MINUTES OF THE MEETING
OF THE
ADVISORY COMMITTEE TO 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*)

January 10, 2000

Carson City, Nevada

The first meeting of the Advisory Committee to 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 Monday, January 10, 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.

ADVISORY COMMITTEE MEMBERS PRESENT:

Bill Bradley, Co-Chairman, Representing the Nevada Trial Lawyers Association
Bill Isaeff, Co-Chairman, Representing the Nevada League of Cities
Mike Davidson, Representing the Nevada Association of Counties
P. Mark Ghan, Representing the Office of Attorney General
Shauna Hughes, Representing the Nevada League of Cities
Madelyn Shipman, Representing the Nevada Association of Counties

ADVISORY COMMITTEE MEMBERS PRESENT IN LAS VEGAS:

J. R. Crockett, Jr., Representing the Nevada Trial Lawyers Association
Bill Hoffman, Representing the Nevada Association of School Boards

LEGISLATIVE COUNSEL BUREAU STAFF PRESENT:

Scott Young, Principal Research Analyst
Risa B. Lang, Principal Deputy Legislative Counsel
Sally Trotter, Senior Research Secretary

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MEETING NOTICE AND AGENDA

Name of Organization: Advisory Committee 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 (A.C.R. 46)

Date and Time of Meeting: Monday, January 10, 2000
10 a.m.

Place of Meeting: Legislative Building
Room 3137
401 South Carson Street
Carson City, Nevada

Note: Some members of the committee 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:

Grant Sawyer State Office Building
Room 4412B and C
555 East Washington Avenue
Las Vegas, Nevada

AGENDA

I. Opening Remarks and Introductions

Bill Bradley and Bill Isaeff, Co-Chairs

*II. Round Table Discussion Among Advisory Committee Members and Possible Action on Recommendations Concerning 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

III. Public Testimony

IV. Adjournment

*Denotes item on which the committee 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 AND INTRODUCTIONS

Co-Chairman Bill Bradley representing the Nevada Trial Lawyers Association (NTLA) called the meeting to order at 10 a.m. He stated that under the appointment of Assemblyman Bernie Anderson, he and Bill Isaeff, representing the Nevada League of Cities, would serve as Co-Chairmen of the Advisory Committee to 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*). He introduced the members and explained the role of the advisory committee. Mr. Bradley requested that everyone attending the meeting sign the attendance record and asked for any public testimony.

Jeff Blanck

Jeff Blanck, Washoe County School District (WCSD), testified that in the past year the district has had five tort cases filed against it. The majority of the cases are:

C Filed and settled with the risk management office; and
C Do not come to the district counsel since they are for small amounts and do not involve attorneys; all of the monies go directly to the injured party.

Mr. Blanck testified he understands the logical aspect of wanting to remove the cap on awards, but stated his concerns are with funding and who would be impacted.

Co-Chairman Isaeff presented the following questions:

C Where does WCSD obtain funding for its operating expenses?
C Is property tax used for this purpose?
C Is funding used mostly for capital expenses?

In response to these questions Mr. Blanck stated the WCSD obtains funding from the state, based on the number of students enrolled (a per capita fund appropriated by the Legislature every biennium), and tax revenues from other sources. The capital expense from bonding is used for long term expenses.

Co-Chairman Bill Bradley asked:

C When the WCSD allocates funds for tort actions, does the district participate in a Washoe County pool, or does the WCSD have a separate pool?
C Does the school district participate in that county pooling association or is WCSD separate?
C Does WCSD pool its tort funds with any other entity?
C Does the school district set aside a certain amount of funds every year for potential claims?
C Have there been any attempts to pool various school districts in order to form a larger buying base in the event a decision is ever made to go out and purchase insurance against those losses?
C Do counties other than Washoe and Clark County pool to cover their school districts?

Responding, Mr. Blanck stated:

C The WCSD is separate as far as the pooling of funds;
C The local public entities pool together to get better insurance rates, however, the actual funds for litigation are derived solely from school district funds;
C The school district sets aside funds for potential claims, but according to the auditors, the fund reserve is short of the amount needed for a self-insured entity; and
C There have not been attempts to pool the various school districts.

Wayne Carlson

Wayne Carlson, Executive Director, Nevada Public Agency Insurance Pool, in response to Mr. Bradley=s question regarding coverage for the other counties, stated there are four small school districts in the Pool (Esmeralda, Eureka,

Lander, and Lincoln). The remainder of the counties buy their coverage individually. Clark and Washoe County are individually self-insured.
Co-Chairman Bradley questioned Mr. Blanck regarding money reserved for individual tort claims and whether those funds are from the operating budget of the WCSD. He also requested a summary of claims received for the previous five years. In response, Mr. Blanck stated the funds are taken from the operating budget and there may be some accumulation over the years.

Mr. Blanck indicated this year the claims would have exceeded the cap if liability had been found against the district. There are presently two cases pending. Historically, the catastrophic cases are not that frequent, but they have occurred. He further indicated he would provide a five to ten-year history of the claims to committee.

Co-Chairman Bradley asked if there was anyone else who would like to testify before the round table discussion ensued. There being no other public testimony, he directed the secretary to call roll. All of the advisory committee members were present at that time except for Bill Hoffman, Nevada Association of School Boards, who joined the committee later at the Las Vegas location.

ROUND TABLE DISCUSSION AMONG ADVISORY COMMITTEE MEMBERS AND POSSIBLE ACTION ON RECOMMENDATIONS CONCERNING 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

Co-Chairman Bill Isaeff began the discussion and stated that he would like to hear what position the NTLA had when they introduced the bill [A.B. 119 from the 70th Session, which called for an interim legislative study of the governmental tort liability cap] and what recommendation would be appropriate for the A.C.R. 46 Committee to consider. He stated Assemblyman Anderson had instructed the co-chairmen to try and convene one or more meetings of the advisory committee to discuss these issues and to see if any common ground might be reached between the representatives of the NTLA and the local and state governments that are subject to the statutory cap. He invited either Co-Chairman Bradley or Mr. Crockett to indicate how the advisory committee should address this issue of the statutory limit.

