

MINUTES OF MEETING - ASSEMBLY COMMITTEE ON JUDICIARY, 55th Session
February 4, 1969

This meeting was in the form of a hearing on AB 53, 80, 97 and 99. It was called to order by Chairman Torvinen at 2:10 P.M.

Present: Torvinen, Schouweiler, Kean, Swackhamer, Prince, Fry, Lowman, Bryan, Reid

Absent: None

Mr. Torvinen: AB 53, 97 and 99 were the only bills I could find that would interest this particular group and they are the ones which we will discuss today.

George Vargas: I believe that we should give some consideration to AB 80, also.

Mr. Torvinen: We will consider AB 80, also.

AB 53: Bases allowance of attorney's fees to plaintiff in civil action upon amount recovered.

Mr. Torvinen: We will hear first from the proponents for AB 53. Mr. McKissick, would you like to be first?

Mr. McKissick: I would defer to Mr. Hilbrecht for the history of this bill. He put in the original bill last session which was AB 223.

Mr. Hilbrecht: We are dealing here with a measure which essentially is the same as AB 223 of last session. It has Committee introduction and was intended to do two things essentially: 1. Recognized cost of living change. It was thought that the \$3,000 limit was too low. It supported an increase to \$10,000 which the Committee agreed on.

At that time Mr. Vargas disagreed whether it should be based on the amount prayed for or the amount granted. Question was whether it should be extended in those cases where the judge was given authority to grant attorney's fees, like where the suit was for \$10,000 and the plaintiff was granted \$8,000, the judge would still have discretion. Mr. Vargas thought it might not be fair to the defendant. If the plaintiff received less than \$10,000, he could be awarded attorney's fees.

When this bill came out of the Senate it said if the plaintiff sued for less than \$10,000, or if he was awarded less than \$10,000, he could be awarded attorney's fees. All Mr. McKissick is trying to do here is to restore what the Committee did. We believe it is unfair to have the plaintiff and defendant in the same situation. There is a big difference in how much you sue for and how much you recover. Part of the judgment is determination of fault or liability. The judge ought to award attorney's fees to the one that recovered.

Mr. McKissick: I can give you some specific cases. The first is an Assault & Battery case I had. It was a landlord and tenant thing. The Plaintiff had sued for \$15,000 general damages. The defendant had

counter claimed to \$50,000. I had plaintiff amended to \$9,999. The judge would not allow it. I asked if that meant that the defendant would recover Attorney's fees. We looked it up and found there was no real way to award Plaintiff attorney's fees.

I had another case of a person whose hand was caught in a collapsible bed and injured quite bad. We did not think it was too serious and I was going to sue for \$9,999. Fortunately, we changed our minds and sued for \$25,000 or so. This man was a fine-line rule man and his hand never did respond to treatment and he had to learn to do his work with his left hand. If I had sued for \$10,000 I would not have done justice to my client.

The purpose of a lawsuit is to make the plaintiff whole. By the time some of the small claims clients have paid all the costs, they don't come close to being whole. It would speed settlement of cases if the court could award attorney's fees.

If a case is literally worth \$12,000 and you sue for that amount and are awarded \$9,000, and the client does not get attorney's fees, he is dead. One suggestion: The defendant should get attorney's fees, no matter what, if the plaintiff doesn't win, regardless of what the case was filed for.

Mr. Kean: Wouldn't that be repetition of (b) ?

Mr. Hilbrecht: I have always thought that (c) was a situation where the defendant only answered a lawsuit and did not counter sue. If the defendant counter sues, then he is totally indistinguishable from the plaintiff. It just happens that one got to the courthouse before the other. In that event, they should be treated the same.

In (c) you are talking about the defendant being sued but not feeling he has a claim against the other party. Often you file counter claims just for attorney's fees.

Mr. Reid: Wouldn't it be made more readable and easier for one to determine if we just had two provisions? The plaintiff or counter-defendant, no matter who prevails.

Mr. McKissick: I would like to read a little from an article in the Missouri Law Journal.

