SENATE JUDICIARY COMMITTEE

MINUTES OF MEETING

APRIL 14, 1977

The meeting was called to order at 8:05 a.m. Senator Close was in the Chair.

PRESENT: Senator Close
Senator Bryan
Senator Dodge
Senator Foote
Senator Sheerin
Senator Gojack
Senator Ashworth

ABSENT:

AB 268 Specifies condition under which persons under disability may recover damages for parents' or guardians' failure to bring medical malpractice action.

Shirley Smith, Deputy Attorney General testified in opposition to this measure. For her statement, see attached Exhibit A.

Senator Norman Ty Hilbrecht responded to her objections and stated that under the doctrine of respondeat superior, irrespective of the fact that the warden or administrator has actual knowledge, he is charged with constructive knowledge for the activities of his department. This was an attempt to insert the standard of reasonable judgment which mitigates the responsibility in this regard. He did not believe that this really changes the law. The reason for actual or constructive knowledge is the fact that some kinds of procedures, if they are erroneous, may not be discernable for many years later. With respect to these concealed kinds of things, it is conceivable that the director or warden may not be aware that the injury occurred. But if it was the kind of injury or malpractice that could be discerned within the limitations period, then they ought to take steps. If he doesn't do that, he ought to be personally responsible and that is the purport of the statute.

Senator Close pointed out that an amendment made by the Assembly on page 2, lines 25-26 put the tail back on for an almost indefinite period of time.
Senator Hilbrecht stated that he was opposed to that because it was contrary to the purpose of the bill. He further suggested that some standard should be imposed such as that on lines 33-34 because as presently written, the only standard would be that of the judge and jury that tries the case and their determinatio on the issue of whether or not an act of omission occurred would be conclusive of the responsibility of the guardian.

AB 268 Dave Small, Deputy Attorney General informed the Committee that every prisoner under the custody and control of the warden has constitutional access to the courts and therefore, legal disability is a concept that has passed. There is no such thing as civil death anymore; that was repealed many years ago. Also, for both the warden and administrator, there are certain conflicts. That is, who the attorneys are going to be. In the most obvious scenario, you are talking in terms of the warden suing the prison doctor. He has responsibility for the medical treatment and he also has, with the aid of the prison board, the responsibility for hiring the doctor. The administrator has his health providers working for him on the staff also. So you have the employer suing the employee for medical malpractice Since you are talking about straight negligence theory of law, he would go into respondeat superior looking for a deeper pocket and sue himself. The Attorney General would prosecute the cause of action for the warden. The man to be sued however is the prison doctor, who is an employee acting within the scope of his employment, who was not wanton and malicious, and therefore, the Attorney General's office is going to defend him. You would then have the Attorney General defending and prosecuting.

Dr. Gwen O'Brien, Assistant Director, Division of Mental Hygiene and Mental Retardation testified in opposition to this measure. She stated that during any one day, the administrator, according to this bill, would have to have actual and constructive knowledge and responsibility for over 480 individuals. The total cost estimated per year for the division to supply the staff necessary for even a very minimal type of monitoring would be $50,000. Howard Barrett, Department of Administration has suggested that because of this, it is very likely that they would have to have insurance coverage and that the last premium quoted for something like this was $350,000, excluding malpractice, errors and omissions. The state has no liability insurance and there is nothing included in the executive budget to cover this anticipated cost should this bill pass.

In response to a question from the Committee regarding Mr. Small's observation that prisoners have access to the courts, Russ McDonald stated that he believed that was correct. Senator Sheerin disagreed with that and stated that he believed that a prisoner could sue the warden but that he did not have complete and total access to the courts.

The Committee will withhold action on this pending a decision on this matter.

AB 321 Increases certain fees and deletes certain fees of county clerks.

For further testimony on this matter, see minutes of meeting for April 6, 1977.

Loretta Bowman, Clark County Clerk of Court testified in support of this measure. She stated that after conversation with Senator Ashworth, she had prepared a chart indicating the fiscal impact of these proposed increases. (see attached Exhibit B) The purpose for having 3 levels of filing fees was that each level required increasing amounts of paper work and staff time and she felt they should be charged accordingly. She further commented that she would rather charge one fee; $20 for each and every defendant answering separately.

Russ McDonald, representing Washoe County, testified in support of this measure. He stated that even with these increases in fees, it was still a losing proposition for the counties.

