

MONTANA STATE SENATE
JUDICIARY COMMITTEE
MINUTES OF THE MEETING

February 2, 1987

The nineteenth meeting of the Senate Judiciary Committee was called to order at 10:10 a.m. on February 2, 1987, in Room 325 of the Capitol by chairman Joe Mazurek.

ROLL CALL: All committee members were present.

OPEN EXECUTIVE SESSION ON SENATE BILL 51: Senator Mazurek opened the executive session on SB 51 by stating there are several areas in the bill where work is needed. He introduced Mr. John Stephenson, an attorney from Great Falls, who explained that the present law deals with comparative negligence, which allows a person to sue and recover from someone who injured him, even if the person was partly responsible for his own injury, so long as his own negligence was not greater than the negligence of the person against whom recovery is sought. He stated if a man wins a \$50,000 negligence suit and was part of the fault of the case, he still gets \$50,000 for it. He pointed out there are other kinds of liability formulas to use, such as "strict liability tort", which is California's liability statute. He said this type can cause any manufacturer of a product to be liable in tort court if a product injures someone, no matter the circumstances. He said in 1983 the Montana Supreme Court rules that this strict liability form is just an assumption of risk, which means a person could know a product is defective and thus, it is not the manufacturers fault at all times. He gave an example of a drunk driver that goes through a stop sign and kills a person. He said the jury fines him negligent, but the brake pads in his car are faulty, and the dealer who sold him the brake pads did not know it when he sold them to him. He explained now this case goes to court and the jury finds the driver 90% negligent and the car dealer 10% negligent. He stated the way the law reads now, the car dealer would have to pay all the recovery to the plaintiff, family of the deceased, because he sold the faulty brakes to the drunk. This is strict liability.

Mr. Stephenson felt under the proposed bill, it would put the car dealer in only 10% at fault if the jury decides that, and 10% is all he would pay to the plaintiff. Mr. Stephenson thought SB 51 gives fairness to the problem of one person paying the whole settlement when that person was only a percentage of the fault. It also makes the plaintiff, if at some fault, pay for that percentage.

Zander Blewett, associate of John Hoyt, responded to Mr. Stephenson if you stand unreasonably in a risk condition, then you put yourself in that situation, which makes you at fault and not the manufacturer. He said what a person knows, and "assumption of risk" should not be in these types of liability cases. He gave an example to the committee about a man who went down the road and lost a wheel on his car, which caused an accident that made him a cripple. He stated that before this man started down the road, he had had 3 drinks, so what really caused the accident is fairly clear. However, now the 3 drinks he had before the accident will become a percentage of the fault in this accident. He felt if the committee is going to have a bill like this, they better take out pure fault assumption.

Senator Beck referred back to Mr. Stephenson's story of the drunk driver and asked Mr. Stephenson to clarify the drunk driver's negligence in this case and to explain what the third party injured person gets out of the settlement, and from whom. Mr. Stephenson responded that under this bill, the third party could only get 10% of the settlement from the car dealer and 90% from the drunk driver, but as the law is now, the third party could make the car dealer pay for the whole settlement because he might be able to pay for the whole settlement more so than the drunk driver. Senator Beck asked if the bill passed and the drunk driver could not pay 90% of the negligence, then what should be done - make him pay what he can, such as 45%.

Senator Crippen asked if a second car involved in the accident was found zero percent negligent, then who would compensate them, how much and when would they get it. Senator Crippen asked if 10% liable is enough to make one 100% responsible.

Senator Halligan inquired if you are 0% negligent you should have the right to recover.

Senator Mazurek asked if there was a product liability bill in the House. Mr. Robischon answered no.

Senator Crippen asked how Mr. Stephenson would respond to expanding this bill to include other liability type formulas. Mr. Stephenson said he does not use assumption of risk liability. Senator Crippen asked to give an explanation of the expansion of this bill. Mr. Stephenson replied many states mix theories of liabilities areas. He stated we are looking at what caused the accident. He pointed out in a federal court case which was held in Montana, the California statute was used. He also felt that type defect liability is not a bad idea.

Senator Halligan asked if we could change to these types of liability that have been discussed.

Mr. Blewett answered, just keep it the way it is, but "assumption of risk" should be defined because if the definition is clear, one would have the right means to handle these liability cases.

