

Legislative History for Connecticut Act

HB 6962	PA 69	1999
SENATE: 1797-1798, 1829-1831		5 p.
HOUSE: 1915-1921		7 p.
Judiciary: 1271-1274, 1310-1329, 1340-1346, 1355-1358, 1362, 1365, 1418-1420, 1426-1431, 1538-1550		59 p.
Total - 71 p.		

Transcripts from the Joint Standing Committee Public Hearing(s) and/or Senate
and House of Representatives Proceedings

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S-434

CONNECTICUT
GEN. ASSEMBLY
SENATE

PROCEEDINGS
1999

VOL. 42
PART 6
1787-2173

001797

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Senate

Wednesday, May 12, 1999

Consent Calendar.

THE CHAIR:

Without objection, so ordered.

THE CLERK:

Calendar page 19, Calendar No. 432, File No. 467
and 618, Substitute for HB6962, AN ACT CONCERNING
APPORTIONMENT OF LIABILITY BETWEEN NEGLIGENT AND
INTENTIONAL TORTFEASORS. As amended by House Amendment
Schedule A. Favorable report of the Committee on
Judiciary.

THE CHAIR:

Senator Williams.

SEN. WILLIAMS:

Thank you, Madam President. I move adoption of the
Joint Committee's favorable report in concurrence with
the House.

THE CHAIR:

Question is on passage and concurrence. Will you
remark?

SEN. WILLIAMS:

Thank you, Madam President. The intent of this
legislation is to restore the state of the laws as it
existed prior to a Connecticut supreme court decision in
Binder vs. Sun Company.

The bill does not impact a person's right to bring

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an action against intentional or reckless party. It does not impact a party's right to make counter claims, cross claims, and special defenses.

It simply allows apportionment of liability and damages only in actions based on negligence. So, essentially this would not allow such apportionment between a negligent and an intentional tortfeasor. And through that, Madam President, it would restore us to the state of the law that existed through tort reform legislation in the 1980's, and I move adoption.

THE CHAIR:

Question is on passage of the bill. Will you remark further? Will you remark further? Senator Williams.

SEN. WILLIAMS:

If there's no objection, I would move this to the Consent Calendar.

THE CHAIR:

Motion is to refer this item to the Consent Calendar. Without objection, so ordered.

THE CLERK:

Calendar page 28, Matters Returned From Committee.
Calendar No. 153, File No. 124, SB1267, AN ACT
CONCERNING WAIVER OF FEES. Favorable report of the
Committees on Judiciary, and Finance Revenue and

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Calendar page 7, Calendar No. 305, Substitute for SB1297.

Calendar 310, Substitute for SB1263.

Calendar page 9, Calendar No. 354, Substitute for HB5373.

Calendar page 10, Calendar No. 371, SB1209.

Calendar page 14, Calendar No. 401, Substitute for HB5070.

Calendar -- correction, Madam President, page 14, it should be Calendar No. 402, HB5742.

Calendar page 15, Calendar No. 409, Substitute for HB6636.

Calendar page 16, Calendar No. 411, Substitute for HB6365.

Calendar 412, Substitute for HB6032.

Calendar page 17, Calendar No. 420, Substitute for HB6881.

Calendar 421, Substitute for HB6881.

Calendar page 18, Calendar No. 425, Substitute for HB6624.

Calendar 426, HB6710.

Calendar page 19, Calendar No. 429, HB5189.

Calendar 431, Substitute for HB6663.

Calendar 432, Substitute for HB6962.

Calendar page 20, Calendar No. 433, Substitute for

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HB7038.

Calendar 436, HB5774.

Calendar page 28, Calendar No. 153, SB1267.

Calendar No. 189, Substitute for SB1054.

Calendar page 29, Calendar No. 191, Substitute for
SB1103.

Calendar page 30, Calendar No. 242, Substitute for
SB1171.

Calendar page 31, Calendar No. 250, SB1148.

Calendar page 32, Calendar No. 273, Substitute for
SB1366.

