MINUTES

MONTANA SENATE
55th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN BRUCE D. CRIPPEN**, on March 27, 1997, at 10:00 a.m., in the Senate Judiciary Chambers of the State Capitol, Helena, Montana.

ROLL CALL

Members Present:

Sen. Bruce D. Crippen, Chairman (R)
Sen. Lorents Grosfield, Vice Chairman (R)
Sen. Al Bishop (R)
Sen. Sue Bartlett (D)
Sen. Steve Doherty (D)
Sen. Sharon Estrada (R)
Sen. Mike Halligan (D)
Sen. Ric Holden (R)
Sen. Reiny Jabs (R)
Sen. Walter L. McNutt (R)

Members Excused: None

Members Absent: None

Staff Present: Valencia Lane, Legislative Services Division
Jody Bird, Committee Secretary

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing(s) & Date(s) Posted: None
Executive Action: HB 100, HB 264, HB 306, HB 571, HB 572

EXECUTIVE ACTION ON HB 100

Amendments: hb010004.asf **(EXHIBIT #1)**

Motion/Vote: **VICE CHAIRMAN LORENTS GROSFIELD MOVED THAT THE COMMITTEE RECONSIDER ITS ACTION TO STRIP hb010003.asf FROM THE BILL YESTERDAY. THE MOTION CARRIED UNANIMOUSLY.**

Discussion: **Valencia Lane**. Yesterday the Committee adopted hb010003.asf. Today we are looking at hb010004.asf. In the hb010003.asf amendments, stated approved public and private treatment facilities were moved to supervisory lease. There was the change in (4) (a), and subsection (d) clarified following

initial placement in a facility in both #1 and #2 which are both identical. In the tan bill Subsection (4) is deleted by the amendments, and the amendments become the new Subsection (4).

Vote/Motion: **VICE CHAIRMAN GROSFIELD MOVED TO ADOPT THE hb010004.asf AMENDMENTS. THE MOTION CARRIED 9-1 IN A ROLL CALL VOTE.**

Discussion: What about #3 of the amendments? **Valencia Lane.** It was moved down into (4)(c)(7) into the supervised release phase of sentencing.

Susan Fox. I spoke with **REP. MCGEE.** He felt treatment is an appropriate option as a condition of supervised release after serving a term of imprisonment. He agreed that a treatment center wouldn't hold a person for 6-13 months, and that it would also be cost-prohibitive.

SEN. FRED VAN VALKENBURG. I want to make two points concerning the hb010004.asf amendments. In Section (4)(a)(i), as the law currently exists, the Court is prohibited from suspending or deferring an imposition of sentence for up to six months. The way it is written now it would be for the full 13 months. Is that the sponsor's or the Departments intent? On page 2 of the amendments, the language in Section (4) (e) addresses violation of restrictions or conditions of supervised release, so it gives the Courts power over supervised release, assuming the Department ends up determining how long supervised release is.

In general, it is still an extremely convoluted procedure, as the Department of Corrections figures it can't handle the offender population, and I don't believe it should take away the discretion of judges to impose up to ten years, as some offenders deserve it. They don't care. So the bill is still a mistake, and I urge you to compare it with the overall pattern of sentencing in the State.

CHAIRMAN BRUCE CRIPPEN. We have an obligation to present the bill in the best fashion we can whether it stays in committee or goes out to the floor.

VICE CHAIRMAN GROSFIELD. SEN. VAN VALKENBURG is right about the 6-13 month period, but the Court is going to impose and/or define the sentence and not the Department, so I don't see that inconsistency.

Motion: **SEN. STEVE DOHERTY MOVED TO TABLE HB 100.**

Discussion: **SEN. SUE BARTLETT.** If you read (4) (a) and (b) carefully, nowhere does it say that the Court will be the one to impose sentence, although it could be implied. I believe it's too restrictive. We need to give the courts a decent range in sentencing even after the fourth or fifth or tenth DUI.

