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10/22/03

Date

2003 SENATE JUDICIARY

SB 2379

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10/22/03

Date

2003 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2379

Senate Judiciary Committee

☐ Conference Committee

Hearing Date 02/12/03

Tape Number	Side A	Side B	Meter #
1	X		0.0 - 9.9
Committee Clerk Signature <i>Maria L. Solway</i>			

Minutes: Senator Stanley W. Lyson, Vice Chairman, called the meeting to order. Roll call was taken and not all committee members present. Sen. Lyson requested meeting starts with testimony on the bill:

Testimony Support of SB 2379

Sen. Nething - Introduced the Bill (meter 0.7) Please do not pass this bill as is. Reviewed bill, discussed assumption of risk and handed out Amendment to put the bill into a study. Attachment #1

Testimony in opposition of SB 2379

Paula Grossinger - ND Trial Association and Lobbyist (meter 3.0) Introduced J. Weikum.

Jeffrey S Weikum - (meter 3.4) Read Testimony - Attachment #2 Sited cases (meter 5.5)

Senator Dick Dever wondered if there would be a benefit in doing a study with Sen. Trenbeath.

Testimony Neutral to SB 2379

None

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*10/22/03*  
Date

Page 2

Senate Judiciary Committee

Bill/Resolution Number SB 2379

Hearing Date 02/12/03

**Motion Made to May Study as Amended SB 2379 by Senator Thomas L. Trenbeath and seconded by Senator Carolyn Nelson.**

**Roll Call Vote: 5 Yes. 0 No. 1 Absent**

**Motion to Amend Passed**

**Motion Made to DO PASS SB 2379 with a May Study as Amended by Senator Thomas L. Trenbeath and seconded by Senator Dennis Bercier.**

**Roll Call Vote: 5 Yes. 0 No. 1 Absent**

**Motion to DO PASS as Amended Passed**

**Floor Assignment Senator Thomas L. Trenbeath**

**Senator Stanley W. Lyson, Vice Chairman closed the hearing**

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Dennis Bercier  
Operator's Signature

10/22/03  
Date

30748.0101  
Title.0200

Prepared by the Legislative Council staff for  
Senator Nethling  
February 11, 2003

*JB*  
2-12-03

**PROPOSED AMENDMENTS TO SENATE BILL NO. 2379**

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to provide for a legislative council study of the doctrine of assumption of risk."

**BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

**SECTION 1. ASSUMPTION OF RISK - LEGISLATIVE COUNCIL STUDY.**

The legislative council shall consider studying, during the 2003-04 interim, the doctrine of assumption of risk and the impact the reenactment of the doctrine would have on other state laws. The legislative council shall report its findings and recommendations, together with any legislation required to implement the legislation, to the fifty-ninth legislative assembly."

Renumber accordingly

Date: February 12, 2003  
Roll Call Vote #: 1

**2003 SENATE STANDING COMMITTEE ROLL CALL VOTES**  
**BILL/RESOLUTION NO. SB 2379**

Senate JUDICIARY Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number 30748.0101

Action Taken Amendment - May Study

Motion Made By Sen. Trenbeath Seconded By Sen. Nelson

Senators	Yes	No	Senators	Yes	No
Sen. John T. Traynor - Chairman	A	A	Sen. Dennis Bercier	X	
Sen. Stanley Lyson - Vice Chair	X		Sen. Carolyn Nelson	X	
Sen. Dick Dever	X				
Sen. Thomas L. Trenbeath	X				

Total (Yes) FIVE (5) No ZERO (0)

Absent ONE

Floor Assignment \_\_\_\_\_

If the vote is on an amendment, briefly indicate intent:

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Dennis Bercier  
Operator's Signature

10/22/03  
Date

Date: February 12, 2003  
Roll Call Vote #: 2

**2003 SENATE STANDING COMMITTEE ROLL CALL VOTES**  
**BILL/RESOLUTION NO. SB 2379**

Senate JUDICIARY Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number 30748.0101

