1990

Automobile Accident Litigation in Kentucky

Office of Continuing Legal Education at the University of Kentucky College of Law

Robert D. Monfort

Right click to open a feedback form in a new tab to let us know how this document benefits you.
Automobile Accident Litigation in Kentucky
USE OF THIS VOLUME

Seminars and publications of the University of Kentucky College of Law Office of Continuing Legal Education (UK/CLE) are designed to assist lawyers in maintaining their professional competence. The Office of Continuing Legal Education and its volunteer authors and speakers are not rendering legal or other professional services by their participation in continuing legal education activities. Attorneys and others using information from UK/CLE publications or seminars must also fully research original and current sources of authority to properly serve their clients' legal interests. The forms and sample documents contained in continuing legal education publications are intended for use only in conjunction with the professional services and advice of licensed attorneys. The legal research discussed herein is believed to be accurate as of August, 1990, but is not warranted to be so. All parties must cautiously consider whether a particular form or document is suited to specific needs. Oral presentations and written materials may contain expressions of opinion which do not necessarily reflect the views of the Office of Continuing Legal Education, the University of Kentucky, the Commonwealth of Kentucky, or other governmental authorities.
ABOUT ... UK CLE

The University of Kentucky College of Law, Office of Continuing Legal Education (UK/CLE) was organized in 1973 as the first permanently staffed, full time continuing legal education program in the Commonwealth of Kentucky. It endures with the threefold purpose: 1) to assist lawyers in keeping abreast of changes in the law; 2) to develop and sustain practical lawyering skills; and 3) to maintain a high degree of professionalism in the practice of law. Revenues from seminar registrations and publication sales allow the Office to operate as a separately budgeted, self-supporting program of the College. No tax dollars, bar dues or public funds are utilized in the operation of UK/CLE.

Seminars
UK/CLE provides a variety of convenient, practical seminars to satisfy the continuing legal education needs of lawyers. Seminars range from half-day programs in selected areas to in-depth programs extending over several days. While most seminars are conducted at the College of Law in Lexington, UK/CLE has a longstanding statewide commitment. Since its first year of operation, beginning with a criminal law seminar in Madisonville, Kentucky, the Office has continued to bring high-quality continuing legal education to attorneys in every region of Kentucky.

Publications
Each seminar is accompanied by extensive speaker-prepared course materials. These bound course materials are offered for sale following seminars and are consistently regarded as valuable, affordable references for lawyers.

Since 1987, UK/CLE has been producing a series of Practice Handbooks and Monographs. Each Practice Handbook is an extensively referenced, fully indexed practice guide consisting of separately authored chapters, sequenced for the comprehensive coverage of a distinct body of law. Their format allows for updating through supplements and revised indexes. Each Monograph is a concisely written practice guide, usually prepared by a single author, designed to cover a topic of narrower scope than the Handbooks. They are convenient references on topics often not treated elsewhere.

Professional Management
UK/CLE serves the needs of the bar from its offices on the University of Kentucky campus in Lexington. Its staff manages course registrations, publication sales, seminar and publication marketing, publication composition and printing, and seminar and publication content planning, as well as budgeting, accounting and financial reporting. As an “income based” program, UK/CLE’s seminar tuitions and publication sales are budgeted to generate sufficient revenues for self support.

Commitment to Quality and Creativity
UK/CLE is a member of the Association of Continuing Legal Education Administrators (ACLEA). As such, UK/CLE subscribes to the Standards of Operation for Continuing Legal Education Organizations, and the Standards of Fair Conduct and Voluntary Cooperation administered under the auspices of the American Law Institute-American Bar Association Committee on Continuing Professional Education. Throughout its existence UK/CLE has been actively involved in the activities and services provided by ACLEA. UK/CLE’s association with national and international CLE professionals has afforded it the opportunity to continually reassess instructional methods, quality in publications, and effective means of delivering CLE services at consistently high levels of creativity and quality.

An Integral Part of the Legal Profession’s Tradition of Service
An enormous debt is owed to the judges, law professors, and practitioners who generously donate their time and talent to continuing legal education. Their knowledge and experience are the fundamental ingredients for our seminars and publications. Without their motivation and freely given assistance in dedication to a distinguished profession, high quality continuing legal education would not exist.

As a non-profit organization, UK/CLE relies upon the traditional spirit of service to the profession that attorneys have so long demonstrated. We are constantly striving to increase attorney involvement in the continuing education process. If you would like to participate as a volunteer speaker or writer, please contact us and indicate your areas of interest and experience.
ABOUT THE AUTHOR

ROBERT D. MONFORT is a sole practitioner in Newport, where he concentrates his private practice in personal injury litigation, workers' compensation, and business litigation. He is also an Assistant County Attorney. He earned his B.S. degree from Eastern Kentucky University in 1971 and his J.D. degree from Salmon P. Chase College of Law in 1977. He is author of the book Kentucky Motor Vehicle Insurance Law, published by the Harrison Company, Norcross, Georgia.
UNIVERSITY OF KENTUCKY
COLLEGE OF LAW
OFFICE OF CONTINUING LEGAL EDUCATION

Suite 260 Law Building
Lexington, Kentucky 40506 0048
(606) 257 2921

INTERIM PRESIDENT, UNIVERSITY OF KENTUCKY: Charles T. Wethington, Jr.

DEAN, COLLEGE OF LAW: Rutheford B Campbell

ASSOCIATE DEAN AND DIRECTOR
Todd B. Eberle

ASSISTANT DIRECTOR/EDITOR
David T. Miller

ADMINISTRATIVE ASSISTANT
Susan C. Saunier

EDITORIAL ASSISTANT
M. Charlene Montgomery

ADMINISTRATIVE STAFF
O. Louise Julian
Bryan N. West
AUTOMOBILE ACCIDENT LITIGATION IN KENTUCKY

Table of Contents

I. Initial interview .......................................................... 1
   A. Conduct of the interview in general .................................. 1
   B. Signing of forms .......................................................... 2
   C. Discussion of fees and expenses ...................................... 3

II. The decision whether to accept the case ................................ 5
    A. Rapport with client .................................................... 5
    B. Liability ................................................................. 5
    C. Damages ................................................................. 6
    D. The small case ......................................................... 7
    E. Collectability .......................................................... 7

III. Liability issues .......................................................... 8
    A. Using jury instructions to determine liability ..................... 8
    B. Duty ................................................................. 8
    C. Negligence ............................................................ 9
    D. Negligence per se for violation of safety statute ............... 10
    E. Minor's negligence imputed to others ................................ 10
    F. Dramshop cases ...................................................... 11
    G. Miscellaneous actions .............................................. 11
    H. Wrongful death actions ............................................. 12
    I. Comparative fault .................................................. 12
    J. Seat belt defense ................................................... 13
    K. Blackout defense .................................................... 14
    L. Statute of limitations ............................................... 15

IV. Damages issues .......................................................... 16
    A. Property damage ...................................................... 16
    B. Medical bills, past and future ..................................... 16
    C. Lost income .......................................................... 16
    D. Impairment of earning capacity .................................... 17
    E. Physical and mental pain and suffering .......................... 17
    F. "Hedonic" damages .................................................... 18
    G. Punitive damages .................................................... 18
    H. Loss of consortium .................................................. 19
    I. Wrongful death damages ............................................ 19
    J. Apportionment ...................................................... 19
    K. Collateral source rule .............................................. 21

V. Basic insurance considerations ....................................... 23
    A. Collision coverage ................................................... 23
    B. Liability coverage .................................................. 23
    C. Uninsured motorist coverage ...................................... 25
    D. Underinsured motorist coverage .................................. 26
    E. No-fault coverage ................................................... 27
    F. No-fault procedures ................................................ 28

VI. Pre-filing procedures .................................................. 32
    A. Notification of insurer ............................................. 32
    B. Investigation ...................................................... 32
    C. Obtaining and understanding medical records .................... 34
    D. Case evaluation ..................................................... 35
    E. Settlement .......................................................... 37
VII. Filing suit ........................................................................................................ 39
  A. Decision to file .......................................................................................... 39
  B. Pleadings .................................................................................................. 39
  C. Service of process ..................................................................................... 40

VIII. Discovery ................................................................................................... 41
  A. Eliminating "boilerplate" defenses ............................................................ 41
  B. Use of interrogatories and other written requests ................................... 41
  C. Deposing the defendant and eyewitnesses .......................................... 41
  D. Deposing defense experts ...................................................................... 42
  E. Preparing the plaintiff for his own deposition ....................................... 43

IX. Trial preparation .......................................................................................... 45
  A. In general .................................................................................................. 45
  B. Setting the case for trial .......................................................................... 45
  C. Preparing witness lists and subpoenaing witnesses ............................... 46
  D. Determining need for expert witnesses .................................................. 46
  E. Preparing pre-trial memoranda and jury instructions ............................. 47
  F. Organizing proof of medical expenses and lost wages ............................ 47
  G. Preparing exhibits and demonstrative evidence .................................... 48
  H. Summary judgment motion .................................................................... 49
  I. Medical proof ........................................................................................... 50
  J. Motion in limine ......................................................................................... 51
  K. Reviewing juror information sheets and preparing voir dire .................. 52
  L. Preparing opening statement ................................................................... 52

X. The trial .......................................................................................................... 54
  A. In general .................................................................................................. 54
  B. The cornerstones - use of theme, primacy, simplicity, forcefulness, honesty 54
  C. Jury selection ............................................................................................ 55
  D. Opening statement .................................................................................... 56
  E. Case in chief, avowals ............................................................................. 56
  F. Cross-examining defense witnesses ......................................................... 57
  G. Preparation of instructions ...................................................................... 57
  H. Closing argument ...................................................................................... 58

XI. Appendix - Forms ......................................................................................... 60
  A. Certificate of notification ......................................................................... 60
  B. Complaint with demand for trial by jury ................................................. 61
  C. Application for benefits - personal injury protection ............................... 65
  D. Authorization for medical information ................................................... 66
  E. Contingency fee contract ......................................................................... 67
  F. Authorization for employment, wage and salary information .................. 68

Statutory appendix ............................................................................................. 69

Table of statutes ................................................................................................ 87

Table of cases .................................................................................................... 89

Index .................................................................................................................. 91
Almost every attorney will, at some time in his or her career, be called upon to handle an automobile accident case. In terms of volume of cases, they outnumber all other personal injury actions combined.

This monograph addresses the basics of handling automobile accident cases, and is addressed to several audiences: the new lawyer; the experienced practitioner who seldom handles an automobile accident case; and the attorney who has handled automobile accident cases in other states, but is unfamiliar with the law and procedures of Kentucky. It is hoped, however, that even the attorney who regularly handles this type of case in Kentucky will find some items of interest.

The monograph is written from the Plaintiff's perspective. Hopefully, attorneys handling primarily defense work will find items of interest, as well.

To some extent, the monograph follows the case chronologically. It begins with the initial interview and the decision whether or not to take the case. That decision, plus most of the steps which follow in the case, are based upon the liability, damages, and insurance available; and each of those substantive areas is considered in its own chapter.

The balance of the monograph is more technique than law, beginning with an attempt to settle the case, and ending with the trial itself. Because of space limitations, some areas are treated
rather briefly, and a few, such as appeals, are omitted entirely. It is hoped, however, that this will prove a good starting point and a valuable reference.
I. [1.1] THE INITIAL INTERVIEW

A. [1.2] CONDUCT OF THE INTERVIEW IN GENERAL

A copy of the police report is a "must" at the initial interview. Either the client or the lawyer should obtain it in advance of the interview.

The format of the interview is largely a matter of personal style. One method which works well for many lawyers is to let the client tell his story in his own words, with interruptions for specific information, or to get the client back on track, only where absolutely necessary. The lawyer should listen intently, and avoid constant note taking.

This practice often helps relax the client, who is in unfamiliar surroundings. By showing a genuine interest in the client, the attorney can begin building the good relationship which will be necessary during the coming months or years. Most of the details can be gathered later.

One fact which must be verified at the initial interview is the date of the accident. The police report will virtually always show the correct date, but the lawyer should make it a point to ask the client anyway.

The lawyer will, of course, answer questions. However, one question which cannot, and should not, be answered during the initial interview is the settlement value of the case.

In some cases, the attorney will be prepared to accept the case
at the initial interview. He should discuss fees and expenses, and obtain signatures on forms, as set forth below.

In other cases, the attorney will recognize that he will not be handling the case. In these instances he must politely but clearly inform the client about his decision. The lawyer should always encourage a second opinion, but is under no obligation to suggest a particular lawyer. He should tell the client that if a second opinion is desired, the client should seek one immediately, before the statute of limitations runs. To insure that there are no misunderstandings, the lawyer may wish to follow up with a short letter confirming that he has declined representation.

Finally, a situation will occasionally arise where the lawyer needs more information to determine whether or not to take the case. If this is the case, the lawyer should follow through promptly so that both he and the client have a clear understanding as to whether representation has been undertaken.

B. [1.3] SIGNING OF FORMS

The initial interview is the appropriate time for the client to sign several forms. First among these is the medical authorization, a sample of which is provided as a form.

Although the form states that a copy is valid, some doctors and hospitals want an original signature. For this reason, it is a good idea to get at least three or four of these signed.

Because many doctors and hospitals require a "fresh" date -- no more than 60 or 90 days old -- it is common practice to leave the
date blank, filling in dates as necessary throughout the progress of
the case. This way the client does not have to sign new forms every
time information is needed. So long as the client understands and
consents to the procedure, there should be no ethical problem with it.

Where lost earnings, past or future, may be an element of
damages, a wage authorization, included in the forms, should also be
signed. If this form is used to get information in an attempt to
settle before filing suit, the employer should be requested to make
its reply on company letterhead.

Virtually all auto accident cases are handled on a contingency
basis. When the decision has been made to accept the case, a
contingency contract (see forms for a sample) should be signed.
Written contracts have long been customary in contingency cases and
are now specifically required by Rule 1.5 of the Kentucky Rules of
Professional Conduct. The Rules of Professional Conduct appear, in
their entirety, as Supreme Court Rule 3.130.

C. [1.4] DISCUSSION OF FEES AND EXPENSES

If the lawyer has accepted the case the client should leave his
office with a clear understanding of the arrangement as to fees and
expenses. This can be accomplished only through thorough discussion.

Typically, expenses will cause more misunderstandings than fees.
Even though the contract so provides, the lawyer should reiterate that
out-of-pocket expenses are separate from and in addition to the fee
charged for the lawyer's services. The amount of time devoted to this
subject will depend on the sophistication of the client.
A middle ground must be reached on pre-authorization of expenditures. On one hand, it is unworkable to require authorization every time the lawyer makes a long distance phone call or obtains copies of physicians' office notes. On the other hand, the lawyer should never incur a major expense, such as hiring an expert witness, without first discussing the matter with the client. Exactly where the balance is struck depends on several factors, chief among them the magnitude of the case. The attorney must spend his client's money wisely in every case, but particularly in the small ones.
II. [2.1] THE DECISION WHETHER TO ACCEPT THE CASE

A. [2.2] RAPPORT WITH CLIENT

Conventional wisdom requires the consideration of three factors in deciding whether to accept a case: liability, damages, and insurance. To this list should be added a fourth, perhaps the most important of all: rapport with the client.

This does not mean that the client must necessarily be pleasant. Injured persons are often angry or depressed. But if the lawyer truly dislikes or distrusts her client, she will seldom be able to do a first-rate job for him.

This alone will occasionally be sufficient reason to reject an otherwise meritorious case. The lawyer should do so as tactfully as possible, and urge the client to seek other counsel immediately.

B. [2.3] LIABILITY

In deciding whether to accept the case, the lawyer will need to make a tentative decision as to liability. Liability issues are discussed in detail in Section III, below.

Although liability can never be 100% guaranteed at the outset, a significant number of cases will have reasonably clear liability. Among these is the common "rear-ender", particularly where the rear driver admits that he was inattentive and that the front driver was stopped.

A second class is the questionable liability case. Normally these are questionable because of disputed or unclear facts. Occasionally there will be a legal question as well, especially in
developing areas such as dramshop cases. There is nothing wrong with accepting these cases so long as both attorney and client have a clear understanding of the hurdles to be overcome. Indeed, the attorney may even file suit knowing the existing law is against her, provided there is "... a good faith argument for the extension, modification or reversal of existing law, and ... [the suit] is not interposed for any improper purpose." Kentucky Rules of Civil Procedure, Rule 11.

Finally, there is the no-liability case. These should not be accepted under any circumstances. A lawyer should never take a case she would not be willing to take to trial, on the assumption it will settle. Invariably, it will turn out to be the case which does not settle.

C. [2.4] DAMAGES

Like liability, damages are discussed in detail below. The economics of practicing law require that the lawyer give some consideration to the damages recoverable, in making her decision whether to accept the case.

Most property-damage-only cases will simply not produce an adequate return from the time spent on them. Typically, these are cases where an adjuster (from either the other driver's liability carrier or the client's own collision carrier) has made an offer which the client deems too low. Many of these cases are appropriate for small claims court, where the client can have his day in court and save some attorney fees in the process.
D. [2.5] THE SMALL CASE

Most attorneys do occasionally take a small case, which would not meet the normal criteria they would set. Many times these are accepted as a service to a friend, a relative, a particularly likeable or sympathetic individual, or a good client. This is commendable; but the lawyer must remember that once she accepts the case, no matter how small, the client is entitled to professional services, and not to having the file repeatedly relegated to the bottom of the stack.