Calendar page 33, Calendar No. 97, Substitute for
HB5335.

Calendar 262, SB1155.

Calendar 345, HJR40.

And, Calendar page 34, Calendar 346, Substitute for
HJR59.

Madam President, I believe that that completes the

--

THE CHAIR:

Thank you, Mr. Clerk. Would you once again
announce a roll call vote on the Consent Calendar. The
machine will be open.

Have all members voted? Have all members voted?
If all members have voted, the machine will be locked.

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Clerk, please announce the tally.

THE CLERK:

Motion is on adoption of Consent Calendar No. 1.

Total Number Voting 36

Those voting Yea 36

Those voting Nay 0

Those absent and not voting 0

THE CHAIR:

The Consent Calendar is adopted. Senator Jepsen.

SEN. JEPSEN:

Thank you, Madam President. I move that this body stand in recess till approximately 6:00 p.m.

THE CHAIR:

Without objection, the Senate is in recess until approximately 6:00 p.m. Thank you, sir.

(Senate recessed at 4:30 p.m. and reconvened at 7:09 p.m.)

THE CHAIR:

The Senate will please come to order. Senator Jepsen.

SEN. JEPSEN:

Thank you, Madam President. Senator Nickerson, Senator DeLuca, Senator Freedman, and Senator Cook, get

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House of Representatives

Thursday, May 6, 1999

"D," in concurrence with the Senate.

Total Number Voting	143
Necessary for Passage	72
Those voting Yea	137
Those voting Nay	6
Those absent and not voting	8

SPEAKER LYONS:

The bill as amended passes. Representative Pudlin.

REP. PUDLIN: (24th)

Madam Speaker I would ask the Chamber at this time for a suspension of the rules for the transmittal of this business to the Governor's office.

SPEAKER LYONS:

Hearing no objection the rules are suspended for the bill to go to the Governor's office.

DEP. SPEAKER CURREY:

Will the Clerk please call Calendar 394.

CLERK:

On page thirteen. Calendar 394, substitute for
HB6962, AN ACT CONCERNING APPORTIONMENT OF LIABILITY
BETWEEN NEGLIGENT AND INTENTIONAL TORTFEASORS.

Favorable report of the Committee on Judiciary.

DEP. SPEAKER CURREY:

Representative Lawlor from the 99th.

REP. LAWLOR: (99th)

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Thank you Madam Speaker. I move acceptance of the Joint Committee's favorable report and passage of the bill.

DEP. SPEAKER CURREY:

Question is on acceptance and passage, please proceed sir.

REP. LAWLOR: (99th)

Thank you Madam Speaker. This bill intends to correct what many people interpret to be a wrongful decision by our state Supreme Court made last August. To make a long story short Madam Speaker, there had been an assumption that under our state's law which governs people recovering damages from other people when they did engage in some negligent conduct. That if in a case where there was an actual crime or other form of intentional wrong.

DEP. SPEAKER CURREY:

Excuse me Representative Lawlor. We are proceeding with further legislation. Thank you, Representative Lawlor.

REP. LAWLOR: (99th)

Actually Madam Speaker, I kind of like it when no one is listening. Madam Speaker, this bill intends to clarify what everyone had understood the law to be prior to a decision of our state Supreme Court last August.

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What it boils down to Madam Speaker, that under the current law people had assumed if there were a situation where someone was harmed and it was someone else's fault that they were harmed, but there was more than one person and one of them had committed a crime or engaged in some intentional conduct but someone else was negligent in allowing that to happen that you could collect damages against the person whose negligence led to the harm.

In general this applies to situations where persons are victims of crime and someone else was at fault for allowing that crime to happen, in addition to the person who committed the crime. In some cases, in many cases actually it will be the person's negligence in not providing security or some other type of thing which was the real actionable cause. For example there were cases described before our committee where it was an apartment building's responsibility to provide security for the tenants, but the security guard actually allowed in someone who subsequently committed a very violent crime against one of the tenants.

