

MINUTES OF THE MEETING
JUDICIARY COMMITTEE
50TH LEGISLATIVE SESSION
HOUSE OF REPRESENTATIVES

March 26, 1987

The meeting of the Judiciary Committee was called to order by Chairman Earl Lory on March 26, 1987, at 9:00 a.m. in Room 312 D of the State Capitol.

ROLL CALL: All members were present with the exception of Rep. Cobb who was excused.

EXECUTIVE ACTION:

ACTION ON SENATE BILL NO. 229:

Rep. Miles moved that SB 229 be taken off the table and reconsidered. She stated she supported a motion to discuss the bill because SRS was not being properly funded. There are people who need to be placed in services for the developmentally disabled and she felt a little more time was needed on the bill in discussion. Rep. Mercer asked Rep. Miles if she had changed her vote or did she want to just discuss the bill. She stated that she votes to move the bill out of committee. Question was called and a voice vote was taken. The motion CARRIED 10-7. Rep. Rapp-Svrcek moved SB 229, BE CONCURRED IN. He stated he felt that discussion was needed so the system was not abused especially for people who have been on the waiting list for a time. Rep. Addy explained that he opposed the bill because it was the executive branch coming to the legislative branch and asking them to tell the judicial branch they could no longer interfere in the actions of the executive branch even though the legal rights of the individuals who are involved in executive branch actions are directly effected. That is a violation and separation of powers and it is a usurpation of power by this branch and a perversion of what the total system of government was suppose to be by the executive branch. Rep. Rapp-Svrcek asked Rep. Addy what about the rights of the people who were waiting to be placed that were being used up by those who could afford to go into court and press their cases. Rep. Addy stated that was the opposite of what they had in the bill. SB 229 has the legislature stepping in where they should not. He also stated that SRS should be adequately funded so there were placements for DD people. The judicial branch must place an individual where they felt his rights are protected. Rep. Gould explained that SRS was doing a good job and SB 229 was an important bill. He stated Montana is a model state and SRS is doing a

fantastic job. He agreed with Rep. Addy but added. "we must do what is right".

Question was called. Chairman Lory called for a roll call vote. The motion CARRIED 12-4. (Roll call vote attached).

ACTION ON SENATE BILL NO. 139:

Rep. Grady requested that SB 139 be reconsidered and that Mr. Robert Lane, attorney, Department of Fish, Wildlife and Parks, speak to the committee in regard to the amendment made to SB 139, on March 23, 1987. Rep. Daily moved that Mr. Lane be allowed to speak in Executive Session. The committee unanimously favored the motion. The committee further moved that Mr. Lane's words be recorded verbatim.

"From my perspective, as the attorney for the department, I have been asked first if there is a difference between gross negligence and wilful or wanton misconduct. I have advised the department, that as a practical matter, I don't see a difference between the two. I don't think a jury is going to distinguish between those two standards in their application. I know that Karl England testified before you and stated, in effect, I thought, that wilful or wanton misconduct in effect, required an intentional act as an attempt to harm somebody and I don't believe that if that is what he was saying, if that is true. If it's an intentional act, then, it is homicide or assault, and, I think that when you define the two terms and in the jury's application of those two terms, they are going to essentially be the same. If you would like, I could read a couple definitions of the two terms and you could see if there is a difference between those. I took this definition out of the BLACK'S LAW DICTIONARY. Gross negligence is defined as "the intentional failure to perform a manifest duty in reckless disregard of the consequences affecting the life or property of another". Such a gross want of care in regards to the rights of others as suggested by the presumption of wilfulness or wanton. A definition of wilful or wanton misconduct, out of the RECREATIONIST LAW RECORDER, which is providing the definition for use in the recreationist use statute says, "wilful or wanton misconduct unlike ordinary negligence goes beyond carelessness, it is a more outrageous behavior, which demonstrates another's disregard for the physical well being of others". So, I think the standards are pretty much the same in applicastion. My only suggestion to the committee would be that wilful or wanton misconduct is used in the recreational use statutes as it applies to landowners when they allow people to

