Inc., 229 Kan. 465, 625 P.2d 472 (1981); Langhofer v. Reiss, 5 Kan. App. 2d 573, 620 P.2d 1173 (1980).

170. *See* Thomas v. Board of Trustees, 224 Kan. 539, 582 P.2d 271 (1978). Subsequently, in Cook v. Doty, 4 Kan. App. 2d 499, 608 P.2d 1028 (1980), the court upheld a refusal to give a legal effect instruction on the ground that *Thomas* did not apply retroactively.

171. *See, e.g.*, Gould v. Taco Bell, 239 Kan. 564, 722 P.2d 511 (1986); *Thomas*, 224 Kan. at 539, 582 P.2d at 271.

172. 238 Kan. 65, 708 P.2d 186 (1985).

173. *Id.* at 66, 708 P.2d at 187.

court presumably could cure the misleading character of the instructions, however, by omitting all references to what the court would do with the jury's comparative fault and damage findings. Nevertheless, the supreme court held that to avoid misunderstandings in future cases, trial courts should instruct both on reduction of the plaintiff's damages in proportion to fault and on the legal effect of the fault allocation rather than omit those matters altogether from the instructions.[174]

c. Multiple Tortfeasors: The Individual Judgment System

Subsection (d) of the statute replaces the traditional system of joint and several liability with an individual judgment system in which tortfeasors are liable for only their own proportionate fault share of the total damages.[175] The court has justified this provision essentially as a system of equitable distribution of loss that avoids the unfairness of requiring one tortfeasor to pay for a portion of the loss attributable to another tortfeasor.[176] To compare the fault of all parties, subsection (c) authorizes the joinder of additional parties whose fault is alleged to have contributed to the plaintiff's injury,[177] and the court has interpreted this provision to permit the joinder of immune, unknown, and unavailable parties.[178] During the survey period the Kansas courts confronted various problems concerning the specific application of these rules.

i. Settlement

Under subsection (c) of the statute a defendant may join for purposes of fault comparison an immune party, including a party who has settled with and been released by the plaintiff.[179] In *Glenn v. Fleming*,[180] the plaintiff brought a negligence action against five defendants, settled with four of them for a total of 695,000 dollars, and then filed an amended petition that removed any claims against the settling defendants. Although the remaining defendant was aware of the settlements, he failed to join the settling parties for the limited purpose of comparing their fault. The jury determined the total amount of damages to be 1,500,000 dollars and found the plaintiff 30 percent at fault and the defendant 70 percent at

174. *Id.* at 68, 708 P.2d at 189.
175. KAN. STAT. ANN. § 60-258a(d) (Supp. 1988).
176. *See* Brown v. Keill, 224 Kan. 195, 580 P.2d 867 (1978).
177. KAN. STAT. ANN. § 60-258a(c) (Supp. 1988).
178. *See Brown*, 224 Kan. at 206, 580 P.2d at 875.
179. *See, e.g.*, McCart v. Muir, 230 Kan. 618, 641 P.2d 384 (1982).
180. 240 Kan. 724, 732 P.2d 750 (1987).

fault. The trial court reduced the damages by 30 percent to 1,050,000 dollars to reflect the plaintiff's fault and then further reduced it by 695,000 dollars to 355,000 dollars to reflect the amount of the prior settlements.

The supreme court reversed the reduction of the judgment by the amount of the settlements. If a defendant seeks to limit liability in such a case, the proper procedure is to join the settling defendants and compare the fault of all parties to determine each party's share of the total damages. A credit for the amount of prior settlements is not proper, according to the court, because with the abolition of joint and several liability parties are liable only for their own proportionate fault share of the judgment.[181]

The court's explanation seems incomplete. More precisely, the reasoning should be that (1) to reduce his share of the total damages, the defendant must join those additional parties whose fault allegedly contributed to the injury, and (2) the trial court's employing a credit-for-settlement reduction instead of the proper procedure probably caused the plaintiff to bear a disproportionate share of the loss. Assuming the jury's fault allocation rationale regarding the two parties, the conventional wisdom is that proof of fault by other parties—if considered—usually would reduce the percentages of fault attributed to both the defendant and the plaintiff. For instance, if the missing four parties had an aggregate fifty percent fault, the logical allocation among all parties would be fifteen percent for the plaintiff, thirty-five percent for the defendant, and fifty percent for the four settling parties. Thus, the plaintiff would suffer unfairness if the credit were allowed, and the defendant would suffer if it were not.[182] The court's holding puts the unfairness on the party who should have prevented it in the first place.[183]

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181. *Id.* at 730-31, 732 P.2d at 755.

182. A third option would be to give a proportionate fault allocation of the credit, *i.e.*, a credit equal to 70% of the settlement amount. This approach might produce a less unfair result in *Glenn*, but it would set a bad precedent concerning proper procedures for future cases.

183. It is somewhat harsh to blame the defendant entirely for the procedural confusion in the case. Because the proper procedure in such a case is to compare the fault of all parties, including the settling parties, the trial judge probably should have denied the plaintiff's motion to file the amended petition deleting the settling parties. Granting the motion only created unnecessary paperwork, requiring the defendant to join those parties in the action for purposes of comparison. In addition, the supreme court's description of the proceedings suggests that the trial court inadvertently may have caused the defendant to forego joinder of the settling parties. *See Glenn*, 240 Kan. at 725-26, 732 P.2d at 752.

ii. The Single Action Rule

The ultimate purpose of the joinder and individual judgment provisions is to allocate damages in proportion to the fault of all parties to the occurrence.[184] Accordingly, the Kansas courts developed the "single action rule" in two early comparative fault cases. In *Eurich v. Alkire*,[185] the plaintiff was injured in a two-car accident. The jury found the driver of one car forty percent at fault on a negligent driving theory and the owner-passenger of the other car sixty percent at fault on a negligent entrustment theory. While the first action was still pending, the driver of the second car brought a cross claim as a "second action" against the owner-passenger of that car. Similarly, in *Albertson v. Volkwagenwerk Aktiongesellschaft*,[186] the jury found the plaintiff driver forty percent at fault and the defendant driver sixty percent at fault. After the plaintiff recovered sixty percent of his damages from the defendant, he brought a products liability design defect action against the manufacturer of his own car for aggravation of his damages in the accident.[187]

In both cases the supreme court held that the second action was barred as inconsistent with the policy of the comparative negligence statute. These holdings promote judicial economy and efficiency by avoiding inconsistent comparative fault determinations. Neither res judicata nor issue preclusion necessarily would prevent a jury in the second action from determining a different and inconsistent allocation of fault among the parties.[188] The court in the second action would then confront the nearly impossible task of meshing diverse jury determinations to allocate the loss among all parties

184. *See, e.g.*, Wilson v. Probst, 224 Kan. 459, 463, 581 P.2d 380, 384 (1978); Miles v. West, 224 Kan. 284, 286, 580 P.2d 876, 880 (1978); Brown v. Keill, 224 Kan. 195, 207, 580 P.2d 867, 876 (1978).

185. 224 Kan. 236, 579 P.2d 1207 (1978).

186. 230 Kan. 368, 634 P.2d 1127 (1981).

187. The plaintiff brought the first action in state court and the second action in federal court. The federal court certified to the Kansas Supreme Court the question whether the first action barred the second action. *Id.* at 369, 634 P.2d at 1129.

188. In a precomparative negligence case, the supreme court held that a prior judgment against codefendants does not trigger the collateral estoppel doctrine in a subsequent action between those defendants. In a comparative negligence action each party has an interest in the determination of its share of fault, and collateral estoppel arguably might apply to a subsequent action between defendants. Nevertheless, in Eurich v. Alkire, 224 Kan. 236, 579 P.2d 1207 (1978), the court avoided any decision whether collateral estoppel would preclude the cross-claim and based its holding solely on an interpretation of the comparative negligence statute. *Id.* at 237, 579 P.2d at 1208-09.

in proportion to fault.[189] The single action rule avoids these problems by requiring the parties to use the joinder and loss allocation provisions of the comparative negligence statute to resolve all comparative fault issues in a single action.[190]

During the survey period the Kansas Supreme Court faced a series of "single action rule" cases. In *Mathis v. TG&Y*,[191] *Childs v. Williams*,[192] and *Anderson v. Scheffler*,[193] the court recognized an exception to the single action rule. In each case, the plaintiff settled with the parties in one action and sought to proceed in another action against additional parties to the same accident. *Mathis*, the initial case in this series, involved a plaintiff injured by a loose door closure in a TG&Y store. The plaintiff sued TG&Y and later joined the construction company and the landlord as additional defendants in the original action. When the plaintiff discovered that he had sued the wrong construction company and had the wrong legal identity of the landlord, he dismissed the wrongly named parties from the original action and filed a separate action against the correct construction company and landlord. Thereafter the plaintiff settled and dismissed the action against the construction company and landlord, leaving only the original action against TG&Y. The trial court dismissed the action against TG&Y on the ground that the plaintiff had violated the single action rule. In reversing, the supreme court held that dismissal of an action with prejudice after settlement does not constitute an adjudication of comparative fault on the merits and that a subsequent action thus does not violate the single action rule.[194]

In *Childs*, the court extended the *Mathis* exception to a case in which the first action was reduced to judgment. In that case a minor passenger was injured in a two-car accident. The plaintiff filed a friendly action against the driver of the car in which she was a passenger to reduce to judgment her settlement with that driver. She then filed a second action against the driver of the other car, which the trial court dismissed as a violation of the single action rule. The supreme court reversed, holding that reduction of the first action to judgment did not bar the plaintiff's

189. Comparative fault determinations and damage determinations both are inherently imprecise, and it is most unlikely that two juries would reach reasonably consistent results when evaluating the same case in piecemeal fashion.

190. *See* Albertson v. Volkswagenwerk Aktiengesellschaft, 230 Kan. 368, 371, 634 P.2d 1127, 1130 (1981); *Eurich*, 224 Kan. at 238, 579 P.2d at 1208-09.

191. 242 Kan. 789, 751 P.2d 136 (1988).

192. 243 Kan. 441, 757 P.2d 302 (1988).

193. 242 Kan. 857, 752 P.2d 667 (1988).