VICE CHAIRMAN GROSFIELD. I have been looking at (4) (c). By the time they get to their eighth DUI, they would have been in jail 13 months times 8, and the judge has the discretion to impose innovative restrictions. This is a money bill, and that's important in some ways, but it's a reality we can't ignore. None of us like tax increases to cover it, but we need to try to make it work.

SEN. MIKE HALLIGAN. I haven't received one letter in support of doing this. Swan River could be used for this, and the graduated sanctions provision is excellent. I would like to get endangerment language in the first DUI offense.

SEN. DOHERTY. I agree with **SEN. GROSFIELD** that this is a money bill, but my constituents complain about repeat offender DUIs. The procedure is convoluted, but I believe it is clarified now. I also agree with **SEN. HALLIGAN**'s point, but don't see compelling evidence to pass this.

Vote: **SEN. DOHERTY'S MOTION TO TABLE HB 100 FAILED 5-5 IN A ROLL CALL VOTE.**

Motion/Vote: **VICE CHAIRMAN GROSFIELD MOVED THAT HB 100 BE CONCURRED IN AS AMENDED. THE MOTION FAILED 5-5 IN A ROLL CALL VOTE.**

NO FURTHER ACTION WAS TAKEN ON HB 100 AT THIS TIME.

EXECUTIVE ACTION ON HB 264

Amendments: hb026401.asf (Holden) **(EXHIBIT #2)**

Motion: **SEN. RIC HOLDEN MOVED TO ADOPT HIS AMENDMENTS.**

Discussion: **Valencia Lane.** Yesterday the Committee adopted hb026401.avl which stripped Subsection (3) of the first section of the bill on page 2, lines 5-14, renumbered Sections 4 and 5, deleted Section 2, and amended the title to conform to the bill. The new amendments would change Sections 4 and 5.

SEN. HOLDEN. On page 2, lines 15-16, I believe the victim should be able to know certain information about the perpetrator, in 46-24-207, MCA. Page 2, line 19 allows a youth court officer to give a school official information regarding a student, but not information on enrollment and substance abuse; however, it leaves in school disciplinary information. I believe we need this bill, as SB 48 may not pass and/or its language may not be clear enough.

SEN. BARTLETT. Is there another bill yet to address release of information to schools? **Susan Fox.** That was SB 15, and it required schools to transfer records and share information with the juvenile justice system; however, no provision tells the

youth court it must share information with schools who don't participate on youth placement teams.

{Tape: 1; Side: A; Approx. Time Count: #25.6; Comments: 10:38 a.m.}

SEN. HALLIGAN. Can you address **SEN. HOLDEN**'s issues to make sure we are not including nuisance information, but viable information as an exception to the disclosure provision? **Susan Fox.** I believe this was covered by the Study Commission and by OPI (Office of Public Instruction) language in SB 48. Specific direction to share with youth courts is missing in SB 48. This does talk about youth-admitted violations or convictions of violations.

SEN. HALLIGAN. I would oppose these amendments as we are holding the Free Conference Committee on SB 48 today.

Vote: **SEN. HOLDEN'S MOTION TO ADOPT HIS AMENDMENTS CARRIED WITH ALL MEMBERS VOTING AYE EXCEPT SENATORS HALLIGAN AND DOHERTY WHO VOTED NO.**

Motion/Vote: **SEN. HOLDEN MOVED THAT HB 264 BE CONCURRED IN AS AMENDED. THE MOTION CARRIED WITH ALL MEMBERS VOTING AYE EXCEPT SEN.S HALLIGAN, BARTLETT, AND DOHERTY WHO VOTED NO. SEN. HOLDEN WILL CARRY HB 264.**

{Tape: 1; Side: A; Approx. Time Count: #32.0; Comments: 10:45 a.m.}

EXECUTIVE ACTION ON HB 571

Letter from Robert Cameron, attorney with Morgan, Cameron & Weaver, P.C. (EXHIBIT #3).

