

SENATE JUDICIARY COMMITTEE

MINUTES OF MEETING

APRIL 2, 1975

The meeting was called to order at 9:15 a.m. Senator Close was in the Chair.

PRESENT: Senator Close
 Senator Wilson
 Senator Bryan
 Senator Sheerin
 Senator Dodge
 Senator Foote
 Senator Hilbrecht

ABSENT:

SB 198 Requires preliminary inquiry following arrest of a parolee for alleged parole violation to determine if reasonable grounds for revocation of parole exists.

Senator Close informed the Committee of the amendments that the Assembly Judiciary Committee wished to make. There were no objections to these amendments.

AB 70 Authorizes recoupment from convicted indigent defendant of costs incurred in providing him attorney.

Senator Close read the amendments made during the meeting of March 26, 1975.

After a brief discussion, Senator Dodge moved a "do pass," Seconded by Senator Foote, Motion carried unanimously. Senator Bryan abstained from voting on this matter in that he was not present during testimony. Senator Wilson was absent from the vote.

SB 400 Authorizes creation of Nevada Essential Insurance Association and imposes powers and duties on Commissioner of Insurance and Association.

SB 401 Excludes malpractice insurance from definition of casualty insurance; makes changes in provision requiring mandatory insurance plan when essential insurance coverage is unavailable.

SB 402 Defines location of emergency in regard to those rendering gratuitous emergency care.

SB 403 Requires amount of judgment for damages in personal injury action against provider of medical care or services to be reduced by amount of any prior payment of defendant.

SB 405 Prescribes standards of evidence in actions for medical malpractice.

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- SB 406 Eliminates medical malpractice actions after period of limitations by persons who were under legal disability at time of alleged injury.
- SB 408 Provides additional forms of consent to medical and surgical procedures.
- SB 409 Creates screening panels to hear medical malpractice claims.
- SB 432 Strengthens provisions relating to physicians.

Assemblyman Lloyd Mann appeared before the Committee and presented a brief background on the package. He informed the Committee that this all started with the introduction of ACR 1 which established a joint committee to study the problems concerning medical malpractice insurance in Nevada. As a result of that study, they developed this 8 bill package that, although it will not solve the whole problem, it is a good start in that direction. The prime objective of the package is to insure that no doctor will have to run his practice without malpractice insurance. He stated that he and Senator Hilbrecht presented the program to a group of doctors and that it was his understanding that they were in agreement with it, with a few amendments.

Richard Garrod, Farmer's Insurance Group stated that this group was opposed to SB 400. He felt the problem could be reached by eliminating the exorbitant awards presently being given and by establishing a statute of limitations, which he feels, at this time, is open-ended.

Senator Hilbrecht informed him of the statute of limitations provision in SB 406. Mr. Garrod replied that this language did not accomplish what it was intended too, that is, they did not read it as such.

According to Mr. Garrod, the main objection to SB 400 was the pool risk concept which would require all insurance companies, including insurers of automobiles, to become involved in medical malpractice insurance. In order to clarify this point, Senator Dodge asked Dick Rottman, Director, Department of Commerce if this was the case. Mr. Rottman responded that it would involve only those companies writing general liability insurance and therefore automobile carriers would not be concerned. In view of this information, Mr. Garrod stated that resolved a lot of their reservations about the bill.

Peter Newman, Nevada Trial Lawyers Association stated that the concept of pooling insurance is good and also recognizes the fact that the medical profession does have a problem that needs to be solved. The Association feels, however, that this problem cannot nor should not be solved simply by abolishing the right to bring a malpractice suit if you are the victim of an injury caused by medical negligence. Mr. Newman addressed the remainder of his remarks to SB 405. The effect of this bill would be that if the medical profession will not produce or furnish someone to testify that there was a deviation from the standard of care, outside the 5 listed exceptions, the injured person will, in effect, be without the right to trial.