194. *Mathis*, 242 Kan. at 794, 751 P.2d at 139.

subsequent action because the first action did not involve an actual comparison of fault.[195]

In *Anderson*, the court applied the *Mathis* exception to the situation in which a subsequent action in state court was arguably necessary because the plaintiff was not allowed to join all parties in a federal action. In that case the plaintiff brought a state court action against the owner of the auger that caused his injuries. The owner removed the case to federal court. The federal court allowed the plaintiff to join all parties involved in the manufacture and sale of the auger except one party whose joinder would have destroyed the court's diversity jurisdiction. The plaintiff eventually settled with all parties in the federal action, dismissed the federal action, and tried to proceed in state court against the party excluded from the federal action.[196] Again, the court held that the case was within the scope of the *Mathis* rule because the federal action involved no comparative fault determination.[197] Even if it had, the court would have permitted the plaintiff to proceed with the state court action because the plaintiff "did not voluntarily accept the risk of nonjoinder by selecting the federal forum."[198]

The *Mathis* exception is largely consistent with the *Eurich-Albertson* rationale for the single action rule. If the first action does not involve a comparative fault determination or any other substantive determination that would inject unnecessary complexity or a risk of inconsistent judgments into the second action, the second action does not significantly violate the policy of promoting judicial economy and efficiency. Although a second action exists, all comparative fault determinations are made in a single action.

A minor inconsistency appears, however, and seems to be resolved in favor of the *Mathis* exception. In *Anderson*, the court explained that the *Eurich* holding was dependent "on the feasibility, under Kansas law, of joining all parties" in the single action.[199] Yet in both *Mathis* and *Childs* the plaintiff could have accomplished all of the procedural maneuvering in a single action. In *Mathis*, the plaintiff could have joined the proper additional parties in the original action rather than file a second action. In *Childs*, the minor plaintiff could have sued both drivers in a single action,

195. *Childs*, 243 Kan. at 443, 757 P.2d at 304.

196. In the subsequent state action, the plaintiff also joined an employee of the party excluded from the federal action. Although the plaintiff had not sought to join the employee in the federal action, joinder of the employee also would have destroyed diversity jurisdiction and, thus, would not have been allowed.

197. *Anderson*, 242 Kan. at 866, 751 P.2d at 672-73.

198. *Id.* at 864, 751 P.2d at 671.

199. *Id.* at 864, 751 P.2d at 672.

reduced to judgment the settlement with one driver, and proceeded to trial against the other. Thus, each case involves a violation, albeit minimal, of judicial economy.[200]

The exception in *Anderson*, the removal case, is more troubling because it opens the door to conflicting and confusing comparative fault determinations in two separate actions. The court's rationale focused on the unfairness when the plaintiff is forced into federal court and then not allowed to join all parties necessary to a comprehensive comparative fault determination.[201] Assuming *arguendo* that when an adequately diligent party is prevented from joining or is unable to join all parties in a single action, the party should have the right to bring a second action to recover full compensation, or if the party is a defendant, to recover comparative contribution or indemnity. Nevertheless, because the *Mathis* exception already applied and because no second comparative fault determination would occur in any event, the court probably should have reserved this issue for a more appropriate case.

The unanswered question is the extent to which a party should have an obligation to avoid the need for a second comparative fault determination involving a single accident. The plaintiff in *Anderson* had two ways of avoiding the dilemma. First, instead of hurriedly filing the action one month after the accident against only the owner of the auger, he could have evaluated the claim more carefully at the outset and named all relevant parties in the original action.[202] Had he done so, complete diversity of citizenship would not have existed and the defendants could not have removed the action to federal court. Second, after removal to federal court, the plaintiff could have dismissed the federal court action and commenced a state court action against all relevant parties before

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200. In each case the burden on the judiciary related only to the additional time and expense of the paperwork required to maintain a second action in the court records, and some of that paperwork would have been duplicated in any event had the parties handled all necessary transactions in a single action.

201. *See Anderson*, 242 Kan. at 865, 751 P.2d at 672.

202. The accident occurred on February 2, 1984, and the plaintiff filed the initial action on March 5, 1984. In other contexts the Kansas Supreme Court has held that a party has an obligation of reasonable diligence to investigate prior to commencing an action. *See* Nelson v. Miller, 227 Kan. 271, 607 P.2d 438 (1980) (malicious prosecution). This proposition is not one sided. Defendants often assert the fault of additional parties to reduce their own share of the total liability. Often a defendant will assert the fault of a party whom the plaintiff believes not to be at fault, thereby forcing the plaintiff to join the party or risk losing a share of the total damages. *See, e.g.*, Ellis v. Union Pacific R.R., 231 Kan. 182, 643 P.2d 158, *aff'd on rehearing*, 232 Kan. 194, 653 P.2d 816 (1982).

expiration of the statute of limitations.[203] Because the plaintiff failed to use either method of avoiding the dilemma, he was not truly in a position of being forced involuntarily to accept the risk of nonjoinder.[204] The supreme court, thus, may have been too hasty in characterizing *Anderson* as a case in which multiple comparative fault determinations should be permitted.

In *Teepak, Inc. v. Learned*[205] and *Mick v. Mani*,[206] the court applied the single action rule to bar the second action in successive tortfeasor situations involving injuries allegedly caused by defective products and aggravated by medical malpractice. In *Teepak*, a doctor removed part of a consumer's small intestine, which had become blocked by the casing on sausage eaten by the consumer. The consumer brought a products liability action in federal court against the manufacturers of the sausage and the sausage casing. The manufacturer of the sausage casing brought a third-party action in federal court and a parallel action in a Kansas state court for "indemnity or subrogation" against the doctor. The consumer settled with the two manufacturers and dismissed his federal court action. The casing manufacturer in turn dismissed its federal court third-party action and attempted to proceed in the state court action against the doctor.

In *Mick*, the plaintiff was injured while working on an oil drilling rig. He filed two actions in different counties at approximately the same time. One was a products liability action against various parties involved in sale and maintenance of the product causing the accident, and the other was a medical malpractice action against three doctors involved in his postaccident treatment. The plaintiff settled with all but one defendant in the products liability action and tried the action against the remaining defendant, whom the jury found to be without fault. As part of his trial strategy, the plaintiff never sought any comparison of the fault of the doctors in the products liability action. After losing the prod-

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203. The plaintiff attempted to join the additional parties in the federal court action on May 1, 1985, more than nine months prior to the expiration of the two-year statute of limitations for tort actions in Kansas.

204. In other cases the supreme court has applied the single action rule to bar a second action even though a party followed otherwise proper procedures. For example, in Eurich v. Alkire, 224 Kan. 236, 579 P.2d 1207 (1978), the assertion of a cross-claim in a second action rather than in the original action was a procedure permitted by the Kansas Code of Civil Procedure. *See* KAN. STAT. ANN. § 60-213(g) (1983). In 1986 the Code was amended to require cross-claims in comparative negligence actions to be brought in the original action. KAN. STAT. ANN. § 60-213(h) (Supp. 1988).

205. 237 Kan. 320, 699 P.2d 35 (1985).

206. 244 Kan. 81, 766 P.2d 147 (1988).

ucts liability trial, the plaintiff attempted to proceed against the doctors in the medical malpractice action.

In both *Teepak* and *Mick* the supreme court held that the second action was barred by the single action rule. In *Teepak* the court correctly recognized that the separate claims against the manufacturers and the doctors did not involve the same occurrence.[207] The manufacturers legally caused all injuries, whereas the doctor caused only aggravation of the initial injury.[208] Nevertheless, the court held that the single action rule applied to successive tortfeasors as well as to joint tortfeasors. The purpose is to resolve in one action all comparative fault claims relating to the overall occurrence. The expanded definition of the "occurrence" is fully consistent with *Albertson*, which also involved only an aggravated injury claim against the manufacturer.[209] Moreover, the single action rule applies in successive tortfeasor situations regardless of whether the plaintiff, as in *Mick*, or the defendant, as in *Teepak*, brings the second action. In either situation the second action is barred if it would involve conflicting and confusing multiple comparative fault determinations.

Teepak, however, did not in fact involve a risk of multiple comparative fault determinations, because the first action was dismissed after settlement without any comparative fault determination. Because *Teepak* was decided prior to *Mathis*, however, arguably it would be decided differently today.[210] Unfortunately, the court seemed to suggest in *Mick* that *Teepak* was still valid.[211] That confusion should be viewed as inadvertent, not purposeful, and *Mathis* should apply to *Teepak*.

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207. *Teepak*, 237 Kan. at 328-29, 699 P.2d at 42-43.

208. The manufacturers caused the initial injury that necessitated medical treatment and exposed the plaintiff to the risk of malpractice. The doctors' alleged malpractice had no connection with the initial injury, but aggravated that injury. Thus, the manufacturers alone caused the initial injury, and the manufacturers and doctors both legally caused the aggravated injury.

209. In *Albertson*, the second action involved a "crashworthiness" claim against the manufacturer of the plaintiff's car. That claim essentially was that the car's defective condition did not cause the initial accident, but only aggravated the injuries suffered in the accident. *See* Albertson v. Volkswagenwerk Aktiengesellschaft, 230 Kan. 368, 369-70, 634 P.2d 1127, 1129-30 (1981).

210. There was, however, an alternative ground for denying the claim in *Teepak*. The court characterized the claim as one for comparative implied contribution, which was insufficient because the plaintiff had not asserted a claim for damages against the doctor. *Teepak*, 237 Kan. at 328, 699 P.2d at 42; *see* Ellis v. Union Pacific R.R., 231 Kan. 182, 643 P.2d 158, *aff'd on reh'g*, 232 Kan. 194, 653 P.2d 816 (1982). The situation in *Teepak* seems to fall squarely within the *Ellis* doctrine, and any criticism on this point relates to the soundness of *Ellis*, not *Teepak*. *See generally* Westerbeke, *supra* note 91, at 38-41.