E. [2.6] COLLECTABILITY

Although it may not be adequate, there will be some insurance coverage available in almost every auto accident case. Even where the tortfeasor has no liability insurance, one's own clients will normally have uninsured motorist coverage. Besides this, there are no-fault coverage, collision coverage and underinsured motorist coverage— all discussed below.
III. [3.1] LIABILITY ISSUES

A. [3.2] USING JURY INSTRUCTIONS TO DETERMINE LIABILITY

The experienced lawyer may occasionally have a simple liability case where he knows all the law and understands all the elements which he would be required to prove at trial. This is not, however, usually the case, even for the experienced practitioner. To gain a sense of direction in pursuing the claim it is advisable for all attorneys, especially relatively inexperienced ones, to map out what needs to be proven early in the case.

A suggestion is often made in criminal cases that the very first research done in the case should involve drafting jury instructions. This sounds like putting the cart before the horse, but actually is an excellent method of organizing the investigation, discovery, and other pre-trial steps.

The method also works well in civil cases. Having tentative jury instructions in hand will allow the attorney to have a good idea as to the elements of the tort, and what he must prove.

The single best source for these instructions is Palmore's Kentucky Instructions to Juries. The attorney will virtually always have to go beyond Palmore to tailor the instructions to the facts of his particular case.

B. [3.3] DUTY

Analyzing the elements of a vehicular accident case can be somewhat like taking a refresher course in law school torts. The
analysis begins with duty. Usually, but not always, the duty owed in vehicular accident cases is to exercise ordinary care. This is the care owed by the driver of a vehicle to other motorists on the road. Louisville Taxicab & Transfer Co. v. Kelley, Ky., 455 S.W. 2d 535 (1970).

There is also case law to the effect that only the duty of ordinary care is owed by a motorist to pedestrians, and this duty will normally appear in the jury instructions. See, e.g., Clem v. Ball, Ky., 237 S.W. 2d 839 (1951). There are, however, so many qualifications and exceptions to this rule that it is of little use. Pedestrian cases require specialized research as to the duties owed to the pedestrian.

The major exception to the ordinary care standard is in cases involving common carriers, which owe their passengers the highest degree of care. It should be noted that even common carriers owe only the duty of ordinary care to other motorists; therefore, in a single accident, a bus driver or cab driver may owe one duty to other motorists on the road, and a higher duty to his own passengers. Louisville Taxicab, supra.

C. [3.4] NEGLIGENCE

Negligence is, of course, the theory under which most automobile cases are brought, and the word, in one of its forms, will appear in the complaint. Conversely, the word will probably not appear in the jury instructions; rather, they will be phrased in terms of duty and breach of duty. Many automobile accident cases are tried, from start
to finish, without mention of the word "negligence" -- a word which probably would not have a precise meaning to the jury, anyway.

D. [3.5] NEGLIGENCE PER SE FOR VIOLATION OF SAFETY STATUTE

Negligence per se is a concept which must be understood by lawyers handling auto accident cases. Kentucky has long had the rule that a violation of a statute regulating traffic is negligence per se, and will impose liability if that violation is the proximate cause of the accident. Jewell v. Dell, Ky., 284 S.W. 2d 92 (1955). Proving violation of a safety statute will therefore get the lawyer at least half way to a finding of liability in his favor. The other half, causation, will normally be allowed to go to the jury. However, in some cases, causation is so clear from the facts that the Court will find that as a matter of law, thus entitling the plaintiff to a directed verdict on the issue of liability. Davis v. Kunkle, Ky., 194 S.W. 2d 513 (1946).

E. [3.6] MINOR'S NEGLIGENCE IMPUTED TO OTHERS

Imputed negligence is rare in Kentucky. The one departure from this general rule which the lawyer handling automobile cases needs to know is that the negligence of a driver under 18 is imputed to the person who signed his driver's license application. KRS 186.590. Actually, the negligence in this situation will be imputed to both parents; and, if that negligence caused the accident, the parents are jointly and severally liable with the child for damages caused by the negligence.
F. [3.7] DRAMSHOP CASES

In any case where alcohol is involved, the lawyer should be alert for the possibility of a dramshop action. The landmark case is Grayson Fraternal Order of Eagles v. Claywell, Ky., 736 S.W. 2d 329 (1987). The rule established is that a liquor licensee may be liable in a case where the licensee served alcohol to a person actually or apparently under the influence. It is important to note that this is in a business setting only, and does not apply to a social host.

Also of note is Pike v. George, Ky., 434 S.W. 2d 626 (1968), which leaves open the possibility of liability on the part of a licensee which illegally serves alcohol to a minor. The relevant statute here is KRS 244.080 (1).

G. [3.8] MISCELLANEOUS ACTIONS

The lawyer should be alert for miscellaneous actions which occasionally arise from accident cases, sometimes alone, and sometimes in combination with the traditional negligence case. One of these would be battery, which, of course, would occur if someone were intentionally struck with an automobile.

Another possibility is the product liability case. Sometimes a defect in the automobile will be the sole cause of the accident. Other times, the accident will be due to driver error, but a claim can be made that, with proper construction of the vehicle, the injuries would not have been so severe. This is the "crashworthiness" case which has been attempted nationwide with varying degrees of success. In any action which has a product liability component, counsel must be
Familiar with the intricacies of the Kentucky Product Liability Act, KRS 411.200 et. seq.

Lawyers are increasingly becoming aware of liability for improperly designed, built, and maintained roads. Potential defendants in these cases include the designers and builders of the roads, the Transportation Cabinet (which cannot be sued, but must be pursued through the Board of Claims), and municipalities. In the latter case, the lawyer must be aware of KRS 411.110, which places an extremely stringent notification requirement of 90 days on the plaintiff. The case law has construed this statute very strictly, and the lawyer must be careful to supply each and every piece of information required under it.

H. [3.9] WRONGFUL DEATH ACTIONS

Wrongful death actions, unknown at common law, are created and controlled by statute. The attorney handling one of these cases must immediately consult the wrongful death statutes, KRS 411.130 et. seq. These statutes set forth the proper party to bring the action (the personal representative) and the method of distributing the proceeds. The single biggest area of departure from other cases, the damage issues, are discussed below.

I. [3.10] COMPARATIVE FAULT

Most lawyers would probably agree that the most dramatic overnight change in negligence law in Kentucky in the last one hundred years was the advent of comparative fault. Comparative fault, which replaced contributory negligence, first came to Kentucky in the
landmark case of Hilen v. Hayes, Ky., 673 S.W. 2d 713 (1984). It has now been codified as KRS 411.182.

Unlike Ohio, which has modified comparative fault, Kentucky has pure comparative fault. This means that even if the plaintiff is 99% negligent, he may still recover 1% of his damages from the other negligent party. However, in any case where the best plaintiff's counsel can hope for is a small percentage of fault on the other parties, he ought to be asking himself a number of questions, one of which is whether he will be able to establish even that small percentage of fault.

In what is being widely hailed as a victory for the plaintiff's bar, a new wrinkle has been added. Now, the jury may receive not only instructions involving comparative fault, but also an explanation from counsel as to the effect of their allocation of fault. Young v. J. B. Hunt Transportation, Inc., Ky., 781 S.W. 2d 503 (1989). In other words, the lawyer may say "If you find Mrs. Jones to be 20% at fault, you will be reducing her award by 20%". This is a radical departure from the prior situation, where jurors were left to speculate what the effect of their allocation would be.

J. [3.11] SEAT BELT DEFENSE

Besides comparative fault, which will be pled in virtually every case and pursued in a fairly large percentage of cases, there are other defenses which will arise from time to time. One of these is the seat belt defense.

This is actually a hybrid liability and damage issue. Although
Kentucky statutory law does not require the use of restraints by adults, the defense is permitted to introduce evidence that the failure to use an available seat belt is a "substantial factor contributing to cause or enhance the claimant's injuries". Wemyss v. Coleman, Ky., 729 S.W. 2d 174 (1987), at 179.

Normally this testimony will be introduced through physicians, virtually all of whom will concede that certain injuries probably would not have been so severe had the plaintiff been wearing a seat belt and harness. Either side may also introduce proof on the issue from persons whose expertise is more directly related to the precise issue, such as a biomechanical engineer. The words "seat belt" should not appear in the jury instructions, but counsel will, in many cases, be permitted to argue that the failure to use the seat belt caused or enhanced the injuries.

K. [3.12] BLACKOUT DEFENSE

Even newer to Kentucky than the seat belt defense is the blackout defense, which was introduced in Rogers v. Wilhelm-Olsen, Ky. App., 748 S.W. 2d 671 (1988). In that case, the defense was raised because the defendant had a condition, which had manifested itself at least once before, which caused him to have blurry vision and become dizzy. Defense counsel should note that this is an affirmative defense which must be pled.

The defense applies to a variety of medical conditions which may cause a person to "black out". The burden will be on the defense to show that the blacking out was not reasonably foreseeable.
L. [3.13] STATUTE OF LIMITATIONS

A final, but obviously important, defense is the statute of limitations. Until July 1, 1975, the statute of limitations in auto accident cases was a relatively simple matter. Since that date, however, when no-fault became law, the statute of limitations has become highly complicated, unpredictable, and a trap for numerous lawyers.

As of the writing of this monograph, the statute of limitations for most auto accident cases appears to have "stabilized" at two years, but, for reasons set forth below, the lawyer should not wait that long if he has a choice. It should be noted that the statute may be extended by the payment of no-fault benefits. KRS 304.39-230 (6).

There is one exception to the two year statute of limitations which is so pervasive that it effectively shortens the statute in at least half of all auto accident cases. That is, despite the two year statute of limitations, the statute for a consortium claim arising from an auto accident is but one year. Floyd v. Gray, Ky., 657 S.W. 2d 936 (1983). For this reason, plus the continuing unpredictability the courts have shown on this subject, it is highly recommended that, absent good reason to wait, cases should be filed within one year.

KRS 304.39-230 also provides statutes of limitations for related claims (other than tort claims) which have been brought about by no-fault. Again, the statutes and cases must be read carefully - and conservatively.
IV. [4.1] DAMAGES ISSUES

A. [4.2] PROPERTY DAMAGE

Technically, the measure of damages for property damage, such as to a vehicle, is not the cost of repair, but rather the difference between the value before and after the accident, not to exceed cost of repair. Harlan Fruit Co. v. Kilbourne, Ky., 133 S.W. 2d 730 (1939). Hopefully, in the relatively rare case where property damages are an issue, a stipulation may be reached either as to the amount of the damage, or that the reasonable repair cost will be accepted.

B. [4.3] MEDICAL BILLS, PAST AND FUTURE

Medical expense has always been a primary element of damage in automobile accident cases. The Plaintiff should be compensated for both past expenses and future expenses which may be expected to a reasonable medical probability.

Under the no-fault law, which is explained in more depth below, certain medical expenses may not be assessed against the tortfeasor, but rather must be collected from the no-fault insurance carrier. See, e.g., Carta v. Dale, Ky., 718 S.W. 2d 126 (1986). Even if this is the case, establishing actual medical expenses is important. Among the reasons for this are exceeding a no-fault threshold, and demonstrating the seriousness of the injury, to increase compensation for pain and suffering.

C. [4.4] LOST INCOME

The Plaintiff is entitled to recover income which he probably
would have received, but for his injury. This is often relatively straightforward for the employed person; past tax returns are useful. For the self-employed person, on the other hand, the proof is sometimes extremely involved in nature, and open to considerable interpretation by the jury. Because lost income is compensable under no-fault, some or all of these losses may be recoverable only from the no-fault carrier, and not from the Defendant or his insurer. Carta v. Dale, supra.

D. [4.5] IMPAIRMENT OF EARNING CAPACITY

While actual loss of income is the standard for those losses occurring before the trial, impairment of earning capacity is the standard for losses occurring after the trial. This is conceptually different from, and considerably more complicated than, the concept of lost income. In cases involving a person with a significant number of years of probable work life left, serious consideration should be given to hiring an economist to assist in presenting this figure to the jury.

E. [4.6] PHYSICAL AND MENTAL PAIN AND SUFFERING

In many cases physical and mental pain and suffering is the single largest element of damages. Like medical bills and damages related to loss of income, the Plaintiff is entitled to be compensated for both past and future pain.

The Plaintiff and the treating physicians are obvious sources of evidence of pain and suffering. Sometimes, however, the most effective testimony of all will come from what are known as
before-and-after witnesses: lay persons who can testify as to obvious changes in the Plaintiff's personality occurring after the accident.

Determining the amount of these damages is more of an art than a science. The reported decisions in Kentucky are filled with challenges to the damages set by the jury, both as inadequate and excessive. Most decisions, in both categories, have allowed the jury award to stand. See, e.g., Southard v. Hancock, Ky. App., 689 S.W. 2d 616 (1985).

Despite the great latitude given to the trier of the fact, there are a few ground rules. The award will be set aside if, at first blush, it appears to have been brought about by passion and prejudice. Townsend v. Stamper, Ky., 398 S.W. 2d 45 (1965). Also, the permanency, or lack of same, of an injury has been judicially recognized as being important in setting damages. Tichenor v. Roll, Ky., 253 S.W. 2d 13 (1952).

F. [4.7] "HEDONIC" DAMAGES

Some states have officially recognized "hedonic" damages, that is, damages awarded for the loss of life's pleasures. Kentucky has not yet recognized these damages, as such. Nevertheless, many of the same principles can be effectively argued as coming under the heading of mental suffering, long recognized in Kentucky.

G. [4.8] PUNITIVE DAMAGES

Punitive damages have always been difficult to recover in automobile accidents in Kentucky. Case law indicated that even driving drunk did not necessarily constitute wantonness.

Now, by statute, recovery of punitive damages is even more
difficult. KRS 411.184(2) provides:

A plaintiff shall recover punitive damages only upon proving, by clear and convincing evidence, that the defendant from whom such damages are sought acted toward the plaintiff with oppression, fraud or malice.

This would seem to virtually eliminate the possibility of collecting punitive damages for anything short of intentionally hitting a person with a car.

H. [4.9] LOSS OF CONSORTIUM

Consortium is statutorily defined as "the right to the services, assistance, aid, society, companionship and conjugal relationship" of a spouse. KRS 411.145. Loss of consortium will normally be claimed any time the primary plaintiff is married, and should be separately pled.

I. [4.10] WRONGFUL DEATH DAMAGES

Wrongful death damages are also largely dependent on statute, and therefore vary greatly among jurisdictions. While a detailed discussion of these damages is beyond the scope of this monograph, it should be noted that although the general wrongful death statute, KRS 411.130, does not specifically mention compensation for loss of affection and companionship, the wrongful-death-of-a-minor statute, KRS 411.135, does specifically mention these damages. Because of the intricacies involved, wrongful death damages must be studied at some length well before trial.

J. [4.11] APPORTIONMENT

A thorough understanding of apportionment is essential to anyone
handling accident cases. To oversimplify, Kentucky has, for many years, generally followed the proposition that where more than one tortfeasor is at fault, each should bear responsibility only in proportion to his fault. Therefore, there has been little joint liability in Kentucky. This means that if a defendant partially responsible is judgment-proof, that part of the judgment would be uncollectable even if there is another, thoroughly solvent defendant.

The history of apportionment in Kentucky is strange, indeed. Originally it stemmed from an ancient trespass statute, KRS 454.040. For decades, that statute has been construed to allow apportionment among joint tortfeasors in negligence cases, as well. See, e.g., Cox v. Cooper, Ky., 510 S.W. 2d 530 (1974).

The statute was also held applicable to defendants who had settled by the time of trial, allowing defense counsel to point to the "empty chair" and suggest that the defendant who had already settled was primarily at fault. Orr v. Coleman, Ky., 455 S.W. 2d 59 (1970). Next followed a series of opinions considering whether there was to be apportionment where a defendant had been dismissed, where a tortfeasor had settled prior to being sued, and where the alleged tortfeasor was a third party defendant only. The results of these cases were not necessarily consistent with each other.

Now there is a statute which probably answers most, but not all of the questions on apportionment. This is KRS 411.182, which requires apportionment of fault among all relevant parties, including "each claimant, defendant, third party defendant, and person who has
been released from liability."

This statute solidifies preexisting law to the effect that the plaintiff may recover from each wrongdoer only in proportion to the fault of the wrongdoer. Plaintiffs' counsel must therefore be extremely cautious in settling with any defendants before the entire claim is settled as a "package".

K. [4.12] COLLATERAL SOURCE RULE

The collateral source rule was established in Kentucky by the cases of Conley v. Foster, Ky., 335 S.W. 2d 904 (1960) and Taylor v. Jennison, Ky., 335 S.W. 2d 902 (1960). Basically, the rule stated that the injured person was entitled to recover, from the tortfeasor, his full damages sustained, despite the fact that he might have already received some benefits from insurance or other sources. If the plaintiff had used up accrued sick pay or vacation pay, the sums received from those sources were not to be deducted from the damages recoverable from the tortfeasor. Davidson v. Vogeler, Ky., 507 S.W. 2d 160 (1974).

There have, however, been two important statutory changes to the rule. The first came as part of the no-fault law, which stated that the plaintiff was precluded from recovering, from the tortfeasor, medical and wage loss benefits paid or payable by his own carrier as basic reparations benefits. See, e.g., Carta v. Dale, Ky., 718 S.W. 2d 126 (1986).

The second important statutory change came in the 1988 General Assembly, which enacted KRS 411.188(3). That statute provides:
Collateral source payments, except life insurance, the value of any premiums paid by or on behalf of the plaintiff for same, and known subrogation rights shall be an admissible fact in any civil trial.