recreate on their property without compensation. It applies to landowners under the stream access provisions and it applies under the recreational skiers statute. So, for consistency, wilful or wanton misconduct would be at least consistent. There was one other thing I wish to comment on also, and that was the change this committee made in section 8 of this bill. The recreational use statute, that is 70-16-302, the word "department" was taken out of the middle of that sentence. The reason that amendment was put in there was to treat the department the same as it is treated already, as a landowner, or as other landowners are treated. When they allow or participate in the allowance of recreational use of property without consideration, right now, the department is held to a wilful or wanton misconduct standard. If we are the landowner, and allow people to recreate on the public land without compensation, it seems consistent when the department enters into an agreement with the landowner providing for a recreational option such as snow mobile trails, that, the landowner in that case would be held to a wilful or wanton misconduct standard. The department, when no compensation is charged, should also be held to the same standard as a consistent policy. The intent in amending the recreational use standard is to make it clear, that the department, when it is in the position as it would be as a landowner, or the same position as other landowners, basically, to be treated the same as those landowners in terms of the standard of conduct. That won't apply to our recreational areas where we charge fees. Those highly developed areas will be held to the standard of ordinary negligence in those cases. The final point is the way the amendment was done, it took the word "department" out of the middle of that sentence. If you read that sentence, the department is mentioned three times in there and I guess as an attorney, I could not advise somebody now with department only taken out once, whether we are in or out, or what standard applies. The amendment doesn't make sense in that perspective. Thank you very much."

Rep. Miles requested that Mr. Karl England, attorney, Montana Trial Lawyers Association, be allowed to speak in Executive Session and give the other side of the issue. The committee further moved that Mr. England's words be recorded verbatim.

"Actually, Mr. Chairman and members of the committee, when we did that whole slough of limited liability bills before transmittal deadline, I think, Rep. Cobb did some research in terms of gross negligence and wilful or wanton misconduct. I relied upon his

research and discussions I had with him concerning the difference between those two standards. My understanding of what people were trying to get at when they were dealing with the notion of gross negligence is something like the way the criminal negligence is defined in our criminal code and that is, the language they use, is a gross deviation from a standard of conduct that a reasonable person would observe under the condition. Gross deviation means, a deviation that is considerably greater than a lack of ordinary care, so, if the standard of negligence is ordinary care, the standard for gross negligence is considerably greater than the lack of ordinary care. It is still my assumption, based on Rep. Cobb's research, that wilful or wanton requires some sort of an intentional act and therefore places it higher than that. Now, I guess I'd like to go on and say this, if the committee decides it is going to change the standards back to wilful and wanton on the basis that there is really no difference between the two, then, I think that should be clearly stated in your minutes and on the record, so that if there is ever a dispute about that, we can go back to that record and make sure that it was the department's position that basically, the two are not different."

Rep. Grady asked Mr. England if he knew if the Trial Lawyers worked with the snowmobile people in drafting this language and Mr. England stated, "no". He further pointed out that the Trial Lawyers worked with them on a technical problem when the bill was in the Senate. He said, there was a problem on the 5th or 6th page in regards to a snowmobiler assuming all risks of the sport of snowmobiling and he was concerned that it may also apply in terms of product liability actions and the snowmobiler would assume the risk of his machine becoming balled up.

Rep. Grady asked Don Kiplin, Parts Division, Department of Fish, Wildlife and Parks, what difference this might make on grooming the trails. Mr. Kiplin stated there would be a financial impact to the snowmobile program if the department was held to a higher standard of care and judgements would reflect claims against the state's tort fund. The tort fund is supported by assessments to user agencies. Future claims that might result from the actions or inactions of the department in the snowmobile program would be paid by the snowmobile account and therefore would detract from the amount of work that could be done on the ground using those funds.

