SENATE JUDICIARY SUBCOMMITTEE
ON CIVIL PROCESS

Hearing Room
Tapes - 37

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 - Work Session
SB 598 - Work Session
SB 393 - 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

004 CHAIR BRYANT: Calls the meeting to order 3:42 PM

WORK SESSION ON SB 450

023 CHAIR BRYANT: Discusses SB 450 and what the effects would be. Discusses proposed amendments that are being drafted. Discusses Chair Parks recommendation of raising the limitation to one-third or 33 percent.

051 SEN. BAKER: I like Chair Parks recommendation.

053 REP. TIERNAN: Fifty percent is an effort to do that. If 15 percent is too low, 30 percent isn't much better. Why should someone who is not primary be responsible for something they didn't primarily cause. The

rational by this SB isn't supported by the 30 percent offer.

071 REP. JOHNSTON: I would leave the 15 percent as it is.

080 CHAIR BRYANT: Currently it is 15 percent not to have joint liability. We were discussing raising that or leaving it where it is.

082 REP. BROWN: I'm not convinced that the current law doesn't work. I think it is fine where it stands.

085 REP. LEWIS: I think that 15 percent is too low. I would rather go to 50 percent, but I would vote on 33 percent as an improvement from what we have now.

093 SEN. BAKER: I know by trying these types of cases, when you get close to 50 percent there tends to be too much litigation. When it is lower than

50 percent, it makes people to honestly litigate those cases based upon merits. Discusses case in Portland. Fifty percent is such a fine line, that is very impractical. Thirty percent is in the mind of the jury a little easier to find fault and contribution. I agree with Rep. Parks.

122 SEN. MILLER: Thirty-three percent is a modest improvement, but not nearly enough.

124 SEN. SORENSON: Rep. Brown and Rep. Johnston have given a good overview of my observations.

WORK SESSION ON SB 598

135 CHAIR BRYANT: Discusses SB 598-1 proposed amendment. (EXHIBIT A)

170 CHAIR PARKS: There wasn't much testimony on this bill. What about the situation of a doctor who is instructing an ambulance crew on their way to the hospital? Or where a nurse does the admitting work and something goes wrong? What is in it for consumers?

182 CHAIR BRYANT: In the situation of the ambulance, if the doctor is on the phone directing what is being done, this bill would not have any effect

on that. With what has been added to subparagraph 3, that definition would

only cover nurse practitioners.

187 CHAIR PARKS: Unless the physician is physically present "and" supervising, it doesn't say "or" directly supervising it. Don't you need to have both?

192 CHAIR BRYANT: Yes. Cites provisional language on line 9 to add "or".

196 CHAIR PARKS: Does that bring in the nurse?

198 CHAIR BRYANT: If you change the "or" and the doctor is instructing over

the phone, then the immunity would not be granted. Because then the doctor

has taken the affirmative action of getting involved in the case.

201 CHAIR PARKS: I just want to make sure that is what it says. We changed

"and" on line 7 and 9?

207 CHAIR BRYANT: Yes, in both cases we changed that .

208 CHAIR PARKS: Then, if the doctor is actually in some way supervising someone over the phone or left a note, then they are acting in the doctor's

direction and they are not immune?

212 CHAIR BRYANT: Yes, that is my understanding of the bill.

220 SEN. SORENSON: Cites line 11-14 language taken from original bill. SB 598-1 only seems to provide the immunity to doctors of medicine and doctors

of osteopathy and not to naturopathic positions. On line 5 of the original

bill, and line 3 of the -1 amendments, the issues of whether a health care professional is a "licensed" health care professional? How would that effect the bill? One concern is that obsticians are doing one type of work, but they are not "licensed". They are doing work at the request of someone else. If you insert the word "licensed" you are narrowing the immunity that the -1 amendments were seeking to establish.

254 CHAIR BRYANT: Under section 2 you have to be licensed to practice medicine under ORS 677.

257 SEN. SORENSON: Are you given immunity as a doctor of medicine for the acts of other "licensed". or all health care providers?