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What you are doing in this bill is, you are saying the very profession whose negligence you are talking about is going to be allowed to be the determiner of whether or not a suit can be filed. In response to a question by Senator Wilson as to the origin of this bill, Senator Hilbrecht stated that it was very similar to the American Medical Association's model res ipsa section. What the Committee did was to try to evaluate how this varied from existing practice in the state of Nevada. He agreed with Mr. Newman that the aspect of medical testimony should be enlarged to include texts, which are recognized by many jurisdictions as evidence. Mr. Newman disagreed with Senator Hilbrecht. The bill, instead of saying the 5 exemptions are res ipsa, says there will be no liability unless it falls within one of the 5 items or unless expert medical witnesses testify to the demonstrated deviation from the standard of care.

In response to a question by Senator Wilson, Mr. Newman informed the Committee that the Arizona and California Supreme Courts have held recently that the locality rule is abolished. The more advanced rule is that medicine is a national thing and that standards are national in scope and should not be limited by the locality rule. The Nevada Supreme Court upheld the locality rule about 15 or 18 years ago but it has not been tested nor reaffirmed since that time. Senator Hilbrecht stated SB 432 had a locality provision in it and requested Mr. Newman review it and make some comment on it at the next hearing.

John Drendall, Nevada Trial Lawyers Association concurred with Mr. Newman's remarks on SB 405. He stated that he would prefer to present text material as evidence than rely on the expert medical witness provided by the medical profession. In regard to Section 4 of SB 406, Mr. Drendall felt that a special class of citizenship was being created for doctors.

Mr Newman stated that he would defer to Mr. Drendall on 406.

Mr Drendall stated, I, along with Mr. Newman and Mr. Osborn, am a member of the Trial Lawyers, but I find myself actually lobbying. I have an axe to grind in this particular field. I handle malpractice cases as they do and would appreciate a few minutes of your time. Certainly, you as lawyers know that bad facts make a bad law; that is a maxim that you are all familiar with, and the malpractice problem, as it exists today, is one that would appeal to any legislator to do something about. When a doctor says he can no longer treat you because it is going to cost him between \$15,000 and \$20,000 a year or more and he is going to join the army or withdraw his practice, certainly fine and good doctors should not be rejoined to do that; and, we are confronted with a problem. I think all of us appear here with mixed emotions on some of these bills, I know I do. But last night, I happened to be listening to Channel KVIE in Sacramento and they had a panel on the malpractice problem in the State of California. Among the witnesses was the father of a 4 year old boy who had received what Farmer's would consider an exorbitant award for being rendered quadraplegic,

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almost comotose, continuous hospital care for the rest of his life and a civil jury gave him a verdict. The father of the son said in this particular interview, "while civil jurys in the judicial cases and proceedings render these verdicts and what is wrong with a civil jury and what is wrong with the jury system, and after 8 or 12 people heard what had happened to my son they returned a verdict, and what is wrong with that." That is the system of justice in America, and I think that is basically what we are talking about. To appear in opposition to every bill is not our intention. But the one that Pete was just talking aoubt - the problem a lawyer has in getting a medical expert if you win in front of the panel, but my experience with experts is that I would rather go with the text material under the statute than the expert. Now on 406, I think the long and short of this is that the insurance company actuarily want to know how long they are going to be on the hook for coverage. I think that is the purpose of the bill. If there was a way to do it, I think they are entitled to it. But, do you want to make doctors under this particular 406 a special class of citizens. Are you trying to give the doctor an exalted position. That is what I would look at as a legislator. Because of the situation of malpractice, is he entitled to something more than any other citizens are entitled to? And that is what Section 4 really gives him, as I read it. Does the doctor get a better break than any other citizen in the community? Do you want to extend that privilege to the doctor?

