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*)
December 10, 1999
Las Vegas, Nevada

The second 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 Friday, December 10, 1999, 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 Dean A. Rhoads
Senator Michael A. Schneider
Assemblyman Jerry D. Claborn
Assemblywoman Genie Ohrenschall

SUBCOMMITTEE MEMBERS PRESENT IN CARSON CITY:

Senator Mike McGinness

SUBCOMMITTEE MEMBERS EXCUSED:

Senator Maurice E. Washington, Vice Chairman
Assemblyman John C. Carpenter

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

All place names mentioned in these minutes are in Nevada unless otherwise noted.

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: Friday, December 10, 1999
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 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:

Legislative Building
Room 4100
401 South Carson Street
Carson City, Nevada

AGENDA

I. Opening Remarks by the Chairman

Assemblyman Bernie Anderson

*II. Approval of Minutes for the Subcommittee=s Meeting on October 20, 1999, in Carson City, Nevada

III. Briefing on Administrative and Financial Aspects of Insuring Governmental Entities Against Tort Claims

Wayne E. Carlson, Executive Director, Nevada Public Agency Insurance Pool and Public Agency Compensation Trust

IV. Practical Issues in Administering and Litigating Tort Claims Against Government Entities

Bill Bradley, Representative of the Nevada Trial Lawyers Association

Bill Isaeff, Representative of the Nevada League of Cities

V. Lunch Break

VI. Public Testimony

VII. 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 BY THE CHAIRMAN

Chairman Anderson called the meeting to order and roll was called. He noted that the next meeting of the A.C.R. 46 Subcommittee will be held on February 16, 2000, in Las Vegas, and the fourth and possibly final meeting will be held on April 19, 2000, in Carson City. At the final meeting the Subcommittee will consider recommendations for submission to the 71st Legislative Session.

APPROVAL OF MINUTES FOR THE SUBCOMMITTEE=S MEETING ON OCTOBER 20,1999, IN CARSON CITY, NEVADA

ASSEMBLYWOMAN OHRENSCHALL MOVED FOR APPROVAL OF THE MINUTES OF THE OCTOBER 20, 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 IN LAS VEGAS, NEVADA. SENATOR SCHNEIDER SECONDED THE MOTION WHICH PASSED UNANIMOUSLY.

BRIEFING ON ADMINISTRATIVE AND FINANCIAL ASPECTS OF INSURING GOVERNMENTAL ENTITIES AGAINST TORT CLAIMS

Wayne Carlson

Mr. Carlson, Executive Director, Nevada Public Agency Insurance Pool (POOL), read a prepared statement and commented upon the small and rural local governments that comprise the membership of POOL (please refer to Exhibit A), which include 15 counties, 10 cities, 4 school districts, 22 towns, special districts, and other local government agencies. In 1985, he initiated the enabling legislation that authorized insurance pooling. Endorsed and supported by the Nevada Association of Counties and the Nevada League of Cities, the legislation passed unanimously.

Mr. Carlson explained that a pool is a mechanism by which local governments, through the Interlocal Cooperation Act, may create a joint risk sharing arrangement or fund. The fund bears a portion of the risk and jointly purchases excess insurance to protect against catastrophic losses. The POOL was formed on May 1, 1987, to provide such a mechanism for Nevada=s local governments, particularly the smaller rural entities whose access to affordable insurance was extremely limited in the mid-1980s. Currently, the POOL retains the first $150,000 of each liability claim including defense costs, and jointly purchases excess insurance for its members. The program and services are funded by assessments to the members based upon their exposures, claims experience, and deductibles. The amount of the 1999-2000 fund for retained losses is $1,600,000 for all claims in the program year. A portion of this amount

is charged to each POOL member as their share for funding future claims payments.

