MINUTES OF THE MEETING
OF THE
LEGISLATIVE COMMISSION=S SUBCOMMITTEE CONCERNING THE STATUTORY LIMITATION ON DAMAGES THAT MAY BE AWARDED TO A PERSON IN A TORT ACTION AGAINST THE STATE OF NEVADA, ITS POLITICAL SUBDIVISIONS OR CERTAIN OTHER PERSONS
(Assembly Concurrent Resolution No. 46, File No. 140, *Statutes of Nevada 1999*)
February 23, 2000
Las Vegas, Nevada

The third meeting of the Legislative Commission=s Subcommittee Concerning the Statutory Limitation on Damages that may be Awarded to a Person in a Tort Action Against the State of Nevada, Its Political Subdivisions or Certain Other Persons (Assembly Concurrent Resolution No. 46, File No. 140, *Statutes of Nevada 1999*) for the 1999-2000 interim was held on Wednesday, February 23, 2000, at 10 a.m., at the Grant Sawyer State Office Building, 555 East Washington Avenue, Room 4401, Las Vegas, Nevada. The meeting was video conferenced to the Legislative Building, 401 South Carson Street, Room 4100, Carson City, Nevada. Pages 3 and 4 contain the AMeeting Notice and Agenda@ for this meeting.

SUBCOMMITTEE MEMBERS PRESENT:

Assemblyman Bernie Anderson, Chairman
Senator Maurice E. Washington, Vice Chairman
Assemblyman John C. Carpenter
Assemblyman Jerry D. Claborn
Assemblywoman Genie Ohrenschall

SUBCOMMITTEE MEMBERS PRESENT IN CARSON CITY:

Senator Mike McGinness
Senator Dean A. Rhoads

SUBCOMMITTEE MEMBERS EXCUSED:

Senator Michael A. Schneider

ADVISORY COMMITTEE MEMBERS PRESENT:

Bill Bradley, Representing the Nevada Trial Lawyers Association
J.R. Crockett, Jr., Representing the Nevada Trial Lawyers Association
Mike Davidson, Representing the Nevada Association of Counties
P. Mark Ghan, Representing the Office of Attorney General
Bill Hoffman, Representing the Nevada Association of School Boards
Shauna Hughes, Representing the Nevada League of Cities

Bill Isaeff, Representing the Nevada League of Cities
Madelyn Shipman, Representing the Nevada Association of Counties

LEGISLATIVE COUNSEL BUREAU STAFF PRESENT:

Scott Young, Principal Research Analyst
Risa B. Lang, Principal Deputy Legislative Counsel
R. Rene Yeckley, Deputy Legislative Counsel

Roxanne Duer, Senior Research Secretary

MEETING NOTICE AND AGENDA

Name of Organization: Legislative Commission=s Subcommittee to Study the Statutory Limitation on Damages that may be Awarded to a Person in a Tort Action Against the State of Nevada, its Political Subdivisions or Certain Other Persons (A.C.R. 46)

Date and Time of Meeting: Wednesday, February 23, 2000
10 a.m.

Place of Meeting: Grant Sawyer State Office Building
Room 4401
555 East Washington Avenue
Las Vegas, Nevada

Note: Some members of the Subcommittee may be attending the meeting and other persons may observe the meeting and provide testimony, through a simultaneous video conference conducted at the following location:

Legislative Building
Room 3138
401 South Carson Street
Carson City, Nevada

If you cannot attend the meeting, you can listen to it live over the Internet. The address for the legislative web site is http://www.leg.state.nv.us. For audio broadcasts, click on the link AListen to Meetings Live on the Internet.@

AGENDA

I. Opening Remarks by the Chairman

Assemblyman Bernie Anderson

*II. Approval of Minutes for the Subcommittee=s Meeting on December 10, 1999, in Las Vegas, Nevada

*III. Discussion and Recommendations from the A.C.R. 46 Advisory Committee Regarding Sovereign Immunity

IV. Public Testimony

V. Adjournment

*Denotes items on which the Subcommittee may take action.

Note: We are pleased to make reasonable accommodations for members of the public who are disabled and wish to attend the meeting. If special arrangements for the meeting are necessary, please notify the Research Division of the Legislative Counsel Bureau, in writing, at the Legislative Building, 401 South Carson Street, Carson City, Nevada 89701-4747, or call Roxanne Duer, at 775-684-6825, as soon as possible.

Notice of this meeting was posted in the following Carson City, Nevada, locations: Blasdel Building, 209 East Musser Street; Capitol Press Corps, Basement, Capitol Building; City Hall, 201 North Carson Street; Legislative Building, 401 South Carson Street; and Nevada State Library, 100 Stewart Street. Notice of this meeting was faxed for posting to the following Las Vegas, Nevada, locations: Grant Sawyer State Office Building, 555 East Washington Avenue; and Clark County Office, 500 South Grand Central Parkway.

OPENING REMARKS BY THE CHAIRMAN

Chairman Anderson called the meeting to order and roll was called. He noted that the A.C.R. 46 Subcommittee will hold a total of four meetings. The first three meetings were held in Las Vegas and the fourth and final meeting will be held April 19, 2000, in Carson City, at which time the Subcommittee will consider recommendations for submission to the 71st Legislative Session.