The gist of this article was that no one will sue for small claims because it would cost at least \$200 to collect \$65. The way things are being done now weakens the faith of the people in our judicial system. This comes about only because they cannot collect attorney's fees.

Mr. McKissick: I submit that this would not raise insurance rates one mill, and if it did, it would still be worth it. What is good for the goose is good for the gander. If you are going to make it "sought sought", just kill the bill.

Mr. Torvinen: We will now hear from opponents of the bill.

Mr. Vargas: This statute under consideration really is a general statute, although I am afraid proponents are confined, really, to insurance cases. I recommend that it applies to cases other than insurance cases. This really is a statute of general interest. 50

I was amazed to learn that there was a difference in the way a court could award defendant's attorney's fees. This should be put on the basis of recovery sought, rather than that obtained. Traditionally, it has been the law of Nevada that counsel fees are not allowable but are subject to agreement between counsel and client. We used to have a law that these could be awarded when a small amount was sought. Two years ago there was a proposition to change the basis on which the court could allow attorney's fees from amount requested to amount collected. Then we came into a philosophical collision. I still think it should be equally applicable to plaintiff or counter-claimant. You can usually tell what your damages are and if you can expect up to \$10,000. If it is on the basis of recovery, every case will come in at \$100,000.

I submit that this law should be amended, but should provide for the court to award attorney's fees where the amount sought is not in excess of \$10,000.

Mr. Reid: Why was the figure \$10,000 picked? Why that particular amount?

Mr. McKissick: It was picked out of the air to conform to Federal Jurisdiction.

Mr. Vargas: \$3,000 was not enough for these small claims.

Mr. Fry: I would like to ask Mr. Vargas a question. Where the defendant merely answers the complaint, should he be entitled to attorney's fees?

Mr. Vargas: As I see the policy of this, it should be limited in all cases to requests or prayers in the suit.

James Lorigan, Farmers Insurance Group: Is it not true that in 8 out of 10 cases where the plaintiff is awarded attorney's fees that they are not collectible? If you are going to do this, maybe you should consider posting of bonds to guarantee the collecting of attorney's fees.

Mr. McKissick: The attorney should point out to his client that if he loses the lawsuit he could be assessed for attorney's fees and court costs. If these people knew their wages were in danger, it might cut down on these frivolous suits.

AB 99: Limits application of automobile and aircraft "guest statutes".

Mr. Torvinen: We will hear proponents for the bill first.

Mr. McKissick: The claim has always been made that if you abolish the "guest statute" it would lead to conjured-up cases between members of a family. I could never figure out how to get around that until one attorney pointed out to me that we could go to the second degree

of consanguinity. The problem we are shoving out is the passenger in the car having to prove that his driver was grossly negligent, etc. /- 57
The present instruction is hard for a jury to understand.

This is what we are trying to do. Let's say I am driving to Carson City and I have a passenger. I hit the car in front of me and do some considerable damage to it. The guy in the car in front of me can sue me, but my passenger, who has been thrown through the windshield, cannot sue me. In order to prevent cooked-up lawsuits, we have gone down to the second degree of consanguinity.

I talked to Dick Blakey and he said he had no objection to AB 99 if we include "spouse". He asked that we put in the word "spouse", along with those related. With anybody else you would be back to ordinary negligence.

Peter Laxalt, Attorney in Carson City: I would like to make one thing clear: I am here speaking as an individual. I have no axe to grind. We do work for both defendant and plaintiff.

If there is any law which creates more hypocrisy than this guest statute I would like to know what it is. It is archaic and a hang-over from generations ago, based on the theory that you should not bite the hand that feeds you.

Modern fears of collusion are the reason for this statute. Requiring a passenger to prove gross negligence creates a pocket of immunity. A driver can with impunity do something to injure someone in his vehicle that he can't do in any other area of law. This is creating less care for people for whom we should have the most care.

I don't think collusion is a very real risk in Nevada. Even when you have a case that cries for relief, you cannot get the jury over the hurdle of "gross negligence". If you do, and the case goes to appeal, they really go through gymnastics to find some justification for compensation.

I respectfully request that the Committee pass this amendment.

