Approved: 3-23-94
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY.

The meeting was called to order by Chairperson Jerry Moran at 10:00 a.m. on March 11, 1994 in Room 514-S of the Capitol.

All members were present except: Senator Feleciano (excused)

Committee staff present: Mike Heim, Legislative Research Department
Jerry Donaldson, Legislative Research Department
Gordon Self, Revisor of Statutes
Darlene Thomas, Committee Secretary

Conferees appearing before the committee:

C. William Ossman, Chairman of Crime Victims Compensation Board
Paul Shelby, Judicial Council

Others attending: See attached list

SB 755--limitation of actions brought by or on behalf of Dalkon Shield victims

Senator Harris reported the Civil Law Subcommittee recommended SB 755 be reported favorably.

A motion was made by Senator Harris, seconded by Senator Petty to adopt the Civil Law Subcommittee recommendation to report SB 755 favorably. The motion carried.

SB 825--twenty-sixth judicial district, mandatory positions

Paul Shelby, Judicial Council testified in regard to SB 825. Mr. Shelby said the Chief Justice of the Supreme Court requested a comprehensive study of the statutes, policies and administrative orders as well as other regulations on judicial apportionments.

A motion was made by Senator Bond, seconded by Senator Martin to report SB 825 favorably and place on the consent calendar. The motion failed.

SB 761--collateral source benefits in certain actions for damages

A motion was made by Senator Bond, seconded by Senator Emert to amend SB761 by changing the affective date from April 16, 1993 to July 1, 1994 on page 2, line 37 as requested by conferees. The motion carried.

A motion was made by Senator Bond, seconded by Senator Emert to report SB 761 favorably as amended. The motion carried.

A motion was made by Senator Bond, seconded by Senator Emert to adopt language in response to the Ivan Thompson, Jr., v. KFB Insurance Company case (Attachment No. 1). A division was requested. The motion failed.

Senator Bond requested the minutes reflect that Attachment No. 1 was the rational for his original motion to pass SB 761 favorably as amended.

SB 820--moneys credited to crime victims compensation fund
SB 821--limitations on fees paid to medical care providers by crime victims compensation board

C. William Ossman, Crime Victims Compensation Board testified in support of SB 820 and SB 821 and provided written testimony (Attachment No. 2). Mr. Ossman answered questions from the Committee. He said they have a staff of 5.5 and 8% of all monies is used for administrative expenses.

A motion was made by Senator Ranson, seconded by Senator Petty to report SB 820 favorably. The motion carried.

Chairman Moran said SB 821 would be worked at a later date.

SB 751--liability of settling parties in action brought by KPERS

A motion was made by Senator Ranson, seconded by Senator Bond to amend SB 751 to add a repealer in three years. The motion carried.

A motion was made by Senator Bond, seconded by Senator Petty to adopt a balloon submitted by Tom Murray, Board of Trustees, KPERS (Attachment No. 3). The motion carried.

A motion was made by Senator Bond, seconded by Senator Petty to report SB 751 favorably as amended. The motion carried.

HB 2788--person commits three felonies, as listed in bill, person in prison for life
SB 695--increased sentences for repeat offenders

A motion was made by Senator Parkinson, seconded by Senator Ranson to amend HB 2788 by deleting the provisions of HB 2788 and inserting SB 695. The motion carried.

A motion was made by Senator Bond, seconded by Senator Brady to further amend HB 2788 by doubling the sentence range for A and B category, 1 through 5 severity levels and increase the sentence range by 50% on 6 through 10 severity levels. The motion carried.

A motion was made by Senator Parkinson, seconded by Senator Emert to allow staff to make technical amendments to HB 2788 and to favorably report HB 2788 as amended. The motion carried.

Meeting adjourned at 11:00 a.m.

The next meeting is scheduled for March 14, 1994.

GUEST LIST

COMMITTEE: Senate Judiciary **DATE:** 3/11/94

NAME (Please Print)	ADDRESS	COMPANY/ORGANIZATION
Brad Smoot	Topeka	AIA
Brian Adkins	[illegible]	Page
Manolito Muñoz	128 Random Rd. [illegible]	Page
[illegible]	Topeka	[illegible]
Lori Callahan	Topeka	KAMMCO
Jeff Bromwell	Emporia	Senate
Lisa Moots	Topeka	KSC
Paul Shelby	Topeka	OJA
Neil Woerman	Topeka	AG
Carlos Cooper	KC	Crime Vic
Bill Ossmann	Topeka	Crime Victims Comp Bd
[illegible]	Topeka	C.V. Comp Board
Kathie Sparks	Topeka	DOB
Scott Alisoglu	Topeka	DOB
Julie Wright		Eagle
Mike Matson	Topeka	WIBW
Gary Stotts	Topeka	DOC

#1

RE: S.B. 761

In order to declare the legislative purpose of S.B. 761, the committee hereby affirms its ongoing objectives of reducing the cost of liability insurance and increasing its general availability in Kansas. The committee also affirms its objectives of maintaining a judicial system which fully compensates injured persons for their losses while preventing recoveries in excess of actual damages incurred. The committee finds that the common law evidentiary principal known as the collateral source rule sometimes allows claimants to recover money in excess of their actual damages. The committee therefore declares the collateral source rule should be modified to prevent the double recovery of damages in certain liability actions, thereby lessening the burden on the insurance system and, ultimately, Kansas consumers.