Mr. Anderson referred to a memorandum dated February 18, 2000, to himself, from Scott Young, Principal Research Analyst, Research Division, Legislative Counsel Bureau (LCB), the subject of which is AClaims History and Actuarial Requests@ (Exhibit A).

Continuing, Mr. Anderson indicated that at the last meeting Assemblyman Carpenter asked Nevada=s Office of the Attorney General to provide information on the amounts paid by the State of Nevada for federal civil rights claims as opposed to sums paid for state tort claims. In response, Mr. Young, Principal Research Analyst, Research Division, LCB, indicated that P. Mark Ghan, Solicitor General, Litigation Division, Office of the Attorney General, provided the information in a letter dated December 7, 1999 (Exhibit B), which had been distributed to the members of the Advisory Committee. He noted that the information contained in the letter is voluminous and technical in nature.

Mr. Anderson distributed and recommended the Subcommittee read an article titled ATorts Pit Lawmakers vs. Courts,@ in the February 2000 issue of *State Government News* (Exhibit C).

APPROVAL OF MINUTES FOR THE SUBCOMMITTEE=S MEETING ON DECEMBER 10, 1999, IN LAS VEGAS, NEVADA

ASSEMBLYWOMAN OHRENSCHALL MOVED FOR APPROVAL OF THE MINUTES OF THE DECEMBER 10, 1999, MEETING OF THE LEGISLATIVE COMMISSION=S SUBCOMMITTEE TO STUDY THE STATUTORY LIMITATION ON DAMAGES THAT MAY BE AWARDED TO A PERSON IN A TORT ACTION AGAINST THE STATE OF NEVADA, ITS POLITICAL SUBDIVISIONS OR CERTAIN OTHER PERSONS, WHICH WAS HELD IN LAS VEGAS, NEVADA. ASSEMBLYMAN CLABORN SECONDED THE MOTION WHICH PASSED UNANIMOUSLY.

DISCUSSION AND RECOMMENDATIONS FROM THE A.C.R. 46 ADVISORY COMMITTEE REGARDING SOVEREIGN IMMUNITY

Bill Isaeff

Bill Isaeff, representing the Nevada League of Cities, referred to the AReport of the Advisory Committee to the Legislative Commission=s Subcommittee Concerning the Statutory Limitations on Damages that may be Awarded to a Person in a Tort Action Against the State, its Political Subdivisions or Certain Other Persons (A.C.R. 46)@ (Exhibit D), which was prepared Friday, December 18, 1999, at the direction of the co-chairs of the Advisory Committee, and signed this date as the official report to the Subcommittee of its meetings on January 10 and February 16, 2000. He indicated all members of the Advisory Committee were present for the entire meeting, or a substantial portion thereof, at which Avigorous@ discussion took place. He reported that the Advisory Committee was unable to reach a consensus on any particular recommendation; however, a number of options were identified for the Subcommittee to take into consideration in its further deliberations. The range of options were:

$ No change in the current statutory limitation or cap;

$ A variety of different circumstances that would cause some increase in the cap given the points set forth in the report; and

$ A random selection of a new cap titled the Adart board@ approach.

Mr. Isaeff said the Advisory Committee was unable to obtain any Ahard@ evidence of legislative intent regarding the amount of the tort cap due to a lack of records in the LCB. Good legislative committee record keeping did not begin until the early 1980s; consequently, the rationale for the previous enactment of the sovereign immunity waiver statute, and its amendment in 1977, is speculative at best. He indicated general concerns were voiced by various members of the Advisory Committee, and those who testified before the full committee, with respect to the issues and options outlined in Exhibit D. Although the options and concerns were addressed in extensive discussions, Mr. Isaeff said the listing is not complete. He suggested members of the audience may wish to elaborate further during public testimony.

Bill Bradley

Bill Bradley, representing the Nevada Trial Lawyers Association, said one of the biggest concerns facing the Advisory Committee was lack of legislative intent. He reported some of the members thought the criteria used to increase the cap over a period of time from $25,000 to $50,000 was based on a fairness approach, others thought it could have been related to a cost of living or inflationary adjustment, and others could find no rationale for the increases. Consequently, when the members who proposed an increase to the cap discussed the 20-year gap, there was discussion regarding whether or not there had ever been an intent to increase the cap by some factor. Mr. Bradley indicated the lack of information addressing legislative intent impeded the Advisory Committee from understanding the thought processes held by previous legislatures in regard to the initial setting of the cap and the reason for its increase.

Mr. Anderson pointed out although the Advisory Committee is crucial to the legislative process, it is not part of the Legislature per se. He expressed gratitude to the Advisory Committee for playing a Abridge role@ in making the Subcommittee aware of potential options and sorting through the myriad of paperwork. It was Mr. Anderson=s opinion that the reality encompassed the following basics:

$ He was unwilling to accept the concept that the state or any of its political subdivisions do no wrong; and

$ Having accepted point number one, the question must be asked, what is just compensation?

