MINUTES

MONTANA SENATE
58th LEGISLATURE - REGULAR SESSION

COMMITTEE ON PUBLIC HEALTH, WELFARE AND SAFETY

Call to Order: By **CHAIRMAN JERRY O'NEIL,** on April 3, 2003 at 11:12 A.M., in Room 350 Capitol.

ROLL CALL

Members Present:
Sen. Jerry O'Neil, Chairman (R)
Sen. Duane Grimes, Vice Chairman (R)
Sen. John C. Bohlinger (R)
Sen. Brent R. Cromley (D)
Sen. Bob DePratu (R)

Members Excused: Sen. John Esp (R)
Sen. Trudi Schmidt (D)
Sen. Emily Stonington (D)
Sen. Dan Harrington (D)

Members Absent: None.

Staff Present: Dave Bohyer, Legislative Branch
Andrea Gustafson, Committee Secretary

Please Note. These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:
Hearing & Date Posted: HB 695, 4/3/2003
Executive Action:

Motion: **SEN. GRIMES moved that HB 695 BE CONCURRED IN.**

Discussion:

SEN. GRIMES asked to reconsider the committee's action on HB 695 for purposes of amendment and action. He had amendment HB069512.adb.

He said physicians present during the hearing had a problem with the language and **SEN. GRIMES** had a last minute change to propose. He did not think the amendment did much for them but he did not think the amendment hurt the defense bar either, which was critical. He said it was not a time during the session to be creating any hard feelings and he did not want to reinsert anything else in the bill. He did not think it was necessary. **SEN. GRIMES** said he would provide some relatively benign language that would codify some concerns and perception that would be able to help the physicians. Beyond that, he was not sure how much practical application it had, which would be up to the majority leader to decide and then maybe possibly go to a conference committee.

SEN. O'NEIL asked if his amendment included that and if it was a handwritten insertion.

SEN. GRIMES said yes.

SEN. CROMLEY asked what instruction 3 did.

Dave Bohyer, Legislative Services Division, said it made the language and the title parallel the language in the section that was being amended.

SEN. CROMLEY asked if Section 5 applied to both the plaintiff and the defendant and if the defendant could testify as an expert witness in his own case.

SEN. GRIMES said he would be testifying in his own defense but that would be separate from an expert. He could call an expert witness.

SEN. CROMLEY said he could testify as to the facts of what he did but he could not testify as to the standard of practice.

SEN. GRIMES thought his or her testimony would be weighed against that of expert medical testimony . He did not think he or she would be a witness giving expert medical testimony, but they would be giving medical testimony that would have to be weighed in light of the expert testimony.

SEN. CROMLEY said it was a technical area. He said he opposed the bill because he thought it attempted to interfere with Montana Rules of Evidence, which worked well. That was one concern he could see immediately and that was if he were a doctor and he was sued he would like to be able to testify with regard want standard of practice because it may be a small case and he did not to hire someone else. He said he could testify to the facts as far as what he did, but he would not be able to testify with regard to the standard of practice if he had practiced for less than 5 years.

SEN. GRIMES said under current rules of evidence he did not see how it would change from the current approach.

SEN. CROMLEY said he pulled up a couple of court cases where witnesses had been excluded and had been involved in litigation where there had been challenges on the basis of the persons expertise. The court looked at it and heard some language and in this case they did allow the person to testify. It was the case brought by the state involving Munchhausens by Proxy and the court said today we analyze the MSEP syndrome by proxy expert testimony under the conventional rule 702 analysis. Rule 702 of the Montana Rules of Evidence was identical to its federal counterpart which was important because it was a whole body of case law with regard to the federal Rules of Evidence on expert witnesses. Then the court said the rule stated if "s*cientific, technical, or other specialized knowledge will assist the tryer of fact to understand the evidence or to determine the fact and issue a witness qualified as an expert by knowledge, skill, experience, training or educ*ation may testify thereto in the form of an opinion or otherwise." Under such analysis the court must before admitting expert testimony: 1. Determine whether the subject matter required expert testimony and 2. Whether the expert had either special training or education and had adequate knowledge on which to base an opinion siting the case. In this case they did allow the person to testify, a professor of pediatrics. There was a case, Seal VS Woodrow Pharmacy, where there was a witness who was excluded and it comes up a lot, not only in medical cases, but in all cases. Many times in product liability cases where there were various issues and sometimes novel issues and sometimes issues based upon science which was kind of considered junk science. The Montana Rules of Evidence, Rule 101 gave the scope of the Montana rules and it said generally those rules governed all proceedings and all courts in the state of Montana with the exception stated in the rules. It was a long number of rules and 702 and 703 reads the facts or data in particular, upon which an expert bases an opinion. Maybe those perceived by or made known to the expert at or before a hearing. If a reason relied on by experts who were in a

particular field gave informed opinions or inferences on the subject, the facts or data needed not be admissible in evidence.

SEN. GRIMES asked if he thought the inclusion of the statute in the Code would preclude using the same standards he alluded to. He said the only differences he saw were the same standards that would have the exception that now there would be a minimum five years professional experience. In other words, the Rules of Evidence would still apply with this one caveat. He asked if that was his understanding.