The purpose of this act is to modify the common law collateral source rule to allow the fact finder in actions involving personal injury or death to award damages based upon all relevant evidence. The collateral source rule can effect an unfair and unjustifiable result in a particular action by allowing an injured party to recover damages in excess of the party's actual losses. This act will allow the fact finder to take into consideration evidence of reimbursements or indemnifications paid to an injured party, thereby preventing the double recovery of such reimbursements or indemnifications. Modification of the collateral source rule will allow the fact finder to determine the true extent of a party's damages and award full and fair compensation for such damages.

Because this issue has been discussed and enacted by the legislature three times, and there was compelling evidence during those hearings to support enactment of a modified collateral source rule, the committee adopts all prior legislative history relating to the legislature's efforts to modify the common law collateral source rule. Further, the committee adopts the information provided it which shows the significant effect of the collateral source rule, including studies reported by the *Wall Street Journal*, the Rand Corporation and KaMMCO.

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No. 68,452

IVAN THOMPSON, JR., *Appellee*, v. KFB INSURANCE COMPANY, *Appellant*.

SYLLABUS BY THE COURT

1. STATUTES—*Constitutionality—Equal Protection.* The tests for determining whether a statute violates the equal protection of law guaranteed under the United States and Kansas Constitutions are stated and applied.

2. SAME—*Collateral Source Benefits—Evidence Admissible under Certain Statutory Classifications—Rational Basis Test Used to Determine Constitutionality of Statutory Classifications.* The "rational basis" test is the proper test for determining the validity of the classification of claimants as created under K.S.A. 1992 Supp. 60-3802.

3. CONSTITUTIONAL LAW—*Equal Protection—Rational Basis Test—Application of Test to Determine Whether Statutory Classification Violates Equal Protection of Law.* Under the "rational basis" test, a statutory classification does not violate the equal protection of law guaranties if the classification is rationally related to a legitimate legislative purpose. The classification, however, must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relationship to the object of the legislation so that persons similarly situated are treated alike.

4. STATUTES—*Constitutionality—Severability of Unconstitutional Provision of an Act.* Where the valid and invalid provisions of an act are not separate and independent of each other, but are so connected and intertwined that they cannot be severed without violating the intent of the legislature, the entire act must fail.

5. DAMAGES—*Collateral Source Benefits—Statute Held Unconstitutional That Allows Evidence of Collateral Source Benefits Where Claim Is for Damages in Excess of $150,000.* The provision of K.S.A. 1992 Supp. 60-3802 which allows evidence of collateral source benefits where claimants demand judgment in excess of $150,000 is unconstitutional as a violation of the equal protection of law as guaranteed by the United States and Kansas Constitutions.

6. STATUTES—*Collateral Source Benefits—Admissibility of Evidence—Entire Act Declared Unconstitutional Where Provision of Act Found to Violate Equal Protection Guarantees.* The provision of K.S.A. 1992 Supp. 60-3802 which allows evidence of collateral source benefits where claimants demand judgment in excess of $150,000 is not severable from the balance of the Collateral Source Benefits Act, K.S.A. 1992 Supp. 60-3801 *et seq.*, under the provisions of K.S.A. 1992 Supp. 60-3806; thus, the entire Act is unconstitutional and void.

7. CIVIL PROCEDURE—*Evidence in Personal Injury Trial of Collateral Source Benefits Received by Injured Party—Evidence Held Inadmissible and Collateral Source Benefits Act Held Unconstitutional—Appellate Review.* The record on appeal is examined and it is held that the district court did not err in (1) holding the Collateral Source Benefits Act, K.S.A. 1992 Supp. 60-3801 *et seq.*, unconstitutional; (2) not allowing the defendant/appellant to introduce evidence of collateral source benefits; (3) not granting a mistrial; and (4) not granting a new trial.

Appeal from Shawnee district court; ADRIAN J. ALLEN, judge. Opinion filed April 16, 1993. Affirmed.

Richmond M. Enochs, of Wallace, Saunders, Austin, Brown and Enochs, Chartered, of Overland Park, argued the cause, and *Lee R. Hardee, III*, of the same firm, was with him on the briefs for appellant.

Charles S. Fisher, Jr., of Fisher, Cavanaugh & Smith, P.A., of Topeka, argued the cause, and *Bryan W. Smith*, of the same firm, was with him on the brief for appellee.