Discussion continued focusing on the impact of raising the tort cap and its impact on the POOL membership. Mr. Carlson stated that the concept that the tort cap insulates government employees from the consequences of their actions and creates a callous, uncaring, and indifferent attitude, is distorted and misleading. Local government employees sincerely attempt to meet the needs of the citizens they serve in spite of great fiscal restraints on their ability to do so. Those who perform public service remain equally aware of the potential for liability from their actions, as does anyone in the private sector. Further, tort limits exist to balance the interest of achieving effective public policy against the liability associated with that policy, which may create an undue economic burden on taxpayers. Should the liability for a particular activity become too great, those in the private sector may simply choose not to perform the function, absent a legal mandate to do so. Local government officials are charged with implementing state and federal public policy, which is sometimes an unfunded mandate. To better serve and protect the citizens of the community, they undertake liability that may be against the local government=s self interest.

Local jurisdictions have taxing powers which leads to the assumption that there are unlimited resources with which to pay for liability cases. With statutory limitations governing tax rates, those resources are scarce. In an era of declining assessed valuations and limited growth in rural Nevada, the tax rates actually produce less revenue. For the most part, these areas have not benefitted from the general economic growth of the nation. Given this fact, a thorough examination of the effects of increasing tort limitations on the ability of local governments to fulfill their public service mission should be considered.

Mr. Carlson noted that:

$ Plaintiff=s view local governments as having deep pockets thus causing them to defend Aweak cases.@ By raising the tort cap, a plaintiff=s attorney=s leverage for settlement is increased, which inflates the number of cases filed; and

$ There is an argument that since the cap has not been increased since 1979 it should be adjusted for inflation, which would raise its value to over $100,000. Commonly, there are three to four causes of action in a single tort case with a potential of $50,000 each, resulting in a total recovery of possibly $150,000 to $200,000 per case. Increasing the cap to $100,000 could mean settlements in the range of $300,000 to $400,000 in a typical case with multiple causes of action. Settlement amounts of this magnitude will attract more cases at higher settlement values and directly effect taxpayers.

To illustrate the effect of the cap, Mr. Carlson cited two cases that involved rural communities:

$ A contractor performed work in a small community and upon completion of the project failed to remove his equipment. After numerous requests from the city, the contractor dispatched an employee who was injured when attempting to start some equipment. The employer did not have workers= compensation insurance nor liability insurance. Thus, the injured worker sued his employer and named the city in the suit. The jury found liability on the part of both defendants, the city=s portion being minimal. Since the contractor was judgment proof, having no insurance or assets, under joint and several liability rules, the city potentially had to make payment of the entire $1 million award but asserted the $50,000 cap rightfully and successfully.

$ An employee of a local rural government committed sexual misconduct outside the scope of employment. The plaintiff sued on a theory that the local entity should be held liable for the employee=s acts. At trial, the plaintiff asserted that there were 100 separate torts each of which should be worth $50,000, or a total liability of $5 million. The jury exonerated the local jurisdiction; however, because the courts have stated that each tort separately carries a $50,000 potential, the plaintiff sought to show that the Nevada cap in fact is unlimited depending upon proof of each tort. In this particular case, had the plaintiff prevailed, the entity would have had to assess the taxpayers of this small community to pay the judgment. An action such as this would have more than doubled their taxes.

Addressing the fiscal impact of increasing the cap, Mr. Carlson indicated that from Fiscal Years (FY) 1994 to 1999, there were 15 cases with indemnities totaling $475,016 and defense costs of $393,638. On average, that equates to

$57,910 per case at three cases per year. He noted that these results were based on cases in which the amount paid or reserved equals $50,000 or more, excluding constitutional cases that allege a state tort action. Since these figures exclude cases that allege constitutional violations that are not subject to a damages cap, it is clear any increase to the cap will result in a proportional increase in indemnity and defense costs. Given the average of three cases per year at $57,910 defense and indemnity cost per claim, POOL members incur $173,730 per year in claims costs. Substantially raising the cap or eliminating it, costs could easily double. Since POOL self-insures the first $150,000 of each claim, it will be forced to increase the local jurisdiction=s contributions accordingly. This would result in an increase in the ad valorum tax to generate the additional funds needed from the rural entities. Actuarial research indicates that the difference in funding claims at a $50,000 limit per claim versus a $150,000 limit would increase the loss fund charges by 28 percent. This does not take into account the potential for additional volume of claims due to potentially higher recovery amounts.