Responding, Co-Chairman Bradley stated the existing $50,000 statutory cap in the context of catastrophic cases is Awoefully@ inadequate. He noted municipalities should be held accountable for their negligent acts. Co-Chairman Bradley stated the intent in introducing A.B. 119 of the 70th Session was to get the cap either abolished or set at a level that would be fair.

Co-Chairman Isaeff asked if there was a figure above $50,000 the NTLA had in mind. Mr. Bradley responded the NTLA did not have a specific figure in mind. He noted one of the numbers Mr. Blanck mentioned was based on a strict inflationary value which would put the cap at approximately $124,000. Commenting further Mr. Bradley stated:

C There is a realization in catastrophic cases that no cap is appropriate and the longstanding philosophy [of NTLA] is opposed to any cap. When a cap is invoked in a catastrophic case, the burden of caring for that catastrophic injured person falls on the county because of Medicaid exposure. The issue turns into a fiscal analysis without consideration of the human aspects.
C The fiscal considerations are driving this debate and neither the subcommittee nor this advisory committee has sufficient knowledge to understand the fiscal impact.

He requested information from Wayne Carlson with NPAIP, the Attorney General=s office, and Washoe and Clark Counties, regarding how many claims in the last five to ten years have exceeded the $50,000 cap and further stated:

C If there are few cases, substantial increases in the cap may not have as significant a fiscal impact; and
C If the number of catastrophic cases is significant, from the fiscal standpoint that will have a detrimental effect on numerous counties.

Mr. Crockett stated while he is concerned with fiscal responsibility, he wants to keep in mind how this issue impacts

people. According to Mr. Crockett:

- The number of catastrophic cases are very few and far between. Since these cases are an infrequent kind of occurrence, the needs of the individual who suffers the catastrophic loss should not be discounted or diluted by the fact that it is one of many claims that the state, county, or city is going to see that year;
- When dealing with statistics, worse case scenario situations are portrayed for planning and accountability;
- The greatest difficulty for this committee is dealing with the problems the rural counties face;
- It is necessary to make the impact on rural counties fair and not an overwhelming burden; and
- In order for a cap to be fair, it needs to be tied to some kind of consumer price index (CPI) to keep it current over the course of the future to enable the system to continue to meet the needs of injured people.

Mr. Crockett stated the two most important items to keep in mind are to:

1. Keep the human aspects of the issues in view; and
2. Keep in mind catastrophic losses are a very infrequent type of occurrence.

Mr. Crockett proposed the advisory committee gather the information Mr. Bradley requested from the cities, counties, and state, then determine how frequently these catastrophic losses occur, and their impact on rural budgets and the insurance premiums (in those cases where insurance premiums are purchased), so the advisory committee can be knowledgeable in its discussions. He supported Mr. Bradley=s recommendation to gather information covering a five-year period.

Co-Chairman Bill Isaeff said there appeared to be a narrowing of the focus of the advisory committee to catastrophic cases. He suggested before the entities are required to search records and produce data, the advisory committee needs a common definition or understanding of what a catastrophic case is, as used in this context. Mr. Isaeff stated perhaps the catastrophic cases could be dealt with in a separate manner while retaining the current statutory cap for non-catastrophic cases in view of the opportunity for stacking claims and getting to a fairly high dollar amount for the more ordinary non-catastrophic type of situations. He commented that the advisory committee needs to focus on what type of cases to discuss in order to get closer to a solution. He discussed leaving the cap as it is with respect to the so-called Aeveryday more traditional@ type of case because previous testimony has shown that the current cap is satisfactory for those types of damages.

Madelyn Shipman, representing the Nevada Association of Counties, asked for a definition of Acatastrophic@ and questioned whether the NTLA is more interested in the catastrophic case or the cap or both.

In response, Co-Chairman Bradley commented that the real discussion is in terms of catastrophic cases. He reiterated that this cap is Awoefully@ inadequate for people with hundreds of thousands of dollars in medical bills and no income.

Mr. Crockett commented he disagreed that the only issue the advisory committee needs to deal with is catastrophic losses. He stated catastrophic losses, that happen so infrequently, are being misused by those who want to keep the cap where it is. He stated those defending the cap were using catastrophic losses involving multiple causes of action arising from a single incident to say that at $50,000 per claim there are potentially situations where an accident can result in a $200,000 or $300,000 claim and, according to Mr. Crockett, that is not the only issue. He commented that in terms of an ordinary tort, a person who had an injury for a compound leg fracture in 1979 might have incurred a bill for $1,000 in the emergency room and $2,000 or $3,000 for the surgeon (using these figures for illustrative purposes). Mr. Crockett noted the same injury today would cost more to treat, resulting in greater lost income, and the relative value of general damages would be more than it was in 1979. If the tort claim is raised to $125,000, just as a reflection of what the present value is, you are not dealing with a catastrophic loss. It would simply bring the cap up to the current value, he said. Mr. Crockett added, the advisory committee should not confuse catastrophic losses that are infrequent, rarely occurring incidents, with the conventional tort injury system. His definition of catastrophic loss is something that is rare and infrequent, that does not happen all the time.

Shauna Hughes, representing the Nevada League of Cities, addressed the concept of leaving the cap at $50,000 and creating some type of an additional cap for catastrophic cases. The $50,000 cap would remain for ordinary tort cases

and catastrophic cases would have a higher limit.

Co-Chairman Bradley agreed with Mr. Crockett=s observation and stated all of the expenses associated with the non-catastrophic claims have increased. Any award on a claim for the pain and suffering associated with a non-catastrophic case is longer proportional to the overall settlement. The NTLA recommends the cap in general be raised to reflect that disproportionate ratio between medical payments and pain and suffering. He suggested the committee create a catastrophic definition and adopt a higher cap for those claims, or raise the cap for all claims. Co-Chairman Bradley further noted that one of the problems is determining what the actual fiscal impact would be as opposed to speculating what it might be.