211. *See Mick*, 244 Kan. at 87-89, 766 P.2d at 152-53.

iii. Intentional Tortfeasors

The courts have held that intentional tortfeasors are outside the scope of the comparative negligence statute and thus are not entitled to the equitable benefits that apply to negligent tortfeasors. Therefore, contributory negligence is not a partial defense to an intentional tort[212] and traditional joint and several liability still applies to two or more intentional tortfeasors.[213] In *Gould v. Taco Bell*,[214] however, injury resulted from the combined acts of an intentional tortfeasor and a negligent tortfeasor. In that case the plaintiff, a customer in the defendant's restaurant, was verbally harassed and then physically attacked and beaten by another customer. The restaurant's assistant manager negligently delayed rendering assistance to the plaintiff. The trial court denied the defendant's motion to join the intentional tortfeasor as an additional party for purposes of comparing the fault of all parties to the occurrence, and the jury awarded compensatory and punitive damages and found the plaintiff forty-nine percent at fault and the defendant fifty-one percent at fault.

In affirming, the supreme court relied on its prior holding in *M. Bruenger & Co. v. Dodge City Truck Stop, Inc.*[215] In that case the defendant bailee of a truck negligently created the opportunity for a thief to steal the truck and was held liable. In refusing to permit comparison of fault in that case, the supreme court relied on the special nature of a bailment: the bailee had a duty to prevent loss of the truck and the wrong was complete when the truck was stolen.[216] In *Gould*, the court broadened its holding in *M. Bruenger* to encompass any situation in which a defendant negligently fails to prevent an intentional tort.

Both the limited holding in *M. Bruenger* and the more general holding in *Gould* seem unsound. Intentional tortfeasors' high degree of culpability justifies their exclusion from the favorable loss allocation provisions of the comparative negligence statute. The supreme court, however, has consistently held that the purpose of the individual judgment provision is to limit negligent defendants' liability to their proportionate fault share of the total damages.[217] The *M. Bruenger-Gould* rule completely ignores the

212. *See* Sandifer Motors, Inc. v. City of Roeland Park, 6 Kan. App. 2d 308, 628 P.2d 239 (1981).

213. *See* Sieben v. Sieben, 231 Kan. 372, 646 P.2d 1036 (1982).

214. 239 Kan. 564, 722 P.2d 511 (1986).

215. 234 Kan. 682, 675 P.2d 864 (1984).

216. *Id.* at 687, 675 P.2d at 869.

217. *See, e.g.*, Brown v. Keill, 224 Kan. 195, 580 P.2d 867 (1978).

purpose of the statute and creates the anomalous rule that negligent actors are subject either to the individual judgment system or to joint and several liability, depending not on the nature or culpability of their own acts, but on the nature or culpability of some third party's unrelated act. For example, a restaurant owes a duty of reasonable care to protect its guests from unreasonable risks of harm while they are on the premises. Assume that a visibly intoxicated third person in the restaurant negligently stumbles into and knocks down one guest, then intentionally pushes down another guest. In each case the restaurant breached its duty in the same manner—by failing to remove the intoxicated person from the premises before he harmed a guest. The results, however, vary. The restaurant is liable for only a proportionate fault share of the damages suffered by the first guest, but is jointly and severally liable for all damages suffered by the second guest.

The better approach would be a hybrid system in which the intentional tortfeasor is jointly and severally liable for all damage, but the negligent tortfeasor is limited to a proportionate fault share of the total damages. This approach would retain the policy of denying the benefits of the comparative negligence statute to intentional tortfeasors, and still honor the intent of the statute to require negligent actors to pay only in proportion to fault.[218]

2. Statute of Limitations

Section 60-513 of Kansas Statutes Annotated provides that "an action for injury to the rights of another, not arising from contract" shall be brought within two years.[219] Section 60-513 further provides, however, that such causes of action "shall not be deemed accrued until the act giving rise to the cause of action *first causes substantial injury* . . . ."[220] In two cases decided during the survey

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218. *See* Westerbeke, *supra* note 91, at 32-33. In other contexts legislatures and courts have recognized similar hybrid systems combining individual judgment systems with joint and several liability. Some comparative negligence statutes, for example, hold the defendant who is more at fault than the plaintiff jointly and severally liable with the other defendants, but hold a defendant who is less at fault than the plaintiff liable for only the defendant's individual proportionate fault share of the damages. Thus, in a single action one defendant may be jointly and severally liable while another defendant is only individually liable. *See, e.g.*, LA. CIV. CODE ANN. art. 2324 (Supp. 1989); NEV. REV. STAT. § 41.141.3 (1987); OR. REV. STAT. § 18.445 (1988). One state has judicially interpreted its statute to provide for joint and several liability when the plaintiff is without fault and for individual judgments when plaintiff is partially at fault. *See* Berry v. Empire Indem. Ins. Co., 634 P.2d 718 (Okla. 1981); Boyles v. Oklahoma Natural Gas Co., 619 P.2d 613 (Okla. 1980); Laubach v. Morgan, 588 P.2d 1071 (Okla. 1978).

219. KAN. STAT. ANN. § 60-513(a)(4) (Supp. 1988).

220. *Id.* § 60-513(b) (emphasis added).

period, the Kansas Supreme Court appeared to provide inconsistent interpretations of the statute's "substantial injury" language.

In *Olson v. State Highway Commission*,[221] the plaintiff sued a construction company and the state highway commission for damages to her real property resulting from a highway construction project. The defendants began highway construction near the plaintiff's home in 1977. The next year, the plaintiff's son began constructing a home for her. The defendants also began blasting operations during that year and the plaintiff's son discovered damage to the foundation in the basement of the home he was building. At about the same time, the plaintiff also discovered damage to a one-acre pond and to some fences located on her property. She did not file suit until October 1980, however. The trial court concluded that "permanent injury to plaintiff's basement, pond and fences first occurred in the spring or summer of 1978,"[222] and it granted summary judgment to the defendants on statute-of-limitations grounds. In the court's view, all damages were precluded because the action was not filed until more than two years from the initial injury to the property.

The Kansas Supreme Court reversed. Writing for a unanimous court, Justice Holmes recognized that under section 60-513(a), the two-year period begins to run from the date the allegedly tortious act occurs and the injury is sustained.[223] He recognized as well, however, that under section 60-513(b), "[t]he focus is not . . . on the faulty act or condition itself, but on its effect."[224] Thus, in this court's view, section 60-513(b) provides "that a cause of action shall not be deemed to have accrued until the act giving rise to the cause of action first causes *substantial* injury, or until the time the fact of injury (inferentially, the fact of substantial injury) becomes *reasonably ascertainable* to the injured party."[225]

Reasoning that the "statutes of limitation were not designed to force injured parties into court at the first sign of injury, regardless of how slight it may be, just because the injury may be permanent in nature," the court held that the cause of action does not accrue until *substantial injury* first occurs.[226] The determination of when

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221. 235 Kan. 20, 679 P.2d 167 (1984).

222. *Id.* at 23, 679 P.2d at 170.

223. *Id.* at 23-24, 679 P.2d at 171.

224. *Id.*

225. *Id.* at 26, 679 P.2d at 172-73 (emphasis in original).

226. *Id.* at 27, 679 P.2d at 173-74. The defendant had argued that because the initially discovered injuries to the plaintiff's property were permanent, the statute started to run upon their discovery. The court disagreed and noted that even though some previous cases placed some importance upon whether the injury was temporary or permanent, the key inquiry for determining whether the limitations period has been triggered is whether the injury is substantial. *Id.* at 25-26, 679 P.2d at 172.

such injury first occurs is for the trier of fact.[227] In this case, the court said, a jury might well have concluded that the injuries the plaintiff suffered did not become substantial, thereby triggering the limitations period, until well after the time that some injury first occurred. "[W]here the evidence is in dispute as to when substantial injury first appears or when it becomes reasonably ascertainable, the issue is for determination by the trier of fact."[228] Summary judgment was therefore inappropriate and the court reversed the lower court's decision to grant it.

The *Olson* court read section 60-513(b) to establish alternative means by which to determine whether a cause of action has accrued for limitations purposes. Under one reading of the section, the limitations period does not commence until the injury is reasonably ascertainable. Under the other, the limitations period begins to run when the allegedly tortious act first causes *substantial injury*. The court failed to define "substantial injury," but there is no doubt regarding its conclusion that the determination of when such injury arises is one for the fact finder. Just seven months later, the court took a different approach.

In *Roe v. Diefendorf*[229] the plaintiff injured his back in an automobile accident allegedly caused by the defendant's negligent driving in November 1979. The plaintiff suffered back pain and missed work for several days immediately after the accident. In February 1981 the plaintiff reinjured his back. He contended that he was not aware of the full extent of his back injury until that time. The plaintiff filed suit in June 1982, two and one-half years after the accident. The trial court denied the defendant's statute-of-limitations-based motion for summary judgment. The court reasoned that because the plaintiff did not realize he had incurred substantial injury until February 1981, the limitations period had not run. The defendant appealed.[230]

On appeal the defendant argued that under section 60-513(b) the limitations period begins to run "either when the *act* causing the substantial injury occurs or when the *fact of injury* is ascertainable by the injured party."[231] Under this view, the plaintiff's action would have been barred because both the act causing his injury (the accident) and the plaintiff's contemporaneous recog-

227. *Id.* at 28, 679 P.2d at 174.

228. *Id.* (quoting Hect v. First Nat'l Bank & Trust Co., 208 Kan. 84, 93, 490 P.2d 649, 657 (1971)).

229. 236 Kan. 218, 689 P.2d 855 (1984).

230. *Id.* at 220, 689 P.2d at 857.

231. *Id.* at 220, 689 P.2d at 858 (emphasis added).

nition that he was in fact injured (he suffered some pain and missed several days of work immediately following the accident) occurred more than two years before the action was filed. The plaintiff argued that his action was timely filed because the limitations period did not begin to run until the fact of *substantial injury* was reasonably ascertainable to him. This view of the statute requires a factual determination of when the injured party should have known that his injury was substantial. Because such a factual determination is required to assess the timeliness of the action, the plaintiff argued, summary judgment should not have been granted.[232]

Had the supreme court approached the statute of limitations issue in this case in a manner consistent with its approach in *Olson*, it would have posed two inquiries. First, has more than two years elapsed since the purportedly tortious act first caused substantial injury? Because the *Olson* court concluded that determination of when such an injury arose is properly made by the trier of fact, it could have reversed the trial court's grant of summary judgment on that basis.[233] Alternatively, the *Olson* court could ask whether the action was filed within two years of the time that the fact of some injury (inferentially substantial injury) was reasonably ascertainable by the plaintiff. The court did not follow the *Olson* rationale here, but instead chose a different path.

