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Judiciary Committee  
February 07, 2007

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[LB78 LB197 LB228 LB274 LB373 LB448]

The Committee on Judiciary met at 1:30 p.m. on Wednesday, February 7, 2007, in Room 1113 of the State Capitol, Lincoln, Nebraska, for the purpose of conducting a public hearing on LB78, LB228, LB274, LB373, LB197, and LB448. Senators present: Brad Ashford, Chairperson; Steve Lathrop, Vice Chairperson; Ernie Chambers; Vickie McDonald; Amanda McGill; Dwite Pedersen; Pete Pirsch; and DiAnna Schimek. Senators absent: None.

SENATOR ASHFORD: (RECORDER MALFUNCTION)...committee. Before we get started, I'd like to introduce my colleagues. Senator Vickie McDonald from the 41st District; Senator DiAnna Schimek from Lincoln; Senator Ernie Chambers from Omaha; Senator Pete Pirsch is here from Omaha. My name is Brad Ashford, I am also from Omaha. The rest of the senators, I'm sure, will be coming in shortly. They have bills to introduce. So we'll get started with LB78. Let me, if I could, just explain a few ground rules that we'd like to go by. We have this light system at the front desk and we'd ask you to, other than the introducer, of course, of the bill, we'd ask the witnesses to try to adhere to the time frame that we've allotted, approximately three minutes, to give your testimony. And when the yellow light comes on, you'll see the yellow light come on, that will tell you that we have approximately a minute to sum up. And then the red light is we'd ask you to conclude so that we can get through all of these bills in a timely fashion. Many of you understand the system and are in here quite a bit. But those who are not, that is the way we'd like to do it. My legal assistant, Stacey Trout, is to my right. And Jonathan Bradford is the clerk and he's to my left and he'll be taking down all the information. We do have a sheet that we passed around where we'd ask you to sign...at the sign-in desk. We'd ask you all to sign in. And when you come up to the witness area, the table, that you state your name and spell your last name for us, for the record. Senator Dwite Pedersen from Elkhorn is here. Welcome, Senator Pedersen. Why don't we get started with LB78? Senator Nantkes, from Lincoln. [LB78]

SENATOR NANTKES: Good afternoon, Senator Ashford, members of the committee. My name is Danielle Nantkes, spelled N-a-n-t-k-e-s. I represent the "Fightin'" 46th Legislative District. I'm appearing before you today to introduce LB78. Some of you as senators, I'm sure, are beginning to receive calls from your constituents about the unfairness of the cap on damages. As inflation drives up the cost of medical bills, caps have remained unadjusted for over 20 years and we'll have fundamentally unjust results. The Political Subdivisions Tort Claims Act was adopted in 1985. The cap on damages placed in the act at the time has remained the same since, since 1985. As inflation has decreased, the real value of that cap, injured people bear a larger and larger part of the damages somebody else has caused. Arbitrary caps on damages do not make the damages incurred by your constituents go away, it simply shifts the burden of that damage from one person who caused it to the person who received it. Opponents will claim that this bill will drive up insurance rates. Yes, insurance rates will

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
February 07, 2007

---

increase to a degree, but not to the point of unaffordability. Remember that the increase in the cap is not significantly different than the increase in the cost of the living over the years since the cap was first put into place. Consequently, insurance would be no less affordable than it was at the time when the cap was first put into place. Opponents may talk about runaway jury awards. Again, the political subdivisions are already protected. These tort claims are decided by a judge. Section 13-907 of the act does not allow for a jury. Caps on tort claims can have tragic impacts on people who have done nothing wrong except be in the wrong place at the wrong time. Now is the right time to do something about it. I would ask the committee respectfully that you advance LB78 to the floor for a full debate. With that, I'm happy to answer any questions. [LB78]

SENATOR ASHFORD: Thank you, Senator. Any questions of Senator Nantkes? Senator Pirsch. [LB78]

SENATOR PIRSCH: Thanks. And I don't know if this may be more appropriately, this question, posed to those who may testify behind you here today. But have you been made aware of specific incidents in which individuals have experienced this type of situation where they've had damages that have exceeded the level? And if so, you know, are you aware, can you quantify the need, so to speak? [LB78]

SENATOR NANTKES: Well, not from a qualitative perspective, but anecdotally and otherwise we're getting increasing reports in our office about the difficulties many injured parties and families face as a result of these arbitrary caps. Particularly we've seen this when people have become severely burned, for example, that the current cap level is really inadequate even to meet their basic medical needs. And that places enormous strain on those families' individual budgets. We did arrange to have some people who were personally affected by this visit with the committee this afternoon. It's my understanding that because of the road conditions that some of them may not have been able to join us this afternoon. But it's my hope that they'll visit and share their personal stories with you individually as committee members. [LB78]

SENATOR ASHFORD: I guess that's it. [LB78]

SENATOR NANTKES: Thank you. [LB78]

SENATOR ASHFORD: Do you wish to close or... [LB78]

SENATOR NANTKES: I'll reserve the right. [LB78]

SENATOR ASHFORD: You may certainly do that. First, how many proponents do we have on LB78? How about opponents? Okay. Proponents? [LB78]

ROBERT MOODIE: Mr. Chairman, members of the Judiciary Committee, my name is

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
February 07, 2007

---

Robert R. Moodie. I'm testifying on behalf of the Nebraska Association for Trial Attorneys in support of LB78. The prior caps adopted in the Political Subdivisions Tort Claims Act were adopted in the mid-1980s. And if we merely were to apply the consumer price index for each year, we would conclude that these increases are justified. If we consider the annual increase in medical care and the cost of medical care alone, I think an even greater increase would be justified. Tort claims involving these limits do not come up often but they are certainly occurring more frequently than they did in the mid-eighties. In October of 2001, a school bus carrying members of the Seward High School marching band drove off a bridge in Douglas County. It landed on its top in the stream bed 60 feet below. Fifteen tort claims were filed on behalf of students and adults injured in that accident, three of those were fatalities. To its credit, the Seward School District voluntarily offered their liability limits of \$5 million. But that amount was not enough to compensate those families for the injuries that they had sustained, including some whose medical bills were approaching the per person limit of the cap. Our legal system and our innate sense of fairness tells us that when somebody or a group of people carelessly or negligently cause injury or damage, the injured person should be fairly compensated. That sense of fairness does not make a distinction between a careless person, corporation or a political subdivision. An artificial cap on damages, as is applied in the Political Subdivisions Tort Claims Act, violates that innate sense of fairness. It shouldn't exist. But if it must exist, at the very least it should be periodically reviewed and adjusted to reflect current economic reality. [LB78]

SENATOR ASHFORD: Any questions of Mr. Moodie? Is Bob your dad? [LB78]

ROBERT MOODIE: Robert. [LB78]

SENATOR ASHFORD: Robert is your dad? [LB78]

ROBERT MOODIE: He's known by Dick, yes, but... [LB78]

SENATOR ASHFORD: Oh, Dick is your dad. Okay. Just trying to get you placed. Go ahead. [LB78]

SENATOR PIRSCH: Just briefly, I'll pose to you the same question I posed to Senator Nantkes, which is, do we have any sort of quantitative type of information as far as... [LB78]

ROBERT MOODIE: As far as numbers of cases? [LB78]

SENATOR PIRSCH: ...the number of cases where you've hit the maximum which might suggest that the greater than the maximum would have been awarded or anything of that sort? [LB78]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
February 07, 2007

---

ROBERT MOODIE: I haven't put together, it's difficult to put together those cases by numbers because you, number one, most of them aren't going to go to trial so you don't have a public record of the result. Many of the ones that are settled will contain confidentiality agreements so that it's difficult to gather and disseminate specific informations. I personally am familiar or know of four cases within the last five years, including the Seward school bus case in which I did have some personal involvement, where the caps came into play. That's just through my limited personal experience and some discussion with colleagues. [LB78]

SENATOR PIRSCH: Okay, thank you. [LB78]

SENATOR ASHFORD: Just a general question. I'm not sure I know of any political subdivision or city anywhere in the country that doesn't have some cap of some kind on damages. And I assume the reason for that is there's a balancing act going on between the potential damage to a citizen and the cost to the taxpayer of having no cap or having a larger cap. Is there something different in your mind, as a trial lawyer, between--I guess you basically answered this--between suing a political subdivision that's funded by the taxpayers versus a private citizen who would be a defendant that's covered by an insurance policy? Is there a qualitative difference? Is there some sort of a difference that justifies that public policy in your mind? [LB78]

ROBERT MOODIE: Well, I think the public policy has to come from the standpoint that...the policy to justify it has to come from a standpoint of the theoretic burden to the taxpayers to cover these kinds of claims. From a legal theory standpoint, no, I don't believe there's a distinction. [LB78]

SENATOR ASHFORD: Wasn't that in English common law where the state was immune and the crown was immune? [LB78]

ROBERT MOODIE: Well, under the tradition of sovereign immunity, the theory was that the king, the crown, and therefore to extrapolate to our country, the government could do no wrong. And that theory was abandoned. [LB78]

SENATOR ASHFORD: Or at least they were immune. [LB78]

ROBERT MOODIE: Originally thought to do no wrong, and secondly then immune when they did wrong. And that theory was abandoned, and to the credit of our state it was abandoned. And in its place was adopted a system whereby both the state government and the political subdivisions could be held responsible for damages caused by those entities. So from a legal theory, legal standing, a position of legal theory, a position of innate fairness, no, I don't know think there is a difference. And that would be the basis of my argument that the caps probably should not exist in the first place. But if they do exist, they need to reflect an economic reality. [LB78]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
February 07, 2007

---

SENATOR ASHFORD: It's a good discussion. I won't belabor this. I'll just ask one other question. If, for example, the city of Omaha's operating budget is \$300 million a year approximately. Theoretically a court could award a judgment with \$10 million, \$20 million, \$30 million, \$40 million, \$50 million without any looking at compensatory damages and then add to that pain and suffering. I could see a damage award that could be in that area, certainly for an event like the Seward bus case. [LB78]

ROBERT MOODIE: Certainly. [LB78]

SENATOR ASHFORD: How would a subdivision pay... [LB78]

ROBERT MOODIE: Well, for one thing I think most municipalities, political subdivisions are purchasing this...in the same market for liability insurance or should be in the same market for liability insurance as private individuals and the corporations that operate under the state. And they need to assess the potential of their risk and make those decisions appropriately. [LB78]

SENATOR ASHFORD: So insurance would in fact be the answer to that? [LB78]

ROBERT MOODIE: Absolutely. [LB78]

SENATOR ASHFORD: Okay, thanks. That's all I have, Mr. Moodie. Any other questions? Thank you. I'm sorry. I'm sorry, Senator Schimek. [LB78]

SENATOR SCHIMEK: Just one occurs to me and maybe Senator Nantkes mentioned it in her opening. I didn't catch it if she did. How does this cap that exists right now compare with the caps that other states may have set? [LB78]

ROBERT MOODIE: Senator, I don't have that information. I can try to locate some of that information and provide it to you. But in the same breath, I'm going to suggest to you that I'm not sure that it makes a whole lot of difference. Because if other states have a million dollar cap per occurrence, then they're too low also. [LB78]

SENATOR SCHIMEK: Well, I don't disagree necessarily. But I know that if this bill would go to the floor, that that would be one of the things that people would want to know. [LB78]

ROBERT MOODIE: I'll endeavor to collect that information and have it distributed to you and the committee. [LB78]

SENATOR SCHIMEK: Thank you. [LB78]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
February 07, 2007

---

SENATOR ASHFORD: Senator Pirsch. [LB78]

SENATOR PIRSCH: I'm sorry about that. [LB78]

ROBERT MOODIE: That's fine. [LB78]

SENATOR PIRSCH: Just in those four or five cases or four cases that you had mentioned within the last five years, including the Seward school bus case, is there a common type of case or fact pattern that are really ones that we experience with the ones that meet that, hit the ceiling of the current level? And is it...I think Senator Nantkes had said burn cases in particular had been one. Are there ones in which typically there's a death experience? [LB78]

ROBERT MOODIE: Well, no. Primarily you're going to run into the higher limits in cases where there is not a fatality but which there is some type of debilitating injury which is requiring a tremendous amount of medical expense. Now burn injuries do bring that into play but traumatic orthopedic injuries also. And then generally in situations where an injury has left an individual unable to care for themselves and there are continuing life care or medical expense matters. So those are the injury cases which are most likely to test the limits. How those injuries, you know, they can be anywhere from motor vehicle accidents involving sheriff's deputies or public utility vehicles or a school bus. But probably you're going to find more of them as motor vehicle accidents. But I haven't attempted to try to distinguish how the injuries occur. [LB78]

SENATOR PIRSCH: And one more follow-up question and I'm done is, is the problem that would be remedied with the increased level of coverage or liability, as it were, is the problem here that we think that by increasing the amount of liability, that that will cause the subdivisions to take greater care in certain areas in which they're not doing now? Or is this just a matter of substantive fairness to the victims and that's the reason we're trying to hold them liable, that that would...you know, that the city should be held for all, whether or not it could or could not, whether it would have...you know, even if it was at \$10 million, taken further precautions, we should try to seek 100 percent remuneration (inaudible)... [LB78]

ROBERT MOODIE: I think I understand your question. I think both reasons are valid reasons. Without any empirical evidence to point me in another direction, I feel that most of our political subdivisions and the people who make decision and act on behalf of political subdivisions do so with reasonable care, and would do so with reasonable care whether the cap was \$1 million and \$5 million or \$3 million and \$12 million. So in most cases, I don't think that changing the cap from \$1 million to \$3 million is necessarily going to affect the way our cities, schools, and counties go about their business. In some cases it might. And if it does accomplish that goal, that would be worth it. But I think the overriding philosophy would be that we have accepted, in theory.

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
February 07, 2007

---

We have accepted the theory that political subdivisions can and should be held responsible for injuries caused by negligence and carelessness. And if we're going to accept that theory, we should be willing to accept the theory that those individuals should be fully compensated. [LB78]

SENATOR PIRSCH: Okay, thank you. [LB78]

ROBERT MOODIE: Thank you. [LB78]

SENATOR ASHFORD: Any other questions? Thank you. I do think it would be helpful to have some sort of a summary of the caps that apply to cities in this general area, the Midwest area. [LB78]

ROBERT MOODIE: I'll take care of that research and provide it to the committee. [LB78]

SENATOR ASHFORD: Thank you. Proponents? Do we have any other proponents? I don't think so. Opponents? Good afternoon. [LB78]

TOM MUMGAARD: Good afternoon, Chairman, members of the committee. My name is Tom Mumgaard, that's M-u-m-g-a-a-r-d. I'm a deputy city attorney and I'm appearing today on behalf of the city of Omaha to oppose LB78. As you've referenced, a goal of a liability cap, as we see it, should be to achieve a balance of compensating the greatest number of people that have claims without an excessive financial burden on the taxpayers who have to pay the claims. The current cap that's in the law we believe is achieving that goal and our statistics and our experiences show that. While of course any cap that you put in place will give you the possibility of seeing cases with extreme damages that are affected by that cap, we encourage you to see the bigger picture. Using a time period of three years--which we use because that's a typical time frame to complete a claim all the way from claim to judgment--over the last three years, the city of Omaha has typically received around 500 claims per year. Now very few of those claims present the possibility of recovering over \$1 million. And our experience has shown us that. We currently have, that has risen over the last three years, approximately seven cases that realistically have a potential to be affected by the million dollar cap. Now that represents about five one-thousandths of all the claims that were filed during that time, approximately 1,500 claims. The median amount on claims that we pay annually range from \$742 to \$1,200. As you can see, the vast majority of all claims that are coming to the city of Omaha are, you know, not at all affected by the million dollar cap and will not see any change because of this change. The vast majority of all claims in Omaha would not be benefited by this change. But we have to keep in mind that in budgeting and preparing for the financial exposure of litigation, the city of Omaha does have to put aside money to pay potential judgments. An increase in the cap would certainly mean that additional financial commitments would have to be made to meet the increased exposure. For example, in 2005 and 2006, the city of Omaha paid

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
February 07, 2007

---

about \$1.8 million per year in claims. That's either through the claim process or through the litigation process. The city of Omaha is self-insured. We're rather unique in that aspect in Nebraska. And we pay those claims from a separate property tax levy that is put aside for this purpose. Now that is required by statute and by charter. An increase in the cap would, of course, require that levy to increase because you have to obtain the money to be set aside in the judgment fund to be ready to pay judgments, if they come about that year. Also by statute, the city of Omaha must pay its judgments. We do not have the luxury of other people, of private citizens, of avoiding judgments. And we must pay those within the next budget year. So any judgment that comes from a tort claim would have to directly require a budgetary increase in the next year. It's a question of how we commit our resources. The current cap is allowing resources to be used in other productive ways without depriving the vast majority of all people with claims of complete compensation. So we would encourage you to leave this cap as it is and not increase it. I'd be glad to answer any questions. [LB78]

SENATOR ASHFORD: Thanks, Tom. Any questions of Mr. Mumgaard? Yes, Senator Chambers. [LB78]

SENATOR CHAMBERS: Mr. Mumgaard, you said that the number of claims that might be affected by this bill would be five one-thousandths of the total claims that the city of Omaha may be confronted with or by? [LB78]

TOM MUMGAARD: Yes. Yes, that's correct. [LB78]

SENATOR CHAMBERS: So then it's not going to cost Omaha that much, being such a small percentage of the claims. But those few it would affect would benefit greatly from an increase in the size of the cap. True? [LB78]

TOM MUMGAARD: I'll answer that in reverse. The people who are affected by the cap, although they're a very small number of people, obviously they would be affected greatly by an increase in the cap. We have seen, over the last, again, three years, I can tell you that there has been one judgment that was limited by the cap and there has been probably two settlements that were affected by the cap. Now I would not try to tell you that those three people were not adversely affected by the current cap. Of course they were. What we look at is the potential of having to pay those and putting money aside to do that. And that balance, yes, that balance has to be made, that some people are going to be deprived of full compensation by any cap. [LB78]

SENATOR CHAMBERS: I'm not through with that yet, but I want to touch on something else before I forget it. You mentioned this judgment fund into which a certain amount of money goes based on a special levy that produces money to go into that judgment fund. Are there any people working at the city who can calculate, on the basis of claims that have come up in the past, the amounts of those claims and make a determination of



Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
February 07, 2007

---

how much more would likely have to go into that fund, if this cap were increased or raised? [LB78]

TOM MUMGAARD: Well, I can answer that. Yeah, I'm sure that there are actuaries that could give you some specifics on that. What we typically do is not...we don't go to that level of expertise, I'll tell you. We... [LB78]

SENATOR CHAMBERS: Okay, now the purpose of allowing a person to receive damages, regardless of who may have harmed that person, is to try to make that person whole to the extent that money can do so. If we start out with a public policy which we know in advance is not going to make people whole who have been harmed through no fault of their own but rather by the inappropriate conduct of one hired by, paid by, and working on behalf of the government, is that a sound policy? Is it fair? Is it equitable? [LB78]

TOM MUMGAARD: Well, if the policy is to make sure that everybody who gets injured by a tort is fully compensated, no, that is not equitable. That is not the way that it's working now. People do not get...people who are injured by the actions of employees of political subdivisions may not get fully compensated because of the cap. That's a reality. Whether that's fair or not, I would turn to just simply that is a reality fact of life, that every citizen of Nebraska, with some notable exceptions such as Warren Buffett, every citizen of Nebraska has some limit to their financial resources that they can pay to compensate somebody who is injured by their negligence. [LB78]

SENATOR CHAMBERS: And with Buffett, I think we could add Walter Scott, David Sokol, Dick Holland, and a few others that I could name. [LB78]

TOM MUMGAARD: There certainly are some people that would have those unlimited resources. Most citizens would not. [LB78]

SENATOR CHAMBERS: If the Legislature chose to do this, Omaha is not going to go bankrupt, is it? [LB78]

TOM MUMGAARD: No. [LB78]

SENATOR CHAMBERS: And Omaha may choose to use the alternative of doing away with being self-insured and purchasing insurance. Is that what they would do? [LB78]

TOM MUMGAARD: Well, they could. Omaha has, in fact, looked at that in the past and found that it is extremely expensive. So the most economical way to handle liability exposure is to be self-insured for a city such as Omaha. [LB78]

SENATOR CHAMBERS: Well, the real way to end liability is to have employees be

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
February 07, 2007

---

more careful. Because if there is no negligence or fault on the part of an employee, must the city pay? [LB78]

TOM MUMGAARD: That would be the ideal, that all employees never make a mistake. [LB78]

SENATOR CHAMBERS: But we know that there's going to be, and that's why we have something like this. [LB78]

TOM MUMGAARD: Yes, we know that that will happen. Yes. [LB78]

SENATOR CHAMBERS: Now this is a question you may choose not to answer, and if you choose not to, I'm not going to press you. Just a preliminary question. When this cap was first put in place and this amount of money would be paid out to an individual, the cap, would it have come closer to making that person whole than that identical amount being paid out today? In other words, were the dollars worth more then, the same number, than they would be today as far as addressing what a person has to expend for medical care? [LB78]

TOM MUMGAARD: If this cap was increased to \$3 million per person, I would say yes, there will be people in the coming years that will recover money that they would not otherwise recover. And I tell you that that will be roughly one person per year. [LB78]

SENATOR CHAMBERS: Would it be rational...let me not use that word. Would it be reasonable for policymakers to consider that--since such a great number of years has elapsed since this cap was put in place, but the cost of whatever is going to be procured through the payment of this money that the injured person would receive has continued to rise--would it be reasonable for policymakers to consider raising the cap, even if not to the extent of this bill? I'm trying to get at a general principle here. [LB78]

TOM MUMGAARD: I can accept your general principle. I mean, obviously medical costs and other costs rise over the years. And so at some point, the million dollar cap would logically be not enough and it would act to deprive a large number of people of full compensation. I cannot argue that principle, that is true. I would just simply say we've not reached that point. When we reach that point, I hope the city of Omaha encourages you to increase the cap. But we have not. [LB78]

SENATOR CHAMBERS: If we are not going to say that we will try to make a person completely whole and we were going to index this cap to anything--the GNP, cost of living, inflation or whatever the term is--but this, the cap would track the increases in the cost of other things. Would that be a better thing to do instead of letting maybe two decades go by and then having to take one large jump? [LB78]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
February 07, 2007

---

TOM MUMGAARD: Well, that has some objective appeal and certainly indexing the cap to something has some appeal. I don't know, we haven't been able to figure out what you would index it to, cost of living, all those types of things. The amount of judgments, the dollar amount of judgments that are awarded in Nebraska has not seemed, over the years, to track and follow along with any of those indexes. So if you choose one of those indexes, I think you have a very high probability that you won't be tracking with the costs that you're trying to pay, that if you can somehow choose an index that measures the increase in the amount of judgments over the years, that objective indexing might make some sense. If you can't use that type of an index, well, no, then you've mixed apples and oranges. [LB78]

SENATOR CHAMBERS: And that's all I'll ask you. Others may come. But I wanted to, at least, lay some groundwork so they can be thinking about the same thing. Thank you. [LB78]

SENATOR ASHFORD: Tom, I have one other question. Do you have a question, Pete? I'm sorry. [LB78]

SENATOR PIRSCH: No, go right ahead. [LB78]

SENATOR ASHFORD: But I just want to follow up just a bit. Clearly when we're talking about compensatory damage, we're talking about medical bills, we're talking about those costs which are identifiable to a particular accident. It would seem reasonable that a cap on those costs just must go up. [LB78]

TOM MUMGAARD: Well, I can tell you that I've seen those costs go up. [LB78]

SENATOR ASHFORD: And that if the cost of healthcare has gone up 9 percent a year over the last whatever, that those...at least we should ensure that, through this kind of legislation, that to some degree those compensatory costs are covered so that...either they're going to be covered here or they're going to be covered by some other source. And certainly we wouldn't want the individual to pay for compensatory costs that are, it would seem, that are not the result of their own fault. And let me just ask one other, before you answer this, let me just add to that. I mean, we have done some things like comparative negligence in the last 20 years that have, to some degree, also impacted the liability of subdivisions because in many times subdivisions are joined in a suit, were joined in a suit just to join them. But if you have any comment on compensatory damages, that would be... [LB78]

TOM MUMGAARD: Well, certainly the medical costs and the increase on medical costs is one of the factors that drives the desire to increase caps because that also drives the upward spiral of judgments. Now whether it's reasonable to require that to, you know, have that length, since they go up we have to put a cap up, I would say... [LB78]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
February 07, 2007

---

SENATOR ASHFORD: Well, not a total cap. I'm talking about a cap that would simply apply to medical costs, other compensatory damages that are... [LB78]

TOM MUMGAARD: Well, it might work better the other way, that you don't have medical costs but you do cap general damages. [LB78]

SENATOR ASHFORD: Well, that's sort of what I'm getting at. [LB78]

TOM MUMGAARD: I mean, that's a system used by some other states and certainly that expresses a philosophy. Again, the philosophy of Nebraska law seems to be expressed directly in the Tort Claims Act. Seems to be that the taxpayers acting through their government are expected to cover the same kind of tort damages and liability as the individual citizen, that it is fair under that system to treat the taxpayers exactly like private citizens. If that's the fact, then we have to recognize that all private citizens and their private activities have a cap. It's a practical, realistic cap. If I hit somebody with my car at the grocery store and they have \$5 million of damages and medical expenses, I can tell you they are not going to be fully compensated. So the cap just simply is a way of trying to put political subdivisions in the same kind of a practical reality as citizens. [LB78]

SENATOR ASHFORD: Tom, I absolutely agree with you. I think that's exactly the proper analysis. But clearly, today, you are trying to equalize the parties or the impact on parties. But I do think that the amount of insurance, for example, a normal person would carry goes up as well with the potential of a greater risk. [LB78]

TOM MUMGAARD: At some point, we may see, if I'm not too old, we may see me in the future sitting here and telling you, yes, it's time to increase the cap because of that. We just don't think it is. [LB78]

SENATOR ASHFORD: Well, I appreciate your comments because I think those are very candid answers and I think they do get at the public policy issues and I appreciate your comments, so thank you. Thanks, Tom. [LB78]

TOM MUMGAARD: Thank you. [LB78]

SENATOR ASHFORD: Senator McGill has joined us, from Lincoln, over here. So we're almost to everyone. Senator Lathrop will be here shortly. [LB78]

CLINT SCHUKEI: (Exhibit 1) Senator Ashford, members of the committee, I'm Clint Schukei, spelling of that name is C-l-i-n-t S-c-h-u-k-e-i. I'm a city attorney in Norfolk and I'm here in opposition to LB78. A couple of comments. First of all, as you look at this, I'm before you reminding you that not everybody is Omaha when you talk about the ability

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
February 07, 2007

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that Omaha has to deal with those kinds of judgments. The same rules apply to the smaller cities, the smaller school districts, and so on and so forth. There are limits that exist, as Tom indicated in his testimony, for instance, the 25/50 requirements on automobile insurance. When the city of Norfolk has gotten sued, we've gotten sued because of the lack of insurance, either because of the minimum amounts on automobiles or because somebody has used artificial entities, LLCs or corporations to limit their liability and then the municipalities are viewed, the government is viewed as the deep pocket. The handout that's going around, Senator, is, I'd like to say, ask and it shall be answered. [LB78]