Rep. Mercer stated that it seemed the lawyer from the department was saying that it did not make a difference and Mr. Kiplin was saying it does make a big difference. Mr.

Kiplin pointed out that Mr. Lane was talking about the wilful and wanton amendment and that his discussion related to removing the department's reference in section 8, which appeared to create a higher responsibility for the department as opposed to the rest of the participants in the program, such as landowners and providers. Rep. Mercer asked him if he had any problem with the gross negligence standard since it is the same as the wilful and wanton, as far as he was concerned. Mr. Kiplin stated he would defer to Mr. Lane's judgment. Rep. Eudaily moved that the Judiciary Committee amendments made by the House be stricken from the bill. Rep. Addy explained that the department does not have any problems with the amendments except in section 8. He proposed that the words "the department" on page 6, line 5, be reinserted. Rep. Eudaily asked if gross negligence was in the bill at the present time. He stated that his point was, that the department's attorney said in all other areas where it talks about recreational use and wilful and wanton is used, if there is no difference, why not be consistent. Rep. Grady supported Rep. Eudaily's motion. He stated that the gross negligence part refers to private landowners under section 3. To be consistent with our present stream access and other liability issues regarding private landowners we should keep it consistent.

Rep. Bulger stated that section 3 applied to a private landowner if he was a snowmobile area operator. It is one thing to allow people to come onto your property to hunt, and another one to be a snowmobile operator with groomed trails.

Rep. Miles asked that the question be divided. She stated that she was getting tired of the fact that they have to define people's responsibilities based on how much it was going to cost the department or how much it was going to cost this and that. People of this state have a reasonable expectation to believe that state agencies are going to act not negligently, much less wilful or wanton. We have never gotten one guarantee from a single insurance company or liability carrier that this is going to make a difference. Chairman Lory pointed out that the motion should be divided on page 3 and on page 6. He asked that a voice vote be taken on the motion. The motion FAILED 8-8. Rep. Brown stated that if there was no difference in the department's opinion, why should they bother to change it. Rep. Eudaily stated that if they are going to divide it and if it should go, put the word department back in and gross negligence should be left on page 3. Rep. Eudaily moved that the motion be divided. Chairman Lory explained that the wording of gross negligence be returned to wilful and wanton misconduct. A voice vote was taken and the motion FAILED 8-8. The second part of the divided motion was to return

the word "department" to page 6, on line 5. A voice vote was taken and the motion CARRIED unanimously. Discussion continued with Rep. Mercer stating that this was a bill dealing with snowmobilers. Anytime the department is operating property under an agreement, then they are not making any guarantees that it is safe except to the extent of gross negligence. He stated he felt this was beyond the title of the bill. Rep. Mercer moved to amend page 6, line 2, inserting snowmobiling. (See amendments attached). Rep. Giacometto asked that clarification be made in regard to other outdoor activities. Rep. Mercer stated it is his understanding that if they own the land or lease the land, they are already covered. If they enter into an agreement to take care of the land which is not really a lease, then, they also want the comfort of this protection. This bill is an act to affect snowmobilers and does not have anything to do with other activities and there are other people who might have other concerns and that bothered him. Rep. Addy favored the motion. When there is a problem with the title being beyond the scope of the title, it is better to narrow the scope of the bill than to expand it, he said. Question was called and a voice vote was taken. The motion CARRIED unanimously. Rep. Grady moved that SB 139 BE CONCURRED IN AS AMENDED. Question was called on the bill. A voice vote was taken and the motion CARRIED unanimously. SB 139 BE CONCURRED IN AS AMENDED.