Senator Mazurek told the committee this bill has several areas to work through, so we should take one area at a time.

Senator Crippen commented that it is hard to distinguish which percentage of negligence each person involved is liable for. Senator Mazurek said subsection 3 of the bill explains that.

Senator Mazurek focused on section 1 of the bill. He told the committee this section has had the suggestions of deleting it, leaving it and defining "assumption of risk". He asked what the committee's pleasure was.

Senator Brown stated the subcommittee which worked on this bill, looked at the problem of one causing injury to himself, but the product he used was defective, which could have caused part of the injury. He said the subcommittee's concern was how to handle this kind of problem.

Senator Mazurek commented if you go to a fault concept, then we will have trouble defining what "comparative fault" is, but the advantage is finding the law more toward the middle.

Senator Crippen asked if everyone understood comparative fault and comparative negligence. He said the concept of fault brings in subsection 2 on page 2, (a) through (d). He said in a comparative negligence case, as long as the defendant is 70% at fault and the plaintiff is 30%, then the defendant will pay only 70% to the plaintiff.

Senator Mazurek asked if someone would explain "fault" differences in these cases.

Mr. Robischon responded if the plaintiff is 50% or less at fault, then he doesn't receive compensation. When you have a multiple person case, you might have a plaintiff that is 40% negligent, which means he can recover fully. He explained this is how the bill reads now.

Karl Englund gave out a handout to the committee with examples of the law now, and examples with the new bill. (Exhibit 1) Mr. Englund explained each example and stated one person is solvent in all cases.

Senator Beck asked why Mr. Hoyt's proposal could not be raised to 30% threshold. (Exhibit 2) Mr. Hoyt said if the threshold was raised to 30%, no one would be a winner because it would cause more litigation.

Senator Halligan moved to remove the "comparative fault" language from section 1 of the bill and put in "negligence". (Exhibit 3)

Mr. John Hoyt stated that amendment #8 in Exhibit 3, is a gray area because the judges would be settling all the same way. Ms. Lane said amendment #8 would put back in existing law.

Senator Halligan said his motion included in amendment #8 striking "fault" and inserting "negligence".

Senator Mazurek asked Senator Halligan if he was assuming with his motion that the committee will change the "assumption of risk" concept. Senator Halligan answered yes.

Senator Pinsonneault asked why Senator Halligan wanted this. Senator Halligan said the motion will clear up the "assumption of risk" concept. He also said his motion contained changing "fault" to "negligence" on page 2, section 2.

Senator Brown thought if the committee could work out language for "assumption of risk", then these changes of Senator Halligan's would work. The motion CARRIED to PASS the amendments and the changes Senator Halligan made.

The committee discussed section 2 of the bill. Mr. Robischon presented an amendment to the committee. (Exhibit 4) Senator Halligan MOVED the amendment. The motion CARRIED.

The committee discussed all persons who have fault in a case being involved in a trial. Mr. Robischon explained if the court allowed the jury to calculate the fault of all parties involved, whether in case trial or not, it would reduce recovery for the plaintiff. Mr. Robischon said some of the defendants will still pay.

Mr. Hoyt felt this bill will not encourage final settlements of a liability case because people will want to go to court to sue everyone who has even one percent of fault in a liability case.

Karl Englund said his job for a plaintiff is to try and settle a lawsuit case without going to trial, so that is why many plaintiffs would rather attempt a lawsuit on the defendant who has money, "deep pocket".

Senator Crippen said the other defendants besides the "deep pocket" defendant are probably "solvent" defendants. He said if one has a 70% liable defendant that is broke and a 30% liable defendant that is rich, why bother with the 70% defendant.

Senator Mazurek said the "fault pie" should be fair, so the jury makes a fair decision on everyone's fault, so the court does bother with the 70% liable defendant who is broke.

Mr. Stephenson felt the bill will not make it more difficult to settle a case.

Senator Halligan MOVED to put in 20% threshold for joint and several liability.

Senator Brown felt this threshold amount would be better in punitive damages. Senator Mazurek stated several liable is what the 20% threshold will make a person.