Action Taken DO PASS as Amended - May Study

Motion Made By Sen. Trenbeath Seconded By Sen. Bercier

Senators	Yes	No	Senators	Yes	No
Sen. John T. Traynor - Chairman	A	A	Sen. Dennis Bercier	X	
Sen. Stanley Lyson - Vice Chair	X		Sen. Carolyn Nelson	X	
Sen. Dick Dever	X				
Sen. Thomas L. Trenbeath	X				

Total (Yes) FIVE (5) No ZERO (0)

Absent ONE

Floor Assignment Sen. Trenbeath

If the vote is on an amendment, briefly indicate intent:

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Dennis Bercier  
Operator's Signature

10/22/03  
Date

**REPORT OF STANDING COMMITTEE (410)**  
February 13, 2003 8:45 a.m.

Module No: SR-28-2528  
Carrier: Trenbeath  
Insert LC: 30748.0101 Title: .0200

**REPORT OF STANDING COMMITTEE**

**SB 2379: Judiciary Committee (Sen. Traynor, Chairman) recommends AMENDMENTS AS FOLLOWS and when so amended, recommends DO PASS (5 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). SB 2379 was placed on the Sixth order on the calendar.**

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to provide for a legislative council study of the doctrine of assumption of risk."

**BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

**SECTION 1. ASSUMPTION OF RISK - LEGISLATIVE COUNCIL STUDY.**

The legislative council shall consider studying, during the 2003-04 interim, the doctrine of assumption of risk and the impact the reenactment of the doctrine would have on other state laws. The legislative council shall report its findings and recommendations, together with any legislation required to implement the legislation, to the fifty-ninth legislative assembly."

Renumber accordingly



2003 HOUSE JUDICIARY

SB 2379

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Deanna Walker  
Operator's Signature

10/22/03  
Date

2003 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2379

House Judiciary Committee

☐ Conference Committee

Hearing Date 3-18-03

Tape Number	Side A	Side B	Meter #
1	xx		45.8-48
1		xx	0-1
Committee Clerk Signature <i>APenrose</i>			

**Minutes:** 10 members present, 3 members absent (Rep. Grande, Wrangham, Eckre).

**Chairman DeKrey:** We will open the hearing on SB 2379.

**Sen. Dave Nething:** Introduced the bill, support. SB 2379 started out as legislation that was going to reinstate the doctrine of substantive risk. In preparing for the testimony, I learned that, in the research I was doing, that this is a really complicated issue in view of fact that we currently have contributory negligence standards. I then offered amendments to our Senate Judiciary committee to do a study of the assumption of risk doctrine, because it is such a broad field. My feeling on it is that people need to be responsible for their own actions. If you assume a risk, you need to be held responsible for that risk. You just can't play in that well, and say it was somebody else's fault, and not bring it in. So, it is somewhat limited in its application and I am guessing that there will be other people here that will talk to you about the complications of whether or not there is a need for that.

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*Deanna Walling*  
Operator's Signature

10/22/03  
Date

Page 2

House Judiciary Committee

Bill/Resolution Number SB 2379

Hearing Date 3-18-03

Chairman DeKrey: Further testimony in support of SB 2379. Testimony in opposition. We will close the hearing. What are the committee's wishes in regard to SB 2379.

Rep. Kretschmar: I move a Do Pass.

Rep. Maragos: Seconded.

10 YES 0 NO 3 ABSENT

DO PASS

CARRIER: Rep. Kretschmar

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10/22/03  
Date

Date: 3/18/03  
Roll Call Vote #: 1

**2003 HOUSE STANDING COMMITTEE ROLL CALL VOTES**  
**BILL/RESOLUTION NO. 2379**

House Judiciary Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken

Do Pass

Motion Made By

Rep. Kretschmar

Seconded By

Rep. Maragos

Representatives	Yes	No	Representatives	Yes	No
Chairman DeKrey	✓		Rep. Delmore	✓	
Vice Chairman Maragos	✓		Rep. Eckre	AB	
Rep. Bernstein	✓		Rep. Onstad	✓	
Rep. Boehning	✓				
Rep. Galvin	✓				
Rep. Grande	AB				
Rep. Kingsbury	✓				
Rep. Klemm	✓				
Rep. Kretschmar	✓				
Rep. Wrangham	AB				

Total (Yes) 10 No 0

Absent

3

Floor Assignment

Rep. Kretschmar

If the vote is on an amendment, briefly indicate intent:

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10/22/03  
Date

**REPORT OF STANDING COMMITTEE (410)**  
March 18, 2003 10:24 a.m.

Module No: HR-48-5004  
Carrier: Kretschmer  
Insert LC: . Title: .

