

**HOUSE COMMITTEE ON JUDICIARY**

**SUBCOMMITTEE ON CIVIL LAW**

**March 31, 1997 Hearing Room 357**

**1:00 P.M. Tapes 50 - 51**

**MEMBERS PRESENT:**

**Rep. Lane Shetterly, Chair**

**Rep. Judith Uherbelau, Vice-Chair**

**Rep. Roger Beyer**

**Rep. Jo Ann Bowman**

**Rep. George Eighmey**

**Rep. Floyd Prozanski**

**Rep. Charles Starr**

**Rep. Larry Wells**

**STAFF PRESENT:**

**Bill Taylor, Counsel**

**Lisa Fritz, Administrative Support**

**MEASURE/ISSUES HEARD:**

**HB 3188 - Public Hearing**

**HB 2044 - Work Session**

**These minutes are in compliance with Senate and House Rules. Only text enclosed in quotation marks reports a speaker's exact words. For complete contents, please refer to the tapes.**

<b>Tape/#</b>	<b>Speaker</b>	<b>Comments</b>
<b>Tape 50, A</b>		
005	Chair Shetterly	Calls the meeting to order at 1:13 p.m.

<b><u>OPENS WORK SESSION ON HB 2044A</u></b>		
007	Bill Taylor	Committee Counsel Discusses HB 2044A and why it has been rereferred to the subcommittee. Discusses two new amendments (-3 and -4) to the bill Counsel. <b>(EXHIBITS A, and B).</b>
055	Rep. Uherbelau	The -3 and -4 amendments do some of the same things.
057	Taylor	Explains the reasoning for the amendments and gives examples to illustrate his points.
074	Rep. Uherbelau	But, the -3 and -4 amendments are exactly the same in some areas.
075	Chair Shetterly	Down to line 14, they are the same.
076	Rep. Uherbelau	The only difference is on line two of the -4, where it only amends ORS 30.800. The -3 amendments amend ORS 30.800 and ORS 30.807. We can't adopt both of them.
087	Chair Shetterly	I would think that the -3 amendments would subsume the -4 amendments.
100	Taylor	Explains and reads aloud the amendments' accompanying memo from Dave Heynderickx, Deputy of Legislative Counsel <b>(EXHIBIT C).</b>
122	Alan Tresidder	Oregon Trial Lawyers Association Submits written testimony on HB 2044A <b>(EXHIBIT D).</b>
130	Mick Alexander	Private Practice Lawyer (Salem) Testifies in opposition to giving any person, who helps with medical assistance, some level of immunity, under the bill. Comments that including such immunity would be a huge policy change from prior legislation. Submits proposed amendments to HB 2044A <b>(EXHIBIT E).</b> I would ask you to at least consider, and perhaps rethink the idea of, interjecting different legal standards (other than gross negligence). Discusses instruction, with regard to statute.
180	Alexander	Continues testimony.
230	Alexander	Continues testimony.
240	Chair Shetterly	Recesses work session on HB 2044A.