That statute means that benefits received from, for instance, a health insurance carrier, may be disclosed to the jury by the defense. Unfortunately, the statute fails to specify what the jury is to do with the information.
V. [5.1] BASIC INSURANCE CONSIDERATIONS

A. [5.2] COLLISION COVERAGE

With respect to collision insurance, and all other topics in this section, only the tip of the iceberg is presented. A more thorough discussion is simply beyond the scope of this monograph.

Collision insurance is important to the plaintiff himself, but generally is of considerably less importance to his attorney. Basically, it provides reimbursement to the plaintiff for damage to his own vehicle, regardless of fault, less a stated deductible. The adjustment of this loss often will have occurred between the client and his own insurance company well before the attorney gets the case. In some, but not all, cases the insurer will be interested in pursuing its own remedy for reimbursement against the tortfeasor.

B. [5.3] LIABILITY COVERAGE

Liability coverage is, of course, that coverage which a driver purchases to pay judgments and settlements to third persons, resulting from his own negligence. In Kentucky, the minimum allowable liability coverage is $25,000.00 per person and $50,000.00 per accident for bodily injury, plus $10,000.00 for property damage. KRS 304.39-110. It is worth noting that if the coverage was purchased out of state from a carrier authorized in Kentucky (which includes virtually all of

Materials appearing herein which are taken from Kentucky Motor Vehicle Insurance Law, by Robert D. Monfort, are reproduced herein with permission of the copyright owner, The Harrison Company, Norcross, Georgia.
the major companies) that coverage will automatically be deemed to provide at least minimum coverage, even if the face amounts are less. KRS 304.39-100(2).

An important clause included in virtually all liability coverages is the omnibus clause. This typically provides that coverage is extended not only to the named insured, but also to anyone else driving the car with the named insured's permission. Sometimes that person then allows another person to drive the car, and permission has, in some cases, been extended by the courts to include the successive user and beyond.

There is also a second omnibus clause in most policies which dovetails with the other type. That is, the named insured is covered not only while driving his own car, but also while driving someone else's car with that person's permission.

Therefore, if A drives B's car and negligently injures C, C will normally have two insurance companies available to pursue for liability coverage. The coverage for B, the owner of the car, will be primary, and if that is insufficient to cover C's loss, C may then turn to the insurer of A, the driver, for excess coverage.

Because of the importance of insurance in automobile accident cases, it is highly recommended that insurance coverage be determined promptly after suit is filed. This information, including a determination as to whether any apparent insurer is denying coverage,
is fully discoverable under CR 26.02(2). Normally this is done by interrogatory, but if the situation promises to be complicated, it can also be explored on deposition.

As stated above, this is only a fraction of the information available on liability insurance law. An attorney handling auto accident cases needs a thorough working knowledge, and should educate himself through seminars or publications on the subject.

C. [5.4] UNINSURED MOTORIST COVERAGE

Because Kentucky law now requires proof of insurance in order to register a vehicle, it would seem that virtually all drivers would be insured. Unfortunately, this has not proven to be the case, and a shocking number of motorists still somehow manage to drive without insurance.

Because of this, an understanding of the uninsured motorist coverage is necessary. This is a coverage which, although written by the plaintiff's own carrier, essentially steps into the position of being the defendant's liability carrier, if the defendant is uninsured. If plaintiff's counsel becomes aware, through the police report or otherwise, that the defendant was uninsured at the time of the accident, or the insurance company is disclaiming coverage, he should immediately put his client's carrier on notice. In fact, specific notice provisions are contained in most uninsured motorist coverages, and these have been strictly enforced by the courts. See, e.g., Shipley v. Kentucky Farm Bureau, Ky., 747 S.W. 2d 596 (1988). Some policies also contain a requirement that the insured obtain the
written consent of the insurer before filing suit against an uninsured motorist.

Where an uninsured motorist coverage is applicable, plaintiff's counsel will find himself negotiating with, and sometimes suing, his client's own insurer. If suit becomes necessary, the plaintiff should sue the uninsured motorist, personally; but, unlike the situation with liability insurance, he may join the uninsured motorist carrier as a party defendant. Puckett v. Liberty Mutual Insurance Co., Ky., 477 S.W. 2d 811 (1972). Once suit is filed, it proceeds much as if there were a liability carrier involved in the defense. However, one of the requirements is that the plaintiff establish that the defendant was, indeed, uninsured. Motorists Mutual Insurance Company v. Hunt, Ky. App., 549 S.W. 2d 845 (1977).

D. [5.5] UNDERINSURED MOTORIST COVERAGE

Underinsured motorist coverage is the newest major coverage in Kentucky. Where the defendant has plenty of liability coverage in relation to the damages sustained, underinsured motorist coverage is unimportant. It becomes material only where the injuries are serious in relation to the amount of liability coverage.

The coverage is included in a surprising number of policies today. It may be shown on the declarations page as a separate coverage, but may also be included in a broad definition of the term uninsured motorist. Where there does not appear to be sufficient liability coverage, the client's own policy must be examined extremely thoroughly.
Because of its relatively recent development, many coverage issues are unresolved. The only help available, to date, from the Kentucky courts at least, are the cases of LaFrange v. United Services Automobile Association, Ky., 700 S.W. 2d 411 (1985) and Simon v. Continental Insurance Company, Ky., 724 S.W. 2d 210 (1986). It is reasonable to expect that, when faced with a coverage question, the attorney may have to look to decisions from states other than Kentucky.

E. [5.6] NO-FAULT COVERAGE

Since 1975, no-fault has been the law in Kentucky. Though roundly criticized by the plaintiffs' bar, no-fault has survived long enough that it appears it will be around for the foreseeable future.

Well-qualified personal injury lawyers practicing in other states sometimes appear to be intimidated by the Kentucky law. This should not be the case. Although the statutes and the case law construing them are, indeed, complex, all that is really necessary is to master a few key concepts, and then handle more sophisticated questions on a case by case basis.

The heart of the law, which is contained in KRS Chapter 304.39, is that it both adds to, and takes away from, certain remedies which were available under prior law. What it gives is the entitlement to certain basic reparations benefits for medical bills, lost wages, and assorted other items, up to a usual maximum of $10,000.00. These are paid to the plaintiff by his own carrier, regardless of who was at fault in the accident.
What it takes away is, in essence, the ability to pursue two particular types of benefits from the defendant or his insurance carrier. The first of these is certain economic benefits, for medical bills, lost wages, and the like, which are paid or payable as basic reparations benefits. The theory is that the plaintiff should be able to recover these from his own insurance carrier; and if, in violation of the law, he has failed to purchase insurance, he is simply out of luck. These restrictions are contained in KRS 304.39-060(2)(a).

The other significant limitation is on the right to sue for non-economic damages such as pain, suffering, and mental anguish, unless the injuries are serious enough to have passed one of the statutory thresholds. These thresholds include death, permanent injury, a fracture to a bone, $1,000.00 in medical expense, and several others. These are listed in KRS 304.39-060(2)(b).

In practice, the vast majority of plaintiffs which the attorney will encounter will be able to meet at least one of these thresholds. This is particularly true since the $1,000.00 limit has never been adjusted for inflation. In a case which does not meet any of the thresholds, but nevertheless appears to be meritorious, the attorney should explore the exemptions to the no-fault law. These are rather numerous, but are beyond the scope of this work.

F. [5.7] NO-FAULT PROCEDURES

The attorney who has handled automobile accident cases in other states, but is not familiar with no-fault procedure, does need to alter his practice a bit with a no-fault case. The primary extra
tasks he must perform are (a) making sure his client collects all available basic reparations benefits; (b) making sure his client meets a statutory threshold; and (c) making sure he understands the settlement procedure under no-fault. These are examined, in order, below.

It is crucial that the plaintiff receive, from his own carrier, all the basic reparations benefits to which he is entitled, because he cannot collect them from the defendant or the defendant's carrier. See, e.g., Dudas v. Kaczmarek, Ky., App., 652 S.W. 2d 868 (1983).

A form, included herein, is used for this purpose. Often the insured will already have submitted it, but if he has not, it should be submitted promptly.

Once the form and the documentation have been submitted, basic reparations benefit payments should begin. It should be noted, parenthetically, that attorneys and adjusters alike often refer to these payments as "PIP", standing for personal injury protection. If the payments are not timely made, sanctions are provided by KRS 304.39-210. As to the threshold, plaintiff's counsel must be prepared, if the case reaches trial, to prove that at least one of the thresholds has been met. This would normally be accomplished via medical testimony that the plaintiff broke a bone, suffered a permanent injury, expended over $1,000.00 in reasonable and necessary medical expenses, etc.

The no-fault law has provisions whereby the no-fault carrier may recover, through subrogation, from the tortfeasor or his carrier, the
no-fault payments made. However, an important provision, which is virtually hidden in the statutes, is that if the liability coverage is insufficient to pay both the plaintiff and the subrogated no-fault carrier, the plaintiff is paid first, with the no-fault carrier's subrogation rights attaching to only what is left of the coverage, if anything. KRS 304.39-140(3).

These subrogation provisions often cause unnecessary confusion in settling cases. Plaintiff's counsel should be interested only in the sums which his client is to receive. It is good practice, in all letters and communications involving settlement, to state that the amount demanded is the sum to be received by the plaintiff himself, with subrogation, if any, to be handled separately between the carriers. This eliminates much confusion.

Most liability insurers do, in fact, negotiate in this manner. A few have the annoying habit of offering a lump sum of money, to be split between the plaintiff and the subrogated no-fault carrier. Counsel must be extremely careful in these situations to specify, with all parties involved, exactly what sum of money is to be paid to the plaintiff, and to further specify that the subrogated insurance company's name shall not appear on the check.

Besides the three departures from traditional practice stated above, if the case is tried, one further modification from traditional practice will be made. That is, the jury instructions must include special interrogatories, itemizing each element of damages, so that the trial court and, if necessary, appellate courts, may sort out
exactly what the jury was awarding in each category.
VI. [6.1] PRE-FILING PROCEDURES

A. [6.2] NOTIFICATION OF INSURER

A letter of representation should be written to the liability carrier as soon as the case is accepted. This serves two purposes. First, it will prevent the insurer from making any further direct contact with the client. Also, in the rare case where the negligent driver has failed to notify his own carrier, it will help to reduce the chance that the carrier will disclaim coverage on grounds of lack of notice.

B. [6.3] INVESTIGATION

Although methodologies will vary from lawyer to lawyer, all will agree that promptness is the key. Particularly in cases with significant liability questions, it is essential to investigate before witnesses forget what they saw and the physical characteristics of the accident scene change.

One thing that needs to be determined at the outset is what photographs have been taken, and what need to be taken. There is a box on the police report indicating whether or not photographs were taken at the scene. This will normally depend on the seriousness of the accident.

Obvious subjects for photography include damaged vehicles and photographs of the victim(s) showing bruises, lacerations, etc. Items to be photographed at the scene include damage to road signs and guard rails, showing impact of the vehicles.
Particularly in accidents which will present obvious liability questions, it is good practice to visit the scene and speak to the police officers early in the investigation. Often they will be able to provide insights beyond what is shown in their report.

Witness statements should be taken as soon as possible. Probably, the witnesses have already been interviewed (by telephone or in person) by an insurance adjuster, but it is important to get an independent statement.

Statement-taking techniques range all the way from tape recorded statements to allowing the witness merely to write out his own version of the incident. A method which has worked well for the author is as follows: first, contact the witness, and make arrangements to take the statement at the witness' convenience. Second, meet with the witness and allow the witness to tell the story of the accident, saving questions until later -- in a manner similar to that used in the initial interview with the client. Next, write out the relevant portions of the story longhand, writing only on every other line. The last paragraph of the statement will read something like "Mr. Monfort, attorney for Mary Jones, has written out this statement from information I have given him. He has explained to me that he has left large spaces between the lines, so I would have room to change anything I felt was incorrect."

Finally, present the statement to the witness for signature and dating. Sometimes the witness will want to change something. This is fine; allow him to do it in his own handwriting before signing the
Another option is to use a law clerk or outside investigator to perform the investigation. While this method has its disadvantages, one of them cost, one advantage it does have is that in the rare case that the witness disputes something in the statement, the investigator will be available to testify, thus keeping the attorney out of the awkward position of testifying himself.

C. [6.4] OBTAINING AND UNDERSTANDING MEDICAL RECORDS

A good set of medical records is necessary for evaluating the case for negotiation (either with an adjuster or defense counsel) and for trial preparation. In cases where the attorney is hired soon after the accident, obtaining the records may be delayed a bit, simply because they will not reveal much. In all other cases they should be obtained early, using the authorization which was signed at the initial interview, with the understanding that they will probably have to be supplemented as the client's medical condition changes, whether for better or worse.

There are two basic types of medical information available. The first is the narrative report, which the physician will, for a fee, prepare especially for the lawyer. Typically, this is a one or two page letter outlining history, physical examination and diagnostic testing, diagnosis, treatment, and prognosis.

Narrative reports have the advantage of being succinct and relatively easy to read, but they do not take the place of consulting the actual medical records. Those records, which consist of
physicians' office records and hospital records, must be reviewed in
detail as well. Sooner or later they will be available to defense
counsel, so plaintiff's counsel should review them early.

Because of the variety of injuries encountered, not even the most
experienced attorney will understand everything in every record. A
good basic grasp of the medical principles is, however, in all cases,
required. For the relatively inexperienced lawyer, there is no
substitute for taking the time necessary in researching medical/legal
texts, such as Gordy and Gray's *Attorneys' Textbook of Medicine*, to
learn the necessary medicine.

With experience, the lawyer will become increasingly familiar
with the more common automobile-accident injuries — in particular
the "whiplash" type neck injury and the low back injury, which may
range from the usually less serious sprain or strain to the herniated
disc. Of particular importance is understanding the various
diagnostic tests: the simple x-ray, the electromyogram (EMG), the CT
scan, the myelogram, the MRI, and others. At every opportunity, the
attorney should ask for help from physicians in explaining diagnostic
tests and other medical principles relevant to the case.

D. [6.5] CASE EVALUATION

Case evaluation is probably the single most difficult task for
inexperienced lawyers, and no lawyer ever entirely masters it. As in
the case of understanding medical records, there is no substitute for
experience. There is certainly no harm in presenting an unbiased
summary of the facts to one or more other attorneys for their
evaluation. Some firms which do a volume of personal injury work, both plaintiff and defense, regularly hold round-table discussions to evaluate cases.

Probably the worst method commonly used in evaluating cases is to multiply the medical bills by a given number. This may have limited value in persuading an adjuster (particularly where there is little else to talk about), but generally will have little impact on an experienced defense lawyer, and probably even less on a jury. Some cases have a value of 10, 20, or even more times the medical bills, while others, particularly in difficult liability situations, are scarcely worth twice the amount of the medical bills.

Rather than trying to prescribe a method for evaluating the case, what is presented here is a list of factors which should be considered in evaluating the case:

a) The liability situation, particularly with reference to facts from independent eyewitnesses and physical evidence.

b) Whether the jury will like and trust the plaintiff.

c) Whether the jury will like and trust the defendant.

d) Whether the defendant is a "deep pocket", such as a utility, corporation, etc., or an individual.

e) The medical diagnosis and prognosis, particularly with respect to permanency.

f) Whether the injury is one which can be easily demonstrated, such as a broken arm, or is more difficult to demonstrate, such as a neck strain. Note that this is a particular challenge for the lawyer,
because, ironically, broken bones often heal well, with little or no residual problems, while soft tissue injuries tend to linger and cause problems for years after the accident.

g) The effectiveness of the medical proof. This depends on what the doctors say, but may depend even more on how they say it and how credible they appear to be. A defense doctor who minimizes an obviously serious injury may help the plaintiff's case rather than hurt it, because he undermines the credibility of the entire defense.

h) The amount of the medical bills, and the projected future medical bills. If a large portion of the bills have gone for diagnosis, rather than treatment, the defense will be certain to emphasize this fact.

i) The impairment of earning capacity. This is important everywhere, and is particularly important in an area such as where the author practices, conservative and hard working, where jurors may be reluctant to award money for pain and suffering but readily identify with loss of earnings.

E. [6.6] SETTLEMENT

If the lawyer and the client are both satisfied that a settlement offer, achieved after negotiation, represents fair compensation for the injuries suffered, there is certainly nothing wrong with taking it. In both financial and emotional terms, a settlement achieved today may be better for the client than one which is ten percent higher, achieved after two years of litigation.

Once suit is filed, however, preparation for trial, not
settlement, should be the major focus. The better a case is prepared for trial, the more chance there is of achieving a fair settlement.

Settlement of cases requires tenacity and hard work. The lawyer should not expect to be able to hold back major items of proof and still achieve a good settlement. Whether dealing with an adjuster or defense counsel, he must be prepared to submit good documentation for the settlement demand, in terms of medical bills, reports and records, documentation of lost wages, and, at times, even case law supporting his legal position.