Scott Young, Principal Research Analyst, Research Division, LCB, presented Mr. Bradley with a document in table format containing a consolidation of the Attorney General=s office tort claim payouts on behalf of the state from 1994 through 1998. Mr. Young stated the document is a breakout of Table 9 from the information distributed during the first meeting of the subcommittee in October. (See Exhibit A.) He commented the table indicates in 1994 there were three claims paid in excess of $50,000 (of 429 total claims). Mr. Young stated the Office of the Attorney General compiles data each year under the statutory provision and the individual claims listed as being paid at $50,000 or more are totaled. In the first year, there were three claims for $50,000 or more during that time period. In the earlier years, the Attorney General=s office did not include civil rights cases, so there may have been more claims paid at $50,000 during those years. Mr. Young stated that around 1998 the reporting began to reflect the civil rights cases.

Co-Chairman Bradley asked for a breakdown of types of injuries and payouts, and what effect the actuarial analysis of the exposure to the various entities would have. He stated the concern from the various municipalities is that any raising of the cap in general would be an automatic raising of the payout.

Madelyn Shipman commented on two issues:

C Speculation about what would happen if the cap was raised; and
C Concern it would increase the number of claims that currently an attorney=s office may feel are not worth pursuing.

Further concerns regarding an increase in the cap raised by Ms. Shipman include:

C Rural counties cannot add to the tax base or any further ad valorem.
C School districts with operating budgets have no ad valorem and no capacity to raise taxes Ctheir funds are supplied by the state.

These entities would have difficulty dealing with even a gradual additional payout according to Ms. Shipman. She stated if the cap is raised, the actuaries would advise increasing the risk fund to cover catastrophic cases that may occur, so additional monies would have to be appropriated from the State General Fund to cover that risk. Further, Ms. Shipman stated normally these cases are not litigated because they are dealt with by risk management. She noted school districts would have to go to the state to increase the reserve fund, or they would have to decrease services in some of the areas of the operating budget. If small governments are required to rework their budgets to cover the additional cost, some services will be reduced. There are political ramifications with any increase whether it is actuarially or actual payout driven, she said.

Co-Chairman Bradley commented that other states, such as California, have rural counties that have confronted these same issues. He questioned how they accommodate these competing demands in order to balance their obligations to citizens= rights versus fiscal impact.

Responding, Ms. Shipman stated that California is a home rule state that can fall back on their taxes for payout and additional budgetary expenses.

Mr. Crockett noted another of his concerns is the argument that if the tort cap is increased, it could result in increased claim filings. He stated the advisory committee does not have the data necessary to show if historically this is true or

not. He agreed with Co-Chairman Bradley that the advisory committee needs to collect more informational data. He requested the data include historical information on changes in the cap from $25,000 to $50,000 indicating if that change resulted in increased claim filings. And, if those increased filings occurred, were they a result of the increase in the damage cap as opposed to an increase in the population, or increase in the frequency of certain types of claims-producing activity. He also requested:

C Statistical or historical information indicating frequency of catastrophic losses; and
C Indicators of how the budget would be affected if claims that have increased in their basic costs, had an increased tort cap in proportion to the cost of living index during the last 20 years.

Mr. Crockett stated the information is definitely available for Clark and Washoe Counties and could be obtained for the rural counties.

Co-Chairman Isaeff commented that the advisory committee needs some concept of what types of cases are being discussed in this area before it can attempt to put together any kind of meaningful data. He further stated the issue is not just a responsibility of an individual governmental entity, but also a societal obligation and the committee should explore other ways besides the traditional system used today to respond to these cases. He introduced the idea of a special state fund for catastrophic cases from which plaintiffs might seek funding. Mr. Isaeff stated there may be alternative solutions to meet this responsibility in an appropriate and fiscally responsible manner.

At this time, Bill Hoffman, Nevada Association of School Boards, joined the committee in Las Vegas. He stated he had been in court and asked to be excused for the portion of the meeting he missed.

Co-Chairman Bradley stated actuaries are going to have to consider the effect on the various entities if this cap is raised. Some governmental bodies are not concerned with allowing their actuaries to go on predicting the future based on an increase, but are unwilling to furnish the committee with any historical data. He noted these predictions are what the committee has requested. According to Mr. Bradley, if the number of catastrophic cases is insignificant, then the actuarial impact should be insignificant. He understands some of the other counties have a carryover of their reserves and said this type of information could change the fiscal impact of anything the subcommittee recommends. Further, Mr. Bradley stated the Legislature will require this type of information to see historically what has happened. If the records are available over the last five to ten years it would be very insightful for the members involved to study them.

Mike Davidson, Nevada Association of Counties, stated he has provided statistics to Scott Young from the United States Department of Justice (USDJ) containing an analysis of claims filed and paid, historically, in jurisdictions of various sizes. The committee would be misled to just look retrospectively to what has been filed or paid, he said. Cases are evaluated based on what the recovery pool will be. There can be any number of cases that an attorney would decline to take if there is not sufficient insurance money or other coverage to justify it. A larger national sampling, which the USDJ has put together, would provide a better historical perspective of jurisdictions where either there was no cap, or where the cap had been higher. He suggested Mr. Young could obtain pertinent information from the USDJ study.

Co-Chairman Bradley commented the NTLA has noted in the past the Legislature is interested in tort cap issues pertaining to the impact in Nevada rather than nationwide. He was of the opinion that the USDJ cases are, for the most part, federal tort claims cases and would not include studies on county payouts.

Responding, Mr. Davidson stated the survey included counties around the country and the cases were not just federal USDJ cases.

Mr. Crockett commented it would be useful to obtain whatever information had been compiled in that regard, and also to look at how Nevada has been impacted by the tort system.