In further review of the measure, it was the decision of the Committee to amend the fees as follows:

Page 1, delete lines 12-22 and insert $32.00. The Committee felt it was better to have one filing fee for all actions rather than go with a break-down;
Page 2, delete lines 7-8. They felt there should be no charge for filing on estates of less than $1,000;
Page 2, line 27 delete $20 and insert $25;
Page 2, lines 45-46, delete as this is included later on;
Page 3, delete line 3;
Page 3, line 5, increase to $ .25 per copy;
Page 3, line 6, increase to $ .60 per copy;
Page 3, line 7, increase to $2.00; and
Retain the increase of $3 going to legal aid.

Senator Ashworth moved to amend and do pass.
Seconded by Senator Bryan.
Motion carried unanimously. Senator Gojack was absent from the vote.

SB 469 Changes monetary limitation on tort liability of State and its political subdivisions.

Senator William Raggio testified in support of this measure. He stated that the $25,000 limit is an arbitrary figure established by the legislature in 1965. He felt that this fails to adequately compensate a victim in most cases. He suggested

SB 469 that perhaps $50,000 may be more realistic than the pr... $100,000 but that some adjustment was necessary.

Senator Bryan felt that a more defensible figure would ... calculate what the increase in the cost of living ha... this figure was first established.

No action was taken at this time.

SB 470 Deletes certain requirements relating to medical care of pri- soners in county and city jails.

Inasmuch as this is covered under a proposed Assembly bill, Senator Dodge moved to indefinitely postpone.
Seconded by Senator Ashworth.
Motion carried unanimously. Senator Gojack was absent for the vote.

There being no further business, the meeting was adjourned.

Respectfully submitted,

Cheri Kinsley

Cheri Kinsley, Secretary

APPROVED:

SENATOR MELVIN D. CLOSE, JR., CHAIRMAN

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TESTIMONY IN OPPOSITION TO AB 268

The Attorney General's Office opposes AB 268 for several reasons. In order to present those reasons clearly, let me first indicate the present state of the law and then outline how the bill would change the law.

I. Existing Law

NRS 11.400 is a statute of limitations provision which prohibits medical malpractice actions against health care providers more than four years after the date of the injury or two years after discovery of the injury, whichever occurs first, or ten years in the case of brain damage or birth defect. The effect of this rule would be harsh if applied uniformly, therefore, certain exceptions are included. For example, where a health care provider conceals an act, error, or omission that would constitute medical malpractice, the running of the statute is tolled during the time of the concealment. Thus, a plaintiff who fails to discover his injury because it was concealed from him by the defendant is not barred from suing until four years after discovery of the injury.

Another exception favors prisoners and persons admitted to State mental health care facilities. The Warden of the Nevada State Prison and the Administrator of the Division of Mental Hygiene and Mental Retardation are held "responsible for exercising reasonable judgment in determining whether to initiate any cause of action" on behalf of persons "subject to their respective control who is under a legal disability".

Note that the existing language requires the Warden and the Administrator to initiate any cause of action. "Initiate" is broad enough to include a number of courses of action. For instance, if the Administator became aware that a health care provider may be guilty of malpractice against a client at the Institute, he could inform the client, the client's family or guardian, refer the case to legal aid, or in any other reasonable way see to it that action on the client's behalf is taken.

II. Proposed Changes

AB 268 substitutes "prosecute"for "initiate". The change would mean that the Administrator himself must prosecute the action on the client's behalf. He could not fulfill his duty by alerting the client or his family, but would have to personally bring the action. The bill does not provide for staffing for the Attorney General's Office or funds for private counsel.

EXHIBIT A

The major change is at lines 22-33 wherein the Warden and Administrator are made personally liable to the legally disabled person or minor child for "damages sustained" because of failure to bring such action. Damages of course would include the amount of any judgment that could have been had against the health care provider, had the statute not run.

III. Attorney General's Conflict of Interest

The bill would put the Attorney General's Office and the Administrator in hopelessly conflictual positions. "Provider of health care" is defined to include physicians, dentists, nurses, physical therapists, psychologists, medical laboratory directors and technicians, as well as licensed hospitals. The Division of Mental Hygiene and Mental Retardation employs members of all those professions and operates two licensed hospitals. The Administrator then would be charged with the duty of filing suit against his own employees and his own facilities. Should he fail to do so he would be personally liable to the legally disabled person for damages sustained.

The Attorney General provides legal representation to the Division of Mental Hygiene and Mental Retardation, defending it against negligence suits and bringing contract actions on its behalf. Under the provisions of NRS 41.0337, the Attorney General also represents State employees who are named as co-defendants with the State. Thus the Attorney General, as legal counsel to the Division and its staff, would be required to prosecute the medical malpractice action on behalf of the Administrator and to defend the State and its employees in the same action. Not only does such an arrangement offend common sense, it violates Canon No. 5 of the lawyer's code of ethics which forbids representing clients whose interests conflict.