Plaintiff's counsel now has a statutory tool to handle those rare cases where the insurance carrier engages in practices which are recognized to be unfair. This is the Unfair Claims Settlement Practices Act, codified as KRS 304.12-230. Although the Act was probably designed principally to aid claimants in dealing with their own carriers, it can, in certain situations, be relevant with respect to a liability carrier as well. State Farm Automobile Insurance Company v. Reeder, Ky., 763 S.W. 2d 116 (1988).
VII. [7.1] FILING SUIT

A. [7.2] DECISION TO FILE

There are several occurrences which may trigger the decision to file. One of these is negotiations which have stalled, or an initial offer which is so low that it is obvious that suit will ultimately have to be filed, anyway. Obviously, another reason is an impending statute of limitations. A refusal by the adjuster to disclose the policy limits is, for many attorneys (the author included), an indication that it is time to file. Finally, in the large case, it is often a good idea to file shortly after the attorney is hired. These cases nearly always end up in a lawsuit, and there is no sense in delaying the case even more by waiting to file.

B. [7.3] PLEADINGS

The Civil Rules permit a short, simple complaint, and there is no reason not to use one, even in the major case. A sample is provided as a form. Only a few specific observations are necessary. Even though it may not technically be a requirement, it is good practice to affirmatively allege that a threshold has been met. Also, of particular interest to counsel from other states, it should be noted that a particular sum of unliquidated damages may not be recited in the complaint. CR 8.01(2).

In virtually every case, either a no-fault carrier or health insurance carrier will have certain subrogation rights. Where this is
the case, the plaintiff must notify the subrogation holders, and file a list of the persons notified along with the complaint. KRS 411.188(4). A copy of this pleading is also provided.

C. [7.4] SERVICE OF PROCESS

Although certified mail service is authorized by the rules, service by the sheriff is usually utilized in auto accident cases. This is because if the defendant refuses to accept the certified mail service, sheriff service will have to be utilized, and time will be lost in the process.

In the case of a non-resident motorist, a special long-arm statute makes service possible through the Secretary of State. KRS 188.020 and 188.030. In these cases, it is also good practice to allege, within the body of the complaint, that the defendant is a non-resident, and that service is made through the Secretary of State.

In the standard auto accident case, an insurance company will not be a defendant. In special cases, however, such as where an uninsured motorist carrier is sued, the method of service on the insured depends on whether it is a domestic corporation (unlikely) or a foreign corporation. See KRS 271B.5-040, KRS 304.3-230(4) and KRS 304.3-230(1).
VIII. [8.1] DISCOVERY

A. [8.2] ELIMINATING "BOILERPLATE" DEFENSES

Although it appears to occur less often, probably because of Rule 11, the lawyer will occasionally receive an answer filled with what appear to be irrelevant defenses, such as statute of limitations, lack of jurisdiction, improper venue, etc. When this occurs, plaintiff's counsel should move promptly to remove these defenses from the record.

To do so, she can send interrogatories, or perhaps better still, requests for admission, asking defense counsel to explain the facts and law supporting each of these defenses. More often than not, the obviously inappropriate defenses will then be withdrawn. If not, they will probably be stricken upon proper motion.

B. [8.3] USE OF INTERROGATORIES AND OTHER WRITTEN REQUESTS

In general, interrogatories and requests for admission are a poor method for obtaining information by the plaintiff in an accident case. The answers are certain to be written or reworded by defense counsel, and permit no follow-up. There are, however, a few areas which do lend themselves to the use of interrogatories. These are: insurance information; information regarding expert witnesses; the identity of eyewitnesses (which should also be explored on deposition); and information regarding documents and other exhibits to be introduced at trial. Interrogatories covering these subjects are enclosed in the forms.

C. [8.4] DEPOSING THE DEFENDANT AND EYEWITNESSES
Even where liability appears crystal-clear, deposing the defendant is a "must". If nothing else, this will provide a look at the defendant and provide valuable information as to whether he is a party with whom the jury would identify at trial.

Questions asked at the deposition should include general background questions, a driving history from the date of his first drivers license (ask to see the current drivers license), a detailed description of how the accident happened, including the weather, road conditions, and condition of the vehicle, and questions regarding all known witnesses. Since it is virtually certain that the defendant has claimed negligence on the part of the plaintiff, it is also fair to ask "What, exactly, do you claim Mr. Brown did wrong?" This will sometimes bring an objection, but will almost always also bring an answer. In a surprising percentage of cases the answer will be "nothing".

Unless she has an unusually good memory, plaintiff's counsel should also make notes as to the defendant's appearance, demeanor, etc. These will prove valuable at a later date.

As to eyewitnesses to the accident, every effort should be made to take a statement, rather than utilizing a deposition. If these efforts fail, and the case has any chance of being contested on a liability basis, these eyewitnesses must be deposed, and a subpoena may be utilized if necessary to force them to testify.

D. [8.5] DEPOSITING DEFENSE EXPERTS

Technically, a party does not have the right to depose an
opposing expert. CR 26.02(4)(a)(i). In reality, however, this can almost always be accomplished, either by agreement of the parties, or order of court.

If the plaintiff has submitted to an independent medical evaluation by the defense, the defense is required to provide a detailed report of the physician. CR 35.02(1). Normally, this report will be sufficient, and it will not be necessary to depose the doctor.

Other defense experts may be utilized, including accident reconstructionists, engineers, and economists. Almost without exception, these experts should be deposed, as the lawyer will not be able to prepare sufficiently through the meager answers supplied to interrogatories.

E. [8.6] PREPARING THE PLAINTIFF FOR HIS OWN DEPOSITION

Preparing the plaintiff for his own deposition is one of the most crucial steps of the case. Some clients will obviously require more time than others, but a substantial amount of time should be spent with all clients.

The lawyer should develop some sort of brochure or handout to mail to the client about a week prior to the deposition. The author uses one of these, but has not provided it, because it was taken almost verbatim from a book, and is probably protected by copyright. Good forms for this type of handout appear in Handling Soft Tissue Injury Cases, by Preiser and Preiser, Kluwer Lawbook Publishers, Inc. and The Anatomy of a Personal Injury Lawsuit, Second Edition,
published by the Association of Trial Lawyers of America Education Fund. Whatever form is used, it should outline the deposition process, and give specific recommendations as to truthfulness, responsiveness, and general demeanor.

In addition to the use of the brochure, it is vital to meet with the client immediately before the deposition, for as long a period as is felt will be necessary. The lawyer should go through the brochure, point by point, and answer questions. Emphasis, again, is on telling the truth; making sure the deponent understands the question before it is answered; being responsive, and not rambling; and on maintaining a businesslike demeanor.

There are several suggestions the author makes to his client in each of these sessions. One is "Don't try to guess what answer I want you to give, just tell the truth. If you try to guess, I guarantee that you will guess wrong." Another suggestion is to remind the client that besides evaluating the answers, defense counsel is also evaluating him. Therefore it is important to maintain the proper demeanor.

Finally, it is a good idea to explain to the client that, while plaintiff's counsel has the opportunity to ask questions himself, he probably will not. One way to put it is "The defense counsel will get answers to 300 questions. Why should I make it 301 or 302?"
IX. [9.1] TRIAL PREPARATION

A. [9.2] IN GENERAL

Trial preparation actually began the day the client walked in the door. What follows is a list, certainly not all-inclusive, of the major tasks, other than discovery, plaintiff's counsel will be accomplishing as the trial date approaches. The order given is not intended to be chronological, as each case is different, and often many of the activities are going on simultaneously.

One excellent aid in organizing trial preparation is a trial notebook, a looseleaf notebook with separate sections for jury, voir dire, opening statement, plaintiff's testimony, witnesses, etc. The lawyer may want to set up such a system on his own; or, an excellent system called Trial By Notebook is commercially available from the Association of Trial Lawyers of America Education Fund.

B. [9.3] SETTING THE CASE FOR TRIAL

In most cases, the plaintiff and his lawyer would both very much like to see the case settled. But the worst thing that could happen is merely for the case to sit. A way of avoiding this is to set the case for trial fairly early in the process, to force both lawyer and client to being preparing in earnest, and to realistically evaluate the case for settlement purposes.

The timing of setting the case for trial depends on many factors, among them the plaintiff's medical condition (and whether it is improving or deteriorating). It also depends largely upon the backlog in the particular court where the case is pending. As an example, one
of the courts where the author practices has had a backlog of 18 months or more between the date the motion to set was filed and the actual trial date. In this court, it was common practice to set cases for trial immediately after the answer was filed, with all parties understanding that they would have plenty of time to complete discovery and prepare for trial in the interim. In that same court, the docket has now been caught up so much that the judge requires, as a condition of filing the motion to set, that counsel be prepared to try the case within 60 days. Therefore, knowledge of the local court situation is indispensable.

C. [9.4] PREPARING WITNESS LISTS AND SUBPOENAING WITNESSES

Fairly early in the trial preparation, the lawyer should have a general idea of what witnesses he wishes to call, and should be starting to think about what order of witnesses he wishes to use. With rare exceptions, it is not a good idea to assume that even a friendly witness will voluntarily show up for trial — use a subpoena, and use it early! It can be explained to the witness that the subpoena is something he can take to his employer, to show that he has no choice about appearing in court.

D. [9.5] DETERMINING NEED FOR EXPERT WITNESSES

Other than doctors, who are discussed below, the experts most commonly used in auto accident cases are accident reconstructionists and economists. Occasionally, in a more exotic case, other specialists, such as engineers and human factors experts, may be
needed as well.

If an expert such as a reconstructionist or an economist is to be used, the decision needs to be made as early as possible. Sometimes the first such expert interviewed will prove to be unsatisfactory or unavailable.

E. [9.6] PREPARING PRE-TRIAL MEMORANDA AND JURY INSTRUCTIONS

Most courts require counsel to submit some sort of pre-trial memoranda in automobile accident cases. Information required may include a brief factual summary, listing of special damages, and an outline of any evidentiary questions or other questions which are expected to appear at trial. Federal courts typically require a much more comprehensive memorandum. In both cases, counsel will usually be expected to tender jury instructions.

Even if the court does not require submission of such a memorandum, the plaintiff's attorney should consider preparing one for his own use. These memoranda are a useful tool in trial preparation, to demonstrate what has been done and what still needs to be done.

F. [9.7] ORGANIZING PROOF OF MEDICAL EXPENSES AND LOST WAGES

While the plaintiff may testify as to her own medical expenses, additional testimony is necessary to establish that the expenses are reasonable, necessary, and related to the accident. Local practice may vary as to what is expected in this regard. It is a rare case where every physician and medical provider (which usually includes radiologists) testifies. One method which courts will typically
accept is to have a primary physician, such as a family doctor or orthopaedist, testify as to the amount, reasonableness, and relatedness of his own bills. He is then read a summary of all the other medical bills in the case, including physicians, hospitals, and prescriptions, and is asked to render a similar opinion with respect to those.

Typically, the bills themselves are introduced into evidence, as exhibits, so the jury may examine them. Today bills are often computerized, and usually contain references to insurance payments and other prohibited subjects. To avoid problems with these, once it appears that the case is going to trial, each medical provider should be asked to provide a "clean" bill, that is, a simple listing of the services provided, along with the date and charge for each.

6. [9.8] PREPARING EXHIBITS AND DEMONSTRATIVE EVIDENCE

Experienced trial lawyers know that jurors usually remember considerably more of what they see than what they hear. It is therefore important to use demonstrative evidence to keep the trial interesting, and present major concepts. Preparation of these materials can be time consuming, so thought should be given to them well before trial.

Some possibilities for demonstrative evidence include: charts summarizing medical bills; charts summarizing doctor visits; key deposition pages, blown up to poster size; large diagrams of the accident scene; and aerial photographs of the accident scene. Aerial photographs are available from the Transportation Cabinet for any
location in Kentucky, and are surprisingly affordable. The lawyer should make a personal visit to the District Office of the Cabinet to specify exactly what is needed.

H. [9.9] SUMMARY JUDGMENT MOTION

In 1986, the Supreme Court of the United States decided **Celotex Corp. v. Catrett**, 477 U.S. 317, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986), which made summary judgments easier to obtain, at least in federal court. Perhaps encouraged by this development, defense counsel in automobile accident cases appear to be filing summary judgment motions with more frequency.

There is a greater variance among the practices of judges in the handling of summary judgment motions than in almost any other area. Some judges grant these motions rather readily, while others will virtually never grant a summary judgment motion. Summary judgments in auto accident cases are rather rare, because of the factual disputes involved in most of them; but when faced by such a motion, plaintiff's counsel should definitely take it seriously, and endeavor to make sure there is sufficient evidence, either by deposition or affidavit, to defeat the motion.

In cases where the liability of the defendant(s) is clearly established by discovery, plaintiff's counsel should file a motion for partial summary judgment as to liability only. Even where not successful, this motion will force the defense to come forth with all of its evidence, including anything which might have been missed during discovery.
I. [9.10] MEDICAL PROOF

Good results in automobile accident cases depend on good medical proof. This begins by determining what doctors will testify, and how they will testify.

In many cases it is not necessary to call every doctor who treated the plaintiff. Doing so will add to the expense of trying the case, increase the possibility of contradictions from doctor to doctor, and, in some cases, strengthen the impression that the Plaintiff has gone from doctor to doctor seeking a favorable opinion. Usually, however, in the typical case where the plaintiff has been treated by specialists, at least one specialist should be called as a witness.

Physicians cannot be subpoenaed to court to testify. See CR 45.05(2) and CR 32.01. This rule, when coupled with the fact that having a physician wait at court to testify at an unknown time can be extremely expensive, results in physicians often testifying by deposition, rather than by personal appearance.

In the major case, which justifies the cost of a physician appearing live, the personal appearance can be very effective. Counsel are cautioned to have a firm agreement with the doctor as to his appearance; if he does not appear, a continuance cannot be guaranteed, particularly where there is other medical proof available.

Short of a personal appearance in court by the doctor, the format recommended in most cases is the videotaped deposition. Jurors are accustomed to watching television, and a videotape of one hour or

50
less, if kept interesting, should hold the attention of the jurors.

In contrast, the old method of merely reading a deposition to the jury is virtually guaranteed to put them to sleep, and should generally be avoided. The rare exception would be a doctor whose testimony is crucial, but is extremely camera-shy or unimpressive on camera. Because doctors' depositions are a crucial portion of the case, counsel should expect to spend a significant amount of time preparing for them. Direct examination, even in a major case, should not exceed about one-half hour. Also, in the preparation for the deposition, the doctor should be reminded to speak English (left arm, not "left upper extremity").

In addition to the testimony of physicians, hospital records often make up part of the proof. One particularly important part of these records may be the nurses' notes, because the nurse may have made notations as to the obvious pain that the plaintiff was suffering. Arrangements should be made well before trial to obtain and certify whatever records are to be introduced, pursuant to KRS 422.300, et seq.

J. [9.11] MOTION IN LIMINE

The motion in limine is a device to prohibit highly prejudicial subjects from being raised at trial. Often in these areas, if the question is even asked, the damage is already done. Regardless of whether or not the objection is sustained, the jury members have heard the question, and will unable to erase the suggestion from their minds. In aggravated cases, a mistrial may be declared; but this must
be regarded as a loss for the Plaintiff, because resolution of the case is delayed, and he must once again prepare for and go through trial.

Sometimes questions asked on deposition will provide a clue to defense strategies. If, for instance, defense counsel has asked quite a number of questions about an old alcoholism problem he may be planning to use that information at trial, even if the Plaintiff has not had a drink in 20 years.

Judges often will consider motions in limine even if filed immediately before trial. However, where possible, Plaintiff's counsel should file them at lease several weeks in advance of trial, to allow for unhurried consideration by the Court.

K. [9.12] REVIEWING JUROR INFORMATION SHEETS AND PREPARING VOIR DIRE

As soon as juror information sheets are available from the clerk, they should be reviewed by counsel. These contain a considerable amount of useful information about the jurors, including age, occupation, and marital status.

The author performs two separate pre-trial steps in preparing for juror selection: preparing questions for the jurors and making a preliminary analysis of the jurors, attaching a positive, neutral, or negative ranking to each juror. These will, of course, be subject to change during the actual jury selection process.

L. [9.13] PREPARING OPENING STATEMENT

As stated below, the opening statement may be the single most
important element of the trial. It is important to spend considerable time on its preparation before trial.
X. [10.1] THE TRIAL

A. [10.2] IN GENERAL

As with other portions of this monograph, a detailed description of trial practices is well beyond its scope. Some subjects, such as motions during and after trial, are omitted entirely. The best that can be hoped for is highlighting some areas of concern. New (or old, for that matter) trial lawyers can learn much from the practical seminars which are presented, particularly by organizations such as KATA and ATLA.

B. [10.3] THE CORNERSTONES - USE OF THEME, PRIMACY, SIMPLICITY, FORCEFULNESS, HONESTY

The five principles listed above are generally recognized as being important in the trial of every case. The first of these is the use of a theme -- a short, simple theory of the case which can be carried through from the moment the trial begins to the end of closing argument. A sample would be "John Smith's promising basketball career was cut short in an instant by the thoughtless acts of a drunk driver."

Primacy is the principle, learned from psychologists, that people make up their minds very quickly from the first pieces of information they hear. Tests have shown that an astoundingly large percentage of jurors have their understanding of the case fully formed by the end of opening statements -- before a single word of testimony has been heard. Some even make up their minds during voir dire. It is therefore crucial to deliver an effective opening statement, and to be
persuasive from the very beginning.

Another principle from the psychologists is that the message has to be simple. This ties in with the use of the theme. If, in preparation, the Plaintiff's attorney determines she has 9 major points she wishes to get across to the jury, she simply must eliminate some of them. Pick a few simple points, and build the entire case around them.