Co-Chairman Bradley noted his definition of catastrophic is anything that exceeds the $50,000 cap. The advisory committee will need to review the definition of Acatastrophic@ if it decides to deal solely with catastrophic claims. He further stated the committee members have to be sensitive to a $50,000 claim cap in the context of a $3,600 ambulance company bill for a short helicopter airlift to a medical center.

Ms. Shipman stated immediate payment should be made if an entity has clear liability. She stated currently when there is a legitimate question of fact, a case is either won or lost with nothing paid in between unless a settlement is reached. Commenting further, she stated lawyers do not want to spend time going to trial for a $50,000 judgment. If the cap is raised to $100,000, all of those settlements for less than $50,000 will be obscured in terms of how they affect settlements negotiated without going to trial. There will be more trials and alternatively it will result in bigger rewards, she said.

According to Co-Chairman Bradley, if that were the case, the current difficulties with the cap would not exist. He noted there are entities that do not take this approach to claims resolution. And consequently, the threat of increased litigation is something that the low cap possesses right now. He continued, stating currently cases are being settled for between $40,000 and $50,000 and even if the cap is increased, those cases will settle for the same amount.

Responding to Co-Chairman Bradley=s comments, Ms. Shipman clarified she was referring to cases that are valued at a minimum of $50,000, and settle for less because it is not worthwhile to go to trial. If the cap is increased to $100,000, more cases would go to trial and more settlements for larger amounts would be made, she said.

Co-Chairman Bradley stated what concerns the NTLA is where a case has a value in excess of $50,000, and there is no remedy. Further, he requested actuarial data that would predict what would happen in these situations if the cap was raised.

Mr. Crockett discussed two possibilities:

1. The historical data will support the theory that an increase in the cap will result in an increase in filing of claims and an increase in the amount paid in settlement of claims; or
2. It will not support that theory.

Mr. Crockett suggested obtaining statistics so the advisory committee can study the information and make an analysis instead of making assumptions.

Mike Davidson predicted once the data is obtained, considerable time would be spent debating the context of the figures; how they interrelate; and how the increased filings will be balanced against population, versus the effect of raising the tort cap. He concluded the data would not provide the answers the advisory committee is seeking.

Co-Chairman Bradley commented the information would be an indicator, but he agreed it would be very difficult to make an analysis in Clark County. He expressed an interest in finding out why 11 school districts are self-insured and have not elected to pool. Mr. Bradley said he would like to explore the idea of putting all the municipalities under one Aumbrella.@
Co-Chairman Isaeff discussed a special catastrophic fund for state cases as a possible solution to this particular problem separate and apart from any increase in the cap.

Bill Hoffman expressed concern that the school districts depend on the state to fund them and without knowing what impact this could have on them, it could create an extra burden on the children and teachers. He stated approximately one-third of the state=s budget goes to K through 12 education. He added that in 1999, the Legislature and Governor Guinn did not provide any salary increases to any of the school districts because of fiscal difficulties at the state level. According to Mr. Hoffman, the difference between increasing the cap from $35,000 to $50,000 is miles away from increasing the cap from $50,000 to $100,000 or $125,000. If the school district has to increase its reserves, the result will be less money in the pool and in the State General Fund available to provide educational services. Mr. Hoffman observed it is valid to consider the funding source.

Co-Chairman Bradley reminded the advisory committee of testimony presented by Wayne Carlson, indicating reserves are being held in excess of the $50,000 cap because of the possibility of multiple causes of action. He is of the opinion that the actuaries of the Pool are reserving two to three times the cap because of potential of multiple causes of action. Mr. Bradley stated if this committee deemed it appropriate to increase the cap, perhaps there could be an offset by reducing the number of causes of action, and not invoke a tremendous increase in reserves, but accurately reflect the value of money from the last cap change.

Mr. Hoffman commented the school district generally operates on the basis of $50,000 per claim because it does not have as many stacking claims [i.e., claims involving multiple causes of action] as some of the other entities. In the last five years, for example, he said there have been very few claim stacking situations. Most of them are single cause of action $50,000 claims. The claims are evaluated when they are received and at that time the reserve is figured.

Mr. Crockett stated what is unique about a school district claim is any time it involves a child, it is going to involve a claim for the parent. Further, he stated the advisory committee members have a responsibility to gather as much information as needed so when recommendations are made to the Legislature, the subcommittee will be able to justify how it came up with the recommendation. Concluding, he said the committee is not doing the Legislature a service without having this information.

Shauna Hughes, representing the Nevada League of Cities, stated it appeared everyone was in agreement about collecting information, but there was a difference in opinion about how valid the information may be in formulating a reasonable compromise on this matter. She offered to collect whatever information would be available in Henderson or southern Nevada. Secondly, if the advisory committee is collecting information, she requested more information about insurance, such as how insurance premiums are calculated. Further, she commented it was her opinion no one on the panel would want to make a recommendation that would have an impact on a rural school district or county hospital. She explored the possibility of picking a cap and seeing how it would affect rural entities from a budgetary point of view. She stated the League of Cities went self-insured in direct reaction to two issues:

1. Insurance companies being irresponsible in the way they settled cases; and
2. The incredible increase in cost.

She stated, according to testimony to this committee there is a good market right now for obtaining insurance in a municipal context. She suggested it would be helpful to come up with a realistic solution (keeping in mind concerns about the rural entities) to see whether or not insuring up to or over a certain amount would be fiscally possible, or if it would create out of control rate increases.

Wayne Carlson noted, in prior testimony he had stated in a five-year period there were total claims costs of $8.8 million with 1,392 liability claims of all types. Forty-eight percent of that amount (a total of $4.25 million) came from 36 claims, in each of which $50,000 or more was reserved or paid. When discussing the cap, he said, it is necessary to take into account the number of cases of action that are pled. In 1979, there was no infliction of emotional distress cause of actionCthat is relatively new. In 1979, there were no constitutional tort claims, because of governmental immunity. The first case was in 1978, and this practice spread in the 1980s, becoming fairly common by the mid-1980s with more constitutional claims against governments. At that time, sovereign immunity was lost.

