

SENATE JUDICIARY SUBCOMMITTEE
ON CIVIL PROCESS

Hearing Room
Tapes - 26

MEMBERS PRESENT:

Rep. Del Parks, Chair
Sen. Tom Bryant, Vice-Chair
Rep. Kate Brown
Rep. Bryan Johnston
Rep. Leslie Lewis
Rep. Bob Tiernan
Sen. Ken Baker
Sen. Randy Miller
Sen. Peter Sorenson

STAFF PRESENT:

Holly Robinson, Committee Counsel
Max Williams, Committee Counsel
Sarah May, Committee Assistant

MEASURES HEARD:

SB 450 - Public Hearing and Possible Work Session
SB 393 - Public Hearing and Possible Work Session

These minutes contain materials which paraphrase and/or summarize statements made during this session. Only text enclosed in quotation marks

report a speaker's exact words. For complete contents of the proceedings, please refer to the tapes.

TAPE , SIDE A

001 CHAIR BRYANT: Calls the meeting to order at 3:40 PM

PUBLIC HEARING ON SB 450

(SB 450 eliminates joint liability for torts.)

Witnesses:

Governor Vic Atiyeh, Oregon Litigation Reform Coalition
John Dilorenzo, Oregon Litigation Reform Coalition
Ron Lansing, Tort Law Professor
Richard Rogers, Attorney
Steve Call, Safeco Insurance
Betsy Bailey, Associated Oregon Industries
Alan Steiger, A-Dec Incorporated
Mike McCallan, Oregon Restaurant Association
Tom Tongue, Oregon Association of Defense Counsel
Tom Cooney, Oregon Medical Association
Ed Patterson, OHSU
Robert Simpson, Attorney

011 GOVERNOR VIC ATIYEH, OREGON LITIGATION REFORM COALITION: Testifies in support of SB 450. Refers to EXHIBIT A.

192 REP. JOHNSTON: About the initiative process, is it enough that we vote on it, or do we need to pass it?

202 ATIYEH: The people need a chance to voice their opinions. If the decision is favorable, then it's favorable. If it's not, it's not. Whatever happens we need to make it work.

215 SEN. SORENSON: Oregon doesn't have as much litigation as other states.

How do you think we should change this. Are we not moving fast enough in the right direction?

227 ATIYEH: I don't know what kind of corrective actions you as legislators need to make. I'm not interested in what's happening in other states. According to the poll, things aren't happening fast enough here in Oregon.

248 JOHN DILORENZO, OREGON LITIGATION REFORM COALITION: Testifies and submits written testimony in support of SB 450. (EXHIBITS A, B)

TAPE 24, SIDE A

140 CHAIR BRYANT: Cites page 37 of the Governor Task force, in 1986. Eighty percent of other states have either enacted or are considering enacting a joint and several liability act. Do you know what other states have done as far as joint and several liability?

147 DILORENZO: I don't know, but would be willing to find out. Many states have the joint and several liability issue pending in their legislatures now.

155 REP. BROWN: Governor Atiyeh suggested that insurance rates have gone up as a result of increase lawsuits. I was under the impression that insurance rates have gone up because of government regulation. Do you have any data to verify that statement?

160 DILORENZO: I don't have that information, but will find out.

165 SEN. SORENSON: In your proposal, would the jury be told about this law? Gives example.

174 DILORENZO: I don't believe that under this proposal that the jury would be informed of the consequence of several liability. The jury would be informed that it was their responsibility to allocate fault among the parties.

177 SEN. SORENSON: Do you have any problems with having the jury be told to allocate moneys according to the defendant, that was going to pay the money?

180 DILORENZO: I do have a problem with telling the jury that in the same way that I have a problem with telling the jury what the extent of the bank accounts are of the defendants. The extent of their wealth is irrelevant to the extent of their responsibility in causing the injury.

186 SEN. SORENSON: Would this work if the rate of insurance goes up?

191 DILORENZO: If more people were insured, there would be less of a risk that the plaintiff would have to take. Often the person that is primarily responsible for the injury happens to be judgment proof, explains. Yes, if everyone was insured that would reduce the risk that the plaintiff takes.