The court held that the "statute of limitations starts to run in a tort action at the time a negligent act causes injury if both the act and the resulting injury are reasonably ascertainable by the injured person."[234] In the court's view, the legislature's use of the term "substantial injury" in section 60-513(b) "does not require an injured party to have knowledge of the full extent of the injury to trigger the statute of limitation. Rather, it means that the victim must have sufficient ascertainable injury to justify an action for recovery of damages, regardless of extent."[235] Thus, "substantial injury" means "actionable injury." Because the lawsuit was filed more than two years after the act causing injury and more than two years after the plaintiff ascertained that he had suffered an actionable injury, the action was barred.

This approach is clearly inconsistent with *Olson*. The court in that case did not distinguish between injuries that are "actionable" and thus "substantial" within the meaning of the statute and injuries that are insufficient to provide the basis for an action for

232. *Id.*
233. See *supra* notes 226-28 and accompanying text.
234. *Roe*, 236 Kan. at 222, 689 P.2d at 859.
235. *Id.*

recovery and therefore, according to the *Roe* court, "insubstantial." Rather, the *Olson* court distinguished between "substantial" injuries and "minor" injuries. Under the *Olson* court's view, some actionable injuries could be insubstantial and thus trigger the running of the limitations period only when and if they became substantial.[236] In *Olson* there was no dispute that *some* injury to the plaintiff's property occurred more than two years before the lawsuit was filed.[237] As the court in that case pointed out, however, summary judgment was inappropriate because "reasonable minds could differ over whether this one crack constituted *substantial* injury for the purposes of [section] 60-513(b)."[238] If *Olson* had been decided under the rationale of the *Roe* decision, the *Olson* plaintiff's cause of action would have accrued with the initial discovery of the hairline crack in the plaintiff's foundation if that injury was actionable. Thus, the trial court's summary judgment order that was reversed by the *Olson* court would have been affirmed by a court sitting just seven months later.

In *Roe*, the court stated that its result is required because any other reading of section 60-513 would provide different limitations periods for injured parties depending upon whether their injury was classified as substantial or insubstantial.[239] In the court's view, such a classification scheme would violate the equal protection clause of the fourteenth amendment to the United States Constitution because it would serve no legitimate legislative purpose.[240] Unfortunately, the court provided no rationale to support its conclusion in that regard, but merely cited the case of *Henry v. Bauder*.[241] Apparently, the court intended to say that because the classification scheme at issue in *Henry* failed to satisfy fourteenth amendment standards, any legislation that differentiates between substantial and insubstantial injuries for limitations purposes is also constitutionally flawed. This logic is not persuasive.

In *Henry*, the plaintiff was a guest passenger in an automobile operated by the defendant and was severely injured in an accident.

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236. The court did not express this view explicitly, but its approach clearly indicated an emphasis on whether the injury was substantial. The court did not even hint that its conclusion that the statute did not begin to run upon the initial discoveries of the plaintiff's injuries rested on a determination that the initial injuries were not actionable.

237. In fact, the apparent agreement that the initially discovered injuries were permanent would seem to support the view that even though the court concluded that these injuries may not have been substantial, they could have been actionable.

238. *Olsen*, 235 Kan. at 26, 679 P.2d at 173.

239. *Roe*, 236 Kan. at 222, 689 P.2d at 859.

240. *Id.* at 222-23, 689 P.2d at 859.

241. *Id.* (citing Henry v. Bauder, 213 Kan. 751, 518 P.2d 362 (1974)).

The plaintiff's action against the defendant for negligence was dismissed by the district court on the basis of the Kansas guest statute.[242] Under the guest statute,

> no person who is transported by the owner or operator of a motor vehicle, as his guest, without payment for such transportation, shall have a cause of action for damages against such owner or operator for injury . . . unless such injury . . . shall have resulted from the gross and wanton negligence of the operator of such motor vehicle.[243]

The plaintiff argued that the guest statute offended the equal protection clause of the fourteenth amendment because it discriminated between "guests" and "paying passengers" in a manner that bore no rational relationship to the purposes of the legislation.[244] Reasoning that none of the justifications traditionally offered to support the guest statute's classification scheme were rationally related to the purposes of the statute, the court invalidated the statute.[245]

Two things about the court action in *Henry* distinguish it from the court's examination of the statute of limitations question in *Roe*. First, the statute at issue in *Henry* narrowed the class of potential plaintiffs from those that would have had the opportunity to bring a cause of action at common law. Before the enactment of the guest statute, host drivers were held to the same standard of care as those who drove passengers for pay.[246] The effect of the guest statute, therefore, was to deprive certain victims of negligent behavior—nonpaying passengers—of a right they enjoyed before the enactment of the statute—the right to bring a cause of action for redress of their injuries. The limitations provision at issue in *Roe* does not present such an issue. It is one thing to condemn a statutory classification scheme that operates to alter the status quo by denying court access to a group that enjoyed such access before the statute was enacted. It is quite another to

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242. *Henry*, 213 Kan. at 752, 518 P.2d at 364.

243. KAN. STAT. ANN. § 8-122b (1970) (repealed 1974).

244. *Henry*, 213 Kan. at 752-53, 518 P.2d at 364-65.

245. The arguments that supported a guest statute were: (1) that such a statute promoted hospitality by insulating generous drivers from lawsuits and (2) that the statute eliminated the possibility of collusive lawsuits "in which a host fraudulently confesses negligence so as to permit his guest—presumably a friend or relative—to collect from the host's insurance company." *Id.* at 759, 518 P.2d at 369. The court evaluated these arguments and concluded that "neither of these justifications provides a reasonable explanation for the discriminations established by the guest statute and thus neither provides a rational basis to uphold the statute against the present constitutional attack." *Id.*

246. *Id.* at 754, 518 P.2d at 366 (citing Howse v. Weinrich, 133 Kan. 132, 298 P. 766 (1931)).

assume that a scheme that alters the status quo by extending the time injured persons have to bring a court action is similarly flawed.

Second, the *Henry* court did not simply conclude without analysis that the classification scheme at issue in that case offended fourteenth amendment equal protection law; it provided a rationale for its ultimate conclusion.[247] If the *Roe* court believed the legislature intended to establish a scheme that provided differential limitations treatment for substantial and insubstantial tort claims, it should have so construed the statute unless it concluded that such a construction is unconstitutional under either state or federal law. Instead of grappling with the question of legislative intent, the court merely concluded without analysis that the legislature was constitutionally forbidden from establishing what the *Olson* court seemed to believe the legislation did establish. Substantively, the *Roe* decision may represent a more appropriate view of how the statute of limitations should operate in cases like these.[248] Nonetheless, the decision would have been more persuasive had the court attempted to harmonize it with the seemingly divergent approach that it used in *Olson*.

II. OTHER CAUSES OF ACTION

A. Strict Liability for Abnormally Dangerous Activities

The modern doctrine of strict liability for abnormally dangerous activities has evolved from the landmark English case, *Rylands v. Fletcher*.[249] In that case the court held the defendants strictly liable for flood damage to the plaintiffs' mines caused by the escape of water from a reservoir built and maintained by defendants on their land. As developed in Kansas, the *Rylands* doctrine lacked clear definition of its elements and limitations:

> When a person brings onto his property something which is harmless to others so long as it is confined to his property, but which is harmful if it should escape, he has a duty to prevent it from escaping and is legally responsible for any damage that ensues if he does not succeed

247. See *supra* note 245.

248. Under the *Olsen* rationale, a defendant could be subject to suit for a period long after the act that eventually causes substantial injury. The effect of *Olsen*, however, should not be overstated. The court merely concluded that a fact finder should be allowed to determine when substantial injury occurred; it did not conclude that the injury in that case became substantial within the limitations period.

249. 3 L.R.-E.& I. App. 330 (H.L. 1868).

> in confining it to his own property, regardless of the care exercised.[250]

This definition is overly broad and could apply to virtually anything that causes harm to another by escaping from the defendant's property. For example, a vehicle or round bale of hay that rolled onto another's property would technically come within the Kansas definition of the doctrine. Yet the Kansas courts have used the doctrine sparingly, applying it primarily to situations in which discharges of substances from a defendant's premises seeped into and damaged a plaintiff's water supply.[251]

In *Williams v. Amoco Production Co.*,[252] leaks in the defendant's natural gas wells caused natural gas to enter the underground water supply and impair the flow of water in the plaintiffs' irrigation wells. The trial court submitted the action to the jury on a strict liability theory with an instruction patterned on the overly broad Kansas definition of the *Rylands* doctrine.[253] The supreme court reversed a jury verdict for the plaintiffs, but remanded the action for a new trial on a negligence theory.[254]

The supreme court adopted the modern version of the strict liability doctrine as set forth in sections 519 and 520 of the *Restatement (Second) of Torts*.[255] Section 519 defines the doctrine as follows:

> (1) One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.
> (2) This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.

This definition of the doctrine imposes two limitations not formally included in the prior Kansas version of the doctrine. First, the activity must be classified as "abnormally dangerous," and second,

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250. KANSAS PATTERN INSTRUCTIONS: CIVIL § 12.80 (1977).

251. *See* Atkinson v. Herington Cattle Co., 200 Kan. 298, 436 P.2d 816 (1968); Klassen v. Central Kan. Coop. Creamery Ass'n., 160 Kan. 697, 165 P.2d 601 (1946); Berry v. Shell Petroleum Co., 140 Kan. 94, 33 P.2d 953 (1934), *reh'g denied*, 141 Kan. 6, 40 P.2d 359 (1935); Helms v. Eastern Kan. Oil Co., 102 Kan. 164, 169 P. 208 (1917). The court has also applied the doctrine to an escape of refuse from land that entered a waterway and damaged a bridge. *See* State Highway Comm'n. v. Empire Oil & Refining Co., 141 Kan. 161, 40 P.2d 355 (1935).

252. 241 Kan. 102, 734 P.2d 1113 (1987).

253. *See supra* note 250 and accompanying text.

254. The trial court refused to submit the action to the jury on either a negligence theory or a private nuisance theory. The supreme court affirmed the trial court's ruling on private nuisance, but held that the plaintiffs introduced sufficient evidence to support a negligence theory. *Williams*, 241 Kan. at 116-18, 734 P.2d at 1121-23.