Mr. Carlson indicated the data in 1979 will not be meaningful relative to today due to the frequency of multiple causes of action. In his opinion, there are no claims that only have one cause of action, and certainly in catastrophic cases it would be rare to have a single or very limited number of causes of action. Additional causes of action have been recognized over the years as the Legislature has seen fit, or as the courts have interpreted, and those need to be taken into account. Also, there is a change in demographics in this stateCpeople coming in from different areas that have different points of view about litigation.

Regarding insurance, Mr. Carlson stated in 1979 everyone bought insurance, then beginning in the 1980s insurance was not competitive, and some counties could not find insurance. He clarified the City of Henderson went self-insured in 1985 before the Pool beganCthe Pool was started in 1987. He noted, there were entities whose insurance premiums were out of the realm of reality, for example, Pershing County went from $8,700 to $78,000 for less limits. Mr. Carlson attributed this to a reaction in part to the insurance company underpricing in prior years and in part to a change in the market. Mr. Carlson stated we have been in a soft market, in a declining cycle of insurance prices. Now, however, some re-insurers are stating they need about 15 percent more money than they formerly received. It is Mr. Carlson=s opinion this is a forerunner to a market upturn similar to the one in the mid-1980s. Further, he stated what is preventing the market turning even sooner is the enormous amount of capitalization that currently is in the market. He said, with the banks entering the insurance business and the merging of financial services, there will be pressure to keep rates down. That pressure, when the market place is showing adverse loss

ratios in the re-insurance layer, will get pushed to the primary carriers and the primary carriers in turn will pass it on in the prices we see in insurance. These are factors that will skew much of the available information.

Mr. Carlson noted the motivations for going self-insured are different. Some entities have gone from self-insured to fully insured because of lower prices, and others have stayed self-insured because they know the prices are going to change.

Mr. Carlson stated in studying the Pool=s actuarial report, there was stratification of the losses. There were losses of $50,000 per occurrence, not $50,000 per cause of action. According to Mr. Carlson, possible claims of $150,000 were examined and the Pool would need approximately 28 percent more in the fund for a total of about $550,000 out of $1.6 million. Further, if a claim is reserved at $200,000, having a $150,000 cap per occurrence would cost 28 percent more than a $50,000 cap per occurrence.

Co-Chairman Bradley asked about the predictions in the actuarial report and what dollar amounts are used per occurrence.

Responding, Mr. Carlson stated retention is based on per loss, per occurrence, and presently the first $150,000 of every loss, regardless of the number of causes of action, is retained. An increase to $250,000, per loss, per occurrence, would increase the amount of funding necessary and that is part of that actuarial predictionCit does not directly relate to the torts. He said there is a difference between retention and caps. There could be a claim that is capped at $50,000 per cause of action and have 10 causes of action, or 100 causes of action, as was the case cited in [his]earlier testimony. If the Pool were to retain $250,000 instead of $150,000, it is an additional $100,000 cost and also an additional cost to the excess insurer if the loss goes above that retention. Using the example of a case with 150 causes of action at $150,000 each, Mr. Carlson stated it would be a $5 million case. He commented the focus should not be on $50,000 because the cap is unlimited in the sense that a governmental entity is liable for up to $50,000 per each cause of action that has been proven. And further, that is where the cost impact pyramids and where the cost impact affects the Pool members.

Co-Chairman Bradley agreed that in the context of medical malpractice there may be more cases if the cap is raised because right now if a case involves a county hospital and a $50,000 claim, the lawyers may handle the case based upon the cost of prosecuting and defending the medical malpractice claim. He stated, if the cap were higher it may make the decision to pursue a malpractice claim against a county hospital in certain venues more attractive. Continuing, Mr. Bradley stated he struggles with comments about increasing the cap causing lawyers to take on more cases. In response, Mr. Carlson stated the number of cases are likely to increase because there will be more interest in filing cases by the attorneys if the caps are higher.

Mr. Bradley inquired if the cap were raised to $100,000, but the Legislature eliminated stacking, would that impact the reserving and the premium costs. Responding, Mr. Carlson stated he would be unable to project that but it should have a smoothing effect similar to the $50,000 acting as a deterrent on the number of cases.

Mr. Bradley commented going from the $50,000 cap to a $100,000 cap would not result in a doubling of premiums people would expect to pay and he would like to know how the large increases in reserve and premium occur. He stated the advisory committee needed more information on that issue and should look at how it could restructure to raise the cap but smooth it out. Further, he suggested the committee could use some assistance in figuring out what the fiscal ramifications would be.

Mr. Carlson, responding to questions regarding actuarial predictions, stated actuaries look at what has happened historically, assuming that the future is going to be somewhat similar to the past. Further, he stated multiple causes of action had to be considered and he commented that numbers were given in prior testimony about potential costs for claims above $50,000 in a reserve.

Co-Chairman Bradley stated if it is already assumed that there are two causes of action per individual, then based on the past, there is a multiplying of claims and the current pricing structure is probably already based on a $100,000 cap. Therefore, if the cap were increased to $100,000 and the multiple claim issue was addressed, there may be no fiscal impact.

Mr. Carlson disagreed with Mr. Bradley=s comments stating the actuary has to consider the catastrophic case, as well as the cases that have 100 causes of action. All of the factors are considered. Mr. Carlson reiterated cases are settled for more than $50,000. Each cause of action is considered and if the Pool is liable, the case goes to settlement and is paid.

Additional discussion between advisory committee members and Mr. Carlson ensued regarding actuaries. It was observed by the advisory committee members that a Aper occurrence cap@ might be necessary to avoid any fiscal impact.

Co-Chairman Isaeff stated Mr. Carlson made some very valid arguments regarding the legitimacy or interpretation of information that may or may not be available from 20 to 22 years ago.