SENATOR ASHFORD: That was fairly quick, thank you. (Laughter) [LB78]

CLINT SCHUKEI: As you can see, this is some information that was put together by the National League of Cities. It shows the range of caps that was reported from \$50,000 to \$1 million. I would note that when we look at this, we can't really just talk about tort caps because in some of these instances, where there are tort caps in amounts larger than what Nebraska has, there are immunities in place that make it virtually impossible that those tort caps will ever be reached in those other states. So when we talk about that, we talk about 2 states have limits between \$500,000 and \$1 million; 16 states have limits between \$250,000 and \$500,000; 14 states have limits less than \$250,000; 5 states are immune to the amount of the insurance purchased. So local officials basically set their own insurance amounts. There are 38 states that report specific limits below what is currently in place in Nebraska. There are 11 states that report no specific dollar limits for tort liabilities, but again, that doesn't mean that they're higher than Nebraska. It means that we have to also look at the immunities that they have in place. I would point out that since a similar survey like this was done in 2000, there's four states that have made changes. One of those, it appears as though Ohio actually reduced their limits in that time period. And some of the other ones increased, none of them increased to an amount that was in excess of the million dollars that Nebraska has. So there are consequences for these things. When we write interlocal agreements, we've got like 30 interlocal agreements with smaller communities. We're always working at trying to transfer that risk. I will tell you that many of those smaller communities have insurance that does not meet the tort limits that we already have in place. And so any further increase of that is going to further expose that. So we're opposed to the bill. [LB78]

SENATOR ASHFORD: Thanks very much. Any questions? Yes, Senator Chambers. [LB78]

SENATOR CHAMBERS: Just a couple, and they're more philosophical. When the Supreme Court was dealing with legislative redistricting, there was a time when geographical and other considerations might have come into play. But the Supreme Court wound up saying ultimately that whether you're electing senators, if you have two houses or representatives, they have to be...the reorganization or redistricting has to be

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
February 07, 2007

---

based on the principle of one person, one vote. So no matter how many cows, pigs, chickens, cities, states, counties or whatever...not states, but counties you had, you still had to base it on population. [LB78]

CLINT SCHUKEI: Correct. [LB78]

SENATOR CHAMBERS: So that would indicate that people in governmental positions represent the interests of people, not political subdivisions. [LB78]

CLINT SCHUKEI: Correct. [LB78]

SENATOR CHAMBERS: Okay. Now the arguments that I've heard from you and Mr. Mumgaard, which are made because of the job you hold and your responsibilities and duties to that political subdivision, would suggest that we should look more at what's in the interest of the political subdivisions than what's in the interest of the people whom we're to be looking after. Do you disagree with that? [LB78]

CLINT SCHUKEI: I don't disagree, but I think there's more to it than that because the political subdivisions aren't really anything but people themselves. So you're talking, on the one hand, about somebody that's been harmed and has had some damage that has resulted. [LB78]

SENATOR CHAMBERS: But in reality, a political subdivision is an existing legal entity as an entity and not the people. The city of Omaha is not the people of Omaha. The city of Omaha is the government, the structure, the departments and so forth. That's what the city of Omaha is. [LB78]

CLINT SCHUKEI: Formally, that's true. [LB78]

SENATOR CHAMBERS: There are people living there. So I want to make a distinction between the political subdivision...okay, let me ask the question differently. What city are you from? [LB78]

CLINT SCHUKEI: Norfolk. [LB78]

SENATOR CHAMBERS: Did the people of Norfolk send you down here by way of a vote or were you sent here by the city officials? [LB78]

CLINT SCHUKEI: No, we didn't have any local ballot initiative that resulted in my being here today, no. (Laughter) [LB78]

SENATOR CHAMBERS: So you were sent by the city officials? [LB78]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
February 07, 2007

---

CLINT SCHUKEI: Correct. [LB78]

SENATOR CHAMBERS: And you're not really here speaking for the people but to articulate the position that the city officials decided they would take... [LB78]

CLINT SCHUKEI: That's correct. [LB78]

SENATOR CHAMBERS: ...and have you pass on to us? [LB78]

CLINT SCHUKEI: That's correct, Senator. [LB78]

SENATOR CHAMBERS: So now I'm back to my original question. We're looking beyond the political subdivision and looking at the people. Now if a person gets hurt in Norfolk, is that person entitled to less consideration than a person that gets hurt in Omaha? [LB78]

CLINT SCHUKEI: No, but the political subdivision, in and of itself, doesn't have any opportunities to generate revenue through the services that it provides. The impetus for those things all comes from the public. I mean, without the citizens on the other side of that, there is no...effectively, there's no reason for the city if there aren't people on the other side that are represented by the city. [LB78]

SENATOR CHAMBERS: Yeah, that's irrelevant to my question. The city is able to tap into all of the citizenry by virtue of its taxing authority. Isn't that... [LB78]

CLINT SCHUKEI: Correct. [LB78]

SENATOR CHAMBERS: Okay. The populace as a whole would share the cost of making this individual whole who had been harmed as a result of a misdeed of some kind by an employee of the political subdivision. And the society as a whole is better able to make that individual whole than that individual is to make himself or herself whole with his or her resources. Would you agree with that? In other words, the idea of insurance is to spread the risk and the cost of making people whole and not letting it fall on one individual. [LB78]

CLINT SCHUKEI: That's right, but that individual could also buy insurance that would apply to their situation as well. [LB78]

SENATOR CHAMBERS: But this is where the person is without fault and it was the city employee that did it. I'm just trying to get at some general principle here. [LB78]

CLINT SCHUKEI: I understand, I appreciate that. [LB78]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
February 07, 2007

---

SENATOR CHAMBERS: Now if you happen to have been injured...or let me make it better or different. If you had a child who was injured and made a quadriplegic, do you think you'd feel differently if, when you went to have something done, the city said, well, we have a cap and we're not going to give you any more than this. And the condition resulted from the gross negligence or recklessness of an employee. Would you feel the same way that you feel sitting there, being paid by the city to tell us what you're telling us? [LB78]

CLINT SCHUKEI: I would have an emotional attachment to that. I understand exactly what you're saying. My feelings would not be the same. The facts that I'm seeking to articulate would be the same and the consequences. Obviously, I'd be closer to that injured party and I would have those particular feelings that go with that. And without regard to whether it was my child or anybody else's, the effect on the citizens of that particular political subdivision would be the same. [LB78]

SENATOR CHAMBERS: But we do feel a little greater? [LB78]

CLINT SCHUKEI: Absolutely. [LB78]

SENATOR CHAMBERS: Okay. Our role as policymakers is different from your role as a city attorney. Would you agree with that? [LB78]

CLINT SCHUKEI: Yes. [LB78]

SENATOR CHAMBERS: Okay. So we take into consideration what does happen to a child and to the family when the child or an adult or anybody else suffers a catastrophic injury and lacks the wherewithal to make himself or herself whole. We have to keep in mind that these are not people who did something wrong. So would you agree or disagree, so you can answer either way you want to, that this cap has been in place without modification for too long and that it ought to be increased to some extent, whatever that might turn out to be? [LB78]

CLINT SCHUKEI: I believe the cap has been in place since it was put in place. I think that if you look at...you are the policymakers, I think if you look at the information we handed out about what other legislatures, what other states have done in regard to this, I understand that different policymakers can look at that and can come to different conclusions, as is evidenced by the information we handed out and everything that everybody else has had. I think it's important to note that, as it relates to all the other legislatures that have dealt with this, this is not one of the things where Nebraska is 48 or 49 in regard to that. We've already got more in place for the victim in that weighing process than what the vast, vast, vast majority of the states have. [LB78]

SENATOR CHAMBERS: But the way is not based on ethical principles or principles of



Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
February 07, 2007

---

equity and justice, but by comparing to see which one comes closer to being a Scrooge or a Midas. And if Scrooge is over here and Scrooge Junior is over here and Nebraska falls between Scrooge and Scrooge Junior therefore Nebraska is not that bad, is not the weighing that I will do. I don't care what they do in Iowa. I don't care what they do in California or any place else. I am a lawmaker in Nebraska. [LB78]

CLINT SCHUKEI: I understand that. [LB78]

SENATOR CHAMBERS: I have to look at what is happening to the people here. And because other states may have been descended upon, as far as their legislature, by powerful lobbyists who could sway those legislators to do things that are not in the best interest of their citizens has no impact on me at all. What I'm trying to get from those of you who speak against this is a recognition that there should be some modification upward of this cap, which has never been modified since it was put in place. [LB78]

CLINT SCHUKEI: Well, I understand that. And the thing that makes me hesitant in regard to that, the thing that's going through my mind, Senator, is the fact that in those instances where we deal with claims, you know, the fact of the matter is I think that the Legislature has already provided a policy that already puts in place something, that if my child is injured, if any citizen in this state is injured, chances are they're going to be better taken care of and they're going to have better opportunities for recovery if they were injured as a result of the negligence of a political subdivision than if they were injured by one of those--I don't know, what's the number--20 percent or 30 percent of the people in Nebraska that don't have insurance when they drive their cars. [LB78]

SENATOR CHAMBERS: That's irrelevant. That's irrelevant. The city is not a private individual. The city has taxing authority. The city can spread the risk among everybody in that societal unit. So we have to hold them to a different standard. I think the most preposterous thing is to try to equate a city with a private person and say that based on what the private person does is what you ought to require of the city and no more. The political subdivision can be compelled to put in place this higher cap level. Isn't that true? [LB78]

CLINT SCHUKEI: Absolutely. [LB78]

SENATOR CHAMBERS: So if we did, are you telling me that your city would go bankrupt? [LB78]

CLINT SCHUKEI: Bankrupt, I don't know. I mean, you could have a larger tort cap in place and it may not affect us for 50 years. It may affect us the day after it came into play. [LB78]

SENATOR CHAMBERS: I agree. [LB78]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
February 07, 2007

---

CLINT SCHUKEI: And obviously there's consequences and give and take in regard to that. I understand what you're saying. I really can't answer that question. I mean... [LB78]

SENATOR CHAMBERS: If we were going to increase it, what percentage increase should we use to be reasonable from where you sit, Scrooge? (Laughter) [LB78]

CLINT SCHUKEI: Well, I did get in the spirit for that when I drove down here in the snow, so that's okay. (Laughter) You know, I think that there's plenty of rational information that indicates that there's not a policy necessity that indicates that there needs to be an increase. [LB78]

SENATOR CHAMBERS: At all? [LB78]

CLINT SCHUKEI: I understand that various people could look at that and come to a different conclusion. [LB78]

SENATOR CHAMBERS: But yours is that it doesn't need to be increased at all? [LB78]

CLINT SCHUKEI: I'm saying that that is a reasonable, rational position for this body to take. [LB78]

SENATOR CHAMBERS: Is it equally rational for us to feel it should be increased? [LB78]

CLINT SCHUKEI: I think that's certainly within your prerogative to do that. I think that there is more at play than just the...there are other consequences and other trade-offs just beyond the damages that come or that are paid to an injured party. [LB78]

SENATOR CHAMBERS: My final question, you're too young to remember this. [LB78]

CLINT SCHUKEI: Thank you. (Laughter) [LB78]

SENATOR CHAMBERS: You may have heard about it. You don't know what I'm going to say, yet. (Laugh) Whatever it is. [LB78]

CLINT SCHUKEI: Too young, thank you anyway. [LB78]

SENATOR CHAMBERS: In the old days they used to have radio serials and one was called "Young Widder Brown." Had you ever heard that? [LB78]

CLINT SCHUKEI: No. [LB78]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
February 07, 2007

---

SENATOR CHAMBERS: Okay, well, she was a poor widow. That's what they would say now. You've read the comic strip "Little Orphan Annie." [LB78]

CLINT SCHUKEI: Yes. [LB78]

SENATOR CHAMBERS: And you know that she has a rich grandfather or something named Daddy Warbucks. [LB78]

CLINT SCHUKEI: Okay. (Laughter) [LB78]

SENATOR CHAMBERS: Okay. Now, if Little Orphan Annie didn't have a rich Daddy Warbucks and Little Orphan Annie is hurt and Daddy Warbucks is over here and he gets hurt, and we as policymakers must formulate a policy, based on whose circumstances should we build that policy, Little Orphan Annie--and she's an orphan, by definition--or Daddy Warbucks, who has nothing but bucks? They could call him Daddy Moneybags. [LB78]

CLINT SCHUKEI: I didn't see that comic strip. (Laugh) I think that you'd have to weigh those and I certainly recognize that different...obviously, you're the policymaker, I'm not. And I also recognize that different policymakers could view that different and come to a different conclusion. [LB78]

SENATOR CHAMBERS: Okay, that's all I had. Thank you very much. [LB78]

CLINT SCHUKEI: Thank you. [LB78]

SENATOR ASHFORD: Thanks, Clint. Any other questions for Clint? Senator Lathrop has joined us, welcome. [LB78]

CLINT SCHUKEI: Thank you. [LB78]

SENATOR ASHFORD: How many other opponents do we have? Two? Okay. [LB78]

BILL KOSTNER: Good afternoon. My name is Bill Kostner and I'm the risk manager for the city of Lincoln. That's Kostner, K-o-s-t-n-e-r. For the record, I'm also president-elect of the Public Risk Management Association and that's an association of risk management professionals that work for public entities. I wanted to encourage you to vote against LB78. As you know, the bill raises the Tort Claims Act from \$1 million/\$5 million, to \$3 million/\$12 million. I oppose this bill for a number of reasons. One, I really don't believe that higher limits are needed. I've been with the city of Lincoln for 12 years. I can't recall any claim settlements that we've settled above \$1 million per occurrence. Most claims received have not reached that high a level and they've also not neared the

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
February 07, 2007

---

million dollar mark. I think as I listen to my colleagues, I would agree that most claims settle at a very low level, this would include the auto liability, general liability or police pursuit claims that would fall under the Political Subdivision Tort Claims Act. Risk management processes all city claims and I can say with certainty that this has not been an issue. Second reason would be setting higher limits will create a financial burden for taxpayers. The city of Lincoln presently purchases insurance above a self-insured retention to a limit of \$5 million. To increase that limit to \$12 million, the city would have to increase our self-insurance and insurance costs and that would ultimately be paid by our residents. This would create an unnecessary financial burden that would ultimately fall upon taxpayers. Third reason, higher limits, higher Tort Claims Act limits are not the norm. You've heard that from some of my colleagues here. I can tell you, for example, Missouri is \$300,000 per person, \$2 million per occurrence is their tort claims limit; Florida is \$100,000 per person, \$200,000 per accident; Utah, \$500,000 per person, \$1 million per occurrence; Minnesota, \$300,000 per person, \$1 million per occurrence; and Colorado, \$150,000 per person, \$600,000 per occurrence. Therefore, I want to recommend that the committee not advance LB78. This bill is not needed, creates an additional financial burden to our residents, and is not the norm in our surrounding states. Thank you. [LB78]

SENATOR ASHFORD: Thanks, Bill. Yes, Steve. [LB78]

SENATOR LATHROP: I have a few questions. if I can. [LB78]

BILL KOSTNER: Yes, sir. [LB78]

SENATOR LATHROP: You are with the city of Lincoln, did you say? [LB78]

BILL KOSTNER: Yes, I am. [LB78]

SENATOR LATHROP: Okay, the city of Lincoln. And you said that your settlements are not approaching the \$1 million mark? [LB78]

BILL KOSTNER: Yes. [LB78]

SENATOR LATHROP: But if we increase the limits, we're going to increase the burden on the taxpayers of the city of Lincoln? [LB78]

BILL KOSTNER: Yes. [LB78]

SENATOR LATHROP: I want to question the logic of that statement. If you're not getting to \$1 million with your settlements, what's raising the limits going to do to it? Because the limits don't establish the value of your case or the claim and only establishes the maximum amount you'll pay. [LB78]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
February 07, 2007

---

BILL KOSTNER : Sure. I think what we want to try to be is good financial stewards of our community's dollars. And therefore, when you put together some kind of a financing plan for insurance or self-insurance, you put that money aside, you plan for it, you build it into your actuarial statements. And because of that, we'd either have to cover that contingency with dollars or insurance in the event that we would have that contingency. If it came up, you know, if something came up and it was unplanned for and really we had not put that money aside, where would it come from? It's something we have to build into some of our financial planning and budgeting. [LB78]

SENATOR LATHROP: Let me go back to the question. The problem I have with what you've told me is, is that you've said we never pay and haven't paid out a million dollars. [LB78]

BILL KOSTNER: Sure. [LB78]

SENATOR LATHROP: So this million dollar limit is not something people get to, but we're going to have a big problem if we have to insure people for \$2 million more... [LB78]

BILL KOSTNER: Sure. [LB78]

SENATOR LATHROP: ...that we never have to pay out anyway. [LB78]

BILL KOSTNER: I guess my feeling... [LB78]

SENATOR LATHROP: Don't you see the inconsistency in your statement? [LB78]

BILL KOSTNER: Well, the limit is \$1 million right now and I'm saying we're not at \$900,000 in settlements or \$800,000. I guess my belief would be that if you raise that cap up, I think that there would be additional care and treatment and I think that settlements would probably result in a larger settlement coming down. Now all I can say is, as a reasonable steward of our city's dollars, I would have to plan on that contingency. [LB78]

SENATOR LATHROP: Okay, but what you're suggesting now is that there may be the need and you'll notice it as soon as the limits are available to the claimant? [LB78]

BILL KOSTNER: I guess what I would point out, Senator, is we try to be reasonable and I read to you a number of states that have much lower limits. I think we have a very fair and reasonable level of coverage in the state of Nebraska. [LB78]

SENATOR LATHROP: Mr. Kostner, I want to ask you a question. If you have somebody

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
February 07, 2007

---

who gets hurt in the city of Lincoln through one of those orange trucks plowing snow and he hits somebody, they hit a banker. It's somebody who is now going to require, has a brain injury, is going to require \$500,000...let's not use a banker. (Laughter) Let's take somebody who doesn't have insurance. [LB78]

BILL KOSTNER: Okay. [LB78]

SENATOR LATHROP: The bankers have had a rough couple of weeks. (Laughter) Let's take somebody who doesn't have health insurance. [LB78]

SENATOR ASHFORD: Choose a lawyer. (Laughter) Hit a lawyer. [LB78]

SENATOR LATHROP: I want somebody without health insurance. (Laughter) Let me make my point. I want to assume somebody, because we talk about unintended consequences down here when we're making policy and I want to talk about one that's maybe not addressed, and perhaps was addressed before I got here but perhaps not. If you have somebody who's going to incur \$500,000 worth of care and they're uninsured, you pay your \$1 million and where do those people go? [LB78]

BILL KOSTNER: I could only speculate where they could go, sir. [LB78]

SENATOR LATHROP: Where would you speculate that they're going for their care? [LB78]

BILL KOSTNER: I guess I would assume...it depends on the injury, depends where they're at. I'm not sure what you're getting at, sir. [LB78]

SENATOR LATHROP: Well, my hypothetical has them getting \$500,000 worth of care a year and you pay them their \$1 million and now where do they go? Who pays for their care after you pay your \$1 million? [LB78]

BILL KOSTNER: Sir, all I can say is that I think, in trying to be reasonable, this could happen any day if someone would perhaps steal a car outside and run into one of us as we're exiting this building. The same thing could happen and there would be no insurance behind it. In our case in our great state, we do have insurance and it is at a very high level. [LB78]

SENATOR LATHROP: First of all, what we're talking about with the subdivisions is a limit for what they have to pay for careless conduct, are we not? [LB78]

BILL KOSTNER: I don't necessarily think that's true, sir. [LB78]

SENATOR LATHROP: Wait a minute, wait a minute. [LB78]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
February 07, 2007

---

BILL KOSTNER: I think sometimes there's legal liability without carelessness. I think... [LB78]

SENATOR LATHROP: For the city? Okay, outside of a police chase circumstance, generally we're talking about liability that's related to careless conduct, are we not? [LB78]

BILL KOSTNER: Most cases, I suppose, yes. [LB78]

SENATOR LATHROP: Would you agree with me on that much? And would you agree that after you pay your \$1 million, these people now become the liability of the Medicaid system, typically? [LB78]

BILL KOSTNER: That would probably be one place they could go, yes. [LB78]

SENATOR LATHROP: Is there another place you expect them to go, if they don't have insurance? [LB78]

BILL KOSTNER: It depends on the situation, sir. It would probably vary if they had a family they could come back to, you know, the extent of their medical condition. I agree with you to an extent, yes. [LB78]

SENATOR LATHROP: All right, so the people who have claims that exceed the cap, whatever we choose to let that be, are going to, if they're uninsured, to have to rely upon either Medicare or Medicaid for their care. [LB78]

BILL KOSTNER: Sure, sure. [LB78]

SENATOR LATHROP: That's all the questions I have for you. [LB78]

SENATOR ASHFORD: Any other...I have...do you want to go first? You'll probably ask mine. [LB78]

SENATOR CHAMBERS: Will you pronounce your name for me so I get it correct? [LB78]

BILL KOSTNER: Sure, it's Kostner. [LB78]

SENATOR CHAMBERS: Oh, Kostner, okay. Like Kevin? [LB78]

BILL KOSTNER: Just like Kevin. (Laughter) Spelled a little bit differently, sir. [LB78]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
February 07, 2007

---

SENATOR CHAMBERS: Right. Mr. Kostner, if a person is injured under the circumstance we're describing and the amount of available, the maximum does not cover that injury, whatever means are available, the injured person is going to have to take care of that remaining injury treatment without aid from the city, correct? [LB78]

BILL KOSTNER: Yes, sir. [LB78]

SENATOR CHAMBERS: So that person then in a sense is being asked to subsidize the negligence of the city employee. Isn't that true? Because the individual has to pay for the results and the harm done by that negligence. So the injured party is subsidizing the negligence of that employee. Isn't that true? You may not see it like that, but in practical terms, isn't that what's happening? [LB78]

BILL KOSTNER: Well, I guess what I would say, Senator, is that I read to you a number of states where it's even much lower... [LB78]

SENATOR CHAMBERS: Let me get you away from that. If there are six men, there are seven men on this block, six are abusing their spouse, make the seventh one therefore be justified in abusing his spouse also because the other six are doing it? [LB78]

BILL KOSTNER: Certainly not. [LB78]

SENATOR CHAMBERS: Now you can tell me all you want to about how these other states abuse and disregard their citizens, but it cuts no ice with me at all, so save that for the others it might impress, then we don't have to go through what I'm going through now. Because I'm not sympathetic to any of that when these tightfisted people come here as employees, carrying water, and trying to make me think that I should suspend my judgment just because they've got some idiots in other states. And it really is an insult to my intelligence to tell me that because the citizens in other states are being treated badly, that I, having taken certain oaths, should treat these citizens badly. So I don't even want to hear what the other states are doing. I want us to talk to each other. Okay. Do you agree, because I'm not sure if I got an answer, that this person, whose injuries would cost more to be treated than what the city will pay under its maximum, is subsidizing, in fact, the negligence of that employee who caused the injury? [LB78]

BILL KOSTNER: I guess what I would say, Senator, is I don't think it's necessarily subsidizing the injury... [LB78]

SENATOR CHAMBERS: The negligence, I said. [LB78]

BILL KOSTNER: I really don't think that that's accurate. I think it's a matter that, in some cases, life isn't fair. It could happen in many other situations as well. [LB78]



Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
February 07, 2007

---

SENATOR CHAMBERS: Okay. I don't want to...I wanted to get an answer and I got it. You said that if we increase this cap by the amount in this bill, it would put an additional burden on the taxpayers of Lincoln. [LB78]

BILL KOSTNER: Right. [LB78]

SENATOR CHAMBERS: Now how much of a burden? Because you know about actuarial activities and you're the risk manager, so you know all these things. You can answer just like that. [LB78]

BILL KOSTNER: Sure. [LB78]

SENATOR CHAMBERS: How much will the tax be increased for each citizen of Lincoln, if we raise this cap? [LB78]

BILL KOSTNER: I can't give you a figure on that, Senator. [LB78]

SENATOR CHAMBERS: Would it be more than a dollar a year? [LB78]

BILL KOSTNER: It would be speculation. [LB78]

SENATOR CHAMBERS: Speculate with me. [LB78]

BILL KOSTNER: I would say that it's more difficult. Maybe one of the things you may consider is going above \$10 million, it becomes much more difficult to get insurance. You get into some of the reinsurance markets, you're putting aside larger amounts of dollars. And I guess, you know, as we try to be good stewards of a community... [LB78]

SENATOR CHAMBERS: But you're not answering my question. [LB78]

BILL KOSTNER: Well, I am, sir. I'm trying to... [LB78]

SENATOR CHAMBERS: Well, then if you can't answer, just tell me. You cannot tell me how much... [LB78]

BILL KOSTNER: I can't give you a figure, no. That would be speculation. [LB78]

SENATOR CHAMBERS: Then how can you give me the contrary and say what a burden it's going to put on the citizens, if you have no idea? [LB78]

BILL KOSTNER: I can tell you that it would be substantial in that... [LB78]

SENATOR CHAMBERS: What do you mean by substantial? [LB78]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
February 07, 2007

---

BILL KOSTNER: I guess I would say that, in some ways, our thinking would be that... [LB78]

SENATOR CHAMBERS: Not in some ways. You used the word "substantial." [LB78]

BILL KOSTNER: Yes, sir. [LB78]

SENATOR CHAMBERS: What do you mean by substantial? Not what I might mean. I'm using your word. [LB78]

BILL KOSTNER: Right, right. [LB78]

SENATOR CHAMBERS: So what would substantial be? [LB78]

BILL KOSTNER: I think it would be much more substantial. We pay approximately \$5 million a year for insurance at this point for all of our insurance and self-insurance coverages. I guess I'm not sure what that figure would be, but it would be much more than \$5 million. [LB78]

SENATOR CHAMBERS: Well, let's take the \$5 million. That's how much you actually pay for insurance, you're telling me? [LB78]

BILL KOSTNER: That's what we put aside in self-insurance and insurance. [LB78]

SENATOR CHAMBERS: How much do you actually pay in insurance premiums? [LB78]

BILL KOSTNER: I don't have that figure handy, Senator. [LB78]

SENATOR CHAMBERS: Do you deal with that? [LB78]

BILL KOSTNER: I do, yes. [LB78]

SENATOR CHAMBERS: When was the last time you dealt with it? [LB78]

BILL KOSTNER: We prepare an insurance budget every year. [LB78]

SENATOR CHAMBERS: But you forgot what the amount of the premiums are? [LB78]

BILL KOSTNER: I'm sorry, Senator. I didn't come prepared for that. I didn't know that you'd be asking me that question. I'm trying to... [LB78]

SENATOR CHAMBERS: I want to be fair with you. [LB78]