Mr. Anderson said the logical conclusion is there is never justice when human life is lost; therefore, the Subcommittee is dealing with a fiscal question regarding political entities and attempting to prevent the courts from removing what is perceived as legislative prerogative. Referencing Exhibit C, Mr. Anderson said the article put the issue into perspective and suggested it might stimulate discussion later in the meeting.

Further, Mr. Anderson invited the members of the Subcommittee to provide input in order to make realistic

recommendations to the 71st Legislature.

Mr. Bradley said it was encouraging to have legislators who had been involved in the Atort wars@ serve on the Subcommittee. He pointed out that past discussions regarding the effect of a cap and various tort reform measures included a great deal of speculation, but not much Ahard@ data. It took several years to obtain such information. As it became available and analyzed, certain conclusions were reached that did not necessarily take emotions into consideration. Mr. Bradley indicated there is a wealth of information contained in Exhibit B regarding the number of claims above $40,000, and how many involved multiple claims. He said some of the Advisory Committee members would be better able to respond to Mr. Anderson=s questions and was of the opinion their answers would be important. He indicated actuaries eventually become involved because of predictions. Mr. Bradley reported an actuary was reviewing the information to ascertain whether or not the trends were consistent with current perceptions; however, an analysis had not yet been accomplished due to the short time frame, but is forthcoming.

Mr. Isaeff discussed the options submitted by the Advisory Committee and presented in Exhibit D.

$ No change in the current statutory limitation or cap.

Mr. Isaeff indicated at the conclusion of the January 10, 2000, meeting the members of the Subcommittee determined it would be helpful to secure data relating to claims histories, particularly claims over $40,000 and/or multiple claims. Pursuant to the Advisory Committee=s request, Mr. Anderson asked for information from members of the Advisory Committee and other selected governmental entities which might possess useful data. The entities responded as best they could under the circumstances and the data received was interesting. The information revealed that 95 to 97 percent of all claims in the last four years fell within the current $50,000 statutory cap limit. Only a small number were outside that percentage, although there were variances in the number according to different governmental entities. The State of Nevada showed the largest number of cases above the amount and others, such as the City of Sparks, had as few as one.

$ No change in the current cap, but create a new fund for major injury and death cases. After listening to various presentations to the Subcommittee and Advisory Committee, Mr. Isaeff noted a significant gap exists regarding major injuries, paraplegia, quadriplegia, and death cases. These cases do not receive the type of financial attention they deserve. Due to that issue, the list of options in Exhibit D demonstrates no change in the current cap because 95 to 97 percent of the cases appear to fall within the current statutory cap. However, he said it may be appropriate to investigate the creation of a new fund for major injury and death cases that would deal with special situations presented by the smaller percentage of cases. Mr. Isaeff indicated government attorneys were not insensitive to the fact that these cases sometimes arise in their jurisdictions and should be better compensated. He conjectured there would never be full or fair compensation insofar as governmental torts are concerned. It is recognized that in a limited number of cases there should be an opportunity for greater compensation than may exist under the current statutory situation. Mr. Isaeff stated he preferred the second option, which would be no change in the existing cap but creation of a new fund for major injury and death cases. He said he anticipated presenting a full explanation of the manner in which a new fund could be created, as well as the sources to support it, at the April 19, 2000, meeting.

$ Increase the cap by:

< Immediate cost of living adjustment (COLA) from 1979 to present.

Mr. Isaeff explained this would basically be what the cumulative cost of living increase has been over that period and the cap increased to that particular limit.

< Gradual phase-in of any increase in the cap.

The government attorneys were unanimous in their opinion that this option would be an important consideration should the Subcommittee consider a possible cap increase. This was in response to repeated testimony received from government entities, such as school districts, hospitals, et cetera, regarding the potential fiscal impact of such an option. Therefore, any increase in the cap would be

gradually phased in.

< Prospective only COLA adjustment.

Mr. Isaeff explained the cap would only be increased prospectively using a COLA number that would be agreed upon in legislation, but would start from a base of $50,000, which is the current statutory limit.

< Immediate COLA adjustment and thereafter COLA adjustments annually or based on some other period of time.

Mr. Isaeff indicated this option was intentionally vague and did not necessarily mean the cap would be increased from its 1979 level. It only meant some kind of change would occur with COLA adjustments thereafter on a fixed period of time as determined appropriate by the Legislature.

< Increasing the cap only within counties whose population is above a certain number.

Mr. Isaeff said this option was an effort to address the negative fiscal effect on relatively small government entities. Due to the fact that it is state law, it will not only affect places such as Clark County, Henderson, Las Vegas, Reno, and Sparks, Nevada, but every governmental entity in the state no matter its size, including Carlin and Gabbs, as well as the smallest Government Improvement District (GID) would come under this particular limit. This option produced concern that there may be constitutional issues should the cap be raised only in counties with populations above 100,000. He indicated this issue would require the expertise of the Legislative Counsel.

< Increasing the cap for medical negligence cases only.

Mr. Isaeff indicated testimony before the Advisory Committee dealt in large part with medical negligence cases and unique situations.

< Increasing the amount for each claim, but reducing or limiting the number of causes of action under which an individual may recover.

