



Cutting the Hedge: Reforming Comparative Fault in Medical Malpractice

By John W. Johnson and Edward L. Robinson

I. Introduction

They say you can't have it both ways. Not so if you are a medical malpractice defendant and you don't want to compare the fault of your fellow defendants until they have settled or been dismissed.

Kansas state courts are letting defendants assert comparative fault as a defense but avoid responding to written discovery questions regarding the defense. They are then letting defendants hedge their positions in the pretrial order by claiming that no one was at fault for the plaintiff's injuries, but adopting the plaintiff's contentions of fault against any defendant who later settles or is dismissed.

This best-of-both-worlds system, referred to in this article as "comparative fault hedging," allows defendants to present a consistent message of no-fault, yet attack as negligent those who cannot be subject to a court judgment.

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our court system. For these reasons and more, this article will argue that comparative fault hedging is a practice that should be stopped. It will explain the practice; discuss the applicable rules of discovery; analyze its many harmful consequences; and provide a simple, practical, and fair solution.

II. Comparative Fault Hedging "Revealed"

The typical scenario is as follows: A plaintiff sues multiple defendants for medical malpractice, all of whom assert comparative fault as a defense.

The plaintiff issues interrogatories and requests for admission regarding whose fault the defendant is comparing and what facts underlie the defense. The defendants each refuse to answer, claiming not enough information is available.

The plaintiff discloses her expert witnesses and reports, and the defendants later do the same. Depositions occur and the expert disclosures deadline passes, prohibiting any new expert opinions regarding fault. The defendants do not supplement their discovery answers.

The final pretrial conference occurs, and the defendants do not specify whose fault will be compared and what facts form the basis for the defense. Instead, they each request language in the pretrial order stating that the defendants believe no one was at fault for the plaintiff's injuries, but if any defendant should settle or be dismissed, the remaining defendants will compare the fault of the former party using the plaintiff's contentions of fault. The district court grants the request.

III. Rules of Discovery

Comparative fault or negligence is an affirmative defense for which the defendant has the burden of proof.¹ K.S.A. 60-258a abolished contributory negligence, which barred recovery if the plaintiff was at all negligent and established comparative fault, which allows the plaintiff to recover damages if her negligence is less than the causal negligence of the defendants.² It also states that each party is liable only in the proportion that his causal negligence "bears to the amount of negligence attributed to all parties against whom recovery is allowed."³



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Although K.S.A. 60-258a addresses many aspects of comparative fault, it does not discuss when the defense must be asserted.

Comparative fault is generally asserted in the defendant's answer and will result in interrogatories and requests for admission from the plaintiff. K.S.A. 60-233 states that interrogatories may relate to any matter generally discoverable and that an otherwise proper interrogatory "is not necessarily objectionable merely because an answer...involves an opinion or contention that relates to fact or the application of law to fact."⁴

Interrogatories must be answered within 30 days of service or 45 days of service of process,⁵ but the district court may order that an interrogatory need not be answered until the pre-trial order or later time.⁶ Each party is limited to 30 interrogatories unless the court authorizes more.⁷

If a party fails to answer interrogatories, after taking informal steps an issuing party may move for an order compelling responses.⁸ Failing to answer includes providing evasive or incomplete responses.⁹ If the party still does not respond, the court may refuse to allow the party to support the claim or defense.¹⁰

A plaintiff may also use requests for admissions, which are statements to the opposing party requesting an "admit" or "deny" response.¹¹ The response time and court scheduling rules are generally the same as those for interrogatories, but failure to respond to requests for admissions results in the statements being admitted.¹² In addition, the opposing party may not use lack of information as an excuse for not responding unless he has made "reasonable inquiry and that the information known or readily obtainable by such party is insufficient to enable such party to admit or deny."¹³

Once discovery has concluded, the court and the parties will meet for the final pretrial conference and define the issues for trial.¹⁴ The result of the final pretrial conference is the pretrial order, which "control[s] the subsequent course of the action."¹⁵ Modification is allowed by the parties' agreement or by the court to prevent "manifest injustice."¹⁶

IV. The Harms of Hedging

A. Unfair Benefits to Defendants

Comparative fault hedging unfairly benefits defendants. First, it lets them have it both ways: multiple defendants can claim as a whole that no one is at fault for the plaintiff's injuries, thus avoiding any fault comparisons among themselves. But it also allows defendants to switch their stories as soon as any defendant settles or is dismissed. From a strategic and professional perspective, medical malpractice defendants will not allege fault against each other. However, once a defendant is dismissed, his liability is erased and he becomes fair game. Furthermore, pointing to an empty chair seems more palatable.

This two-step strategy insulates party defendants from ever having to allege the others' comparative fault and potentially increases the likelihood of a wholesale defense verdict, but also risks that a defendant may be held liable for more than his proportionate share of fault if the jury returns a verdict for the plaintiff.¹⁷

Second, comparative fault hedging allows defendants to assert comparative fault without proof. The defendants do not obtain their own comparative fault experts and are careful that their experts not address the fault of other defendants. Instead, if comparing fault becomes beneficial, the defendants will use the plaintiff's expert reports, which detail the very allegations of fault the defendant needs to prove his affirmative defense.