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Transcriber's Office

Judiciary Committee  
February 07, 2007

---

BILL KOSTNER: Sure. [LB78]

SENATOR CHAMBERS: Let me ask you questions you might have some answers to. [LB78]

BILL KOSTNER: Certainly. [LB78]

SENATOR CHAMBERS: How much tax do you think there is per capita on those who pay taxes in Lincoln in order to set aside the amount that you set aside for self-insurance and what you might pay in premiums? [LB78]

BILL KOSTNER: I really couldn't say. [LB78]

SENATOR CHAMBERS: Okay. If a person is paying \$10 a year in tax now, would it raise that person's tax by 10 percent so now that person is paying \$11 instead of \$10? Would it raise each person that much? [LB78]

BILL KOSTNER: It might raise taxes initially, depending on how we structure that amount of money... [LB78]

SENATOR CHAMBERS: How much does a penny in sales tax bring into Lincoln? [LB78]

BILL KOSTNER: I'm not sure, Senator. [LB78]

SENATOR CHAMBERS: Okay, you probably don't deal with that part of it? [LB78]

BILL KOSTNER: I really don't. [LB78]

SENATOR CHAMBERS: Okay, let me go to something else. I don't want to hold on to what you don't know the answer to. If we do raise this cap, what will happen to the city of Lincoln? [LB78]

BILL KOSTNER: I think that there would be money spent that could be better spent for development and for getting additional business into the area. [LB78]

SENATOR CHAMBERS: Isn't that speculative? Isn't all that speculative? [LB78]

BILL KOSTNER: I think it is and I think somewhat though it's an opinion of the use of dollars and funding and... [LB78]

SENATOR CHAMBERS: Okay, that's all I'll ask you, Mr. Kostner, because I don't want

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Transcriber's Office

Judiciary Committee  
February 07, 2007

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to be unfair. But next time, if you come to this committee and I'm still on it, be better prepared. Join the Boy Scouts or at least listen to their motto. Because you need to expect anything here when we're talking about such a serious issue and the city sent you to discuss this specific issue. It seems to me, and I'm not an actuary, but it seems to me, as an ordinary run-of-the-mill garden-variety Nebraska citizen doing the best I can with what I have to work with, having been educated at OPS--which is very efficient in education--it seems to me that if I were going to go to a legislative committee and speak against raising a cap, as this bill suggests doing, I would prepare myself to answer the types of questions that I've asked you. So just in general, without...what kind of questions did you come here prepared to answer? [LB78]

BILL KOSTNER: Well, Senator, I guess, as you know, in my capacity with the city of Lincoln we handle insurance and claims. And I came prepared to tell you about the types of claims that we are settling and... [LB78]

SENATOR CHAMBERS: But you don't even know how much your premiums are. [LB78]

BILL KOSTNER: ...also am prepared to tell you that there would be some fair costs, depending upon how we structured insurance for this or self-insurance. [LB78]

SENATOR CHAMBERS: Well, let me ask you this... [LB78]

BILL KOSTNER: Twelve million dollars is not... [LB78]

SENATOR CHAMBERS: Let me ask you this. [LB78]

BILL KOSTNER: ...is a very large sum of money. [LB78]

SENATOR CHAMBERS: Okay, Mr. Kostner, let me ask you this, because you take a long time and when you get through then I'm not enlightened any more than I was. That's why I have to ask another question. How much is Lincoln insured for? How much is the value of their policy or whatever term you use to describe the amount of insurance Lincoln has? [LB78]

BILL KOSTNER: Sure. I mentioned earlier we have up to \$5 million, which is the tort claim limit, yes. [LB78]

SENATOR CHAMBERS: But then how much do you have in this self-insurance fund? [LB78]

BILL KOSTNER: We also put aside dollars in self-insurance because... [LB78]

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Transcriber's Office

Judiciary Committee  
February 07, 2007

---

SENATOR CHAMBERS: How much? [LB78]

BILL KOSTNER: ...when you put together a plan for insurance, there is usually some monies that you pay up-front. And that's... [LB78]

SENATOR CHAMBERS: How much is involved? [LB78]

BILL KOSTNER: It varies. We have about... [LB78]

SENATOR CHAMBERS: Well, for this year. [LB78]

BILL KOSTNER: ...seven, eight funds, so I really... [LB78]

SENATOR CHAMBERS: Do you have a self-insurance fund? [LB78]

BILL KOSTNER: Yes, sir. [LB78]

SENATOR CHAMBERS: Do you know how much is in that self-insurance fund? [LB78]

BILL KOSTNER: It's not one fund, there's a number of funds... [LB78]

SENATOR CHAMBERS: Do you know how much is in that pot when you total up all of the different programs that go into that fund? [LB78]

BILL KOSTNER: I guess I would say perhaps a few million dollars. [LB78]

SENATOR CHAMBERS: A few? [LB78]

BILL KOSTNER: A few million dollars. [LB78]

SENATOR CHAMBERS: Is few more than three? [LB78]

BILL KOSTNER: Well, I'm not sure on the figures, Senator. I guess I would say... [LB78]

SENATOR CHAMBERS: Okay, so you don't know the answer to that one either. [LB78]

BILL KOSTNER: ...probably \$2 million to \$3 million there. [LB78]

SENATOR CHAMBERS: You don't know the answer to that one either. [LB78]

BILL KOSTNER: I guess I would say \$2 million or \$3 million, something like that. [LB78]

SENATOR CHAMBERS: But you're not sure? [LB78]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
February 07, 2007

---

BILL KOSTNER: I don't have an exact amount and... [LB78]

SENATOR CHAMBERS: Could it be \$1 million or \$5 million? [LB78]

BILL KOSTNER: It's not. It's somewhere in between those, sir. [LB78]

SENATOR CHAMBERS: Okay, thank you. [LB78]

SENATOR ASHFORD: Any other questions? Let me...on all these immunity bills that, we've got lots of them, let me tell you what my concern is and then obviously everybody on the committee has their own view. But my concern is that there is unquestionably people who are not going to be covered by these limits. And it may be, as was suggested by Clint, in Norfolk it doesn't happen very often and in Omaha maybe once or twice or whatever. We have an obligation as a state, whether or not the cities can do this, and it may be...what's surprising to me--and I remember we discussed this before when I was here 12 years ago and it's still not resolved, 20 years ago and it's still not resolved--is the state, in my view the state has an obligation. If the cities can't do it, if the cities cannot take care of that one or two cases that exceeds the \$1 million, then the state has an obligation through some mechanism, whether it's a pooled, some sort of pooled fund, which is what I always supported before, the idea of the cities pooling together and funding those few cases where there is an excessive damage claim. And I think that, from my perspective I think this committee needs to look at, this year, now, something that will address that. Because it's a very real problem. And I grant you, it is not all the time and it occurs rarely. But it does occur, like the Seward case, which is a tragedy. The fact that the state of Nebraska did not compensate those children, the 15 claims, fully is amazing to me that the state has an obligation to cover that. And it may be that the balancing of the city's responsibility versus the taxpayers' ability causes the need for the cap. And I'm not debating that because caps are the prevalent practice. But I do think that the state does have an obligation. And so as we look at all of these bills, I certainly am going to press for something that compensates those citizens who are innocent victims. We cannot have innocent Nebraskans running around uncompensated. It's just not, it's not fair. And that's my philosophy on all this. And it doesn't really address your points necessarily because I understand the city's points, I understand the restrictions on the city. But we as a state cannot let that happen. So as we look at all these bills, I think from my perspective, I'd like to see something happen so that every year we don't have all these bills brought all the time, that we solve the problem. We're a solving-the-problem committee. (Laughter) Don't you think? So I appreciate your testimony, your candor, but that's where I'm going in my thinking. So anybody else wants to comment on that, I would be happy to hear it. (Laugh) Any other opponents? [LB78]

ELAINE MENZEL: (Exhibits 2 and 3) For the record, my name is Elaine Menzel,

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Transcriber's Office

Judiciary Committee  
February 07, 2007

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M-e-n-z-e-l, and I'm appearing today on behalf of Nebraska Association of County Officials. I'm in opposition to LB78 that increases the liability limits for the political subdivisions. Although the tort caps of \$1 million per individual and \$5 million per occurrence have not been increased since 1985, Nebraska was actually very liberal in setting its limits at that time. I'm not sure what the figures of the other states were then, but after researching the various limits in the states currently, I can tell you that Nebraska has still one of the higher tort limits for its political subdivisions in the nation and the Midwest, as you've currently heard previously. As you will see from the chart I'm providing you, only one of the states--which is Iowa--has no limit for its political subdivisions. But each of the nine others has individual limits per person or occurrence or to the extent of insurance coverage. Any time you increase the tort limits, then the potential liability or exposure for all political subdivisions, such as county, is increased. Additionally, the premiums will be increased. Currently, insurers are mandating increased deductibles, policy exclusions, and sublimits for certain exposures. The challenges with settling or adjusting tort limits is to find an equitable balance between the needs of accident victims and the resources of local government. The public policy challenge is to achieve reasonable protection for both the persons who might suffer injury due to negligence on the part of those local governments and the taxpayers who ultimately pay local government bills, including tort judgments. The question then is how to strike that balance between what victims can receive and what the government, which is the taxpayers in other words, should pay. Our study shows that Nebraska appears to be recognizing both the current tort limits for political subdivisions. For these reasons, I urge you to indefinitely postpone LB78. And I've also provided to you a letter from Lancaster County, which has taken opposition to LB78 and LB448. They were unable to be here. [LB78]

SENATOR ASHFORD: Okay. Any questions? Seeing none...do I see none? I do see none. (Laughter) Any neutral...oh, opponents? You crept in because you didn't raise your hand earlier. Any other opponents? Any neutral ones, do we have any neutral testifiers? Okay, let's proceed. [LB78]

CHRIS DIBBERN: Senator Ashford and members of the committee, my name is Chris Dibbern, and that's C-h-r-i-s D-i-b-b-e-r-n, and I'm the general counsel for the Nebraska Municipal Power Pool but I'm here today on behalf of the Nebraska Power Association. And I researched, on Casemaker this week, the Political Subdivision Tort Claims Act and found there were 627 dockets or cases that have been in front of the Nebraska Supreme Court in the past three years. And I think I can speak for many people that nobody enjoys testifying up here against this bill. But as you've heard, the Tort Claims Act is the exclusive means by which tort claims may be maintained against a political subdivision or their employers. Our mission with the Power Association is low-cost, reliable energy. And we are generally political subdivisions and we don't have taxing authority. Political subdivisions, like public power providers, have a great deal of exposure and cost regarding power and services. Our exposure is 24/7, every day of

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
February 07, 2007

---

the year. I know you're balancing policy concerns with cost, exposure, and public funds, and that's an important role that this committee has. LB78 is moving up the costs, and I hate to use this word, significantly. We also buy insurance. Getting the insurance sometimes is a problem. We went to Lloyd's of London to get our insurance for our liability and our property on a small wind farm. Our tort claims don't always have direct cost in that we're sued under the Tort Claims Act, but then our insurance policy's premiums go up. We insure for \$5 million and our insurance costs are about \$90,000 for the Nebraska Municipal Power Pool. And just as a summary comment, I've heard words like gross and wanton disregard and careless. Well, the statute says that it is caused by any negligent or wrongful act or omission by the employee or the political subdivision while acting in the scope of his or her office or employment. So I don't want it to be out there that it's always gross, wanton disregard, careless. It's any negligent act or omission. Any questions? [LB78]

SENATOR ASHFORD: Thank you. Okay, Virgil. We have five more bills so all of you others that are testifying on other bills, if we could just talk about combining testimony, if it's not adding new things, that would be helpful. Yes, go ahead. [LB78]

VIRGIL HORNE: Senator Ashford, my name is Virgil Horne, V-i-r-g-i-l H-o-r-n-e. I have one very specific thing to this bill in a neutral capacity. As the individual who coordinates the use of the Lincoln Public Schools facilities by others, we currently require \$1 million coverage of insurance by anyone who uses our facilities--that's churches, the Boy Scout Council, the chamber, anybody who uses--because of the potential for liability in our case. And if this bill were to pass, we would just have to increase that requirement. And that's all I wanted to let the committee know and... [LB78]

SENATOR ASHFORD: That is new information, Virgil. That's new information. [LB78]

VIRGIL HORNE: ...we would have the same comments on other bills and we will not come up again. [LB78]

SENATOR ASHFORD: All right. Yes, Senator. [LB78]

SENATOR CHAMBERS: Mr. Horne, having gotten my compliment of your flesh the other day, I don't have any questions of you. (Laughter) [LB78]

VIRGIL HORNE: I certainly appreciate that. [LB78]

SENATOR ASHFORD: All right, thanks for your testimony. Any other questions? Senator Schimek. [LB78]

SENATOR SCHIMEK: Actually, I wanted to be before Senator Chambers so he couldn't pick on Virgil today. (Laughter) No, I just had one quick question, Virgil. Would that



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Transcriber's Office

Judiciary Committee  
February 07, 2007

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preclude some organizations then from using the facilities, do you think? [LB78]

VIRGIL HORNE: Possibly, yes, because they do have concerns about the cost of insurance. [LB78]

SENATOR SCHIMEK: Thank you. [LB78]

SENATOR ASHFORD: Thanks. [LB78]

VIRGIL HORNE: Thank you. [LB78]

SENATOR ASHFORD: Thanks, Virgil. All right, moving right along, LB228. And you've waived, haven't you? Or John is coming. All right, Senator Synowiecki is on his way, "Snickee." (Laughter) He was here and then he left. Let's see, LB228. How many testifiers do we have in favor of LB228? Opponents? Okay, that's not very many. Senator? [LB78 LB228]

SENATOR SYNOWIECKI: Senator Ashford, Mr. Chairman, members of the committee, my name is John Synowiecki. I represent District 7 in the Legislature. Today I represent or bring to you LB228, a bill that repeals the guest statutes. Prior to 1981, a passenger in a motor vehicle injured through the negligence of the driver could not recover damages for his or her injuries unless the driver was found to be guilty of gross negligence. This was known as the guest statute. In 1981, the Legislature passed LB54, which amended the guest statute so that it was applicable only to those related to the driver within the second degree by blood or marriage. At the time, it was argued that car insurance rates would increase dramatically because of this change. In fact, in 20 years, there has not been a rate increase based upon this change. LB228 would repeal this last vestige of the guest statute. There will be those that will follow me that will give you some actual cases that have resulted in unfair outcomes. They should also be able to answer any technical questions for you relative to LB228. I want to thank you, Mr. Chairman and members of the committee, for your consideration. [LB228]

SENATOR LATHROP: Thank you, Senator Synowiecki. Are there any questions for Senator Synowiecki? [LB228]

SENATOR CHAMBERS: Not a question, just a comment. Remember I gave you immunity on the floor on that other bill that you had the other day, if you went along with my amendment? [LB228]

SENATOR SYNOWIECKI: You gave me...what, immunity? (Laughter) [LB228]

SENATOR CHAMBERS: As far as letting your bill go, if we agreed. [LB228]

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Transcriber's Office

Judiciary Committee  
February 07, 2007

---

SENATOR SYNOWIECKI: Yeah. [LB228]

SENATOR CHAMBERS: Well, I just want to let you know that immunity carries over to today. [LB228]

SENATOR SYNOWIECKI: Thank you, Senator Chambers. (Laughter) [LB228]

SENATOR CHAMBERS: To you. Okay. [LB228]

SENATOR LATHROP: All right, nobody else with any questions? Thank you very much. Do we have proponents? [LB228]

CHRISTOPHER WELSH: Good afternoon, members of the Judiciary Committee. My name is Christopher Welsh, W-e-l-s-h, and I'm speaking on behalf of the Nebraska Association of Trial Lawyers. As the senator said, this guest statute was amended back in 1981 and it was a compromise between the Legislature and the insurance industry. And what they did was, they said it's not going to apply to all guests, only your family members. And one of the things that's happened since 1981, the makeup of the family in Nebraska, in all states, has changed. You have stepchildren, you have families that live, two families under the same roof as if they are one. And in that...if you apply this law to that, if you have a man and a woman who each have two children and they're driving down the road and dad gets in an accident, his children have no right to receive any compensation where the woman's, he's living with, children would. It's just unfair. The last time the Supreme Court dealt with this issue was just recently, in 2006, and the court upheld the constitutionality of the statute four to three. But one of the things that the court talked about is that the statute is far too gross and overinclusive to be justified since it bars the great majority of valid suits along with the rare fraudulent claim. The court went on, the dissent went on to say that the guest statute's classification system presumes all related drivers and passengers will conclude a negligence action for damages caused by the driver's disregard the procedural safeguards already set up in our judicial system. The statute itself does not serve to prevent any actual collusion. But let's talk about what other states around Nebraska are doing. Iowa, guest statute was held unconstitutional; Kansas, the guest statute was held unconstitutional; Missouri has never had a guest statute; Wyoming, statute was declared unconstitutional; South Dakota, statute was declared unconstitutional; Colorado, it was repealed; Minnesota never had a statute. Currently right now, Nebraska is among only Alabama, Illinois, and Indiana that has a guest statute in any way, shape or form. This statute is just unfair and it does not apply to the situation that we are living under. It rewards a family only if the family member is drinking or grossly negligent. And if there is a nonfamily member in that vehicle that gets injured, they get compensated and the family member does not get compensated. This statute, it's due. It should be repealed and follow suit with the rest of the country. Thank you. [LB228]

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Transcriber's Office

Judiciary Committee  
February 07, 2007

---

SENATOR LATHROP: Thank you. Any questions for Mr. Welsh? [LB228]

CHRISTOPHER WELSH: (Exhibit 4) I do have a letter from Dan Chesire. He represented the injured victim in the most recent case that I'd like to pass around. [LB228]

SENATOR LATHROP: Dan Chesire is a lawyer from Omaha? [LB228]

CHRISTOPHER WELSH: Yes. [LB228]

SENATOR LATHROP: Before you get out of your chair, let me ask you a question because I don't know if it's clear to everybody what the guest statute is. Essentially, in Nebraska you can make a claim against a negligent party that hurts you in an automobile collision. Is that the case? [LB228]

CHRISTOPHER WELSH: Correct. [LB228]

SENATOR LATHROP: And if you are a passenger in a vehicle and your driver runs into a tree or does something otherwise careless and causes an injury, you can make a claim against the driver, unless he's a family member? [LB228]

CHRISTOPHER WELSH: Correct. [LB228]

SENATOR LATHROP: And that's essentially what the guest statute does. It says you can't make a claim against a family member. [LB228]

CHRISTOPHER WELSH: It says you can't. [LB228]

SENATOR LATHROP: You cannot, exactly. And so what you're asking us to do today is to repeal a prohibition against claims against family members? [LB228]

CHRISTOPHER WELSH: Correct. [LB228]

SENATOR LATHROP: What's the historical logic behind that rule, if you know? And does it still prevail today? [LB228]

CHRISTOPHER WELSH: The guest statute originally applied to all guests. And the current form of the guest statute in Nebraska is to try to prevent collusion, that somehow family members are going to conspire together to be able to make a claim. And the sad thing is that it takes away all the people who have a legitimate claim and who are honest, and it only protects those who are dishonest. [LB228]

SENATOR LATHROP: Okay. Any other questions? Senator Pirsch. [LB228]

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Transcriber's Office

Judiciary Committee  
February 07, 2007

---

SENATOR PIRSCH: Have you...in the jurisdictions that you had mentioned, had repealed the guest statute, had there been an increase in the amount of moral hazard or as you spoke of, the collusion? [LB228]

CHRISTOPHER WELSH: I can't speak to what the other states, whether there's been an increase or not. But there's been no evidence before the Legislature to support that there's ever been a problem with collusion among family members. [LB228]

SENATOR LATHROP: Any other questions? Okay, thank you very much. [LB228]

CHRISTOPHER WELSH: Thank you. [LB228]

SENATOR ASHFORD: Where are we, do we have any more proponents? Proponents? Opponents? Where are we, I've lost track. Opponents? [LB228]

COLEEN NIELSEN: Good afternoon, Chairman Ashford, members of the Judiciary Committee. My name is Coleen Nielsen, C-o-l-e-e-n N-i-e-l-s-e-n, and I'm the registered lobbyist for the Nebraska Insurance Information Service, which is an association of property casualty insurers doing business in Nebraska. The members of this organization write a majority of the property casualty business in Nebraska and I'm testifying in opposition to LB228. The association believes that collusive lawsuits often arise out of situations where the relationship between the host driver and the guest passenger is one of blood or marriage in that the guest would not wish to collect from the owner or operator's personal assets but loses that reluctance when insurance is involved. The host driver, not objecting to filing of a claim with his or her insurer, may tend to favor the guest passenger with less than truthful testimony. If we repeal the guest statute, we would help dissolve the protective barrier to these friendly lawsuits and thus contribute to hampering cost-containment efforts. Under our guest statute, the guest passenger is still able to recover compensation for reasonable medical expenses under the medical payments coverage provided in all policies of automobile insurance. In addition, family members are allowed to recover in instances where the driver is intoxicated or grossly negligent. For these reasons, we respectfully request this committee refrain from moving this bill onto General File. I'd be happy to answer any questions. [LB228]

SENATOR ASHFORD: Any questions? Steve. [LB228]

SENATOR LATHROP: First of all, your suggestion that they can go to the med pay, that if there's a family member in the car they don't get to make a recovery but they can collect under med pay. We don't prescribe what the limit of med pay coverage should be in the state. Is that true? [LB228]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
February 07, 2007

---

COLEEN NIELSEN: No, there's no amount prescribed, no. [LB228]

SENATOR LATHROP: In fact, plenty of auto policies are issued with no med pay coverage. [LB228]

COLEEN NIELSEN: I believe...I don't think that's true. But med pays are in varying amounts. [LB228]

SENATOR LATHROP: Well, they can...they're not required, first of all. Would you agree with that? [LB228]

COLEEN NIELSEN: Right. [LB228]

SENATOR LATHROP: And they can be as low as \$500? [LB228]

COLEEN NIELSEN: Yes. [LB228]

SENATOR LATHROP: Progressive writes a lot of insurance. Typically, there is \$1,000. Do you know that or... [LB228]

COLEEN NIELSEN: Yes, I don't know what Progressive writes, no. [LB228]

SENATOR LATHROP: So the resort to med pay, not a particularly good substitute for the policy limits of the liability coverage. [LB228]

COLEEN NIELSEN: I do think that it is, that most insurance companies do offer higher amounts than that. And my understanding is that up to \$50,000 to \$100,000 in med pay is out there to be purchased, if you'd like to buy it. [LB228]

SENATOR LATHROP: If you're buying a \$300,000 policy. [LB228]

COLEEN NIELSEN: And I don't know if you have to have liability limits in that amount or not, but you may. [LB228]

SENATOR LATHROP: Okay, the effect of leaving this in place, would you agree that the effect of leaving this in place is that if I'm driving a car, I pull out from a stop sign in front of another vehicle and injure the passengers, if I have my next-door neighbor in the car, he can make a recovery but if I have a child in the car, they cannot? [LB228]

COLEEN NIELSEN: Your child, right. [LB228]

SENATOR LATHROP: Right. [LB228]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
February 07, 2007

---

COLEEN NIELSEN: Yes, that's correct. [LB228]

SENATOR LATHROP: Okay. Thank you. [LB228]

SENATOR ASHFORD: Okay. Thanks, Coleen. [LB228]

COLEEN NIELSEN: You're welcome. [LB228]

STEPHANIE STACY: Good afternoon. [LB228]

SENATOR ASHFORD: Good afternoon. [LB228]

STEPHANIE STACY: My name is Stephanie Stacy, S-t-e-p-h-a-n-i-e S-t-a-c-y. I'm here today to testify in opposition to LB228, and I don't represent anyone. I'm just a trial attorney in Lincoln, Nebraska, and I happen also to be a fan of the guest statute. That puts me in kind of an odd category, because a lot of people, number one, don't know about the guest statute, and number two, when you talk about the guest statute, it tends to sort of bifurcate a room. You know, you're either for it or you're against it. After 25 years of wondering whether the amended version that was amended in 1981 was constitutional, we know now, from a very thoughtful and very thorough Supreme Court Opinion, that the statute, the guest statute that we have on the books today is constitutional. It doesn't violate equal protection. It's not special legislation we know that as we sit here today. So the question that's before this body isn't whether the guest statute in Nebraska is constitutional, but whether it's wise public policy? That's what you're grappling with now. Do we keep it? Should we keep it? And if so, why? I think it is good public policy, and I'd like to talk with you about why. Admittedly, the question of whether the statute is constitutional is a different question than whether it's necessary. And I think it's a good idea to ask the question to yourselves. I've heard the argument that we should be content with the procedural safeguards in place, that you don't need a guest statute to protect against fraud and collusion in a close familial situation because there are other safeguards. When they talk about that, they talk about cross-examination as a safeguard, discovery, and then the jury. My concern is that although that, at first blush, that has some appeal--you say, well, gosh, yeah, the system should protect us from fraud and collusion--the problem is, in close familial lawsuits, the procedural safeguards that are in place don't work. Let me tell you why I think that's true. If you are the plaintiff's attorney, it's not going to be in your client's interest or your interest to bring out fraud and collusion between the plaintiff and the defendant, you know, between a son and maybe the defendant father. If you are the defense attorney, it also is not going to be in your client's best interest. You owe your ethical obligation to that defendant, not to the insurance company. And so you are not the person...the right person to peel behind the facts and disclose to the jury whether there may be some fraud or collusion. In fact, your obligation to the defendant is just the opposition or you could compromise his or her coverage. Then should the jury be the

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Transcriber's Office

Judiciary Committee  
February 07, 2007

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safeguard? The problem is, the jury can only deal with the issues that are presented them, and if no one is there to uncover the close familial fraud and collusion, the jury doesn't know about it either. So in situations where the plaintiff and the defendant live under the same roof or have close affection for one another, the system doesn't work. The other thing I'd like to say, and I have just a couple of seconds left, is I find it interesting that across the country legislatures are debating tort reform of all different shapes and sizes, and we have before us right now a statute, which we know to be constitutional, which really is a form of tort reform. And to repeal it would swing the doors open to an entirely new class of personal injury litigation, when the trend nationwide is precisely the opposite. Thank you for letting me go a little over. [LB228]

SENATOR ASHFORD: Thank you, Stephanie. Any...Steve? [LB228]

SENATOR LATHROP: Yes. You've told us you're here just as an interested citizen, yes? [LB228]

STEPHANIE STACY: As a trial attorney who's a fan of the guest statute, yeah. [LB228]

SENATOR LATHROP: A fan of the guest statute? [LB228]

STEPHANIE STACY: Yeah, isn't that silly? [LB228]

SENATOR LATHROP: Who do you work with? [LB228]

STEPHANIE STACY: I'm a partner at Baylor, Evnen, Curtiss, Gemit and Witt, a law firm here in town. [LB228]

SENATOR LATHROP: Baylor, Evnen. [LB228]

STEPHANIE STACY: Yes, sir. [LB228]

SENATOR LATHROP: They do defense work, don't they? [LB228]