Mr. Isaeff explained this option would limit the opportunities for Astacking,@ which was defined at an earlier meeting. This is not an infrequent circumstance among various states. A number of other states have a claim limit, which is composed of a per person limit for each claim, and a per occurrence limit on the amount of claims. He mentioned Senator McGinness suggested raising the cap to $100,000, but capping all claims at that amount, which would eliminate stacking.

< A fixed increase in the cap, but with a sunset provision to allow study of the effects of the increase.

Mr. Isaeff indicated there had been much debate among attorneys on the Advisory Committee as to the true fiscal effect of changing the present cap. He said it would be difficult to document a situation but was of the opinion it was an opportunity to experiment with a change in the cap. He explained there would be a predetermined amount with a sunset provision to return the cap to the previous amount at a fixed date unless the Legislature took further action. A study of the effects of the increase in the cap would be conducted during the interim.

< Random selection of a new cap amount.

Mr. Isaeff explained this option was a Adart board@ approach and had been used in the past.

Further, Mr. Isaeff pointed out the concerns discussed by the Advisory Committee as presented in Exhibit D.

$ With no change, victims whose special damages (i.e., medical bills and lost wages) have increased over time will possibly realize a lesser general damage (i.e., pain and suffering) component.

Mr. Isaeff indicated special cases presented by members of the Advisory Committee had been considered. The cases demonstrated the fact that medical bills and lost wages have increased since the cap was put into effect in 1979. In that event, there is a possibility individuals with large amounts of special damages may realize a lesser general damage component of their claims against government entities.

$ Any increase in the cap carries with it concerns about the fiscal ability of the various governmental entities to pay more.

Mr. Isaeff reiterated the members of the Subcommittee and Advisory Committees heard considerable testimony from entities, such as school districts, regarding the fiscal effects of raising the cap. These entities have no taxing power; therefore, anything that costs them money must be within whatever funds are made available by the Legislature to operate schools in 17 school districts. Testimony was taken from public hospitals, particularly those in the rural areas of Nevada that are struggling to remain open. It was perceived that any additional substantial increase in exposure to liability could be the Astraw that breaks the camel=s back.@ This law covers all entities, including the smallest GID or special district performing some governmental function and subject to the waiver of sovereign immunity contained in Chapter 41 AActions and Proceedings in Particular Cases Concerning Persons,@ of *Nevada Revised Statutes* (NRS).

$ Creation of a new fund for major injuries and death would require identification of a funding source.

Mr. Isaeff said any new funds created to handle major injuries and death cases would require identification of an appropriate funding source. He indicated he would address this concern at the April 19, 2000, meeting.

$ Any COLA increase may not be reflective of any entity=s financial capability.

Mr. Isaeff reflected that should the COLA during a specific time period be 125 percent, there is no evidence that the financial capabilities of every governmental entity in the state had also increased that amount during the same time period. Therefore, perhaps the use of a COLA without further consideration is not fair to entities whose revenues have not increased at the same rate.

$ Constitutional issues may exist regarding the use of differing caps based on county population.

In conclusion, Mr. Isaeff stated the men and women who served on the Advisory Committee with Mr. Bradley and himself attempted to create a realistic list of options for the Subcommittee to consider on a matter that has been deemed worth their time and effort during the interim period of the Legislature. In turn, Mr. Anderson thanked the Advisory Committee for their diligent work and deliberations.

Mr. Anderson requested a representative of the LCB=s Legal Division address questions relative to the legality of varying the cap based on differences in population in the counties, and the possibility of allocating resources.

Risa B. Lang

Risa B. Lang, Principal Deputy Legislative Counsel, Legal Division, LCB, indicated the Legal Division had been asked by the Advisory Committee to address the issue of whether or not it would be constitutional to increase the amount of the cap based on the population of the county. Subsequent to perusing cases and the NRS, it was deemed constitutional. Other states have taken similar steps. She pointed out that Chapter 41.507 of the NRS AVolunteer emergency medical dispatchers and volunteer medical directors of agencies which employ emergency medical dispatchers,@ authorizes a different damage award based on population. Although that particular statute has not been

addressed by the Nevada Supreme Court, other similar statutes have been considered by courts in other states and upheld based on a rational basis test stating that the fiscal considerations of the Legislature were sufficient to uphold such a statute.

Mr. Anderson speculated that should an accident occur in a Adeep pocket@ county, such as Douglas County, Nevada, as compared to a Ashallow pocket@ county, such as Esmeralda County, the outcome could be a dramatic difference in the payment based upon a population cap or fiscal ability. Asked how the determination would be made, Ms. Lang answered the consideration is based on population, but the rationale used is that certain larger counties would have greater fiscal capacity to handle the increased dollar amount.

Mr. Bradley stressed the importance of legislators realizing the difference between state and federal claims. He said when an individual=s civil rights are violated and there is limited recovery, whether in the least populated city in Nevada or in Clark County, it is difficult to tolerate. He pointed out a claim cap does not exist for civil rights claims even though states and counties have made adjustments to handle these tragic and infrequent claims. It is not fair nor does it hold government accountable when an incarcerated person has unlimited recovery, but an innocent victim of unintentional conduct caused by the negligent action of a state employee has limited coverage. He emphasized all individuals should be held accountable for their actions. This issue has not come before the Legislature in 20 years, Mr. Bradley remarked.

