

# Senate Judiciary Committee

*Jennifer Horgan 271-3092*

**SB 163-FN**, relative to live medical testimony in courts.

**Hearing Date:** January 31, 2017

**Time Opened:** 10:21 a.m.

**Time Closed:** 11:05 a.m.

**Members of the Committee Present:** Senators Carson, Lasky, French, Gannon and Hennessey

**Members of the Committee Absent :** None

**Bill Analysis :** This bill permits certain medical and dental records and reports to be admissible in civil proceedings as evidence of the necessity of and charges for certain medical and dental services, the diagnosis and prognosis of a physician or dentist, and certain opinions of physicians and dentists.

**Sponsors :**

Sen. Lasky

Sen. Reagan

Sen. Soucy

Rep. Wall

Rep. Hynes

Rep. Walz

Rep. Keans

Rep. McBeath

---

**Who supports the bill:** Senator Lasky; Senator Soucy; Representative Wall; Representative Somssich; Fran Murphy (Shaheen & Gordon); Roger Turgeon (NH Association of Justice); Anna Goulet Zimmerman (NHAJ)

**Who opposes the bill:** Bob Best (NH Medical Society); Jim Hatem (State Farm); Lindsay Nadeau (AIA & NHADIC); Paula Minnehan (NH Hospital Association)

**Summary of testimony presented in support :**

**Senator Lasky**

- Brought this forward to reduce litigation costs for personal injury cases under \$25,000.
- Allows for written testimony from experts saving both time and expense for plaintiffs and defendants.
- Currently, the costs incurred are pricing these lower yield cases out of the system.

**Attorney Fran Murphy (Shaheen & Gordon)**

- This would allow the process that is used at the Department of Labor for workers comp. to be adopted in lower end personal injury cases in the superior court.
- When the workers comp. statute was revised 20 years ago it was designed to secure just, speedy and inexpensive determinations of every proceeding. That should be the goal in superior court as well.
- Doctors don't want to do this typically and when they are compelled to do it, they charge a lot of money.
- This statute governs disclosure of expert testimony. When a doctor is brought in, a lot of information has to be disclosed by the doctor and the doctors do not want the expense of putting it together.

- This is already in existence in Massachusetts.
- This allows the records and the reports to speak for themselves.
- This does not prevent either side from bringing forward a doctor to challenge the records, as they often do now.
- Currently, doctors end up having their testimony videotaped because of the scheduling of the courts and that tape is shown to the jury.
- This process incurs costs from the doctor, the videographer, and the court reporter.

**Roger Turgeon** (NH Association of Justice)

- For all of the woes described about this bill, none of them have actually happened in Massachusetts where they use this practice in all cases.
- This is self-limiting process because if it is a case that is only worth \$10,000-\$15,000 no lawyer is going to spend \$1,000-\$2,000 to put on a live witness because there would be almost nothing left for the client.
- NH pulls juries every other week. So, a lawyer may pull a jury on a Monday and not start the trial until Wednesday of the following week, which is where the testifying for days in the bill comes from even though they are only really testifying for one day.
- Will submit a letter in response to Mr. Best's arguments.
- Two years ago with SB37, the bill was voted favorably out of committee 5-0, but it was tabled when the insurance companies said they many have to raise premiums.
- Insurance premiums are low because the injured parties are bearing the cost.
- This is not burden shifting because sometimes in a medical record a doctor will say 'in my opinion these problems are causally related to this incident'.
- Under current law, NH records medical records are recognized as being authentic, but not relevant to a case.
- It is rare case where the defense is going to say no problem to simply submitting the records.
- When the records are not clear it is permissible to ask the doctor to write an addendum that he swears to.
- Talking to juries after the fact, they feel that the experts are talking heads and they tend to go with their gut instead.
- Many other states have this system in place and have never heard of complaints on this in MA.
- Senator Lasky asked how often live expert testimony is needed.
  - A lot of cases are rear end car accidents or a slip and fall where it is a sprain or ruptured disk, not something clear cut like a broken arm. People who are healthy tend to not get injured in these instances, but those with a pre-existing conditions, like osteoporosis, tend to get injured. The argument becomes whether or not the preexisting condition predisposed the individual or the injury would have happened no matter what. If this is a \$10,000 case should it be argued through \$5,000-\$10,000 worth of live testimony or \$500-\$1,000 of written reports?

**Anna Goulet Zimmerman** (NH Association of Justice)

- Generally, lawyers will agree to let the records come in, but they do not agree on causation.
- If the judge does not agree that the records are clear enough, the case will be dismissed.
- In any case that is not cut and dry lawyers get testimony from a paid expert or the treating doctor.
- Doctors will bill between \$400-\$ 1,000 an hour for deposition time.