STEPHANIE STACY: Part of what we do is defense work. We're a general litigation firm. A lot of what I do, day in and day out, is defend auto negligence cases. [LB228]

SENATOR LATHROP: In fairness...okay. Okay. [LB228]

STEPHANIE STACY: That's why I am very familiar with this. [LB228]

SENATOR LATHROP: And why you'd be a fan. [LB228]

STEPHANIE STACY: Yeah. I see...I've defended cases outside the automobile

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
February 07, 2007

---

negligence context, between two close...you know, if you slip and fall on your parents' driveway, you can sue them. I've been involved in litigation like that, and I've seen...I have been in the position where you worry about what's going on, and there's not an avenue to protect against it. [LB228]

SENATOR LATHROP: I appreciate your remarks. My question was, where you were at and if you use the guest statute as a defense tool? And your answer is, that's what you do. You defend these kinds of cases. [LB228]

STEPHANIE STACY: I do routinely defend these kinds of cases. [LB228]

SENATOR LATHROP: Thank you. [LB228]

STEPHANIE STACY: I can't always use it, because sometimes, you know, in the complaint, if you allege gross negligence or intoxication, the guest statute isn't a bar to the litigation at all. [LB228]

SENATOR LATHROP: Thank you. [LB228]

STEPHANIE STACY: Sure. [LB228]

SENATOR ASHFORD: Thank goodness for lawyers. (Laughter) Yes. [LB228]

SENATOR CHAMBERS: Do you believe that if I have a girlfriend, she and I would not collude? [LB228]

STEPHANIE STACY: I think your...I don't...I hope you wouldn't. But I think your question is going to...back to the constitutionality of it. Did we draw...did the Legislature draw the line in the right place? [LB228]

SENATOR CHAMBERS: I'm not even talking about constitu...I'm talking about the principle. You said there's a greater likelihood that there would be collusion between family members. If my girlfriend is injured in my car, can she recover? She's not related to me by blood or... [LB228]

STEPHANIE STACY: If you were negligent. I don't believe that you probably are. [LB228]

SENATOR CHAMBERS: Say it again? No, but that...okay, if I'm negligent and my girlfriend is in the car with me, she can recover? [LB228]

STEPHANIE STACY: Yes. [LB228]



Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
February 07, 2007

---

SENATOR CHAMBERS: You don't believe that me and my girlfriend would collude?  
[LB228]

STEPHANIE STACY: I hope you wouldn't. [LB228]

SENATOR CHAMBERS: Well, hope is not what I'm talking about. You believe that every family member would collude, but you don't believe that I and my girlfriend would collude? Should we... [LB228]

STEPHANIE STACY: That's an interesting premise. [LB228]

SENATOR CHAMBERS: ...should we change the statute to say that if the guest is a significant other, that person, because of the likelihood of a bond of affection, ought not be able to recover? Or make it more general--anybody who is a guest in the vehicle for whom the driver may have some affection should not be able to recover, if the driver is negligent and that person is injured. [LB228]

STEPHANIE STACY: That's exactly the guest statute that we had originally, and up until 1981. And I think... [LB228]

SENATOR CHAMBERS: But I mean, is that what you'd like us to go back to? [LB228]

STEPHANIE STACY: No, I think you are in a fabulous position right now. You know that the statute that's on the books is constitutional and is rationally related to a legitimate state interest. I wouldn't change a thing, because each time you tweak it and change it, it results in 25 years of litigation over whether it means what we all think it means.  
[LB228]

SENATOR CHAMBERS: Which means nothing to me. I'm looking at the philosophical point that you made, that collusion may be presumed--your position is that strong--it may be presumed between family members. So if Senator Lathrop is driving and he is negligent and he has an eight-month-old child in the car and that child is injured, is the child guilty of collusion? [LB228]

STEPHANIE STACY: I don't...to answer your question, I see what you're getting at, and I appreciate the inquiry. I think it's whether...a lot of people have kind of a basic distaste for the conclusion that there's going to be collusion between close family members. I understand that that's debatable, and I certainly am not going to say that every family member is going to collude. That would be silly. [LB228]

SENATOR CHAMBERS: But you didn't answer my question, counselor. [LB228]

STEPHANIE STACY: But the Supreme Court has said that that's legitimate, and I have

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
February 07, 2007

---

to go by that. [LB228]

SENATOR CHAMBERS: I don't care what the Supreme Court said. We can change...we can overrule a Supreme Court decision. If a statute is not violating the constitution and the Supreme Court is not ruling on a constitutional point, we can overrule a Supreme Court decision. So what the Supreme Court says may have validity, but it's in a very narrow range, as compared to what we can do as a Legislature. But here's my question. [LB228]

STEPHANIE STACY: Okay. [LB228]

SENATOR CHAMBERS: Would collusion be found between Senator Lathrop and his eight-month-old child who was injured? [LB228]

STEPHANIE STACY: Perhaps. I don't know. I hope not, but it wouldn't be the eight-month-old... [LB228]

SENATOR CHAMBERS: Well, let me ask the question a different way. [LB228]

STEPHANIE STACY: Okay. [LB228]

SENATOR CHAMBERS: Collusion requires the cooperation of two people. I can't collude with myself. There must be somebody else with whom I'm colluding. If I have a piece of statuary in my car, can I collude with that statuary? [LB228]

STEPHANIE STACY: I don't believe so. [LB228]

SENATOR CHAMBERS: Is my child who is eight months old presumed by the law to have a greater ability to make moral judgments than that piece of statuary? [LB228]

STEPHANIE STACY: Our law would require that the suit be brought by a next friend rather than the eight-month-old child, and that person could collude. [LB228]

SENATOR CHAMBERS: I'm asking you about the child, counselor. Is the child presumed by the law to be able to make moral decisions or judgments, yes or no? [LB228]

STEPHANIE STACY: No. [LB228]

SENATOR CHAMBERS: Okay. [LB228]

STEPHANIE STACY: They're under an inability until they're majors. [LB228]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
February 07, 2007

---

SENATOR CHAMBERS: And so what you mentioned is the means by which the law addresses that situation, to see that the interests of the child will be looked after by the next best friend. [LB228]

STEPHANIE STACY: Right. [LB228]

SENATOR CHAMBERS: So your statement breaks down at the point where it may be most necessary to provide protection for a guest who is a member of the driver's family. The one who even as a matter of law is incapable of colluding is deemed to be a colluder, because that person is a member of the family. Isn't that the state of the law? [LB228]

STEPHANIE STACY: I wish I followed that, but I didn't, and I apologize. [LB228]

SENATOR CHAMBERS: Well, let me say it...let me try to make it simpler. [LB228]

STEPHANIE STACY: Remember, I'm just a trial attorney. [LB228]

SENATOR CHAMBERS: Under the state of the law now, a family member cannot recover, if the driver is negligent. Is that true or false? [LB228]

STEPHANIE STACY: It's not always true. [LB228]

SENATOR CHAMBERS: When is it not true? [LB228]

STEPHANIE STACY: A family...someone within the first degree of consanguinity or affinity cannot recover unless there's gross negligence or intoxication. [LB228]

SENATOR CHAMBERS: Can a child recover then? [LB228]

STEPHANIE STACY: If there's gross negligence or intoxication. [LB228]

SENATOR CHAMBERS: If there's not gross negligence, can the child recover, based on what you... [LB228]

STEPHANIE STACY: No. No. [LB228]

SENATOR CHAMBERS: Okay. The child is the one who is completely innocent,... [LB228]

STEPHANIE STACY: I would assume so. [LB228]

SENATOR CHAMBERS: ...but the child cannot recover. [LB228]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
February 07, 2007

---

STEPHANIE STACY: Correct. [LB228]

SENATOR CHAMBERS: As policymakers, we should feel comfortable with that state of affairs, in your opinion? [LB228]

STEPHANIE STACY: Yes. I think... [LB228]

SENATOR CHAMBERS: Do you have any children? [LB228]

STEPHANIE STACY: I have four boys. [LB228]

SENATOR CHAMBERS: Oh, no wonder you feel like you feel. (Laughter) I'm just lightening the mood. But that's all I would ask you. Thank you. [LB228]

STEPHANIE STACY: Thanks. [LB228]

SENATOR ASHFORD: Thanks, Stephanie. Any other questions of Stephanie? Thank you, Stephanie. [LB228]

STEPHANIE STACY: Thank you. [LB228]

SENATOR ASHFORD: Okay. Do we have any neutral testifiers? Senator Synowiecki, is he...did Senator Synowiecki waive? I can't remember whether he waives. Okay. LB... [LB228]

SENATOR CHAMBERS: Did you call him Senator "Snooky"? What did you call him? [LB228]

SENATOR ASHFORD: Well, I tried to say his whole name. [LB228]

SENATOR CHAMBERS: (Laugh) Okay. [LB228]

SENATOR ASHFORD: He hasn't given me a pass yet to call him something else. LB274, Senator McDonald. [LB228 LB274]

SENATOR McDONALD: (Exhibit 5) Chairman Ashford and members of the Judiciary Committee, I'm Senator Vickie McDonald, representing the 41st Legislative District. LB274 deals with liquefied petroleum gas, also called propane, LPG or LP gas. For simplicity, I'll call it propane today. Propane is widely used, particularly in rural areas. In its natural form, propane is colorless and odorless. To make propane easier to detect, manufacturers add a chemical compound to give it that propane smell. Propane is transported and stored as a very cold liquid. This liquid is turned into gas inside a tank

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
February 07, 2007

---

or a cylinder. Propane is flammable when mixed with air, and can be ignited by many sources, including open flames, smoking materials, electrical sparks, and static electricity. Propane vapors are heavier than air, so they tend to accumulate in low-lying areas like basements, crawlspaces, ditches or along floors. A leading cause of propane accidents is improper installation of or changes to a residential or small agricultural propane system, allowing propane vapors to leak from the system. Improper installations in Nebraska have resulted in property loss, injuries, and death. A testifier who will follow me has photos to illustrate how foolish some do-it-yourselfers can be when they use materials not intended for use with propane, such as garden hoses, wrong size and type of piping material and parts, and they often reassemble the propane system incorrectly. LB274 requires the propane...the retail propane supplier to place a container warning label near the tank shutoff valve. The warning label language is specified in the bill, and warns the propane user to not turn the propane system on before a leak check is performed by a qualified technician. I have an amendment that adds a statutory reference to this section to the warning label. A leak check determines if the propane system is safe for operation, requires the use of specific tools, and must be performed by a qualified technician, following the National Fuel Gas Code, as adopted by the Nebraska State Fire Marshal. Any time a propane system...propane gas system is turned off, service is interrupted, and safety hazards exist if a leak check is not performed before placing the propane system back in service. Normal reasons for interruption of service include repairs to the system, a new appliance or line installation or removal, and regulator or valve change-out. LB274 makes propane safety the duty of both the retail propane supplier and the residential and small agricultural propane user. It does not affect propane grills. The retail propane supplier must place the warning label on the propane tanks. If the propane user does not comply with the leak check requirement, the retail propane supplier is not liable for the damage, injury or death resulting from the failure to have a leak check performed. The immunity provision applies only to the failure to have a leak check performed after the interruption in service. Suppliers have until July 1, 2008 to affix the container warning labels to residential and small agricultural tanks. LB274 is intended to increase the safety of propane users by warning them of the need for a leak check of their propane system. I encourage you to send LB274 to General File. Thank you. [LB274]

SENATOR ASHFORD: Thank you, Senator McDonald. I don't see any questions. Thank you. [LB274]

SENATOR McDONALD: Thank you. [LB274]

SENATOR ASHFORD: Do we have any...how many proponents do we have? Opponents? One? Okay. Good afternoon. [LB274]

MICHELLE SWERTZIC: (Exhibits 6 and 7) Chairman Ashford and members of the Judiciary Committee, my name is Michelle Swertzic, that's S-w-e-r-t-z-i-c. I'm executive

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
February 07, 2007

---

director of the Nebraska Propane Gas Association. We represent over 200 marketers throughout the state, and I'm here in support of LB274. The propane industry has identified one of the leading causes of incidences involving propane when unqualified individuals, commonly referred to as do-it-yourselfers, make improper installations and changes to their system. These incidents not only dramatically impact the lives of the do-it-yourselfer, but also their families and the propane industry as a whole. In Nebraska, there has been property loss, injuries, and death as a result of do-it-yourselfer system changes. I will discuss two of them. The first one--this is in my handout--happened in Rising City, October 1, 2004. There was an 83-year-old female that was injured, a 15-year-old girl that was killed, and a 66-year-old male that was killed. And according to the Fire Marshal's report, the homeowner had worked on the regulators and the piping system prior to the accident, and there was no leak check done, and there were several code violations. As well as in Farwell, Nebraska, on August 5, 2004, there was one male, one female that were injured and badly burned in an incident. In this case, the homeowner connected the gas line to the house without installing regulators. And both of these incidences could have been prevented if the propane supplier was notified and a leak check was conducted on these systems. Also illustrated is some common things that do-it-yourselfers do that we see in the field. The consequences of working on your gas system can be severe. LB274 proposes to help prevent these unfortunate incidents from happening. A leak check is an operation performed with specialized instruments, and the propane industry has very specific employee training programs based on the proper leak check procedures. Under LB274, the LP gas provider is required to affix a container warning label, which I've included in the handout is a sample of that label. Since the LP gas provider has a responsibility to affix the label, it is reasonable for the provider to get some protection if the propane user does not adhere to the label. The immunity provision in the bill that's addressed in Section 6 applies only to these very specific situations. If the LP gas provider does fail to affix the label to containers...on the containers, and an incident results, the provider will not have any immunity with this proposal. In Nebraska, there currently is a case pending involving a system being placed back into service where the customer did not do...have a leak check performed by a qualified person. And final note, our industry does work hard to promote safety. In 1998, the state of Nebraska passed the Nebraska Propane Education and Research Council, and their primary mission is to educate the public and industry about safety practices. In 2006, NPERC provided education to over 1,000 industry employees, over 300 firefighters, and also distributed over 100,000 safety warning materials. In closing, LB274 can increase the level of safety for the propane users in Nebraska. I encourage you to advance this bill. Thank you for your time, and I would welcome any questions. [LB274]

SENATOR ASHFORD: Thank you, Michelle. Thank you. Steve. Senator Lathrop. [LB274]

SENATOR LATHROP: I do have a few questions, if I could. [LB274]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
February 07, 2007

---

MICHELLE SWERTZIC: Sure, Senator. [LB274]

SENATOR LATHROP: This...is this an example of the warning you think ought to be on? [LB274]

MICHELLE SWERTZIC: Um-hum. [LB274]

SENATOR LATHROP: So if we pass this statute or this bill becomes law, this is what we'll see near the shutoff valve? [LB274]

MICHELLE SWERTZIC: Yeah. And the only...the amendment that was on is, that warning label would reference, if it were to pass, would reference the state statutes. [LB274]

SENATOR LATHROP: Oh, okay. Is this being done now as a safety measure by the propane industry? Are they now putting these labels on or near the shutoff valves of the propane tanks? [LB274]

MICHELLE SWERTZIC: That's a good question. Our national Propane Education Research Council just passed something, and they're having those labels made. [LB274]

SENATOR SCHIMEK: Mr. Chairman, I can't hear. [LB274]

SENATOR LATHROP: I thought it was just me. Maybe you could... [LB274]

SENATOR SCHIMEK: Could you speak into the microphone, please? I didn't hear your response. [LB274]

SENATOR ASHFORD: But go ahead, Michelle. Just... [LB274]

MICHELLE SWERTZIC: Our national PERC council just approved that label, and they are going to be distributing it. [LB274]

SENATOR LATHROP: Okay. So will we find these...regardless of whether this becomes law, will we find these now on or near the shutoff valve of propane tanks? [LB274]

MICHELLE SWERTZIC: I think that's a good question. The marketer...I think if it's actually put in the state statutes, it will be...every marketer then will have to affix...will be required to affix it, where now it would be a voluntary thing with that label. [LB274]

SENATOR LATHROP: You represent an association here today? [LB274]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
February 07, 2007

---

MICHELLE SWERTZIC: Um-hum. [LB274]

SENATOR LATHROP: Are your association members going to put this label on propane tanks, regardless of what we do today? [LB274]

MICHELLE SWERTZIC: We're going to encourage them to do that, yes. [LB274]

SENATOR CHAMBERS: I didn't understand the answer? [LB274]

MICHELLE SWERTZIC: We are going to encourage them to do that. I mean, we can't...as an association, we can't require them to do that, but... [LB274]

SENATOR LATHROP: I'm just...I didn't mean to turn this into an argument. But if it's a good idea and you want it to become law, I'm wondering why the members of your association wouldn't be required to do this, just as a matter of policy. [LB274]

MICHELLE SWERTZIC: To be a member of our association? [LB274]

SENATOR LATHROP: Yeah, just to say, if you're going to be a member, this is a mandatory thing. [LB274]

MICHELLE SWERTZIC: I guess we don't... [LB274]

SENATOR LATHROP: Not happening? [LB274]

MICHELLE SWERTZIC: No. [LB274]

SENATOR LATHROP: Okay. I'm not familiar with propane as a means of heating a home. And I know that's very common in rural areas. Is this going to apply to my gas that I...the propane that I use on my grill out in the back? [LB274]

MICHELLE SWERTZIC: No, the definition in the bill applies to residential vapor systems, so it wouldn't apply to, like, an irrigation engine unit where you're using liquid. So it would apply to residential vapor systems. So primarily residential, and then our small, like agriculture, like heating a shop, those types of things, it would apply to those as well. [LB274]

SENATOR LATHROP: Okay. And is it your intention or do you...is it your expectation that once these things are affixed, then immunity attaches to the propane dealer for...what? [LB274]

MICHELLE SWERTZIC: In the specific instance, if the homeowner...typically, if you're



Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
February 07, 2007

---

going to work on your system, you shut the container off. So say the homeowner shut the container off and, you know, changed out regulators or you know, installed a new line or did some kind of modification to their system. When they went to go turn the container back on, I mean, the warning label is there, telling them that this leak check is required by a qualified technician. [LB274]

SENATOR LATHROP: Okay. And that all seems like a good idea. I'm curious about the immunity that you're looking for. If you don't do something, if somebody...and typically, it's in a rural setting, and the people from the rural area are very handy. It's the kind of thing they do themselves, isn't it? [LB274]

MICHELLE SWERTZIC: I mean,... [LB274]

SENATOR LATHROP: Oftentimes. So they might change out a regulator. If your members don't change out the regulator, where do you see the liability that you're trying to get immunity for? I mean, you're looking for immunity, and I'm wondering...I can't think of a way they'd be responsible for something the homeowner did, and they weren't even around for. [LB274]

MICHELLE SWERTZIC: Well, that's kind of like we see in the case right now that's going on, that they are being brought into that. [LB274]

SENATOR LATHROP: Pardon me? [LB274]

MICHELLE SWERTZIC: They are being brought into that, when they had no notice or no notification that the homeowner did modifications to their system. [LB274]

SENATOR LATHROP: There is some case pending? [LB274]

MICHELLE SWERTZIC: Um-hum. [LB274]

SENATOR LATHROP: And that's with one of your members? [LB274]

MICHELLE SWERTZIC: Um-hum. [LB274]

SENATOR LATHROP: Okay. I think you answered my questions. Thanks so much. And I apologize for asking you to speak louder, but it's hard when... [LB274]

MICHELLE SWERTZIC: No, I...thanks. [LB274]

SENATOR ASHFORD: If I might, just very briefly, would it help the association if we were to require that these tanks have this affixed? Would that kind of get at the same problem? If there's a potential public safety...rather than create some sort of immunity

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
February 07, 2007

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and try to contemplate what all the fact situations might be, maybe it would be just as well if we just put the...require all these...the propane distributors to affix this label? [LB274]

MICHELLE SWERTZIC: I think it's important to include the immunity. I mean, I think it's a big encouragement to the marketer to affix those labels and to make...entice them to put those on. [LB274]

SENATOR ASHFORD: I understand that side of it, but I can't imagine just...well, that...I understand your point, and I appreciate your testimony. Thanks, Michelle. Yes, Senator Chambers. [LB274]

SENATOR CHAMBERS: If there's a gas line in my house and the gas company does not put a warning that I might not seek to find out whether there's a gas leak by lighting a match, and I light a match, is the gas company liable for the resulting explosion because it did not tell me that I should not light a match in that situation? [LB274]

MICHELLE SWERTZIC: They can be, yes. [LB274]

SENATOR CHAMBERS: Say it again? [LB274]

MICHELLE SWERTZIC: They can be, yes. [LB274]

SENATOR CHAMBERS: Well, we'll bring it to your organization. If I modify this equipment and my modification is one that should not be made, and something bad happens to me as a result, how is anybody in your organization liable if I did not use this equipment in the way I was supposed to? That's what I don't understand. [LB274]

MICHELLE SWERTZIC: Yeah, I agree that it doesn't make sense to me that they're oftentimes held liable for those...in those situations. But... [LB274]

SENATOR CHAMBERS: Has somebody in your organization been found liable under circumstances like that? [LB274]

MICHELLE SWERTZIC: We do have a case pending right now, where they are... [LB274]

SENATOR CHAMBERS: But that doesn't mean that the case is going to go in favor of the person who brings it. You're trying to get us to head off whatever decision the court might make. How many times has a bill like this been before the Legislature, if you know? If you know. [LB274]

MICHELLE SWERTZIC: Twice. [LB274]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
February 07, 2007

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SENATOR CHAMBERS: But it's been here more than once, right? [LB274]

MICHELLE SWERTZIC: Um-hum. [LB274]

SENATOR CHAMBERS: Okay, that's all I have. Thank you. [LB274]

MICHELLE SWERTZIC: Thanks. [LB274]

SENATOR ASHFORD: Thanks, Michelle. Okay, thank you. Next witness. [LB274]

DENNIS BARNARD: (Exhibits 8, 9, and 10) Good afternoon, Chairman and members of the Judiciary Committee. My name is Dennis Barnard, and that is D-e-n-n-i-s B-a-r-n-a-r-d. And I am an employee of Sapp Brothers Petroleum, of Omaha, Nebraska. We serve roughly 10,000 propane customers for residential, irrigation, and grain-drying propane needs. Sapp Brothers operates about 13 different locations throughout Nebraska. I am also currently serving on the board of directors of the Nebraska Propane Gas Association. I am testifying in support of LB274. A lot of times our service personnel, that may be called out to a residential place, finds very...a lot of unsafe and shoddy workmanship, as Michelle had said, by some of the do-it-yourselfers. It doesn't come close to what we rule ourself under, the NFPA 54. Those are the codes that we install and service our customers under those codes. Unless we are notified of a change to the gas system, we cannot perform the necessary leak check, leak test, to make sure that the system is leak-free. This bill would put in place a warning sticker by the tank's service valve that you see, and let the consumer know that they need to contact us or a qualified person to turn the gas back on, so that a leak check can be performed on their system. As a marketer, we do want our customers' gas systems to be safe. We constantly remind our customers to call us if they smell gas or have anything done to their gas system. And a couple of the pamphlets that I gave you are some that we give to our customers, we mail to our customers once a year, just reminding them of what they need to do with their propane system. I feel this bill is essential for the propane marketer, so that we are not liable for somebody's lack of qualifications or procedural knowledge. I would encourage you to advance LB274, and I thank you for your time and consideration. Questions of me? [LB274]

SENATOR ASHFORD: Dennis. Any questions? Thank you, sir. Yes, Senator Chambers. [LB274]

SENATOR CHAMBERS: I just have one. I still cannot understand what this bill is about, so I'm going to start with the easiest question first, and Senator Lathrop suggested it. If, in fact...and I have no reason to doubt the truthfulness of what you said, but I'm phrasing the question this way to get at what I want to ask you. If, in fact, the people who do the work that you've described to us want their customers to be safe, why will

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
February 07, 2007

---

not the industry automatically have one of these labels accompany the equipment when it's either installed or turned over to the consumer? Why do we need a law to make them do what they think they ought to do? [LB274]

DENNIS BARNARD: As far as I know, the label came about this year. Our concern is that we don't know, unless the customer calls us, if there's been something done to their piping system, their system, their whole propane system, and is it leak-free, is it safe? [LB274]

SENATOR CHAMBERS: Well, if it had been done by somebody else, how are you going to be liable? [LB274]

DENNIS BARNARD: It kind of seems...and they come back to some of the suppliers, you know: Why did you not warn your customer of the dangers of propane? [LB274]

SENATOR CHAMBERS: So you ought to just do it automatically, without this statute. [LB274]

DENNIS BARNARD: We got to know...we've got to know that they broke their system or that they did something to their system in order to go do this automatically. [LB274]

SENATOR CHAMBERS: No, here's what I'm saying,... [LB274]

DENNIS BARNARD: Personally, I don't have a problem putting the label on,... [LB274]

SENATOR CHAMBERS: Okay. Okay. [LB274]

DENNIS BARNARD: ...you know, for our company. [LB274]

SENATOR CHAMBERS: That's what I was wondering. Okay. [LB274]

DENNIS BARNARD: Yeah. No, I do not. But it's...we need somehow...and we reiterate it many, many times to our customers, even a new customer that's never used it, we go through these packets, we show them, this is where you turn your tank off. You know, we want them to be safe, because ultimately, we don't want to be in court. [LB274]

SENATOR CHAMBERS: Okay, and I'm not challenging that. You answered that. The label...is the label, in your opinion, going to be automatically attached whenever this equipment is installed? [LB274]

DENNIS BARNARD: I would say that would depend on the company, Senator. I...you know. [LB274]

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Transcriber's Office

Judiciary Committee  
February 07, 2007

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SENATOR CHAMBERS: Oh, then some of the companies aren't willing to do that?  
[LB274]

DENNIS BARNARD: I would assume they all would be, but I can't speak for them.  
[LB274]

SENATOR CHAMBERS: Then they do have some responsibility, and if they don't do that, they ought to be liable. [LB274]

DENNIS BARNARD: We all have responsibility when it comes to a propane system.  
[LB274]

SENATOR CHAMBERS: Okay. That's all I have, by the way. Thank you. [LB274]

DENNIS BARNARD: Okay. [LB274]

SENATOR ASHFORD: Thanks, Dennis. Any other proponents? [LB274]

SENATOR LATHROP: Maybe I...can I ask this witness just one question? [LB274]

SENATOR ASHFORD: Yes, you can. [LB274]

DENNIS BARNARD: Sure. [LB274]

SENATOR LATHROP: Do you think it will improve safety and avoid these types of explosions, leaks, disasters, and injuries if we require everybody to put these labels on?  
[LB274]

DENNIS BARNARD: I think it would help. The label, where the service valve is that you turn your tank on and off with, that label is there, they pick that lid up that covers that. If they see that, that may...you know, there's...we know there's no guarantee. But there's another warning to say, hey, call us. We... [LB274]

SENATOR LATHROP: But they will have been warned at that point. [LB274]

DENNIS BARNARD: They will have been warned. [LB274]

SENATOR LATHROP: Okay. [LB274]