Senator Dodge commented that he hadn't sat on the committee when these bills were reviewed, but it seemed to him that the whole value of judgment that we have to make is whether we have a sufficient -- what amounts to a social problem in American because of medical malpractice costs. That among other things, you are estimating health care costs against all people in the country. What we have to try to do is balance some of these considerations in the interest of trying to alleviate, in some reasonable way, the problem. Now, I would agree with you from the point of view of the types of clients that you say have continuing problems and where they have longer statutes of limitations, but, what I want to ask you, is do you feel, not as a practicing lawyer, but as a citizen of Nevada and a citizen of this country, that this legislature faces some value judgments about trying to mitigate this social problem and this health care problem in some respects?

Mr. Drendall stated that he certainly did, but he thought it fell with the insurance companies. In other words, we operate in somewhat--you as lawyers know we go into court and we cannot mention insurance; this is the best example. As a practical matter insurance is behind every casualty case that I know of. I know of no lawyers in this organization that would be particularly interested in proceeding against a doctor or any other tort feasor if there wasn't any insurance involved. If I was a doctor and had to pay \$10-\$20,000 for insurance every year, it would bother me, and I looked at a patient and didn't know whether in a

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week or 2 weeks or 6 months that I was to see him in court, that would also bother me. But, on the other hand, is the doctor somebody who doesn't have to adhere to the same rules as every citizen, that is the question?

Senator Dodge stated that was not necessarily so. I think this is the question, again, of balancing social considerations. The doctor just happens to be a recipient of some compromises we make. It is not, in my opinion, that anybody is trying to favor the doctors or the professional people.

Mr. Drendall said that had the insurance people gone into the rating system, the premium system, the structure; if the doctor could get his insurance as I understand it, the malpractice problem would not be so vital to him. His problem is he has to pay what he feels is an exorbitant fee for the premiums.

Senator Dodge stated this statute of limitations thing has to do with continuing risks as he saw it, and he asked Mr. Rottman what the loading factor in the premiums was on this sort of thing; that the insurance companies are imposing because of the continuing rate of exposure.

Senator Hilbrecht stated that there was about a 13 year tail on this as opposed to the standard that Dr. Rottman has. That was the evidence that was presented.

Senator Dodge asked what the loading factor on the premium does on the continuing risk aspect?

Dr. Rottman answered that this is one of the real problems. The actuaries generally around the country have come up with some sort of agreement, that right now, with a sort of unlimited statute that exists in many states, they just don't know. They don't know where to price it out because they don't know where the thing is going to be in 10 years.

Senator Hilbrecht states that the median exposure, as he recalled, came at about 8 years.

Senator Wilson stated that he realized that this package was designed to try to create an insurance climate, so that we can give some of these companies the right insurance. Do we have any numbers on the question of whether or not, after 2 years of discovery, you have a reasonable obligation. Do you know the full implication and consequence of the injury?

Mr. Drendall answered that this has been the law.

Dr. Rottman stated that as far as statistical data, no. He didn't know where they would find it.

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Senator Sheerin stated that he was concerned about the words "such person" on line 18 and the word "him" on line 20 in Subsection 2 of Section 1. Doesn't the "such person" refer to the doctor and the "him" refer to the plaintiff.

Senator Hilbrect said he thought it was the patient referring to the doctor.

Mr. Drendall thought that this should be clarified.

Senator Hilbrect felt that instead of "such person" it should be "health care provider" and that should clear it up.

Mr. Al Osborn of Reno stated that the locality rule as far as the federal district court of Nevada and also the State district courts have held that it is not applicable because all doctors take nationwide exams. They have the same standards and in cases they have tried in the past few years they have not held with the locality rule. Our complaints and our reasons for opposing 409, are sections 9 and 10. Ten says that if you get a positive result from the panel that they should cooperate in furnishing a doctor. Sometimes this is helpful and sometime it isn't. You can often have a popular local surgeon and someone who works with him in a hospital, and he is not going to come in and testify against him. I assume where it says in Section 9, "affirmatively recite" that the findings of the panel, I assume that you must plead and this come into evidence. Whether affirmative or negative, if you get a popular doctor from Reno, it is a very difficult task to get a positive finding against him. If you get someone from Ely and he comes to Reno, it is very easy.