SEN. CROMLEY said that was his understanding and that it would be enforceable not to say it was not enforceable but he thought the other standards would still apply and there was still a lot of safety out there.

SEN. GRIMES said he would be able to support it himself if I thought it exclusionary.

SEN. CROMLEY said he did not know if it would keep out the bad experts but he thought they were kept out quite well now. In his experience when he challenged a witnesses on the basis of their expertise, they were excluded and if they were excluded, and there were no other witnesses, the case could not go forward.

SEN. GRIMES said he was somewhat amenable to that concern himself.

SEN. BOHLINGER said he was conflicted on the proposition in that he heard the testimony from medical people and representatives of medical people who all indicated a need for that kind of protective legislation. He also heard testimony from opponents who said the bill would do nothing, that the rules of evidence covered the issue. He wondered if it were really a perception issue. He said if it was something that was thought to be a problem and it was not really a problem, then he favored getting rid of the perception. If it was perceived that there was a problem, then address it. He supported the amendment and would support the bill as amended.

SEN. O'NEIL asked **Al Smith**, MT Trial Lawyers Association, if he had looked at the amendment and how exclusionary was it.

Mr. Smith said he just found out about it that morning and was unable to contact both **Mr. Daue** and **Mr. Riley**, a defense attorney and a plaintiff attorney about this and their reaction was do not do it. It would make things worse. Things were fine the way they were and all this was going to do was set up another layer of

areas where people would fight about things that they did not need to in established rules.

SEN. O'NEIL asked if he had any idea how many witnesses it would exclude.

Mr. Smith said he did not, but for most people it was not going to be a problem.

SEN. CROMLEY said that he thought it would do more damage to the defense of malpractice cases than it would to the plaintiff and that his firm did primarily defense work. **SEN. CROMLEY** said his analogy of what **Al Smith** said was that it was sort of like passing a bill describing which scalpel the surgeon could use, such as a #4 and not a #6. He said in Montana with the residency program, it would encourage more younger physicians. All the physicians that practiced less than 5 years would be excluded as being expert witnesses. **SEN. CROMLEY** said his perception was that in a plaintiffs case, an attorney would have to go outside the state to get an expert witness because in any community one attorney would not want to testify against another because they would probably know each other. Even though the person might have done something wrong, he would be reluctant to testify as an expert witness, which is why generally plaintiff's attorneys go outside the state. On the other hand, Montana physicians who were sued were likely going to want to use local state physicians. He said there were many state physicians who were unable to be expert witnesses. In a small community there may be a clinic of two physicians. One may practice more than five years and the other one less. This might exclude one testifying on behalf of the other. He thought it was arbitrary to set five years if a person with three years experience testified and the judge said because of his qualifications of his work in that field he could testify in defense of the doctor. The jury would take that into account. **SEN. CROMLEY** said that to try to exclude them because of one year of practice would probably come down worse on the defense.

SEN. GRIMES asked if **Mr. Tom Ebzery** would address the issue.

Mr. Tom Ebzery, Attorney, Deaconess Clinic of Billings, said he was not an expert. He said he did think there was a problem. He said that over time, there had been instances where they had been bringing in people or used people that did not have the experience but could articulate. He said they did not want someone who had been at it for four or five years. Furthermore, in a two person clinic in a rural area, would they want to select a person to be an expert witness, such as someone in a small

clinic having a requirement that they be directly related to the diagnosis or prognosis.

SEN. GRIMES asked how many states had the standard of five years for expert. **Mr. Ebzery** said he did not know.

SEN. GRIMES said he could be thinking of caps that there was a standard. In all of those cases **NCSL** had lists and he did not recall that being addressed. **Mr. Mark Taylor** said Connecticut had a 5 year standard. Iowa provided their statute to **Mr. Dave Bohyer** and there was not a five year limitation in the Iowa statute. He said they were looking to do an amendment similar to the Iowa statute in terms of prognosis, diagnosis, or treatment. **Mr. Taylor** thought he heard reference to Florida having a 5 year requirement as well.

SEN. GRIMES asked the committee to make a decision based on the information they had been given.

SEN. O'NEIL said he would vote against it because his perception was that the reason there were crazy verdicts in courts was because they did not have enough information, not because they had too much.

CLOSE

SEN. GRIMES said it had been done in other states with their rules and procedures and that it worked well. He did not think there was any danger in it.

{Tape: 1, Side B}

Motion/Vote: SEN. GRIMES moved that amendment HB069512.adb BE ADOPTED. Motion carried 3-2 with CROMLEY and DEPRATU voting NO.

Motion/Vote: SEN. GRIMES moved that HB 695 BE CONCURRED IN AS AMENDED. Motion carried 4-2 with SENS. CROMLEY and O'NEIL voting NO, and ESP voting AYE via proxy.

ADJOURNMENT

Adjournment: 11:45 A.M.

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SEN. JERRY O'NEIL, Chairman

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ANDREA GUSTAFSON, Secretary

JO/AG

EXHIBIT(phs71aad)