Forcefulness and self-confidence are also important. If the lawyer does not believe in her own case, how can the jury be expected to believe in it? There are negative aspects to every case, and these should be mentioned by Plaintiff's counsel in advance, to take the "sting" out of their use by the defense. However, all major portions of the case, including but not limited to opening statement, direct examination of the Plaintiff, and closing argument, should both begin and end on a high note.

Finally, honesty is of paramount importance. By trial, the Plaintiff undoubtedly will have been cautioned many times to be scrupulously honest, and not to exaggerate his injuries. A dishonest or exaggerated answer to a relatively innocuous question can sometimes taint the entire case.

C. [10.4] JURY SELECTION

Volumes of information are available on the art of jury selection. Included in them are authors' viewpoints as to the preferred age, race, sex, and occupation of jurors for particular types of cases. While these are useful, peremptory strikes must,
ultimately, be made on a juror-by-juror basis. A good rule to follow is: if you, or your client, takes an instant dislike to a juror, strike him. He probably does not like you, either.

Besides the art involved in jury selection, the lawyer must understand the mechanics, as well. Kentucky follows a rather unusual procedure in which all peremptory challenges are exercised at once. CR 47.03(3). An attorney handling her first jury trial in Kentucky would be well advised to attend another trial, to observe the process first-hand.

D. [10.5] OPENING STATEMENT

As noted above, the opening statement is perhaps the most crucial element of the trial. Counsel must present, in a positive, logical, and interesting fashion, why her client is entitled to be compensated. This is best done by presenting a summary of the evidence in story form, making use of the theme, and avoiding legalistic phrases such as "We expect the evidence to show. . .".

E. [10.6] CASE IN CHIEF, AVOWALS

Plaintiff's counsel must present her case in a logical fashion. Traditionally, this involves beginning with the liability issues and then moving on to the damage issues. It is important that the first and the last witnesses be strong.

Kentucky law requires that the Plaintiff testify first. KRS 421.210(3). Case law construing the statute provides that the judge may permit a different order, in his discretion; but counsel should be extremely careful with this rule, as many judges enforce it to the
letter.

One other evidentiary matter should be of note. Like most states, Kentucky requires that if the court sustains an objection to testimony, that testimony must be made to the Court out of the hearing of the jury, to preserve the error for appeal. Some jurisdictions call this an offer of proof or a proffer; Kentucky calls it an avowal. CR 43.10.

F. [10.7] CROSS-EXAMINING DEFENSE WITNESSES

Cross-examining witnesses is no different in an automobile accident case than in any other case. As is well known, the primary rule is to avoid asking a question to which one does not know the answer. Some experienced trial lawyers modify the rule to state "Do not ask a question to which you cannot handle the answer."

Jurors expect vigorous cross-examination of obvious advocates, such as the physicians called by the defense. With lay witnesses, however, such as independent eyewitnesses to the accident, a much gentler approach must be used. These persons did not ask to become involved in the case, and jurors normally will identify strongly with them.

G. [10.8] PREPARATION OF INSTRUCTIONS

The instruction of juries is another area where Kentucky practice departs radically from that of many other states. Kentucky uses "bare bones" instructions, meaning that, in the case of an auto accident, the jury may be given a few simple definitions, the duties which each party had at the time of the accident, and simple instructions for
apportioning and awarding damages. In federal court, however, the instructions are likely to be much more voluminous.

Another area where Kentucky differs from some other states is that instructions are read to the jury before, not after, closing arguments. Typically, after both sides have rested the judge will call a recess, at which time the parties will discuss their proposed versions of the instructions. Any objections to the final version which the court prepares must be made at that time, or the error will be waived.

H. [10.9] CLOSING ARGUMENT

Unlike the practice in many other states, in Kentucky, each party gives only one closing argument. The Plaintiff is, of course, last.

The closing argument should be based around the theme which has been developed during the case. It should start and end on a high note. While following those general principles, the attorney has considerable flexibility in delivering a closing argument suited to her particular style.

There are two specific Kentucky rules of which the attorney must be aware. The first is that Kentucky does permit the per diem argument, which breaks down pain and suffering into a specific award for a unit of time, such as a day or an hour. Southard v. Hancock, Ky. App., 689 S.W. 2d 616 (1985).

The attorney should also be aware, however, that Kentucky does not permit a "golden rule" argument. This is one where the attorney asks the jurors to put themselves in the place of the defendant.
Stanley v. Ellegood, Ky., 382 S.W. 2d 572 (1964). This should be scrupulously avoided, to prevent the chance that reversible error will occur at the very end of an otherwise successful trial.
XI. [11.1] Appendix - Forms

COM MONWEAL TH O F KE NTUCKY

BOONE CIRCUIT COURT

CASE NO. __________

(PLAINTIFF'S NAME), et al

PLAINTIFFS

VS.

CERTIFICATE OF NOTIFICATION

(DEFENDANT NAME), et al

DEFENDANTS

* * * * * * * * *

Comes now the undersigned, attorney for Plaintiff, and pursuant to KRS 411.188, certifies notification of the following:

(HERE SET OUT SEPARATELY THE NAMES AND ADDRESSES OF EACH INSURANCE COMPANY, INCLUDING NO-FAULT PROVIDERS AND HEALTH CARE PROVIDERS, WHICH HAS A SUBROGATION INTEREST)

Robert D. Monfort
31 East Fourth Street
Newport, Kentucky 41071
(606) 581-8811

Attorney for Plaintiffs
B. [11.2] Complaint with Demand for Jury Trial

COMMONWEALTH OF KENTUCKY

BOONE CIRCUIT COURT

CASE NO.  

(PLAINTIFF'S NAME) and (NAME OF SPOUSE)

VS.  

(DEFENDANT DRIVER)

(ADDRESS)  

and

(DEFENDANT UNINSURED MOTORIST CARRIER)

(ADDRESS)

SERVE: Kentucky Secretary of State

* * * * * * * * * * *

Come now the Plaintiffs, (INJURED PLAINTIFF AND SPOUSE), and for their complaint state as follows:

FIRST CLAIM

1. On June 30, 1990, Plaintiff, (NAME OF INJURED PLAINTIFF) was a passenger in an automobile driven by (DRIVER OF CAR IN WHICH PLAINTIFF WAS A PASSENGER) on Middlecreek Road in Boone County, Kentucky.

2. At the aforesaid time, Defendant, (DEFENDANT DRIVER), was also operating an automobile on Middlecreek Road, at or near the same place.

3. At the aforesaid time and place, Defendant, (DEFENDANT DRIVER), operated her vehicle in such a negligent manner as to collide
with the automobile in which Plaintiff (NAME OF INJURED PLAINTIFF) was riding.

4. As a direct and proximate result of the negligence of Defendant, (DEFENDANT DRIVER), as set forth above, Plaintiff, (NAME OF INJURED PLAINTIFF), was severely injured and has suffered, is suffering, and will continue to suffer great physical pain and mental anguish, all to his damage.

5. As a further direct and proximate result of the negligence of Defendant, (DEFENDANT DRIVER), as set forth above, Plaintiff, (NAME OF INJURED PLAINTIFF), has incurred expenses for medical care and treatment and will in the future be required to incur additional expenses for medical care and treatment, all to his damage.

6. As a further direct and proximate result of the negligence of Defendant, (DEFENDANT DRIVER), as set forth above, Plaintiff, (NAME OF INJURED PLAINTIFF), has lost earnings and fringe benefits, will continue to lose earnings and fringe benefits and has suffered permanent impairment to his earning capacity, all to his damage.

7. This action is filed pursuant to Chapter 304.39 of the Kentucky Revised Statutes. Plaintiff, (NAME OF INJURED PLAINTIFF), states that his "medical expense" caused by the accident and as defined by the aforesaid Chapter, exceeds $1,000.00; and/or that he has exceeded one or more of the other thresholds contained therein. The damages herein are sufficient to invoke the jurisdiction of the Circuit Court.

SECOND CLAIM

8. Plaintiffs restate and incorporate by reference all allegations of the First Claim, above, except to the extent that said
allegations are unnecessary for the claim stated herein.

9. Plaintiff, (SPOUSE OF INJURED PLAINTIFF), is, and has been at all times, the (HUSBAND OR WIFE) of Plaintiff, (NAME OF INJURED PLAINTIFF).

10. As a direct and proximate result of her (HUSBAND'S OR WIFE'S) injury, as stated above, and further as a direct and proximate result of the negligence of Defendant, (DEFENDANT DRIVER), as stated above, Plaintiff, (SPOUSE OF INJURED PLAINTIFF), has been deprived of the services of her (HUSBAND OR WIFE) and her comfort and happiness in his society and companionship have been impaired, and it appears that such deprivation and impairment will continue in the future, all to her damage in a sum sufficient to invoke the jurisdiction of the Circuit Court.

THIRD CLAIM

11. Plaintiffs restate and incorporate herein by reference all allegations of the First Claim and Second Claim, above, except to the extent that said allegations are unnecessary for the claim stated herein.

12. Defendant, (UNINSURED MOTORIST CARRIER), is a non-resident insurance company authorized to do business in the Commonwealth of Kentucky and doing business in the Commonwealth of Kentucky, and is therefore subject to service of process through the Secretary of State.

13. At the time and place of the accident, (DRIVER OF CAR IN WHICH PLAINTIFF WAS A PASSENGER) carried on the vehicle he was driving in the accident a policy of insurance with Defendant, (UNINSURED MOTORIST CARRIER), which included an uninsured motorist provision
which inures to the benefit of Plaintiffs.

14. At the time and place of the accident, Defendant, (DEFENDANT DRIVER), is believed to have been uninsured, and her status as an uninsured motorist is sufficient to invoke the provisions of the (UNINSURED MOTORIST CARRIER) policy in favor of Plaintiffs. Defendant, (UNINSURED MOTORIST CARRIER) is, therefore, jointly and severally liable to Plaintiffs, to the extent of the coverage of its uninsured motorist clause for damages negligently caused to Plaintiffs by Defendant, (DEFENDANT DRIVER).

WHEREFORE, Plaintiffs demand judgement against Defendants, jointly and severally, in a sum sufficient to fully compensate them for their damages, as set forth above, and as shown by the evidence; and further demand their costs herein expended and any and all other relief to which they may appear entitled.

PLAINTIFFS DEMAND TRIAL BY JURY.

Robert D. Monfort
31 East Fourth Street
Newport, Kentucky 41071
(606) 581-8811

Attorney for Plaintiffs
(Kentucky No-Fault)

**DATE** | **OUR POLICYHOLDER** | **DATE OF ACCIDENT** | **FILE NUMBER**
---|---|---|---

1. **YOUR NAME**
   - **HOME Phone Number**
   - **BUSINESS Phone Number**

2. **YOUR ADDRESS**
   - **NO. STREET, CITY OR TOWN, STATE & ZIP CODE**
   - **DATE OF BIRTH**
   - **SOCIAL SECURITY NO.**

3. **DATE AND TIME OF ACCIDENT**
   - **PLACE OF ACCIDENT**
   - **STREET, CITY OR TOWN AND STATE**

4. **NAME OF COMPANY**
   - **A.M.**
   - **P.M.**

5. **DO YOU OR ANY MEMBER OF YOUR HOUSEHOLD OWN A MOTOR VEHICLE?**
   - **YES**
   - **NO**

   **WAS THE DRIVER OF THE MOTOR VEHICLE YOU OR ANY MEMBER OF YOUR HOUSEHOLD?**
   - **YES**
   - **NO**

   **WERE YOU A PASSENGER IN THE MOTOR VEHICLE YOU OR ANY MEMBER OF YOUR HOUSEHOLD?**
   - **YES**
   - **NO**

   **WERE YOU A PEDESTRIAN?**
   - **YES**
   - **NO**

6. **AS A RESULT OF THIS ACCIDENT WERE YOU INJURED?**
   - **YES**
   - **NO**

7. **DESCRIBE YOUR INJURY**

8. **WERE YOU TREATED BY A DOCTOR?**
   - **YES**
   - **NO**

9. **WERE YOU TREATED IN A HOSPITAL?**
   - **IN-PATIENT**
   - **OUT-PATIENT**

10. **AMOUNT OF MEDICAL BILLS TO DATE:**
    - **$**

11. **WILL YOU HAVE MORE MEDICAL EXPENSES?**
    - **YES**
    - **NO**

12. **AT THE TIME OF YOUR ACCIDENT, WERE YOU IN THE COURSE OF YOUR EMPLOYMENT?**
    - **YES**
    - **NO**

13. **AMOUNT LOST TO DATE:**
    - **$**

14. **WHAT IS YOUR AVERAGE WEEKLY WAGE OR SALARY?**
    - **$**

15. **IF YOU LOST WAGES:**
   - **BEGINNING DATE OF DISABILITY FROM WORK:**
   - **DATE YOU RETURNED TO WORK:**

16. **HAVE YOU RECEIVED OR ARE YOU ELIGIBLE FOR BENEFITS UNDER:**
   - **1. ANY WORKMEN'S COMPENSATION LAW?**
     - **YES**
     - **NO**
   - **2. SOCIAL SECURITY BENEFITS?**
     - **YES**
     - **NO**

17. **AMOUNT:**
    - **$**

18. **LIST NAMES & ADDRESSES OF YOUR EMPLOYER & OTHER EMPLOYERS FOR 1 YEAR PRIOR TO ACCIDENT DATE. GIVE OCCUPATION & EMPLOYMENT DATES:**

<table>
<thead>
<tr>
<th>Employer and Address</th>
<th>Occupation</th>
<th>From</th>
<th>To</th>
</tr>
</thead>
<tbody>
<tr>
<td>Employer and Address</td>
<td>Occupation</td>
<td>From</td>
<td>To</td>
</tr>
<tr>
<td>Employer and Address</td>
<td>Occupation</td>
<td>From</td>
<td>To</td>
</tr>
</tbody>
</table>

I hereby authorize release of medical information, including but not limited to, medical bills and reports, to such persons as the company may deem necessary.

19. **AS A RESULT OF YOUR INJURY, HAVE YOU HAD ANY OTHER EXPENSES?**
    - **YES**
    - **NO**

   **IF "YES", EXPLAIN ON REVERSE SIDE:**

   **SIGNATURE:**
   - **DATE:**

---

**DO NOT DETACH**

**AUTHORIZATION FOR MEDICAL INFORMATION**

This authorization or photocopy hereof will authorize you to furnish all information you may have regarding my condition while under your observation or treatment, including the history obtained, X-ray physical findings, diagnosis and prognosis. You are authorized to provide this information in accordance with the personal injury protection benefits (Kentucky No-Fault) law.

**SIGNATURE:**
- **DATE:**

---

**DO NOT DETACH**

**AUTHORIZATION FOR WAGE AND SALARY INFORMATION**

This authorization or photocopy hereof will authorize you to furnish all information you may have regarding my wages or salary while employed by you. You are authorized to provide this information in accordance with the personal injury protection benefits (Kentucky No-Fault) law.

**SIGNATURE:**
- **DATE:**

---

**KY NA 11 (3-78)**

65
AUTHORIZATION FOR MEDICAL INFORMATION

TO WHOM IT MAY CONCERN:

This authorizes physicians, hospitals, and all medical attendants to furnish full and complete medical reports and information to Robert D. Monfort, Attorney at Law, 31 East Fourth Street, Newport, Kentucky 41071, or to any representative, investigator or other agent of said Robert D. Monfort; and especially any and all medical reports and information concerning

This authorization also includes examination of all hospital records, X-ray films, and the furnishing of any information including opinions, which will aid said attorney.

Your full cooperation with the attorney is requested. You are further requested to disclose no information to any adjuster or other persons without written authority from me or my attorney to do so.

A photocopy of this authorization shall be as valid as the original.

ALL PRIOR AUTHORIZATION IS HEREBY CANCELLED.

Patient

DATED this ___ day of ____________, 19__.
CONTINGENCY FEE CONTRACT

called "Client(s)," hereby employ(s) Robert D. Monfort, Attorney at Law, hereinafter called "Attorney," to represent Client(s) in recovering damages by settlement or suit from ____________________________.

As compensation, Attorney is to receive an amount equal to ___ per cent of the gross recovery on said claim by settlement or suit. This fee covers all duties normally performed but does not cover any appeal which might be taken. It is further agreed that in addition to the aforesaid compensation, Client(s) is/are to bear the cost of all out-of-pocket expenses which may be incurred including, but not limited to, court costs, depositions, expert witnesses, travel and long distance phone calls. Said expenses are payable by Client(s) regardless of the outcome of the case.

Client(s) shall assist Attorney in furtherance of this case; Attorney agrees to pursue the matter diligently.

Additional terms: __________________________________________

__________________________________________________________

__________________________________________________________

__________________________________________________________

Signed in ____________________________, ____________________________, this ______ day of ____________________________, 19__.

______________________________  ______________________________

Client

______________________________  ______________________________

Robert D. Monfort  Client

CONTINGENCY FEE CONTRACT: #1-RDM
AUTHORIZATION FOR EMPLOYMENT, 
WAGE AND SALARY INFORMATION

TO WHOM IT MAY CONCERN:

This authorizes any firm, corporation, company, public agency or other employer to furnish to Robert D. Monfort, Attorney at Law, 31 East Fourth Street, Newport, Kentucky 41071, or to any representative, investigator or other agent of said Robert D. Monfort, any and all information or opinions which they may request regarding my present or past employment, payroll records, and any other information that may be kept by said firm, corporation, company, agency, or others by virtue of my employment or association with them. My said attorney has been retained by me to prosecute a claim for damages sustained and your full cooperation with my attorney is requested. You are further requested to disclose no information to any other person, without written authorization by me to do so. All prior authorization is hereby cancelled. A photocopy of this authorization shall have the same force and effect as the original.