266 CHAIR BRYANT: Under section 3, it would be of a health care provider who had admitting privileges to a health care facility. Only doctors of medicine and those "licensed" under ORS 677 and the nurse practitioner would have that authority.

275 SEN. SORENSON: The 598-1 amendment is narrowing down the immunity because it is only for doctors of medicine and those who have admitting privileges?

284 CHAIR BRYANT: Yes.

285 SEN. BAKER: The people that have admitting privileges now are MD, ophthalmologists, and nurses?

288 CHAIR BRYANT: Practicing nurse practitioners at some hospitals.

289 SEN. BAKER: Would that include chiropractors or alternate medical models that also have admitting privileges?

291 CHAIR BRYANT: I don't think chiropractors do. Some naturopathic positions do.

298 TOM COONEY, OREGON MEDICAL ASSOCIATION: Medicare requires, that if anyone besides the MD or DO has admitting privileges in a hospital, that the MD or Do be responsible for that other health care providers patient. Medicare does not impose any civil liability for the acts of the admitting person who is not an MD or DO. It is the bylaws in order to fulfill Medicare, and Medicaid requirements that the alternative admittors have admitting privileges, and an MD or DO must be responsible for that persons patient. That MD or DO who has no control over the decision to admit and

should not be liable civily for the acts of the other health care providers. All you are doing is limiting the vicarious liability of the physician who is being required to supervise under the bylaws. It doesn't eliminate their liability if they don't do it right, or eliminate the person who is being supervised liability. It only eliminates the vicarious

liability of the doctor for the person who is making the mistake unless they are right there supervising. The way the language is written, is for anyone who has admitting privileges, that is broader than just nurse practitioners.

335 CHAIR BRYANT: Who do hospitals allow admitting privileges to besides MD's and DO's?

340 COONEY: Dentists, podiatrists, nurse practitioners, and midwives. When

a hospital gives that right to someone else, in order to be eligible for Medicare of Medicaid the hospital is required to make an MD or a DO responsible for that other person's patient. What we are trying to avoid is the bylaw when they are responsible for that patient, but not the mistakes of person they are monitoring.

359 CHAIR BRYANT: If they are not physically there, if they are supervising

or instructing.

361 COONEY: Even if they weren't instructing, that is an individual failure

that they could be liable for. This is designed to only cut off their liability vicariously for the mistake of the practitioner when the doctor isn't physically there.

369 SEN. SORENSON: Discusses language on line 7, "and". Are you advocating

that the word "and" rather than "or" be there?

379 COONEY: Yes, explains positions as to why they desire that language. We don't think that a monitor who is physically present should be liable for the mistakes of the person who is doing the act. Monitors don't supervise, they just observe and are present.

401 CHAIR PARKS: It seems this comes close to excusing a physician?

409 COONEY: That example is of a floor nurse who is an employee of a hospital and who does not have admitting privileges. This applies only to independent physicians who can admit people to a hospital. Discusses bylaw.

421 CHAIR BRYANT: Why would a physician sign on as a monitor?

422 COONEY: It is a part of the requirement of medical staff membership to accept assignments or peer review, etc.

425 CHAIR BRYANT: To have privileges in a hospital, the doctor has to agree

to be a monitor?

427 COONEY: No, not a monitor. But to accept certain responsibilities that

may come down from the chief of staff or board.

435 JIM MARKEE, AMALGAMATED TRANSIT UNION: We have the same concerns as Rep. Parks. Discusses sections of bill. Gives proposal of language.

TAPE 37, SIDE A

024 REP. JOHNSTON: Do the monitoring relationships have any responsibility?

026 COONEY: Explains the position of the monitor is to observe, report, and review the performance of the person being monitored.

