

MINUTES

MONTANA HOUSE OF REPRESENTATIVES 51st LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By Vice-Chairman Kelly Addy, on Jan. 13,
1989, at 8:02

ROLL CALL

Members Present: All members present with the following
exception:

Members Excused: Chairman, Dave Brown

Members Absent: None.

Staff Present: Julie Emge, Secretary
John MacMaster, Legislative Council

Announcements/Discussion: None.

HEARING ON HOUSE BILL 57

Presentation and Opening Statement by Sponsor: Rep. Bob Marks, House District 75, addressed the committee with amendments to HB 57 listed as EXHIBIT 1. Rep. Marks continued by stating that HB 57 is a medical malpractice bill that would allow immunity to physicians and facilities that provide strictly emergency services. Rep. Marks is speaking of incidents when individuals are caught in emergency situations that may be life threatening and care is needed immediately. During these such incidents, the facility or practicing specialist are in a position to provide emergency care for the injured person and many times do not have or are unable to attain any kind of record or information on this person. If an occurrence happens to take place while this care is being provided, the facility or practicing specialist can and has been held liable.

List of Testifying Proponents and What Group They Represent:

Jerry Loendorf, Montana Medical Association
Jim Robischon, Montana Liabilities Coalition
Jim Ahrens, President, Montana Hospital Association
Larry Akey, Montana Health Network Inc.

List of Testifying Opponents and What Group They Represent:

Terry Treewiler, Attorney, Whitefish, Montana
Bill Rossbach, Montana Trial Lawyers Association
Michael Sherwood, Montana Trial Lawyers Association

Testimony:

Jerry Loendorf, speaking in favor of HB 57 commented that the Montana Medical Association (MMA) is very much in favor of the amendments that are being proposed. The bill, as it currently exists without the amendments, states that a health care provider in good faith rendering care or assistance in an emergency situation, is relieved from liability for what the law calls ordinary negligence. He/she is still responsible for what the law calls gross negligence. Mr. Loendorf stated that the purpose of this bill and laws like it are to encourage physicians to except patients in emergency situations.

Jim Robischon, in agreement with Jerry Loendorf approved of HB 57 as amended. He commented that the purpose of his statement is to discuss how the proposed amendments of HB 57 relate to the current status of Montana's laws. He stated that HB 57 as amended is consistent with the evolution as what is known as the Good Samaritan Doctrine. The Montana Supreme Court recently addressed the evolution and extension of the good samaritan and statutory doctrine in the case of McCain vs Batson (EXHIBIT 2). It was sighted by the Montana Supreme Court in a split decision on Aug. 18, 1988 in favor of the extension of the doctrine to a situation in which the medical care was not given at the sight of the accident and where there was some question as to whether or not there was an emergency situation with the patient. It is on this basis that HB 57 presents to the legislature the opportunity to define for the court specifically what is meant by emergency situation which will provide the physician with protection.

Jim Ahrens commented that emergency care situations are dramatic, practical problems, but that too often the physicians or hospital facilities are being sued for performing a need when emergency care is needed. Because of these such acts, the bill is being presented to address these situations and urges considerable support of HB 57 as amended.

Larry Akey, in agreement with the above mentioned proponents testified in favor of HB 57 as amended.

Terry Treewiler, in opposition to HB 57 testified that there were two main issues that he wanted to address: 1.) That this bill is not an economic interest to himself, or to the profession as a whole, and 2.) He feels it is important to understand that this is not an issue to be categorized as a doctor vs lawyer bill. More properly categorized this is an issue addressing public safety in Montana. He feels that HB 57 would make Montana a less safe place to live due to the fact that it attempts to immunize health care providers who fail to exercise reasonable care when the health situation of a injured person is life threatening. He stated that this type of legislation has been held unconstitutional in the past by the courts and encouraged the committee to reject HB 57 as it has been proposed, even in it's modified form.

Bill Rossbach, reiterating Mr. Treewiler, stated to the committee that this is not a case of lawyer vs doctor, but a case that will potentially be affecting every citizen of Montana. This bill provides, even in its amended form, in emergency situations when quality care is most needed, the standard of care is greatly reduced. Shown as EXHIBIT 3, Mr. Rossbach presented the committee with a listing of hospitals that advertise 24 hour emergency care. This bill states that doctors, health care providers and/or hospitals now have the right and are licensed to be careless. They no longer have an obligation to be reasonably competent when treating someone associated with an emergency situation. Mr. Rossbach addressed the issue of negligence by presenting to the committee the standard jury instruction that is given in every negligence case (EXHIBITS 4 and 5). He feels that if the question is regarding rural areas not providing adequate prenatal care, then it is a separate issue that should be dealt with as a matter of social policy and that HB 57 is an entirely separate issue and does not apply.

Michael Sherwood stated that he felt the most critical comment was made in reference to the McCain vs Batson case. In light of this case, almost every jurisdiction in the United States has passed some sort of a good samaritan law. That law has two elements in exempting someone from ordinary negligence liability: 1.) There is no pre-existing duty, and 2.) There is no compensation involved. Referring again to the McCain

case, Mr. Sherwood stated that it in no way corresponds to what is presently being proposed.