Further, in reviewing the claims of POOL members for FYs 1994-1999 to identify constitutional cases that also allege a state tort action in which the amount paid or reserved equals $50,000 or more, the following results were obtained:

$ There were 21 claims with indemnity costs totaling $2,144,640 and defense costs of $1,237,730 averaging $161,066 per case.

$ By including constitutional and state tort claims, the average cost per claim more than triples (3.22 times) while defense costs rise by 2.25 times.

In conclusion, Mr. Carlson stated that the state is currently faced with uncapped liability with regard to federal constitutional claims. Increasing the cap would merely invite more lawsuits and increase defense and settlement costs. The effects of an increase would not materialize for several years; however, tax assessment increases would be immediate to provide for future claims.

Stephen C. Balkenbush

Mr. Balkenbush, General Counsel for the Liability Cooperative of Nevada (LiCON), stated that LiCON was initiated by the Nevada Hospital Association (NHA) to assist its members in obtaining control of rising liability costs by providing them with a long-term source of hospital and professional liability insurance. In 1989, NHA formed LiCON, a local cooperative public agency, for the purpose of self-insuring professional and related lines of liability for those eligible members who chose to participate in the program.

Mr. Balkenbush identified the nine member rural hospitals that comprise LiCON=s membership (please refer to Exhibit B) and explained that LiCON assumes the first $500,000 of liability per claim. With respect to wrongful employment practice claims, LiCON and the member entity share dollar for dollar the first $500,000 of exposure in any such claim. For such a claim, the contribution by the member entity is a direct cost to the taxpayers. Any increase in the cap with respect to tort claims which are premised upon wrongful employment practices, will present a direct increase in cost to the taxpayers. He noted that:

$ Seven of the nine hospitals have entered into independent contracts with physicians who provide services at the member hospitals. These physicians are not protected by the statutory cap of $50,000;

$ Five of the member entities employ physicians at their respective hospitals. These physicians are protected by the cap. Any increase in the cap with respect to the member hospitals that employ physicians would have a direct fiscal impact on the hospital and would result in the necessity for increased funding to generate additional revenue to pay for the potential liability exposure. This would create a severe hardship since several rural counties are at or near their maximum tax rate; and

$ Wrongful employment practice claims include claims related to the employment of a claimant and include claims premised upon recruiting, interviewing, hiring, declining to hire, assigning and reassigning, granting or placing on leave, performance review, promotion, training, transfer, et cetera. This area of liability has increased LiCON=s exposure and resulted in some of the largest settlements the company has experienced.

Focusing his comments on the current statutory cap provided by *Nevada Revised Statutes* 41.035, he noted its effectiveness in resolving claims presented against LiCON member entities. Comparing claims presented against member entities which are uncapped with those currently capped, both the indemnity expense and defense expense have been substantially higher under uncapped claims versus the capped claims. A review of members= claims from 1991 through 1999 reveals that claims subject to the $50,000 cap and paid in an amount greater than $50,000 show an average indemnity expense of $113,000 per case and a defense cost of $7,046 per case. In contrast, uncapped claims paid in an amount greater than $50,000 show an average indemnity expense of $200,000 per case and $30,735 for defense costs. Indemnity expenses incurred in defending uncapped claims versus capped claims nearly doubled (1.76 times). Similarly, the expenses for defending uncapped claims more than quadrupled (4.36 times). Comparable effects should be expected if the state tort cap is raised.

In summary, Mr. Balkenbush commented that, given LiCON=s claims experience, it is anticipated that an increase in the cap would result in more cases being filed, incurring more defense expenses, and an increase in the average judgment or settlement value. The effect of such an increase could threaten the vitality of several rural hospitals which currently operate in counties at or near the maximum tax rate. The provision of medical services in the rural communities has been, at best, a difficult goal to achieve. He informed the Subcommittee that in the past year one county hospital was forced to sell its assets due to financial circumstances and he urged the Subcommittee to take no action that would result in additional financial burdens to Nevada=s rural hospitals.