029 REP. JOHNSTON: If they see something while they are monitoring that is an error, do they step in?

031 COONEY: Generally not, explains.

035 REP. JOHNSTON: While they are monitoring if they see a mistake, they should say nothing?

038 COONEY: If they saw something that was a mistake they would speak out and assist if necessary.

040 REP. JOHNSTON: I think we keep approaching these issues from the side of the professional and not the injured person. Discusses how this would have effect on SB 450. Where does the injured party get taken care of?

050 CHAIR BRYANT: One of the reasons I was interested in the bill is for a nurse practitioner who can presently have admitting privileges and participate directly in the care of a patient. Gives example. In that situation, a monitor isn't present, and a nurse may do the things that a doctor would do.

059 COONEY: That is true. When a nurse practitioner admits the patient, there must be a physician who is responsible for that patient. If the doctor isn't there and the nurse practitioner makes a mistake, the nurse is responsible. We want to avoid the situation where the bylaw makes the physician responsible for the mistake of the nurse practitioner. All this bill does is eliminate any vicarious liability a physician has by virtue of the bylaw provision.

074 REP. BROWN: How do you get around the Medicare requirements?

075 COONEY: You don't avoid the Medicare requirement. They do not impose civil liability, there are penalties, etc. It is simply a matter of avoiding vicarious liability of the physician for the other practitioner unless the doctor is supervising or directing.

082 ED PATTERSON, OREGON ASSOCIATION OF HOSPITALS: In all cases it is a voluntary relationship between the hospitals and the doctors. Discusses difficulty of nurse practitioner to gain admitting responsibilities. If you remove the liability, the position oversight will not be as complete about nurse practitioners activities. Therefore the hospital will have to assume more responsibility. This bill has some unintended consequences. Most bylaws require the physician to serve on a probation while gaining admitting privileges. That is not the case with a nurse.

104 CHAIR BRYANT: If no physician volunteers to be the monitor, then the

nurse does not have the admitting privileges?

106 PATTERSON: No one in my association is aware of any nurse practitioner that has admitting privileges to a hospital that doesn't have a physician sponsor.

109 CHAIR BRYANT: Gives example of nurse practitioner. That nurse practitioner has someone who may not be in the hospital at the time, but is

signed on as that person's sponsor?

116 PATTERSON: Yes, someone who has a great deal of trust in the nurse's abilities.

117 CHAIR BRYANT: Because of the sponsorship, that doctor would be named in

a lawsuit.

119 PATTERSON: I don't think there would be a high likelihood of that. It also makes sure that the nurse practitioner and their sponsor communicate and the nurse knows if they could get in trouble.

123 CHAIR PARKS: If this bill were to pass, this nurse might not be able to perform their services?

126 PATTERSON: If I were a member of the hospital board, I would want to guarantee that anyone who admitted patients to the hospital has a position oversight. It is the responsibility of the board to make sure that whoever

has clinical privileges in the hospital is highly trained and skilled. A nurse can have admitting privileges, but a physician must do the history and physical on all the patients the nurse admits. The physician needs to make sure they are very comfortable with that nurse practitioner.

143 CHAIR BRYANT: You could still do that if the hospital elected to. With

this law, there wouldn't be a backup of the physicians malpractice insurance if there was a problem?

146 PATTERSON: That is accurate about the backup, but that isn't the most significant thing. The comfort level that a hospital governing board would

have if the physician is also liable for that non-physician nurse practitioner.

150 CHAIR PARKS: Is it highly likely that a hospital will not let nurse practitioners deliver babies if this law becomes effective?

155 PATTERSON: It would tighten the regulations for nurse practitioners, explains.

162 COONEY: It is usually matter of the bylaw that the physician be responsible for the patients of the people that have admitting privileges.

168 REP. JOHNSTON: What if something goes wrong in a birth. A nurse practitioner admitted them to the hospital and the doctor is not available.

If there is a suite filed and this law does not pass, the named parties

are the hospital, the nurse, the monitoring doctor, and the ambulance?