Statement from Montana Chamber of Commerce (EXHIBIT #4).

Discussion: **Valencia Lane.** HB 572 is a back-up to HB 571, if HB 571 is declared unconstitutional, but I believe you should discount the effective contingency date. Last session the Legislature passed SB 212 which amended the same section of law as HB 571 and HB 572 concerning comparative negligence and defense tort action. It is called the empty chair defense concerning negligence or liability of another party not called into the case. So, the Legislature specifically put the empty chair defense back into the Code to allow a defendant in a case to bring in evidence of liability or fault of someone not brought into a case.

In the Plumb decision, the Montana Supreme Court ruled this unconstitutional, as a violation of substantive due process. So HB 571 attempts to re-institute the empty chair defense, but more narrowly than in the 1995 session. It is limited to a settled or

released defendant only. It also changes the dollar credit rule to a percent credit rule.

{Tape: 1; Side: B; Approx. Time Count: #00; Comments: None}

CHAIRMAN BRUCE CRIPPEN. HB 571 or HB 572 don't stand on each other. I'd rather deal with HB 571 first and then go on to HB 572 later this morning.

SEN. BARTLETT. Were will things stand if we do nothing?
Valencia Lane. It would require a discussion of comparative negligence and of joint and several liability. In HB 571 it amends both 27-1-702 and 703, MCA. Section 702 is the comparative negligence law that says you will compare the fault of all parties and if the plaintiff is not 51 percent or more liable for his own injury he is allowed to recover, if not, he's not allowed to recover against other parties - this is the modified Montana comparative negligence law. I don't believe the current law in 702 was affected by the Plumb decision, which means we still have the 50 percent rule in effect.

Section 27-1-703, MCA, is the joint and several liability section in the bill, and addresses allocation of liability of all parties so all defendants are liable in some way. If its more than 50 percent, they can be held liable jointly, if less than 50 percent, they can be held liable severally, and I don't believe these are affected by the Plumb decision.

{Tape: 1; Side: B; Approx. Time Count: #2.0; Comments: 10:56 a.m.}

The Plumb decision only refers to the allocation of liability once the plaintiff gets the judgment. In the lawsuit, the Plumb decision would strike down that part of the law that says the defendant can bring in evidence of anyone who is at fault in the case even though they are not a party in the action. With the Plumb decision ruling that unconstitutional, they now cannot do that, so essentially, you still have modified comparative negligence, you have joint and several liability, but the defendant cannot bring in that evidence of fault of people who are not named defendants in the case.

CHAIRMAN CRIPPEN. I will allow one person from each side to get up an make a brief, simple statement on HB 571. Since 1981 we have been doing joint and several liability, and it is a confusing, onerous, and frustrating process.

Stan Kaleczyk. The cities and towns have a self-insurance program. Recently there was a lawsuit in Montana community where policed chased an under-age drunk driver, who then hit an innocent driver and severely injury them. The injured person sued the police, the minor, the parents, and the bar who served the minor. The minor had no insurance, the parents had very little, and the bar had gone out of business. The Court said, as

long as the plaintiff didn't settle with anyone, the jury would be able to consider the relative fault of the municipality, the driver, the parent, and the bar owner. If the plaintiff settled with them under the post-Plumb decision, the jury would not be able to consider negligence of any party the plaintiff settled with, and the only negligence that would be in front of the Court would the negligence of the municipality. If we assume that everyone were in the courtroom and the jury deemed 40 percent negligence, they'd pay 40 percent of the damages. If the plaintiff settled with each of the other three potential defendants, then the only part left for the jury to consider the negligence would be the municipality, and the municipality would be liable for 100 percent of the damages suffered by the innocent plaintiff, less the dollar amounts of the settlement which could be, theoretically $5000 each.

HB 571 says it's okay if the plaintiff settles with the minor, the bar, and the parent, but the jury will still be able to consider their role in the accident. If the jury then considers these roles and determines the municipality is 40 percent reliable, they would only have to pay that percent. That is the difference between the existing law, post Plumb, and what HB 571 attempts to do.