DATED this ___ day of ____________________, 19__. 

WAGE & SALARY AUTHORIZATION:#1-RDM
Rule 8.01. Claims for relief. — (1) A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross claim, or third-party claim, shall contain (a) a short and plain statement of the claim showing that the pleader is entitled to relief and (b) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

(2) In any action for unliquidated damages the prayer for damages in any pleading shall not recite any sum as alleged damages other than an allegation that damages are in excess of any minimum dollar amount necessary to establish the jurisdiction of the court; provided, however, that all parties shall have the right to advise the trier of fact as to what amounts are fair and reasonable as shown by the evidence. When a claim is made against a party for unliquidated damages, that party may obtain information as to the amount claimed by interrogatories; if this is done, the amount claimed shall not exceed the last amount stated in answer to interrogatories. (Amended October 18, 1977, effective January 1, 1978; amended June 29, 1984, effective January 1, 1985; amended June 30, 1986, effective January 1, 1987.)

Rule 11. Signing of pleadings, motions, and other papers — Sanctions. — Every pleading, motion and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address. Except when otherwise specifically provided by Rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certification by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee. The Court shall postpone ruling on any Rule 11 motions filed in the litigation until after entry of a final judgment. (Amended July 8, 1983, effective January 1, 1984; amended July 12, 1989, effective August 28, 1989.)
Rule 26.02. Scope of discovery. — (1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) Insurance Agreements. A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this section, an application for insurance shall not be treated as part of an insurance agreement.

(3) Trial Preparation: Materials.

(a) Subject to the provisions of paragraph (4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under paragraph (1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

(b) A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37.01(4) apply to the award of expenses incurred in relation to the motion. For purposes of this subparagraph (b), a statement previously made is (i) a written statement signed or otherwise adopted or approved by the person making it, or (ii) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) Trial Preparation: Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of paragraph (1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(a) (i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

(ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to
paragraph (4) (c) of this rule, concerning fees and expenses as the court may deem appropriate.

(b) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35.02 or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(c) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under paragraphs (4)(a)(ii) and (4)(b) of this rule, and (ii) with respect to discovery obtained under paragraph (4)(a)(ii) of this rule the court may require, and with respect to discovery obtained under paragraph (4)(b) of this rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert. (Amended effective October 1, 1971; amended October 18, 1977, effective January 1, 1978; amended November 21, 1977, effective January 1, 1978.)

Rule 32.01. Use of depositions. — At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applies as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

(a) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

(b) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 30.02(6) or 31.01(2) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party may be used by an adverse party for any purpose.

(c) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds the witness: (i) is at a greater distance than 100 miles from the place where the court sits in which the action is pending, or out of the state, unless it appears that the absence of the witness was procured by the party offering the deposition; or (ii) is the governor, secretary, auditor or treasurer of the state; or (iii) is a judge or clerk of a court; or (iv) is a postmaster; or (v) is a president, cashier, teller or clerk of a bank; or (vi) is a practicing physician, dentist or lawyer; or (vii) is a keeper, officer or guard of a penitentiary; or (viii) is dead; or (ix) is of unsound mind, having been of sound mind when his deposition was taken; or (x) is prevented from attending the trial by illness, infirmity, or imprisonment; or (xi) is in the military service of the United States or of this state; or (xii) if the court finds that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

(d) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts.

(e) Depositions may be used in the trial of actions as provided in Rule 43.04.
Substitution of parties does not affect the right to use depositions previously taken; and when an action in any court of this state or any United States court sitting in this state, has been dismissed and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor. (Amended effective October 1, 1971; amended October 18, 1977, effective January 1, 1978.)

Rule 35.02. Report of examining physician. — (1) If requested by the party against whom an order is made under Rule 35.01 or the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed written report of the examining physician setting out his findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that he is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if a physician fails or refuses to make a report the court may exclude his testimony if offered at the trial.

(2) This rule applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This rule does not preclude discovery of a report of an examining physician or the taking of a deposition of the physician in accordance with the provisions of any other rule. (Amended effective October 1, 1971.)

Rule 43.10. Avowals. — In an action tried by a jury, if an objection to a question propounded to a witness is sustained by the court, upon request of the examining attorney, the witness may make a specific offer of his answer to the question. The court shall require the offer to be made out of the hearing of the jury. The court may add such other or further statement as clearly shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. In actions tried without a jury the same procedure may be followed, except that the court upon request shall take and report the evidence in full, unless it clearly appears that the evidence is not admissible on any ground or that the witness is privileged.

Rule 45.05. Subpoena for a hearing or trial — Personal attendance. — (1) At the request of any party, subpoenas for attendance at a hearing or trial shall be issued by the clerk of the court in which the action is pending, and such a subpoena may be served at any place within the state.

(2) Subject to the provisions of paragraph (3) of this Rule, a witness whose deposition might be used under Rule 32.01(c) shall not be compelled to appear in court for oral examination, unless he failed, when duly subpoenaed, to give his deposition.

(3) Upon the affidavit of a party or his attorney that the testimony of a witness is important, and that the just and proper effect of his testimony cannot in a reasonable degree be obtained without an oral examination in court, the court may, in its discretion, order the personal attendance of the witness, although such witness may otherwise be exempt from personal
Rule 47.03. Peremptory challenges. — (1) In civil cases each opposing side shall have three peremptory challenges, but co-parties having antagonistic interests shall have three peremptory challenges each.
(2) If one or two additional jurors are called, the number of peremptory challenges for each side and antagonistic co-party shall be increased by one.
(3) After the parties have been given the opportunity of challenging jurors for cause, each side or party having the right to exercise peremptory challenges shall be handed a list of qualified jurors drawn from the box equal to the number of jurors to be seated plus the number of allowable peremptory challenges for all parties. Peremptory challenges shall be exercised simultaneously by striking names from the list and returning it to the trial judge. If the number of prospective jurors remaining on the list exceeds the number of jurors to be seated, the cards bearing numbers identifying the prospective jurors shall be placed in a box and thoroughly mixed, following which the clerk shall draw at random the number of cards necessary to comprise the jury or, if so directed by the court, a sufficient number of cards to reduce the jury to the number required by law, in which latter event the prospective jurors whose identifying cards remain in the box shall be empaneled as the jury. (Adopted September 4, 1979, effective January 1, 1980.)

KENTUCKY REVISED STATUTES

186.590. Minor's negligence imputed to person signing application or allowing him to drive. — (1) Any negligence of a minor under the age of eighteen (18) who has been licensed upon an application signed as provided by KRS 186.470, when driving any motor vehicle upon a highway, shall be imputed to the person who signed the application of the minor for the license. That person shall be jointly and severally liable with the minor for any damages caused by the negligence.
(2) If a minor deposits or there is deposited in his behalf, a proof of financial responsibility in form and amounts required by K.RS chapter 187, the person who signed the application shall not, while such proof is maintained, be subject to the liability imposed by subsection (1). If the minor is the owner of a motor vehicle, the proof of financial responsibility shall be with respect to the operation of that motor vehicle; if not an owner, then with respect to the operation of any motor vehicle.
(3) Every motor vehicle owner who causes or knowingly permits a minor under the age of eighteen (18) to drive the vehicle upon a highway, and any person who gives or furnishes a motor vehicle to the minor shall be jointly and severally liable with the minor for damage caused by the negligence of the minor in driving the vehicle. (2739m-41, 2739m-53, 2739m-54.)
188.020. Nonresident owner or operator of motor vehicle makes secretary of state process agent. — Any nonresident operator or owner of any motor vehicle who accepts the privilege extended by the laws of this state to nonresidents to operate motor vehicles or have them operated within state shall, by such acceptance and by the operation of such motor vehicle within this state, make the secretary of state the agent of himself or his personal representative for the service of process in any civil action instituted in the courts of this state against the operator or owner, or the personal representative of the operator or owner, arising out of or by reason of any accident or collision or damage occurring within this state in which the motor vehicle is involved. (12-1: amend. Acts 1954, ch. 22, § 1; 1960, ch. 119, § 1.)

188.030. Service of summons and complaint in action against nonresident motorist. — The clerk of the court in which the action is brought shall issue a summons against the defendant named in the complaint and direct it to the sheriff of Franklin County. The sheriff shall execute the summons by delivering two (2) true copies to the secretary of state and shall also deliver with each summons an attested copy of plaintiff's complaint. The secretary of state shall immediately mail a copy of the summons and complaint to the defendant at the address given in the complaint. The letter shall be posted by prepaid certified mail, return receipt requested, and shall bear the return address of the secretary of state. The sheriff shall make the usual return to the court, and in addition the secretary of state shall make a return to the court showing that the acts contemplated by this statute have been performed, and shall attach to his return the registry receipt, if any. Summons shall be deemed to be served on the return of the secretary of state and the action shall proceed as provided in the Rules of Civil Procedure. (12-2: amend. Acts 1952, ch. 84, § 64; 1972, ch. 307, § 1; 1974, ch. 315, § 25; 1980, ch. 114, § 34, effective July 15, 1980; 1988, ch. 185, § 1, effective July 15, 1988.)

244.080. Retail sales to certain persons prohibited — Affirmative defense in prosecution for selling to a minor. — No retail licensee shall sell, give away or deliver any alcoholic beverages, or procure or permit any alcoholic beverages to be sold, given away or delivered to:

(1) A minor, except that in any prosecution for selling alcoholic beverages to a minor it is an affirmative defense that the sale was induced by the use of false, fraudulent, or altered identification papers or other documents and that the appearance and character of the purchaser were such that his age could not have been ascertained by any other means and that the purchaser's appearance and character indicated strongly that he was of legal age to purchase alcoholic beverages. Such evidence may be introduced either in mitigation of the charge or as a defense to the charge itself.

(2) A person actually or apparently under the influence of alcoholic beverages.

(3) An habitual drunkard or any person convicted of drunkenness as many as three (3) times within the most recent twelve (12) months period.

(4) Anyone known to the seller to have been convicted of any misdemeanor attributable directly or indirectly to the use of alcoholic beverages, or of a felony. (2554b-181: amend. Acts 1972, ch. 286, § 1.)
271B.5-040. Service on corporation. — (1) A corporation's registered agent shall be the corporation's agent for service of process, notice, or demand required or permitted by law to be served on the corporation.

(2) If a corporation has no registered agent, or the agent cannot with reasonable diligence be served, the corporation may be served by registered or certified mail, return receipt requested, addressed to the secretary of the corporation at its principal office. Service shall be perfected under this subsection at the earliest of:

(a) The date the corporation receives the mail;
(b) The date shown on the return receipt, if signed on behalf of the corporation;
(c) Five (5) days after its deposit in the United States mail, as evidenced by the postmark, if mailed postpaid and correctly addressed.

(3) This section does not prescribe the only means, or necessarily the required means, of serving a corporation. (Enact. Acts 1988, ch. 23, § 32, effective January 1, 1989.)

304.3-230. Service of process on insurers — Secretary of State as attorney for service of process. — (1) Upon issuance of a certificate of authority to do business in this state, the following shall be deemed to have appointed the Secretary of State as their attorney to receive service of lawful process issued against them in this state:

(a) Foreign or alien insurers;
(b) Domestic reciprocal insurers;
(c) Domestic Lloyd's insurers;
(d) Qualified self-insurers.

(2) Such appointment shall be irrevocable, shall bind any successor in interest or to the assets or liabilities of the insurer, and shall remain in effect as long as there is in force in this state or elsewhere a contract that would give rise to a cause of action in this state, made by the insurer, or liabilities or duties arising therefrom.

(3) Service of lawful process against unauthorized insurers, except in contracts issued by insurers or underwriters to industrial insureds as defined in KRS 304.11-020, shall be made upon the Secretary of State, as provided in KRS 304.11-040.

(4) Service of lawful process against authorized domestic insurers shall be had pursuant to KRS 271B.5-040.

(5) If the Secretary of State is by law the lawful attorney for service of process, the clerk of the court in which action is brought shall issue a summons against the defendant named in the complaint and shall serve by certified mail, return receipt requested, two (2) true copies of the summons with two (2) attested copies of plaintiff's complaint to the Secretary of State. The Secretary of State shall immediately mail a copy of the summons and complaint to the defendant; if an authorized insurer, to the person designated pursuant to subsection (7) of KRS 304.3-150, and if an unauthorized insurer to the last known principal place of business. The letter shall be posted by prepaid certified mail, return receipt requested, and shall bear the return address of the Secretary of State. The Secretary of State shall make a return to the court showing that the acts contemplated by this statute have been performed, and shall attach to his return the registry receipt, if any. Summons shall be deemed to be served on the return of the Secretary of State and the action shall proceed as provided in the Kentucky Rules of Civil Procedure.

(6) The Secretary of State shall keep a record of the date and hour of receipt of such lawful process, as well as the date it is forwarded to the defendant.

(7) For the purpose of this section, "lawful process" shall include only the summons which initiates and commences a cause of action, and such other initial notices, rules, or orders which would be required by the Kentucky Rules of Civil Procedure to be by personal service.
The sheriff serving the summons upon the Secretary of State shall pay to him at the time of service a fee in the amount set forth in KRS 454.210, which shall be taxed as costs in the action. (Repealed and reenact. Acts 1990, ch. 425, § 2, effective July 13, 1990.)

304.12-230. Unfair claims settlement practices. — It is an unfair claims settlement practice for any person to commit or perform any of the following acts or omissions:

1. Misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue;
2. Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies;
3. Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies;
4. Refusing to pay claims without conducting a reasonable investigation based upon all available information;
5. Failing to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed;
6. Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear;
7. Compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insureds;
8. Attempting to settle a claim for less than the amount to which a reasonable man would have believed he was entitled by reference to written or printed advertising material accompanying or made part of an application;
9. Attempting to settle claims on the basis of an application which was altered without notice to, or knowledge or consent of the insured;
10. Making claims payments to insureds or beneficiaries not accompanied by statement setting forth the coverage under which the payments are being made;
11. Making known to insureds or claimants a policy of appealing from arbitration awards in favor of insureds or claimants for the purpose of compelling them to accept settlements or compromises less than the amount awarded in arbitration;
12. Delaying the investigation or payment of claims by requiring an insured, claimant, or the physician of either to submit a preliminary claim report and then requiring the subsequent submission of formal proof of loss forms, both of which submissions contain substantially the same information;
13. Failing to promptly settle claims, where liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage; or
14. Failing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement. (Enact. Acts 1984, ch. 171, § 2, effective July 13, 1984; 1988, ch. 225, § 19, effective July 15, 1988.)

304.39-060. Acceptance or rejection of partial abolition of tort liability — Exceptions. — (1) Any person who registers, operates, maintains or uses a motor vehicle on the public roadways of this Commonwealth shall, as a condition of such registration, operation, maintenance or use of such motor vehicle and use of the public roadways, be deemed to have accepted the provisions of this subtitle, and in particular those provisions which are contained in this section.
(2) (a) Tort liability with respect to accidents occurring in this Commonwealth and arising from the ownership, maintenance, or use of a motor vehicle is "abolished" for damages because of bodily injury, sickness or disease to the extent the basic reparation benefits provided in this subtitle are payable therefor, or that would be payable but for any deductible authorized by this subtitle, under any insurance policy or other method of security complying with the requirements of this subtitle, except to the extent noneconomic detriment qualifies under paragraph (b) of this subsection.

(b) In any action of tort brought against the owner, registrant, operator or occupant of a motor vehicle with respect to which security has been provided as required in this subtitle, or against any person or organization legally responsible for his acts or omissions, a plaintiff may recover damages in tort for pain, suffering, mental anguish and inconvenience because of bodily injury, sickness or disease arising out of the ownership, maintenance, operation or use of such motor vehicle only in the event that the benefits which are payable for such injury as "medical expense" or which would be payable but for any exclusion or deductible authorized by this subtitle exceed one thousand dollars ($1,000), or the injury or disease consists in whole or in part of permanent disfigurement, a fracture to a bone, a compound, comminuted, displaced or compressed fracture, loss of a body member, permanent injury within reasonable medical probability, permanent loss of bodily function or death. Any person who is entitled to receive free medical and surgical benefits shall be deemed in compliance with the requirements of this subsection upon a showing that the medical treatment received has an equivalent value of at least one thousand dollars ($1,000).

(c) Tort liability is not so limited for injury to a person who is not an owner, operator, maintainer or user of a motor vehicle within subsection (1) of this section, nor for injury to the passenger of a motorcycle arising out of the maintenance or use of such motorcycle.

(3) For purposes of this section and the provisions on reparation obligor's rights of reimbursement, subrogation, and indemnity, a person does not intentionally cause harm merely because his act or failure to act is intentional or done with his realization that it creates a grave risk of harm.