SENATOR ASHFORD: Thanks for your candor, Dennis. Thank you. [LB274]

DENNIS BARNARD: Thank you. [LB274]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
February 07, 2007

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SENATOR ASHFORD: Any other proponents? [LB274]

NEAL KANEL: (Exhibit 11) Good afternoon, Mr. Chairman and members of the Judiciary Committee. My name is Neal Kanel. That's N-e-a-l K-a-n-e-l. I'm the co-owner of an independent propane business called Stateline Propane Service, six miles south of Dawson, Nebraska. We currently serve 900 residential and agricultural customers in Kansas, Nebraska, and Missouri. I also am on my second term with the board of directors for the Nebraska Propane Gas Association, and I am also here to testify in support of LB274. The main reason myself and so many other propane retailers support this bill is simply for everyone's safety. It doesn't matter if you're the owner of a small business like myself, a trained delivery driver or the end user. Safety is still our number one concern. In my nearly 20 years in the industry, I'm still constantly amazed at some of the things a do-it-yourselfer can come up with that hasn't injured someone. We need to have some type of a safety cushion to alert all persons involved as to the hazards of mishandling this product. I feel that we as an industry have certainly done our part in educating our retailers and our employees. We've established programs on national levels to certify our employees and train them on the proper techniques. We provide our customers with semiannual safety mailings, and we also provide new customers with the latest safety information available. Yet, with all this in place, how is the new tenant of a rental property informed of these concerns prior to their contacting the propane company for service. We're different from other utilities that are shut and must be reconnected by a trained technician. The consumer is able to reconnect the propane without having a leak check of their system performed by one of our technicians. In conclusion, LB274 would require all propane marketers to place a container warning label on the tank or tanks present, to alert people what needs to be done to restore service when an interruption has taken place. This would be in place for the safety and well-being of all parties involved. We encourage you to advance this LB274, and thank you for your considerations. [LB274]

SENATOR ASHFORD: Thank you, Neal. Any questions of Neal? Thank you, sir. Opponents? John. Any other opponents to this bill? [LB274]

JOHN LINDSAY: Mr. Chairman, members of the committee, my name is John Lindsay, L-i-n-d-s-a-y, appearing on behalf of the Nebraska Association of Trial Attorneys, in opposition to LB274. First thing, I think I need to commend Senator McDonald, Mr. Vickers, who's the lobbyist for the Propane Association, and the Propane Association, because this bill is much, much better drafted than the versions that I think Senator Chambers referred to in past years. This is really focused in on a problem and focused in on the safety aspect, and something we can actually address the safety aspect, and I think that needs to be commended. That having been...and as typical, I think, you probably have the responsible operators who are in the room, carrying the weight for the association. My guess is that any of those three operators that were up here earlier, probably all will be applying the warning label to those tanks. The problem we have has

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
February 07, 2007

---

already been addressed by Senator Lathrop and Senator Chambers a little bit, and that is that we think the bill attempts to address a nonexistent problem, and that is, trying to absolve from liability where liability does not exist. And that's...the difficulty is pointing to...is trying to find out the basis for what the litigation would be. While there may be a case pending, there may have been cases filed, we are not aware of any successful litigation being brought where there was not fault on the part of the LP dealer. And I think that's where, I believe, Senator Lathrop's questions were going, is, there has to be some act of negligence on the part of the LP handler, dealer, in order to create that cause of action. So in trying to draft the legislation, it's difficult to achieve that, absolving someone of liability that they don't have. And the problem in doing that, I believe it goes a little bit...probably an unintended consequence, and that is, if you read the immunity provision in subsection (6), the...I believe it would absolve from liability the...a dealer who knows of a leak, knows that the system has been shut down, knows that it has not been checked by a certified technician, but as long as that warning label is in place, that they would be absolved from liability. So I think it goes...an unintended consequence of trying to relieve people from liability they don't have. So I would...my recommendation to the committee would be to really focus in on certainly the safety issue that you have done already, but to continue to focus in and try to see what exactly the liability problem that the LP dealers are facing is, so that that can be addressed. With that, I'd be happy to try to answer any questions. [LB274]

SENATOR ASHFORD: Just one quick point. And I...John, I agree with you. I think that the liability immunity provisions in paragraph (6) are almost there, quite frankly, and I think it's pretty tightly drafted. There may be some additional language that would solve that problem that you've raised. But I do think...but I see that they have drafted this specifically to absolve liability in a case where there's not a leak check performed...failure to have a leak check performed, as the only element of damage, of negligence that they would be immune from. [LB274]

JOHN LINDSAY: Correct. [LB274]

SENATOR ASHFORD: So that is a pretty tightly drafted provision, so there might be some language that can deal with your issue, as well. Correct? [LB274]

JOHN LINDSAY: Yes. [LB274]

SENATOR ASHFORD: Okay. [LB274]

JOHN LINDSAY: Yeah, and we'll continue to visit with Mr. Vickers regarding... [LB274]

SENATOR ASHFORD: Yeah, and maybe Senator McDonald, too, who's the only important one in this whole process. (Laughter) Thank you. Thanks, John. Thank you. Senator McDonald, do you wish to close? [LB274]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
February 07, 2007

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SENATOR McDONALD: I thank you for hearing this bill. Actually, I have never had a home out in the country that was done by...or heated by propane. I've always been fortunate to have either electricity or natural gas. But I can see this happening many times, because especially the rural people are very good at do-it-yourself, and many times don't realize that...you know, I was taught how you'd use a little soapsuds and some water and you could tell, if it bubbles or not, there was a leak there. It's not necessarily the best way to check. And so one of those issues did happen in my district. And if we could do anything to resolve that type of issue before it took some lives of people that we dearly love, I hope that we can do that. So basically, that's what it is--a safety issue that we need to address. [LB274]

SENATOR ASHFORD: (Exhibit 12) Thank you. I think I understand what you're trying to do here, Senator McDonald, and I...maybe with a little work with Senator...with...I keep calling him...John Lindsay, and others, maybe we can get some language that will help us all. [LB274]

SENATOR McDONALD: Appreciate it. [LB274]

SENATOR ASHFORD: Thanks. [LB274]

SENATOR McDONALD: Thanks. [LB274]

SENATOR ASHFORD: LB373, Senator Schimek. How many proponents do we have for LB373? Opponents? One, two? Two opponents, three to two. Senator Schimek. [LB373]

SENATOR SCHIMEK: (Exhibits 13-17) Thank you, Senator Ashford and members of the Judiciary Committee. I'm here to introduce LB373. As all of us in this room are aware, advances in medicine are tremendous. We see miracles happen daily due to research and the application of that research. However, medicine is not perfect and adverse outcomes occur even with the best of care. For an example, the radiation treatment that doesn't kill all of the cancer cells, the scope in the colonoscopy that nicks the lining of the intestine, the heart catheterization that doesn't take are all examples. When an unanticipated adverse outcome does occur, how healthcare providers respond has a powerful effect on all parties concerned. Based on a number of studies, patients expect caregivers to acknowledge an incident and to explain what happened to the extent that it is known. Patients expect someone to take responsibility and, if an error has occurred, to admit it and apologize. And patients expect that the hospital will take a serious look at the incident and, when possible, make changes to ensure that it doesn't happen to anyone else. I think those are reasonable expectations. Unfortunately, there's often a difference between what patients expect and what they receive after a medical accident or error occurs. The reason is that medical injury is different from other types of



physical or emotional injury. A medical injury is a result of treatment intended to help caused by a person to whom you entrust your life. And in most cases, patients will continue to be cared for by the same caregiver even after an adverse event. Thus, the lack of an apology and a failure to be direct and caring becomes even more traumatic. The relationship between the patient and the caregiver is damaged when a clear acknowledgement of mishap that has occurred is not forthcoming and when no one seems to take responsibility for what has happened. Most importantly, this relationship is damaged when no one apologizes. Doctors don't apologize often due to concerns about reputation and the possibility of malpractice suits. This fear of speaking up has long been legitimized by risk managers and lawyers who have advised healthcare providers not to admit responsibility or apologize, advice that is still given in many institutions. Historically, physicians and medical providers have erected a wall of silence to protect themselves from possible litigation. The result of that wall of silence is often frustration, anger, and in many instances a resort to the legal system...all apologies (laugh) to get information or the satisfaction of an apology. Due to the work of a number of groups--the National Patients Safety Foundation, the Harvard School of Public Health, the University of Michigan, and Stanford University teaching hospitals, and the Veterans Affairs Hospital of Lexington, Kentucky, to name a few, efforts are being made to break through that wall of silence to change the way that institutions and caregivers respond when bad outcomes occur. LB373 is an effort to break through that wall of silence in Nebraska. LB373 is an effort to encourage providers to give full disclosure of a bad outcome and to apologize. LB373 provides that any apology or statement of fault not be admissible as evidence of an admission of liability or as an admission against interest. LB373 is an effort to maintain the patient-provider relationship and to assure patients and their families that the caregiver recognizes the hurt and is committed to taking every possible measure to prevent further injury. In fact, studies have shown that apologizing may be the most important thing we can do after a serious event to help the patient and his or her family begin to heal. It is just as important to state what LB373 is not. It is not a bar to malpractice claims. Only the statement of the caregiver is excluded from evidence. A suit can still be brought and evidence that is gathered as a result of the apology is still admissible. It is not an attempt to avoid responsibility. In many instances compensation, when warranted, is provided by the caregiver, often faster. At the University of Michigan hospital, the response time for compensation dropped from an average of 20 months to 9.5 months after "I'm sorry" standards were put in place. In fact, the vast majority of adverse outcomes is not malpractice and will not result in compensation in a court of law. An apology and assistance by the provider may be the only compensation a person will receive. It is not the end of the story. When full disclosure is made, both to the patient and to the hospital or insurance carrier, evidence is gathered to learn why a bad outcome occurred and whether there are steps that can be taken to ensure that the outcome doesn't occur again. "I'm sorry" legislation, and that's what this legislation is referred to, has passed in 29 states. I will distribute a list of those states where the legislation has been passed. The bill before you is identical to the bill that passed with little fanfare in Colorado a couple of years ago. And I don't think

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Transcriber's Office

Judiciary Committee  
February 07, 2007

---

there were any that came in in opposition. In conclusion, LB373 removes the barrier to immediate full disclosure and apologies in medical situations. It is the right thing to do. It is what patients expect. And I hope that it's what you'll support. I have letters here from the Nebraska Nurses Association. I have a letter here from a woman whose son died unexpectedly in a hospital and I have her story. I also have maps that shows you what states the legislation has been passed in. Too many prepositions in that but nevermind. And then a news clip which describes the "I'm sorry" legislation. I might mention that there was a CBS program this morning that I didn't see but I think they put it on just for you. I hope some of you got to see it. Thank you. [LB373]

SENATOR ASHFORD: Thank you, Senator Schimek. [LB373]

SENATOR CHAMBERS: Senator Schimek? [LB373]

SENATOR SCHIMEK: Yes? [LB373]

SENATOR CHAMBERS: If a doctor is supposed to cut off my left leg and he cuts off my right leg and he says, I cut off the wrong leg, that protects him... [LB373]

SENATOR SCHIMEK: No. [LB373]

SENATOR CHAMBERS: Let me finish. [LB373]

SENATOR SCHIMEK: I'm sorry. [LB373]

SENATOR CHAMBERS: ...from having ever acknowledged that he even operated on me? And if he doesn't take the witness stand, then no reference can be made to what the doctor admitted based on this bill, isn't that true? If there's a malpractice lawsuit, the doctor is better off to have made apologies and then not take the stand and then nothing the doctor said could be brought up in any kind of way, could it? [LB373]

SENATOR SCHIMEK: His statement of apology cannot be used against him, Senator. [LB373]

SENATOR CHAMBERS: Or expression of fault. [LB373]

SENATOR SCHIMEK: Or expression of fault. But that does not mean that the investigation, which looks into the particular situation, cannot be used. It is simply that the doctor's statement cannot be used. [LB373]

SENATOR CHAMBERS: If the expression of fault does not...first of all, we have to have an action performed by one of these healthcare providers which caused harm that is actionable, meaning somebody can recover against that person for what the person did.

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
February 07, 2007

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If it is an act which is not actionable, then it doesn't matter what the doctor or healthcare provider said, the victim of it is not going to recover. The only time this would come into play is if the possibility of recovering against that provider is there. That's the only time it makes any difference. So if you don't put the doctor on the stand, then the doctor or whoever it is would be smart to cover everything possible. And then the fact that it came from the doctor could not be used. I'm overstating what is likely to happen. Your view in response to that, if I understood you, is that an investigation could be undertaken and maybe fault could be found without using the statement of the doctor or the healthcare provider. [LB373]

SENATOR SCHIMEK: That is the way that I understand it, Senator Chambers. [LB373]

SENATOR CHAMBERS: Well, if I am not a doctor or one of these designated persons and I do something that harms a person, why don't we say nobody who apologizes can have the statement of fault or anything else used against him or her and don't just limit it to these people? [LB373]

SENATOR SCHIMEK: Senator, I think professionals have a much greater responsibility. I've heard you indicate that before in debate on the floor. Public officials have probably a greater responsibility in some instances than does the average citizen. Attorneys have a greater responsibility. [LB373]

SENATOR CHAMBERS: That's why they should be held to a higher standard and be made accountable. [LB373]

SENATOR SCHIMEK: I don't argue with that at all, Senator Chambers. [LB373]

SENATOR CHAMBERS: Suppose a doctor said, you know what, I was supposed to use one of those devices that would only cut bone and I got in a hurry and I used the miter saw? [LB373]

SENATOR SCHIMEK: I'm glad you're not my physician, I can tell you that. (Laughter) [LB373]

SENATOR CHAMBERS: That's all I have though. Thank you. [LB373]

SENATOR SCHIMEK: Thank you. [LB373]

SENATOR ASHFORD: Thank you, Senator Schimek. Any proponents? [LB373]

ROWEN ZETTERMAN: Senator Ashford, members of the committee, I'm Rowen Zetterman, it's R-o-w-e-n, the last name is Z-e-t-t-e-r-m-a-n. And I'm the current president of the Nebraska Medical Association. And I'd like to speak to you today in

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
February 07, 2007

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support of LB373. It's a great honor and privilege for me to be here and I thank you for the opportunity. Miscommunication between patients and their physicians or between physicians and their patients is at the root of many malpractice cases that occur in this country. Sometimes such cases are filed simply because of an unexpected adverse outcome coupled with a lack of empathy by the physician or the other healthcare provider. Why would there be a lack of empathy? Well, many times people are advised not to talk to their patient, not to own up for what may have happened. And this may result from fear that expressing such empathy could be used against them in a court of law as an admission of guilt. The inability to say "I'm sorry" can prevent the sense of abandonment that may happen when nothing is said by the physician. This bill is about healing. Dr. Aaron Lazare has a quote. It says an effective apology is one of the most profound healing processes between individuals, groups or nations. This bill can salvage relationships between patients and their physicians. And as Senator Schimek has already pointed out, it can reduce defense costs as well. The University of Michigan established a similar policy in 2002 of acknowledgement and empathy over cases and they've reduced their tort claim expenses dramatically. I've had personal experience with "I'm sorry." I work for a healthcare system in which we acknowledge when events occur. And I had the opportunity to meet with a family and express empathy about the death of their loved one. And what I learned was what they really wanted was for me to go back and train my physicians and my mid-level providers in how to recognize the problems of the patient similar to that of their loved one. And we did, we carried all that out on behalf of the family. I hope that all of you today would take a leadership position in this effort and follow what Senator Schimek has proposed and support this bill and advance it to the floor. Thank you very, very much for your attention. [LB373]

SENATOR LATHROP: Thank you, Doctor. Are there any questions? Senator Chambers. [LB373]

SENATOR CHAMBERS: This is not going to be a grilling, Doctor, so I'm going to try to be a better man. I try to do the right thing. (Laughter) Am I to understand that doctors will not express sorrow or condolence of these various things for fear of being sued? Is that what inhibits them? [LB373]

ROWEN ZETTERMAN: I believe that many physicians have been advised by their attorneys to not speak up and talk and provide answers to the patient whenever they feel that there may be a tort claim filed. [LB373]

SENATOR CHAMBERS: Will a physician allow a lawyer to tell that physician how to perform an operation? In other words, will that physician accept medical direction from an attorney? [LB373]

ROWEN ZETTERMAN: Well, Senator Chambers, in this particular instance they would accept that from another physician because that's who they're going to for counsel and

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
February 07, 2007

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advice. [LB373]

SENATOR CHAMBERS: But that's not what I'm asking. [LB373]

ROWEN ZETTERMAN: And in this particular case, they would be going to a lawyer for counsel and advice about a legal issue. And in that case, they would accept the opinion of the lawyer. [LB373]

SENATOR CHAMBERS: That's not what I'm asking you. [LB373]

ROWEN ZETTERMAN: I understand what you're asking, but I'm telling you that they would do it, of course, for a legal opinion. [LB373]

SENATOR CHAMBERS: Is it a problem for you to answer the question I asked? Would it violate your ethics? And if it will, I won't ask it again. [LB373]

ROWEN ZETTERMAN: I don't think that...I can just simply say no or concur with what you said. [LB373]

SENATOR CHAMBERS: Okay, lawyers don't advise doctors on how to treat patients. [LB373]

ROWEN ZETTERMAN: Correct. [LB373]

SENATOR CHAMBERS: Okay. Now I think I heard you say that this is a part of healing. Did you say that or did Senator... [LB373]

ROWEN ZETTERMAN: I did say that, I did say that. [LB373]

SENATOR CHAMBERS: Okay. Is healing a part of the art of practicing medicine? Are doctors in the business of healing? [LB373]

ROWEN ZETTERMAN: I certainly hope so, Senator. [LB373]

SENATOR CHAMBERS: So this would be a part of medical practice? [LB373]

ROWEN ZETTERMAN: Correct. [LB373]

SENATOR CHAMBERS: But they're letting a lawyer tell them, you might be sued, so don't you do what might result in healing for this patient. And the doctors are accepting that advice from the lawyer, more or less. [LB373]

ROWEN ZETTERMAN: I certainly believe that has happened, yes, sir. [LB373]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
February 07, 2007

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SENATOR CHAMBERS: So they fear being sued more than they feel an obligation to be a healer? [LB373]

ROWEN ZETTERMAN: I believe that can be a problem, yes, sir. [LB373]

SENATOR CHAMBERS: And that's what is happening, just being frank and direct, so we know what we're dealing with. True? [LB373]

ROWEN ZETTERMAN: I agree with you. [LB373]

SENATOR CHAMBERS: Okay. That's all I wanted. Thank you. [LB373]

ROWEN ZETTERMAN: Okay. Thank you. [LB373]

SENATOR ASHFORD: Thanks, Doctor. Pete? [LB373]

SENATOR PIRSCH: I guess I just have a general question. As it is the practice in other states, the question is with regard to the scope of the covered communications. Typically, how does this apology manifest, manifest itself? Is it just in one letter, generally, or a number of letters? [LB373]

ROWEN ZETTERMAN: You're talking about how would they carry out the activity of... [LB373]

SENATOR PIRSCH: Have you seen this experienced in other states then or how is it usually... [LB373]

ROWEN ZETTERMAN: I have not seen it experienced in other states. I know how it is done in some areas, such as in the Veterans Administration where they'll meet directly with the family. And of course, what they would expect is that for, first of all, as Senator Schimek pointed out, there are some procedures that physicians do that carry a risk. The risk may be incredibly small, but it'll still happen to a certain percentage of the patients. And when that occurs, we would expect that that physician would immediately talk to the patient and/or their family about the circumstance of what happened and explain to them what needs to be done to provide that care. In the VA, in addition, there is a review of the circumstances of a case and it is felt that more disclosure is done. Then that will often be done a second time in a more formal fashion in which someone, such as the chief of staff of that hospital along with the risk management officer and the physicians involved, may actually provide the information. How it's done exactly in the other states where this has already been passed, I've not observed, so I can't answer your question directly. The idea would be to do it in proximity to the event. [LB373]

SENATOR ASHFORD: Senator McDonald. [LB373]

SENATOR McDONALD: If I had surgery from a doctor and the doctor did something that maybe I would never find out, so say I had an operation and the doctor left a sponge or something in there. And you know, chances are I might never know that it's there. And then the doctor doesn't tell me. And ten years later, find it and we could have done something about it prior to that just because the doctor had knowledge that it happened and then we make the decision at that point, do you think that by saying, I'm sorry I did this, that that would allow me to make a decision what I'm going to do at that point in time rather than maybe hoping it goes away? See where I'm getting? [LB373]

ROWEN ZETTERMAN: Yeah, I'm not exactly certain that I understand. But I would say that, as Senator Schimek has already pointed out, in cases of negligence, this does not change anything about a tort claim act. What it changes is the admissibility of the statement of empathy or being sorry. If a physician or other healthcare provider would do something that would be deemed negligent by a court, whether they said they were sorry or not would not be an issue. But the simple statement of "I'm sorry" could not be used as evidence of their guilt in that negligence case. So if that happened in that case...first of all, if something happened that you were unaware of that I knew about happened, I would try to tell you about it, whether you would have ever known or not that something actually happened. You know, if it was adverse in any way, it would be my personal policy to try and explain to you what happened and say fortunately nothing adverse happened because of it. [LB373]

SENATOR McDONALD: But do you think all doctors have that same standard? [LB373]

ROWEN ZETTERMAN: I would hope so. [LB373]

SENATOR ASHFORD: Senator Schimek. [LB373]

SENATOR SCHIMEK: Yes, thank you for being here. I appreciate your testimony. [LB373]

ROWEN ZETTERMAN: My pleasure. [LB373]

SENATOR SCHIMEK: As this bill was being explained to me, the sponge example was used. And I'd like to just comment on that, because I think that what I was told is that in many hospital settings or clinic settings or whatever nowadays, the fact that the sponge gets left in occasionally is something that then the physicians and people in the operating room have a plan for taking care of so that it doesn't happen. For instance, they count the sponges before the surgery and after the surgery to make sure that something isn't included in the patient's body. Is that a good example of what can come from being able to say you're sorry and we left the sponge in and we're sorry and we

need to do something about this? [LB373]

ROWEN ZETTERMAN: I think the natural extension of what you suggested is that you always look for the why. It isn't just simply the empathy that goes along with a patient. But then as you look at your own system, most patient safety issues in hospitals, clinics, and other places turn out to be errors of the system rather than errors of individual persons if you really look at them in-depth. There's something about the way they counted the sponges, there's something about the way they introduced additional sponges into the operating theater on that particular procedure. Some way that they could have failed in their count of number of sponges at the end. So that in that particular instance, what I would do as a chief medical officer is we would then explore and study the circumstances around that event and attempt to learn how the system failed to accurately count the number of sponges and allowed one to remain behind in a patient, because most of the time, these are system errors. So yes, the natural extension would be to try and study the safety issues that go along with it. [LB373]

SENATOR SCHIMEK: But it doesn't necessarily have to be an "I'm sorry" situation for that to occur probably, does it? [LB373]

ROWEN ZETTERMAN: Oh, we would study any sorts of events in the hospital, and we do. I mean, you know, we look at things all the time, infection rates and a variety of things that we study simply because we want to control them and keep them as low as we can without necessarily having any specific event that may have triggered it. So yes, you're correct. It would not have to be that. Again, the "I'm sorry" is only a portion of all of what hospitals do to look at the issues of patient safety. And this particular instance, it's simply about preventing its use, the statement of empathy, and preventing its use an admission of negligence. [LB373]

SENATOR ASHFORD: Thank you, Senator Schimek. Senator Chambers. [LB373]

SENATOR CHAMBERS: Thank you. Doctor, playing the angel's advocate, I'd like to ask a question or two. [LB373]

ROWEN ZETTERMAN: Sure. [LB373]

SENATOR CHAMBERS: If a surgeon is proficient...if we have a neurosurgeon and within the realm of that physician's training an operation is to be performed, it's not enough for that surgeon to just do the best he or she can. It is the requirement that that surgeon perform the operation right or correctly. Isn't that true? [LB373]

ROWEN ZETTERMAN: I would certainly say that within the realm of the training, that's exactly what they should be doing. [LB373]



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Transcriber's Office

Judiciary Committee  
February 07, 2007

---

SENATOR CHAMBERS: That's what I wanted to...right. So I'm not, you know, going off everywhere. I'm trying to narrow it as much as I can. [LB373]

ROWEN ZETTERMAN: Sure. [LB373]

SENATOR CHAMBERS: Sometimes people want to express a great amount of sympathy or empathy for a surgeon, physician or other healthcare provider who does make a misstep. But in reality, when they perform those services, they're paid to perform those services, aren't they? [LB373]

ROWEN ZETTERMAN: That's correct. [LB373]

SENATOR CHAMBERS: And they're paid to perform them right or correctly. [LB373]

ROWEN ZETTERMAN: That's correct. [LB373]

SENATOR CHAMBERS: So if they fail to do that, they did not do what they were paid to do, right? [LB373]

ROWEN ZETTERMAN: As you, I suspect, know better than I, that certainly has been actually a proposal that has been provided, that when a misadventure occurs and an act of negligence actually occurs around it, that the hospital should not be paid by the insurance company or Medicare or the physician or other mid-level provider should not be paid for the same reason. If that's where you're going, yes, that has been proposed. [LB373]

SENATOR CHAMBERS: I'm not going that far. I'm just trying to make it clear that we're talking about people who are not volunteers or good samaritans, they are being paid and well-paid for the services that they perform and an unanticipated result occurs. And if they had performed the service correctly, then that...I'm not saying everything must be anticipated. [LB373]

ROWEN ZETTERMAN: Sure. [LB373]

SENATOR CHAMBERS: But in the ordinary course of events, if an unanticipated outcome occurs, this does not say unanticipated based on the level of expertise, knowledge or training available. It can just be unanticipated by an inattentive healthcare provider. [LB373]

ROWEN ZETTERMAN: Unfortunately, some complications--as an example, from procedures--happen to the very best trained people that probably occurred through some unavoidable event. In other words, despite how well you're trained and how perfect you can do something, again I'll use the example of Senator Schimek's

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
February 07, 2007

---

testimony about a colon perforation. I'm a gastroenterologist and so this is a procedure that I do frequently and I do them every week. And I've done a lot because I've been doing this now for more than 30 years. Yet I know that there's still about 1 chance in 1,000 of having a colon perforation. No matter how well I pick the patient, no matter how well I avoid patients that I think are higher risk, it will still happen on occasion that there will be a colon perforation. And we warn every patient that's going to have it done about that risk. So some things happen despite the quality of the person doing the procedure and the events are not avoidable. But when they do happen, what then I would do as a physician and what I believe most physicians in health systems would do, would be to study the circumstances and look at the question of why. Why did it happen, what could we have done differently, what did we do that somehow put that event to occur in that setting? [LB373]

SENATOR CHAMBERS: And all of that I can accept. But going back to the point I was getting to, that word "unanticipated" does not deal only with the highly exceptional instance that you mentioned, would it? [LB373]

ROWEN ZETTERMAN: Well, certainly that...no, I would agree with that. I would agree with that. [LB373]