Responding to questions from Subcommittee members, Mr. Carlson explained that:

$ An actuary is employed to determine the amount needed in the POOL fund to maintain solvency and pay member obligations. The actuary also assists with a formula which includes liability exposures and indicators such as payroll, population, the number of policy officers in a community, if, in fact, they have a police force versus those that do not. If an entity has a higher frequency and severity rating than another POOL member, they will pay proportionately more. To some degree, it is mitigated based upon their size as predictability is a factor in actuarial science. A considerable amount of time is expended teaching members about liability exposure and providing tools such as human resource consultants and policy training courses to avoid exposure.

$ Relative to the issue of legislative intent, there have been concerns regarding interpreting the statute pertinent to applying the cap. There was a time when local governments were of the opinion that $50,000 was the maximum amount paid on any one claim. The fact is, this is an area of the law that has not been defined. There is an assumption that through the process of settlement and litigation the issues surrounding tort decisions will be resolved.

$ It is recommended and local governments are encouraged to purchase insurance for liability protection. However, oversights do occur and many small entities do not have adequate staffing to follow up on such matters. With reference to the case involving the out-of-state contractor from Utah who did not purchase workers= compensation insurance, he was in violation of the state law. It is the responsibility of local jurisdictions to ask for proof of insurance. In this particular case, however, even if the subcontractor had acquired liability insurance, that would not have precluded the employee from suing the city.

$ In order to protect members against catastrophic losses when there are multiple causes of action in a state tort claim, or a constitutional violation, the POOL board has purchased varying amounts of excess insurance above the $150,000 for loss retention. At the inception of the program, an excess of $1 million was purchased and then periodically increased to $2 million. This year it was raised to $5 million which was a direct reaction by the board due to the case cited previously which had multiple causes of action. The board realized that the $2 million may have protected its budget, but it still left the budget at risk.

Bill Bradley

Mr. Bradley, Co-Chair of the A.C.R. 46 Advisory Committee and a representative of the Nevada Trial Lawyers Association, asked Mr. Carlson what the additional cost was to increase the excess policy from $1 million to $5 million.

Mr. Carlson stated approximately $175,000 in additional cost. Responding to several questions from Mr. Bradley, he explained that:

$ Requests are sought from various insurance companies in the bidding process;

$ It is a discretionary call by the board members to determine if the policy is dealt with as a competitive bid process or awarded to a sole service provider. The board ascertains whether the current carriers and service providers are performing effectively; and

$ The $50,000 cap was in place when the POOL was formed and, therefore, cannot draw upon empirical data that would depict the increase of claims due to the cap increasing.

Responding to a question from Mr. Bradley, Mr. Balkenbush stated that there has not been a single case where there has been a verdict against the rural hospitals in the counties; all cases have been resolved by way of settlement. Referring to Mr. Bradley=s previous inquiry, Mr. Balkenbush was of the opinion that there is empirical data to show that claims are more expensive to defend and indemnity costs increase when the cap is raised.

Senator Rhoads observed that there are entities such as the City of Wendover, the Elko Humboldt School District, and the cities of Battle Mountain and Eureka who are not in the POOL. He inquired about their options for insurance coverage.

Mr. Carlson stated that these entities can purchase commercial insurance as well. He did note that the POOL was established to assist the rural communities by finding a market and lowering the cost of insurance. It has invested collectively and by decreasing the costs and improving the risks has actually doubled in size since 1994 and 1995 in terms of the number of members.

Responding to an inquiry from Senator McGinness, Mr. Balkenbush stated that if the cap was raised to $100,000, a protective mechanism would be to eliminate multiple causes of action. Rural hospitals and counties who do not have the ability to raise revenue to meet additional financial demands would then be protected.

Bill Isaeff, Co-Chair of the A.C.R. 46 Advisory Committee and the representative of the Nevada League of Cities, referred to a membership list (please refer to Exhibit B) provided by Mr. Carlson and asked if Clark and Washoe Counties were the only counties that are not members of the POOL.