255. RESTATEMENT (SECOND) OF TORTS §§ 519, 520 (1977).

the resulting harm must relate to the specific risk that renders the activity abnormally dangerous. It also expands the doctrine by eliminating any requirement that the activity must take place on the defendants' land.[256]

Section 520 employs a factor test to determine whether an activity is abnormally dangerous. One group of factors relates to the nature of the risk inherent in the activity, that is, a high degree of risk with the potential for producing great harm and a risk that cannot be eliminated by reasonable care.[257] In essence, the risk factors in the aggregate should pose a situation of dangerousness in excess of the risk element found in activities limited to negligence liability.

Second, the activity must not be a matter of common usage.[258] The fault requirement remains the linchpin of American tort law. Strict liability is generally limited to narrow specific areas of activity having some special justification for a departure from the fault requirement.[259] There is a certain familiarity with and acceptance of the risks associated with activities of common usage, and reliance on fault doctrines to limit redress for harms from those activities is arguably a price that we all pay for living in a complex society. Highly dangerous activities not of common usage expose the community to unfamiliar and less accepted risks, however. Strict liability for those activities is arguably appropriate because the actors who introduce unfamiliar and unaccepted risks into the community should do so at their own peril, not at the peril of the community.

Finally, even if the activity is both highly dangerous and not a matter of common usage, the choice between strict liability and negligence may depend on the appropriateness of the activity in the community[260] and its value to the community.[261] Thus, the drilling and operation of natural gas wells would be a common, accepted, and natural use of the land and a matter of crucial economic value in the Hugoton area of Kansas, the largest known

256. Accordingly, the doctrine could apply to transportation of highly explosive, toxic, or radioactive substances on public highways or on navigable waterways, or to spraying chemicals from airplanes. *See, e.g.*, Chavez v. Southern Pacific Transp. Co., 413 F. Supp. 1203 (E.D. Cal. 1976) (explosives on train); Loe v. Lenhardt, 227 Or. 242, 362 P.2d 312 (1961) (crop dusting).

257. RESTATEMENT (SECOND) OF TORTS § 520(a)-(c) (1977).

258. *Id.* § 520(d).

259. Strict liability for defective products is the only other formally recognized application of strict liability in Kansas. *See* Brooks v. Dietz, 218 Kan. 698, 545 P.2d 1104 (1976).

260. RESTATEMENT (SECOND) OF TORTS § 520(e) (1977).

261. *Id.* § 520(f).

reservoir of natural gas in the world, but not in downtown Kansas City.[262]

Even if the activity is "abnormally dangerous," strict liability does not apply to all harms caused by the activity, but only to those harms related to the specific risks that make the activity abnormally dangerous.[263] With respect to a natural gas well, the risk of explosion would arguably support a finding of abnormally dangerous activity. That harm did not occur in *Williams*, however, nor did the presence of natural gas in the water supply cause any contamination of the water, damage to the plaintiffs' land, or injury to their livestock. The only harm was a reduced flow of irrigation water. Accordingly, the court did not decide whether natural gas wells could be an abnormally dangerous activity, but merely held that in any event the harm did not qualify for strict liability.[264]

The adoption of the *Restatement* test for strict liability is a sound development in Kansas law. The prior Kansas test was overly broad because it theoretically could apply to any activity regardless of its level of dangerousness, its common usage, or its appropriateness in the community. As such, it provided no rational basis for distinguishing between activities governed by the fault principle and activities governed by strict liability. The *Restatement* test provides the desired rationale basis.

B. Retaliatory Discharge

The traditional common-law rule in Kansas, as well as in a majority of states, is that an employment relationship not governed by contract, either expressed or implied, is terminable at the will of either party.[265] Although the at-will doctrine continues to operate as the general rule, several jurisdictions have used the common

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262. *Id.* § 520 comments j, k.

263. *Id.* § 519(2).

264. *Williams*, 241 Kan. at 116, 734 P.2d at 1123. After its limited holding, the court added that the "activity does not constitute a non-natural use of the land." *Id.* A "non-natural" use of land was an important element of the *Rylands* doctrine. It is not a part of the *Restatement* test, although the same concept is largely covered by the common usage and appropriateness factors. The statement may suggest that the court did not consider natural gas wells to be an abnormally dangerous activity in the Hugoton area, but in the absence of a more specific holding, it should probably be considered *dictum*.

265. *See* Johnson v. Farmers Alliance Mut. Ins. Co., 218 Kan. 543, 546, 545 P.2d 312, 315 (1976). Under the employment-at-will doctrine, an employer may fire an employee for "good cause, or bad cause, or not cause at all." NLRB v. McGahey, 233 F.2d 406, 413 (5th Cir. 1956).

law to modify the at-will rule.[266] Several jurisdictions have recognized a public policy limitation on an employer's right to fire an at-will employee.[267] In 1981 Kansas joined those jurisdictions recognizing the public policy exception to the at-will doctrine when an appellate court panel held, in *Murphy v. City of Topeka*,[268] that an at-will employee may bring a tort action for retaliatory discharge if the employee is fired for filing a workers' compensation claim.[269]

During the survey period, the Kansas Supreme Court took three opportunities to examine whether the retaliatory discharge cause of action recognized in *Murphy* should be available to employees subject to collective bargaining agreements. In the first case, the court refused to make the tort action available to such workers.[270] In the next case, it reaffirmed that refusal in the face of state and federal constitutional challenges.[271] In its most recent decision addressing the issue, however, the court reversed itself and held that workers subject to employment contracts may state a retaliatory discharge cause of action if they are fired for filing workers' compensation claims.[272]

In the first case, *Cox v. United Technologies, Inc.*,[273] the defendant employed the plaintiff as a fine-wire operator. The plaintiff was a member of Local Union No. 851, United Rubber, Cork, Linoleum and Plastic Workers of America, and a collective bargaining agreement governed his employment relationship with the defendant. Under that agreement, no employee could be terminated without proper cause. The agreement also established grievance procedures, including arbitration, for resolving complaints and disputes. The plaintiff filed a workers' compensation claim that was settled. Less than two weeks later, however, the plaintiff was fired on the ground that he had failed to report for work following the presentation of his workers' compensation claim.[274] He filed a

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266. *See* Note, *Protecting Employees at Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931, 1935 (1983).

267. *See, e.g.*, Frampton v. Central Ind. Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973); Sventko v. Kroger Co., 69 Mich. App. 644, 245 N.W.2d 151 (1976). The rationale for the public policy limitation is that an employer should not be permitted to fire even an at-will employee for reasons that "contravene fundamental principles of public policy." Note, *supra* note 266, at 1936.

268. 6 Kan. App. 2d 488, 630 P.2d 186 (1981).

269. *Id.* at 495-97, 630 P.2d 192-93.

270. *See* Cox v. United Technologies, Inc., 240 Kan. 95, 727 P.2d 456 (1986).

271. *See* Armstrong v. Goldblatt Tool Co., 242 Kan. 164, 747 P.2d 119 (1987).

272. *See* Coleman v. Safeway Stores, Inc., 242 Kan. 804, 742 P.2d 645 (1988).

273. 240 Kan. 95, 727 P.2d 456 (1986).

274. *Id.* at 95-96, 727 P.2d at 456-57.

grievance under the agreement and was ultimately restored to his position.[275] Because the plaintiff was unable to receive the full relief for which he claimed entitlement,[276] he subsequently sued his employer alleging, among other things, that he had been fired in retaliation for filing a workers' compensation complaint.[277] He sought actual and punitive damages.[278] The district court entered summary judgment for the defendant on the retaliatory discharge claim on the ground that such an action is unavailable in Kansas to an employee covered by a collective bargaining agreement.[279] The supreme court affirmed.

The supreme court based its decision to withhold the retaliatory discharge cause of action from workers covered by employment contracts upon its view that at-will employees need such a cause of action to protect their valid interests whereas workers subject to an agreement do not. A worker who "may be discharged with or without cause . . . [needs such protection because] [a]n unscrupulous employer could subvert . . . public policy by placing the employee-at-will in the position of having to choose between filing a workers' compensation claim or keeping his or her employment."[280] Thus, according to the court, the decision in *Murphy* to recognize the tort of retaliatory discharge for filing of workers' compensation claim was spurred by judicial desire to "create[] a remedy for a class of employees having no contractual remedy."[281] Workers covered by collective bargaining agreements, conversely, already have a contractual remedy available to them—such workers may be discharged only upon "proper cause." Because a discharge based on the filing of a workers' compensation claim could not constitute "proper cause," the court opined, the collective bargaining agreement operates to provide adequate protection for

275. *Id.* at 96, 727 P.2d at 457. Another employee who had been discharged on the same grounds also filed a grievance. An arbitrator found that the other worker's firing was without proper cause and ordered reinstatement, but denied his request for backpay based on the worker's failure to mitigate his position. The plaintiff later settled his grievance on the same basis as the arbitrator had determined his coworker's action. *Id.*

276. *Id.* The plaintiff was unable to obtain either backpay or punitive damages in his grievance action.

277. *Id.* The plaintiff also sought relief under 42 U.S.C. § 1981 which provides: "All persons within the jurisdiction of the United States shall have the same right in every state and Territory to make and enforce contracts . . . as is enjoyed by white citizens . . . ." 42 U.S.C. § 1981 (1982). A jury verdict for the defendant was returned on the § 1981 claim and that disposition was not an issue on appeal. *Id.*

278. *Id.*

279. *Id.*

280. *Id.* at 97, 727 P.2d at 457.

281. *Id.*

these workers. Thus, concluded the court, neither the protection of those workers' interest nor Kansas public policy requires recognition of the retaliatory discharge tort for those covered by collective bargaining agreements.[282]

Justice Herd dissented. In his view, the majority failed to recognize a key distinction between the retaliatory discharge tort and the remedial rights embodied in a collective bargaining agreement. The retaliatory discharge cause of action sounds in tort, whereas a claim pursued under the grievance procedure contained in a collective bargaining agreement sounds in contract. That distinction was important for Justice Herd because "[a] tort is a breach of duty imposed by law and has different remedies and measures of damages, such as pain and suffering, emotional distress, and exemplary damages, than does a breach of contract."[283] Justice Herd contended that the collective bargaining remedy was inadequate to discourage employers from discharging employees making workers' compensation complaints.[284] Just over a year later, a more divided court reaffirmed the *Cox* court's refusal to extend *Murphy* to employees subject to collective bargaining agreements.