Continuing, Mr. Bradley indicated it was unfortunate that Wayne Carlson of the Nevada Public Agency Insurance Pool and Public Agency Compensation Trust, was not a member of the Advisory Committee and, consequently, did not receive Mr. Anderson=s letter. Mr. Carlson=s input was later requested regarding the impact of this issue on the rural counties. Noting that the information identified only one case involving multiple claims, Mr. Bradley stated that although multiple claims are pled, the effect appears to be minimal. It is assumed there was a grievously injured person when cases exceed the cap of $50,000. Although the number of these claims is small, they represent a larger percentage of the total payout. Therefore, it is a difficult balancing act for the Subcommittee and the Legislature to determine whether, on a fairness and equity basis, it is time to hold each individual more accountable for his or her wrongdoing, and whether or not it is advisable in the face of fiscal constraints.

Further, Mr. Bradley pointed out a good argument was presented by the counties and other entities regarding the difficulty of fiscal recovery should there be such an increase. In any event, the cost of the injury ultimately falls on the county in many of these cases. In catastrophic cases where the cap is woefully inadequate, a long-term care case is typically turned over to state Medicaid or a different government funding agency. The State of Nevada is one of the few states that has such a small restrictive cap, whereas surrounding states have accomplished innovative ways to balance the need for citizens to hold government accountable while ensuring the financial viability of the various entities. Mr. Bradley said although there may be a way to accomplish this goal, it is important to have professional expertise to determine the consequences should certain increases be considered.

In regard to stacking, Senator Washington asked whether an individual filing a claim for sexual harassment could also file for defamation of character, lost wages, stress, et cetera. In response, Mr. Bradley pointed out civil rights claims are not subject to Nevada=s claim cap. He said a lawyer may plead sexual harassment, which is a constitutional violation, and as a result of that discrimination the individual suffered lost wages, pain, and suffering, which are elements of a tort claim. Using an example of a negligent employee of Nevada=s Department of Transportation who runs a stop sign, Mr. Bradley said if the victim was alone in the car when injured, there may be only one claim; however, should there be two people in the car and one of them witnessed his or her spouse being injured, that person not only has a claim for his or her own medical expenses but also for observing the injury of the spouse. In addition, should a breadwinner be killed by the negligent act of a state employee, each one of the heirs (widow and/or children) have a claim for wrongful death. He pointed out that people involved in an accident can generate different claims which differ from generating disparate types of damages.

Senator Washington queried whether or not stacking could occur on a civil rights claim, as well as a bodily injury claim. Mr. Bradley answered, yes, although there would be no need for stacking a civil rights violation because there is no cap. He explained the reason claims were stacked was because, in the past, the Nevada Supreme Court had been asked to consider serious cases involving the cap. Based on arguments from lawyers, the Supreme Court found

another way to increase the cap for a particularly aggrieved individual. It was, therefore, Mr. Bradley=s opinion that stacking arose as a result of the low cap. Due to the fact there is no cap in civil rights cases, stacking has not been necessary.

Referring to the chart in Exhibit B, Assemblyman Carpenter noted that $1 million had been paid for a federal claim and asked whether the state paid the claim. Mr. Bradley indicated the claim was a civil rights violation against Nevada=s Department of Prisons and was paid out of the tort fund from the State of Nevada. He reported the Office of the Attorney General and the State of Nevada claims are self insured from the first dollar with no excess coverage.

In reference to the first claim on page 1 of Exhibit B, Mr. Carpenter asked whether a sexual assault case was considered a state or federal claim. Mr. Bradley confessed he was not aware of that particular claim, but cited the case of the *State Department of Human Resources v. Jiminez* in which the Nevada Supreme Court addressed the issue of whether the State of Nevada was liable for nine separate acts of sexual assault committed by a state employee upon a minor placed in a state program that was administered by the state employee. Under the facts of the case, sexual assault was considered foreseeable and within the course and scope of employment of the government employee. Each of the nine assaults constitutes a separate tort and the plaintiff was awarded $50,000 for each assault. The case was also pled on civil rights violations. He added that civil rights violation is a technical area of the law that is not practiced effectively by many lawyers. Mr. Bradley said the *Jimenez* opinion was withdrawn by the Supreme Court during that Legislative Session.

Mr. Anderson referred to an article in Exhibit C that addresses what has occurred in several states when the court seized the initiative in the tort question. Although Legislative intent was considered, the court mandated that separation of powers prevented the Legislature from carrying out its intent and limiting the court=s role in addressing legal remedies. Mr. Anderson said part of the goal would be to create a system that would retain the integrity of both the judicial and legislative branches of government without surrendering authority on either side of the issue.

Mr. Bradley indicated there are certain claims regarding violation of civil rights that are delineated in the civil rights arena; however, run-of-the-mill negligent conduct of an employee causing an accident is not a civil rights violation. There is a category of claims that falls within state tort claims and a large body that is strictly state civil rights claims. Every claim cannot be Awedged into@ the civil rights arena, Mr. Bradley remarked.