<b><u>OPENS PUBLIC HEARING ON HB 3188</u></b>		
253	Rep. Ron Sunseri	District 22 Discusses background, reasoning behind, intent, and basic purpose of HB 3188. Page two, line six should have been taken out. That deals with political committees, being liable for their statements, and candidates, not necessarily, being responsible. Gives examples to illustrate his position.
302	Chair Shetterly	So, you are proposing an amendment to delete that sentence?
305	Rep. Sunseri	Correct. Also, on line 26, where it says "\$200," my original proposal was "\$2,500."
306	Chair Shetterly	How did it get to be \$200? Did Legislative Counsel (LC) do that?
307	Rep. Sunseri	They just put that in.
311	Rep. Bowman	How does this change now that Measure 9 has been struck down? The independent expenditures you referred to, in your testimony, won't exist. They may exist, differently than before, but the example you used is no longer law. Why do we need to do this?
320	Rep. Sunseri	Actually, that is not accurate. Independent expenditures existed before Measure 9 and were utilized often. There was more latitude on the Secretary of State's part to allow candidates to know what the content of those independent expenditures were, but the reversal of Measure 9 will not change that. We'll still see independent expenditures, just as we did before.
328	Rep. Bowman	People lie when they run for office. Are you going to change this from \$200 to \$2,500? Do you think that would deter someone from making a dishonest statement, if there's a possibility of a \$2,500 fine?
336	Rep. Sunseri	This also allows for punitive damages (line 27), which could exceed \$2,500. If the court had a way to determine actual damages, in terms of reputation, then the damages could be assessed at much higher than \$2,500. I didn't lie in my campaign. I think we need to have something that will hold us accountable. I'm hoping that some kind of a punitive damage will do that. There are people who are lying, intentionally, because there's nothing in the law to hold them accountable, in terms of cost. If we can have something in our statute that says, "If you do this intentionally, then you're going to pay a price for it," I think people will, at least, think twice before they make grossly negligent misstatements.
363	Rep.	Why not criminal sanctions?

	Prozanski	
365	Rep. Sunseri	Where do you draw the line? I don't know. I don't oppose that. I just didn't think it was where we needed to go on this. I want something that is simply going to tell people "Don't do this. It's going to cost you something to do this." I didn't consider criminal sanctions.
373	Rep. Uherbelau	You mentioned grossly negligent statements. Besides the outright lies, I think that what happens, more often than not, is the presentation of misleading information about opponents, which you could argue is not a lie, but it's presented in a very misleading way. I could see grossly negligent statements coming under that category, but I didn't know if you were referring to bringing in that category or how you told the lie.
389	Rep. Sunseri	I have seen those kind of statements used intentionally, and there is a difference between a gross misrepresentation of the truth and someone who tries to make you think something a little differently. Both are wrong, but one would be more difficult to prove than another. Gives example.
<b>TAPE 51, A</b>		
003	Rep. Uherbelau	It's not the outright lies you see as much as the really misleading (e.g. looking at records, etc.). I don't see that covered here, but you mentioned it in talking. Do you intend to cover that kind of thing, or would this just cover the outright lies?
010	Rep. Sunseri	My intention was to create a bill that required accountability, but I am certainly opened to adding some things. I'm not married to this specific language.
013	Chair Shetterly	Your bill (and the amendments you proposed) provides for a greater level of sanction, but the standard that's created by the statute is not changed. If you look up on line eight, "knowingly" or "reckless disregard" are the standards, and line nine concerns a false statement of "material fact." This bill doesn't change any of that. The same thing is in section two (the candidate's liability), and then in section four, lines 22-23, reference is made to "clear and convincing evidence." The standard of proof is pretty high here.
027	Rep. Sunseri	I suspect that the court would be able to sort out some of that, in terms of intent and how gross the misstatement is. I just wanted to make it a little more costly for someone to do it intentionally.
033	Rep. Eighmey	I'm not objecting to the exposure, but I think it really boils down to the "material fact" statement. That one is the hardest. It is the same one applied, to attorneys in malpractice cases, to show the case would have been won, but for whatever action there was. "Material fact" is one where you would probably have to say, "I would have won, but for this false statement." That standard is pretty high. "Knowing" and "reckless" are