Cherry-picking the plaintiff's expert opinions allows the defendants to avoid the irony of hiring a comparative fault expert but claiming no one was at fault. It also is cheaper, because defendants need only invest resources to prove they were *not* at fault and need not devote time and money proving the fault of their fellow defendants.

Last, but certainly not least, comparative fault hedging allows defendants to subvert the Kansas Rules of Civil Procedure. Interrogatories and requests for admission are generally due within 30 days and must be supplemented as information becomes known. Defendants sidestep this requirement by claiming that not

enough information is available, even if all expert witness disclosures have been made and all comparative fault information is known. The interrogatory responses are thus evasive and incomplete and the requests for admission are not answered, but the defendants receive no penalty or sanction. If forced to answer pursuant to a motion to compel, the response will be a parity of what is embedded in their pretrial order contentions.

B. Undue Prejudice to Plaintiffs

While comparative fault hedging indirectly harms plaintiffs by benefiting defendants, it also causes clear and independent prejudice to plaintiffs. Comparative fault damage calculations can affect a plaintiff's recovery, and affirmative defenses impact how a case should be presented to a jury.¹⁸ Hiding the comparative fault "ball" denies plaintiffs critical information about the defendants' positions and prevents them from preparing for trial. Defendants face no such uncertainty, as plaintiff's contentions of fact and law are defined in the pretrial order and not subject to arbitrary change.

It is erroneous to argue that plaintiffs are not prejudiced because comparative fault hedging may be foreshadowed in the pretrial order: the objective of the pretrial order is to define the issues of law and fact, not create conditional issues for trial.¹⁹ Furthermore, no party should endure "trial by surprise" when modern discovery rules are designed to give all parties a clear picture of each other's case before trial.²⁰

Comparative fault hedging also results in plaintiffs' experts being used to support their opposing parties' defenses. While it is not inherently unfair to use another party's witness for one's own benefit, it cannot be deemed fair for a defendant to rest on his laurels, knowingly fail to obtain any evidence to prove a defense for which he has the burden of proof, and then use his opponent's expert witnesses to prove the comparative fault of a "phantom" defendant who was not identified in the pretrial order as one against whom fault would be compared.

Finally, while plaintiffs have many

trial strategies at their disposal, there is no equal and opposite strategy that mitigates the effect of comparative fault hedging. Plaintiffs may move to amend the pretrial order once a defendant is dismissed; however, such motions are at the mercy of the trial judge and at times are not granted.

C. Increased Court Workload

The practice of comparative fault hedging indirectly increases the workload of the judicial system. If defendants knew they could not hedge but would have to decide during discovery whether to assert comparative fault, they could not wait for another defendant to settle and then point the finger. If defendants could not compare fault when most convenient, those who may be less negligent would be more inclined to compare the fault of those who may be more negligent, increasing the possibility of settlement and reducing the court's workload during all phases of the litigation.

V. Proposed Solution

The consequences of comparative fault hedging are complex and widespread, but the solution is simple: Require defendants to comply with the rules of civil procedure and supplement discovery requests as facts are made known.

For medical malpractice cases, courts should use expert disclosure dates as the baseline for comparative fault deadlines. When expert disclosures are complete, the parties have every opinion that may be used at trial to establish fault. The Kansas Rules of Civil Procedure require supplementation of responses to written discovery when this information is available,²¹ and it cannot be argued the defendants are waiting for further information when none will be available. Therefore, within a reasonable time after disclosures are complete, all parties should be required to respond to any discovery requests regarding fault. Furthermore, specific allegations of fault must be made as opposed to setting a condition subsequent, which is the current practice.

Because disclosure of comparative fault allegations should be made within a reasonable time after expert disclosures are complete, defen-

dants should not be allowed to wait until the final pretrial conference to respond to written discovery regarding comparative fault. Moreover, defendants should not be allowed to include language in the pretrial order stating no one is at fault for the plaintiff's injuries but adopting the plaintiff's contentions of fault against any defendant who settles or is dismissed.

Kansas appellate courts have not addressed comparative fault hedging; the United States District Court for the District of Kansas has. In *Cuiksa v. Hallmark Hall of Fame Productions, Inc.*,²² the plaintiff was a service technician for D & D Rental, an equipment rental company.²³ He was electrocuted when a boom lift he was working on struck a power line.²⁴

Cuiksa filed suit, and the defendants asserted comparative fault against "others not party to this lawsuit."²⁵ Cuiksa issued interrogatories and later obtained an order compelling their response.²⁶ The defendants continued to claim the plaintiff was the only "other" party with whom they would compare fault.²⁷