SENATOR CHAMBERS: Okay. And I'm just trying to get at the meaning of the language. And maybe I can give an example so you can see what I was trying to get at. I don't know if you ever watch football or these babblers who talk about games and, you know, rehash them. But sometimes they'll ask a referee, you were in that tight situation, you had to make an instantaneous decision, isn't it difficult to be in that situation? That question shouldn't even be asked because that's what he's paid for. The nature of the game is such that he's going to be in those situations, make those decisions. He's not due any sympathy. He is paid to do that. So I will just ask the question outright. If there is no negligence, and I'm framing the question like that, it doesn't matter what the doctor says, the doctor is not going to be liable. Isn't that true? There must first be an act performed without due care and harm must be suffered by the one who is on the other end of it. If the act was performed with due care and there was no harm to the individual, no matter what the doctor says, the doctor is not going to be found liable. Is that the case? I mean, isn't that true? [LB373]

ROWEN ZETTERMAN: That is not my understand, Senator, but I'm not a legal authority so I can't answer your question specifically. [LB373]

SENATOR CHAMBERS: Okay, I'll wait until somebody who might because I don't want to put you off in deep water that you're not... [LB373]

ROWEN ZETTERMAN: Okay, yeah, it's beyond what I could relate to as a physician alone. [LB373]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
February 07, 2007

---

SENATOR CHAMBERS: Thank you. You've been very helpful. [LB373]

ROWEN ZETTERMAN: Okay, thank you. [LB373]

SENATOR ASHFORD: Thanks, Doctor. [LB373]

ROWEN ZETTERMAN: Thank you very much. [LB373]

SENATOR ASHFORD: I believe that's all the questions. Thank you. Pete, how are you? [LB373]

PETER WHITTED: Senator Ashford, members of the Judiciary Committee, my name is Peter Whitted, P-e-t-e-r W-h-i-t-t-e-d. I'm an ophthalmologist in private practice in Omaha and member of multiple professional organizations, including the NMA. I'm also a member of the Nebraska Bar Association. I am the Nebraska representative to the board of COPIC, Colorado Physicians Insurance Company, one of the major malpractice carriers in Nebraska. COPIC is a nonstock, nonmutual company dedicated to the provision of professional liability insurance through advocacy, innovation, and dedication to patient safety. I speak in that capacity in support of LB373, the "I am sorry" legislation. In that Senator Schimek has provided such a wonderful summary, I will speak only very briefly and answer any questions that you might have, which seem today to be considerable. An effective apology is one of the most profound healing processes between individuals, as Dr. Zetterman mentioned. It is a very natural human response and expression of empathy and compassion. In the healthcare arena, it has the ability to restore self-respect and dignity, restore the feeling of being cared for, relieve the suffering of both parties, validate that an unexpected outcome has occurred, be an assurance of shared values between the patient and the physician, initiate a dialogue that can lead to change and a promise for future improvement, and it can lead to reparations. Over the past few years, the disclosure and apology movement has spread rapidly in healthcare as a growing number of states pass laws protecting a doctor's apology from use in trial, and as many hospitals and healthcare systems adopt policies that encourage physicians and other healthcare providers to promptly disclose medical errors and unexpected outcomes and apologize as warranted. "I am sorry" is the first initiative to bring transparency into the medical liability arena. The long-established defend-and-deny policy that threw up a wall of silence after a maloccurrence is beginning to disintegrate so that real patient safety legislation can occur. "I am sorry" is simply one pillar designed to support a new system of medical liability reform that encourage disclosure, development of solutions for unanticipated outcomes, both individually and collectively, and timely and fair reparations. This is identical to COPIC's initiative 3R's program--recognize, respond, and resolve--which has shown remarkable early results and that's at four years. There is mounting evidence that "I am sorry" works to reduce the burden of medical malpractice costs on society

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
February 07, 2007

---

and improvement in patient care and safety. I strongly encourage you to support this patient safety legislation. I will answer any questions. [LB373]

SENATOR ASHFORD: Thanks, Pete. Any questions of Pete? Steve...Senator Lathrop. [LB373]

SENATOR LATHROP: I do. Dr. Whitted, I would like to visit with you and, maybe by way of background, talk about the difference between a bad outcome and medical negligence. There is a difference, is there not? [LB373]

PETER WHITTED: I think that's true. [LB373]

SENATOR LATHROP: Can you move just a little closer to the mic, so we can hear and the record picks it up? [LB373]

PETER WHITTED: I think that's true. [LB373]

SENATOR LATHROP: Terrific. Thank you very much. The difference between a bad outcome and medical negligence is a bad outcome is, as the previous witness indicated, if you perforate a colon, it's a known risk of the procedure. It might happen 1 in 1,000 times and it can happen even when you do the procedure carefully. [LB373]

PETER WHITTED: True. [LB373]

SENATOR LATHROP: That would be a bad outcome. You would agree with that? [LB373]

PETER WHITTED: I would agree with that. [LB373]

SENATOR LATHROP: Okay. Medical negligence is where a doctor breaches the standard of care in performing a procedure or responding to a situation. Would you agree with that? [LB373]

PETER WHITTED: If the duty exists and the standard of care was breached, yes. [LB373]

SENATOR LATHROP: Okay. And you know, as a lawyer and as a doctor, that in order to be responsible, legally responsible, it's not a bad outcome you're responsible for but only medical negligence. Would you agree with that? [LB373]

PETER WHITTED: I would agree with that, but it's never that clear in situations or all of the cases that had medical negligence would be brought to fruition. And all those cases that did not involve negligence would not be brought to fruition. [LB373]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
February 07, 2007

---

SENATOR LATHROP: Well, you would agree with the principal. [LB373]

PETER WHITTED: Correct, I do... [LB373]

SENATOR LATHROP: Your point is, is that we may have to litigate whether it was a bad outcome or a medical negligence. [LB373]

PETER WHITTED: That is correct. [LB373]

SENATOR LATHROP: Okay. But if you have a bad...the bill that we have in front of us today, it provides for the inadmissibility of an apology. That's the primary purpose of the bill. Is that right? [LB373]

PETER WHITTED: That's correct. [LB373]

SENATOR LATHROP: And that's advanced by COPIC, which is your medical malpractice insurance company. Is that true? [LB373]

PETER WHITTED: Correct. [LB373]

SENATOR LATHROP: The apology in this bill is more than just "I'm sorry" though, is it not? I mean, an apology is a conversation that you have with a patient after either a bad outcome or medical negligence occurs. [LB373]

PETER WHITTED: I think apology can be a lot of things and a lot of things can be included in the discussion, that's correct. [LB373]

SENATOR LATHROP: In terms of what this bill attempts to keep from ever coming into a trial is not just the words "I'm sorry," but "I'm sorry, I made a mistake." That would be covered by this bill, would you agree? [LB373]

PETER WHITTED: I think it would be covered by this. [LB373]

SENATOR LATHROP: And an apology or a sorry under this bill would be, "I'm sorry, I made a mistake, I shouldn't have done exactly what I did." That would be covered by this bill. [LB373]

PETER WHITTED: The apology would be not covered (sic). I think the instances surrounding that and the investigation of that would be admissible. [LB373]

SENATOR LATHROP: Well, you mention the investigation. The fact is, is that under current law, the peer review that follows medical negligence is not admissible or any of

the findings that take place. Isn't that also true? [LB373]

PETER WHITTED: What peer review are you referring to? [LB373]

SENATOR LATHROP: The peer review...there is a peer review that follows medical mistakes, is there not? [LB373]

PETER WHITTED: Not in all instances. [LB373]

SENATOR LATHROP: But in the instances where they have peer review, that is protected by statute from even being discovered in a civil proceeding. Would you agree with me on that? [LB373]

PETER WHITTED: I'm not sure about that. I'm not sure about that. [LB373]

SENATOR LATHROP: Okay, let me go back to the apology. The apology can include not just "I'm sorry," but an explanation of where the doctor made a medical mistake. [LB373]

PETER WHITTED: That's true. [LB373]

SENATOR LATHROP: And that would not be admissible, if we pass this bill. [LB373]

PETER WHITTED: The apology would not be. The circumstance around it and the investigation associated with investigating that comment would be admissible. [LB373]

SENATOR LATHROP: We're talking about the apology and not the discovery that follows the filing of the civil suit. In terms of this bill, any explanation the doctor gives during that apology would not be admissible. Is that true? [LB373]

PETER WHITTED: That's my understanding. [LB373]

SENATOR LATHROP: Okay. Now if you have a bad outcome, not a medical mistake but a bad outcome, you may go talk to your patient and say, I'm sorry we had a bad outcome, but no one is going to admit making a medical mistake when we're dealing with a bad outcome. Would you agree with that? [LB373]

PETER WHITTED: No. [LB373]

SENATOR LATHROP: No? [LB373]

PETER WHITTED: No. [LB373]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
February 07, 2007

---

SENATOR LATHROP: You think the doctors who have not made a mistake will come out and apologize and say, I made a mistake? [LB373]

PETER WHITTED: I routinely talk to my patients, if they have a bad outcome, about the issues whether it's not necessarily an apology, but I explain the situation. I would hope that most physicians would do that. And that's the encouragement that this bill gives you to do just that. [LB373]

SENATOR LATHROP: Okay. We want to encourage them to have a conversation. If they make an apology and if a lawsuit is filed over that apology or over the medical mistake, the legislation that we have here, this bill would keep the doctor's admission from ever coming into court. [LB373]

PETER WHITTED: The apology itself, yes. [LB373]

SENATOR LATHROP: Okay. And if we pass this bill, it would keep the apology and the explanation by the doctor of his own fault from coming into court even where he denies it later on? [LB373]

PETER WHITTED: That's a good question, but I think it would. [LB373]

SENATOR LATHROP: And that really is the problem. The bill doesn't say, keep the apology out if we admit fault at the time the litigation starts. It's just, keep it out, so we can deny liability later on. [LB373]

PETER WHITTED: The reason that the fault issue is not...that fault is not admissible as well is, when is an apology an admission of fault and when is it not? And as soon as you get into that discussion, then you're going to just tie it in at trial. When is this apology an admission of fault and when is this apology not an admission of fault? And that's a discussion that you want to have. [LB373]

SENATOR LATHROP: Well, I don't know if it's a discussion we do or don't want to have. But the difficulty I have with the bill is, is that we could...I don't have any trouble with not admitting the fault of the doctor if he comes to the patient after this happens and he said, I made a mistake for whatever reason, I'm sorry I made a mistake, and then this lawsuit gets filed. We don't have to worry about this if he admits his mistake in the lawsuit. The only time this is a concern is if he both apologizes and admits a mistake and then later denies it. [LB373]

PETER WHITTED: Do you think that would happen? [LB373]

SENATOR LATHROP: It happens all the time, Doctor. [LB373]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
February 07, 2007

---

PETER WHITTED: I mean, I sit on a malpractice claims committee. We review probably ten cases a month. That's 120 cases a year. I can't say that I've ever seen this discussion come up. [LB373]

SENATOR LATHROP: Well, would you agree that there's no point in immunizing and keeping from a trial the apology that includes an explanation of fault unless the doctor has denied liability after the petition is filed? [LB373]

PETER WHITTED: I certainly think that I would be discouraged if admitting fault and going through the process and then denying it later, that would be troubling to me. [LB373]

SENATOR LATHROP: What if we amended your bill to allow for...well, it's not your bill, it would be Senator Schimek's bill. What if we amended the bill to provide that the apology with the explanation of fault didn't come in, in those instances where the care providers admitted liability? Would that seem like a fair compromise? Otherwise, we're trying to have it both ways, are we not? [LB373]

PETER WHITTED: No. Say that again for me please, would you? [LB373]

SENATOR LATHROP: Would you have difficulty if the bill provided that the apology and the explanation of fault would not come in, in those instances where the doctor has admitted liability when the lawsuit comes along? [LB373]

PETER WHITTED: I'm not comfortable with that. [LB373]

SENATOR LATHROP: I wouldn't expect so. And really, that's kind of the point. And really, we talk about unintended consequences down here in the Capitol. But what we're doing is we're allowing a doctor to apologize, explain to the patient their fault, and then come in when the lawsuit happens and deny liability. And then never permit his explanation of fault to be used in his own trial. [LB373]

PETER WHITTED: His apology is not admissible and the explanation of fault would not be admissible under this bill, you're correct. [LB373]

SENATOR LATHROP: Probably not much healing goes on at that point. [LB373]

PETER WHITTED: Well, if it's gone to litigation, then probably not much healing has gone on anyway. The idea of this legislation is to take care of the process before it gets that far down the line. The point of this legislation is to encourage people to discuss this before it ever gets to that point. And that's why that the company really supports this. That's why I can support this as a physician. And this is something that we do all the time. [LB373]



Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
February 07, 2007

---

SENATOR LATHROP: First of all, I want to tell you I appreciate the fact that you've come down here and I appreciate the fact that you've given me answers. And I've talked to you at different times about issues similar to this and I appreciate that as well. I'm not trying to put you on the spot, but I do have a concern if we are going to keep the explanation of fault out in a case where the doctor also refuses to admit that he was responsible. [LB373]

PETER WHITTED: I have to agree with you. To immunize somebody from fault in a case that's obviously negligent, that would trouble me. I don't think that this bill affects that instance. I don't think it affects it negatively. [LB373]

SENATOR LATHROP: It doesn't provide immunity, but it does keep out an important piece of evidence, which is the doctor's own admission that he made a mistake. And it's only necessary in those cases where he's denying that he made a mistake when the lawsuit is filed. Isn't that true? [LB373]

PETER WHITTED: I think that that's true. [LB373]

SENATOR LATHROP: Okay, thank you. [LB373]

SENATOR ASHFORD: It's nice to hear two experts talking about something they both know about. [LB373]

SENATOR LATHROP: He certainly does, I appreciate that. [LB373]

SENATOR ASHFORD: Well, I think you both do. Let me just...it's getting late so we've got three bills left. I would hope that we, if there has been testimony about a particular part of this, let's not be redundant, let's not add new information. That happened to have been a very good exchange and was very illuminating. I appreciate Senator Lathrop's questions and Dr. Whitted's responses. Senator McDonald? [LB373]

SENATOR McDONALD: Would it happen that a doctor would admit to a patient they made a mistake, and then it goes to court, that they would retract that information, say, no, I didn't make a mistake? We trust our doctors a little bit more than that, don't we? [LB373]

PETER WHITTED: What I've told you is I haven't seen that happen. I would be disturbed if that happened. But what Senator Lathrop is pointing out is the fact that, at least in theory, that could happen. I think that's true. I think this bill, the idea of this legislation is to encourage the discussion early on so you don't get to that point. I think as soon as we get to the clunkiness of medical liability litigation, I think we have a problem already. I think the purpose of this is to stay away from that. [LB373]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
February 07, 2007

---

SENATOR McDONALD: And it...would the attorney that gets involved recommend the doctor not to admit that he said that? [LB373]

PETER WHITTED: And I would hope that the bar would discourage that type of activity, too. I mean, I think there's a lot of light that needs to be shed on the medical liability arena on both sides. And I think that this is the first attempt to shed that type of light. I mean, it's a very imperfect process. It's the best that we have right now. I think that we can do better. And this is a first attempt to try to move in that direction. I'm on the board of an insurance carrier that basically, their last CEO said was, my duty is and my goal is to put this company out of business, because I think we need to look at medical liability and compensation a whole different way. I think that's true. That's a long ways down the line. There's a lot of solutions that have been proposed, some of which are good, some of which aren't so good. But this is a first attempt to work on moving forward to something that's better. [LB373]

SENATOR ASHFORD: Thank you. Senator Chambers. [LB373]

SENATOR CHAMBERS: Are you to be, during this hearing, addressed as Counselor or Doctor? (Laughter) [LB373]

PETER WHITTED: Pardon? [LB373]

SENATOR CHAMBERS: You're a lawyer and a doctor, so how do you prefer to be addressed? [LB373]

PETER WHITTED: Well, I'm a member of the Bar Association. I have actually no legal experience whatsoever. I went to law school. [LB373]

SENATOR CHAMBERS: Based on those who have been, you're still on par with them, but you are a lawyer. So how do you prefer to be addressed? (Laughter) [LB373]

PETER WHITTED: You know, Peter. (Laughter) [LB373]

SENATOR CHAMBERS: Say that again? [LB373]

PETER WHITTED: Peter. [LB373]

SENATOR CHAMBERS: Well, I can't get that familiar, because I'm like an interrogator here. (Laughter) [LB373]

PETER WHITTED: That's fine. [LB373]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
February 07, 2007

---

SENATOR CHAMBERS: And it seems like I'm not being fair. Had you ever though, since you're a lawyer and a doctor, to also be a mortician? (Laughter) Lightening the mood. But here's what...I'm going to say this to try to make a point. There are three women in mythology known as the Fates: Clotho, Lachesis, and Atropos. Each one has a separate function distinct from that of the other. One weaves the thread of life, the other determines the length, and Atropos cuts it. On the other hand, if you have a hydra, it is a multiheaded creature and there is not apparently a separate and independent function carried on by each head. There is a centralized controller that determines what all the heads will do. So you're more like, if you allow me to say it, a hydra. So I'm going to talk to you as somebody trained in medicine and the law. And I don't feel I'm asking an unfair question, because you're in a position to answer in either capacity, as is necessary, based on the question. Now, if we were going to strip away everything and get right down to what this bill is, it is more a protect the doctor, not a bill to heal the patient. Isn't that true? [LB373]

PETER WHITTED: I don't agree with that, Senator Chambers. [LB373]

SENATOR CHAMBERS: Well, a doctor can apologize. The only thing that stops the doctor, based on what Dr. Zetterman said, is advice from a lawyer not to do this because there may be liability. And the liability fear trumps the necessity or the duty of the doctor to heal, because something which could contribute to healing is not going to be done. [LB373]

PETER WHITTED: I would make one correction. I don't think it necessarily comes from your attorney. I think it's a general atmosphere that pervades the two professions. It creates a barrier for people that had these frank discussions. And I think you're correct in saying that it does keep us from healing these patients. And I think that that's wrong. [LB373]

SENATOR CHAMBERS: And it's the fear of liability. [LB373]

PETER WHITTED: I think that that's true. [LB373]

SENATOR CHAMBERS: Okay. So this is a protect the doctor bill. By saying you can make any statement that you choose and it's not admissible in a civil action against you, that's to protect the doctor not the patient. Isn't that true? [LB373]

PETER WHITTED: I think it's to encourage a frank discussion where one doesn't occur right now. [LB373]

SENATOR CHAMBERS: Counselor, the question is, this bill is designed to protect the doctor by saying you can follow your conscience and whatever your medical ethics would require you to do or say with this patient and it cannot be used against you. That

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
February 07, 2007

---

protects the doctor rather than heals the patient. Isn't that true? [LB373]

PETER WHITTED: Well, I think it protects the doctor. If he had the discussion, it may heal the patient as well. [LB373]

SENATOR CHAMBERS: But here's the point. The doctor can say all these things without this bill, can't he or she? [LB373]

PETER WHITTED: And it happens. [LB373]

SENATOR CHAMBERS: And we don't really need this bill if the doctor is going to be ethical and give preeminence to the duty to heal. We don't need this bill because the doctor will do that. Isn't that true? [LB373]

PETER WHITTED: We're all human and I think we make decisions, all sorts of fears that affect the way we confront others. And I think that some people are driven by those fears and that outweighs this other overlying need to heal patients. So I think that that's true. [LB373]

SENATOR CHAMBERS: Well-stated, Counselor. [LB373]

PETER WHITTED: I think that that's disappointing, but it happens. And I think that's a real fear. And I think that that's what this bill gets at, is trying to break down that fear so these discussions occur. [LB373]

SENATOR CHAMBERS: And the only way we can do it is to protect the doctor. This is a protect the doctor bill rather than heal the patient, because the doctor can do all of these things without this bill. And if the doctor wasn't so afraid of liability, the doctor would do it. So the fear overcomes knowledge. I thought knowledge was supposed to banish fear and perfect love casts out all fear. So if the doctor loved his or her work, loved the patient, not in a sexual way, but as a fellow creature needing something that the doctor can perform or provide, but because the doctor fears something that may happen over here, the doctor is not going to provide it. I'm getting all that into my question because I think this is strictly a protect the doctor bill. It has nothing to do with the welfare of the patient whatsoever. This does not stop...there is nothing that stops the doctor from doing all of these things other than fear. [LB373]

PETER WHITTED: If we don't encourage this type of discussion with patients, we will continue to have individuals in our profession who aren't comfortable, for whatever reason, in having these discussions. There are even people who don't have the fear who aren't very good at this and don't do it for those reasons. Those are skills we're trying to teach people in medical schools today. [LB373]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
February 07, 2007

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SENATOR CHAMBERS: And that's where it should be done... [LB373]

PETER WHITTED: And we're getting better at it. [LB373]

SENATOR CHAMBERS: ...and not coming here saying, protect us. Now I'm going to ask you a question in your role as a lawyer. You're going to make this admission to your client as they take him off in handcuffs. You tell that client, I ought to have objected and had I objected, that inadmissible evidence would not have gotten in, but I did not object, the inadmissible evidence got in, and that's why you're going to prison for life. That statement can be used against the lawyer in a malpractice lawsuit, couldn't it? [LB373]

PETER WHITTED: I really don't understand the analogy. [LB373]

SENATOR CHAMBERS: Say it again? [LB373]

PETER WHITTED: I don't understand... [LB373]

SENATOR CHAMBERS: That's why I'm talking to you as a lawyer. I'm not making an...I'm talking to you as a lawyer. That could be used against the lawyer, couldn't it? [LB373]

PETER WHITTED: I don't know, I think so. [LB373]

SENATOR CHAMBERS: Okay. Now should we, in order to encourage open exchanges between a lawyer and client, to say that any apology made by a lawyer, any acknowledgment of fault is inadmissible against the lawyer if the client brings a malpractice lawsuit against the lawyer? Should we give the same shield to the lawyer that we're giving to the doctor and these other medical providers, medical care providers? [LB373]

PETER WHITTED: Well, there is an attorney-client privilege that does protect some of those things. Is that what you're saying? [LB373]

SENATOR CHAMBERS: But it does not protect the lawyer against the client presenting evidence of an omission by the lawyer against the lawyer's interest that resulted in harm to the client, namely loss of freedom. [LB373]

PETER WHITTED: I don't know what the procedural rules are with respect to that, so I would be speaking out of school with... [LB373]

SENATOR CHAMBERS: Well, let me ask you a simple question that I think any lawyer will know. And Doctor, I have to acknowledge all the time, my education started in OPS, Omaha Public Schools. That's the foundation of my education. A house built on the

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
February 07, 2007

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sand cannot stand. So maybe that's why I'm doing such a poor job. But let me do the best I can with what I have to work with. (Laughter) The lawyer-client privilege is not the privilege of the lawyer, it's the privilege of the client. Isn't that right? [LB373]

PETER WHITTED: I think so. [LB373]

SENATOR CHAMBERS: The client can waive the privilege. So the lawyer cannot say, because there is a lawyer-client privilege, the client cannot introduce a statement against my interest in a malpractice lawsuit against me. In other words, the lawyer cannot invoke that privilege against the client. [LB373]

PETER WHITTED: That's true. [LB373]

SENATOR CHAMBERS: But I, as the client, can stop you, my lawyer, from saying certain things. Isn't that true? [LB373]

PETER WHITTED: That's true. [LB373]

SENATOR CHAMBERS: Okay. Now let's bring it over here to the doctor and the patient. This is a discussion, not between two experts as occurred between you and Senator Lathrop, but between an expert and one struggling. [LB373]

PETER WHITTED: Two struggling. (Laughter) [LB373]

SENATOR ASHFORD: Therefore it's fine for you to proceed, because it's a whole different set of circumstances. (Laughter) [LB373]

SENATOR CHAMBERS: Okay. I'm trying to get something from a person who's trained in both the law and medicine. And remember, everything we say is recorded. Everything will be transcribed. And anything you say can and will be used in the appropriate way. (Laughter) That's why I'm taking this time with you, because anybody else who comes up, I'm not going to put these questions to that person. Would you, if you are willing to answer the question, do any of these things that you felt were necessary to maintain a proper relationship with you and the patient and maybe contribute to the healing, even if we didn't have this bill? [LB373]

PETER WHITTED: I do it. [LB373]

SENATOR CHAMBERS: You do it now. Has it harmed you, do you feel? [LB373]

PETER WHITTED: I don't think so, but I don't know, but I don't think so. [LB373]

SENATOR CHAMBERS: Have you been sued... [LB373]

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Transcriber's Office

Judiciary Committee  
February 07, 2007

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PETER WHITTED: I felt better about it. [LB373]

SENATOR CHAMBERS: ...have you been sued for malpractice? [LB373]

PETER WHITTED: Never. [LB373]

SENATOR CHAMBERS: You mean to tell...have you ever made a mistake that you admitted to a patient? [LB373]

PETER WHITTED: I've made a lot of mistakes, admitted a lot of mistakes to a lot of patients. [LB373]

SENATOR CHAMBERS: I would tell the court that this witness has just made the case against the necessity for this bill. You're my exhibit A. [LB373]

PETER WHITTED: I'm in a unique specialty where medical liability isn't a huge issue. I'm in a specialty where, in general, the negative result is not a high-cost item; such as OB/GYN, such as neurosurgery, such as surgery or cardiovascular surgery. [LB373]

SENATOR CHAMBERS: You work with these, on these. [LB373]

PETER WHITTED: We do, um-hum. [LB373]

SENATOR CHAMBERS: Is there anything you would do that could damage my vision or even cause me to lose it? [LB373]

PETER WHITTED: That I would do or could? (Laughter) [LB373]

SENATOR CHAMBERS: That you could do...no, I meant, are there any procedures or treatments you perform... [LB373]

PETER WHITTED: Yes, there are. [LB373]

SENATOR CHAMBERS: ...in your line of medicine that could cause me to lose my vision? [LB373]

PETER WHITTED: Yes, there are. But they're relatively uncommon and they really don't grab the attention of plaintiffs very often. [LB373]

SENATOR CHAMBERS: But that is something that can happen. So you are risk for being sued. [LB373]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
February 07, 2007

---

PETER WHITTED: Yes, I am. [LB373]

SENATOR CHAMBERS: Whether the person would win or not, we know that... [LB373]

PETER WHITTED: Yeah, I'm at risk. [LB373]

SENATOR CHAMBERS: I'm still going to say that what you have indicated to me is that we don't need this and we ought to make these doctors hold themselves to a higher standard without asking the Legislature to protect them as the Legislature is not going to protect any other profession. [LB373]

PETER WHITTED: Senator Chambers, I think that I am unique in my experience in the law. And the one thing that it's taught me is not to fear the legal profession. I think that they represent society in a very important way. I think that most people who don't have that background don't necessarily feel that way. There's a lot of animosity, but most of that animosity is due to fear and the threat to their profession, both from a financial standpoint and every other standpoint. That's why I think this is so important, because I'm not sure how to break down that fear. [LB373]

