

JUDICIARY COMMITTEE
February 9, 1977

The regular meeting of the House Judiciary Committee was called to order at 8:00 a.m. by Chairman Scully in room 436 of the Capitol Building, Helena, Montana. All members were present except Representatives Dussault, Lory and Seifert.

Scheduled for hearing were House Bills 641 and 647.

HOUSE BILL #641:

REPRESENTATIVE COURTNEY, DISTRICT #86:

This bill is concerned with the aftercare of youths in alleged violations. I want to amend on page 1, line 15 and 16, strike: "or by any person" and on page 2 line 6, stike: "and the facts constituting alleged violation"; on page 3 line 11 - line 13 "board to department; page 3, line 24 through 1 and 2 on page 4. He stated these amendments would clarify, make more clear.

DAN RUSSELL, CHIEF OF BUREAU OF AFTER-CARE:

This would provide more kinds of evidence, make different kinds of arrangements, than arrange too restrictive a hearing or review.

REPRESENTATIVE COURTNEY:

I was concerned about the rights of a youth being protected. I feel the amendment does that.

The hearing closed on House Bill 641.

THE HEARING OPENED ON HOUSE BILL #647:

CHAIRMAN SCULLY turned the meeting over to vice-chairman Teague, to present this bill.

REPRESENTATIVE SCULLY, DISTRICT #76:

This bill will establish a mandatory pre-trial review panel to hear and determine claims for medical liability. It would establish rules, procedures and facilities to implement the purpose and also provide for a schedule of compensation and benefits for award. It would guarantee the financial responsibility of physicisns and to provide the source for the funding of the act and the payment of awards.

Section 6 deals with the structure of the panel, screening the claims. On page 6, section 5 the wording is not clear. On page 12, subsection (2) is the part dealing with the collateral source rule. I believe in it only so far as it is not by the individual. I think the mandatory pre-trial panel is very important. I personally feel that this will lead to some change in the rates. It will eliminate a great bulk of the defense costs of the insurance company. This will facilitate a lot of the difficulties we have in the medical-legal pre-trial panel. The point here I think would help more than anything is in the actuarial. The premiums collected in any given calendar year might not be paid out that year. I think the number of cases will be reduced because of the

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fact it is mandated in the pre-trial panel. I don't anticipate a reduction in premiums until 1981 or 1982. I don't think they would be cleared out for four years.

GERALD NEELY, MONTANA MEDICAL ASSOCIATION:

Among the more frequently quoted and disturbing reasons put forth for the "malpractice crisis" is a suggestion that the increase is directly due to a deterioration in the quality of medical care being delivered in Montana. Under section 1 the bill is limited in its impact. In this way it differs from Senate Bill 402.

On page 2, section 3 deals with pre-conditioned suit, and section 4 with the statute of limitations. Section 5 can be written in a couple of different ways. On page 3, section 6, the concept of a pre-trial screening is of great merit. On page 6, section 10, areas of evidence would be considered. Section 14, conclude both the question of liability and the question of damages. Section 15 is the award schedule for medical liability. Page 18, section 26, the admissability of evidence. There have been court tests of this kind of a proceeding. The concept is what is critical, subject to the input.

CHAD SMITH, MONTANA HOSPITAL ASSOCIATION:

There has been a tremendous increase in the cost of insurance. The cost of the insurance now reflects in the patients bill. Any procedure that will direct to a settling of claims will be an improvement. We are looking for a just compensation in cases that do have merit.

OPPONENT, BOB RYAN:

I have, in the past, handled cases of this nature for the claimant. The last two or three years has seen a rise in the cost of insurance. There is no evidence they can give that these rates will go down. They are not subject to the anti-trust laws. Of the 4 million spent on this insurance in Montana only 900 doctors pay that. If it were spread over all physicians it would be less than \$4000. The lawyers, doctors and legislators, without any real study are attacking the insurance system. There is no proof to our knowledge that actions have risen extensively. They do propose 4 propositions in their article, statutory requests should all be the same regardless of the size of the practice. Special privileges for the privileged few is not new. I wonder what you would do if you had a panel of lawyers. If you are going to have a panel it should be of lay people and I also oppose the voluntary panel.

He gave examples of cases in which the panel would not work. I would like to have you have the four recommendations.