206 REP. JOHNSTON: Cites graph, under current law you mean that is their maximum exposure?

218 DILORENZO: My assumption is that the amount of economic damages determined for the injury itself was \$100,000 maximum.

221 REP. JOHNSTON: If one was unable to pay, only the other would pay. But if both were able to pay then they would both pay as the jury has chosen to establish there fault levels?

226 DILORENZO: That is true, so long as they were both available. Sometimes once the plaintiff has a judgment they will go after whoever is readily available. There is a contribution law that would allow the defendants to adjust among themselves. We get into trouble when one of the defendants cannot respond and the situation becomes one where even though one person wasn't at fault for all of the accident, they have to pay for it all.

236 REP. JOHNSTON: Cites graph two. The accident wouldn't have occurred except for that persons participation. Under SB 450, we are capping his exposure even though the accident wouldn't have happened if it wasn't for what they did.

254 DILORENZO: We are doing that, but are capping it because that is the only theory that is compatible with the doctrine of comparative negligence.

259 REP. JOHNSTON: Cites graph and asks if one of the plaintiff could be more readily damageable. If under SB 450, one who wasn't at fault for all of it, but could pay, would have to pay?

269 DILORENZO: "Tom" isn't happy because he still has to pay \$40,000. It is an injustice that the plaintiff is unable to collect the rest, but should that injustice be cured by causing another one? That being making Tom responsible to pay damages that he had no liability for.

276 REP. JOHNSTON: Except that the accident would not have occurred but not for what "Tom" did.

277 DILORENZO: You are arguing for the doctrine of nonallocation, that was the old rule. Every person, "if it was not for what they did, the accident wouldn't have occurred", is a discredited theory.

287 REP. JOHNSTON: We've modified that theory because we excuse some people who are less responsible than the plaintiff. If under your theory, do you want us to move to the policy of excusing people who are more responsible than the plaintiff?

291 DILORENZO: We are not excusing anyone. We are holding them liable for

the full extent of their responsibility as determined by the jury.

294 REP. JOHNSTON: "Their responsibility", given a scheme were everyone gets to participate to the full extent of the others responsibility? If the jury wasn't told of one of the defendants, would they have apportioned it this way?

298 DILORENZO: If the jury was not told of, "Dick", if he was not a member of the lawsuit, under SB 450 there would only be the other two to split the costs.

303 REP. JOHNSTON: We may be creating a situation, where in the presence of other people who could potentially be tagged as defendants of this, gives a defendant a good legal defense. Because of a persons existence, it lessens their contribution to the ultimate compensation.

316 DILORENZO: That is a necessary element to fair party practice. A defendant could always bring in more defendants to help share the costs.

320 REP. JOHNSTON You are right that it being a policy argument, now we have to weigh it and decide what is better.

335 RON LANSING, TORT LAW PROFESSOR: Testifies in opposition to SB 450.
-SB 450 is too broad
-explains what joint and several liability means
-discusses entirety rule and three factors that have to happen for it to apply

TAPE 23, SIDE B

199 REP. BROWN: Does SB 450 conceptualize what the public thinks in terms of relying on responsibility?

209 LANSING: Explains. The general public would agree. The entirety rule depends on substantive fault. You either caused the accident and are at fault, or you didn't.

226 CHAIR BRYANT: Discusses that legislation has already decided that if a person is less than fifteen percent at fault, there is a legislative decision to treat that differently.

233 RICHARD ROGERS, ATTORNEY: Testifies in opposition to SB 450.
1) SB 450 will cause an increase in third party practice and in present law
-Discusses letter from OADC
2) SB 450 will discourage pretrial settlements
3) SB 450 will hurt lien holders such as SAIF who advance money to pay medical expenses
4) Indivisible injury Under SB 450 under proportionate fault
-Gives case examples of injury

TAPE 24, SIDE B

040 CHAIR BRYANT: The hospital could bring in other doctors or defendants under the existing law?

045 ROGERS: Yes they could, but under the current system there is joint liability. If they are successful, the simple fact is that we will pay and the culpable defendants will not.