Senator Halligan felt this will protect the plaintiff and give the defendants a fair chance. The motion FAILED. (See roll call vote)

Senator Beck MOVED a 33 1/3% threshold. Senator Pinsoneault made a SUBSTITUTE MOTION of a 25% threshold. There was no discussion. The motion FAILED. (See roll call vote)

Senator Beck changed his motion of 33 1/3% to 30%. The motion FAILED. (See roll call vote)

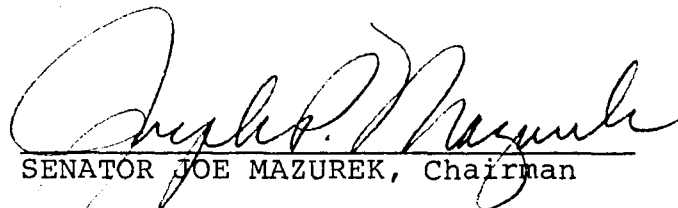
Judiciary Committee
February 2, 1987
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Senator Bishop MOVED to leave section 2 of the bill as it stands. Senator Mazurek stated it will abolish joint and severally liable. The motion FAILED with Senators Galt, Crippen and Bishop voting yes.

Senator Halligan MOVED 25% threshold again. The motion CARRIED with Senators Crippen, Beck, Galt and Bishop voting no.

Karl Englund had hand delivered to the committee, his opinion on the bill. (Exhibit 5)

ADJOURNMENT: The committee adjourned at 12:00 noon.


SENATOR JOE MAZUREK, Chairman

mh

ROLL CALL

Judiciary

COMMITTEE

50th LEGISLATIVE SESSION -- 1987

Date Feb. 2, 1988

NAME	PRESENT	ABSENT	EXCUSED
<u>Senator Joe Mazurek, Chairman</u>	X		
<u>Senator Bruce Crippen, Vice Chairman</u>	X		
<u>Senator Tom Beck</u>	X		
<u>Senator Al Bishop</u>	X		
<u>Senator Chet Blaylock</u>	X		
<u>Senator Bob Brown</u>	X		
<u>Senator Jack Galt</u>	X		
<u>Senator Mike Halligan</u>	X		
<u>Senator Dick Pinsoneault</u>	X		
<u>Senator Bill Yellowtail</u>	X		

Each day attach to minutes.

APPLICATION OF JOINT AND SEVERAL LIABILITY

I. CURRENT LAW -- \$100,000 total damages

P	0% negligent	D(1)	10% negligent
		D(2)	40% negligent
		D(3)	50% negligent

P can collect \$100,000 from either D(1), D(2) or D(3). P can collect from all Ds, but P can only collect once.

If P collects \$100,000 from D(2), D(2) can collect \$10,000 from D(1) and \$50,000 from D(3)

II. SB51 -- \$100,000 total damages

Same percentages as above

P can only collect \$10,000 from D(1), \$40,000 from D(2) and \$50,000 from D(3). If D(3) is insolvent, P receives only \$50,000.

III. CURRENT LAW -- \$100,000 total damages

P	10% negligent	D(1)	10% negligent
		D(2)	40% negligent
		D(3)	40% negligent

Total damages are reduced by \$10,000 (10% of \$100,000), so amount of judgment is \$90,000. P can collect from one D, or can collect from all Ds but can only collect once.

If P collects \$90,000 from D(2), D(2) can collect \$10,000 from D(1) and \$40,000 from D(3)

IV. SB 51 --- \$100,000 total damages

Same percentage as III above

P can only collect \$10,00 from D(1), \$40,000 from D(2) and \$40,000 from D(3)

V. CURRENT LAW --- \$100,000 total damages

P	20% negligent	D(1)	10% negligent
		D(2)	20% negligent
		D(3)	50% negligent

Either, P cannot collect from D(1) and must look to D(2) and D(3) to satisfy judgment, or P can collect at total of \$80,000 from D(1), D(2) and/or D(3). Ds have right of contribution.

VI. SB51 -- \$100,000 total damages

Same percentages as V above

P can only collect \$10,000 from D(1), \$20,000 from D(2) and \$50,000 from D(3).

VII. SB51 -- \$100,000

P	0% negligent	D(1)	10% negligent
		D(2)	50% negligent
		X	30% negligent
		Y	20% 10% negligent

P can only collect \$10,000 from D(1) and \$50,000 from D(2) for a total amount recoverable of \$60,000.