ACTION ON SENATE BILL NO. 375: Rep. Addy moved the amendments of the subcommittee, on page 5, lines 3 and 4. (See amendments attached). Rep. Addy moved that SB 375 BE CONCURRED IN AS AMENDED. Rep. Gould asked Rep. Addy what exactly is happening on this. Rep. Addy asked Mr. Karl England to explain wrongful death. He explained that currently, when there is a death and a tort case, there is a possibility of bringing two cases to court, but in separate cases. One for the wrongful death of the person and one on behalf of the survivor of the person, and, there is a possibility of at least one area of damages where you can collect damages for the same thing in both cases. This bill says, when there is a death, the two cases have to be combined and you can only collect each measure of damages possible. Rep. Eudaily questioned Rep. Addy about taking the word "immediate" out of the title. Rep. Addy stated that was exactly correct. Rep. Addy also moved that amendment. Question was called and a voice vote was taken. The motion CARRIED unanimously. SB 375 BE CONCURRED IN AS AMENDED.

ACTION ON SENATE BILL NO. 380: Rep. Addy moved the amendments of the subcommittee. He explained the amendments stating that the amendments go from an implied negligence theory to an actual notice theory. (See amendments

attached). Rep. Hannah agreed with the amendments. Question was called and a voice vote was taken. The motion CARRIED unanimously. Rep. Addy moved that SB #380 BE CONCURRED IN AS AMENDED. Question was called and a voice vote was taken. The motion CARRIED unanimously. SB 380, BE CONCURRED IN AS AMENDED.

ACTION OF HOUSE BILL NO. 873: Rep. Hannah moved that HB 873 BE CONCURRED IN. Question was called and a voice vote was taken. The motion CARRIED 12-2 with Reps. Miles and Meyers dissenting. HB 873, BE CONCURRED IN.

ACTION ON SENATE BILL NO. 77: Rep. Giacometto moved that SB 77 BE CONCURRED IN. Question was called and a voice vote was taken. The motion CARRIED 9-5 with Reps. Miles, Bulger, Rapp-Svrcek, Addy and Darko dissenting. SB 77 BE CONCURRED IN.

ADJOURNMENT: There being no further business to come before the committee, the hearing was adjourned at 10:34 a.m.



EARL LORY, Chairman

DAILY ROLL CALL
JUDICIARY COMMITTEE

50th LEGISLATIVE SESSION -- 1987

Date March 29, 1987

NAME	PRESENT	ABSENT	EXCUSED
JOHN MERCER (R)	✓		
LEO GIACOMETTO (R)	✓		
BUDD GOULD (R)	✓		
AL MEYERS (R)	✓		
JOHN COBB (R)			✓
ED GRADY (R)	✓		
PAUL RAPP-SVRCEK (D)	✓		
VERNON KELLER (R)	✓		
RALPH EUDAILY (R)	✓		
TOM BULGER (D)	✓		
JOAN MILES (D)	✓		
FRITZ DAILY (D)	✓		
TOM HANNAH (R)	✓		
BILL STRIZICH (D)	✓		
PAULA DARKO (D)	✓		
KELLY ADDY (D)	✓		
DAVE BROWN (D)	✓		
EARL LORY (R)	✓		

ROLL CALL VOTE

HOUSE COMMITTEE JUDICIARY

DATE March 26, 1987 BILL NO. 229 TIME 9:17A.M

NAME	EXCUSED	AYE	NAY
JOHN MERCER		✓	
LEO GIACOMETTO		✓	
BUDD GOULD		✓	
AL MEYERS		✓	
JOHN COBB	✓		
ED GRADY		✓	
PAUL RAPP-SVRCEK		✓	
VERNON KELLER			✓
RALPH EUDAILY		✓	
TOM BULGER			✓
JOAN MILES		✓	
FRITZ DAILY		✓	
TOM HANNAH	XXXXXXXXXX	✓	
BILL STRIZICH		✓	
PAULA DARKO		✓	XXXXXX
KELLY ADDY			✓
DAVE BROWN			✓
EARL LORY		✓	