053 SEN. BAKER: What would prevent a couple of defendant from bringing in a strong man who then with might exaggerate his responsibility?

056 ROGERS: Other than honesty and our current laws against bringing frivolous litigations, nothing.

057 SEN. BAKER: My constitutional professor said that everybody lies, so you can't depend upon the veracity of witnesses. How do we protect the plaintiff in that case under SB 450, if we have someone who comes in and lies about their responsibility?

064 ROGERS: There will be little protection for the plaintiff because the other person will be lying under oath.

077 STEVE CALL, SAFECO INSURANCE: Testifies and submits written testimony in support of SB 450. (EXHIBIT C) Discusses case in Lane county.

140 CHAIR PARKS: Part of your apprehension might have been because of the duty of the insurance carrier to settle within the policy limits when they knew their policy holder was in jeopardy of losing everything. Since '87 when this law went into effect, how much money has that saved your company, and how has that translated in savings to your policy holders?

152 CALL: I don't know. I am a claims adjuster which is a separate unit from your question.

158 CHAIR PARKS: Could you find out for us? I don't believe how lifting liability will decrease the premiums for the citizens.

170 CALL: I will see if this information is available.

174 REP. JOHNSTON: Don't you see your company suffering additional exposure as a result of this?

183 CALL: Sometimes our policy holders have purchased liability limits not only for their liability, but for the liability of others who may not be able to take care of their own liabilities.

189 REP. JOHNSTON: If we are compelled to move against the defendants in the proportion of relative fault, we might find ourselves in a positions where we are not able to satisfy the lien. To some degree this bill moves against the interest of your company.

197 CALL: I'm not sure that is a change from the current system. There are times where we are not able to collect liens now.

200 REP. JOHNSTON: If this should pass, you will see that increase significantly.

204 BETSY BAILEY, ASSOCIATE OREGON INDUSTRIES: Introduces Alan Stieger.

208 ALAN STEIGER, A-DEC INCORPORATED: Testifies and submits written testimony in support of SB 450. (EXHIBIT D)

254 SEN. SORENSON: Asks Ms. Bailey about previous testimony and if she represents specific firms.

260 BAILEY: That is correct.

261 SEN. SORENSON: Did those same law firms have a chance to review SB 450 for your association?

266 BAILEY: Three of those law firms have reviewed it.

286 MIKE MCCALLAN, OREGON RESTAURANT ASSOCIATION: Testifies in support of SB 450.

409 TOM TONGUE, OREGON ASSOCIATION OF DEFENSE COUNSEL: Testifies and submits written testimony in support of SB 450. (EXHIBIT E)

TAPE 25, SIDE A

034 TOM COONEY, OREGON MEDICAL ASSOCIATION: Testifies in support of SB 450.

056 CHAIR BRYANT: On defendants that aren't a party to the lawsuit, why couldn't the defendant join someone who might have already settled?

063 TONGUE: Under the covenant statute, the settling defendant is absolved from any contribution claims. Only on indemnity claims where all the liability could be passed on, that would enable the third party action. Contribution claims are barred to encourage people to settle.

070 CHAIR PARKS: Can you construct an amendment that would provide that the jury consider part of the responsibility to only those people that have previously settled with the plaintiff?

074 TONGUE: Yes.

075 CHAIR PARKS: How are we going to make SB 385 work with this bill with the concept of joint and several liability?

078 TONGUE: I believe that once you put SB 385 into more definitive language, it might work better than you think. SB 450 isn't that much of a radical change, explains.

099 ED PATTERSON, OHSU: Testifies and submits written testimony in support of SB 450. (EXHIBIT F)

125 ROBERT SIMPSON, ATTORNEY: Testifies and reads off of Exhibit G in support of SB 450.

160 CHAIR PARKS: Don't you, as a matter of business practice, require people that practice in your hospitals to indemnify you?