The facts in *Armstrong v. Goldblatt Tool Co.*[285] were similar to those in *Cox*. An employee covered by a collective bargaining agreement, sued the defendant for retaliatory discharge based on the plaintiff's filing a workers' compensation claim.[286] The district court granted the defendant's motion for summary judgment on the ground that the plaintiff's state tort claim was preempted by federal law and should have been pursued under the dispute resolution mechanism of the collective bargaining agreement. The court of appeals affirmed the order, concluding that the case was controlled by the supreme court's decision in *Cox*.[287]

The plaintiff conceded the applicability of *Cox*, but argued that the decision operated to violate the due process, equal protection, and first amendment rights of union workers.[288] The court rebuffed each of the plaintiff's constitutional objections.

The essence of the plaintiff's due process challenge was that in recognizing an at-will employee's right to bring a retaliatory discharge action for filing a workers' compensation claim, while

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282. *Id.* at 99, 727 P.2d at 459.

283. *Id.* at 100, 727 P.2d at 459 (Herd, J., dissenting).

284. *Id.*

285. 242 Kan. 164, 747 P.2d 119 (1987).

286. *Id.* at 165, 747 P.2d at 121.

287. *Id.* at 166-67, 747 P.2d at 121-22. Apparently, the court of appeals did not address the federal preemption issue; the supreme court's majority did not address it either.

288. *Id.* at 168-69, 747 P.2d at 123.

denying such a right to employees covered by collective bargaining agreements, the *Cox* decision denied union workers' due process rights by abridging their right to bring a court action that has been recognized by the state's courts.[289] The court did not agree. With "no hesitancy" the court held that no due process rights are infringed when unionized employees are denied access to the retaliatory discharge tort. The court reasoned that the grievance procedure contained in a collective bargaining agreement adequately protects such workers from retaliatory discharge.[290] Similarly, the court rejected the plaintiff's contention that the *Cox* decision created unreasonable classifications of employees and employers in violation of the equal protection clause[291] of the United States Constitution.

The court reasoned that because "[t]he remedy of a cause of action for retaliatory discharge was created . . . to benefit a limited group of employees at will who otherwise were completely without a remedy," it does not classify improperly.[292] The simple refusal to extend the tort retaliatory discharge remedy to workers covered by collective bargaining agreements who do not need such an action to protect their rights does not violate equal protection.[293] According to the majority, at-will employees "fall within an entirely different category than do employees who are fully protected from wrongful discharge by collective bargaining agreements."[294] Thus, the court held, "[t]here is definitely a rational basis for distinguishing between such employees."[295]

The plaintiff also alleged that *Cox* violated the first amendment rights of organized workers. The plaintiff argued that by denying such workers the same state tort remedies available to at-will employees, *Cox* penalized union workers thereby abridging their

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289. *Id.*

290. *Id.* at 169-70, 747 P.2d at 123.

291. *Id.* at 170-72, 747 P.2d at 123-24. It is unclear whether the plaintiff based his claim on state or federal constitutional equal protection law. The majority subjects the claim to federal constitutional analysis, but Justice Lockett's dissent analyzes the claim under Kansas equal protection law. *See infra* notes 302-08 and accompanying text.

292. *Armstrong*, 242 Kan. at 170, 747 P.2d at 124.

293. *Id.* at 172, 747 P.2d at 125.

294. *Id.*

295. *Id.* The court also read the United State Supreme Court's decision in Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985), to recognize the propriety of distinguishing between at-will employees and collective bargaining employees for state tort availability purposes. *Armstrong*, 242 Kan. at 170-71, 747 P.2d at 124. In *Allis-Chalmers*, the Court reversed a Wisconsin Supreme Court determination that an employee subject to a collective bargaining agreement was entitled to bring a bad faith tort claim against his employer. *Allis-Chalmers*, 471 U.S. at 219-20.

associational rights. The court summarily dispensed with this challenge, stating that it was essentially a reformulation of the equal protection argument that it had already rejected.[296]

Justice Herd again dissented. This time, however, he was not alone. Justice Lockett, who was joined by Justices Herd and Allegrucci, dissented at length. His views on the plaintiff's due process and equal protection challenges to *Cox* contrasted sharply with those that the majority expressed.[297]

Justice Lockett's analysis of the due process issue sprang from his rejection of the majority's contention that an employee's rights are protected by a collective bargaining provision that no worker can be fired without cause.[298] Justice Lockett identified three characteristics of a collective bargaining agreement's dispute resolution mechanism that made it inadequate in this regard.[299] First, an arbitrator's determination of whether just cause for termination exists often involves an examination of custom or industry policy.[300] "Such standards are not the proper ones for determining whether state public policy has been violated. Such violations should be determined as they always are—through the courts."[301] Second, Justice Lockett recognized that the focus in a retaliatory discharge claim is the motivation of the employer in discharging the worker. In his view, the factfinding process employed in the dispute resolution process established by employment contracts was insufficient for that sort of a determination.[302] Moreover, arbitration, the usual method used to resolve worker-employer disputes, is inappropriate because the arbitrator has no authority to impose punitive damages.[303] Thus, Justice Lockett concluded that denying union workers this cause of action violates their due process rights because the mechanism to which *Cox* relegates these workers, procedures

296. *Armstrong*, 240 Kan. at 172, 747 P.2d at 125.

297. *Id.* (Lockett J., dissenting).

298. *Id.* at 175, 747 P.2d at 126.

299. *Id.*

300. *Id.* (citing Hill, *Arbitration as a Means of Protecting Employees from Unjust Dismissal: A Statutory Proposal*, 3 N. ILL. L. REV. 139 (1982)).

301. *Armstrong*, 240 Kan. at 175-76, 747 P.2d at 127.

302. *Id.* at 176, 747 P.2d at 127. The inadequacy stemmed from the fact that in the dispute resolution procedures, "[r]ules of evidence do not usually apply; the rights and procedures common to civil trials such as discovery, compulsory process, cross-examination, and testimony under oath are often severely limited or unavailable." *Id.*

303. *Id.* This was an important consideration for Justice Lockett because in his view, *Murphy* "recognized that the [retaliatory discharge] tort was . . . necessary as a deterrent to the employer to discourage the practice of retaliatory discharge." *Id.* at 176-77, 747 P.2d at 127.

established by a collective bargaining agreement, is inadequate.[304] Justice Lockett contended as well that the *Cox* decision's classification scheme violated state constitutional equal protection guarantees.[305]

In *Farley v. Engelken*,[306] the court held that in abrogating the collateral source rule,[307] the state legislature violated the Kansas Constitution by treating a limited class of tortfeasors (negligent health providers) preferentially and by denying a limited class of tort victims (insured medical malpractice victims) the right to full compensation.[308] In Justice Lockett's view, the court in *Cox* acted similarly. As a result of *Cox*, one class of victims, employees subject to collective bargaining agreements, is denied a tort remedy and "its employers are immunized from accountability for violations of state public policy."[309] The other class of victims, at-will employees, "has a tort remedy and its employers are accountable for violations of state public policy."[310] In Justice Lockett's view, *Farley* was controlling in this case on the equal protection issue and the majority's holding is inconsistent with *Farley*.[311] Three

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304. *Id.* at 176, 747 P.2d at 127.

305. Unlike the majority, Justice Lockett analyzed the plaintiff's equal protection claim under the Kansas constitution. *Id.* at 177, 747 P.2d at 128.

306. 241 Kan. 663, 740 P.2d 1058 (1987).

307. The collateral source rule is a common-law rule that prevents the introduction of evidence relating to "[p]ayments made to or benefits conferred on the injured party from other sources [that] are not credited against the tortfeasor's liability, although they cover all or a part of the harm for which the tortfeasor is liable." RESTATEMENT (SECOND) OF TORTS § 920A(2) (1977).

In 1985 the Kansas legislature enacted a statute that abrogated the collateral-source rule in "'any medical malpractice liability action.'" *Farley*, 241 Kan. at 665, 740 P.2d at 1060-61 (quoting KAN. STAT. ANN. § 60-3403 (Supp. 1986)).

308. *Farley*, 241 Kan. at 675, 740 P.2d at 1068.

309. *Armstrong*, 242 Kan. at 177-78, 747 P.2d at 128.

310. *Id.* at 178, 747 P.2d at 128.

311. *Id.* at 179, 747 P.2d at 129. Justice Lockett also disagreed with the majority's use of *Allis-Chalmers* to support its conclusion on the equal protection issue. In his view, *Allis-Chalmers* stands only for the proposition that state tort claims involving the interpretation of employment contracts may be unavailable to workers covered by such contracts. He agreed that "[a]llowing employees to frame [contract interpretation issues] as tort actions would . . . 'eviscerate' the central role of the arbitrator as the interpreter of the labor contract." *Id.* at 178, 747 P.2d at 128. But he asserted that "[t]ort claims of retaliatory discharge, however, were never intended by the parties to be covered by the contract." *Id.* The majority's reasoning failed, in his view, to "distinguish the general tort of wrongful discharge from the public policy tort of wrongful discharge because an employee has sought workers' compensation." *Id.*

Justice Lockett also took issue with the majority's failure to deal with the federal preemption issue raised by the district court's decision. He would have applied a test derived from *Allis-Chalmers* to determine whether this retaliatory discharge claim was

months later when Justice Lockett had the opportunity to again express his views on the issues raised in *Cox*, he did so in a majority opinion.

