Kansas

Statutes of Limitations

In Kansas, a medical malpractice action must be brought within two years after the fact of injury becomes reasonably ascertainable to the injured person, but in no event more than four years after the act giving rise to the cause of action. Kan. Stat. Ann. § 60-513(a)(7) and (c) (Supp. 2001). If a claimant is incompetent (due to minority, incapacity, or imprisonment) he may bring an action within one year from the date the disability is removed, but no action may be brought more than eight years after the act giving rise to the cause of action. Kan. Stat. Ann. § 60-515 (1994).

The statute of limitations for wrongful death is also two years. Kan. Stat. Ann. § 60-513(5) (Supp. 2001). If the cause of death is medical malpractice, however, the two years still begins to run at the date of injury or discovery, which in some cases may be prior to the date of death. *Crockett v. Medicalodges, Inc.*, 247 Kan. 433, 799 P.2d 1022 (1990); *Kelley v. Barnett*, 23 Kan. App. 2d 564, 932 P.2d 471 (1997).

Contributory or Comparative Negligence

Kansas has adopted the doctrine of modified comparative negligence. Kan. Stat. Ann. § 60-258a (1994). Under this doctrine, a claimant's action is barred if his negligence is equal to or greater than the combined negligence of all defendants. Otherwise, the claimant's recovery is diminished in proportion to his degree of negligence. *Id.* A patient's failure to follow a physician's instructions may be considered as a form of comparative negligence. *Cox v. Lesko*, 263 Kan. 805, 953 P.2d 1033 (1998).

Joint and Several Liability

Joint and several liability has been abolished by statute. Kan. Stat. Ann. § 60-258a(d) (1994). Each joint tortfeasor is liable only for the portion of total damages that is equal to the proportion that his causal negligence bears to that of all the parties against whom recovery is allowed.

Contribution

Kansas observes what is called the "one-action rule," which says that all parties must have their fault determined in a single trial. *Albertson v. Volkswagenwerk Aktiengesellschaft*, 230 Kan. 368, 634 P.2d 1127 (1981). A defendant can join any other party he thinks may be liable. Kan. Stat. Ann. § 60-258a(c) (1994). With allocated several liability, no tortfeasor is liable for the fault of others, so "the equitable need for contribution vanished," and the Kansas Supreme Court abolished it. *Teepak, Inc. v. Learned*, 237 Kan. 320, 326, 699 P.2d 35, 40 (1985).

Vicarious Liability

Kan. Stat. Ann. § 65-442(b) (1992) bars medical malpractice claims against a licensed medical care facility based on professional services performed within the facility by a licensed physician if the physician is not an employee or agent of the facility. Kan. Stat. Ann. § 40-3403(h) (Supp. 2001), which was held to be constitutional in *Blair v. Peck*, 248 Kan. 824, 811 P.2d 1176 (1991), bars vicarious liability between two medical care providers, both of which are covered under the Health Care Stabilization Fund. (See discussion of this fund below in *Patient Compensation Funds and Physician Insurance*.) Pursuant to these sections, the Supreme Court has rejected claims based on ostensible agency and corporate liability for negligent credentialing. *Lemuz v.*

Fieser, 261 Kan. 936, 933 P.2d 134 (1997); *McVay v. Rich*, 255 Kan. 371, 874 P.2d 641 (1994). However, a physician can still be held directly liable for his own negligence in supervising the work of another, if he has a duty to do so. *Glassman v. Costello*, 267 Kan. 509, 986 P.2d 1050 (1999).

Expert Testimony

Expert medical testimony is required to establish negligence unless the absence of reasonable care is so obvious and the results are so bad as to be apparent to and within the common knowledge and experience of mankind generally. *Hare v. Wendler*, 263 Kan. 434, 949 P.2d 1141 (1997). No person may qualify as an expert to testify with respect to the standard of care in a medical malpractice action, unless 50 percent of the person's professional time over the two years preceding the subject incident was devoted to clinical practice. Kan. Stat. Ann. § 60-3412 (1994). The statute does not require that the expert witness practice in the same medical specialty as the defendant. *Glassman v. Costello*, 267 Kan. 509, 986 P.2d 1050 (1999).

Damage Caps

In any personal injury action, non-economic damages are limited to a total of $250,000 per plaintiff as against all defendants. The statute specifies that the jury should not be told about this limitation, and if it awards non-economic damages in excess of the limit, the judge should enter an award of $250,000. Kan. Stat. Ann. § 60-19a02 (1994). This statute has been interpreted to mean that separate claims brought within a single action should be aggregated under the cap, not treated separately. *Hoover v. Innovative Health of Kansas, Inc.*, 26 Kan. App. 2d 447, 988 P.2d 287 (1999). Similarly, in wrongful death actions, damages are limited to $250,000, except for pecuniary loss sustained by an heir at law. Kan. Stat. Ann. § 60-1903 (Supp. 2001). Both § 60-19a02 and § 60-1903 have been upheld as constitutional. *Samsel v. Wheeler Transport Services, Inc.*, 246 Kan. 336, 789 P. 2d 541 (1990); *Leiker v. Gafford*, 245 Kan. 325, 778 P.2d 823 (1989).