In the Plumb decision, Justice Trieweiler, writing for a unanimous court, said where you can third party someone in, that is to say the plaintiff decides to sue only the municipality, the municipality could institute a third-party lawsuit and bring in the minor and these other people. But Justice Trieweiler says he's not sure the third-party practice rules would not be applicable if, before the lawsuit is filed, the plaintiff settled with the driver, the bar owner, and the parent. So the defendant who's left in the case can't bring them in and maybe under those circumstances substance of due process does or does not apply, so it leaves an open issue which HB 571 addresses.

Russell Hill. Stan Kaleczyc gave a good explanation. HB 571 attempts to deal with Plumb by limiting definitions of non-party. It's a good faith, ingenious attempt. The consequence of going to the percent credit rule will make it possible for a plaintiff to accrue more than 100 percent of their damages. The main reason the plaintiff settles is because people have policy limits.

In terms of limiting the non-party defendant to only settling parties, we think this is unconstitutional. Newville started all this and involved a settling party, it doesn't seem a valid reason to us. Twice, the Montana Supreme Court struck out settling parties, and settlement is voluntary, but under HB 571 the defendant still gets to walk away with no more consequences. To be constitutional you can't treat the settling plaintiff and defendant so differently.

HB 571 doesn't answer the question of what if the defendant wants to intervene - giving two people the right to mount that case and running the risk of sandbagging the defense.

CHAIRMAN CRIPPEN. These statements should clarify the issues for the Committee.

Motion: SEN. HOLDEN MOVED THAT HB 571 BE CONCURRED IN.

Discussion: SEN. HALLIGAN. I don't agree with the motion. We don't know if this is constitutional, so my support of HB 571 is conditional on HB 572 not going anywhere.

SEN. DOHERTY. The central teaching of Plumb is it's unconstitutional and violates basic fairness of those not there to defend themselves. I believe the bill reduces incentives to settle early, and I see no advantage for the defendant to settle early. I believe that is a danger in the bill, and that' s not good public policy.

I've have been trying to figure out why the non-severability clause is in the bill. It's ingenious, but if we adopt HB 571 with the non-severability clause and it's declared unconstitutional, the whole thing may be declared unconstitutional because it's non-severable. Stan Kaleczyk was exactly right. Plumb was a slip and fall case, suing the South Gate Mall in Missoula. Her injuries were real, but the Mall tried to allege medical malpractice of the plaintiff's doctors. I believe this bill still allows for the empty chair defense, and that is unconstitutional. My cases are three for three since last session.

{Tape: 1; Side: B; Approx. Time Count: #22.0; Comments: None}

I am also bothered by when Franklin Delano Roosevelt tried to pack the U.S. Supreme Court to change the law. That was very wrong. When the Anaconda Copper Company threatened Montana in the 1920s with a shutdown to get rid of an unfavorable judge, that was bad. This is raw, naked power and aggression to the Montana Supreme Court, and this is offensive and I believe we'd be setting up that Court.

VICE CHAIRMAN GROSFIELD. It violates basic fairness to apportion as much as 100 percent of liability to anyone not anywhere near that liability. But we don't know if this is unconstitutional, and if its declared unconstitutional we need to try again. This is an innovative approach, and I support it.

SEN. HOLDEN. I believe common sense needs to apply.

Vote: SEN. HOLDEN'S MOTION THAT HB 571 BE CONCURRED IN CARRIED 7-3 IN A ROLL CALL VOTE.

{Tape: 1; Side: B; Approx. Time Count: #28.4; Comments: 11:22 a.m.}

EXECUTIVE ACTION ON HB 572

Discussion: **Valencia Lane.** This does two things. It abolishes joint and several liability, and requires apportionment of fault to everyone whether they are made a party to a case or not, i.e., a pure comparative negligence law, and it allows the defendant to bring in the question of apportionment of fault whether immune, settled, or released from the case. It preserves three exceptions to joint and several liability.