At the final pretrial conference, the defendants proposed language comparing the fault of D & D Rental and the plaintiff's supervisor.²⁸ The magistrate sustained the plaintiff's objection that the defendants' attempt was untimely and inconsistent with previous discovery responses.²⁹ The defendants unsuccessfully moved to amend the proposed pretrial order and filed objections to the denial, bringing the matter before the district court.³⁰

The court reviewed the magistrate's decision *de novo* and affirmed, emphasizing that the defendants "had no less than three opportunities to specify that they were comparing the fault of [plaintiff's supervisor] and D&D Rental, yet chose to remain silent."³¹ The court also stated the defendants "sat on" their comparative fault assertions until the final pretrial conference, which prejudiced the plaintiff.³² The court was thus "unwilling to allow a party, under the guise of 'trial strategy,' to withhold discovery concerning an affirmative defense raised in its answer and then reintroduce the defense in the pretrial

order."³³

The defendants' actions in *Cuiksa* are similar to comparative fault hedging in medical malpractice: both involve defendants who have information responsive to the plaintiff's written discovery regarding comparative fault but fail to respond. In addition, both involve defendants who attempt to assert comparative fault at the final pretrial conference after not disclosing the assertions during discovery.

Cuiksa differs from medical malpractice hedging in one important aspect, which further illustrates why its reasoning should be extended to medical malpractice cases. In *Cuiksa*, the defendants had evaded questions regarding comparative fault in discovery but stated their assertions at the final pretrial conference.³⁴ The court held that withholding information during discovery was sufficient grounds to prevent the defendants from presenting the defenses at trial.³⁵ Medical malpractice defendants are more deceptive, refusing to disclose their comparative fault assertions at the final pretrial conference and attempting to compare fault as soon as a party settles, which could occur during trial. The fact that medical malpractice defendants may "sit on" their assertions of comparative fault until trial has begun shows their actions are even more objectionable than the defendants' in *Cuiksa*.

VI. Conclusion

Comparative fault hedging in medical malpractice cases should be prohibited. Kansas courts should not allow defendants to withhold discovery responses regarding comparative fault, state in the pretrial order that no one is at fault, yet adopt the plaintiff's contentions of fault against any defendant who settles or is dismissed. Comparative fault hedging is unfairly beneficial to defendants, unduly prejudicial to plaintiffs, and impairs the function and credibility of our court system.

Kansas state courts should adopt the Kansas District Court's reasoning in *Cuiksa v. Hallmark Hall of Fame Productions, Inc.*³⁶ and rule that a defendant's knowing failure to respond to discovery requests regarding comparative fault until another defendant

settles is prejudicial to plaintiffs and subject to penalty. Courts should require that both plaintiffs and defendants supplement discovery responses in accordance with the Kansas Rules of Civil Procedure and penalize those who willfully disregard those rules. ❖

Endnotes

¹ *E.g., McGraw v. Sanders Co. Plumbing and Heating, Inc.*, 233 Kan. 766, 773, 667 P.2d 289 (1983); PIK—CIVIL 3D § 106.01 (2005).

² KAN. STAT. ANN. § 60-258a(a) (2005).

³ *Id.* § 60-258(d).

⁴ *Id.* § 60-233(c). This language clearly encompasses allegations of comparative fault.

⁵ *Id.* § 60-233(b)(3).

⁶ *Id.* § 60-233(c).

⁷ KAN. SUP. CT. R. 135.

⁸ KAN. STAT. ANN. § 60-237(a)(2)(B) (2005).

⁹ *Id.* § 60-237(a)(3).

¹⁰ *Id.* §§ 60-237(d), 60-237(b)(2)(B).

¹¹ *See Id.* § 60-236.

¹² *Id.* § 60-236(a).

¹³ *Id.*

¹⁴ *Id.* § 60-216(d); KAN. SUP. CT. R. 140.

¹⁵ KAN. STAT. ANN. § 60-217(e) (2005).

¹⁶ *Id.*

¹⁷ This article does not address whether a strategic failure to compare fault resulting in a judgment in excess of a defendant's proportionate negligence would subject an attorney to liability.

¹⁸ Insert text regarding reduced damages based on proportion of fault.

¹⁹ KAN. STAT. ANN. § 60-216(d) (2005); KAN. SUP. CT. R. 140 (2006).

²⁰ *Bodnar v. Jackson*, 205 Kan. 469, 471, 470 P.2d 726 (1970) "We have consistently held that pretrial procedure was adopted to enable courts to call parties before them and

cut away by agreement or admissions all encumbrance to a speedy trial. One specific purpose of a pretrial conference is to acquaint each party in advance of trial with the respective factual contentions of the parties upon matters in dispute."

²¹ KAN. STAT. ANN. § 60-226(2) (2005).

²² 2004 WL 303553 (D. Kan. Jan. 26, 2004).

²³ *Id.* at *1.

²⁴ *Id.*

²⁵ *Id.* at *2.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at *3.

³³ *Id.*

³⁴ *Id.* at *2.

³⁵ *Id.*

³⁶ 2004 WL 303553 (D. Kan. Jan. 26, 2004).

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