A statute that created an absolute cap in medical malpractice actions, rather than a cap on non-pecuniary damages only, was found to be unconstitutional in *Kansas Malpractice Victims Coalition v. Bell*, 243 Kan. 333, 757 P.2d 251 (1988).

In any civil action, punitive damages are limited to the lesser of the defendant's highest gross income for the prior five years or $5,000,000. If the profitability of the misconduct exceeded this, the court may award one and one half times the profit instead. Kan. Stat. Ann. § 60-3702 (1994). The judge, not the jury, determines the amount of punitive damages. *Id.* Punitive damages are not available in a wrongful death case. *Smith v. Printup*, 262 Kan. 587, 938 P.2d 1261 (1997) (also holding statute constitutional).

Statutory Cap on Attorneys' Fees

There is no Kansas statute establishing a maximum amount for attorneys' fees in medical malpractice actions, although there is one that requires judicial approval and provides some non-numeric guidelines for determining reasonableness. Kan. Stat. Ann. § 7-121b (2001). "This statute is not a matter of common knowledge to members of the Bar or the courts, much less to jurors. It appears that it has been ignored." *Walters v. Hitchcock*, 237 Kan. 31, 44-45, 697 P.2d 847, 857 (1985) (Schroeder, C.J., dissenting) (emphasis omitted).

Periodic Payments

Kansas does not mandate the periodic payment of medical malpractice judgments, but it give judges the power to require that damages be paid in installments, in whole or in part. Kan. Stat. Ann. § 60-2609(a) (1994). This has not been cited in a reported case and is presumably seldom used.

Collateral Source Rule

Kansas follows the collateral source rule, under which benefits received by the plaintiff from a source independent of the wrongdoer, like insurance, do not diminish damages. *Farley v. Engelken*, 241 Kan. 663, 740 P.2d 1058 (1987) (holding a former statute modifying the rule in malpractice cases to be unconstitutional). Although Kansas has a statute on the books permitting collateral benefits to be deducted from judgments that exceed $150,000, Kan. Stat. Ann. §§ 60-3801 to 60-3807 (1994), it has been held to be unconstitutional. *Thompson v. KFB Insurance Co.*, 252 Kan. 1010, 850 P.2d 773 (1993).

Pre-Judgment Interest

Generally, pre-judgment interest is not awarded on unliquidated claims, although it is permitted in a judge's discretion. *Kansas Baptist Convention v. Mesa Operating Limited Partnership*, 258 Kan. 226, 898 P.2d 1131 (1995).

Patient Compensation Funds and Physician Insurance

Kansas requires all health care providers to carry liability insurance with limits of at least $200,000 per claim and $600,000 in the annual aggregate. Kan. Stat. Ann. § 40-3402 (2000). Larger health care providers who qualify can self-insure. Kan. Stat. Ann. § 40-3414 (Supp. 2001).

In addition, Kansas has established a Health Care Stabilization Fund, which provides coverage to health care providers excess of their required primary limits. The following options are available: (a) $100,000 per claim and $300,000 in the annual aggregate, (b) $300,000 per claim and $900,000 in the annual aggregate, or (c) $800,000 per claim and $2,400,000 in the annual aggregate. Kan. Stat. Ann. § 40-3403 (Supp. 2001). The fund purports to be excess over any additional insurance that would be applicable in the absence of the fund and the coverage it provides. Kan. Stat. Ann. $ 40-3408 (2000). It is not responsible for punitive damages or for failure to settle a case within its limits. Kan. Stat. Ann. $ 40-3412 (2000).

Immunities

Pursuant to statute, Kansas and its political subdivisions are subject to liability in tort up to $500,000 per occurrence, but are exempt from punitive damages and pre-judgment interest. Kan. Stat. Ann. § 75-6105 (1997). Claims against governmental health care providers other than charitable hospitals and hospitals owned by political subdivisions are exempted from the act's provisions. Kan. Stat. Ann. § 75-6115 (1997). Therefore, claims against most state-owned hospitals are treated no differently than those against private health care providers. *Id.* The purchase of insurance generally waives the statutory protection to the extent of the policy limits. Kan. Stat. Ann. § 75-6111 (1997). *Kansas State Bank & Trust v. Specialized Transportation Services, Inc.*, 249 Kan. 348, 819 P.2d 587 (1991).

Arbitration

Upon the request of any party in a medical malpractice action, or on the judge's own motion, the action must be submitted to a medical screening panel made up of three health care providers and a non-voting lawyer. Kan. Stat. Ann. § 65-4901 (1992). The panel's written report is admissible at trial and any party may call members of the panel as witnesses with respect to the issues at trial. Kan. Stat. Ann. § 65-4904 (1992). In addition, in medical malpractice cases the court must hold a settlement conference not more than 30 days before trial attended by trial lawyers for each side and all persons with settlement authority. Kan. Stat. Ann. § 60-3413 (1994).