Co-Chairman Bradley noted, although there was general disagreement between advisory committee members regarding what effect a change in the cap would have, it would still be beneficial to retrieve and study any data available, including historical data collected when the cap was changed from $35,000 to $50,000.

Ms. Shipman offered two issues she would like to consider in connection with raising the current cap:

1. Would there be additional claims filed, that are not filed today; and
2. Would there be additional payouts.

It is Ms. Shipman=s opinion that currently cases are settled at less than the cap because both parties recognize it does not serve any major purpose to go to trial. If the cap is raised to $100,000 or $125,000, cases are not going to settle at $40,000 or $42,000. They will settle at something in excess of $50,000.

Mr. Crockett commented the Legislature will request data and will expect the advisory committee to have done some fact gathering:

- To provide information on what the increased costs might be;
- To explain why there might be resistance to the idea of increasing the caps; and
- To explain why it is being suggested that there be a per occurrence or per person limitation.

Mr. Crockett stated he perceives resistance to gathering the data, but feels it will be a requirement in order to respond to the Legislature. Actuaries use this historical data, as Mr. Carlson has pointed out, because they want to be as realistic as possible. And, according to Mr. Crockett, the advisory committee also needs to be as realistic as possible. He stated an actual history of claims made and claims paid would be helpful so when the committee makes its presentation to the Legislature, the information presented will be considered well-founded and factual, taking everything into account.

Following discussion between Mr. Carlson and committee members about the total amount a person could receive for a catastrophic injury, it was concluded that the answer is uncertain and depends on how many negligent infliction of emotional distress claims are filed and how many causes of action are pled.

Ms. Hughes, commenting on the issue of data collection, recommended the two Co-Chairmen meet and limit or define the extent of information that needs to be prepared and make assignments regarding obtaining data. Further, she stated some specific questions should be prepared for Mr. Carlson so he can confer with others to provide specific examples for the advisory committee. She also requested for the remainder of the meeting the discussion be expanded to provide examples of potential changes and stated it would be helpful to develop some types of alternatives in anticipation of the next meeting.

Co-Chairman Bradley agreed specific questions based on hypotheticals would be beneficial to determine what the ramifications would be. An issue he would like addressed is property damage claims and whether the advisory committee needs to consider the property damage claim in a standard tort claim case against the state.

John Hansen

John Hansen, Tort Claims Manager for the State of Nevada, answered Mr. Bradley=s question, stating a property damage claim is made by the individual or his insurance company and when the state is satisfied with verification of the amount of the loss, a check is disbursed for the amount.
He noted the $50,000 limit applies to property damage claims and a bodily injury claim would be considered a separate cause of action. Typically, any legitimate claim is settled with the plaintiff=s insurer.

Responding to Ms. Shipman=s question about reimbursement to insurance companies, Mr. Carlson stated if there is third-party liability, the individual whose car is damaged can file a claim directly with the Pool or with their own insurance company, in which case the insurance company files with the Pool on their behalf. The individual is made whole by their insurance company, he said. If the insurance company recovers an amount from the Pool, it will also seek to recover its insured=s deductible and that portion is reimbursed to its insured.

In response to Co-Chairman Bradley=s question on property damage resolution, Mr. Hansen stated the Unfair Claims Practice Act of the State of Nevada (which he contended does not apply to the state, although the state attempts to abide by it) does not allow the holding of one element of loss hostage to another for settlement purposes. The property damage claim is paid as soon as the state is satisfied it is liable and that the amount of the damage has been properly determined. Mr. Carlson commented that third-party administrators are required to follow the practice of the Unfair Claims Practice Act procedures.

Steve Balkenbush, representing the Liability Cooperative of Nevada (LiCON) stated there have been numerous statistics provided to the subcommittee regarding this issue. It is his opinion the state, as well as Washoe County, has already provided all of their tort claims history to the subcommittee.

Further, according to Mr. Balkenbush, the Pool, through Mr. Carlson, has also submitted information covering a period of five years. The claims history of LiCON has also been provided to the subcommittee. He noted this information was provided to the subcommittee so it could make a determination on what it should or should not do with the cap increase issue.

Mr. Balkenbush stated the information provided by the Pool compared capped and uncapped claims to indicate what the indemnity costs and the actual costs of defense were and whether there was a difference. The pool determined the average cost per claim (the indemnity cost) for uncapped claims was 3.22 times those of capped claims and the defense costs were 2.25 times for capped versus uncapped. In addition, he said LiCON presented similar testimony and it determined the indemnity costs were nearly doubled at 1.76 times for the uncapped claims versus the capped claims. In terms of costs of defense, the figure increased 4.36 times. He stated this information included an entire claims history for LiCON since its inception. Concluding, Mr. Balkenbush stated active claims history has been provided by all of the entities that are before the advisory committee, as well as before the subcommittee studying this issue, and this information should provide guidance as to whether there is going to be an increase in costs in both the indemnity side and the defense cost side if the cap is increased.

Co-Chairman Bradley stated it was his opinion those numbers are not genuine because, based on the fiscal impacts to the smaller counties and school districts, no one anticipates the cap will be abolished. Consequently, the issue of capped versus uncapped does not apply. Further, he stated another question that has not been answered is what the actuaries are relying on to determine their current premium structure in terms of multiple claims.

Mr. Balkenbush pointed out the claims history from the rural hospitals has some unique information in terms of physicians who are covered by LiCON. The claims history is really indicative of what you can expect with an increased cap, because many of those claims were against physicians who were not covered or protected by the cap.

In response to questions by Co-Chairman Bradley, Mr. Balkenbush explained many of the claims are not covered by Chapter 41 [of *Nevada Revised Statutes*] because some of the physicians are independent contractors working for the hospital, who are provided coverage by LiCON, but do not have the benefit of tort protection because they are not employees. In these situations, it is a tort against one of the physicians who does not have protection of the cap because he is not an employee. It certainly is an indication that persons who do not have protection in a state tort context will be more expensive to defend and to pay settlements on, he said.