It could be argued, since the bill does not address the problem of conflict of interest, that the intent is for the Administrator and the Warden to prosecute those cases at their own expense and without representation by the Attorney General. If that is the result, then few people would take those jobs. Since the bill holds the Administrator personally liable then the $25,000 limitation contained in NRS 41.035 for actions against the State may not apply in such cases brought against the Administrator.

Alternatively, the State could hire private counsel to prosecute those actions, thereby avoiding the conflict of interest, but at some cost to the State.

IV. Administrator's Conflict of Interest

A similar conflict applies to the Administrator. He would be required to bring suit against his own staff people who come within the definition of provider of health care. As an employer, the Administrator may be amenable to suit under a theory of respondeat superior for the torts of his own employees. A lawyer bringing a tort action on behalf of an injured person would name not only the individual health care provider, but would name his supervisors as well. Thus you have the Administrator prosecuting a law suit on behalf of one of his clients and being named as a defendant therein. He would be both plaintiff and defendant in the same suit!

V. Respondeat Superior

The reasons for the doctrine of respondeat superior are grounded in social policy.

Courts reason that where one is injured through no fault of his own, then it is desirable that the loss occasioned by that injury be spread not only to the person directly responsible, but to those who stood to gain most by the conduct that caused the injury. Therefore, where a delivery driver for Ajax Dairy negligently injures a plaintiff in a crosswalk then not only is the driver held liable, but so is his employer, who stood to benfit the most from the driver's conduct within the scope of his employment, i.e., driving the truck.

By making the Administrator liable for conduct of which he has only constructive knowledge is in effect making him liable as if under respondeat superior without the concomitant policy reasons. The Administrator does not stand in an entrepreneurial relationship to his employee; he does not stand to earn a profit from that employee's work. The bill gratuitously shifts the liability from the proper person, the health care provider who has committed a tortious act, to one who is not at fault, the Administrator or the Warden.

Not only does the bill require the Administrator to bring suit when he has actual knowledge of an injury, but also when he has constructive notice. Under the doctrine of constructive knowledge one is held responsible for knowing that which he does not in fact know. A common application of the doctrine is in principal-agent or employer-employee relationships. In this situation, the Administrator would be held responsible for the knowledge of each of hundreds of Division employees who are directly involved in client care.

VI. Cost of Compliance

To protect himself fully from potential liability he would have to perform a thorough review of each case file for every Division client for the last ten years. (Ten years is the longest limitation period provided for in NRS 11.400.) That review would have to be conducted by health care professionals in order to evaluate the quality of care that was provided, e.g., by physicians to review other physicians' work. Dentist, nurses, etc., likewise. A review would also have to be made by a lawyer to determine whether there was an actionable cause. Witnesses would have to be interviewed to verify the accuracy of case files. Needless to say, Division of Mental Hygiene and Mental Retardation facilities have provided service for tens of thousands of persons over the last ten years.

In every case where there is found a colorable cause of action the Administrator would have to resolve any doubts for the benefit of the legally disabled person. To do otherwise would be to run the risk of himself later being sued by the injured party.

The bill is objectionable because it will expose the State's fiscal resources to another possible liability. NRS 41.0337 provides that no action can be brought against a State employee unless the State is also joined as a co-defendant. Subsection three provides that the State shall have no right of contribution against an employee found liable with the State as joint tortfeasors unless the State can prove that the employee acted wantonly, maliciously, or failed to cooperate in the defense. Therefore, by creating a new cause of action against the Administrator, this legislation also creates one against the State. The practical effect, where the State has no right of contribution against the Administrator, is that the State and its taxpayers are left holding the bag.

VII. Who is Covered?

In regard to certain clients, those whose treatment involves symptoms relating to alcohol or drug abuse, the bill imposes a duty, the execution of which potentially could put the Administrator in violation of the federal confidentiality requirements of 42 Code of Federal Regulations section 2, and thereby endanger all federally funded programs operated by the Division. Those rules prohibit the use of any information which would reveal the identity of clients, by any persons other than the treatment team, without a written, specific waiver of confidentiality or a court order. If the written release or court order were unavailable, the Administrator would have to elect between failure to prosecute the malpractice action and the attendant penalties and violating his right to confidentiality and thereby subjecting himself to a possible fine of from $500.00 to $5,000.00 or losing federal funding.

VIII. Lack of Definitions

The bill fails to define "subject to their respective control". The Division offers services in a variety of settings and circumstances and it is not clear which, if any, of its clients are subject to the control of the Administrator. Some people may have only one contact, for a few minutes, voluntarily and as an outpatient. Others may return for an hour or two per week. Others are served as voluntary admissions in residential facilities, or are brought in by the police for emergency treatment or are court committed. Others are referred from the criminal justice system as incompetent to stand trial, not guilty by reason of insanity, or for mental illness occurring while imprisoned. Some of these people may be residents for years. While residents, some are afforded passes and convalescent leaves during which they can leave Division facilities: even those people who are in Lake's Crossing Center, the security facility for the disordered offender, can be said to be under the control of the Administrator in only limited ways.