Questions From Committee Members: Rep. Daily questioned Mr. Loendorf if he could give to the committee an example of the differences between ordinary negligence and gross negligence. Mr. Loendorf did not have the specifics of the differences; however, Mr. Treewiler stated that simple or ordinary negligence is not being professionally competent, and gross negligence orders on intentional conduct or a willful disregard for the safety of the person that is being dealt with.

Rep. Boharski questioned Mr. Ahrens if this legislation would decrease the problem of rural obstetrical care in Montana by specifically decreasing the fears and lowering the rates of malpractice insurance. Mr. Ahrens replied by stating that he thought it would decrease the problem, and would have an overall effect with the hospitals, and community doctors premiums. If people are acting in good faith, this law would acknowledge that and there would be now reason to further increase those types of reserves.

Rep. Stickney questioned Mr. Rossbach as to his statement regarding this bill giving doctors a license to be careless. Is it only the threat of the lawyers and the lawsuits that create doctors that do only a good job? Mr. Rossbach stated that in contrast to the proponents this bill allows the practicing doctor to act as a physician, but they have no obligation under the law to act carefully. He feels that if this bill passes, people no longer have any right to expect any obligation from the doctor or for the doctor to act reasonably or careful toward them.

Rep. Rice asked Mr. Robischon how a physician would know whether or not the patients condition would lead to a serious disability or death if he had not performed the diagnosis? Mr. Robischon, in understanding the language of the amendments, stated that the condition of the patient would be examined and a diagnosis would then be made to determine as to how to treat that condition and if it was not immediately treated would it lead to a serious disability or death.

Closing by Sponsor: Rep. Marks pointed out to the opposition that no comments were made by the proponents as to this case being a doctor vs lawyers bill. This bill has to do health care only. Also, Rep. Marks agreed that an emergency situation is when the patient needs the best care, but more importantly, it's the best care that's available at that time that this bill addresses. This bill is dealing with more than just getting the best care at a time when they most need it. It comes down to a question of having the best care available, or no care at all. Rep. Marks stated that if we don't stop the decrease in the delivery and availability of health care, the State will suffer both in health related areas as well as economic areas.

DISPOSITION OF HOUSE BILL 57

Motion: None.

Discussion: None.

Amendments and Votes: None.

Recommendation and Vote: Recommend to close the hearing on House Bill 57. No action taken.

DISPOSITION OF HOUSE BILL 59

Motion: A DO PASS recommendation was made by Rep. Wyatt, motion seconded by Rep. Darko.

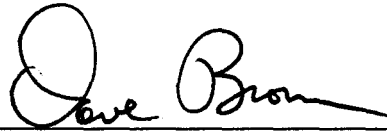
Discussion: Rep. Hannah raised the question as to if lawyers were going to have to be finger printed. It was to Rep. Mercer's knowledge that it is a procedure that is already taking place.

Amendments and Votes: Rep. Darko made a motion to amend HB 59 (see attached standing committee report), motion seconded by Rep. Brooke.

Recommendation and Vote: Rep. Wyatt moved DO PASS AS AMENDED, motion seconded by Rep. Darko. Motion CARRIED with Rep. Hannah voting No.

ADJOURNMENT

Adjournment At: 9:56 a.m.

A handwritten signature in cursive script, reading "Dave Brown". The signature is written in black ink and is positioned above a horizontal line.

REP. DAVE BROWN, Chairman

DB/je

1108.MIN

DAILY ROLL CALL

JUDICIARY

COMMITTEE

51st LEGISLATIVE SESSION -- 1989

Date JAN. 13, 1989

NAME	PRESENT	ABSENT	EXCUSED
REP. KELLY ADDY, VICE-CHAIRMAN	X		
REP. OLE AAFEDT	X		
REP. WILLIAM BOHARSKI	X		
REP. VIVIAN BROOKE	X		
REP. FRITZ DAILY	X		
REP. PAULA DARKO	X		
REP. RALPH EUDAILY	X		
REP. BUDD GOULD	X		
REP. TOM HANNAH	X		
REP. ROGER KNAPP	X		
REP. MARY McDONOUGH	X		
REP. JOHN MERCER	X		
REP. LINDA NELSON	X		
REP. JIM RICE	X		
REP. JESSICA STICKNEY	X		
REP. BILL STRIZICH	X		
REP. DIANA WYATT	X		
REP. DAVE BROWN, CHAIRMAN			X

STANDING COMMITTEE REPORT

January 16, 1989

Page 1 of 1

Mr. Speaker: We, the committee on Judiciary report that HOUSE BILL 59 (first reading copy -- white) do pass as amended.