{Tape: 1; Side: B; Approx. Time Count: #32.5; Comments: None}

Page Dringman. This had a diverse reading from both the public and the legislature concerning joint and several liability. The key difference is switching to 0-100 percent liability.

Russell Hill. There is a big difference between current law and centuries of tradition in Montana and elsewhere, and what this bill does. Orphan share means someone can't pay their share. If we're going to pure comparative fault, everyone only deals in dollars only to the level of their fault.

HB 572 doesn't attempt to conform to the Montana Supreme Court decision, and I believe the Committee needs to discuss the contingency date.

My understanding of the non-severability clause is that if any part is unconstitutional, it doesn't go back to pre-bill language, but leaves holes in the law.

CHAIRMAN CRIPPEN. The only way to get a law off the books is to repeal it, but it could be unenforceable.

Jacqueline Lenmark. We do oppose the pure comparative negligence amendment, and did favor HB 572 over HB 571 with that amendment removed.

{Tape: 2; Side: A; Approx. Time Count: #2.8; Comments: 11:33 a.m.}

Valencia Lane. On page 1, line 9-10, comparative negligence allows the plaintiff to still sue for up to the remaining one percent of liability. Without this, it would eliminate joint liability (currently, 51 percent or more responsible), making each party responsible for 100 percent of the plaintiff's recovery, leaving a several liability rule under which each party is responsible for their own percent of liability.

{Tape: 2; Side: A; Approx. Time Count: #4.5; Comments: 11:34 a.m.}

Section 27-1-702, MCA, is the comparative negligence rule. Section 27-1-703, MCA, is multiple defendants, and talks about the apportionment of the liability.

SEN. HOLDEN. On page 5, lines 20-22, the Ward Shanahan amendments **(EXHIBIT #5)** would re-institute the 50 percent rule? **Valencia Lane.** I believe so.

CHAIRMAN CRIPPEN. With that you'd be back to the original status of the bill, but you would still have coordination with HB 571. **Stan Kaleczyk.** It was proposed by an attorney on the House Judiciary Committee. If the Committee adopts the Shanahan amendments, you would still have joint and several liability, but if you had 51 percent or more liability, as the plaintiff, you could not file.

CHAIRMAN CRIPPEN. We need to deal with the House amendments.

Motion: **SEN. HOLDEN MOVED TO ADOPT THE SHANAHAN AMENDMENTS.**

Discussion: **Stan Kaleczyk.** The non-severability clause was put on in the House at the same time, but I don't know if it's in the Shanahan amendments.

VICE CHAIRMAN GROSFIELD. What was the rationale of putting joint and severability in this bill? **Page Dringman.** If you take out pure comparative negligence, you could take out joint and severability, as well. **Valencia Lane.** Then it would revert back to the 50 percent rule. **CHAIRMAN CRIPPEN.** And then we would need to strike New Section 9 and reinstate the old New Section 9.

Valencia Lane. Just so I understand, the motion is on page 5, line 20, following "property" to reinsert the stricken language, delete the non-severability clause, and reinsert the severability clause.

SEN. DOHERTY. If we only want to make people responsible to their percent of responsibility, we're going to make the plaintiffs responsible for their percent of responsibility, so it would seem we need to go with pure comparative negligence.

Vote: **SEN. HOLDEN'S MOTION TO ADOPT THE SHANAHAN AMENDMENTS CARRIED WITH ALL MEMBERS VOTING AYE EXCEPT SENATORS DOHERTY, BISHOP, BARTLETT, AND HALLIGAN WHO VOTED NO.**

CHAIRMAN CRIPPEN. I'm tempted to leave the effective date, as one bill has to die, either HB 571 or HB 572.