And then in the subsequent law suit the company which ran the apartment building claimed well, it's not really our fault, blame the guy who actually committed the crime. Even though part of the cost of the rent

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involved the maintenance of adequate security at the front door. In cases like that if we were to continue to abide by the decision of the state Supreme Court last year there would be a judgement mainly against the criminal who in most cases will have no ability to pay any damages, and little if any damages against the real person that failed to supervise -- in this case the apartment building security company.

Madam Speaker, the Clerk has an amendment LCO 8527, I ask the Clerk to call and I be permitted to summarize.

DEP. SPEAKER CURREY:

Would the Clerk please call LCO 8527.

CLERK:

LCO 8527 House "A" offered by Representative Lawlor.

REP. LAWLOR: (99th)

Thank you Madam Speaker. This amendment doesn't add any new content to the bill it just makes it ever more clear that the only intention of this bill is revert the law to what everyone understood it had been prior to last August's decision. In fact Madam Speaker if I could just state the, if I could just have one moment Madam Speaker, if I could just state for legislative intent so that there's no mistake about what

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the General Assembly intends in proposing and hopefully passing this bill, it's the intent of this legislation to restore the state of the law as it existed prior to the state Supreme Court decision last August 11th in Binder versus Sun Company.

It's not our intent, and this bill will not impact, and should not impact a person's right to bring an action against an intentional or reckless party. It also does not impact a party's right to make counter claims, cross claims and special defenses.

The bill simply allows apportionment of liability and damages only in actions based on negligence. And let me emphasize Madam Speaker, there was a great deal of concern among the various parties and interests who are represented here at the legislature as to whether or not in some way this bill would do more than go back to the way the law was prior to last August's Supreme Court decision. It's, based on the testimony before our committee and the discussions that have happened prior today, it's very clear that the only intent here is to put the law back where everyone understood it to be last year. That's the only purpose of this bill.

This amendment further clarifies that intention and I urge its adoption.

DEP. SPEAKER CURREY:

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Thank you Representative Lawlor. Question is on adoption of the amendment, will you remark further? If not I'll try your minds. All those in favor please signify by saying aye.

REPRESENTATIVES:

Aye.

DEP. SPEAKER CURREY:

All those opposed no. The amendment passes. Would you care to remark on the bill further as amended?

Would you care to remark further on the bill as amended?

If not, will staff and guests to the well of the House the machine will be open.

CLERK:

The House of Representatives is voting by roll call members to the Chamber. The House is voting by roll call, members to the Chamber please.

DEP. SPEAKER CURREY:

Have all the members voted? Will the members please check the machine to make sure your vote is properly cast. Have all members voted Representative Amann? The machine will be locked and the Clerk will take a tally. The Clerk will please read the tally.

CLERK:

HB6962 as amended by House amendment schedule "A."

Total Number Voting

139

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207

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House of Representatives

Thursday, May 6, 1999

Necessary for Passage	70
Those voting Yea	138
Those voting Nay	1
Those absent and not voting	12

DEP. SPEAKER CURREY:

The bill as amended passes. Would the Clerk please call Calendar 382.

CLERK:

On page twelve. Calendar 382, substitute for HB7056, AN ACT CONCERNING STATE USE OF REMANUFACTURED GOODS. Favorable report of the Committee on Government Administration and Elections.

DEP. SPEAKER CURREY:

Representative Fox from the 144th.

REP. FOX: (144th)

Thank you Madam Speaker. I move acceptance of the Joint Committee's favorable report and passage of the bill.

DEP. SPEAKER CURREY:

Question is on acceptance and passage of the bill, please proceed sir.

REP. FOX: (144th)

Thank you Madam Speaker. This is a bill that came before the General Law Committee relating to the obligation of the commissioner to revise certain

JOINT
STANDING
COMMITTEE
HEARINGS

JUDICIARY
PART 4
1052-1449

1999

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JUDICIARY COMMITTEE

March 15, 1999
1:00 P.M.