**REPORT OF STANDING COMMITTEE**  
SB 2379, as engrossed: Judiciary Committee (Rep. DeKrey, Chairman) recommends **DO PASS** (10 YEAS, 0 NAYS, 3 ABSENT AND NOT VOTING). Engrossed SB 2379 was placed on the Fourteenth order on the calendar.

(2) DESK, (3) COMM

Page No. 1

HR-48-5004

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*10/22/03*  
Date

2003 TESTIMONY

SB 2379

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10/22/03

Date

Part 2

**Testimony of Jeffrey S. Welkum on Senate Bill No. 2379**

**February 12, 2003**

**Senate Judiciary Committee**

North Dakota operates on a modified comparative fault standard which is an equitable process. In plain language it means everyone is responsible for their own actions and the results of those actions.

The current law is clear and effective and well applied by the courts. Attached for your review are five (5) North Dakota pattern jury instructions which deal with the "assumption of risk" defense.

Bill 2379 as introduced is a regression of 30 years in tort law.

This Bill would operate to preclude recovery if a jury determines that the injured party is responsible even in a miniscule amount – that result is unconscionable.

Defendants will raise "assumption of risk" in every case as it is a shot to a complete bar to recovery.

The reason tort law evolved away from pure comparative faults statutes was to make it more equitable to all parties.

Passage of this Bill would preclude recovery in cases such as:

- Passenger of a Driver who has had a single alcoholic drink.
- Pedestrian Crossing Roadway
- Motor vehicle accidents
- Vast majority of injuries involving children
- Cigarettes (warning on package)
- Any pharmaceutical drug (warnings on label & PDR)
- Dangerous Products (Lighter example) (Ford Pinto)

A warning label, such as the one listed below, on a known defective product would preclude recovery.

**WARNING: Users should be aware that this lighter may explode upon ignition causing potentially serious injury or death.**

Who is Senate Bill 2379 intending to protect? Certainly not the citizens of North Dakota. Furthermore is this the kind of business we want to protect?

Every product sold in North Dakota could have a warning label as above and any recovery for injury/death would be precluded.

I would respectfully request that the committee assign a "Do Not Pass" recommendation to Senate Bill 2379.

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10/22/03

Date

1986

NDJ-CIVIL

C - 64.00

**Assumption of Risk**

If a person has actual knowledge of a dangerous situation, having freedom of choice and an appreciation of the dangerous situation then existing, freely and voluntarily exposes oneself to the hazard and a mishap is proximately caused by the danger encountered, that person assumes the risk of damages thereby sustained and the wrongdoer's liability is diminished.

To have freedom of choice, the injured Claimant, without violating any legal or moral duty, must have had a reasonably safe opportunity to avoid self-exposure to the present danger.

**[(Momentary Forgetfulness of Danger)]**

However, if an injured Claimant voluntarily encounters a dangerous situation of which the Claimant had previous knowledge, but momentarily forgets the danger, the Defense of "assumption of risk" does not apply unless under all of the circumstances it shows a want of ordinary care not to have kept the danger in mind. It is a question of fact for the Jury to determine whether the Claimant failed to exercise ordinary care for personal safety in not keeping the danger in mind.]

\*\*\*\*\*

NDCC 9-10-06

*Keller v. Vermeer Mfg. Co.*, 360 NW2d 502 (ND 1984)  
*Borstad v. La Roque*, 98 NW2d 16 (ND 1959)  
*Cameron v. Great N. Ry. Co.*, 80 NW 885 (ND 1899)

Restatement (2d) Torts, *Causal Relation Between Harm and Plaintiff's Negligence*, § 465.

*Cf. Wentz v. Deseth*, 221 NW2d 101 (ND 1974), 16 ALR4 700.