The lack of definition of "control" would require the Administrator to proceed conservatively and bring suit in a number of cases where such control is not very evident.

Similarly, legal disability is not defined. NRS 433A.460 provides a rebuttable presumption of legal capacity unless he has been specifically adjudicated incompetent. Does "legally disabled" mean the same thing as "adjudicated incompetent"? Should the Administrator bring a malpractice action on behalf of one who has not been adjudicated incompetent but who as a factual matter does not have the capacity to do so himself?

Similar problems arise in regard to minors, persons who have guardians of the person or the estate or both, or guardians ad litem. Those persons may be "legally disabled", but they may also have parents or guardians who have the duty to act on their behalf and in their own best interests. To that extent they are not legally disabled. Would the Administrator be obligated under this law to sue on their behalf? If so, that duty would overlap the duty of the parent and guardian.

IX. Constitutional Infirmities

The selection of the Administrator and the Warden appears to be arbitrary and not reasonably related to the problem the bill attempts to address. There are

a number of other facilities in the State which house people who may suffer from "legal disability". These include county jails, public and private children's homes, hospitals, the Elko boys' school, Caliente girls' school, Wittenberg Hall, Clark County Juvenile Court Services, County and State Welfare Departments and so on. Those programs are not included. If the intent is to preserve rights and remedies to people who may be under a disability, then the bill only addresses a small part of the problem.

If the intent is to protect those helpless people, then the choice of the Administrator as the responsible person is a poor one. He of all the staff of the Division of Mental Hygiene and Mental Retardation is least likely to have specific information on individual cases. He directs a statewide multi-million dollar program serving thousands of clients. For the benefit of those clients it would make more sense to place the responsibility with people who would have reason to know of acts of medical malpractice.

Mental health law and prisoners'rights are very glamorous legal issues today, just as civil rights and poverty law were the glamour issues ten years ago. It may be that the selection of the Administrator and Warden instead of persons closer to those to be protected was inspired by the currency of those issues in the news.

To single out these two men and place on them an onerous responsibility and personal liability may constitute a violation of their rights to equal protection and substantive due process.

X. Other Remedies

If the intent is truly to provide a protection to prisoners and mental health clients, there are other means of doing so without cost to the State or to the two men singled out by AB 268. Some of the more obvious possibilities that could be used either singly or in combination would include:

(a) tolling the running of the statute of limitations for medical malpractice actions during any legal disability,
(b) authorizing other representatives, relatives and friends, who are close to the clients to initiate actions on their behalf, or
(c) put the time and money this bill will cost into a client-advocacy program.

XI. Conclusion

NRS 11.400 as it now stands, only requires the Administrator and the Warden to exercise "reasonable judgment", based on their own personal knowledge, for initiating action. That does not impose unreasonable burdens on the Administrator and Warden nor does it create conflict of interest problems for the Attorney General's Office, or result in the government in effect suing itself. Neither does it place a heavier burden on the State and its employees than it does upon parents, guardians, spouses, etc. whose inherent duty it is to assert the rights of their children and wards. Our specific objections are to the changes proposed at page two lines 3 and 13 where the word "prosecute" is inserted, lines 6 and 16 where "commence an" is inserted and all of the new language contained in lines 22 through 33.

In summary, on behalf of the Attorney General, the Administrator of the Division of Mental Hygiene and Mental Retardation, and the Warden of the prison, I respectfully submit that AB 268 be defeated.

Sincerely,

ROBERT LIST, ATTORNEY GENERAL

BY Shirley Smith
Shirley Smith
Deputy Attorney General

SS:jlb

CALENDAR YEAR	CIVIL CASES REQUIRING FEES	INCOME GENERATED	(3) COST OF OPERATIONS	(4) % DEVOTED TO FEE CASES	COST OF FEE CASES
1976	13,400	$227,800	$830,000	64%	$531,200
1977	14,000 (Projected)	(1) $238,000 (Present Fees)	$960,000	64%	$614,400
1977*	14,000	(2) $504,000 (Proposed Fees)	$960,000	64%	$614,000

*(1) Projection based on January, February, March of 1977 to arrive at 1977 total.

(2) Based on requested fees as set forth in A.B. 321

(3) From Clark County Clerk's Records

(4) Actual 1976 civil cases requiring fees / Total Cases Handled $\frac{13,400}{20,900} = 64\%$