Senator Washington asked how the state=s responsibility was delineated under the *Jimenez* case. Mr. Anderson said the State of Nevada was found negligent because the child was in state care and policy was not carried out by the supervisor, who was the individual the lawsuit was brought against. The case was upheld by the Supreme Court. The reason the Supreme Court acted in the initial instance was because the Legislature failed to clearly express its intent; therefore, an attempt was made to articulate the intent through legislation enacted subsequent to the decision. Mr. Anderson said the Supreme Court withdrew its initial opinion, which was unusual, at the request of the parties, who agreed to a settlement rather than pursuing further litigation; however, a major criticism leveled against the State of Nevada was failing to accept a settlement offer. Had the settlement offer (which exceeded the $50,000 cap) been accepted, the Supreme Court would have not become involved.

P. Mark Ghan, Solicitor General, Office of the Attorney General, commented that in the *Jimenez* case the Office of the Attorney General questioned how the state agency could be held responsible for what was essentially the criminal act and conduct of a state employee. He said the Supreme Court found the state responsible pursuant to a doctrine entitled Arespondent superior,@ which means the employer is responsible for the conduct of the employee. Mr. Ghan pointed out the *Jimenez* case was not pled as a constitutional case and was brought into state court as a negligence case alleging a number of specific sexual acts between an employee and a ward of the state. The Supreme Court found nine sexual acts had been committed and awarded the plaintiff $50,000 for each act, and another $50,000 for negligent supervision. The Office of the Attorney General maintained there was liability for negligent supervision only.

In reference to stacking, Mr. Ghan indicated in constitutional cases it is common to plead a civil rights violation when an individual is charged with a crime. The civil rights violations could include battery, false arrest, intentional infliction of emotion distress, malicious prosecution, negligent hiring and training, as well as many collateral state claims that might be pled at the same time.

Mr. Isaeff commented Mr. Ghan was referring to pendant state claims which are often pled in federal court in a complaint along with the primary federal claims arising under federal law. Often in an appropriate case, the federal court will hear and dispose of those pendant state claims as part of the federal court action. On other occasions it may decide to split those pendant claims and return them to state court for resolution. The opportunity exists in the federal system and could be called a form of stacking because both federal and state claims are used to process a single case in the federal court, Mr. Isaeff remarked.

Madelyn Shipman

-

Madelyn Shipman, representing the Nevada Association of Counties, explained the Advisory Committee did not anticipate LCB legal counsel=s response. She pointed out the issues relating to Asplitting off,@ raising the cap to $100,000, or determining the cap by population, does not answer completely the question. She indicated Washoe County has several GIDs, none of which have adequate funding and are very small governmental entities. Ms. Shipman opined the real question is whether or not the cap could be determined by the population served by a particular entity of the counties.

Continuing, Ms. Shipman followed up by stating she was not making a case for Washoe County, which only had two cases in five years that exceeded $40,000, and a few federal claims. As a representative of the Nevada Association of Counties and a member of the Advisory Committee, Ms. Shipman conjectured splitting by population may be a policy decision that carries with it a broader connotation than just addressing the counties because there are small districts within those counties.

Mr. Bradley said it was important to realize that should a representative of a Atiny@ entity drive a vehicle into California and injure someone, the California citizen would have unlimited rights against the agency because the cap established by Nevada law is not effective if the accident occurs in another state. This case was established by the courts several years ago and is a basic fairness issue. He pointed out that should an individual from Gerlach, Nevada, drive a GID vehicle to Cedarville, California, and accidentally cross the center line causing an injury, the cap would not apply to the Cedarville resident; whereas, a rancher on a Washoe County highway injured by the Gerlach GID driver would be subject to the cap.

Mr. Anderson suggested:

$ Placing a cap on pain and suffering;

$ Leaving medical and lost wages uncapped;

$ Moving the cap from $50,000 to $75,000 in 2003, and from $75,000 to $100,000 in 2005; and

$ Creating a different method for smaller entities.

PUBLIC TESTIMONY

Mr. Anderson referred to a letter he received from C. W. Hoffman, Jr., General Counsel, Clark County School District, on February 7, 2000 (Exhibit E).

C.W. Hoffman, Jr.

C.W. Hoffman, representing the Nevada Association of School Boards, indicated that Exhibit E comprised the concerns of some school board attorneys throughout the state, including Jeff Blanck, General Counsel, Washoe County School District, and noted the primary issue is fiscal impact. He said the committee appropriately analyzed:

$ Whether or not injured individuals are properly compensated; and

$ Fiscal impact.

Mr. Hoffman indicated the school districts have a unique problem because they are funded by the state through the Nevada Plan; consequently, there is a direct link between an increase in the statutory cap which impacts the state=s ability to provide funds to the school district since that is from whence the funds emanate.

Continuing, Mr. Hoffman said during the study, the Clark County School District was in arbitration with the teachers union in an attempt to resolve the contract for the coming years. The school district was faced with the 1999 legislative decision that there would be no salary increase for teachers due to the fiscal status of the state. Therefore, legislation that would increase the cap from $50,000 to $100,000 would impact the amount of money the state could pass on to the school districts.