TALLY

12 4

Ann's J. Adell
Secretary

Earl Lory
Chairman

MOTION: Be Conc. In

STANDING COMMITTEE REPORT

MARCH 26,

19 87

JUDICIARY

Mr. Speaker: We, the committee on _____

SENATE BILL NO. 220X 139

report _____

do pass
 do not pass

be concurred in
 be not concurred in

as amended
 statement of intent attached

Strip

Chairman

~~State~~ amendment number 3 (to page 6, line 5 of the third reading copy of SB 139) on the March 23, 1987, House Judiciary Committee report and further amend the third reading copy of SB 139 as follows:

1. Page 6, line 2.

Following: "recreational"

Insert: "snowmobiling"

Following: "opportunities"

Insert: ", including but not limited to a snowmobile area."

2. Page 6, line 3.

Following: "property."

Insert: "and when not also acting as a snowmobile area operator on the property."

Microfiche

THIRD

reading copy (BLUE)
color

REP. GRADY WILL CARRY THE BILL!

STANDING COMMITTEE REPORT

MARCH 25,

87

19

JUDICIARY

Mr. Speaker: We, the committee on

SENATE BILL NO. 229

report

do pass

do not pass

be concurred in

be not concurred in

as amended

statement of intent attached

Chairman

THIRD

reading copy (

BLUE

color)

REP. RAPP-SVACEK WILL CARRY THE BILL!

STANDING COMMITTEE REPORT

MARCH 26,

87

19

JUDICIARY

Mr. Speaker: We, the committee on _____
HOUSE BILL NO. 873
report _____

do pass
 do not pass

be concurred in
 be not concurred in

as amended
 statement of intent attached

Chairman

FIRST reading copy (**WHITE**)
color

STANDING COMMITTEE REPORT

MARCH 26,

19 37

Mr. Speaker: We, the committee on JUDICIARY
report SENATE BILL NO. 375

do pass
 do not pass

be concurred in
 be not concurred in

as amended
 statement of intent attached

Chairman

1. Title, line 16.

Strike: "IMMEDIATE"

2. Page 5, lines 1 and 2.

Strike: "the effective date of this act"

Insert: "July 1, 1927"

3. Page 5, line 4.

Strike: "on passage and approval"

Insert: "July 1, 1927"

THIRD

reading copy (

BLUE

color

REP. MERCER WILL CARRY THE BILL!

STANDING COMMITTEE REPORT

MARCH 26,

19 87

Mr. Speaker: We, the committee on JUDICIARY

report SENATE BILL NO. 77

do pass
 do not pass

be concurred in
 be not concurred in

as amended
 statement of intent attached

Chairman

THIRD

reading copy (_____)
color

BLUE

REP. GLACOMETTO WILL CARRY THE BILL!

STANDING COMMITTEE REPORT

MARCH 26,

19 37

Mr. Speaker: We, the committee on JUDICIARY

report SENATE BILL NO. 380

do pass
 do not pass

be concurred in
 be not concurred in

as amended
 statement of intent attached

Chairman

1. Title, line 6.

Strike: ";"

Insert: "AND"

2. Title, lines 7 and 8.

Strike: "; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE"

3. Page 2, line 5.

Following: line 4

Insert: "(4) The requirement in subsection (3)(b) that the product is expected to and does reach the user or consumer without substantial change in the condition in which the product is sold does not apply to an action based upon improper product design."

Re-number: subsequent subsections

4. Page 2, lines 17 and 18.

Strike: "or in the exercise of ordinary care should have discovered"

5. Page 2, lines 19 and 20.

Strike: "and was aware or in the exercise of ordinary care should have been aware of the danger"

Insert: "or the defect was open and obvious"

6. Page 2, line 20.

Following: "and"

Insert: "the user or consumer"

7. Page 2, line 22.

Strike: "UNFORESEENABLY"

Insert: "unreasonably"

8. Page 3, line 1.

Strike: "(4)"

Insert: "(5)"

THIRD

reading copy (BLUE)

color

REP. ADDY WILL CARRY THE BILL!