OPPONENT, GREG MORGAN, STATE BAR OF MONTANA:

He commented that Mr. Ryan does not represent the bar association. He gave a handout to the committee stating the position of the bar association. (copy attached)

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FRANKLIN LONGAN, MONTANA BAR ASSOCIATION:

I have been on a panel to review these cases, and it has been a success. We have 12 members, 6 doctors and 6 lawyers. These panels have been operating without expense to anybody. We only make recommendations. No one else is allowed at the hearing, only the doctors and the lawyers, and the witnesses. No press. All records are made available to the panel.

MR. LORY CAME IN.

Mr. Longan continued, It has broken down in the past few years. The fault is the insurance companies, so the doctors have told us. Aetna has said they would not let the doctors appear before the panels any more. The panels have worked and we want them to work. I am in favor of a mandatory panel. However, don't allow any panel to determine damage. In section 10, I notice, only Montana doctors are allowed, and that is unfortunate. This is a violation. He discussed section 11, it seems it should be like a jury does, do it immediately. In section 12, we should not figure out what the settlement should be. It involves one of our constitutional rights.

He commented about section 13, asking the panel consist of 3 doctors and 3 lawyers and the chairman must be a lawyer. Sections 14 and 15 call for the award of damage. This panel should not be concerned with awarding damages. It is a big enough job to set on the panel.

TOM DOWLING, TRIAL LAWYERS ASSOCIATION:

We have touched on some of the problems. The trial lawyers are opposed to this bill.

ARNOLD BURGER, YELLOWSTONE BAR ASSOCIATION:

Discussed some of the things wrong with the bill, in his opinion. Section 14 (c), I think this was a carry-over. We do support a mandatory panel to screen claims. I hope this committee is waiting until the entire package is put forth before reaching a decision. One of the things wrong with this, everyone of the panel has an interest in the outcome, even if it is equalized. Another thing, why should a bond have to be posted in this type of case when he does not have to in any other. The court should consider only the evidence and what the panel has determined should not be admissible evidence. He went on and discussed the fees section of the bill.

WALTER MURFITT, STATE BAR OF MONTANA:

I merely agree with Mr. Longdon and Mr. Burger on the shortcomings of the bill.

REPRESENTATIVE SCULLY:

I want to thank the Yellowstone Bar for appearing. I would like to speak to a couple of issues. I don't think the courts are really

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free. They never have been. The insurance companies never figure their figures on the cost figures, they figure it on the possible loss figures.

Mr. Scully went on to discuss the testimony of the opponents. He talked about the honest mistakes or dishonest mistakes. If we put a mandatory panel in there are few rules to play by. Then you have to allow for the liability factor to the district. If you are talking about presenting the findings there is the fact that you have a limitation on the evidence you are going to present.

The constitutional issue does not apply. You can fix that by framing it in language so it is an administrative procedure. He went on in further detail to explain the procedure. I would suggest that damages is a proper consideration at that stage of the game.

REPRESENTATIVE RAMIREZ:

If the Bar Association and the Yellowstone Bar going to get behind Senate Bill 402.

MR. DOWLING:

I can't say for sure that they will get behind a mandatory panel.

MR. BURGER:

The Yellowstone Bar will probably support Senate Bill 402.

MR. MURFITT:

The bar will be supporting that bill.

MR. MORGAN:

The Bar Association will support it.

In answer to a question from the committee, Mr. Morgan stated that the collateral source rule provides in effect that benefits received by the plaintiff from a source wholly independent of and collateral to the wrongdoer will not diminish the damages otherwise recoverable from the wrongdoer. In answer to another question, he stated that "tolling" involves the statute of limitations.

MR. NEELY:

The basic concept is the same in both bills. However, there is a subsection that is different between the two bills.

REPRESENTATIVES SEIFERT, EUDAILY and DUSSAULT came in.

REPRESENTATIVE ROTH:

Will you explain the self-insurance program.

MR. NEELY:

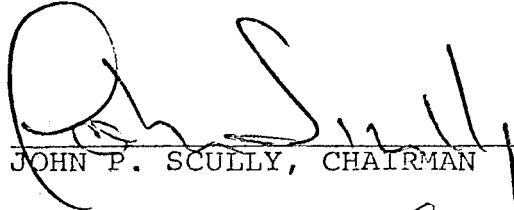
This would be a joint underwriting association for a self-supporting program of medical malpractice insurance.

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Then followed discussion about the original panel. Mr. Murfitt was chairman of the Western District Panel. He stated, in answer to a question, that they did not know how anyone voted but the vote count was announced.

After some general discussion the hearing closed on House Bill 647.

The meeting adjourned at 11:55 a.m.



JOHN P. SCULLY, CHAIRMAN

Mary Ellen Connelly, Secretary