Mr. Carlson replied in the affirmative. To illustrate a point, he explained that due to adverse developments and claims activity, costs for the loss fund prior to the current year were actually up to $1.75 million. An actuary looks at trends as well as claims activity and determines if more revenue is needed to fund the self-insured losses. It is a function of losses as well as market conditions. Where catastrophic losses have not occurred, a discount on catastrophic loss pricing may be realized; however, an increase to the loss layer, where most of the losses are occurring, could result. Actuaries look at a minimum of five years to gage the trend. Their function is not just statistical, they consider the economy, the legal system, and the changes and patterns in society that are occurring which might influence rates.

Responding to a question from Chairman Anderson, Mr. Carlson stated that pools are specifically exempt from rate review by Nevada=s insurance commissioner. He did note, however, that the POOL does have a second opinion actuary who verifies if charges are adequate. The POOL also has the ability in its interlocal agreement to assess itself if there is a shortfall and obligations cannot be met.

Chairman Anderson thanked Mr. Carlson and Mr. Balkenbush for their informative testimony regarding the impact of an increase of the tort cap on the rural communities. He observed that increasing the membership of the POOL could create a twofold situation. Although additional governmental entities are needed to potentially decrease costs, the increased number of claims associated with more participants may, in fact, adversely affect insurance rates.

PRACTICAL ISSUES IN ADMINISTERING AND LITIGATING
TORT CLAIMS AGAINST GOVERNMENT ENTITIES

Bill Bradley

Mr. Bradley, identified previously, focused his comments on the nature of the tort cap and the function of multiple causes of action. Referring to a set of charts titled AApplication of Nevada=s Tort Claims Cap@ (please see Exhibit C), he noted that the Nevada Supreme Court has not ruled on the validity of some of the fact situations presented in the tables; however, it would be fair to say that the insurance companies underwriting these claims are assuming these scenarios do exist under Nevada law.

Mr. Bradley described some typical case scenarios to demonstrate how the cap would apply in various events. All cases involve the negligence of a government employee:

$ The first example depicts an injured person with no spouse or children. The plaintiff seeks $50,000 for bodily injury including pain and suffering and medical bills, and $50,000 for property damage. In a case where the state is self-insured, it is responsible for property damage expenses.

$ Under current Nevada law there are three potential causes of action that a claimant may have. The first is for his or her own bodily injuries; the second is the wrongful death of a loved one or spouse, a child, or a very close relative; and the third is if that spouse had to watch another loved one injured or killed. This is what the court has interpreted as a Anegligent infliction of emotional distress.@ In this particular example, one person is killed by the negligent conduct of a city, state, county, or university employee, and the spouse and two children who are not in the car survive the decedent. There are causes of action for $50,000 bodily injury including pain and suffering and medical bills; $50,000 property damage; and a wrongful death claim of $50,000 to the spouse, and $50,000 for each child. This does not mean that the spouse and each child will automatically receive $50,000. Competent lawyers will inquire into the nature and extent of a relationship to determine an actual amount. An additional $50,000 could also be awarded to the estate. Nevada law specifies that the estate has a separate cause of action for medical bills and funeral expenses, if the decedent=s medical and funeral costs totaled $50,000. However, if the decedent was killed instantly, there would be no expenses associated with the estate.

Responding to a question from Senator Rhoads regarding the constitutionality of multiple causes of action, Mr. Bradley stated that *Nevada Revised Statutes* 41.035 is very specific and states that any action sounding in tort is subject to a $50,000 limitation. The court has been very clear that wrongful death and the negligent infliction of emotional distress constitute separate causes of action.

$ The next scenario involves a father, mother, and a child in an automobile accident. Only the child is injured and dies. The mother and father both witnessed the injury to their child. The court has stated that if the emotional distress is severe, there is up to $50,000 in recovery for each parent for observing their child injured. The other causes of action are property damage $50,000; wrongful death $50,000 to the father and $50,000 to the mother; and $50,000 to the estate of the child. If everything is considered catastrophic, the maximum exposure to the state is $300,000.