		hurttles I think you can overcome, but "material fact" is a tough one.
044	Rep. Sunseri	This was introduced before we had the reversal of Measure 9, so if changing the language would be beneficial, to get us toward some type of campaign reform in this session, I'm not opposed. I think the courts are saying that they don't want people making misstatements and telling lies, either to the public, or about other candidates.
051	Rep. Uherbelau	The standards that are here right now are very tough. There are very few cases that get over the hurttles of "material fact" and "clear and convincing evidence," so I don't know that it's getting you anywhere. However, the penalty certainly would, if you could jump all those hurttles. Because of some of the things you said, if we wanted to go that direction, I think we'd have to do something differently.
059	Rep. Prozanski	We've talked about false statements, material fact, and where they are throughout the bill, and then on the back, we pull that out, where we talk about the damages under subsection six. It seems to me that there's an inconsistency. If we're going to work this through a session, it may mean that we just list it as "false statements," taking out "material fact."
067	Rep. Sunseri	I'm completely open to relaxing some of the requirements to be able to prove this.
070	Chair Shetterly	Do we have a first amendment issue with this? If we back-off too far from either materiality of fact or burden of proof, do we run into a first amendment problem? Are we getting into a free speech issue here?
077	Rep. Eighmey	I think you also have the problems with regard to the "public figure" standard of the first amendment. Gives example. We know we can get away with saying things about public figures because they are public figures. However, if I, a public figure, say something against a private individual, I would be held to a higher standard because that might, in fact, ruin that private individual's reputation. We have to be very careful in that area.
090	Rep. Bowman	I don't know how you could prove something is a lie. People can craft words in a manner (as in Rep. Sunseri's example) that gives an appearance of one thing versus another, and you could never prove that the person lied. I would also be concerned about lowering the burden of proof because then, I believe, you have the opposite effect, where people are afraid to say anything because they are afraid of getting sued. I can just see the next campaign where everybody is suing everybody else before they get to the polls.
104	Rep. Sunseri	I agree that the court would probably have to sort out how to prove whether someone was lying. I did ask LC about the first amendment implications, and the answer I got was, "The first amendment never allows you to lie." I'm trying to get at people who make intentional misstatements.
118	Chair Shetterly	References annotations for the subcommittee's information.
136	Chair Shetterly	Closes Public Hearing on HB 3188.

<b><u>REOPENS WORK SESSION ON HB 2044</u></b>		
140	Dave Barrows	Oregon Veterinarian Medical Association The previous witness indicated that we are going from a very narrow scheme, to the current "Good Samaritan" law, to a much broader scheme, which is an accurate statement, but I wish to refresh the committee's memory: this was the committee's idea. At the committee's request, Ms. Williams, of our firm, did an exhaustive search, of the laws of other states, and came up with that fact that more than two-thirds of the states have adopted an approach similar to the one you are now examining. Being this broad, everyone is provided with some type of shield. We're not cutting "new Oregon ground" here; we're closer to the "back end of the train."
158	Rep. Beyer	I thought this bill was on the floor. What happened?
160	Chair Shetterly	Explains why HB 2044A was brought back from the floor.
180	Rep. Uherbelau	We changed from "reasonable care, under the circumstances" to "gross negligence." One of the things that can be very harmful to someone, who is injured, is being incorrectly moved at the scene of accident. Gives example. "Reasonable care" would take into consideration that the person who stopped to help had no training at all. Gross negligence would not. I'm uncomfortable with that. Our objective is to get people to stop and render aid, but we don't want them rendering the wrong aid. I don't think I can vote for this with gross negligence included.
202	Rep. Eighmey	Of the majority of states that have the all-encompassing "Good Samaritan" statutes, most have a gross negligence standard, so we would not be setting any precedence here. I made the statement, "Why don't we include everybody under this umbrella?" I wanted to have a policy change. I want to encourage everyone to be a "Good Samaritan." With regard to your concerns of "reasonable care" versus "gross negligence," what standards do you believe we changed?
224	Alexander	With gross negligence, there is supposed to be a higher standard. I think the approach of negligence does a great job of addressing all of these situations. The gross negligence standard is not a wise or necessary idea. The other problem I have is from an application standpoint. Gross negligence has been very ill defined. Further discusses instruction and higher standards of negligence.
274	Alexander	Continues testimony.
284	Rep. Eighmey	Are you saying that there is no definition of gross negligence, simply because it has not been used in Oregon? Obviously there has been a