001271

PRESIDING CHAIRMAN: Representative Lawlor

MEMBERS PRESENT:

SENATORS: Williams, Coleman, Upson,
Looney

REPRESENTATIVES: Doyle, Farr, Abrams, Amann,
Bernhard, Cocco, Conway,
Dillon, Feltman, Fox, Godfrey,
Green, Hamm, Hamzy, Jarjura,
Klarides, Martinez, Murphy,
Nystrom, O'Neill, Powers,
Roraback, Rowe, Staples,
Stone, Winkler

REPRESENTATIVE LAWLOR: Just for informational purposes, following Representative Tulisano will be two panels of various agency heads on the Governor's proposals, both on Megan's Law and on civil commitment. This is being done to conserve time for those presentations. And we will go to the normal sign-up sheet after that.

Representative Tulisano.

REP. TULISANO: Mr. Chairman, members of the committee, thank you for giving me the opportunity to address the committee concerning one bill before you today, raised HB6962.

As you know, I do not -- it is not my habit to normally address committees during that short period of time which legislators may give that opportunity to others and talking to you behind closed doors where we can do a lot more things than anybody would ever have to be aware of.

But I'm here today because this is an ACT CONCERNING A PORTION OF LIABILITY BETWEEN NEGLIGENT AND INTENTIONAL TORTFEASORS and as ranking member of this committee in 1985 and 1986, working with the then Chairman, Bill Wollenberg, now Judge Wollenberg, we had a lot of difficulty and hours and hours and hours of negotiations and after we go through, the leadership of the General Assembly went through the same thing in creating a delicate

balance in reform of our tort law, Tort Reform 1, as it's called and then Tort Reform 2. It's a minor modification.

The bill before us addresses a court decision which modified what this Legislature did in Tort Reform 2. Basically, allowing a person who is accused of being negligent to bring in -- the statute allows you to bring in other tortfeasors in, other people who were negligent to apportion damages.

In a recent court case, indicated in that case was Binder vs. Sun Oil allowed the defendant to bring in an intentional tortfeasor for purposes of apportioning damages. And it seems to me that that was never contemplated by the Legislature and if you read the case it almost looks like it was an officious act of the court and although I'm not one to be adverse to having judicial activism as many legislators might be, I mean clear out legislating when I read this case. This isn't before us. We don't need to do it. We're going to add this language to the statute is even further than I might go and for those of you on this committee who often raise questions with judges as to whether they're going to be judicial activists or passivists, this is one you ought to look at closely.

But let me say to you that when we did that close balancing act, there were a lot of gnashing of teeth going on, a lot of compromise and this throws it all off.

We abolished joint and civil liability at that time, but we allowed apportionment of damages among negligent tortfeasors. This allows, as I said, an intentional tortfeasor to come in. And what that means as an example. If you had an obligation -- and I see these cases being tried often in the courts today, an obligation to protect me from, say, say you were aware that in a parking garage, as an example, there were assaults going on and you did not warn me and all of your employees, as an example, you escorted from the parking garage to work, but I'm an invitee in that parking garage. You don't warn me and I get mugged, sexually

assaulted or even murdered. When my estate, if I were murdered, brings an action against those folks for not warning me and giving me appropriate protection that I should be entitled to as an invitee, allows them to bring in the tort for the person who did the act and sue them. And most juries are smarter than most people think. They know who the apportionment of the damages is, the person who did the act is the person they're going to hold responsible, but as the individual who was damaged and the person who had an obligation to be protected, would end up with nothing. And I think this throws it out of whack completely.

Now, this Legislature has a long history of overruling Supreme Court decisions when they do things like this and I would urge you to do so now.

Thank you, Mr. Chairman.

REP. LAWLOR: Any questions? Representative Farr.

REP. FARR: Thank you, Representative Tulisano. Just a question about the language in this particular bill. I don't know if you've looked at this particular language.

REP. TULISANO: Yes, I did.

REP. FARR: On line 120, it says, "That there should be no apportionment of liability of damages between parties liable for negligence, parties liable for any other form of (inaudible) conduct including, but not limited to, intentional, reckless, or wanton misconduct or breach of a statutory duty."