In *Coleman v. Safeway Stores, Inc.*,[312] an employee covered by a collective bargaining agreement alleged that she was fired because her employer improperly assessed her with infractions for absences from work incurred because of work-related injuries and while she was under the care of a physician provided pursuant to the Workers' Compensation Act.[313] The plaintiff filed a grievance with her union as provided for in the collective bargaining agreement governing her employment relationship with the defendant. The union declined to pursue the matter through arbitration. The plaintiff then filed a retaliatory discharge action. The district court granted the defendant's motion for summary judgment and the plaintiff appealed. The court of appeals relied on *Cox* to affirm the lower courts. The supreme court reversed the lower court and overruled the *Cox* and *Armstrong* decisions.[314]

The *Coleman* majority identified three bases for overruling the *Cox* and *Armstrong* decisions. First, it was "disturb[ed]" by the "proposition that an employee subject to a collective bargaining contract surrenders state tort remedies which were neither included in the bargaining process nor intended by the parties to be a part of the contract."[315] As a result, these decisions immunize employers with such agreements from accountability for state public policy violations.[316] Second, the decisions fail to "recognize the limited remedy afforded the injured employee through collective bargain-

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preempted. Only when the tort claim is "inextricably intertwined" with consideration of the labor contract does the federal law preempt the state tort action. *Id.* at 173, 747 P.2d at 126 (citing *Allis-Chalmers*, 471 U.S. at 211, 213). "Causes of action for retaliatory discharge . . . are derived solely from clearly mandated state public policy," and thus they exist independently of a labor contract and are not preempted by federal law. *Armstrong*, 242 Kan. at 174, 747 P.2d at 126.

The Supreme Court recently resolved the preemption question. In Lingle v. Norge Div. of Magic Chef, Inc., 108 S. Ct. 1877, 1882 (1988), a unanimous Court held that a state retaliatory discharge action is not preempted by federal law because none of the "purely factual" elements that a plaintiff must prove in a state law claim "require[] a court to interpret any term of a collective-bargaining agreement." "[A]s long as the state-law claim can be resolved without interpreting the agreement itself, the claim is 'independent' of the agreement for . . . preemption purposes." *Id.* at 1883.

312. 242 Kan. 804, 752 P.2d 645 (1988).

313. *Id.* at 805, 752 P.2d at 646.

314. *Id.*

315. *Id.* at 813, 752 P.2d at 651.

316. *Id.*

ing."[317] Third, those cases failed to "consider that decisions to enter collective bargaining agreements are made by majority vote."[318] Thus, an employee whose individual rights have been violated "is forced to submit his grievance under an agreement which was never designed to protect individual workers, but to balance the individual against the collective interests."[319] For these reasons, the court concluded that "employees covered by collective bargaining agreements who are wrongfully discharged in violation of state public policy . . . have a tort cause of action for retaliatory discharge.[320]

Whether one accepts the *Coleman* or *Cox* decision as the correct one depends in large part on how one views the source of the retaliatory discharge cause of action established in *Murphy*. If one thinks the *Murphy* court based its decision to recognize the cause of action primarily upon its perception that it was necessary to protect at-will workers who were unprotected by contract, one might be predisposed to limit the action's availability to such employees.[321] If, however, one determines that "the primary emphasis of the [*Murphy*] opinion was on the strong public policy of Kansas underlying the Workers' Compensation Act, applicable to all workers injured on the job,"[322] one is unlikely to conclude that the cause of action should be limited to at-will workers.[323]

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317. *Id.* The court said that the dispute resolution mechanisms established under such agreements are inappropriate to enforce public policy because the extent of relief that may be granted is limited by the terms of the agreement. *Id.*

318. *Id.* at 814, 752 P.2d at 651.

319. *Id.* "The potential result of a union's emphasis on the collective good is that, in some cases, the employee may be left without a remedy for an employer's violation of state public policy." *Id.*

320. *Id.* at 815, 752 P.2d at 652. The court emphasized, however, that it did not "hold that employees covered by collective bargaining agreements have a tort cause of action for wrongful discharge in general." *Id.*

321. The *Cox* and *Armstrong* decisions reflect this view and in so doing rely upon the rationale expressed by a Pennsylvania court. In Phillips v. Babcock & Wilcox, 349 Pa. Super. 351, 503 A.2d 36 (1986), a Pennsylvania court decided to withhold the retaliatory discharge cause of action from the state's collective bargaining employees. The court held that the cause of action is available only to at-will employees because Pennsylvania courts created the wrongful discharge action to protect otherwise unprotected employees from indiscriminate discharge and to provide unorganized workers a legal redress against improper actions by their employers.

322. *Coleman*, 242 Kan. at 809-10, 752 P.2d at 649. Although *Murphy* involved an at-will employee, the wellspring of the cause of action is the need to provide the employee with a remedy *and* the need to enforce the employer's duty to compensate workers for job-related injuries. *Id.* (emphasis added).

323. *See, e.g.*, Midgett v. Sackett-Chicago, Inc., 105 Ill. 2d 143, 473 N.E.2d 1280 (1984). In that case the court extended the retaliatory discharge cause of action to collective

Once one concludes that the cause of action springs from the need to enforce an important public policy, the question becomes whether an alternative remedy—procedures under a collectively bargained for agreement—adequately serves that need.

Kansas courts first recognized a retaliatory discharge cause of action to prevent workers from acting to contravene public policy.[324] Part of the rationale supporting the decision to allow the plaintiff to assert a *tort* claim was the availability of punitive damages.[325] The need to have employers act in concert with public policy does not diminish when an employer's relationship with its workers is governed by a collective bargaining agreement. Thus, such an employer should be subject to the same sanctions for violating that policy. Expanding the availability of the retaliatory discharge cause of action to workers subject to such agreements accomplishes that end.

The supreme court decided two additional cases during the survey period that raised important retaliatory discharge issues. In *Palmer v. Brown*,[326] the court had to decide whether the retaliatory discharge cause of action was limited to retaliation for filing a workers' compensation claim.[327] In *Chrisman v. Philips Industries, Inc.*,[328] two questions faced the court. First, whether a retaliatory discharge cause of action is cognizable for an employee who has been injured on the job and upon expressing an intent to file a workers' compensation claim, is persuaded by his employer to forgo the filing and is then fired as a result of the intent to file. Second, whether such a cause of action is cognizable when an employer alleges that he was discharged based on his refusal to approve allegedly defective nuclear industrial products.

In *Palmer*, the plaintiff, a medical technician, discovered that at least one of the physicians for whom she worked was billing

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bargaining workers. Like the *Coleman* court, this court found it significant that under a collectively bargained for dispute resolution mechanism there is no possibility that an employer will be liable for punitive damages. Thus, "there is no available sanction against a violator of an important public policy of this state." *Id.* at 148, 473 N.E.2d at 1284.

324. *See* Murphy v. City of Topeka, 6 Kan. App. 2d 488, 495-96, 630 P.2d 186, 192 (1981).

325. *Id.* at 497, 630 P.2d at 193.

326. 242 Kan. 893, 752 P.2d 685 (1988).

327. In *Morton Bldgs., Inc. v. Department of Human Resources*, 10 Kan. App. 2d 197, 695 P.2d 450, *review denied*, 237 Kan. 887 (1985), the court indicated that the retaliatory discharge action is limited to a claim based on retaliation for filing a workers' compensation claim. In dicta in another case, however, the supreme court evidenced a contrary indication. *See* Morriss v. Coleman Co., 241 Kan. 501, 510, 738 P.2d 841, 846-47 (1987). The court had yet to squarely address the issue.

328. 242 Kan. 772, 751 P.2d 140 (1988).

Medicaid for work that had not been performed. She alleged that when she transmitted her suspicions of Medicaid fraud to unspecified authorities, she was fired. The plaintiff alleged that she was terminated in retaliation for "whistle-blowing."[329] The defendants moved to dismiss the suit on the grounds that the Kansas retaliatory discharge action is limited to suits alleging retaliation for filing a workers' compensation claim.[330] The trial court agreed and dismissed the action.[331]

After examining the inconclusive precedent on this issue,[332] the court reasoned that "[p]ublic policy requires that citizens in a democracy be protected from reprisals for performing their civil duty of reporting infractions of rules, regulations, or the law pertaining to public health, safety, and the general welfare."[333] Thus it had little difficulty "in holding termination of an employee in retaliation for the good faith reporting of a serious infraction of such rules, regulations, or the law by a co-worker or an employer to either company management or law enforcement officials is an actionable tort."[334]

In *Chrisman*, the plaintiff, a quality control inspector in a company that produced products for the nuclear industry, alleged that he was fired after he told his employer that he intended to file a workers' compensation claim.[335] The court had little difficulty in concluding that such an allegation states a claim for retaliatory discharge. To hold otherwise, the court recognized, "would permit an employer to discharge an employee shortly after an industrial accident and before the employee has filed a workers' compensation claim."[336] Such a result "is no less subversive of the purposes of the Workers' Compensation Act, and no less opposed to public policy, than the firing of the employee in retaliation for the actual filing of a claim."[337]

The plaintiff also alleged that he was fired in retaliation for his failure to approve defective nuclear industrial products. The question for the court was whether the employee protection section of the Energy Reorganization Act[338] preempted the state tort action.

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329. *Palmer*, 242 Kan. at 894-95, 752 P.2d at 686.
330. *Id.* at 895, 752 P.2d at 686.
331. *Id.*
332. *See supra* note 327.
333. *Palmer*, 242 Kan. at 900, 752 P.2d at 689.
334. *Id.*
335. *Chrisman*, 242 Kan. at 773-74, 751 P.2d at 141.
336. *Id.* at 774, 751 P.2d at 142.
337. *Id.*
338. 42 U.S.C. § 5581 (1982).

After examining the split among the courts that have addressed this issue,[339] the court concluded that in enacting the statute, Congress preempted the field in providing an effective remedy for employees in the nuclear industry who contend that they have been discharged for "whistle-blowing."[340]

III. KANSAS TORT CLAIMS ACT

Since the Kansas legislature enacted the Kansas Tort Claims Act,[341] in 1979, governmental liability for tort claims has been the rule[342] subject to numerous exceptions.[343] The "effectiveness of the Act as a remedy for persons injured by the tortious conduct of government employees . . . depend[s], to some extent, on the breadth or narrowness which with the courts interpret those exceptions."[344] During the survey period the court continued to define the contours of the Act's exceptions.