(4) Any person may refuse to consent to the limitations of his tort rights and liabilities as contained in this section. Such rejection must be in writing in a form to be prescribed by the department of insurance and must have been executed and filed with the department at a time prior to any motor vehicle accident for which such rejection is to apply. Such rejection form together with a reasonable explanation thereof shall be furnished by the reparation obligor with each policy to each prospective insurance applicant. Such rejection form shall affirmatively state in bold print that acceptance of this form of insurance denies the applicant the right to sue a negligent motorist unless certain requirements contained in the policy of insurance are met. Rejection by a person who is under legal disability shall be made on behalf of such person by his legal guardian, conservator or his natural parent. The failure of such guardian or a natural parent of a person under legal disability to file a rejection, within six (6) months from the date that this subtitle would otherwise become applicable to such person, shall be deemed to be an affirmative acceptance of all provisions of this subtitle. Provided, however, any person who, at the time of an accident, does not have basic reparation insurance but has not formally rejected such limitations of his tort rights and liabilities and has at such time in effect security equivalent to that required by KRS 304.39-110 shall be deemed to have fully rejected such limitations within meaning of this section for that acci-
(5) (a) Any rejection must be filed with the department of insurance and shall become effective on the date of its filing until revoked;
   (b) Any rejection filed prior to June 30, 1980, shall be deemed to be effective from the date of its filing until revoked; and
   (c) Any revocation shall be in writing and shall become effective upon the date of its filing with the department of insurance.

(6) Every insurance company when issuing an automobile policy to a resident of this Commonwealth must inform the buyer in writing in a form to be prescribed by the insurance commissioner of his right to reject the limitations of his tort rights and liabilities under this subtitle in the manner provided in subsections (4) and (7) of this section.

(7) Any rejection shall result in the full retention by the individual of his tort rights and his tort liabilities. Any person injured by a motor vehicle operator who has such rejection on file may claim his full damages, including nonpecuniary damages, or, if such injured person has not rejected his own tort limitations, he may also claim basic reparation benefits from the appropriate security on the vehicle as established under KRS 304.39-050. If such provider of security is other than the one providing security for the operator who has rejected the limitations, such provider shall be subrogated to the rights of the injured person to the extent of reparation benefits paid against the owner and operator of the vehicle.

(8) No person who has rejected the tort limitations under this section, except as provided in subsection (9) of this section or KRS 304.39-140(5), may collect basic reparation benefits.

(9) Any owner or operator of a motorcycle, as defined in Kentucky Revised Statutes, may file a rejection as described in subsections (4) and (5) of this section, which will apply solely to the ownership and operation of a motorcycle but will not apply to injury resulting from the ownership, operation or use of any other type of motor vehicle. (Enact. Acts 1974, ch. 385, § 6; 1976, ch. 75, § 2, effective March 29, 1976; 1980, ch. 364, § 1, effective July 15, 1980; 1986, ch. 37, § 1, effective July 15, 1986.)
304.39-110. Required minimum tort liability insurance. — (1) The requirement of security for payment of tort liabilities is fulfilled by providing:
   (a) Either:
      (1) Split limits liability coverage of not less than twenty-five thousand dollars ($25,000) for all damages arising out of bodily injury sustained by any one (1) person, and not less than fifty thousand dollars ($50,000) for all damages arising out of bodily injury sustained by all persons injured as a result of any one (1) accident, plus liability coverage of not less than ten thousand dollars ($10,000) for all damages arising out of damage to or destruction of property, including the loss of use thereof, as a result of any one (1) accident arising out of ownership, maintenance, use, loading, or unloading, of the secured vehicle; or
      (2) Single limits liability coverage of not less than sixty thousand dollars ($60,000) for all damages whether arising out of bodily injury or damage to property as a result of any one (1) accident arising out of ownership, maintenance, use, loading, or unloading, of the secured vehicle;
   (b) That the liability coverages apply to accidents during the contract period in a territorial area not less than the United States of America, its territories and possessions, and Canada; and
   (c) Basic reparation benefits as defined in KRS 304.39-020(2).

(2) Subject to the provisions on approval of terms and forms, the requirement of security for payment of tort liabilities may be met by a contract the coverage of which is secondary or excess to other applicable valid and collectible liability insurance. To the extent the secondary or excess coverage applies to liability within the minimum security required by this subtitle it must be subject to conditions consistent with the system of required liability insurance established by this subtitle.

(3) Security for a motorcycle is fulfilled by providing only the coverages set forth in subsections (1)(a), and (b) of this section. (Enact. Acts 1974, ch. 385, § 11; 1976, ch. 75, § 4, effective March 29, 1976; 1984, ch. 19, § 2, effective July 13, 1984; 1984, ch. 86, § 1, effective July 13, 1984; 1986, ch. 437, § 31, effective July 15, 1986.)

304.39-140. Optional additional benefits. — (1) On and after July 1, 1975, each reparation obligor of the owner of a vehicle required to be registered in this Commonwealth shall, upon the request of a reparation insured, be required to provide added reparation benefits for economic loss in units of ten thousand dollars ($10,000) per person subject to the lesser of:
   (a) Forty thousand dollars ($40,000) in added reparation benefits; or
   (b) The limit of security provided for liability to any one (1) person in excess of the requirements of KRS 304.39-110(1) (a).

(2) Each basic reparation obligor shall be permitted to incorporate in added reparation benefits coverage such terms, conditions and exclusions as may be consistent with premiums charged. The amounts payable under added reparation benefits may be duplicative of benefits received from collateral source benefits, or may provide for reasonable waiting periods, deductibles or coinsurance provision. The added reparation obligor shall be subrogated, subject to KRS 304.39-070 and 304.39-300, to the injured person's right of recovery against any responsible third party.

(3) If the injured person, or injured persons, is entitled to damages under KRS 304.39-060 from the liability insurer of a second person, a self-insurer or an obligated government, collection of such damages shall have priority over the rights of the subrogee for its reimbursement of basic or added reparation benefits paid to or in behalf of such injured person or persons.

(4) Basic reparation insurers shall make available upon request deductibles in the amounts of two hundred fifty dollars ($250), five hundred dollars ($500) and one thousand dollars ($1,000) from all basic reparation benefits otherwise payable, except that if two (2) or more basic reparation
insureds to whom the deductible is applicable under the contract of insurance are injured in the same accident, the aggregate amount of the deductible applicable to all of them shall not exceed the specified deductible, which amount where necessary shall be allocated equally among them. Any person who is a basic reparation insured under an insurance policy issued with no deductible or with a deductible of a lesser amount than that under which he receives basic reparation benefits payments, shall be entitled to be paid under such policy the difference between the benefits he is actually paid and the benefits which would have been paid had his benefits been payable under such policy.

(5) Reparation obligors shall make available upon request to those persons who have rejected their tort limitations, in accordance with KRS 304.39-060(4), basic reparation benefits coverage and added reparation benefits. (Enact. Acts 1974, ch. 385, § 14, effective July 1, 1975; 1978, ch. 215, § 3, effective June 17, 1978.)

304.39-210. Obligor's duty to respond to claims. — (1) Basic and added reparation benefits are payable monthly as loss accrues. Loss accrues not when injury occurs, but as work loss, replacement services loss, or medical expense is incurred. Benefits are overdue if not paid within thirty (30) days after the reparation obligor receives reasonable proof of the fact and amount of loss realized, unless the reparation obligor elects to accumulate claims for periods not exceeding thirty-one (31) days after the reparation obligor receives reasonable proof of the fact and amount of loss realized, and pays them within fifteen (15) days after the period of accumulation. If reasonable proof is supplied as to only part of a claim, and the part totals one hundred dollars ($100) or more, the part is overdue if not paid within the time provided by this section. Medical expense benefits may be paid by the reparation obligor directly to persons supplying products, services, or accommodations to the claimant.

(2) Overdue payments bear interest at the rate of twelve percent (12%) per annum, except that if delay was without reasonable foundation the rate of interest shall be eighteen percent (18%) per annum.

(3) A claim for basic or added reparation benefits shall be paid without deduction for the benefits which are to be subtracted pursuant to the provisions on calculation of net loss if these benefits have not been paid to the claimant before the reparation benefits are overdue or the claim is paid. The reparation obligor is entitled to reimbursement from the person obligated to make the payments or from the claimant who actually receives the payments.

(4) A reparation obligor may bring an action to recover benefits which are not payable, but are in fact paid, because of an intentional misrepresentation of a material fact, upon which the reparation obligor relies, by the insured or by a person providing an item of medical expense. The action may be brought only against the person providing the item of medical expense, unless the insured has intentionally misrepresented the facts or knows of the misrepresentation. An insurer may offset amounts he is entitled to recover from the insured under this subsection against any basic or added reparation benefits otherwise due.

(5) A reparation obligor who rejects a claim for basic reparation benefits shall give to the claimant prompt written notice of the rejection, specifying the reason. If a claim is rejected for a reason other than that the person is not entitled to the basic reparation benefits claimed, the written notice
shall inform the claimant that he may file his claim with the assigned claims bureau and shall give the name and address of the bureau. (Enact. Acts 1974, ch. 385, § 21, effective July 1, 1975.)

304.39-230. Limitations of actions. — (1) If no basic or added reparation benefits have been paid for loss arising otherwise than from death, an action therefor may be commenced not later than two (2) years after the injured person suffers the loss and either knows, or in the exercise of reasonable diligence should know, that the loss was caused by the accident, or not later than four (4) years after the accident, whichever is earlier. If basic or added reparation benefits have been paid for loss arising otherwise than from death, an action for further benefits, other than survivor’s benefits, by either the same or another claimant, may be commenced not later than two (2) years after the last payment of benefits.

(2) If no basic or added reparation benefits have been paid to the decedent or his survivors, an action for survivor’s benefits may be commenced not later than one (1) year after the death or four (4) years after the accident from which death results, whichever is earlier. If survivor’s benefits have been paid to any survivor, an action for further survivor’s benefits by either the same or another claimant may be commenced not later than two (2) years after the last payment of benefits. If basic or added reparation benefits have been paid for loss suffered by an injured person before his death resulting from the injury, an action for survivor’s benefits may be commenced not later than one (1) year after the death or four (4) years after the last payment of benefits, whichever is earlier.

(3) If timely action for basic reparation benefits is commenced against a reparation obligor and benefits are denied because of a determination that the reparation obligor’s coverage is not applicable to the claimant under the provisions on priority of applicability of basic reparation security, an action against the applicable reparation obligor or the assigned claims bureau may be commenced not later than sixty (60) days after the determination becomes final or the last date on which the action could otherwise have been commenced, whichever is later.

(4) Except as subsections (1), (2), or (3) of this section prescribe a longer period, an action by a claimant on an assigned claim which has been timely presented may be commenced not later than sixty (60) days after the claimant received written notice of rejection of the claim by the reparation obligor to which it was assigned.

(5) If a person entitled to basic or added reparation benefits is under legal disability when the right to bring an action for the benefits first accrues, the period of his disability is a part of the time limited for commencement of the action.

(6) An action for tort liability not abolished by KRS 304.39-060 may be commenced not later than two (2) years after the injury, or the death, or the last basic or added reparation payment made by any reparation obligor, whichever later occurs. (Enact. Acts 1974, ch. 385, § 23, effective July 1, 1975.)
411.110. Action against city for injury from defect in thoroughfare
—Service of notice.—No action shall be maintained against any city in
this state because of any injury growing out of any defect in the con-
dition of any bridge, street, sidewalk, alley or other public thoroughfare,
unless notice has been given to the mayor, city clerk or clerk of the
board of aldermen in the manner provided for the service of notice in
actions in the Rules of Civil Procedure. This notice shall be filed within
ninety (90) days of the occurrence for which damage is claimed, stat­
ing the time of and place where the injury was received and the char­
acter and circumstances of the injury, and that the person injured will
claim damages therefor from the city. (2741e-24: amend. Acts 1954,
ch. 171.)

411.130. Action for wrongful death — Personal representative to
prosecute — Distribution of amount recovered. — (1) Whenever the
death of a person results from an injury inflicted by the negligence or
wrongful act of another, damages may be recovered for the death from the
person who caused it, or whose agent or servant caused it. If the act was
wilful or the negligence gross, punitive damages may be recovered. The
action shall be prosecuted by the personal representative of the deceased.
(2) The amount recovered, less funeral expenses and the cost of adminis­
tration and costs of recovery including the attorney fees, not included in the
recovery from the defendant, shall be for the benefit of and go to the kin­
dred of the deceased in the following order:
(a) If the deceased leaves a widow or husband, and no children or their
descendants, then the whole to the widow or husband.
(b) If the deceased leaves a widow and children or a husband and chil­
dren, then one-half (1/2) to the widow or husband and the other one-half (1/2)
to the children of the deceased.
(c) If the deceased leaves a child or children, but no widow or husband,
then the whole to the child or children.
(d) If the deceased leaves no widow, husband or child, then the recovery
shall pass to the mother and father of the deceased, one (1) moiety each, if
both are living; if the mother is dead and the father is living, the whole
thereof shall pass to the father; and if the father is dead and the mother
living, the whole thereof shall go to the mother. In the event the deceased
was an adopted person, “mother” and “father” shall mean the adoptive
parents of the deceased.
(e) If the deceased leaves no widow, husband or child, and if both father
and mother are dead, then the whole of the recovery shall become a part of
the personal estate of the deceased, and after the payment of his debts the
remainder, if any, shall pass to his kindred more remote than those above
named, according to the law of descent and distribution. (6: amend. Acts
1974, ch. 89, § 1.)

411.135. Damages in action for wrongful death of minor.—In a
wrongful death action in which the decedent was a minor child, the sur­
viving parent, or parents, may recover for loss of affection and com­
panionship that would have been derived from such child during its
minority, in addition to all other elements of the damage usually re­

411.145. Damages for loss of consortium.—(1) As used in this sec­
tion “consortium” means the right to the services, assistance, aid, so­
ciety, companionship and conjugal relationship between husband and
wife, or wife and husband.
(2) Either a wife or husband may recover damages against a third
person for loss of consortium, resulting from a negligent or wrongful
act of such third person. (Enact. Acts 1970, ch. 200, § 1.)
411.182. Allocation of fault in tort actions — Award of damages — Effect of release. — (1) In all tort actions, including products liability actions, involving fault of more than one party to the action, including third-party defendants and persons who have been released under subsection (4) of this section, the court, unless otherwise agreed by all parties, shall instruct the jury to answer interrogatories or, if there is no jury, shall make findings indicating:
(a) The amount of damages each claimant would be entitled to recover if contributory fault is disregarded; and
(b) The percentage of the total fault of all the parties to each claim that is allocated to each claimant, defendant, third-party defendant, and person who has been released from liability under subsection (4) of this section.
(2) In determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each party at fault and the extent of the causal relation between the conduct and the damages claimed.
(3) The court shall determine the award of damages to each claimant in accordance with the findings, subject to any reduction under subsection (4) of this section, and shall determine and state in the judgment each party’s equitable share of the obligation to each claimant in accordance with the respective percentages of fault.
(4) A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable, shall discharge that person from all liability for contribution, but it shall not be considered to discharge any other persons liable upon the same claim unless it so provides. However, the claim of the releasing person against other persons shall be reduced by the amount of the released persons’ equitable share of the obligation, determined in accordance with the provisions of this section. (Enact. Acts 1988, ch. 224, § 1, effective July 15, 1988.)

411.184. Definitions — Punitive damages — Proof of punitive damages. — (1) As used in this section and KRS 411.186, unless the context requires otherwise:
(a) “Oppression” means conduct which is specifically intended by the defendant to subject the plaintiff to cruel and unjust hardship.
(b) “Fraud” means an intentional misrepresentation, deceit, or concealment of material fact known to the defendant and made with the intention of causing injury to the plaintiff.
(c) “Malice” means either conduct which is specifically intended by the defendant to cause tangible or intangible injury to the plaintiff or conduct that is carried out by the defendant both with a flagrant indifference to the rights of the plaintiff and with a subjective awareness that such conduct will result in human death or bodily harm.
(d) “Plaintiff” means any party claiming punitive damages.
(e) “Defendant” means any party against whom punitive damages are sought.
(f) “Punitive damages” includes exemplary damages and means damages, other than compensatory and nominal damages, awarded against a person to punish and to discourage him and others from similar conduct in the future.
(2) A plaintiff shall recover punitive damages only upon proving, by clear and convincing evidence, that the defendant from whom such damages are sought acted toward the plaintiff with oppression, fraud or malice.
(3) In no case shall punitive damages be assessed against a principal or employer for the act of an agent or employee unless such principal or employer authorized or ratified or should have anticipated the conduct in question.
(4) In no case shall punitive damages be awarded for breach of contract.
(5) This statute is applicable to all cases in which punitive damages are sought and supersedes any and all existing statutory or judicial law insofar as such law is inconsistent with the provisions of this statute. (Enact. Acts 1988, ch. 224, § 2, effective July 15, 1988.)
411.188. Notification of parties holding subrogation rights — Collateral source payments and subrogation rights admissible. —

(1) This section shall apply to all actions for damages, whether in contract or tort, commenced after July 15, 1988.

(2) At the commencement of an action seeking to recover damages, it shall be the duty of the plaintiff or his attorney to notify, by certified mail, those parties believed by him to hold subrogation rights to any award received by the plaintiff as a result of the action. The notification shall state that a failure to assert subrogation rights by intervention, pursuant to Kentucky Civil Rule 24, will result in a loss of those rights with respect to any final award received by the plaintiff as a result of the action.

(3) Collateral source payments, except life insurance, the value of any premiums paid by or on behalf of the plaintiff for same, and known subrogation rights shall be an admissible fact in any civil trial.

(4) A certified list of the parties notified pursuant to subsection (2) of this section shall also be filed with the clerk of the court at the commencement of the action. (Enact. Acts 1988, ch. 224, § 4, effective July 15, 1988.)