I fully agree with your original statements --

REP. TULISANO: I think it should be limited to intentional tort. Recklessness maybe a higher degree of negligence which may, in fact, also have, if you want, the -- or a person who was a form of negligence, but you hold them to a higher degree. So I think reckless may very well stay in.

It should not be excluded. Let's put it that way.

REP. FARR: And what about the statutory duty? Doesn't this get into somebody who --

REP. TULISANO: Well --

REP. FARR: -- any motor vehicle case you would --

REP. TULISANO: Statutory duty --

REP. FARR: -- classify it --

REP. TULISANO: -- is a form of negligence, actually. Most of -- you're negligent in that you broke the statutes which you would normally plea. So that could be cleaned up a little more too.

REP. FARR: Okay. Thank you.

REP. LAWLOR: Further questions? If not, thanks.

REP. TULISANO: Thank you.

REP. LAWLOR: First, we're going to have the panel on the Governor's proposal on Megan's Law involving most of the relevant agency heads and I don't know how you would like to apportion the presentation, but however -- just identify yourself as you begin, please.

MIKE CICCHETTI: Good morning, Representative Lawlor. I'm Mike Cicchetti from the Office of Policy and Management. I have with me, behind me, representatives from Public Safety, the State's Attorney's Office, Board of Parole, Department of Correction, and OPM, persons who staff the Section 11 Committee.

HB 6785
HB 6784

So what we're going to do is I'm going to read some testimony and then if there's any questions, technical questions, I can either answer them myself or direct them to the appropriate agency.

REP. LAWLOR: I'm looking behind you, if you were going to rob a bank in Connecticut, today would be a good day. They're all here.

MIKE CICCHETTI: We should all feel pretty safe here,

art system. So that's something else to -- I know Chairman Mullin is very involved in that process already.

So, are there any other questions on this topic? Okay. If not, thank you very much.

MIKE CICCHETTI: Thank you.

REP. LAWLOR: Just to point out, we're over the first hour time limit for agency heads, etc. We have eleven others signed up on the agency head list. We'll get to them. We'll rotate them in with the members of the public as we go through it.

Switching to the members of the public list, first is Andrew Groher. He'll be followed by Ken Laska, Jim Guston, Joe Meaney, and Louise Hyppa.

And we would encourage that the presentations be confined to three minutes so we can get through the entire list. We've got quite a few people signed up to testify.

There maybe questions and answers that follow your presentation. That would not be counted in the three minutes, obviously.

You guys are testifying as a panel, is that it?

ANDREW GROHER: Yes.

REP. LAWLOR: Okay.

ANDREW GROHER: Good afternoon, Chairman Lawlor and members of the Judiciary Committee.

My name is Andy Groher. I'm here with Steve Ecker and we're both here on behalf of the Connecticut Trial Lawyers Association to testify in support of HB6962.

I want to say just very briefly that in our opinion the decision of the court in Binder vs. Sun Oil Company has completely turned the law around as it was in this state concerning apportionment of fault between negligent and intention tortfeasors and

ought to be overruled by this body.

We have submitted for your consideration an affidavit of Ernestine Reese who is someone who actually suffered an assault that Binder would affect -- the decision would affect and I just wanted to read to you her last paragraph which says much more eloquently than I could why this is such an unfair decision.

She writes, "Under the Binder decision a crime victim's ability to receive adequate compensation would be severely compromised or eliminated leading to an unfair result whereby a company could neglect their duty to keep the premises safe while resting in the comfort of the Binder decision. It would be glorifying social irresponsibility for the fault to be apportioned to the animals that I should have been protected against."

And I would commend that affidavit to your attention and ask you to consider that.

And with that, I'm going to turn it over to Attorney Ecker.

STEVE ECKER: I wanted to just make two fundamental points. The first is that apportioning liability between an intentional tortfeasor and a negligent tortfeasor is flawed conceptually.