Three cases illustrate the court's attempt to define the scope of what is "perhaps the most important exception to liability" in the Act[345]—the discretionary function exception.[346] In *Jackson v. City of Kansas City*,[347] numerous lawsuits were filed for injuries suffered when two city fire trucks collided in an intersection on their way to the same fire. The plaintiffs alleged that the driver of one of the trucks was negligent.[348] A jury found that the city and some of its employees were partially liable and assessed damages accordingly. On appeal the city argued that the discretionary function exception should have operated to immunize it and its employees from liability in this case.[349] As the court framed it, the issue in

339. *Compare* Stokes v. Bechtel N. Am. Power Corp., 614 F. Supp. 732 (N.D. Cal. 1985) *and* Wheeler v. Caterpillar Tractor Co., 108 Ill. 2d 502, 485 N.E.2d 372 (1985), *cert. denied*, 475 U.S. 1122 (1986) (the federal act does not preempt state tort cause of action) *with* Snow v. Bechtel Const., Inc., 647 F. Supp. 1514 (C.D. Cal. 1986) (federal law does preempt state cause of action).

340. *Chrisman*, 242 Kan. at 780, 751 P.2d at 145.

341. KAN. STAT. ANN. §§ 75-6101 to -6188 (1984 & Supp. 1988).

342. KAN. STAT. ANN. § 75-6103(a) (1984 & Supp. 1988).

343. KAN. STAT. ANN. § 75-6104 (1984 & Supp. 1988); Fudge v. City of Kansas City, 239 Kan. 369, 371, 720 P.2d 1093, 1097 (1986); Carpenter v. Johnson, 231 Kan. 783, 784, 649 P.2d 400, 402 (1982).

344. Westerbeke, *supra* note 91, at 63.

345. *Id.*

346. The discretionary function exception grants immunity for "any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee, whether or not the discretion is abused." KAN. STAT. ANN. § 75-6104(d) (1984 & Supp. 1988).

347. 235 Kan. 278, 680 P.2d 877 (1984).

348. *Id.* at 279-80, 680 P.2d at 882.

349. *Id.* at 281, 680 P.2d at 882-83.

this case was whether the operation of a vehicle under emergency circumstances constitutes a discretionary function.[350] The court held that it did not.

The plaintiffs in this case alleged that one of the fire truck drivers failed to comply with statutory standards for operation of an emergency vehicle[351] and had violated Kansas City fire department regulations as well.[352] The existence of the statutory and regulatory standards was sufficient to convince the court that the discretionary function exception should not apply here. The court appeared to recognize that the exception might immunize the city from a lawsuit challenging "how and what policies, regulations, and ordinances it . . . enact[ed] [to] govern[]its fire department."[353] But the exception does not shield conduct that allegedly disregards the rules, policies, and regulations that have been enacted. "[O]nce such policies . . . were promulgated, the City no longer had discretion on whether to adhere to them."[354] Thus, the court held that the exception did not apply in this case.

In *Fudge v. City of Kansas City*,[355] the plaintiff's husband was killed when his car collided with a car operated by an intoxicated driver that had swerved into his lane of traffic. The drunk driver had been drinking with friends in a bar. When his behavior became disruptive the bartender asked him to leave and called the police. The drunk driver left the bar and, with some other bar patrons, went to an adjoining parking lot. Two police officers subsequently arrived. The officers told the patrons to leave the scene; while the others dispersed on foot, the driver left in his car.[356] Shortly thereafter, the accident occurred. The plaintiff alleged that the police officers were negligent in allowing the drunk driver to drive away from the parking lot in an intoxicated state. The plaintiff obtained a verdict in her favor, which found the city and the

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350. *Id.* at 288, 680 P.2d at 887.

351. *Id.* at 287, 680 P.2d at 886-87. Kansas law provides that, notwithstanding the authority possessed by emergency vehicle drivers to disregard certain traffic regulations, they must "drive with due regard for the safety of all persons." KAN. STAT. ANN. § 8-1506(d) (1982).

352. Kansas City, Kansas Fire Department regulations required that emergency vehicles proceed no faster than 35 miles per hour. The plaintiff in this case alleged that one of the fire truck drivers had exceeded that limit. *Jackson*, 235 Kan. at 283, 680 P.2d at 884.

353. *Id.* at 289, 680 P.2d at 888.

354. *Id.*

355. 239 Kan. 369, 720 P.2d 1093 (1986).

356. There was some dispute regarding whether the officers told the intoxicated patron to get into his car and leave the scene or if they even saw him. There was testimony to that effect, however, and the court did not disturb the jury's decision to believe that testimony. *Id.* at 370-71, 720 P.2d at 1097.

police officers partially liable for her husband's death. The defendant city and the officer appealed contending that the Kansas Tort Claims Act immunized them from liability.[357]

As it did in *Jackson* the supreme court approached the discretionary function issue by first examining whether the city had adopted any policies to guide the officers in circumstances like the one they faced when they encountered the intoxicated bar patron in the parking lot. The court found that the city had adopted a "specific mandatory set of guidelines for police officers to use with regard to handling intoxicated persons. The guidelines left no discretion and [the discretionary function exception] is inapplicable to the facts at hand."[358] Thus, *Jackson* and *Fudge* stand for the proposition that if the allegedly negligent act is one that is guided by some established standard, a suit alleging that the government official's conduct violated that standard will not be blocked by the discretionary function exception and the official and governmental entity will be subject to liability. In *Beck v. Kansas Adult Authority*[359] the court deviated slightly from that approach.

In *Beck*, a former prisoner in the Kansas State Penitentiary entered the University of Kansas Medical Center emergency room and fired three shotgun blasts, killing a second-year resident physician and a hospital visitor.[360] The survivors filed suit alleging that the Kansas Adult Authority negligently released the prisoner from the penitentiary "without conditions and necessary treatment and control."[361] The trial court held that because the Authority "'did not act in bad faith, . . . it is protected from liability under the [discretionary exception].'"[362] Again, the court examined whether the plaintiffs could point to any policies that the Authority had violated, thereby removing its conduct from the discretionary category. On the one hand, the court found that the Authority's decision to conditionally release the prisoner was not discretionary at all but was required by law.[363] Thus, the portion of the lawsuit

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357. *Id.* at 371, 720 P.2d at 1097. The jury assessed fault for the various parties involved as follows: decedent 7%, drunk driver 75%, and police officers 18%. The driver was convicted of vehicular homicide and served six months in jail. He was not active in the civil trial or the appeal. *Id.*

358. *Id.* at 375, 720 P.2d at 1100.

359. 241 Kan. 13, 735 P.2d 222 (1987).

360. *Id.* at 14-15, 735 P.2d at 225.

361. *Id.* at 16, 735 P.2d at 225.

362. *Id.* at 19, 735 P.2d at 228 (quoting trial court's ruling by letter dated June 28, 1985).

363. *Id.* at 30, 735 P.2d at 235. KAN. STAT. ANN. § 22-3718 (1988) requires the Authority to release a prisoner "who has served . . . maximum term or terms, less such work and good behavior credits as have been earned."

that challenged the decision to release the prisoner was not cognizable.[364] On the other hand, the court also found that the determination of whether to impose conditions on the released prisoner and the extent of such conditions was discretionary.[365] The court held that the Authority's decision to release the prisoner without certain conditions and treatment requirements was just the kind of governmental decision for which the discretionary function exception was enacted.[366]

Chief Justice Prager dissented. In his view, the majority failed to recognize that the plaintiffs were not merely challenging the decision that the Authority reached regarding the conditions placed on the prisoner's release. The plaintiffs also alleged that the Authority violated its own procedures by failing to consider "all pertinent information regarding" the inmate before deciding whether to impose conditions on his release.[367] It is one thing to say that the Authority's ultimate decision regarding whether to impose certain conditions upon an inmate it releases falls within the discretionary function. It is quite another thing to reach the same conclusion when a plaintiff alleges that the Authority acted with disregard of procedures established to determine whether and what conditions should be imposed.[368]

In these same three cases, *Jackson, Fudge*, and *Beck*, the court also defined the contours of the "method of protection" exception. Section 75-6104(n) of Kansas Statutes Annotated grants immunity for "failure to provide, or the method of providing, police or fire protection."[369] In *Jackson*, the case that involved the colliding fire trucks, the city argued that section 75-6104(m) (currently 75-6104(n)) provides "*absolute* immunity from civil actions alleging the government failed to provide fire protection or the method by which the government provided fire protection was negligent."[370] The court rejected such a broad reading of the section and held that "subsection (*m*) is aimed at such basic matters" as decisions about the type and number of fire trucks deemed necessary for

364. *Beck*, 241 Kan. at 32, 735 P.2d at 236.

365. *Id.* The statute also provides that the released inmate "shall . . . be subject to such written rules and conditions as the Kansas parole board may impose." KAN. STAT. ANN. § 22-3718 (1988).

366. *Beck*, 241 Kan. at 36, 735 P.2d at 238.

367. *Id.* at 40, 735 P.2d at 241 (Prager, C.J., dissenting).

368. It appears that Chief Justice Prager would have required in this case what the court had done in *Jackson* and *Fudge*, that is, to examine whether there were any established standards that the plaintiffs alleged the governmental officials had violated.

369. KAN. STAT. ANN. § 75-6104(n) (Supp. 1988).

370. *Jackson*, 235 Kan. at 290, 680 P.2d at 888 (emphasis in original).

the department's operation, the number of personnel required, the placement and supply of hydrants, and selection of equipment.[371] Thus, the court rejected the city's contention that the manner in which the fire trucks proceeded to the fire constituted a method of providing fire protection.[372] Similarly, the court encountered little difficulty in concluding that the allegedly negligent conduct of the police officers in *Fudge* amounted to a method of providing policy protection. In reaching that conclusion, the court merely quoted *Jackson* at length and concluded that "[t]he police action in this case does not fall within the scope of [the subsection] and the [city and its employees] were not immune from liability on this ground.[373]

In *Beck*, the plaintiffs alleged that the University of Kansas Medical Center negligently "failed to maintain and operate the emergency room facility in a condition reasonably safe for its use by personnel, patients, visitors, and guests."[374] The court held that this allegation squarely implicated the "method of protection" exception.[375] "The determination of how to provide police protection is immunized. The Medical Center is not liable because of the methods it adopted for police protection."[376] The court's approach to the "method of protection" exception appears sound.

371. *Id.* at 292, 680 P.2d at 890.
372. *Id.*
373. *Fudge*, 239 Kan. at 374, 720 P.2d at 1099.
374. *Beck*, 241 Kan. at 21-22, 735 P.2d at 229.
375. *Id.* at 24, 735 P.2d at 230.
376. *Id.*