Mr. Reid: Let's assume a person is in a bar and drinking and leaves with a passenger and has an accident. Should that passenger be taken care of? I guess there is an assumption of risk, unless that person knows how much the drive has been drinking.

Mr. Laxalt: Sure, if it had been a drink for drink defense. In a case where the passenger had no idea how much the driver had been drinking and he was a captive in the automobile, the Common Law concepts provide for this.

The trend is to abolish guest statutes. Many states have already done away with them.

Robert Berry: Attorney in Carson City: I subscribe fully to the views expressed by Mr. Laxalt. I believe that a trial under the "guest statute" is the sickest procedure we have ever been able to come up with. In a trial we have procedures to get at all truths in the case.

The safeguards that we have for trials should be as sufficient in this area as in other areas. The amendment will take care of a lot of the danger of collusion. /- 58

You have insurance laws and you have personal injury laws, one saying let's keep it, and one saying let's throw it out.

When an insurance agent sells a policy he tells you that you are protected and that your passengers are protected. If you have an accident and your passenger is injured, you tell him he is protected, but when he gets to court, the court relies on the "gross negligence" factor.

Abolition of the "guest statute" as here proposed recognizes a fair and just way of handling these cases. I respectfully propose that this committee adopt this amendment.

FRANK CASSAS: I agree with the two previous speakers. Authorities in the field state that "guest statutes" are archaic. I could read you what Prosser and others say - - -

Mr. Reid: What does Prosser say?

Mr. Cassas then read from Prosser, what he had to say about this.

Mr. Cassas: Passengers in the car hit can recover, but passengers in the car whose fault it was cannot recover. There never has been any real reason for this distinction.

What if the passenger is killed? How can a dead man take part in a collusion? There is no rhyme or reason in why we should deny to his close relatives recovery in that situation. Basically, the principle of the guest statute no longer has applicability in these times.

In regard to states which have enacted these statutes: At least half of them have repealed the statutes.

There are always arguments that insurance rates will go up. I would like to cite an article which gives statistics for those which have these statutes and those that do not. There is no difference in insurance rates when the statutes are repealed. Insurance rates are determined by the density of cars, frequency of accidents and so on, and not by whether or not there is a guest statute.

I think AB 99 is a realistic attempt to compromise in this situation. I think in time it will be abolished entirely. This is a valid compromise and should be adopted.

Mr. Torvinen: We will now hear from the opponents of the bill.

MR. VARGAS: This boils down to the basic proposition of whether the Legislature wants to abolish the "guest statute". If you feel this statute is not in the best public interest, you should abolish the statute.

Someone made the statement that there was no distinction made in the law in other areas. That is not quite accurate. There are at least three distinctions for persons coming onto your land. The first is

a business visit; the second is a licensee; and the third is a trespasser. With reference to a man's land there are three different categories of his responsibility.

A statement was made that there was a guest statute in the horse and buggy days. This is not so. They came in with the advent of the automobile.

If you are doing someone a favor and receiving no pay, maybe you should not be as responsible as in other situations. I am simply trying to assist the Committee to come to its own conviction as to what the public policy should be.

WILLIAM CROWELL: I think the direction of this Committee should be toward the public and the public interest. They should not consider the defending attorneys or the prosecuting attorneys opinions too much.

I support Mr. Vargas. If we are going to do this to the bill, just do away with the statute entirely. If not, let's remember the guy that does the driving and pays for the insurance for the driving.

MR. BRYAN: I take it we have disposed of one of the predicates posed by Mr. Cassas, that of collusion. If the only argument against the bill is public policy, no question has been injected about collusion. Why not just repeal the statute entirely?

Mr. McKissick: I would like to. Mr. Dean Prosser, who is the foremost authority on tort laws says to repeal them. (Read from Prosser).

JAMES LONIGER: You are opening one further door for higher rates for insurance. This will increase litigation, rather than decreasing it. I can't say there will be astronomical raises. The collusion between relatives is not as great a danger as that between buddies.

AB 97: Allows civil discovery of information relating to insurance policies.