163 SIMPSON: No, we have a requirement that they have insurance, but not be indemnified

168 CHAIR PARKS: I can't imagine letting people operate in a hospital without insurance.

176 SIMPSON: It is a recent policy in Oregon, where they will agree to insure physicians practicing in community hospitals.

181 CHAIR PARKS: I'm talking about private hospitals. Don't you control who can practice in your hospital?

183 SIMPSON: Yes.

184 CHAIR PARKS: I'm surprised that you're letting people operate without making sure they are insured.

188 SIMPSON: For the those specialist who work as faculty members at OHSU, the limit on their liability is \$100,000. Many of them have been allowed to assist in community hospitals under the belief that the state tort was insurance, but it is not.

194 CHAIR BRYANT: Under the proposed privatization of OHSU, they have requested to keep their same protections that they have now, as a public institution.

202 SEN. SORENSON: This example would not be the case in the example of a doctor and a hospital where the physician was insured. You wouldn't end up with a physician not paying their share.

212 SIMPSON: The same shift can occur, explains. As a result of that, the hospital ends up paying the shortfall and the shift still occurs.

218 SEN. SORENSON: The policy choice that you are encouraging on us is that the person who would bear that loss would be the patient rather than the hospital?

221 SIMPSON: Correct.

223 REP. JOHNSTON: What happened to the \$100,00 cap on the hospital?

227 CHAIR BRYANT: The cap didn't apply to the hospital, only to the physician.

228 REP. JOHNSTON: This applies because it is a community hospital rather than a state institution?

231 MAX WILLIAMS, COMMITTEE COUNSEL: For Example, this would be a doctor from OHSU working in a private hospital. When he leaves OHSU, he brings with him his tort claims limitation. But the private hospital will have it.

237 REP. JOHNSTON: As a result of the jury making a verdict between two tort feasons, you should only have to pay 15 percent, which is different than you are 15 percent responsible for the accident? Without you, the accident wouldn't have occurred?

248 SIMPSON: What the jury has done has listened to the evidence and made the determination that the hospital was 15 percent responsible and that the physician is then responsible for the balance.

250 REP. JOHNSTON: That is only after they have determined that the hospital has liability. They ask the negligence questions first, then the jury apportion damages. They don't have a complete view of the facts.

263 SIMPSON: This is a real possibility under the way the Oregon law presently reads. That is the reason why the Hospital Association is in favor of this bill.

265 REP. JOHNSTON: I'm not convinced that there is shifting occurring. Between two tort feasons, one of them is now shifting his partner in tortuous conduct.

271 SIMPSON: Rather than partners, they are independent actors.

PUBLIC HEARING ON SB 393

(SB 393 eliminates joint and several liability of professional corporation

shareholders for acts or omissions of other shareholders [EXHIBIT G])

Witnesses: Scott Gallant, Oregon Medical Association
 Tom Cooney, Oregon Medical Association
 Robert Simpson, Oregon Association of Hospitals and Health Systems
 Rick Braun, Attorney
 Greg Smith, Registered Nurse and Attorney

284 SCOTT GALLANT, OREGON MEDICAL ASSOCIATION: Testifies in support of SB
393 and introduces Mr. Cooney.

291 TOM COONEY, OREGON MEDICAL ASSOCIATION: Testifies and submits written
testimony in support of SB 393. (EXHIBIT H)

425 SEN. BAKER: I have liability insurance as a lawyer. If we were to pass
SB 393 what would be your thoughts about requiring all physicians to have a
mandatory insurance of liability of one to five million dollars?

TAPE 26, SIDE A

010 COONEY: We have consistently been opposed to mandating or requiring
insurance.

011 SEN. BAKER: The attorneys in the state are required to have insurance
to practice. Why shouldn't the medical profession?

013 COONEY: There are very few practitioners in the state of Oregon that
don't have insurance because of the mandatory requirement of medical staff
privileges. I know of no hospital in Oregon that requires mandatory
insurance.

020 SEN. BAKER: It would be a great amount of insurance to know that every
doctor has enough insurance to cover them. The risk management of those
insurance companies would guarantee that the doctor followed certain
protocols because if they didn't, they wouldn't cover them.