The idea of relative fault in this context is rhetorically appealing. Why should the negligent tortfeasor pay or bear the responsibility for the wrong done to the intentional tortfeasor? But the idea of apportioning fault in this context misses the point of the determination of fault even if it's negligent fault.

To use a real life example. A case that I had in my office a couple of years ago and there's hundreds of others like this in various contexts. A boarding school hires a pedophile. Then over a period of years ignores repeated signs that this person is a sexual predator whose molesting students. This is a real case. It happened in Connecticut.

The finding of negligence in the type of case that we're addressing is based on the negligent party's failure to prevent the intentional harm that came to pass. If the person, whether it's a school or a medical facility or a summer camp or a chaperon at a boy scout troop or a storekeeper, whomever, has a duty to prevent that harm. And the harm is reasonably foreseeable and the harm occurs. Then it makes no sense to reduce that negligent party's responsibility because there's a bad guy in the room. That's the point is that the negligent person was supposed to stop that from happening.

And this fundamental point, it was missed in Binder. You can't take the existing statutory model in our view, in my view, and apply it for negligence across intentional and negligent torts.

The second point is more practical and I'll make it very quickly. The fact that it's practical doesn't mean that it's unprincipled. In fact, I think it captures the essence of tort law principles. If Binder remains the law, then the loss is shifted to the innocent victim.

I think the answer to all the concerns and questions are legitimate ones. Well, why should the intentional tortfeasor get off and the negligent tortfeasor have to pay everything? The answer to that is that's not the universe of relative fault that we're talking about because it ignores the innocent person.

If the intentional tortfeasor is held in and is apportioned in, say 90% of the fault, just to use an example, then the negligent tortfeasor will pay 10%. The remaining 90% is uncollectible because the intentional tortfeasor is uninsured. It's an uninsurable act and is often in Somers and the victim is stuck with 90% of the damages to pay for by himself, notwithstanding a jury determination that the negligent party was negligent.

So, I think the question is as between an innocent victim and a negligent tortfeasor, not a bad person, but a careless one, who should bear the

loss and we believe the answer is obvious and it's consistent with, I think, a few hundred years of tort law.

So, those are the two points I wanted to make in brief.

REP. LAWLOR: Okay. Senator Upson.

SEN. UPSON: Yes. And I'm not suggesting -- I'm a lawyer so I'm not against this, necessarily, but I just want to know, are you suggesting when it comes -- in negligence we allow comparable negligence in the State of Connecticut. Is that correct?

STEVE ECKER: Correct.

SEN. UPSON: Alright. And are you suggesting -- there's a negligent situation and an intentional situation that in that case we do not apportion or should not apportion?

STEVE ECKER: That's correct.

SEN. UPSON: And we should just go. So what should we do, just go to the negligence part and forget the intentional?

STEVE ECKER: Well, very often the --

SEN. UPSON: I just want to know. Can you intellectually divide that?

STEVE ECKER: Yes. Very often both get sued. So, it wouldn't always happen.

SEN. UPSON: Correct.

STEVE ECKER: But if the plaintiff, for whatever reason, just wants to sue the negligent party, what we're saying is that's the way it should be.

SEN. UPSON: And -- how do I reason? How do I reason with that? How do I intellectually --

STEVE ECKER: Well, I think the main point is that in order to recover anything you have to show that the

negligent tortfeasor was negligent.

SEN. UPSON: Correct.

STEVE ECKER: So, that, perhaps should be enough.

SEN. UPSON: And what do we do about the intentional part?

STEVE ECKER: Well, the criminal system takes care of that person --

SEN. UPSON: But if we bring that person in, what happens?

ANDREW GROHER: Well, if I could just jump in here for a moment. Because there's a couple of answers to that.

First, the civil justice system isn't only about apportioning fault. It's about compensation, as well. And under the scenario that's created by the Binder decision, and if you look at Justice Callahan's dissent, basically what he says is that the person who had the responsibility of protecting the victim from the very thing that happened to them, will be allowed to escape their responsibilities simply by bringing in the intentional tortfeasor. So the compensation won't be there and that also is a second answer which is that the negligence here isn't just I was careless in the way I drove my car. It was I was negligent in failing to do what I was supposed to do to protect people in the victim's shoes.