185 COONEY: A nurse practitioner has admitting privileges. The hospital is not liable for the errors of the practitioners who are on staff and have admitting privileges unless the hospital is negligent in giving privileges to that person. I don't think the hospitals exposure to a nurse practitioner is any greater than that of a physician. Managed care and cost containment is demanding that there is greater access by other alternative practitioners to hospitals. One thing that doctors are afraid of, is that the responsibilities of having the other person's patients will put them into a malpractice suite. This bill will aide to greater communication between the practitioner and doctor by relieving some of the concern.

WORK SESSION ON SB 393

226 MAX WILLIAMS, COMMITTEE COUNSEL: Discusses SB 393 -1 proposed amendments. (EXHIBIT B)

264 CHAIR PARKS: The way this is written, if there were three claims, the maximum for the plaintiff would be $700,000?

270 MAX WILLIAMS, COMMITTEE COUNSEL: That is true. It tracks with the original or current language in the statute "per calendar year". This adopts the calendar year provision for the maximum cap, explains.

277 CHAIR BRYANT: That was adopted because of the way the insurance for malpractice is based upon a calendar year. The two million cap does not apply to the individual who was guilty of the negligence. The amendments also delete the part of the bill that provided that no practice protocol be introduce as evidence to establish the standard of care. Protocol should be so evident that it be something that it would be decided by the jury or the judge.

300 REP. JOHNSTON: If there are five physicians in partnership with a tort feasor, they could all have the $300,000 exhausted over the course of a calendar year. But if there are one hundred physicians working for Kaiser Permanente, they would get to two million well before anyone was exhausted. This is a "big practice is better" bill.

311 CHAIR BRYANT: The more partners and shareholders there are, the larger the benefit. The other way to determine a cap would be to do it on the number of people in the practice, explains.

323 REP. JOHNSTON: This sort of legislation provides a way for people to get into bigger partnerships.

329 SEN. SORENSON: I thought the purpose of the protocols was to give some guidance as to what you do?

335 CHAIR BRYANT: That section is dropped.

337 SEN. SORENSON: I don't recall hearing any testimony on the two million dollar amount. Is that an appropriate amount? It seems like if there were 500 physicians, they could get close to the two million in any one year.

362 CHAIR BRYANT: The idea of the two million is that there is some benefit of being together as a partnership or a corporation. The assets of the partnership should be responsible for a portion of what the claim might be.

This suggestion of the bill was to make the dollar amount zero. This reinstates the $300,000 and puts a cap on the two million.

376 CHAIR PARKS: The two million doesn't bother me when we discuss a partnership of five. But when this effects a Kaiser Permanente and if your claim was in January rather than August, it would have a different effect.

I think we are trying to cover too big of grouping. I thought bar insurance was by occurrence?

401 CHAIR BRYANT: It would apply to each claim as far as the cap.

405 CHAIR PARKS: Discusses questioning insurance group about the changing of 15 percent threshold. They don't have any kind of evidence that would suggest putting in the 15 percent made any difference in their rates.

426 SEN. SORENSON: Another problem is what would happen in the event that claims exceeding two million dollars in any one year would they be prorated? Gives example of two people being injured. Would you have to prorate their damages down, or would the first person get their entire damages and the second person wouldn't get everything?

TAPE 36, SIDE B

014 CHAIR BRYANT: That would depend upon when the judgments were made.

016 SEN. SORENSON: Because it says for "all claims made during a calendar year". There might have to be an expiration of a calendar year before you knew how many claims were made.

019 CHAIR BRYANT: In the last legislature when the $300,000 was adopted, they used the wording in the "calendar year". Why was that? We suspect that it might be because of the bar insurance.

032 CHAIR BRYANT: Adjourns the hearing at 4:40 pm.

Submitted by, Reviewed by,

Sarah May Debra Johnson
Committee Assistant Committee Cooordinator

EXHIBIT SUMMARY:

A. SB 598-1 Amendments, staff, 1 page
B. SB 393-1 Amendments, staff, 5 pages