VIII. HOYT PROPOSAL --- \$100,000 total damages

P 0% negligent

D(1) 10% negligent

D(2) ~~50~~ 40% negligent

D(3) 40% negligent

D(1) has several liability only. Therefore P can only collect \$10,000 from D(1). D(2) and D(3) have joint and several liability, so P can collect total judgment from either or can collect from both, but can only collect once. D(2) and D(3) have right of contribution if they pay more than their respective share of judgment.

Proposed Amendments to SB 51

25% THRESHOLD FOR
JOINT LIABILITY (Hoyt)

1. Title, lines 7 through 9.
Following: "LIABILITY;" on line 7
Strike: the remainder of line 7 through "NEGLIGENCE;" on line 9
2. Title, lines 9 through 10.
Following: "LIABILITY" on line 9
Strike: the remainder of line 9 through "TORTFEASORS" on line 10
Insert: "IN CERTAIN CASES"
3. Page 1, line 15.
Following: "~~negligence~~"
Strike: "fault"
Insert: "negligence"
4. Page 1, line 16.
Following: "~~negligence~~"
Strike: "fault"
Insert: "negligence"
5. Page 1, line 17.
Following: "damages."
Strike: "(1)"
Following: "~~negligence~~"
Strike: "fault"
Insert: "negligence"
6. Page 1, line 20.
Following: "~~in~~"
Insert: "negligence resulting in"
7. Page 1, line 21.
Following: line 20
Strike: "contributory fault"
Insert: "negligence"
Following: "~~negligence~~"
Strike: "fault"
8. Page 1, line 22.
Following: line 21
Strike: "of the person or the"
Following: "combined"
Strike: "fault"
Insert: "negligence"
9. Page 1, line 25.
Following: line 24
Strike: "fault"
Insert: "negligence"

10. Page 1, line 25 through line 10, page 2.

Following: "recovering" on line 25

Strike: the remainder of lines 25 through line 10, page 2 in
their entirety

11. Page 2, line 13.

Following: "~~contribution~~"

Strike: "~~-- apportionment of fault~~"

Insert: "jointly and severally liable -- right of contribution"

12. Page 3, lines 14 through line 9, page 4.

Strike: subsections (1) through (3) in their entirety

(1) *Except as provided in subsection (2) whenever*

the negligence of any party in any action is an issue, each party against whom recovery may be allowed is jointly and severally liable for the amount that may be awarded to the claimant but has the right of contribution from any other person whose negligence may have contributed as a proximate cause to the injury complained of.

(2) When the negligence of any party in an action is an issue and the negligence of such party is determined to be 10 percent or less of the combined negligence of all parties in such action, the negligence of such party shall be treated severally only and such party shall be responsible only for the amount of negligence attributable to such party, and the amount of that negligence shall be deducted from the whole of the combined negligence of all parties and the remaining parties shall be jointly and severally liable only for the remaining negligence.

~~(2)(3)~~ On motion of any party against whom a claim is asserted for negligence resulting in death or injury to person or property, any other person whose negligence may have contributed as a proximate cause to the injury complained of may be joined as an additional party to the action. Whenever more than one person is found to have contributed as a proximate cause to the injury complained of, the trier of fact shall apportion the degree of fault among such persons. Contribution shall be proportional to the negligence of the parties against whom recovery is allowed. Nothing contained in this section shall make any party indispensable pursuant to Rule 19, M.R.C.P.

~~(3)(4)~~ If for any reason all or part of the contribution from a party liable for contribution cannot be obtained, each of the other parties against whom recovery is allowed is liable to contribute a proportional part of the unpaid portion of the noncontributing party's share and may obtain judgment in a pending or subsequent action for contribution from the noncontributing party."

Proposed Amendments to SB 51

ELIMINATE "FAULT" CONCEPT

1. Title, lines 7 through 9.
Following: "LIABILITY;" on line 7
Strike: the remainder of line 7 through "NEGLIGENCE;" on line 9
2. Title, line 10.
Following: "OF"
Strike: "FAULT"
Insert: "LIABILITY"
3. Page 1, line 15.
Following: "negligence"
Strike: "fault"
Insert: "negligence"
4. Page 1, line 16.
Following: "negligence"
Strike: "fault"
Insert: "negligence"
5. Page 1, line 17.
Following: "damages."
Strike: "(1)"
Following: "negligence"
Strike: "fault"
Insert: "negligence"
6. Page 1, line 20.
Following: "in"
Insert: "negligence resulting in"
7. Page 1, line 21.
Following: line 20
Strike: "contributory fault"
Insert: "negligence"
Following: "negligence"
Strike: "fault"
Insert: "negligence"
8. Page 1, line 22.
~~Following: "person"
Strike: "or the combined fault of all persons"~~