Signed: [Signature]
Dave Brown, Chairman

And, that such amendments read:

1. Page 2, lines 4 and 5.

Strike: ". To" on line 4 through "agency" on line 5

Insert: "and"

2. Page 2, line 8.

Following: "federal"

Insert: "(to the extent allowed by federal law)"

PROPOSED AMENDMENT TO HOUSE BILL NO. 57

House Bill 57 be amended in Section 1, page 1, by deleting line 25 and on page 2 by deleting lines 1-14 and inserting in lieu hereof the following:

(a) "Emergency situation occurring in the provider's office" means a situation that occurs in an office, other than a hospital, attended by a health care provider for the examination or treatment of patients and that requires immediate services for alleviation of severe pain or immediate diagnosis and treatment of conditions that, if not immediately diagnosed and treated would lead to serious disability or death; and:

(i) is a condition the provider would not ordinarily attempt to treat, but would refer the patient to another provider if the patient did not require immediate services; or

(ii) is a condition of which the patient is aware and had the opportunity to consult a provider before immediate services are required but does not do so.

(b) "Emergency situation occurring in a hospital" means a condition that occurs in a hospital emergency room, and that requires immediate services for alleviation of severe pain or immediate diagnosis and treatment of conditions that, if not immediately diagnosed and treated would lead to serious disability and:

is a condition the provider would not ordinarily attempt to treat or refer the patient to another provider if the patient did not require immediate services; or

EXHIBIT 1
DATE 1-13-89
HB 57

(ii) is a condition of which the patient is aware and has the time to consult a provider before immediate services are required but does not do so.

STATE REPORTER
Box 749
Helena, Montana 59624

EXHIBIT 2
DATE Jan. 13, 1989
HB 57-Marks

VOLUME 45

No. 88-134

KAREN MCCAIN,

Plaintiff and Appellant,

v.

Submitted: June 30, 1988

Decided: Aug. 18, 1988

JOHN BATSON, M.D.,

Defendant and Respondent.

GOOD WILL--JUDGMENT, SUMMARY--NEGLIGENCE, Appeal from summary judgment in action for recovery of damages for the negligent treatment of injuries where defendant invokes the immunity of the Good Samaritan statute. The Supreme Court held: (1) The standard of review is one of gross negligence and willful or wanton acts or omissions, rather than ordinary negligence/medical malpractice, (2) When a case is disposed of below on a motion for summary judgment before a judge sitting without a jury and no testimony is taken as the facts are relatively uncontested, the scope of review is much broader than in other appeals and the Supreme Court is free to make its own examination of the entire case and reach a conclusion in accordance with its findings, (3) The Court will uphold the result below if it is correct, regardless of the reasons given below for the result, and (4) The elements of the Good Samaritan statute were met.

Appeal from the Eighteenth Judicial District Court, Gallatin County, Honorable Joseph Gary, Judge

For Appellant: James J. Screnar; Nash, Guenther, Zimmer & Screnar,
Bozeman

For Respondent: Richard F. Cebull; Anderson, Brown Law Firm, Billings

Submitted on briefs.

Opinion by Justice Harrison; Chief Justice Turnage and Justices Hunt and Gulbrandson concur. Justice Sheehy dissents and filed an opinion.

Affirmed.

____ Mont. ____

____ P.2d ____

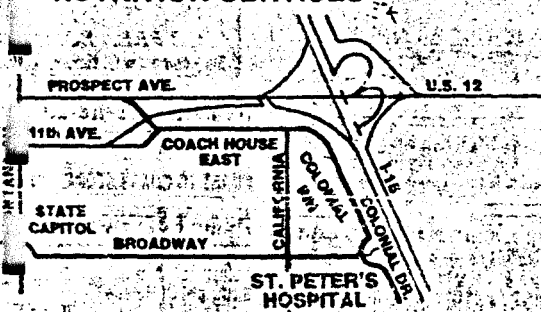
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INSTRUCTION NO. _____

In performing professional services for a patient, a doctor has the duty to have that degree of learning and skill ordinarily possessed by qualified doctors practicing in that field of medicine [and practicing in the same or a similar locality and under similar circumstances].

It is his further duty to use the care and skill ordinarily exercised in like cases by qualified doctors practicing in that field of medicine [practicing in the same or a similar locality under similar circumstances].

A failure to perform any such duty is negligence.

GIVEN: _____
District Judge

Comments: (1) It is not certain whether the locality rule applies to physicians who are not board certified. See Aasheim v. Humberger, 695 P.2d 824, 826-27, 42 St. Rep. 235, 237-38 (1985). Use bracketed language if locality rule is appropriate. Cf. Tall Bull v. Whitney, 172 Mont. 326, 564 P.2d 162 (1977).

(2) See MPI 2.11 and 2.12 for burden of proof instructions.

Proposed by P(#____), D(#____), Ct(#____) Disposition G____ R____ W____

INSTRUCTION NO. _____

Every person is responsible for injury to the person [or property] of another, caused by his [or her] negligence.

Negligence is the failure to use reasonable care. Negligence may consist of action or inaction. A person is negligent if he fails to act as an ordinarily careful person would act under the circumstances.

GIVEN: _____
District Judge

Proposed by P(#____), D(#____), Ct(#____) Disposition G____ R____ W____

JUDICIARY COMMITTEE

DATE JAN. 13, 1989

[illegible]

CS-33