Senator Wilson asked what had been the experience of other doctors from other locals coming in and testifying?

Mr. Osborn answered that this is one reason that people have been able to get on malpractice cases because there are two things: 1) you can get professors from state medical schools in California and 2) there is a new breed of doctors, the young doctors don't have the covering up aspects that doctors had for many years, and many of the young doctors don't hesitate to, in an appropriate case, testify. The thing that he objected to was making it mandatory that the findings of the panel come into it because this would be terribly persuasive and I do think that also has constitutional problems; an equal protection problem. Why do doctors have this right and no one else in the country have this right?

Senator Hilbrecht stated that he could conceive of a situation where a medical screening panel might be held unconstitutional, but maybe "shall cooperate fully" doesn't insure what we intended it to insure. Maybe affirmatively recite is what we mean, but certainly, this can't be construed to be unconstitutional simply because, if you are involved with a regulatory agency. We are simply providing an administrative step as we do in many areas, in requiring

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those prerequisites; those administrative remedies to be exhausted first, in the hope that we can resolve matters before we get into court. You well know, and I think you have to discuss the fact, that usually affirmative findings by a medical screening panel resulted in a resolution outside of court many times.

Mr. Osborn said he thought our voluntary system works pretty well.

SEnator Hilbrecht said that there are cases where you are required to completely exhaust your administrative remedies.

Mr. Osborn said that he didn't believe that the evidence - that the result of the administrative body comes into evidence in a trial de novo.

SEnator Hilbrecht said that you would not be an aggrieved party and you would have no standing in court unless you, at least, provide the findings of that administrative body.

Mr. Osborn said you might employ that, but he didn't think it was the same thing as saying there is a medical-legal panel and that this is what they did. These are their findings.

Senator Hilbrecht asked if he said it is unconstitutional as a matter of policy?

Mr. Osborn said he thought that the difference in the instance you are talking about; there is an historical reason for having a (workman's) situation, but I don't think that applies in the medical-legal situation.

Senator Wilson stated that he was bothered about how well this medical-legal panel is working because if it were working properly, I would assume it wouldn't be necessary to talk about this as one of the elements of the package.

No action was taken at this time.

SCR 21 Directs the Legislative Commission to study the problems of medical malpractice insurance.

Senator Dodge moved to "do pass and rerefer to Legislative Functions,"
Seconded by Senator Bryan,
Motion carried unanimously. Senator Wilson was absent from the vote.

SJR 16 Proposes to amend Nevada Constitution to more clearly delineate property rights of married persons and to delete requirement that laws be adopted providing for registration of wife's separate property.

Senator Sheerin moved a "do pass,"
Seconded by Senator Hilbrecht,
Motion carried unanimously. Senator Wilson was absent from the vote.

SB 52 Makes changes in law relating to sexual crimes against persons.

Senator Close read to the Committee the proposed amendments.

Following a brief discussion, Senator Hilbrecht moved to "amend and rerefer,"
Seconded by Senator Wilson,
Motion carried unanimously. Senator Dodge was absent from the vote.

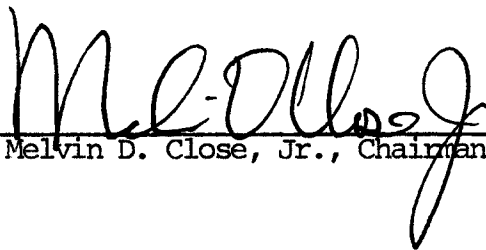
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There being no further business, the meeting was adjourned.

Respectfully submitted,


Cheri Kinsley, Secretary

APPROVED:


Senator Melvin D. Close, Jr., Chairman