Addressing the issue of medical malpractice claims, Mr. Bradley explained that seven of the rural hospitals have contracted with physicians who work at the hospital. None of these physicians are protected by the statutory cap because they are not employees. Accordingly, any claims made against these physicians which are based upon medical malpractice are uncapped. With respect to claims that are capped, the facts pertaining to the individual claim will determine how the cap is applied.

Furthermore, in a single lawsuit filed by a patient, more than one physician may be involved, a nurse may be involved, and the hospital may also be sued directly. Where a physician is determined to be negligent with respect to the way a surgery if performed, a $50,000 cap would potentially apply to such a claim. In the event the same patient is provided improper medication during the course of the patient=s hospitalization, by a nurse who is an employee of the hospital, the cap would potentially apply to such a claim. Additionally, in the event of a surgery wherein an

anaesthesiologist is employed by a hospital and it is determined that the anaesthesia was improperly administered, the $50,000 cap would apply to such a claim.

In the event the hospital is sued in connection with a physician who is sued for malpractice, a nurse who improperly administers medication, or an anaesthesiologist who administers anaesthetic improperly, a patient could attempt to recover three $50,000 caps based upon a cause of action for negligent hiring of these individuals under the current cap.

Finally, in the event of the death of a patient, each heir at law would have a cause of action for $50,000 premised upon the wrongful death of the patient.

Mr. Bradley brought to the attention of the Subcommittee the fact that nurses at county hospitals are purchasing their own $1 million liability insurance policies. He stated that the coverage is a Atotal waste of money@ because they are already protected as an employee. Another example of insurance abuse is that of medical malpractice insurance purchased by clinics with taxpayer dollars. If a taxpayer is injured due to negligence on the part of a county employee, that coverage never comes into effect. The only explanation given to Mr. Bradley in the past for purchasing this insurance is, Awhat if the cap is abolished some day.@ In his opinion, this constitutes taxpayer fraud.

Bill Isaeff

Mr. Isaeff, identified previously, continued with the presentation outlining the following scenarios:

$ A case involving a father, mother, and a child in an automobile accident in which the father and child are killed and the mother is injured. The mother is entitled to $50,000 for bodily injury including pain and suffering and medical expenses; $100,000 for emotional distress; $50,000 for property damage; and $100,000 for wrongful death. The estates of the father and child are each awarded $50,000. This case has a potential liability of $400,000 to the governmental entity involved.

$ A typical scenario is that of a claimant who slips and falls injuring herself. The spouse does not witness this particular incident. There is a $50,000 cause of action for bodily injury and a loss of consortium cause of action of $50,000 to the spouse of the injured person. This case presents an exposure of $100,000.

$ The final event concerns a multiple tort case that involves a juvenile ward in the custody of a juvenile facility in the State of Nevada. The juvenile has been sexually assaulted by an employee of the governmental entity on five separate occasions. The claimant seeks $250,000 for bodily injury, pain and suffering, and medical expenses associated with the incident, and an emotional distress claim of $250,000. Total exposure in this case is $500,000.

Focusing his comments on construction defects (please see Exhibit C), Mr. Isaeff noted that this is an area of increased litigation activity over the past decade. Construction defect claims are generally brought against general contractors, subcontractors, and more often against the county or the city which inspected the building or the buildings at issue. A significant problem facing counties and cities in the construction defect arena is that they may be jointly and severally liable with the contractor and/or subcontractor. In such a case, if the trier of fact could determine the county/city to be only 1 percent responsible for the loss in the case, the county/city could end up paying the entire judgment.

Another concern posed by construction defect cases is that the amount of $50,000 per building or condominium is recoverable. In an action where a condominium project is at issue, $50,000 is recoverable for each condominium; thus, a complex with 50 condominiums could result in a recovery as high as $2.5 million. Similarly, in a subdivision composed of 50 homes, the total recovery against the county/city would be determined by multiplying the statutory limit of $50,000 times the number of homes which, could result in a potential judgment of $2.5 million.