SENATOR CHAMBERS: No, the opposite for you. You're the one who knows that that fear is unjustified, yet you're testifying on this bill that entrenches the fear and tells the doctors, don't overcome it, we're going to protect you. You should be doing all you can to help them overcome that and explain to them, go to these medical schools and have them invite others in. But tell them, you have an obligation, when you're dealing with this patient, to think about that patient and not worry about liability first. And as you say, everybody's human. But still, there are certain standards that I don't think the Legislature ought to excuse a doctor from meeting. And if this kind of conversation with the patient is a part of healing, that doctor should not be told that those admissions will not be allowable in an action. Psychiatrists are medical doctors, but they don't use knives and other implements, they use words and they deal with the mind. Can a psychiatrist be found guilty of malpractice? [LB373]

PETER WHITTED: Certainly. [LB373]

SENATOR CHAMBERS: So it doesn't have to be a physical contact. Would this apply to psychiatrists also? [LB373]

PETER WHITTED: Probably in a more special way because of the protected nature of their activity. [LB373]

SENATOR CHAMBERS: And that's all that I will ask you. Thank you very much. [LB373]



Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
February 07, 2007

---

SENATOR ASHFORD: Any other questions of Peter? Yes. [LB373]

SENATOR McDONALD: If a doctor did something and knew that it happened, rather than telling the patient, you know, this is what happened, told his attorney. What would the attorney say? Would the attorney say, Doctor, don't talk to the patient about this, keep quiet, don't admit anything, and break that relationship between the doctor and the patient? Where then the patient feels like they can't trust their doctor just because that doctor is trying to avoid them or, you know, don't have a comfortable feeling so it breaks that relationship. Is that what an attorney does? Do they break down the communication between the doctor and patient because they don't want the doctor to admit anything to the patient? [LB373]

PETER WHITTED: I don't think that attorneys say that, per se. I think...I guess, I think it's an atmosphere that surrounds those situations. The typical way a malpractice claim arises is, you know the first person that the physician talks to is there claims person with their malpractice carrier. Then they may be, depending on, they'll investigate the case and they may be assigned an attorney, maybe not. Depending on the size of the case and the nature of the case, they may decide to retain attorney on their own. But I do not think, per se, that attorneys say...I suppose they say don't discuss this. I mean, I think that that's true. But I think more than that, it's the atmosphere that has been perpetuated over a long period of time. Don't talk. [LB373]

SENATOR McDONALD: Which in turn breaks down the relationship between the patient and the doctor. And that's where the patient then thinks, oh my goodness, I need to maybe look at a malpractice suit, maybe I need to look at something because obviously something is going on here because I can feel this tenseness. [LB373]

PETER WHITTED: I think that this, and the question was asked earlier, the timing with respect to the occurrence of the "I am sorry" or the apology. I think it needs to occur early. I don't think that, you know, I don't think by the time you've got, you know, other folks involved, particularly attorneys, that that's a possibility. But I think that the idea is to say, you know, this is after you have done a good review of the situation, to say this is what happened. You know, maybe like you said, a bad outcome and not a negligent...I'm not happy about the way this came out and I know you're not happy. I feel your pain, so to speak, let's see what we can do to right this situation and make sure it doesn't happen again. That's the goal of this legislation, that's what we're trying to do. And I think that this gives us an opportunity to do that. In deference to Senator Chambers, I think that you bring up good points. I mean, I can't disagree with that. But I think that the cloud of silence has been so deeply entrenched, that I think it's very difficult to overcome. And that's why I come before you today and the Legislature to urge you to support a way to try to begin to break down that code of silence so that we really do get to the bottom of medical errors, so we do try to make things more safe, and that we do compensate people that are injured by maloccurrences or whatever term you

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
February 07, 2007

---

want to use for those. [LB373]

SENATOR ASHFORD: Okay. Thank you. Thanks, Peter, for your testimony. How many other testifiers do we have here? Okay. On the proponents side, if it's new testimony, that's great. If not, try to keep it short. [LB373]

BRENDON POLT: (Exhibit 18) Chairman Ashford, members of the committee, my name is Brendon Polt. I'm the assistant executive director of the Nebraska Health Care Association. We're a trade association... [LB373]

SENATOR CHAMBERS: Excuse me, would you spell your last name, please? [LB373]

BRENDON POLT: Oh, I'm sorry. P-o-l-t. We're a trade association with a membership of nursing facilities and assisted living facilities. And I'll submit my testimony, but I do want to offer a different dimension to the bill. And that is, in our circumstances, you have a care provider licensed under the Uniform Licensing Act and controlled by the bill that's trying to carry out a set of directions or a care plan that a physician has recommended. And so in this circumstance, you might have a nurse that the question is, whether or not they properly were monitoring someone? The three biggest negligence claims in a nursing facility is dropping, a bed sore or a slip and a fall. And so the issue is, was someone monitoring properly, was someone turning properly, did someone transfer properly? And if a caregiver says, oh, I'm very sorry, you have that sore, I'm very sorry that you hurt your leg, they're talking to someone they live with because the residents of our facilities live there. And the reason our members are very supportive of this bill is because that's what you do in common English when someone is hurt. You say, oh, I'm sorry about that. And so from that perspective, we do support the bill. I have some other statistics in my testimony. [LB373]

SENATOR ASHFORD: Thanks. Any questions? Thank you. [LB373]

BRUCE RIEKER: (Exhibit 19) Chairman Ashford, other members of the Judiciary Committee, my name is Bruce Rieker, it's R-i-e-k-e-r, vice president of advocacy for the Nebraska Hospital Association. And I want to compliment Dr. Peter. I did not catch his last name. But that was probably a demonstration in exemplary testimony as well as model behavior as a physician. And what I would like to do is not add...a lot of what my written testimony is, just reiterate what has already been laid out. But I would like to point out that we believe...we do support the legislation and we believe that it is a bold step forward to tear down the either real or perceived barriers that we've created as a society, mostly from our litigious society. Senator McDonald, yes I'm a lawyer by training as well. But I truly believe that when the lawyers become involved on both sides, then the lines of communication break down in a hurry because then you have these insulation factors. So it may be a societal move, but in this day and age in society we've created with a litigious nature, we believe that, you know, this is important legislation.

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
February 07, 2007

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Then I will go to the specifics of the legislation. As we have studied legislation that's been enacted by other states on this and reviewed their testimony and the legislative intent, they have gone to great lengths not to excuse or create immunity for any of the healthcare providers for acts of negligence or fault. What they did was hopefully worked on their legislation so that it drew a distinct line between statements of empathy, sorrow, and benevolence versus that of fault or negligence. And for those reasons, we do support the bill. [LB373]

SENATOR ASHFORD: Thanks, Bruce. Yes, Senator Schimek. [LB373]

SENATOR SCHIMEK: Thank you. Thanks for being here, Bruce. What do you mean, they drew a line? [LB373]

BRUCE RIEKER: Well, as I was reading some of the information from the "I'm sorry" coalition, and that has nothing to do with legislation, but then also researching what the University of Michigan did, what Harvard is researching, as well as you drew reference to the Veterans Affairs Hospital in Lexington, Kentucky, their line said that statements of sorrow were inadmissible. But then they also said that statements of fault or negligence were admissible. So they drew that line between those two. I also read a dissenting opinion that some folks even argued that these should be admissible because it allows the doctor to say, you know, I went forward and I said I'm sorry and that's part of what I did to heal. But that wasn't adopted into any of the legislation that I've read or any of the statements of intent or testimony from any of these other states. And most of the research that I have looked at in preparation for this testimony came from the University of Michigan and what they do with their facilities there. [LB373]

SENATOR SCHIMEK: I appreciate that. Thank you. [LB373]

SENATOR ASHFORD: Yes, Senator Chambers. [LB373]

SENATOR CHAMBERS: Mr. Rieker, what is the VP after your name stand for? [LB373]

BRUCE RIEKER: Vice president. [LB373]

SENATOR CHAMBERS: Oh, I wanted to be sure it wasn't a certain degree that...okay. (Laughter) Again, educated in OPS. You said this is a bold step. In what sense is it a bold step and by whom? [LB373]

BRUCE RIEKER: Well, I think it's a bold step by our state to move forward in creating an environment...I wish I could just bring the doctor back up here, as he eloquently said it. We have a society in the healthcare arena whereby when there is the chance that there was negligence or malpractice, as it may be, to lock up and not say anything. And thus... [LB373]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
February 07, 2007

---

SENATOR CHAMBERS: So it's that fear factor? [LB373]

BRUCE RIEKER: It's the fear factor, absolutely. It's a step towards removing the fear factor. [LB373]

SENATOR CHAMBERS: But you're not suggesting that this should cause us to view these people who get this protection as being courageous in any sense, are you? [LB373]

BRUCE RIEKER: No. [LB373]

SENATOR CHAMBERS: Okay. Because it's really the opposite, isn't it? It's abject... [LB373]

BRUCE RIEKER: It's doing the right thing. [LB373]

SENATOR CHAMBERS: It's abject cowardice that we're dealing with on the part of these healthcare providers though, isn't it? Because they're afraid to do what their conscience tells them they ought to do unless they're protected from the consequences of following their conscience. [LB373]

BRUCE RIEKER: I think that would be a fair statement. [LB373]

SENATOR CHAMBERS: Okay. And it sounds harsh, but that's what I see. Thank you. [LB373]

SENATOR ASHFORD: Thank you. Thank you, Bruce. Any further proponents? Are we...opponents? Do we have any neutral testifiers today? Okay. [LB373]

KURTH BRASHEAR: Chairperson Ashford, members of the committee, my name is Kurth Brashear, K-u-r-t-h B-r-a-s-h-e-a-r. I appear today on behalf of the Nebraska State Bar Association in opposition to LB373. I'll try and be very brief. The bar is opposing LB373 on two grounds. One, as Senator Chambers pointed out, it would create two different standards for medical or for malpractice amongst professionals. If this was enacted, a lawyer who is harmed by his doctor would have a different standard than if the doctor got poor advice from the lawyer for legal representation. Secondly, LB373 would change the rules of evidence in determining what is admissible. Currently, the judge determines what's admissible, the jury decides what weight to give that. This would be a blanket prohibition against that. And in fact, I would make the observation, I think with the definition of statement or statute or whatever else, there will need to be some determination by the judge of what exactly is the statement that's inadmissible. Is it the words "I'm sorry," is it the phrase that included "I'm sorry," is it the entire letter that

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
February 07, 2007

---

says regret or whatever else? There are going to be questions that have to be determined in that case as well. Finally, an observation I would make is that the premise certainly appears true that this does reduce litigation, apologizing for mistakes. I think lawyers would admit that. Doctors, I think, have admitted that as well. It is interesting to note that the University of Michigan system, which has been referred to today and is often proposed, operates, it's my understanding, in a state that does not have an "I'm sorry" law on the books. If this is good business, it's good business and it would be true for the medical profession, the legal profession, and all others in that case. I should also point out, since it's simply been asked, in defense of my profession, lawyers are there to provide recommendations and all options. The client decides what recommendations to accept and adopt. If I fail to do that, that's malpractice on my part. But we're not the ones who are necessarily directing it the entire way. The client ultimately makes those decisions. With that, we are in opposition to LB373 and I'd be happy to answer any questions. [LB373]

SENATOR ASHFORD: Any questions of Mr. Brashear? Thanks very much. [LB373]

KURTH BRASHEAR: Thank you. [LB373]

SENATOR ASHFORD: Chris? [LB373]

CHRISTOPHER WELSH: Christopher Welsh, speaking in opposition on behalf of the Nebraska Association of Trial Lawyers. [LB373]

SENATOR CHAMBERS: May I ask you to spell your last name, because it can be spelled more than one way? [LB373]

CHRISTOPHER WELSH: That is correct. W-e-l-s-h. [LB373]

SENATOR CHAMBERS: Thank you. [LB373]

CHRISTOPHER WELSH: (Exhibits 20 and 21) Our big problem that we have with the way that the bill is drafted is that fault cannot be used against a doctor. I am passing out states...Kansas has a bill that they've introduced. They apply this "I'm sorry" legislation across the board in all tort actions, not just malpractice actions. But any admission of fault is admissible according to the rules of evidence. Louisiana applies it strictly in medical negligence cases. Again, any admission of fault can be used against the doctor according to the rules of evidence. The state of Washington, their language applies to all tort actions. And again... [LB373]

SENATOR ASHFORD: Chris, is that a factual determination then that the court could make, as to whether or not it's an admission of fault or a statement of sympathy? Is that possible, where their objection could be made as to the admissibility issue and then the

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
February 07, 2007

---

court could make a finding that this is actually a statement of sympathy and not a statement of fault? Could that be adjusted by the trial judge in a motion, pretrial motion or something to that effect? [LB373]

CHRISTOPHER WELSH: I would think this could be easily addressed in a motion and limiting...if there's a question as to the statement, I mean, obviously it's clear, "I'm sorry, it was my fault," well... [LB373]

SENATOR ASHFORD: That's easy... [LB373]

CHRISTOPHER WELSH: That's easy. But when you get into where it's not very clear, I think it's something that the court is well-equipped to deal with in... [LB373]

SENATOR ASHFORD: So we could...I'm sorry to interrupt you. But we could, the Legislature could give a direction to the court to look at, on a motion in limine, for example, to look at the issue of the admissibility of a statement of sympathy or whatever, expression of sympathy. And that could be covered under a motion in limine. [LB373]

CHRISTOPHER WELSH: I would think it could be easily handled that way. The problem that you have is, if you take the statement "I'm sorry, it was my fault," if the person who runs the red light says "I'm sorry, it was my fault," it's used against him. If the doctor says, "I'm sorry, it was my fault," it can't be used against him. And there's been a lot of talk about healing process. Let me tell you what it's like when a client comes to you. I could only imagine what they're going to feel like when you tell them and they say, the doctor said "it was my fault and I'm sorry," tell me what my rights are. Normally, when you're talking about the situation with a person who runs the red light and they say "it was my fault," the only issue that most likely is going to be before a jury is what are their damages. Under this legislation, we still would have the burden of proof to prove that the doctor fell below the standard of care. His admission of fault would never be used against him. And I don't see how that's going to help the healing process. There's peer review committees, by statute, that, as far as trying to uncover what happened, improve the medicine, improve the procedures, those are all in place. The Nebraska Association of Trial Lawyers, we don't have a problem with the "I'm sorry" and keeping that out. But keeping out when a doctor says they're at fault, we got to draw the line somewhere. [LB373]

SENATOR ASHFORD: Okay, I appreciate...that's very good. Any other questions? Chris, thank you for your comments. [LB373]

CHRISTOPHER WELSH: Thank you. [LB373]

SENATOR ASHFORD: Are there any other testifiers? Let me just say that I think this is

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Transcriber's Office

Judiciary Committee  
February 07, 2007

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an exceedingly interesting issue and I applaud the testifiers on both sides, the questions by Senator Lathrop were very good, and this is a great hearing. I learned a great deal. And Senator Chambers...(laughter) I was trying to spread it around, Senator Chambers. [LB373]

SENATOR CHAMBERS: I know, I know. [LB373]

SENATOR ASHFORD: You know, to some of the newer... [LB373]

SENATOR LATHROP: Well, now I feel like you've taken some of it back. (Laughter) [LB373]

SENATOR ASHFORD: No, I do appreciate it. It was an exceedingly interesting hearing. So thank you for that. Senator Schimek, do you desire to close? [LB373]

SENATOR SCHIMEK: I don't desire to close, Mr. Chairman. I would just like to say that I'd like to keep the discourse on this bill going. [LB373]

SENATOR ASHFORD: (Exhibit 22) Yeah, I think there needs to be some more discussion and I appreciate the comments by the lawyers as well. And it's given me some ideas. So I appreciate the comments. Thank you very much. The last two bills, we're going to hear together, LB197 and LB448. They both deal with tort claims. So if I might just very quickly, Senator Schimek, when the testifiers come up to talk either for or against, if they would address both bills at the same time so that we can move through those because they're both tort claims subject matter bills. Thank you, Senator Schimek. [LB373 LB197 LB448]

SENATOR SCHIMEK: Thank you. Thank you, Mr. Chairman. I will be brief. This is not a difficult bill to explain. For the record, my name is DiAnna Schimek, and I represent the 27th Legislative District. This bill has actually been before you before, and I'm not so sure but what it didn't advance to the floor previously. But the problem is that some claimants are having problems in trying to enter into actions against political subdivisions. As I understand it, a lawsuit against a political subdivision must be preceded by the filing of notice, and that has to be done within one year after the claim has accrued. Failure to file this notice within a year forever bans a lawsuit on the issue. In addition, there's a two-year statute of limitations on lawsuits against political subdivisions. After providing notice, if an action is not filed within two years after the claim has accrued, it's forever banned. Some political subdivisions operate proprietary businesses, but not under the name of the political subdivision, and they do not file the fictitious name under Section 87-210 of the Trades Names Act. Thus, an action filed by the business, the name of which does not indicate it is in reality a political subdivision, often results in the failure to accommodate the one-year notice, and access to the legal system is denied. So what LB197 would do would be to suspend the time limitations

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
February 07, 2007

---

which protect the political subdivision unless and until the fictitious name...trade name is registered with the Secretary of State. If a political subdivision has filed under the Trades Names Act, this bill would have no impact at all. But if one has a claim against a political subdivision, that claim should be decided on its merits, rather than on whether the person can figure out who runs the business. [LB197 LB448]

SENATOR ASHFORD: Thank you, Senator Schimek. Any questions for Senator Schimek? Members of the Judiciary Committee, Brad Ashford, Legislative District 20. LB448 simply enlarges the time when a claim may be filed under the State Tort...under the Political Subdivision Tort Claims Act, from one year to two years. And in light of the prior discussion we had earlier about the State Tort Claims Act and the Political Subdivisions Tort Claims Act, this simply mirrors my belief that the two acts should generally mirror each other on critical elements such as the time for filing the claim. So this would harmonize those provisions. [LB197 LB448]

SENATOR LATHROP: Any questions? Thank you. [LB448 LB197]

ROBERT MOODIE: Members of the committee, my name is Robert R. Moodie, M-o-o-d-i-e. I'm testifying on behalf of the Nebraska Association of Trial Attorneys, in support of both LB197 and LB448. I'll try to go quickly. I want to tell you about a character flaw that my wife accuses me of having when it comes to the family dog. I'll take my dog into the backyard with a tennis ball, and I'll throw the tennis ball, and the dog will go get it, bring it back to me. And the dog will do this as often as I will throw that ball. And here's where my character flaw comes in, because inevitably, after a few times of doing this, I'll act like I'm throwing the ball, hide it behind my back, and will watch the dog run back and forth in my yard, accomplishing nothing. LB197 corrects a problem in which political subdivisions can play "hide the ball." It's not uncommon for political subdivisions in this state to operate enterprises under names that have no...that don't document any relationship to the political subdivision. This includes hospitals, recreation centers, and at least one county courthouse. A citizen who has a claim against that enterprise must know of its association with the political subdivision in order to properly comply with the provisions of the act. And if the information is hidden from the citizen, they're going to merely run back and forth, accomplishing nothing, just like my dog. LB197 will provide for a correction to that "hide the ball" problem for the citizens of the state, and we would encourage you to accept it. LB448 brings the time requirements of the Political Subdivision Tort Claims Act into compliance with the time limits of the State Tort Claims Act. I have never been aware of a rational explanation for why one tort claims act would have a one-year statute of limitations and the other would have two. It merely provides a trap for the unwary and the inexperienced. Opponents who follow me will probably suggest that political subdivisions would be unfairly burdened by extending the time limit to two years. However, it should be noted the state of Nebraska has been operating under a two-year time limit with no apparent ill effects. Likewise, a similar two-year statute of limitations exists for professional liability cases. Almost all other



Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
February 07, 2007

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claims for negligence operate under a four-year statute of limitations when dealing with private citizens or corporations. We would encourage you to adopt this bill and end that trap and that confusion. Thank you. [LB448 LB197]

SENATOR LATHROP: Oh, I'm sorry. Senator Chambers. I didn't see. [LB448 LB197]

SENATOR CHAMBERS: How do you pronounce your last name? [LB448 LB197]

ROBERT MOODIE: Moodie. [LB448 LB197]

SENATOR CHAMBERS: Oh, I thought you said "Barmoodie." [LB448 LB197]

ROBERT MOODIE: Robert R. Moodie. [LB448 LB197]

SENATOR CHAMBERS: Oh, Robert R. I though you said "Barmoodie." I was going to say it ought to be "Bar Sinister." Your wife is correct about that character flaw. (Laughter) And you know why? I know your dog is not a hybrid between a dodo and a cuckoo, but the dog is thinking, as his best friend, he wouldn't do this to me. [LB448 LB197]

ROBERT MOODIE: That's right. [LB448 LB197]

SENATOR CHAMBERS: (Laugh) That's all I have. [LB448 LB197]

SENATOR LATHROP: Any other questions? Okay, thank you, Mr. Moodie. [LB448 LB197]

ROBERT MOODIE: Thank you. [LB197 LB448]

SENATOR LATHROP: Any other proponents of either bill? How about opponents? [LB197 LB448]

GARY KRUMLAND: Senator Lathrop, members of the committee, my name is Gary Krumland, the last name is spelled K-r-u-m-l-a-n-d, representing the League of Nebraska Municipalities. I'm appearing and want to address LB197, and I don't necessarily oppose the concept of the bill. The concern I have is just, the language seems very broad. On page 3 of LB197, it says, if a political subdivision is transacting business under a name other than the true name of the political subdivision, and hasn't registered the name, then basically there is no statute of limitations. The concern we have, I guess, is the term "transacting business." For example, the city of Lincoln or for any city, the business of the city is to provide streets, libraries, parks. If...does this mean, then, that if the city of Lincoln names a library Bennett Martin Library, does that mean that name has to be registered as a trade name? Does every park have to be

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
February 07, 2007

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registered as a trade name? Does every street have to be registered as a trade name? There's some things I think that are very clear that belong to the political subdivision. They're not hidden. But the language seems to be very broad, and it just would be very difficult to advise our members exactly what they need to register and what they don't need to register. The consequences are quite heavy. I mean, it does basically take away a statute of limitations until something is registered. So there needs to be something that would start the time. And you could say, well, you need to register everything. There is a \$100 filing fee and paperwork involved, so it could be quite a burden to do this. So I guess if this is something that needs to be addressed, I think it needs to be clarified and the definition needs to be narrowed and there needs to be reasonable time periods included in the bill. [LB448 LB197]

SENATOR LATHROP: Okay. Thank you, Mr. Krumland. Senator Schimek. [LB448 LB197]

SENATOR SCHIMEK: Thank you, Mr. Chairman. I just have one question, Gary. And it says "transacting business." Now, is a city park a business? [LB448 LB197]

GARY KRUMLAND: Well, it's...if you say... [LB448 LB197]

SENATOR SCHIMEK: Can you give me a different example? [LB197 LB448]

GARY KRUMLAND: Well, I mean, the library. I guess that's what I mean. It's very vague. I don't know... [LB197 LB448]

SENATOR SCHIMEK: Are those for-profit enterprises? [LB197 LB448]

GARY KRUMLAND: Well, if...okay, I mean, but that's not...it doesn't say "for-profit enterprises" here. If you're saying if their subject is operating a proprietary function that makes a profit or something like that, that would be clear. [LB197 LB448]

SENATOR SCHIMEK: Okay. [LB448 LB197]

GARY KRUMLAND: I mean, one could argue the business of a city is to provide parks or libraries. [LB197 LB448]

SENATOR SCHIMEK: I appreciate that thought, anyway. I'll go back to the persons who had me introduce this bill. Thank you. [LB197 LB448]

GARY KRUMLAND: And I know this bill has been introduced for several years in a row. [LB197 LB448]

SENATOR SCHIMEK: Thank you. [LB197 LB448]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
February 07, 2007

---

SENATOR LATHROP: Do you have any suggestions? I mean, if the concern is that they open a clinic in Broken Bow and they call it the Broken Bow Clinic, and there's doctors there, and they don't have University of Nebraska or any other identifying feature in the clinic, and someone means to, for whatever reason, make a claim, what should this say so that we can not avoid having the cities register every library and every building that they have? [LB448 LB197]

GARY KRUMLAND: Yeah, I don't have a suggestion right now. I guess I would probably need to know specific...a little more specifically about what the target is. But I mean, if it's something the committee wants to pursue, I'd be happy to sit down and try and come up with something, work with... [LB448 LB197]

SENATOR LATHROP: Well, maybe you could give us your thoughts on it when you've given it some thought,... [LB448 LB197]

GARY KRUMLAND: Sure. [LB197 LB448]

SENATOR LATHROP: ...because obviously you've studied enough to be critical of the language that's used, and I'm just wondering how you'd fix it, because there's a legitimate concern. You're supposed to register if you're the Broken Bow Clinic and it's actually run by the city or the county, right? [LB197 LB448]

GARY KRUMLAND: Well, I guess that may be an example. I don't know where the line is, though, that we're trying to get. That might be the problem. But I will be happy to talk to you more about it, talk to Senator Schimek. [LB448 LB197]

SENATOR LATHROP: Okay. I don't have any other questions. [LB448 LB197]

SENATOR CHAMBERS: And you said it costs how much, Mr. Krumland, to register a name? [LB448 LB197]

GARY KRUMLAND: One hundred dollars, and then I think that's good for, like, ten years. [LB448 LB197]

SENATOR CHAMBERS: If...so then if we were to enact this into law, then everything that the city is doing that it deems to be the transaction of business, they should just register the name of that, shouldn't they? [LB448 LB197]

GARY KRUMLAND: Well, and I guess that would be...then I would probably oppose the whole concept, because that would go way beyond what I think the intent of this is, and would place a burden on cities and villages across the state. [LB448 LB197]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
February 07, 2007

---

SENATOR CHAMBERS: Well, when you say you would oppose it, you weren't sent here to do that; you were sent to oppose this bill, right? [LB448 LB197]

GARY KRUMLAND: The league would...yeah, I'm sure the league would oppose the... [LB197 LB448]

SENATOR CHAMBERS: Well, how do you know? They're just against these kinds of things automatically? [LB197 LB448]

GARY KRUMLAND: They're against things that place an undue burden on them, cost expenses that really have no benefit. I mean,... [LB448 LB197]

SENATOR CHAMBERS: How is this an undue burden if they've got to say what they're doing and that it's me doing it? Suppose we would say that on every structure, any place where it is the city transacting the business, they have to put, prominently displayed so somebody who doesn't need reading glasses, as I do, can read, that this is operated by the city of whatever it is. They'd be against that, too, wouldn't they? [LB448 LB197]

GARY KRUMLAND: Probably, just because of the expense. [LB448 LB197]

SENATOR CHAMBERS: If all they've got is a city hall in a little town, they'd be against that, too, huh, because they'd say, you ought to have sense enough to know the city hall belongs to the city? They'd find a way, in other words, to oppose anything along this line, wouldn't they? [LB448 LB197]