Mr. Crockett stated he was fully aware of the information that had been provided to the subcommittee and

commented on the following three issues:

- Testimony provided by Mr. Balkenbush that the state had been paying premiums for some of the contracting doctors who have unlimited liability indicates that the state has funded on unlimited liability in certain instances under its current fiscal capabilities;
- Grouping in the constitutional tort claims is unfair because it cannot be factored in; and
- He requested the information necessary to study the actuarial data so committee members will know historically the same issues that actuaries use to make their predictions.

Mr. Hansen stated information was provided at the last meeting that included losses broken out by federal and state, so that issue has been addressed. He commented on actuarial studies and stated it was his recommendation to have one actuary look at all the data from all the government entities.

According to Mr. Hansen, an actuary is interested in:

- The increase in number of claims;
- Changes in benefits; and
- Changes in the number of causes of action.

Concluding, Mr. Hansen stated only a skilled actuary would be able to interpret the data the advisory committee is requesting.

Co-Chairman Bradley commented that absent some of the basic information it would be difficult to make any intelligent decisions but he would not be comfortable with just one actuary interpreting the data. In response, Mr. Hansen gave the opinion that each actuary would end up with different assumptions that would be presented to the committee.

Ms. Shipman suggested the database be narrowed down and presented a list of items to the advisory committee, proposing that the committee request:

- The number of state tort claims that were asserted against Clark County, Clark County School District, WCSD, Reno, Sparks, et cetera, that would have been subject to the $50,000 cap;
- A five-year history (1994 to 1998);
- The number of cases closed in those years;
- The total number on which payouts were made;
- Total dollars on the payouts;
- Any unusual circumstances on a particular case;
- An indication of any multiple causes of action that were used for an excess of $50,000 payout; and
- The number of cases settling for $40,000 or more, or alternatively which of those cases would have been a payout in excess of $50,000 if there had not been a cap.

She concluded these figures would assist the advisory committee in evaluating the types and numbers of cases that a change in the cap would effect.

Co-Chairman Bradley suggested including a breakout on those claims that involved stacking. Co-Chairman Isaeff noted some of the information included in Ms. Shipman=s proposal included reports his office is required to file with the Attorney General=s Office. Further, he stated some of the offices would not have time to put together all of the information before the February 16th meeting of the full subcommittee. Mr. Hansen noted it would be difficult to analyze each case to determine if there were multiple causes of action. Ms. Shipman clarified she only requested that information for payouts over $40,000.

Mr. Carlson asked the advisory committee if it had any data supporting the cap. Responding, Co-Chairman Bradley stated the wrongful death of a magician in southern Nevada stirred interest in the Legislature to look at the cap and prompted the NTLA to file the bill draft request [for A.B. 119]. He stated there are a number of cases where the cap does not seem to adequately balance social policy between the need for a person to receive compensation and the

fiscal impact on the state.

Ms. Hughes moved to direct Mr. Bradley and Mr. Isaeff to:

- **Work together on the parameters for the acquisition of the information, using Ms. Shipman=s proposal as a basis; and**
- **Contact the other committee members as necessary to provide information.**

Mr. Crockett asked if the motion included actuarial information regarding how things have been reserved historically. In response, Ms. Hughes stated it would be helpful if the information could be fine-tuned by hypothetical question or example. It was her opinion, all the entities have independent resources that would be willing to provide that information to the advisory committee at no cost.

Mr. Crockett seconded the motion.

Ms. Shipman voiced her support for the underlying motion, but stated she could not support the motion if actuarial information was being requested.

Discussion ensued regarding actuaries and their fees. Ms. Shipman stated self-insured entities have an actuarial review on an annual basis to determine what the retention fund should be. She noted these reports are public record and any entity that has the reports could provide a copy of that report. Mr. Carlson stated in a pool an actuary looks at that information collectively for the members. He has an actuarial report for last year, but contended this information would not address the advisory committee=s questions. He stated the actuary does not analyze each claim as to the number of tort caps that were applicable or available. Mr. Carlson added the claims person would have that information in the claims file, but it would be difficult to obtain the information the advisory committee was requesting.

Co-Chairman Bradley directed the advisory committee to leave the motion as it was including the areas proposed by Ms. Shipman and to not include any actuarial interpretation. The advisory committee can study the actuarial reports provided and attempt to ask a few of the actuaries what information they use to base their 2001-2002 anticipated losses on.

Mr. Davidson reminded the advisory committee of the motion on the floor and clarified that it included the proposal made by Ms. Hughes that the Co-Chairmen work together to decide what information was necessary and to include Ms. Shipman=s suggestions as a framework.

Co-Chairman Bradley stated the motion was made and seconded to obtain the type of data suggested by Ms. Shipman from agencies that are able to produce it.

The motion was approved with all members voting in favor except Co-Chairman Isaeff who voted no.

Shauna Hughes moved that any of the members who have actuarial reports produce them for the advisory committee. Motion seconded by Mr. Crockett.

Co-Chairman Isaeff clarified the motion at this point only suggests that people who have these actuarial reports for the time period in question submit them to the advisory committee and did not include any expenditure of funds for actuarial review.

Co-Chairman Bradley asked for a vote.

The motion was approved unanimously.

Co-Chairman Bradley asked if any of the entities would support an increase in the cap if it would not involve fiscal bankrupting of the agencies and if it could be accomplished without fiscally bankrupting any entity.

Co-Chairman Isaeff commented the advisory committee is attempting to be sensitive to the catastrophic cases that have been discussed and would be willing to discuss methods to deal with those cases, while leaving the general cap unchanged. The only case made against the cap are instances of catastrophic cases that have not been properly addressed by the current statutory limits, with stacking, common law, et cetera. That issue has not been addressed today, and he added, he wanted to give individuals the opportunity to testify. Further, he stated currently the cap and stacking situation provide more than an adequate legal basis for recovery in the average case one would encounter in this type of situation. Co-Chairman Isaeff stated he would not be in support of any increase in the cap. Concluding, he stated he would be willing to discuss special ways of handling the catastrophic case issue.