- Now these additional expenses for the doctor's time and court expenses have to be paid in the settlement, which means higher costs of everyone.
- This will increase efficiency and lower costs for both sides.
- There is no shifting of the burden, it is just making it more accessible

#### **Summary of testimony presented in opposition :**

##### **Bob Best (NH Medical Society)**

- This bill is similar to SB37 from a few years ago.
- Doesn't think this is the right approach for these cases because the kinds of cases affected by this legislation are not easy ones.
- When medical records are clear, the parties come to an agreement to admit the medical records without live testimony.
- The Judicial Branch's FN says "given the limited applicability of the proposed bill and the fact that attorneys already reach agreement in many cases to submit medical evidence in lieu of live testimony when the issues are not contested, the Judicial Branch concludes that the fiscal impact of the proposed bill on the Branch will be minimal."
- Live medical testimony does add costs in the difficult cases where the records are unclear, but for the ones that are not difficult live medical testimony does not even come in.
- Even with this bill, costs will continue to exist in the difficult cases, as the defendant has to call in the doctor to explain the records. So, this only changes who has to pay.
- In terms of there being hours or days of testimony that is not realistic in these cases as they are lower cost cases.
- Courts go out of their way to accommodate physicians and most of the time it is video testimony.
- The claim is that physicians are reluctant to treat patients if they expect litigation is involved, but that is not the experience of the Medical Society.
- Workers comp. is very unique: a person can't sue for pain and suffering, there is no need to prove liability, and it is not dealt with by a jury rather a hearings officer. When presenting the medical record without live testimony both parties go through the records and pick the parts that work for their case and the hearing officer sorts that out.
- These cases deal with jurors who need clarification from doctors.
- Does not think this is going to help doctors or patients. Instead, it will result in more contentious cases coming forward.
- This shifts the costs to the defense and shifts the burden of proof, which is more meaningful than the costs.
- In live testimony a physician raises his hand in video or in court swearing to tell the truth and he answers questions about the record. Under this bill, the document is sworn to, but there is the question as to whether or not the physician is swearing that the record is simply the record or that it is true or accurate or complete. 25 people could have made entries into that one chart and only one is swearing to it.
- Once the record is ascribed to is it admissible to prove that the care is reasonable and necessary, and then it is up to the defendant to disprove that.
- The record is also ascribed to say that the cost of the care is fair and reasonable, but a receipt does not speak to that. If the defendant disagrees they have to disprove what the plaintiff hasn't even proven.
- When looking through a medical record, the question will arise if that is an opinion of

the doctor or simply what the patient said.

- Doctors provide the opinion on disability and incapacity, but it is important to know the basis for determining that, which the record is unlikely to contain.
- Senator French asked if this bill would work towards limiting the damage cases to under \$25,000
  - In terms of people reducing the size of their case to take advantage of this, these cases are driven by what the medical injury claims are, so unless an individual is craving out certain bills to fall under this they would not qualify. Would not expect the plaintiff's council to be manipulating the system like that. The \$25,000 however, is a little misleading because that is only the medical expenses. The value of the case can be many times that (\$75,000-\$100,000) because of pain and suffering and lost wages.

**Jim Hatem** (State Farm Insurance Companies)

- This does not promote the efficient and effective administration of justice.
- When a consumer in NH buys a policy they buy two things. First, it provides indemnification if someone determines the policy holder is at fault for harming someone else. And secondly, it provides a defense, so that in the context of being accused, the insurance policy provides a lawyer to help determine whether or not it was the policy holder's fault.
- It is the accuser's burden to prove that the individual is at fault.
- This is fundamental to the justice system and it is important that the defense have the opportunity to test the credibility of live witnesses at trial.
- This bill tries to short circuit that approach in the name of expediency and cost savings.
- The right to confront an accuser in person is in the Constitution and the notion of confronting the accuser allows for the cross-examination in front of the judge and jury who are trying to make a determination on the case.
- The jury cannot look at a doctor's report and determine if anything is overstated.
- It is never 100% clear who is at fault.

**Lindsay Nadeau** (American Insurance Association & NH Association of Domestic Insurance Companies)

- Has the same concerns as shared by State Farm and the Medical Society over cost and burden shifting.
- Concerned this will bring forward more suits, which will lead to higher insurance costs.
- This takes away the fundamental right to cross examine a witness.
- The judge and jury need to make a credibility determination which is not based on paper.
- Senator Lasky asked if this brings the cost of cases lower would that not bring down the cost of insurance.
  - Does not think this lowers costs, it just shifts it.
- Senator Lasky pointed out that this may result in settlements being reached quicker.
  - The cases that would be settled by this bill through medical records are already being settled.
- Senator French pointed out that without this bill both sides are paying for live medical testimony, but with it the costs become optional.
  - When looking at it being the plaintiff's burden to prove its facts, they would do that through expert testimony. Under this, all they would need to do is provide paper, while the defense has to bear the cost of bringing in the doctor to cross

examine to disprove the argument. That doctor is also potentially a hostile witness and then there is the cost of having to subpoena him.

**Future Action:** Pending

JCH

Date Hearing Report completed: February 2, 2017