GARY KRUMLAND: Well, no, I think if there is...if there are situations where there's something operated that is not...I mean, it's not clear what it is, I think... [LB448 LB197]

SENATOR CHAMBERS: Well, suppose we ignore you and what you said and pass this. What, then, is the city going to do to protect itself? Nothing? [LB448 LB197]

GARY KRUMLAND: I don't know. That's the problem. I don't know exactly what they would have to do under here. [LB448 LB197]

SENATOR CHAMBERS: They didn't discuss with you what they might be faced with if we pass this anyway? They just told you, go there and be negative? [LB197 LB448]

GARY KRUMLAND: Well, I don't know that I'm completely negative. I'm just pointing out this is very broadly written. [LB197 LB448]

SENATOR CHAMBERS: Then I'm going to tailgate on what my colleague, Senator Lathrop, asked you, except I'm taking a different approach. What would happen to these

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
February 07, 2007

---

cities that you represent if we passed this law just as it's written? [LB197 LB448]

GARY KRUMLAND: Well, if it's just as it's written, they probably would have to file trade names for virtually everything that they do. [LB197 LB448]

SENATOR CHAMBERS: And can they do that? [LB197 LB448]

GARY KRUMLAND: They could, but it would be an expense that... [LB197 LB448]

SENATOR CHAMBERS: So this is not... [LB197 LB448]

GARY KRUMLAND: ...I don't know is of much value to anybody else. [LB197 LB448]

SENATOR CHAMBERS: Well, we...they don't want to spend money for anything. They don't even want... [LB197 LB448]

GARY KRUMLAND: Well, no, I don't know that that's... [LB197 LB448]

SENATOR CHAMBERS: They don't even want to compensate an elderly lady who'd step into a hole on a sidewalk leading up to the courthouse, and she's injured. They don't think they ought to pay for that, do they? You're going to come in here and support a bill to take away liability for political subdivisions in that situation, aren't you? [LB197 LB448]

GARY KRUMLAND: Yeah, we will. [LB197 LB448]

SENATOR CHAMBERS: All right. Is your grandmother an elderly lady? [LB197 LB448]

GARY KRUMLAND: My grandmother isn't living right now. I don't have a grandmother. [LB197 LB448]

SENATOR CHAMBERS: Say it again? [LB197 LB448]

GARY KRUMLAND: My grandmothers aren't alive. [LB197 LB448]

SENATOR CHAMBERS: Neither are mine, so I'm in the same boat as you. But before mine died, they were elderly. And I know people who have grandmothers alive, and they're elderly. And when somebody can come in here and take a position against elderly women who are hurt due to the negligence of a public entity, where people are entitled to believe that the public entity is not going to invite me here if I can be hurt, I believe they're going to protect me, and then they say, well, you got hurt--tough luck. And then I'm supposed to accept the word of somebody like that on a bill such as this? Why, perish the thought, Mr. Krumland. Go tell them what I told you, and they'll pay you

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
February 07, 2007

---

more money next time you have to come here. [LB197 LB448]

SENATOR ASHFORD: Thank you, Larry (sic), for your...any other questions of Larry (sic)? Thank you. [LB448 LB197]

CHRIS DIBBERN: Good afternoon, members of the committee. My name is Chris Dibbern, and that's C-h-r-i-s D-i-b-b-e-r-n, and I'm the general counsel for the Nebraska Municipal Power Pool. We have submitted a statement that we're neutral on the bill, but we have the same concerns as Gary Krumland. And I wanted to tell you a little bit. We're a family of organizations that operate under a trade name, NMPP Energy. We have a federal trademark. We operate in seven states, so instead of going to one state, we went to the federal government and got a federal trademark, so that we'd be recognized in many states. So therefore, we thought the bill was a little narrow by saying you have to just go to the Secretary of State. Senator Schimek's bill has a very good purpose, but it has a lot of uncertainty. We had many concerns about initials. In the industry that we work in, LES, OPPD NPPD, MEAN, are all other names other than the true name of the operation. So we were concerned about, if you use those initials, is that not your true name? You're doing business, but you're under...you're saying you're LES or OPPD or MEAN, in our business. We also do understand the purpose, though. The purpose is so people can find you within that one-year period of time. And so we are in the phone book, we are in the...on the web, we are in the Blue Book, and we're also in the Secretary of State's Office, so that there...to answer your question, Senator, there are many other ways that may be, besides just paying the trademark name, to say you're recognized on the web or to say you're recognized in the Blue Book, which is a publication by this Legislature. So we think the bill has a lot of good purposes, but it is pretty narrowly defined. You have to have a Secretary of State trade name. Questions? [LB448 LB197]

SENATOR ASHFORD: Thank you. Excuse me, Gary, for calling you Larry. [LB448 LB197]

CHRIS DIBBERN: And also, I'm at a disadvantage because I'm a cat owner and not a dog owner. But my name is Chris Dibbern. I'm with...I'd like to testify opposing LB448, Senator, on behalf of the Nebraska Power Association. So this one, I speak for the entire electric industry. And the issues...I understand the difference between the State Tort Claims Act and the Political Tort Claims Act, but there are many more of us political subdivisions than the state, and I think the Supreme Court said it the best, in an opinion that said, the taxpaying public has an interest in seeing that prompt and thorough investigation of claims is made when a political subdivision is involved, and the taxpayers who provide the public treasury with funds have an interest in protecting the treasury from stale claims. The Supreme Court also said, the primary purpose of notice provisions in connection with actions against political subdivisions is to afford municipal authorities prompt notice of an accident and injury, in order that an investigation may be

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
February 07, 2007

---

made while the occurrence is still fresh and municipal authorities are in a position to intelligently consider the claim and to allow it, if deemed just, or, in the alternative, to adequately protect and defend the public interest. So the one-year time period is why...what we prefer. [LB448 LB197]

SENATOR ASHFORD: Yes. Senator Chambers. [LB448 LB197]

SENATOR CHAMBERS: In that decision, did the court say in its opinion that a two-year statute of limitations is unreasonably long? [LB448 LB197]

CHRIS DIBBERN: No, it did not. This... [LB448 LB197]

SENATOR CHAMBERS: That wasn't even a part of the issue, was it? [LB448 LB197]

CHRIS DIBBERN: Right. This was just the Political Subdivision Tort Claims Act. It was the one-year statute of limitation, and the court was only addressing that year. [LB197 LB448]

SENATOR CHAMBERS: So that decision really is irrelevant to what this bill is doing, isn't it? [LB197 LB448]

CHRIS DIBBERN: No, because it uses...think of the words that it uses--stale, fresh,... [LB448 LB197]

SENATOR CHAMBERS: Then let me ask you this question. How did the court define "stale"? [LB448 LB197]

CHRIS DIBBERN: Well, they clearly said that after the one year, it was not fresh and not...and that it was a stale...they threw out the case. They said it was not properly filed. [LB448 LB197]

SENATOR CHAMBERS: So they said...so then the court said that stale...a stale claim is one filed more than one year after the occurrence? Or you are interpreting the court's decision to mean that a stale claim is one more than a year old? [LB448 LB197]

CHRIS DIBBERN: In this case, the lawsuit was not filed within the one year of the accrual of the claim,... [LB448 LB197]

SENATOR CHAMBERS: Obviously, that's the nature... [LB197 LB448]

CHRIS DIBBERN: ...so the court said...it was tossed out. And so it's my interpretation that... [LB197 LB448]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
February 07, 2007

---

SENATOR CHAMBERS: Well, it was stale pursuant to the one year. If it had been six months and it had been filed one day past six months, the court would have said, for the purposes of this statute of limitations, any action filed after that period is stale. [LB197 LB448]

CHRIS DIBBERN: I would agree with you, except that they...in the headnotes of this case, it says, the... [LB197 LB448]

SENATOR CHAMBERS: The headnote is not a part of the decision. [LB197 LB448]

CHRIS DIBBERN: No, but both of those quotes are in the decision, I'll tell you. [LB197 LB448]

SENATOR CHAMBERS: Okay, then let me hear the quote. [LB448 LB197]

CHRIS DIBBERN: Okay. The quote is... [LB448 LB197]

SENATOR CHAMBERS: You can read it from the headnote if it's the same. I take your word for that. [LB197 LB448]

CHRIS DIBBERN: Okay. The taxpaying public...and it says "public purpose" on the head of it. The taxpaying public has an interest in seeing that prompt and thorough investigation of claims is made where a political subdivision is involved. And the taxpayers who provide the public treasury with funds have an interest in protecting the treasury from stale claims. [LB197 LB448]

SENATOR CHAMBERS: But it doesn't say that any claim filed more than a year later is stale for all purposes. It's stale only in the context of deciding whether that one-year statute of limitations is okay. [LB448 LB197]

CHRIS DIBBERN: Right. I think the concept is just that in this case, the one year is what they were saying will not be a stale case. [LB448 LB197]

SENATOR CHAMBERS: Are you aware of another statute of limitation on tort claims which is two years rather than one? [LB448 LB197]

CHRIS DIBBERN: Yes, for the State Tort Claims Act, yes. [LB448 LB197]

SENATOR CHAMBERS: Did the court ever rule that this...in its opinion, two years is too long? [LB197 LB448]

CHRIS DIBBERN: I would have to go research that question. I'm not aware that they've said that. [LB197 LB448]



Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
February 07, 2007

---

SENATOR CHAMBERS: Me either. Are there some statutes of limitation which are four years? [LB197 LB448]

CHRIS DIBBERN: Yes there are--contracts, written contracts. [LB197 LB448]

SENATOR CHAMBERS: So why wouldn't that be stale? If we're going to extrapolate from what you interpreted the court to mean that anything filed more than a year after the occurrence is stale, then every statute of limitations should be one year, correct? [LB197 LB448]

CHRIS DIBBERN: No, because a contract, a document that you can interpret, that you...that two parties have agreed to, is something you can determine, what's the contract read. Whether someone slipped on a sidewalk or whether they fell off of a ladder is something that it's very difficult for a political subdivision, a year later, to maybe even have known about it, to have found the latter, to determine what the whether was like. So... [LB197 LB448]

SENATOR CHAMBERS: Suppose the person... [LB197 LB448]

CHRIS DIBBERN: ...the reasons why they're longer are important in contracts. [LB197 LB448]

SENATOR CHAMBERS: Suppose, rather than a political subdivision, the person alleges that I maintain my sidewalk in an unsafe condition, and suffered an injury. What would the statute of limitations be for that person to bring a personal injury action? [LB197 LB448]

CHRIS DIBBERN: I hate to say this, with good attorneys on the board, four years, we'll say, from Senator Lathrop. [LB197 LB448]

SENATOR CHAMBERS: Well, why isn't that automatically considered stale? [LB197 LB448]

CHRIS DIBBERN: Because... [LB197 LB448]

SENATOR CHAMBERS: Because the state said it's four. [LB197 LB448]

CHRIS DIBBERN: No, an individual that owns their own property, I think, has more control and more knowledge than a political subdivision of its hundreds of employees, or... [LB197 LB448]

SENATOR CHAMBERS: No, that has nothing to do with it. It's four years because the

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
February 07, 2007

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Legislature said four years. The other one is two years because the Legislature said two years. The other one is one year because the Legislature said one year. And if you file an action within the one year, you're home free; if you file it within the two-year statute, you're home free; if you file it within the four-year statute, you're home free, even if the same kind of injury occurred in all three instances. [LB197 LB448]

CHRIS DIBBERN: I agree with you. You make the public policy on that. [LB197 LB448]

SENATOR CHAMBERS: So if we... [LB197 LB448]

CHRIS DIBBERN: And I think the one year was good public policy. [LB197 LB448]

SENATOR CHAMBERS: So if we make this two years, then a claim that was stale one day after one year is not stale any more, under...if we make it two years. [LB197 LB448]

CHRIS DIBBERN: If the Legislature changes the law, the Supreme Court should follow that. [LB197 LB448]

SENATOR CHAMBERS: You are such an agreeable person. I really like working with you. Thank you very much. [LB197 LB448]

CHRIS DIBBERN: Yeah. We still don't like it. (Laugh) Thank you. [LB197 LB448]

SENATOR ASHFORD: How many other opponents do we have? [LB448 LB197]

TOM MUMGAARD: Good afternoon. My name is Tom Mumgaard, that's M-u-m-g-a-a-r-d, deputy city attorney for the city of Omaha. I'm here to oppose both LB197 and LB448. The city of Omaha agrees with the comments of the two previous speakers with regard to LB197, and I won't repeat those. I'll answer any questions you have. With regard to LB448, our opposition is similar to what I expressed earlier today with regard to raising the tort liability cap--basically, that we don't see any need to do this. As we...as I indicated earlier, the city of Omaha receives approximately 500 or more claims every year. Under the one-year process, the vast majority of these claims are received within six to nine months after the event. Oftentimes, we receive a claim within a day or two of the event. Any limitation period that you come up with will of course result in some claims missing the time period. That's the nature of the statute of limitations. People miss the four-year statute of limitations now. So whether you pick one year, two years, four years, yes, you're going to have some people who make the statute, and some people who don't. The difference here is that if it's looked for...if we're doing this for purposes of consistency, well, certainly, the statute of limitations differ across the board, depending on the type of lawsuit. Attorneys and people are charged with the responsibility of either knowing what those limitations are or knowing where to find that out. They seem to be able to do that. The one-year process seems to be

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
February 07, 2007

---

working, at least in the city of Omaha. It presents the benefit of getting claims made, claims investigated, and claims resolved. We try to get those done quickly. I think the one-year time period gives people an impetus to get that done quickly. That's good public policy. One year is better than two at achieving that; two years is better than three at achieving that. But one year seems to be working, and it should be kept. I'd be glad to answer any questions. [LB448 LB197]

SENATOR ASHFORD: Okay. Any questions of Tom? [LB448 LB197]

SENATOR LATHROP: I...maybe I can make a point with you, and that is with respect to LB197, that is, the requirement that...or it basically provides that if you don't register the name as provided in an existing statute, that the statute of limitations is suspended. Would you agree with that? [LB448 LB197]

TOM MUMGAARD: I agree. It gives an indefinite time period to bring the lawsuit. [LB448 LB197]

SENATOR LATHROP: Okay. It doesn't really change whether or not...it doesn't change when you have to file it, who has to file it. That's already existing requirement, isn't it? [LB448 LB197]

TOM MUMGAARD: As I understood it, it doesn't start the time period to make...to file the claim or to do anything else until the registration occurs. [LB448 LB197]

SENATOR LATHROP: Maybe I can suggest the problem that I have. Mr. Krumland said that he has problems with "transacting business," that language in there. The fact is, is that the statute, 87-208 to 220, already requires political subdivisions to register their trade names. [LB448 LB197]

TOM MUMGAARD: I believe you're right. [LB448 LB197]

SENATOR LATHROP: Okay. So we're not creating a new requirement. All we're doing is saying, when you don't do what you've already been told to do, we're going to suspend the statute of limitations till we can figure out who you are and you comply with the requirement that you register your name. [LB448 LB197]

TOM MUMGAARD: And the difficulty here is, because as Mr. Krumland indicated, the wide variety of activities that a city would engage in, which of those activities fall within the trade name requirements? Let's take, for example, the city of Omaha operates Benson Golf Course and several other golf courses. Does that mean that we are operating Benson Golf Course as a trade name? The Orpheum Theater, are we operating that as a trade name? The first step, obviously, if this bill passes, is that we would have to determine what, of the many, many activities that we're engaged in at

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
February 07, 2007

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various facilities that have separate names, would fall within that trade name requirement. We would then have to register or not register, as we made the assessment. If we guess wrong, that's the problem. If we guess wrong, and if we decide that we do not need to register a place or an activity with a trade name, we are then open to unlimited statute of limitations. We would never know that we were wrong until someone brought the lawsuit, ten years later. [LB448 LB197]

SENATOR ASHFORD: Would the statute of repose apply in that case? [LB448 LB197]

SENATOR LATHROP: I don't even know if they have a statute of repose for the city of Omaha. [LB197 LB448]

SENATOR ASHFORD: Do they have a statute of repose in... [LB197 LB448]

TOM MUMGAARD: Boy, I can't answer that. We have a one-year limitation, so people get things to us quickly. We never have that problem. [LB197 LB448]

SENATOR LATHROP: But...(laugh) now you're lobbying on a different bill. The point is, is that requirement to do that is already in place. It's kind of...I guess my point is, you should have talked about that when they were passing 87-208, shouldn't you? [LB448 LB197]

TOM MUMGAARD: I'll tell you, with regard to LB197, I think Mr. Krumland is right that there's vagueness and ambiguity in what do you have to register or not. But the biggest problem is the open-ended consequences, that if you get it wrong, you never know you got it wrong until the plaintiff can lie in wait, and wait years, and bring the lawsuit, and then show you got it wrong. You should at least have a time period that starts when the plaintiff knows or should know, the injured person knows or should know, that they're dealing with a facility that's owned by the city of Omaha. [LB448 LB197]

SENATOR LATHROP: Now you're talking, because what you're giving us is an alternative, and you're saying... [LB448 LB197]

TOM MUMGAARD: And that would be my alternative, yes. [LB197 LB448]

SENATOR LATHROP: ...and you're saying, I'm critical of the bill, but here's an idea to fix it, which is... [LB197 LB448]

TOM MUMGAARD: Yeah, because as it stands now, we certainly could have an injured person, who knows very well that the Orpheum Theater is operated by the city of Omaha, but for some reason doesn't file their claim. Two years goes past, and all of a sudden decides they've got a claim. Then what happens is you file the claim and you end up in an argument about whether the Orpheum Theater should have been

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
February 07, 2007

---

registered as a trade name. And if the city turns out to be wrong in guessing that it shouldn't...didn't need to be registered, bingo, you've got an unlimited, open-ended statute of limitations, and a stale claim that may be six, seven years old has now been revived, simply because the city did not...was not aware they needed to register that place as a trade name. [LB197 LB448]

SENATOR LATHROP: And this isn't mine to amend, but your solution would be that it would be suspended not indefinitely, but for...the statute would be what the statute is, and the notice requirements would remain the same, but we would allow them to be extended for one year from the date the plaintiff knew or should have known that he was dealing with a political subdivision? [LB197 LB448]

TOM MUMGAARD: That would be the simplest. I would also point out that we also don't think that it's really necessary, that it's a solution looking for a problem. There's businesses all over the state of Nebraska operating day in and day out under trade names. And people fall on their premises, and those people and their lawyers seem to be able to figure out who those...what business is operating that facility, who the owner of that facility is. It really doesn't seem to be a problem in day-to-day litigation. These things do get figured out, and so this solution is really overkill for a problem that's not that great. [LB197 LB448]

SENATOR LATHROP: Okay. Appreciate it, Tom. Thanks. [LB197 LB448]

TOM MUMGAARD: Thank you. [LB197 LB448]

SENATOR ASHFORD: Thanks, Tom. Any...yes, Senator Chambers. [LB448 LB197]

SENATOR CHAMBERS: Just one point, Mr. Mumgaard. Staleness is a blade that cuts both ways. If I bring a stale claim, I've got to go forward first and establish that I can state a claim which, if true, would provide me a basis to go forward. That gets me into court. But then it's incumbent on me to prove my allegations. So I'm going to first have to come up with evidence and whatever else it takes. If the standard of proof is a preponderance or clear and convincing, whichever the case might be--it's not going to be beyond a reasonable doubt--I've got to meet that burden of proof. So if it's stale, there is a burden on me also. [LB448 LB197]

TOM MUMGAARD: Without a doubt, staleness cuts both ways. However, I think the courts have generally recognized, in looking at the statute of limitations, that staleness works to the disadvantage of the defendant greater than it does to the plaintiff, because the plaintiff has the information that they need to go forward with the claim, they know that something happened, they know where it happened, they know under what conditions it happened, they know who the witnesses were, because they were there. [LB448 LB197]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
February 07, 2007

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SENATOR CHAMBERS: But they have to prove it. Merely stating it...I think that can be challenged. [LB448 LB197]

TOM MUMGAARD: Sure, they have to prove it. And I'm pointing out that there is a difference in the degree of proof that is available to the two different sides. And a stale claim works against the defendant more so than the plaintiff, because the plaintiff has the ability to preserve proof that the defendant does not, because the defendant doesn't know this thing happened. So staleness cuts both ways. It becomes harder for the plaintiff to prove something that happened a long time ago, but it cuts more deeply to the defendant. And so, you know, what is or is not a stale claim? But time limit, you know, cuts off staleness, and is something that the Legislature has to deal with constantly in the statute of limitation. Choosing between one to two years, I'm just saying, having people...giving people the incentive to get things...get claims against the taxpayers in so that they can get resolved quickly,... [LB448 LB197]

SENATOR CHAMBERS: Sure. [LB197 LB448]

TOM MUMGAARD: ...stale or otherwise, is a good thing. [LB197 LB448]

SENATOR CHAMBERS: All of that I understand. But up to this point, nobody had mentioned the fact that it can place a burden on the plaintiff also. It's not just on the political subdivision; it's on the one making the stale claim. [LB448 LB197]

TOM MUMGAARD: Again, I'd say, yes, there is a burden there, but the burdens are not equal. Thank you. [LB448 LB197]

SENATOR ASHFORD: Thank you, Tom. Any other testifiers? [LB448 LB197]

ELAINE MENZEL: For the record, my name is Elaine Menzel. It's M-e-n-z-e-l. And I'm here to oppose LB448. As you probably know, the State Tort Claims Act and the Political Subdivisions Tort Claims Act were the result of an interim study committee created by the Legislature in 1969, and were fashioned after Iowa statutes and the Federal Tort Claims Act. As originally introduced, both LB154 and LB155 included a two-year notice provision. However, LB155, which was amended on General File to reduce the notice provisions from two years to one year--that's, obviously, the Political Subdivision Tort Claims Act--however, there is no legislative history to indicate...or within the legislative history, it doesn't indicate why that one-year provision was modified. Arguably, such a change was made based on the assumption that individuals with tort claims against a political subdivision, schools, counties, municipalities, public power districts, are more likely to know who to file a claim with than those who have a tort claim against the state, and thus, a shorter time period to bring suit is justified. We looked at various states, and the requirements of those various states with respect to

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Judiciary Committee  
February 07, 2007

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presenting the claims to political subdivisions varies from state to state. The pattern state of Iowa has a 60-day notice requirement, and time frames for notice requirements in other states range from 60 days to three years. It's just one state that has three years, and I believe it's two states have the two-year requirement. For a number of the states reviewed, the notice provisions for political subdivisions coincide with the state notice provision of one year or less, and that was 15 states that were reviewed. I have similar testimony to the prior individuals, but I will reserve that for time restraints. But I will... [LB448 LB197]

SENATOR ASHFORD: Thank you for your comments. Any questions? What? [LB448 LB197]

SENATOR CHAMBERS: Just so you won't feel left out--I haven't asked you anything--since the evidence or information you've presented on what is going on in the various states,... [LB448 LB197]

ELAINE MENZEL: Yes. [LB197 LB448]

SENATOR CHAMBERS: ...and one of those was a three-year period, would your group or whoever you represent, accept our making it a three-year period, based on your evidence that you presented to us? [LB197 LB448]

ELAINE MENZEL: We would prefer no. (Laughter) [LB448 LB197]

SENATOR CHAMBERS: (Laugh) Okay. That's all I have. Thank you. [LB197 LB448]

SENATOR ASHFORD: That's a good answer. Thank you very much for your testimony. [LB197 LB448]

ELAINE MENZEL: We would prefer it to stay the same. [LB197 LB448]

SENATOR CHAMBERS: Okay. [LB197 LB448]

SENATOR ASHFORD: Okay. It looks like you're batting cleanup here, Clint. [LB197 LB448]

CLINT SCHUKEI: And I will be very quick. [LB448 LB197]

SENATOR ASHFORD: Okay. [LB197 LB448]

CLINT SCHUKEI: My name is Clint Schukei. The last name is spelled...the first name is spelled C-l-i-n-t, the last name is S-c-h-u-k-e-i. I'm the city attorney in Norfolk, and I'm here to oppose both of the bills, LB197 and LB448. A couple of comments that...I was

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Transcriber's Office

Judiciary Committee  
February 07, 2007

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going to talk, and then I wasn't, and then I was, because you were talking about comments, so here I am. One of the things, when you talked, Senator Lathrop, about the possibility of delaying that and making it one year after that, one comment I would make to that is that if there's already a four-year statute of limitations, if you're going to consider something like that, you know, certainly I would think that any extension would go beyond what the four years would have been in the first place. Does that make sense? I'm saying, if you're going to... [LB197 LB448]

SENATOR LATHROP: No, because the political subdivision has a one-year notice and a two-year statute of limitations, so it's not four years. [LB448 LB197]

CLINT SCHUKEI: Well, if it never starts, though, until they've registered the trade name,... [LB448 LB197]

SENATOR LATHROP: Right. [LB197 LB448]

CLINT SCHUKEI: I mean, if you waited six years to register the trade name, you could start it after six years, when if it would have been anything else, it would have been precluded after four. That was the point I was trying to make. [LB197 LB448]

SENATOR LATHROP: Oh, I got you. All right. [LB197 LB448]

CLINT SCHUKEI: Okay. The second thing is, I mean, I heard the testimony of the proponents, and I understand if there's a hospital and those kinds of things. You know, the thing that goes to my mind is some of the relatively insignificant things that we have going on which might be...I thought of a summer rec program, where they pay \$5 to be involved in a baton twirling thing. There's revenue, you say it's proprietary. It doesn't make...because not only do we have to file the 100 bucks, but we have to publish notice--this would make great money for the newspapers--we have to publish notice as part of that when you register a trade name, as well. And so I think the key is just to know what that is. And I really don't have any great solutions for that, but those are the thoughts. But on the last bill, the comment that I had is that when you talk about the...and it wasn't until...Senator Ashford, until you mentioned the same thing as the State Claims Act, what happens after you file that claim? And I understand the difference between the one and the two years. We think the one year isn't broken. That hasn't been a problem that we've experienced. We know about it when those things happen. But on the back end of it, the claims act are different. [LB197 LB448]

SENATOR ASHFORD: I understand that. [LB197 LB448]

CLINT SCHUKEI: I mean, and so maybe the resolution of them ends up the same way. So they're not exactly the same. [LB197 LB448]



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Transcriber's Office

Judiciary Committee  
February 07, 2007

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SENATOR ASHFORD: Right. It's the initial claim, is what I was getting at. [LB197 LB448]

CLINT SCHUKEI: So those are the comments that I have, and I tried to be brief. [LB197 LB448]

SENATOR ASHFORD: Thanks, Clint. Thank you. Senator Ashford, do you want to close? (Laugh) I waive closing. Senator Schimek? Thank you. Thank you all very much. [LB197 LB448]

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Transcriber's Office

Judiciary Committee  
February 07, 2007

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Disposition of Bills:

LB78 - Held in committee.  
LB197 - Held in committee.  
LB228 - Held in committee.  
LB274 - Advanced to General File, as amended.  
LB373 - Advanced to General File, as amended.  
LB448 - Held in committee.

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Chairperson

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Committee Clerk