MR. MCKISSICK: I have several authorities who are on their way from Reno to speak on the bill but I do not know which side they are on.

I don't see this as any great question. Mr. Vargas will say that if you know the limit you will always be shooting for the limit and this would congest the courts. I think the opposite of this is true. Usually, you can find out the way it is if it is 10 and 12. In California they endorse 15 and 30 as the limits. I am in favor of the bill.

MR. TORVINEN: We will now hear opponents of AB 97.

MR. VARGAS: I oppose this bill on behalf of my clients and on the basis of my 35 years in the courtroom finding these cases. This bill would allow a blanket disclosure. Many times the question of insurance has come up when I have been in the courtroom. The jury is told to come to a decision on the evidence, rather than whether the parties have insurance. I have asked them not to speculate on these cases.

It involves a wholly unrelated factor in determining the worth of a 60 case.

Insurance companies are simply trustees of the public's monies. They, therefore, have a great responsibility to the public in the management of these funds. It is incumbent on the insurance companies to speak out. I do not feel that disclosure is in the public interest.

Mr. Reid: In regard to the other two bills we have talked of, I can honestly say that I can go along with them. However, I feel very strongly about this bill. It has no bearing or relevance to a lawsuit. If the defense attorney somehow settles a case for \$50,000 when there is a limit of \$10,000 there is adequate protection for such a case. This bill would prevent settlement of many cases. I would like Mr. McKissick to present his arguments for the bill because right now I can see no reason for it.

MR. TORVINEN: Question: Apparently they have been able to discover in California for some years. With what results?

MR. VARGAS: I can't tell you what the experience has been.

MR. REID Since then the court has done away with pre-trial disclosure.

Mr. LORIGAN: We usually tell them.

MR. TORVINEN: I would like to know what evil results from this practice.

AB 80: Removes limitation of parents', guardians' liability for tortious acts of minors.

MR. LOWMAN: I feel like a country boy about to be thrown to the lions.

My feeling on this is that somebody has got to be responsible and the first one who ought to be is the parents of the youngster who committed the offense.

Mr. TORVINEN: Are there any opponents to the bill?

MR. VARGAS: I am not speaking for insurance companies because I don't think you could get this kind of insurance. My only concern is as a parent.

It strikes me that in this day and age when parents are being frugal and maybe saving a little for their old age you would be penalizing them for something which they could not help.

MR. LOWMAN: It seems to me the poor victim should be kept in mind as much as the parent. Maybe this will help them feel more responsible.

MR. TORVINEN: It occurred to someone that maybe the minor child would not be considered on the home owner's policy.

MR. VARGAS: The Steen-Gass case comes to mind. We were on that case, for Steen. He was not even involved in the fight. We had to settle out of court.

There are gray areas where parents could be wiped out.

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MR. REID: I am wondering what would happen if a child burned out a transformer. These cost thousands of dollars. You could wipe out the parents, and this is not a gray area.

MR. LOWMAN: In my thinking, one of the primary problems of the United States is that we do not control our children. We must come to a place where we do. This bill says exactly what I wanted it to say. We have somehow gotten away from the concept that we must train our children.

MR. BRYAN: If a child's parents were wiped out simultaneously in an accident and in the will one of his brothers was appointed his guardian, then suppose while he had been in this guardian's custody for only two or three days, he does something which causes a great deal of damage. Under the scope of this act, that guardian would enjoy unlimited liability. I am not just trying to foul you up. I am trying to give what might be a real situation.

MR. KEAN: I have a question for the insurance and legal people. Let's assume a child wilfully does damage to a house that is already insured. Does this law transfer liability from the insurance company and put it on the child and his parents?

MR. VARGAS: No, the insurance company could not get out of their responsibility but they could subrogate the parents.

MR. FRY: Is there a possibility in the theory of recovery that if you have a very wilful child who commits a series of acts with damage the parents could recover on their home owner's policy?

MR. VARGAS: I think maybe they could.

Mr. Lowman moved the hearing and the meeting be adjourned.
Mr. Swackhamer seconded the motion.

Adjournment was at 3:45 P.M.