Further, Mr. Hoffman indicated Clark County School District, as well as Washoe County School District, are self-funded and represent approximately 85 percent of the students in the state. The self-funded entities would be required to increase reserves, which come out of the State General Fund from the same money that comes through the Nevada Plan.

Mr. Hoffman expressed concern that whatever decision is made regarding the fairness issue, the fiscal impact should not be borne by the students of Nevada. He proposed focus be placed on the fairness side regarding catastrophic cases which require a cap of more than $50,000; while at the same time, relieve the fiscal impact on school districts by setting up a special fund to handle catastrophic cases. Over the past five years the Clark County School District averaged nine cases that reached the $50,000 cap. Should five catastrophic cases each year be increased from $50,000 to $100,000, it would cost students an additional $250,000, which could purchase eight new teachers, countless computers, and books.

Mr. Bradley stated he did not agree with nor endorse the last two paragraphs of Mr. Hoffman=s statement on page 2 of Exhibit E regarding the personal stake of plaintiffs= attorneys. He noted he had been a plaintiffs= attorney in Nevada for 20 years and resented the fact his occupation was accused of having a greater incentive to prolong litigation. He stated earlier resolution is better than prolonged litigation. Attorneys would be put out of business if companies controlling the money were more fair, Mr. Bradley exclaimed.

Answering Senator Washington=s question regarding the amount of the school districts= funding pool, Mr. Hoffman said Clark County School District is self-funded with reserves set aside for injury cases. He explained cases are evaluated after they are filed, an estimated amount is placed on them, and it is then determined whether or not the reserves will meet the requirement. He speculated it is done the same way in Washoe County, which is also self-insured. Nevada=s other 15 school districts are members of various pools and purchase insurance with policies that address the problem. He said the premiums paid by those school districts would be impacted should the cap increase.

In that event, Senator Washington queried how difficult it would be for school districts to become insurable should the cap be raised. Mr. Hoffman said it was not an issue in regard to Clark and Washoe County School Districts, and he was unable to speak to the issue of the other school districts. He indicated claims histories would not be available to precisely evaluate the impact of an increase in the cap.

That issue being an unknown factor, Senator Washington asked whether revenue would ultimately come from the taxpayer. Mr. Hoffman answered, AThat=s absolutely correct.@ He indicated school district budgets are built through the Nevada Plan that advances the money, but the money ultimately comes from the taxpayers.

Mr. Anderson said Mr. Hoffman=s letter made reference to Assembly Bill 119, which proposed that the Legislative Commission conduct an interim study concerning the statutory limitation on damages that may be awarded to a person in a tort action against the State of Nevada, its political subdivisions, or certain other persons. This bill died in the Assembly Committee on Elections, Procedures, and Ethics. Mr. Anderson noted A.B. 119 of the 1999 Legislative Session proved to be the impetus for a continuing study; however, comparing the bill to this issue is purposely ambiguous and paints a worse case scenario. He recalled that when he requested the legislation he was asked whether or not to put in a dollar figure or leave it blank, and suggested leaving it blank.

Jeff Blanck

Jeff Blanck, General Counsel, Washoe County School District, indicated he collaborated and concurred with Mr. Hoffman on the issue. He pointed out that step one must address the state=s desire regarding sovereign immunity. He stated, originally, caps of $10,000, $20,000, and $25,000 were considered; however, approximately 20 years ago that amount did not fully compensate people who were injured.

Further, Mr. Blanck said from the perspective of the school districts, step two must ask:

$ What is the fiscal impact?

$ How would it be funded?

$ Would it necessarily temper the original decision?

Mr. Blanck emphasized that school districts and public entities attempt to provide the best education for the children of Nevada. He said he gleaned from the Advisory Committee that there was factual consensus among the members, but they were unable to reach a conclusion regarding what would be done with the facts. However, there are serious injuries that do not receive fair compensation and public entities that do not have enough money. The political arena is being asked to determine whether to leave, raise, or change the level of the cap.

Mr. Anderson indicated Ms. Shipman had pointed out that governmental entities falling under this issue are oftentimes ignored. He said small communities in Clark County face similar problems, as well as larger counties in the state (in terms of geographical area), and have difficulty meeting their fiscal responsibility.

Henry Etchemendy

Henry Etchemendy, Executive Director, Nevada Association of School Boards, commented most arbitrated claims never go to trial and are settled at a much lesser amount than the present level of liquidated damages. When arbitrated claims go to trial, it is not allowable under the legal rules of courts to mention a statutory limit. He conjectured that because participating individuals are aware of it, the statutory limit is a factor in arbitration. Mr. Etchemendy remarked that future legislation regarding the cap would continue to have an effect.

Mr. Anderson indicated the facts brought forth by Mr. Etchemendy were addressed during the committee=s deliberations, but thanked him for bringing them to the attention of the Subcommittee.

Mr. Anderson closed the public testimony portion of the meeting and discussed the process for making recommendations to be addressed at the April 19, 2000, meeting. The Subcommittee members were directed to submit their recommendations to Mr. Young before the next meeting. Mr. Anderson indicated his intent to make two recommendations now. He pointed out that only a few bills would emanate from this Subcommittee and the goal was not to rewrite numerous sections of state law. This directive had been made clear by the Chairman of the Legislative Commission who appointed the Subcommittee.