Timothy A. Short, of Spigarelli, McLane & Short, of Pittsburg, was on the brief for *amicus curiae* Kansas Trial Lawyers Association.

Wayne T. Stratton, of Goodell, Stratton, Edmonds & Palmer, of Topeka, and *John D. Ensley*, of the same firm, were on the brief for *amici curiae* Kansas Hospital Association and Kansas Medical Society.

The opinion of the court was delivered by

ALLEGRUCCI, J.: Ivan Thompson, Jr., brought this action against his automobile insurance carrier, KFB Insurance Company (KFB), claiming underinsured motorist benefits. Thompson sought to recover for personal injuries and damages suffered as a result of an automobile accident. Before trial began, the district court ruled that K.S.A. 1992 Supp. 60-3801 *et seq.*, the current Collateral Source Benefits Act, is unconstitutional. Evidence of collateral source benefits was not admitted at trial. The jury awarded $377,000 to Thompson. The district court made several reductions in the award and entered judgment for him in the amount of $226,150. KFB appeals from the jury verdict and rulings of the district court. This appeal was transferred from the Court of Appeals by order of this court, pursuant to K.S.A. 20-3018(c).

With regard to the circumstances of the accident, there is no dispute. Ivan Thompson was a passenger in his automobile, which was being driven east on Interstate 70 by Joy Burgen. A westbound automobile driven by Verbal Russell crossed the median

Lockett stated in his concurring opinion in *Farley:* 'Where the legislature has enacted statutory provisions that do not unequivocally state the public policy, the courts may interpret the intention of the legislature.' 241 Kan. at 679. No authority has come to this court's attention which prohibits the court from inferring and supplying a purpose for legislation where it is not expressed, at least for the two least stringent levels of equal protection scrutiny." 250 Kan. at 779.

The legislative objective which KFB has inferred and supplied for analysis may be stated straightforwardly as the intention to cut costs of insurers and insurance. The question for the court is whether that goal and the classification of plaintiffs by the amount of the prayer bear some rational relationship.

KHA/KMS suggest that the purpose of the legislature was to alleviate a liability insurance crisis which was threatening the public good. They attribute the classification by amount of the demand to testimony of Professor James Concannon before the House Judiciary Committee on February 11, 1987. Concannon generally supported changing the collateral source rule, but he characterized the bill which eventually became K.S.A. 1992 Supp. 60-3801 *et seq.* as "an ill-conceived and grossly unfair way to make the change." He identified many problems with the bill, including the following:

"There will be new system costs from any legislation in this area. If the parties do not stipulate on these matters, there will have to be discovery, perhaps even from non-parties, relating to the amount and cost of collateral source benefits, the likelihood of continuation of collateral source payments by the provider, the provider's solvency, and the future eligibility of the plaintiff for benefits. Ironically, legislation justified in part by the fact it reduces system costs produces some of its own. Perhaps there is some monetary threshold at which we should recognize that the new system costs exceed the benefit."

KHA/KMS urges the court to adopt the view that the classification is rationally related to the cost-cutting objective as excluding prayers for which the cost of obtaining information on collateral source costs and benefits likely would be greater than the plaintiff's excessive recovery.

In an article on the legislation, it was noted that, among the conflicts in the provisions of the legislation, "the most obvious [is] that the legislature wants juries to hear evidence of present and future collateral source benefits but only when the entire

claim exceeds $150,000." Concannon and Smith, *Implementing the Kansas Collateral Source Rule,* 58 J.K.B.A. 19, 20 (Feb. 1989). In a footnote to this observation, the authors state: "There is no individual rationale for the $150,000 figure except that is the number to which four of the six conferees on the conference committee could agree." 58 J.K.B.A. at 20 n.13 (Feb. 1989).

KHA/KMS further contend that the court should not be concerned with where the legislature drew the line. This court has stated that "[e]stablishment of classifications with mathematic precision is not required." *State ex rel. Schneider v. Liggett,* 223 Kan. 610, 619, 576 P.2d 221 (1978). To the same effect, the court quoted a dissenting opinion of Mr. Justice Holmes: " ' . . . [W]hen it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark.' " 223 Kan. at 619 (quoting *Louisville Gas Co. v. Coleman,* 277 U.S. 32, 41, 72 L. Ed. 770, 48 S. Ct. 423 [1928]). A statutory classification that has a reasonable basis is not violative of the due process clause simply because it is not made with mathematical precision. Here, this court has nothing before it from which it could conclude whether the $150,000 line is reasonable or, if not, how far it lies from reasonableness. In *Henry,* the court stated that "[t]here must be some difference in character, condition, or situation, to justify distinction . . . ; otherwise, the classification is forced and unreal, and greater burdens are, in fact, imposed on some than on others of the same desert." (Citation omitted.) 213 Kan. at 753. Although the classification need not be mathematically precise, it must have a rational basis.