So that's -- remember, in order to prevail against a negligent person, it has to be negligence that allowed harm that was in the scope of the risk created by the negligence. So you're not just dragging in unrelated parties.

SEN. UPSON: I'm still at a loss though. I have to explain this to my caucus if I can.

We like to sue someone who is maybe intentional, but make it negligent, don't we?

ANDREW GROHER: I'm sorry. I missed the question.

SEN. UPSON: Well, sometimes we bring suit against someone who may have been intentional, but we try to, as lawyers, make that a negligent situation so we can get the insurance policy. Is that a fair statement?

STEVE ECKER: That's been known to happen.

SEN. UPSON: Thank you. And what I'm trying to - so, obviously, murder or that type of -- you can never do that. But I'm still having a problem trying to intellectualize this.

ANDREW GROHER: Maybe the best thing --

SEN. UPSON: Not that it's going to effect my voting.

ANDREW GROHER: Maybe the best answer is the -- I don't want to interfere with that.

SEN. UPSON: I know, but you are right now.

ANDREW GROHER: The best answer is the practical situation and this is the one -- I've had two of them in my office. So I can speak to them. One involved a sexual molestation at Hartford Hospital. And one involved a sexual molestation at a school.

SEN. UPSON: That's apples and oranges. Is that what you're saying? You shouldn't include both.

ANDREW GROHER: I think that's right. I mean you can't compare the fault here because the fault is 100% on each party. And what happens in these situations in the one case involving the medical facility, the intentional wrongdoer was in prison. In the case involving the school, the intentional wrongdoer was in New York and wasn't coming to Connecticut.

SEN. UPSON: That's a factual situation. But so the -- so in every case if we sue someone that was intentional and negligent we -- there should be a dichotomy and we should never -- fault should not be applied.

ANDREW GROHER: Again, it goes to the negligence was the failure to protect from the risk that was within the -- in other words, because I think why this is so hard because what Steve just said is in both cases -- in those cases, the fault on both parties is 100%. Because the intentional actor is always going to be responsible. Always. But the negligent person who allowed that risk to come in and invade the victim, is also always going to be responsible. But if you get into a situation where you're comparing the equities between the intentional one who did it volitionally and the one who was just negligent, I think that the predicted outcome will be the juries are going to find most of the fault lies with the intentional actor.

STEVE ECKER: The conceptual framework that I use is --

SEN. UPSON: That's what I'm trying to -- is what?

STEVE ECKER: Is a dog and I don't mean to de-humanize the situation, but if you imagine the intentional tortfeasor as a vicious animal, then you would never say we should hold -- we need to apportion fault there somehow. The fault that we're focused on in the tort system and in the negligence system is the fault of the person whose job it is to keep the animal on the leash, keep the animal in the pen, or however you look -- so conceptually, that's the way I view it and they're incommensurable and you can't compare the two.

Which is why historically the common law never has.

SEN. UPSON: Is that true in other states?

STEVE ECKER: Yes. I did a quick run through and there are four states in which this issue has come up to the Supreme Court, Florida, Massachusetts, Kansas, and Alaska in the 1990's and even if you discount Alaska a little bit, that's three pretty good states. And the four of those in the 90's have all held the way that we would like this court to hold.

Apparently New Jersey goes the other way. Although the opinion leaves some wiggle room.

SEN. UPSON: Thank you.

SEN. WILLIAMS: Representative Farr.

REP. FARR: A couple of quick questions. One, is I think you may have heard me earlier with Representative Tulisano. I'm a little concerned about the language that has been proposed here because it seems to me this does more than simply go back to the way the law was before.