Continuing, Mr. Anderson made the following recommendations:

$ <u>Recommendation 1</u>

The pain and suffering cap would be placed at $50,000, and medical bills and lost wages would not have a cap. The pain and suffering cap would be moved to $75,000 in 2003, and to $100,000 in 2005, in counties with populations greater than 100,000. In counties with populations less than 100,000, the cap would be moved to $60,000 in 2003, and $75,000 in 2005.

$ <u>Recommendation 2</u>

Establish a mechanism for appeal for small governmental entities that fall within large governmental entities. Allow a net population of less than 100,000 people to make application to the state for reimbursement to offset their loss. Set up a separate mechanism for both small school districts and other improvement districts that fall into the category.

Referring to the second recommendation regarding counties with populations less than 100,000, Mr. Bradley asked whether there would be a cap on medical bills and wage loss. Mr. Anderson answered there would be no cap on medical bills or wage loss.

In answer to Senator Washington=s query as to whether Mr. Anderson=s recommendations included arbitration for pain and suffering claims, Mr. Anderson pointed out the cap limit is for such claims. Asked about claims that are not for pain and suffering, Mr. Anderson said there would be no limit on the actual medical costs. The issue has been left open and is related to the stacking question. He said it was debatable as to whether or not the judiciary would allow modification of the stacking mechanism.

Mr. Anderson directed Mr. Young to instruct the Subcommittee on the procedure for submitting their recommendations. Mr. Young explained that staff would prepare a work session document for the final meeting of the Subcommittee. The work session document would list the recommendations received by the committee during the course of its work. He indicated the recommendations would be culled from meeting minutes and staff notes; however, it would be helpful to receive direct written recommendations from interested individuals. This would help staff accurately reflect the recommendations and ensure correct identification of the individuals who submit them. The documents tend to be lengthy and are reviewed several times; therefore, Mr. Young requested the recommendations be submitted to LCB=s Research Division by March 22, 2000, which would provide sufficient time to prepare the document for the April 19, 2000, meeting.

Mr. Anderson asked whether there were any closing comments from members of the Subcommittee. Mr. Carpenter expressed a desire for more discussion, deliberation, and ideas on the issues of no change in the current cap, and creation of a new fund for major injury and death cases. He indicated the loss of a little finger should not be worth $50,000; however, death or inability to work should be further explored, Mr. Carpenter remarked.

Senator Washington expressed the opinion the sunset clause is an Aoutstanding@ recommendation. He suggested revisiting:

$ The effects of the cap on counties whose populations exceed 100,000;

$ The effects of an increase of the cap on smaller counties; and

$ The effects of a COLA increase on smaller entities in their ability to be financially sound and capable of paying the cap.

Mr. Anderson reminded the Subcommittee the next meeting would consist of a full work day and asked the members to be present in Carson City, if possible. He said one-on-one is an important factor when creating clear and concise recommendations. He expressed appreciation to the Advisory Committee for addressing the numerous concerns associated with this controversial issue and thanked them for the options presented to the Subcommittee.

ADJOURNMENT

Exhibit F is the AAttendance Record@ for this meeting.

There being no further business, the meeting adjourned at 12:00 p.m.

Respectfully submitted,

Barbara Moss
Research Secretary

Scott Young
Principal Research Analyst

Approved By:

_____
Assemblyman Bernie Anderson, Chairman

_____
Date

LIST OF EXHIBITS

Exhibit A is a memorandum dated February 18, 2000, to Assemblyman Bernie Anderson, from Scott Young, Principal Research Analyst, Research Division, Legislative Counsel Bureau (LCB), the subject of which is AClaims History and Actuarial Requests.@

Exhibit B contains the following items:

1. A memorandum to Chairman Bernie Anderson and A.C.R. 46 Subcommittee Members, dated December 8, 1999, the subject of which is AFederal Civil Rights Claims Against the State of Nevada@; and

2. A letter to Scott Young, Principal Research Analyst, Research Division, Legislative Counsel Bureau, from P. Mark Ghan, Solicitor General, Litigation Division, Nevada=s Office of the Attorney General, dated December 7, 1999, the subject of which is AAssembly Concurrent Resolution No. 46.@

Exhibit C is an article titled ATorts Pit Lawmakers vs. Courts,@ in the February 2000 issue of *State Government News*.

Exhibit D is the AReport of the Advisory Committee to the Legislative Commission=s Subcommittee Concerning the Statutory Limitations on Damages that may be Awarded to a Person in a Tort Action Against the State, its Political Subdivisions or Certain Other Persons (A.C.R. 46).,@ which is dated February 23, 2000.

Exhibit E is a letter to Assemblyman Bernie Anderson from C. W. Hoffman, Jr., General Counsel, Clark County School District. This correspondence concerns the AA.C.R. 46 Subcommittee,@ and is dated February 7, 2000.

Exhibit F is the AAttendance Record@ for this meeting.

Copies of the materials distributed during the meeting are on file in the Research Library of the Legislative Counsel Bureau, Carson City, Nevada. You may contact the library at (775) 684-6827.