Co-Chairman Bradley commented the suggestion of a state fund to address catastrophic cases is something he would like to study and be prepared to discuss at the next meeting. He was of the opinion there are other states that have a similar process in place.

Mr. Crockett stated the problem with a damage cap that is as low as Nevada=s is it is going to impact not just the catastrophic claims, but will also impact many mid-level claims that would be considered significant injury claims if there were no cap on them. He noted the cap has not changed in 21 years and medical costs have increased considerably since then. In his opinion there are many mid-level claims that also go unfairly compensated because of the nature of the cap. Mr. Crockett suggested a two-step approach:

C Increase the damage cap so that not only average cases, but mid-level cases will be compensated; and
C Investigate a catastrophic injury fund to provide a more fiscally responsible and affordable solution to that problem.

Mr. Hoffman agreed the problem is the catastrophic injury. He noted the advisory committee appears to agree that the catastrophic problem should be addressed. He stated he would not support any increased cap for mid-level claims. The vast majority (90 to 95 percent) of the cases are under $50,000, and according to Mr. Hoffman, the law should not be changed to deal with that remaining 5 percent. He suggested focusing on catastrophic cases.

Ms. Hughes agreed with Mr. Hoffman=s comment and stated she is concerned about medical cases. Testimony was provided that indicated this is an area that should receive special consideration. She stated she disagreed with Mr. Crockett and does not want to get involved in mid-level claims. Ms. Hughes commented the members should be cognizant of the fact that public services could suffer and stated she would be in favor of dealing with the catastrophic cases.

Co-Chairman Bradley requested the members to consider, in order to avoid any future debate, whether a recommendation should be made to the subcommittee to consider including an index so the cap will move pursuant to some standard to ensure that 20 years from now the Legislature will not still be dealing with the $50,000. The reason the NTLA requested an increase in the cap is because medical expenses have increased in excess of the 3.1 percent CPI over the last 20 years, and wages have gone up in excess of the CPI over the last 20 years, and those are the elements of any person=s damages. Two-thirds of fixed damages have increased precipitously over the last 20 years, but the cap has remained the same. Concluding, he stated he would strive to make the cap more realistic in terms of today=s values.

Mr. Davidson discussed sovereign immunity and the fact that the Legislature had waived it. He stated the advisory committee is suggesting the Legislature take a look at fundamentally changing the way society=s obligation to injured people is viewed. According to Mr. Davidson, nothing has changed today from when sovereign immunity was initially waived in terms of the individual right or lack of a right - the injuries are no more severe. Mr. Davidson stated what has changed is the cost of treating those injuries. Further, he agreed that dealing with catastrophic coverages would be a fundamental difference from what the Legislature did when it waived sovereign immunity. Concluding, Mr. Davidson stated there are probably some other pool liability arrangements in Nevada law today that might serve as a framework for restructuring the cap limits.

Ms. Shipman discussed the issue of indexing. She commented that the cost of living assumes there has to be some rational basis of indexing. She stated indexing is wrong unless you are going to abolish the cap. It is Ms. Shipman=s opinion that without an overall cap, no entity across the state would be willing to increase the cap at all.

Mr. Crockett commented on the original abolition of sovereign immunity. He stated it was not an arbitrary determination and once it was determined that the Legislature was going to go from no liability to some liability, it had to analyze intelligently what could be dealt with at the time. The Legislature realized it could not go from zero to $25,000 liability without being prepared and based that on what the fiscal impacts would be in the future using sensible predictions. He suggested the members do the same and utilize some kind of an index. He said if $50,000 is indexed to the current value it will produce no real change. That number represents real dollars in terms of buying power today as opposed to 1979. Concluding, he stated medical providers and insurance companies are being reimbursed for medical bills, and are getting present cash value for the money. The injured party should be no less entitled to the same compensation.

Mark Ghan, Office of the Attorney General, directed the members to take a closer look at the claims history that has been provided. He stated that of special interest are the cases that were more than $50,000. Some of the cases are examples of stacking or of multiple parties with a single occurrence. But, according to Mr. Ghan, it is almost as interesting to observe those cases and claims that settled between $30,000 and $50,000 because there were quite a few. Mr. Ghan commented that what this information indicates is that the cap does have an impact.

Co-Chairman Isaeff stated if there is any increase in the statutory cap, there should be a reasonable phase-in period. He noted the importance of giving entities time to make fiscal adjustments. He requested the members submit the actuarial reports to Scott Young.

Barbara McKenzie, City of Reno, stated she would attempt to submit a report to the committee, and Mr. Hansen stated he has those studies available and would forward copies.

At this time Co-Charman Bradley discussed the scheduling of the next meeting and asked if the members had any preference. Mr. Young stated the subcommittee is tentatively scheduled to meet February 16, 2000, at 10 a.m. Co-Chairman Bradley directed a message be sent to the subcommittee requesting it move its scheduled meeting forward so the advisory committee could meet on February 16, 2000, to study and discuss the information obtained.

PUBLIC TESTIMONY AND ADJOURNMENT

Co-Chairman Bradley asked if there was anyone who wished to testify. Seeing no one, and with no further business, the committee adjourned at 1:20 p.m. Exhibit B is the AAttendance Record@ for this meeting.

Respectfully submitted,

Sally Trotter
Senior Research Secretary

Scott Young
Principal Research Analyst

Approved By:

_____
Bill Bradley, Co-Chairman

Approved By:

_____
Bill Isaeff, Co-Chairman

Date:_____ Date: _____

LIST OF EXHIBITS

Exhibit A is a copy of Table 9, ATotal Amounts Claimed and Paid for Torts by State for Fiscal Year Base 1994B1999.@ Submitted by the Office of the Attorney in response to a request made by 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*).

Exhibit B 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.