In conclusion, Mr. Isaeff commented that the scenarios presented demonstrate how the tort system works and how

causes of action can be stacked upon one another. The Nevada Legislature did not have to waive our sovereign immunity, it chose to do so voluntarily with some limitations. Appropriate limits were imposed by the Legislature starting with $15,000, then $25,000, and eventually increasing to the current cap of $50,000. In the *Arnesano v. the State of Nevada Department of Transportation*, 113 Nev. 815, 942 P.2d 139 (1997), the Nevada Supreme Court states that large jury awards could present a threat to the state treasury. A statutory cap on the damages the state must pay for its tortuous conduct furthers a legitimate interest in protecting the state treasury. The court would probably say the same things about the county or the city treasury in an appropriate case. Additionally, some of these scenarios could involve legislators. For instance, if while on a field trip a legislator driving a vehicle causes an accident, he could bring about one of the scenarios described here today. Under the Nevada tort cap limit, our predecessors had the foresight to include state legislators within the protections of the statutory cap.

Responding to Chairman Anderson=s question pertaining to the growth of Nevada=s building industry, Mr. Isaeff stated that the potential for exposure is increasing dramatically in Clark and Washoe Counties where there is a tremendous amount of construction that must be inspected under local building codes. There is not, however, an overabundance of this type of litigation, but the potential for exposure becomes very high with the enormous residential construction boom.

PUBLIC TESTIMONY

Lawrence Davidson

Mr. Davidson of Benson, Bertoldo and Baker, who specializes in medical malpractice law spoke on malpractice cases and focused his comments specifically on university students involved in such suits. He indicated that when a medical malpractice case is filed against residents who have graduated from the University of Nevada School of Medicine and are serving their two, three, or four-year residency program, defense litigation is controlled financially by the resident=s private insurance carrier. Therefore, the insurance carrier pays any attorney=s fees and settlement or judgment rendered against the resident. During his practice as a defense attorney and now representing plaintiffs, Mr. Davidson stated that he has experienced firsthand university employees, residents, and physicians who have received payment directly from an insurance carrier, not the State of Nevada or a local jurisdiction. Therefore, it appears there should be no affect on the state treasury if the residents of the university who, by its bylaws, carry private insurance coverage to the full limit of $1 million. The only impact on the state treasury would be the expense of premiums.

In answer to Chairman Anderson=s inquiry about insurance coverage for student teachers, Mr. Davidson stated that Nevada=s statutory scheme already encompasses differentiating between medical malpractice actions and other potential civil lawsuits. The reason is that damages that could occur if a student teacher were to negligently perform his functions, are usually less than damages that arise when a doctor is negligent in his duties.

ADJOURNMENT

Exhibit D is the AAttendance Record@ for this meeting.

There being no further business, the meeting adjourned at 12:30 p.m.

Respectfully submitted,

Roxanne Duer
Senior Research Secretary

Scott Young
Principal Research Analyst

Approved By:

_____
Assemblyman Bernie Anderson, Chairman

_____
Date

LIST OF EXHIBITS

Exhibit A is the testimony of Wayne Carlson, Executive Director, Nevada Public Agency Insurance Pool, titled AA.C.R. 46 Interim Legislative Committee on Tort Cap,@ dated December 10, 1999.

Exhibit B is the testimony of Stephen C. Balkenbush, General Counsel for Liability Cooperative of Nevada, titled AA.C.R. 46 Interim Legislative Committee on Tort Cap,@ dated December 10, 1999.

Exhibit C is a copy of the charts submitted by Bill Bradley, Co-Chair of the A.C.R. 46 Advisory Committee and the representative of the Nevada Trial Lawyers Association, and Bill Isaeff, Co-Chair of the A.C.R. 46 Advisory Committee and the representative of the Nevada League of Cities, titled AApplication of Nevada=s Tort Claims Cap*.@

Exhibit D 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.