		plethora of cases, in other states, that define gross negligence.
291	Alexander	There have been cases, at least in this state, that have defined it in slightly different terms. There may be some statutory language floating around.
293	Rep. Eighmey	There is.
298	Chair Shetterly	Recites definition as defined in statute.
300	Alexander	I think that's accurate, but I'm saying that maybe if the legislature said, "this is what gross negligence is," some of those problems would be resolved.
307	Chair Shetterly	Actually, the definition I recited would be in legislative history.
310	Rep. Eighmey	With regard to your proposed amendments, wouldn't the judge or attorneys, in preparing the jury instruction, say this is under ORS whatever, so the jurors would have access to the statute? How are you going to define that? How is the fact-finder going to be told that these are the requirements regarding statute, without going beyond the statute, because they would have to get more than what the statute reads? Isn't that getting into the fact-finders interpretive powers or responsibility?
332	Alexander	I don't know that the fact-finder would be instructed about the particulars of the statute, as it now exists. Gives example.
344	Rep. Eighmey	Aren't they given the statute?
345	Alexander	Not necessarily. Usually judges try to avoid lengthy instructions, but you may be right.
376	Rep. Eighmey	The objective was to encourage people to come forward and to be "Good Samaritans." That's still the objective. Discusses gross negligence versus reasonable care. Gross negligence is only in there because the bill was drafted that way.
398	Chair Shetterly	It seems to me that there was some discussion about "reasonable care, under the circumstances" being not particularly protective. It appears as if it is giving a level of immunity, but our concern was that it really isn't. I think that gross negligence was more intentional, on the part of the committee, than just being brought to us by LC.
<b>TAPE 50, B</b>		
010	Bill Taylor	That standard was also in other state statutes that we based this on. That's where the language came from, and following the committee's direction, that's what I used to send to LC.
		Remember that we were also using the term "ordinary negligence;" we sort

014	Rep. Eighmey	of put that within "reasonable standard of care." I had discussed the fact that I didn't want ordinary negligence to be the standard because nobody would want to come forward. We had to have a standard that was higher than ordinary negligence.
021	Chair Shetterly	I think the -3 amendments would repair the oversight. If the committee doesn't want to incorporate the -3 amendments, then we would need to look at a larger remake of this.
028	Rep. Bowman	<b>MOTION: Moves to ADOPT HB 2044A-3 amendments dated 3/31/97.</b>
		<b>VOTE: 7-0</b> <b>EXCUSED: 1 - Rep. Starr</b>
030	Chair Shetterly	<b>Hearing no objection, declares the motion CARRIED.</b>
032	Rep. Bowman	<b>MOTION: Moves HB 2044A to the full committee with a DO PASS AS AMENDED recommendation.</b>
		<b>VOTE: 6-1</b> <b>AYE: 6 - Rep. Beyer, Rep. Bowman, Rep. Eighmey, Rep. Prozanski, Rep. Wells, Chair Shetterly</b> <b>NAY: 1 - Rep. Uherbelau</b> <b>EXCUSED: 1 - Rep. Starr</b>
036	Chair Shetterly	<b>The motion Carries.</b> <b>REP. SHETTERLY will lead discussion on the floor.</b>
047	Rep. Uherbelau	I would suggest that we all sleep on this and think about the care standard we would want, if we were in an accident.
049	Chair Shetterly	Adjourns at 2:10 p.m.



Submitted by, Reviewed by,

Lisa Fritz, Sarah Watson,

Administrative Support Office Manager

**EXHIBIT SUMMARY**

**A - HB 2044A, proposed amendments (-3), Legislative Counsel, 2 pages.**

**B - HB 2044A, proposed amendments (-4), Legislative Counsel, 1 page.**

**C - HB 2044A, written testimony accompanying proposed amendments, Legislative Counsel, 1 page.**

**D - HB 2044A, written testimony, Oregon Trial Lawyers Association, 3 pages**

**E - HB 2044A, proposed amendments, Mick Alexander, attorney, 1 page.**