F: "combined"
 Strike: "fault"
 Insert: "negligence"
9. Page 1, line 25.
Following: line 24
Strike: "fault"
Insert: "negligence"

10. Page 1, line 25 through line 10, page 2.
Following: "recovering" on line 25
Strike: the remainder of line 25, page 1 through line 10, page 2
in their entirety

11. Page 2, line 13.
Following: "of"
Strike: "fault"
Insert: "liability"

12. Page 3, line 14.
Following: "the"
Strike: "fault"
Insert: "negligence"

13. Page 3, line 16.
Following: line 15
Strike: "fault"
Insert: "negligence"

14. Page 4, line 6.
Following: "the"
Strike: "fault"
Insert: "negligence"

Senate Bill No. 51

Introduced Copy

1.

Page 3, line 22.

Following: "Claimant."

Insert: "Provided, however, that in attributing fault among persons, the finder of fact shall not consider or determine any amount of fault on the part of any injured person's employer or co-employee to the extent that such employer or co-employee has tort immunity under the Workers' Compensation or Occupational Disease Acts of this state, of any other state, or of the federal government."

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January 30, 1987

Senator Joseph P. Mazurek
 Chairman
 Senate Judiciary Committee
 Capitol Station
 Helena, Montana 59624

HAND DELIVER

Re: SB 51

Dear Senator Mazurek:

I have reviewed the contents of a letter dated January 28, 1987 addressed to you from Mr. James Robishon on behalf of the Montana Liability Coalition. While I know that you and the members of the Senate Judiciary Committee have a great deal of information on the subjects covered in SB 51, I feel that some response is necessary to Mr. Robishon's letter.

First, Mr. Robishon responds to a proposal from John Hoyt concerning an amendment to Montana Code Annotated Section 27-1-702, our statute on comparative negligence. Mr. Hoyt's proposal is intended to clarify that when the jury compares the negligence of the plaintiff to the negligence of multiple defendants, the plaintiff is allowed to recover if his/her negligence is less than the combined fault of the defendants. Mr. Robishon says this proposal would "further expand" existing law.

I draw your attention to page 1, line 22 of SB 51. There you will see that Mr. Hoyt's proposal is already included in the bill Mr. Robishon so strongly supports. In other words, Mr. Hoyt is simply agreeing, in this instance, with the language of the introduced bill.

Mr. Hoyt's second proposal is to eliminate joint and several liability for those defendants found to be ten percent or less negligent. As he stated during the hearing, the most persuasive argument for some change in joint and several liability is the problem that is caused to those defendants whose actions were

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a very small cause of the plaintiff's injuries. The classic example is the city who contributed one percent to plaintiff's injuries yet must pay the entire judgment because the other defendant is judgment proof. Mr. Hoyt's proposal is to eliminate joint liability for what he calls "the one-percenters" while retaining the rule for persons who substantially contributed to causing damages to another.

Next Mr. Robishon turns his attention to my letter of January 20, 1987. As I said in that letter, its purpose was to put before the Committee alternatives which have been proposed or adopted in other states. Only when the Committee knows of the full range of options can it make a truly informed decision. The alternatives listed included the two extremes -- no change in our existing joint and several rule and complete elimination of the rule as provided for in SB 51.

I am realistic enough to know that the "no change" option will not be the option chosen by your Committee. Nonetheless, there are strong policy reasons for joint and several liability including the classic reason that once a person has been determined to be a wrongdoer, the burden should shift from the injured to the injurer.

Mr. Robishon next proposes an amendment providing that employer or fellow employee fault would be excluded from consideration in the determination of fault attributable to each person whose actions contributed to the damages. Since employer and fellow employee fault is so rarely an issue in a negligence action, this amendment is, for all intents and circumstances, meaningless. This is true because work-related accidents are covered by Workers' Compensation, where fault is simply not an issue.