Motion/Vote: **SEN. SHARON ESTRADA MOVED TO TABLE HB 572. THE MOTION FAILED 4-6 IN A ROLL CALL VOTE WITH SENATORS HOLDEN, GROSFIELD, BISHOP, AND JABS VOTING NO.**

Motion: **SEN. HOLDEN MOVED HB 572 BE CONCURRED IN AS AMENDED.**

Discussion: **SEN. DOHERTY.** For the record, I echo the comments on HB 571, but would magnifying my comments to the bullying affect to intimidate the Court. "The contingent effective date is the screwiest thing I have ever seen in my entire life." Passing bills with contingent effective dates, depending upon the constitutionality of some case which may or may not happen in one to thirty years is the most "back-assward" thing I can think of.

{Tape: 2; Side: A; Approx. Time Count: #15.6; Comments: None}

If HB 571 is found to be constitutional we don't need to clutter it up with this. If it's found to be constitutional, we can go in and try it again next session. HB 572 contains the same constitutional infirmities in allowing fault to be apportioned to someone not there. I believe the net attempt of HB 571 and HB 572 is an attempt to bully the Montana Supreme Court to make certain decision, and then laying ground work in a long term political campaign.

SEN. HALLIGAN. In terms of good public policy, I've never seen this done in seventeen years. This is a fundamental change in tort policy. We need to come back and look at this.

Valencia Lane. I don't think the contingency clause will work.

SEN. HOLDEN. I see **SEN. HALLIGAN**'s frustration with the public policy of the whole session as a minority, but the Legislature will still meet in two years so we can address if the Montana Supreme Court strikes it down.

Vote: **SEN. HOLDEN'S MOTION THAT HB 572 BE CONCURRED IN AS AMENDED CARRIED 7-3 IN A ROLL CALL VOTE WITH SENATORS HALLIGAN, DOHERTY, AND BARTLETT VOTING NO.**

{Tape: 2; Side: A; Approx. Time Count: #22.6; Comments: None}

EXECUTIVE ACTION ON HB 306

Amendments: hb030605.avl **(EXHIBIT #6)**

Motion: **SEN. HOLDEN MOVED TO ADOPT AMENDMENTS hb030605.avl.**

Discussion: **SEN. HOLDEN.** Page 2, line 27 deals with re-routing public policy. The bill says that if property values are reduced less than five percent, the owner can complain in court. My amendment changes this figure to 20 percent.

VICE CHAIRMAN GROSFIELD. I don't believe the amendment goes far enough, It should probably be 30 percent, but I don't like the bill either. There has been a 30 percent decision by the Court in Montana. This bill doesn't make sense. There is the problem of substantial and disproportionate. I also have a problem with Section 6. It doesn't make sense to put this in state law.

Substitute Motion: **VICE CHAIRMAN GROSFIELD MADE A SUBSTITUTE MOTION TO TABLE HB 306.**

Discussion: **CHAIRMAN CRIPPEN.** I had an amendment, but I didn't submit it because of a possible conflict of issue. I'm convinced we need to deal with this session as there are takings situations out there now. In my mind, the opponents could not answer what they'd do if it were their property being taken. There is some unfairness out there, and the Legislature needs to protect cities and counties and to protect citizens from loss, as well.

SEN. HALLIGAN. We should have done this on joint and several liability in the last two bills.

SEN. DOHERTY. The fiscal note mentions that (either statute or rules) costs are not to be passed on to local governments. For the record, this bill should not have been introduced as there is no corresponding funding source. I agree with **SEN. CRIPPEN.** If they go to court and win, that is good.

Vote: **VICE CHAIRMAN GROSFIELD'S SUBSTITUTE MOTION TO TABLE HB 306 CARRIED WITH ALL MEMBERS VOTING AYE EXCEPT SENATORS HOLDEN, ESTRADA AND CRIPPEN WHO VOTED NO.**

ADJOURNMENT

Adjournment: 11:37 a.m.

SEN. BRUCE D. CRIPPEN, Chairman

JOANN T. BIRD, Secretary

BDC/jtb