411.200. Immunity from civil liability of officer, director or trustee of nonprofit organization. — Any person who serves as a director, officer, volunteer or trustee of a nonprofit organization qualified as a tax-exempt organization under Section 501(c) of the Internal Revenue Code of 1986, as from time to time amended, and who is not compensated for such services on a salary or prorated equivalent basis, shall be immune from civil liability for any act or omission resulting in damage or injury occurring on or after July 15, 1988, if such person was acting in good faith and within the scope of his official functions and duties, unless such damage or injury was caused by the willful or wanton misconduct of such person. (Enact. Acts 1988, ch. 2, § 1, effective July 15, 1988.)

421.210. Competency of certain testimony. — (1) In all actions between husband and wife, or between either or both of them and another, either or both of them may testify as other witnesses, except as to confidential communications between them during marriage, provided, however, that in an action for absolute divorce or divorce from bed and board, either or both of them may testify concerning any matter involved in the action, including questions of property, and provided further, that neither may be compelled to testify for or against the other.

(2) Subject to the provisions of subsection (6) of this section, no person shall testify for himself concerning any verbal statement of, or any transaction with, or any act done or omitted to be done by an infant under fourteen (14) years of age, or by one who has been adjudged mentally disabled or dead when the testimony is offered to be given except for the purpose, and to the extent, of affecting one who is living, and who, when over fourteen (14) years of age and of sound mind, heard such statement, or was present when such transaction took place, or when such act was done or omitted, and except in actions for personal injury, death or damage to property by negligence or tortious acts, unless:

(a) The infant or his guardian shall have testified against such person, with reference to such statement, transaction or act;

(b) The person who has been adjudged mentally disabled shall, when of sound mind, have testified against such person, with reference thereto;

(c) The decedent, or a representative of, or someone interested in, his estate, shall have testified against such person, with reference thereto;

(d) An agent of the decedent or mentally disabled person, with reference to such act or transaction, shall have testified against such person, with reference thereto.

(3) No person shall testify for himself, in chief, in an ordinary action, after introducing other testimony for himself, in chief; nor in an equitable action, after taking other testimony for himself, in chief.
(4) No attorney shall testify concerning a communication made to him, in his professional character, by his client, or his advice thereon, without the client's consent; nor shall an ordained minister, priest, rabbi or accredited practitioner of an established church or religious organization be required to testify in any civil or criminal case or proceedings preliminary thereto, or in any administrative proceeding, concerning any information confidentially communicated to him in his professional capacity under such circumstances that to disclose the information would violate a sacred or moral trust, unless the person making the confidential communication waives such privilege herein provided.

(5) If the right of a person to testify for himself be founded upon the fact that one who is dead or mentally disabled has testified against him, the testimony of such person shall be confined to the facts or transactions to which the adverse testimony related.

(6) A person may testify for himself as to the correctness of original entries made by him against persons who are under no disability — other than infancy — in an accounting, according to the usual course of business though the person against whom they were made may have died or have become mentally disabled; but no person shall testify for himself concerning entries in a book, or the contents or purport of any writing, under the control of himself, or of himself and others jointly, if he refuse or fail to produce such book or writing, and to make it subject to the order of the court for the purposes of the action, if required to do so by the party against whom he offers to testify.

(7) The assignment of a claim by a person who is incompetent to testify for himself shall not make him competent to testify for another.

(8) A party may be examined as if under cross-examination at the instance of the adverse party, either orally or by deposition as any other witness; but the party called for such examination shall not be concluded thereby, but may rebut it by counter testimony.

(9) None of the preceding provisions of this section apply to affidavits for provisional remedies, or to affidavits of claimants against the estates of deceased or insolvent persons, or affect the competency of attesting witnesses of instruments which are required by law to be attested. (C.C. 606; amend. Acts 1898, ch. 1, §§ 1 to 9; 1912, ch. 104; 1926, ch. 29; 1930, ch. 21; 1932, ch. 59; 1940, ch. 95; trans. Acts 1952, ch. 84, § 1; 1976, ch. 358, § 1; 1980, ch. 188, § 289, effective July 15, 1980; 1980, ch. 312, § 2, effective July 15, 1980.)

422.300. Use of photostatic copies of medical records — Originals held available. — Medical charts or records of any hospital licensed under KRS 216B.105 that are susceptible to photostatic reproduction may be proved as to foundation, identity and authenticity without any preliminary testimony, by use of legible and durable copies, certified in the manner provided herein by the employee of the hospital charged with the responsibility of being custodian of the originals thereof. Said copies may be used in any trial, hearing, deposition or any other judicial or administrative action or proceeding, whether civil or criminal, in lieu of the original charts or records which, however, the hospital shall hold available during the pendency of the action or proceeding for inspection and comparison by the court, tribunal or hearing officer and by the parties and their attorneys of record. (Enact. Acts 1978, ch. 109, § 1, effective June 17, 1978; 1980, ch. 188, § 291, effective July 15, 1980.)

454.040. Trespass, joint or several damages for. — In actions of trespass the jury may assess joint or several damages against the defendants. When the jury finds several damages, the judgment shall be in favor of the plaintiff against each defendant for the several damages, without regard to the amount of damages claimed in the petition, and shall include a joint judgment for the costs. (12.)
Rule 1.5. Fees.

(a) A lawyer's fee shall be reasonable. Some factors to be considered in determining the reasonableness of a fee include the following:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) The likelihood, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) The fee customarily charged in the locality for similar legal services;

(4) The amount involved and the results obtained;

(5) The time limitations imposed by the client or by the circumstances;

(6) The nature and length of the professional relationship with the client;

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) Whether the fee is fixed or contingent.

(b) When the lawyer has not regularly represented the client, the basis or rate of the fee should be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. Such a fee must meet the requirements of Rule 1.5(a). A contingent fee agreement shall be in writing and should state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon recovery of any amount in a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) Any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony, maintenance, support, or property settlement, provided this does not apply to liquidated sums in arrearage; or

(2) A contingent fee for representing a defendant in a criminal case.

(e) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) (a) The division is in proportion to the services performed by each lawyer or,

(b) By written agreement with the client, each lawyer assumes joint responsibility for the representation; and

(2) The client is advised of and does not object to the participation of all the lawyers involved; and

(3) The total fee is reasonable.
## TABLE OF STATUTES

### KENTUCKY RULES OF CIVIL PROCEDURE

<table>
<thead>
<tr>
<th>Code</th>
<th>Description</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>CR 8.01(2)</td>
<td></td>
<td>39</td>
</tr>
<tr>
<td>CR 11</td>
<td></td>
<td>641</td>
</tr>
<tr>
<td>CR 26.02(4)(a)(i)</td>
<td></td>
<td>43</td>
</tr>
<tr>
<td>CR 26.02(2)</td>
<td></td>
<td>25</td>
</tr>
<tr>
<td>CR 32.01</td>
<td></td>
<td>50</td>
</tr>
<tr>
<td>CR 35.02(1)</td>
<td></td>
<td>43</td>
</tr>
<tr>
<td>CR 43.10</td>
<td></td>
<td>57</td>
</tr>
<tr>
<td>CR 45.05(2)</td>
<td></td>
<td>50</td>
</tr>
<tr>
<td>CR 47.03(3)</td>
<td></td>
<td>56</td>
</tr>
</tbody>
</table>

### KENTUCKY REVISED STATUTES

<table>
<thead>
<tr>
<th>Code</th>
<th>Description</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>KRS 186.590</td>
<td></td>
<td>10</td>
</tr>
<tr>
<td>KRS 188.020</td>
<td></td>
<td>40</td>
</tr>
<tr>
<td>KRS 188.030</td>
<td></td>
<td>40</td>
</tr>
<tr>
<td>KRS 244.080(1)</td>
<td></td>
<td>11</td>
</tr>
<tr>
<td>KRS 271B.5-040</td>
<td></td>
<td>40</td>
</tr>
<tr>
<td>KRS 304.3-230(1)</td>
<td></td>
<td>40</td>
</tr>
<tr>
<td>KRS 304.3-230(4)</td>
<td></td>
<td>40</td>
</tr>
<tr>
<td>KRS 304.12-230</td>
<td></td>
<td>38</td>
</tr>
<tr>
<td>KRS 304.39</td>
<td></td>
<td>27</td>
</tr>
<tr>
<td>KRS 304.39-060(2)(a)</td>
<td></td>
<td>28</td>
</tr>
<tr>
<td>KRS 304.39-060(2)(b)</td>
<td></td>
<td>28</td>
</tr>
<tr>
<td>KRS 304.39-100(2)</td>
<td></td>
<td>24</td>
</tr>
<tr>
<td>KRS 304.39-110</td>
<td></td>
<td>23</td>
</tr>
<tr>
<td>KRS 304.39-140(3)</td>
<td></td>
<td>30</td>
</tr>
<tr>
<td>KRS 304.39-210</td>
<td></td>
<td>29</td>
</tr>
<tr>
<td>KRS 304.39-230</td>
<td></td>
<td>15</td>
</tr>
</tbody>
</table>
KENTUCKY RULES OF PROFESSIONAL CONDUCT

Rule 1.5 ................................................................. 3
**TABLE OF CASES**

<table>
<thead>
<tr>
<th>Case Title</th>
<th>Citation</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Carta v. Dale</td>
<td>Ky., 718 S.W. 2d 126 (1986)</td>
<td>16, 17, 21</td>
</tr>
<tr>
<td>Clem v. Ball</td>
<td>Ky., 237 S.W. 2d 839 (1951)</td>
<td>9</td>
</tr>
<tr>
<td>Conley v. Foster</td>
<td>Ky., 335 S.W. 2d 904 (1960)</td>
<td>21</td>
</tr>
<tr>
<td>Cox v. Cooper</td>
<td>Ky., 510 S.W. 2d 530 (1974)</td>
<td>20</td>
</tr>
<tr>
<td>Davidson v. Vogeler</td>
<td>Ky., 507 S.W. 2d 160 (1974)</td>
<td>21</td>
</tr>
<tr>
<td>Davis v. Kunkle</td>
<td>Ky., 194 S.W. 2d 513 (1946)</td>
<td>10</td>
</tr>
<tr>
<td>Floyd v. Gray</td>
<td>Ky., 657 S.W. 2d 936 (1983)</td>
<td>15</td>
</tr>
<tr>
<td>Harlan Fruit Co. v. Kilbourne</td>
<td>Ky., 133 S.W. 2d 730 (1939)</td>
<td>16</td>
</tr>
<tr>
<td>Jewell v. Dell</td>
<td>Ky., 284 S.W. 2d 92 (1955)</td>
<td>10</td>
</tr>
<tr>
<td>LaFrange v. United Services Automobile Association</td>
<td>Ky., 700 S.W. 2d 411 (1985)</td>
<td>27</td>
</tr>
<tr>
<td>Louisville Taxicab &amp; Transfer Co. v. Kelley</td>
<td>Ky., 455 S.W. 2d 535 (1970)</td>
<td>9</td>
</tr>
<tr>
<td>Orr v. Coleman</td>
<td>Ky., 455 S.W. 2d 59 (1970)</td>
<td>20</td>
</tr>
<tr>
<td>Pike v. George</td>
<td>Ky., 434 S.W. 2d 626 (1968)</td>
<td>11</td>
</tr>
<tr>
<td>Puckett v. Liberty Mutual Insurance Co.</td>
<td>Ky., 477 S.W. 2d 811 (1972)</td>
<td>26</td>
</tr>
<tr>
<td>Rogers v. Wilhelm-Olsen</td>
<td>Ky. App., 748 S.W. 2d 671 (1988)</td>
<td>14</td>
</tr>
<tr>
<td>Shipley v. Kentucky Farm Bureau</td>
<td>Ky., 747 S.W. 2d 596 (1988)</td>
<td>25</td>
</tr>
<tr>
<td>Simon v. Continental Insurance Company</td>
<td>Ky., 724 S.W. 2d 210 (1986)</td>
<td>27</td>
</tr>
<tr>
<td>Southard v. Hancock</td>
<td>Ky. App., 689 S.W. 2d 616 (1985)</td>
<td>18, 58</td>
</tr>
<tr>
<td>Stanley v. Ellegood</td>
<td>Ky., 382 S.W. 2d 572 (1964)</td>
<td>59</td>
</tr>
<tr>
<td>State Farm Automobile Insurance Company v. Reeder</td>
<td>Ky., 763 S.W. 2d 116 (1988)</td>
<td>38</td>
</tr>
<tr>
<td>Taylor v. Jennison</td>
<td>Ky., 335 S.W. 2d 902 (1960)</td>
<td>21</td>
</tr>
</tbody>
</table>
Tichenor v. Roll, Ky., 253 S.W. 2d 13 (1952) ......................................................... 18
Townsend v. Stamper, Ky., 398 S.W. 2d 45 (1965) ......................................................... 18
Wemyss v. Coleman, Ky., 729 S.W. 2d 174 (1987) ......................................................... 14
INDEX

Acceptance of case, decision concerning, 5-7
  client relations, 5
  collectability, 7
  damage determination, 6
  liability determination, 5-6
  small cases, 7

Accident reconstructionists, see Expert Witnesses

Application for insurance benefits, 65

Apportionment of liability, 19-21

Avowals, 56-57

Battery, 11

Blackout defense, 14

Board of Claims, Kentucky, 12

Case evaluation, 35-37

Case in chief, 56-57

Certificate of notification of insurer, 25, 32, 60

Client relations, 5

Closing argument, 58-59

Collateral source rule, 21-22

Collectability, 7

Collision insurance, 23

Comparative fault, 12-13

Complaint, 39, 61

Consortium, loss of, 15, 19

Contingency fees, contract for contingency, 67

Contract, 67

Contributory negligence, 12-13

Cross-examination, 57

Damages, 16-22; see also specific items of damage, this index

Decision to file suit, 39

Defenses, elimination of, 41

Demonstrative evidence, 48-49

Depositions
  defendant, 41-42
  eyewitnesses, 41-42
  experts, 42-43
  plaintiff, 43-44

Discovery, 24-25, 41-44; see also Depositions; Interrogatories; Requests for Admission

Dramshop cases, 11

Duty, 8-9

Earning capacity, impairment of, 17

Economists, see Expert Witnesses

Employment information, forms, 2-3, 68

Engineers, see Expert Witnesses

Exhibits, 48-49

Expert witnesses, 4, 14, 34-35, 41-43, 46-48

Fees, 2-3, 6, 67

Filing suit, 39-40

Hedonic damages, 18

Income, lost, 16-17

Initial interview with client, 1-4, 34
  conduct, 1-2
  fees and expenses, 2-4, 6, 67
  forms, signing of, 2-3

Insurance
  generally, 5, 23-31, 34, 39, 41
  benefits, application for, 65
  collision insurance, 23
  discovery of insurance information, 24-25
  health, 22, 39
  liability insurance, 23-25, 30, 38 life, 22
  no-fault insurance, 15, 21, 27-31, 39
  notice to insurer of claim, 25, 32, 60
  omnibus clause, 24
  subrogation, 30, 40

91
underinsured motorist insurance, 26-27
uninsured motorist insurance, 25-26

Insurer, notification of, 32, 60

Intentional torts, 11

Interrogatories and other written requests, 41

Investigation, 32-34

Juror information sheets, 52

Jury instructions, 8, 30-31, 47, 57-58

Jury selection, 52, 55-56

Liability
  apportionment of, 19-21
determining, 5-6
  insurance, 23-25
  issues, 8-15

Limitations, 15

Loss of consortium, 15, 19

Lost income, 3, 16-17, 21, 27-28, 47-48

Medical bills, 16

Medical expenses, 16-21, 27-28, 37, 47-48

Medical proof, at trial, 36-37, 50-51

Medical records, 2-3, 34-35, 48, 51, 64

Minors, 10, 19

Miscellaneous actions, 11-12

Motions in limine, 51-52

Negligence
  generally, 9-10
  imputed, 10
  joint, 10
  minor’s, 10
  per se, 10
  proof of, 25
  safety statute, violation of, 10
  see also specific claims and defenses, this index

No-fault insurance, 15, 21, 27-31

Opening statement, 45, 52-53, 56

Pain and suffering, 17-18, 28

Physicians, 50-51, 57; see also Expert Witnesses; Medical Records

Pleadings, 39-40

Police report, 1, 32-33

Pre-filing procedures, 32-38
  case evaluation, 35-37
  investigation, 32-34
  medical records, 34-35
  notification of insurer, 32
  settlement, 37-38

Pre-trial memoranda, 47

Process, service of, 40

Product liability, 11-12

Property damage, 6, 16

Punitive damages, 18-19

Requests for admission, 41

Roads, improperly built or maintained, 12

Seat belt defense, 13-14

Service of process, 40

Settlement, 20, 29, 37-38, 45

Statute of limitations, 15

Subpoenas, 46

Summary judgment, 49

Transportation Cabinet, Kentucky, 12, 48

Trial date, 45-46

Trial preparation, 45-53

Trials
  generally, 54
  avowals, 56-57
  case in chief, 56-57
  closing argument, 13, 58-59
  cross-examination, 57; see also Expert Witnesses
  date, setting, 45-46
  jury deliberations, 48-49
  jury instructions, 57-58
  jury selection, 55-56
  opening statement, 56
trial date, 45-46
use of theme, primacy, simplicity,
forcefulness, honesty, 54-55
voir dire, 52

Underinsured motorist insurance, 26-27

Unfair Claims Settlement Practices Act, 38

Uninsured motorist insurance, 25-26

Voir dire, 52

Wage authorizations, 2-3, 68

Wages, loss of, 16-17, 21, 27-28, 47-48

Witnesses, 32-33, 41-43, 45-46

Witness lists, 46

Wrongful death, 12, 19