Regrettably, as previously noted there is very little, if any, legislative history to guide us in determining the purpose for the classification. Whether Professor Concannon's suggestion that a monetary threshold should be set actually explains the classification is immaterial under the rational basis test, which would uphold statutory discrimination " 'if any state of facts reasonably may be conceived to justify it.' " 250 Kan. at 779 (quoting *McGowan v. Maryland,* 366 U.S. 420, 426, 6 L. Ed. 2d 393, 81 S. Ct. 1101 [1961]). The parties to this action have not supplied any other "state of facts" for the court's contemplation. KFB, in

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STATE OF KANSAS
OFFICE OF THE ATTORNEY GENERAL
CRIME VICTIMS COMPENSATION BOARD
700 S.W. JACKSON, JAYHAWK TOWER—SUITE 400, TOPEKA, KS 66603-3757 (913) 296-2359

ROBERT T. STEPHAN
ATTORNEY GENERAL

March 11, 1994

C. WILLIAM OSSMANN, CHAIR
CARLOS COOPER, MEMBER
DORTHY S. MILLER, MEMBER

Senator Jerry Moran, Chairman
Senate Judiciary Committee
Room 514S, State Capitol Building

Mr. Chairman and Members of the Judiciary Committee:

The Crime Victims Compensation Board appreciates your time and urge you to pass SB 820 and SB 821.

The need for this legislation is due to the decrease in revenue in the Crime Victim Fund. The amounts collected in fines, fees and forfeitures have decreased 11.5% this fiscal year compared to FY '92, the last fiscal year prior to the change in the Highway Patrol ticket practices.

The proposed increase of two percent in SB 820 would raise approximately $180,000.

In conjunction with the above stated decrease in funds, the Board has considered numerous cost savings options, and agreed that payment of a percentage of actual medical costs would be the best. This bill further protects the victim from liability of the balance due except in cases where the claim has been diminished due to contributory misconduct.

The enactment of SB 821 would allow the Crime Victims Board to pay those amounts due medical providers at approximately the same amount as other providers, insurance, Medicaid, etc.

It is projected that SB 821 will save approximately $500,000. With the passage of both of these the Compensation Fund will be solvent through FY '95.

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#3

SENATE BILL No. 751

AN ACT concerning liability of settling parties in certain actions brought by the Kansas public employees retirement system.

Be it enacted by the Legislature of the State of Kansas:

Section 1. (1) A judicially approved settlement ~~in any action brought by~~ of any claim or cause of action of the Kansas public employees retirement system ~~to recover money damages whether the liability for such recovery is based on tort, breach of fiduciary duty or any other theory of recovery, other than contract,~~ against any party for any injury, loss or damage shall discharge the settling party from all liability for contribution or noncontractual indemnity to any other individual or entity ~~that is or may be liable, in whole or in part, for that same injury, loss or damage,~~ irrespective of whether or not such individual or entity has been joined as a party to ~~the action,~~ any suit brought by the Kansas public employees retirement system, provided such individual or entity is notified, in any manner approved by the court, of the proceeding to approve the settlement not less than 20 days prior thereto. As used in this section, the term "noncontractual indemnity" includes indemnity between active and passive tortfeasors and indemnity based on principles of vicarious liability but does not include indemnity which arises by reason of contract.

(2) When a release, covenant not to sue or agreement not to enforce a judgment is given in good faith by the Kansas public

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employees retirement system, the release, covenant not to sue or agreement not to enforce a judgment does not discharge any non-settling party from liability, unless the terms of the release, covenant not to sue or agreement not to enforce a judgment so provide. However, non-settling parties shall be entitled to a set-off against any claims that are made against them by the Kansas public employees retirement system and that are not covered by the Kansas comparative negligence statute (K.S.A. §60-258a) in the amount stated in the release, covenant not to sue or agreement not to enforce a judgment, or the amount of the consideration actually paid for it, whichever is greater.

(3) Such settlement shall conclusively establish that the settling party has extinguished such settling party's share of the total liability and is not obligated for or entitled to pro rata contribution or noncontractual indemnity from any other individual or entity irrespective of whether or not such individual or entity has been joined as a party to the action and whose liability is not extinguished by the settlement.

(4) The provisions of this act shall apply to any settlement judicially approved after the effective date of this act regardless of the date on which the Kansas public employees retirement system suffered any injury, loss or damage or the date on which any claim or cause of action of the Kansas public employees retirement system arose or accrued.

(5) Except as provided in this act, the provisions of this act are not intended to alter the substantive law of Kansas relating to contribution, indemnity or comparative fault.

Sec. 2. This act shall take effect and be in force from and after its publication in the Kansas register.

2/25/94, 1:11 pm