028 COONEY: That already happens. Most of the insurance companies require
attendance of loss prevention programs which the medical association puts
on, those as a condition of getting insurance.

030 SEN. BAKER: Some doctors in the state, don't have insurance.

031 COONEY: That would be a very small number. If insurance policies were
covered for 5 million dollars, that would raise medical costs at a time
when managed care is trying to reduce the cost of health care.

036 SEN. SORENSON: A difference is that more and more physicians are
working for corporations or entities controlled by nonphysicians. In law
firms, the rule is that they should be controlled by the professional of
that profession.? To have the physician in charge of their own practices
instead of working in a setting where people that are not knowledgeable
about their services are their supervisors, is that a change that could
bring about greater autonomy for the provision of professional services for
physicians?

050 COONEY: That could become a serious problem if those who are motivated
by utilization and financial interests overwhelm the medical judgments that
are there for the best interest for the patient. We strongly believe that
it is important that the medical care quality of care be in the hands of
medically trained people and not controlled by people that are not
medically oriented.

058 CHAIR BRYANT: Cites medical protocol part of bill that he has problem with.

062 COONEY: Discusses medical protocol. If you have moved into managed care, every entity has protocols that may be more motivated toward utilization cost containment rather than quality of care. It is our concern that those types of utilization protocols not be used. If we are going to evaluate the care and quality of a physician, it should be done by experts who know what the practice is.

077 CHAIR BRYANT: Can you distinguish between those two types of protocol?

078 COONEY: The distinguishing factor is by the quality of people that put them together. Protocols may not be driven by professionals who have the priority of quality of care, but by nonprofessionals that may be influencing the decisions that may not be for best quality.

084 GALLANT: Are you asking, if someone can distinguish by statute between the two?

085 CHAIR BRYANT: I took from your answer that it would be very difficult for you to do.

087 COONEY: Yes, you would have to evaluate everyone that participated in it.

091 REP. JOHNSTON: You don't think that the traditional trial practice avenues of impeaching the creditability of that protocol are adequate protections for you?

095 COONEY: To use it in the state practice as an impeachment ground, the expert that is being cross examined would have to say that they are familiar with and recognizes it as an authoritative work. I have seen attempts being made where experts testify about certain protocol. We need to rely upon experts to give their opinions as to what the standard of care is and who can be cross examined.

109 REP. JOHNSTON: Being jointly and severally liable gives them a pure consciousness that we relieved them of the addition liability.

117 COONEY: If I am a shareholder in a business, then I own part of that business. That ownership is on the line if my partner makes a mistake, and takes down the assets of the corporation of which I am a owner of. Gives example of highly specialized areas of law and how that would be effected.

152 ROBERT SIMPSON, OREGON ASSOCIATION OF HOSPITALS AND HEALTH SYSTEMS: Testifies and submits proposed amendment to SB 393. (EXHIBIT I)

186 RICK BRAUN, ATTORNEY: Testifies in opposition to SB 393.

278 GREG SMITH, REGISTERED NURSE AND ATTORNEY: Testifies in opposition to SB 393.

399 CHAIR PARKS: Adjourns the hearing at 6:22 pm.

Submitted by, Reviewed by,

Sarah May Debra Johnson

EXHIBIT SUMMARY:

- A. Testimony on SB 450 - John Dilorenzo - Booklet
- B. Chart on SB 450 - John Dilorenzo - Chart
- C. Testimony on SB 450 - Steve Call - 1 page
- D. Testimony on SB 450 - Alan Steiger - 5 pages
- E. Testimony on SB 450 - Tom Tongue - 2 pages
- F. Testimony on SB 450 - Ed Patterson - 2 pages
- G. Testimony on SB 393 - Don Douglass -2 pages
- H. Testimony on SB 393 - Scott Gallant & Ed Cooney- 1 - page
- I. Proposed amendments to SB 393 - Robert Simpson - 1 page
- J. Testimony on SB 450 - Jerry F. Jackson - 1 - page
- K. Testimony on SB 450 - Joe Gilliam - 2 - pages.