We have raised strenuous objections to that part of SB 51 which would allow the jury to apportion fault to parties who are not involved in the lawsuit. What could be more unfair than to allow a jury to place blame upon a person who has no opportunity to defend him/herself?

Mr. Robishon says that the initial decision to include or exclude a possible defendant is the plaintiff's. That is, of course, true. He neglected to say that the defendant has the ability to join any and all additional parties who may have contributed to the accident.

If the jury is allowed to assign fault to unrepresented parties and thereby reduce the liability of named defendants, plaintiff will have no choice but to name everybody who could have possibly contributed to the

accident. I know that in my own practice, we never name individual nurses in medical malpractice actions. Yet if this bill passes in its current state, I would have no choice but to change this policy.

Additionally, a plaintiff could never settle a case with one of many defendants. Because the jury can apportion fault to the settling defendant, to settle with one defendant is to invite the "empty chair" defense. This doesn't mean that the full range of facts should be kept from the jury. It does mean that when the jury determines fault, it cannot place the blame upon someone who has not been there to advance a defense and who has reached an agreement concerning his/her responsibility with the injured party.

Mr. Robishon has mischaracterized the option of eliminating joint and several liability for those defendants found less negligent than the plaintiff. He says that this concept is what is being proposed in SB 51. SB 51 would eliminate joint and several liability in all instances. Under the option of eliminating joint and several liability for those defendants found less negligent than the plaintiff, joint and several liability would be eliminated only for those defendants who are found to be less at fault than the plaintiff. So, if we have a plaintiff who is twenty percent negligent, a defendant who is ten percent negligent and another defendant who is seventy percent negligent, only the second defendant is subject to joint and several liability.

Eliminating joint and several liability for non-economic damages only is, I understand, the California rule and I presented it to you simply because of that fact.

Reallocation of uncollectible judgment is an idea I first found in the American Tort Reform Association's Legislative Resource Book. It is presented as a compromise to lessen the harshness which will result from pure severable liability.

Once again, I thank you for your consideration. I know that you and the Committee members have a great deal of information to consider. Please let me know if I can be of any assistance.

Best regards,

Karl J. Englund

cc: Members of the Senate Judiciary Committee

SENATE JUDICIARY
EXHIBIT NO. 5
DATE Feb 2, 1987
BILL NO. SB 51

ROLL CALL VOTE

SENATE COMMITTEE JUDICIARY

Date Feb 2 1987 Bill No. SB 51 Time 11:45 pm.

NAME	YES	NO
Senator Joe Mazurek, Chairman	X	
Senator Bruce Crippen, Vice Chairman		X
*Senator Tom Beck		X
Senator Al Bishop		X
Senator Chet Blaylock	X	
Senator Bob Brown		X
Senator Jack Galt		X
Senator Mike Halligan	X	
Senator Dick Pineseault		X
Senator Bill Yellowtail	X	

Secretary _____

Chairman _____

Motion: Motion of 20% threshold on SB 51.
The motion failed.

ROLL CALL VOTE

SENATE COMMITTEE JUDICIARY

Date Feb. 2 1987 Bill No. SB 51 Time 11:50 pm

NAME	YES	NO
Senator Joe Mazurek, Chairman	X	
Senator Bruce Crippen, Vice Chairman		X
*Senator Tom Beck		X
Senator Al Bishop		X
Senator Chet Blaylock		X
Senator Bob Brown	X	
Senator Jack Galt		X
Senator Mike Halligan		X
Senator Dick Pinsoneault	X	
Senator Bill Yellowtail	X	

Secretary _____

Chairman _____

Motion: Substitute
Motion of 25% threshold for SB 51
Motion failed

ROLL CALL VOTE

SENATE COMMITTEE JUDICIARY

Date Feb. 2 1987 Bill No. SB 51 Time 11:54pm

NAME	YES	NO
Senator Joe Mazurek, Chairman		X
Senator Bruce Crippen, Vice Chairman		X
*Senator Tom Beck	X	
Senator Al Bishop		X
Senator Chet Blaylock		X
Senator Bob Brown	X	
Senator Jack Galt		X
Senator Mike Halligan		X
Senator Dick Pinsonneault		X
Senator Bill Yellowtail		X

Mary T. Huber
Secretary

Chairman

Motion: Motion of 30% threshold for SB 51
Motion failed.