NOTE: Assumption of risk is not a defense in an action by an injured railroad employee against an employer. NDCC 49-16-04, 49-16-08.

Instructions on fault are being revised. See NDCC 32-03.2-02, North Dakota's Comparative Fault Act.

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1986

NDJI-CIVIL

C - 64.05

**Assumption of Risk  
(By Passenger)**

If a person has actual knowledge of the [reckless propensity] [or] [intoxicated condition] of the owner, driver, or person responsible for the operation of a vehicle, [if either existed,] and, having freedom of choice and an appreciation of the dangerous situation thereby created, freely and voluntarily enters the vehicle or remains therein as a guest passenger and a mishap is proximately caused by the host's [negligence] [or] [intoxication], that guest assumes the risk of injuries thereby received. The risk assumed is treated as contributory negligence in comparing the fault of the parties.

To have freedom of choice, the injured Claimant, without violating any legal or moral duty, must have had a reasonably safe opportunity to avoid the confronting danger.

\*\*\*\*\*

NDCC 9-10-06

*Borstad v. La Roque*, 98 NW2d 16 (ND 1959)

NOTE: Instructions on fault are being revised. See NDCC 32-03.2-02, North Dakota's Comparative Fault Act.

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1986

NDJI-CIVIL

C - 66.10

**Fault of Decedent Diminishes Recovery  
(Wrongful Death)**

If the decedent [was guilty of [ordinary negligence] [willful misconduct] that proximately caused the decedent's own injury and death], [assumed the risk of injury and death], a beneficiary's right to recover any damages against another wrongdoer is diminished.

\*\*\*\*\*

*Larson v. Meyer*, 135 NW2d 145 (ND 1965)  
*Hogan v. Bragg*, 170 NW 324 (ND 1918)  
*Cameron v. Great N. Ry. Co.*, 80 NW 885 (ND 1899)

NOTE: See NDJI C - 66.00, Fault of Beneficiary Diminishes Recovery (Wrongful Death).

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C - 64.20

**Assumption of Risks  
(Strict Products Liability)**

If a Claimant 1) is aware that a manufactured product is defective in condition or design and unreasonably dangerous, 2) has a reasonable opportunity to choose to avoid the danger, and 3) voluntarily proceeds to use the product and is thereby injured, the [manufacturer's] [or] [seller's] liability is diminished in proportion to the percentage of the injuries proximately caused by the Claimant's assumption of the risk of injury.

The Jury must determine, on a pure comparative causation basis, the percent of the Claimant's damages proximately caused by the Claimant's assumption of the risk and the percent proximately caused by the unreasonably dangerous defect in the product. The Court will then reduce the Claimant's recovery by an amount proportionate to the damages attributable to the assumption of risk.

\*\*\*\*\*

*Kaufman v. Meditec, Inc.*, 353 NW2d 297 (ND 1984)  
*Day v. Gen. Motors Corp.*, 345 NW2d 349 (ND 1984)  
*Mauch v. Mfr. Sales and Serv., Inc.*, 345 NW2d 338 (ND 1984)

NOTE: NDJI C - 90.55, Special Verdict, should be used with this instruction.

Instructions on fault are being revised. See NDCC 32-03.2-02, North Dakota's Comparative Fault Act.

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1995

NDJI-CIVIL

C - 68.00

**Comparative Fault**

The law requires that fault be apportioned among those parties [and other persons] you have found to be at fault in causing the Plaintiff's damages.

Defendant's [and other persons'] fault may consist of [negligence] [breach of warranty] [strict liability for product defect] [dram shop liability] [absolute liability] [malpractice] [failure to warn] [reckless or willful conduct].

Plaintiff's fault may consist of [contributory negligence] [assumption of risk] [misuse of a product] [failure to exercise reasonable care to avoid an injury or to mitigate damages].

If, by your answers, you have determined that two or more persons are at fault and that their fault was a proximate cause of Plaintiff's damages, you must apportion fault among them.

\*\*\*\*\*

NDCC 32-03.2-01 - 03

NOTE: This instruction applies to claims arising after July 8, 1987.

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