When you talk about recklessness and wanton misconduct or breach of a statutory duty, in all negligence cases that I've seen everybody always alleges all of these things. So, --

ANDREW GROHER: I don't mean to cut you off, but actually the statute does go back to the way the law was before because until this decision, the courts had held that you could not bring in a reckless actor, wanton, willful. Those are different than negligence. They couldn't be apportioned.

In addition, you're now finding commentators --

REP. FARR: Statutory duty?

ANDREW GROHER: Pardon?

REP. FARR: Statutory duty? You mean to tell me if you allege that the person was speeding that there was no contribution?

ANDREW GROHER: No, that's not the -- we're talking about if you allege specifically reckless and willful or wanton misconduct, which is different than alleging somebody was -- you can have a violation of a statute which is negligence, per se and this wouldn't change that. You could still bring in and try to apportion fault between actors who are negligent, whether it's common law negligence or statutory negligence.

REP. FARR: Okay.

ANDREW GROHER: But the other thing that's happening is

you have commentators who are now suggesting that this case can be used to apportion -- bring in apportionment defendants in dog bite cases, dram shop cases, product liability cases. Statutory causes of action where traditionally apportionment has never been allowed and now they're suggesting that Binder opens -- the Binder decision opens the door for that.

REP. FARR: Let me ask you a quick one on the contribution. If the intentional -- if you get a judgment against the negligence tortfeasor, can you seek contribution against the intentional one? Can the negligent tortfeasor seek contribution against the intentional one?

ANDREW GROHER: That's a very good question. And I believe the answer to that is yes. And the reason -- I'm not 100% certain on that, is because there was -- there were cases in Connecticut that said that there was no contribution among joint tortfeasors. However, joint several is now gone and there was a recent decision within the last couple of years in the insurance situation that allowed an uninsured motorist carrier to go back and sue the person that had no insurance for contribution. I think and I can't remember the name of that case, but I think under that case law, the answer to your question is yes.

REP. FARR: Okay. That would be -- I remember the case too. I don't remember the name of it. It would be helpful if we could -- did allow contribution because that would take care of some of these situations. You wouldn't allow the intentional tortfeasor off the hook all together.

ANDREW GROHER: I can get you that case.

SEN. WILLIAMS: Senator Looney.

SEN. LOONEY: Thank you, Mr. Chairman. Gentlemen, I'm sorry if the question I'm about to ask had been answered already. I came in part way into your presentation, but isn't one of the key issues here in terms of whether or not we're going to allow apportionment for intentional tortfeasors and

that's used correctly said, then you're muddying the waters between - you're crossing between the two really distinct categories of negligence liability and liability for intentional tort, but if we do allow apportionment for -- if we follow that Binder decision and allow apportionment for intentional tortfeasors, in terms of looking at what the General Assembly should be doing in terms of public policy, isn't the real danger of the idea that we will be, in a sense, lowering the bar so much that the impetus to care and concern to avoid liability will be so damaged that it might lead to a lack of protective measures because the negligence -- the negligent party would be off the hook, perhaps, if there is an intentional tort that is so outrageous that, in a sense, overwhelms the perception that the negligent party had a role. In other words, in the case that you gave, for instance, about the school that may have hired a pedophile in that sense if the pedophile is viewed -- his horrible act becomes the entire focus of responsibility, and if that becomes an accepted standard, then the impetus to have the public policy imperative that employers should be very careful about who they hire, could be compromised because in that -- in a sort of horrible extreme sense, the more outrageous the conduct of the person you hire in some ways than it might relieve responsibility of the hiring party if you go to the standard where you will allow the focus to be entirely upon the intentional tortfeasor.

STEVE ECKER: That's absolutely right. I mean if part of the purpose of the tort law is to set rules that will require optimal spending, which is to say not too much, but not too little on safety, then Binder sends the very wrong message because it's telling motels or hotels or schools or whatever, look if somebody gets raped in the lobby or in the elevator or whatever, 95% of the problem will be -- won't be yours. So they won't spend the extra dollar on the lock.

SEN. LOONEY: Right. The lock or the surveillance camera or whatever there might have been that might have been included otherwise because of the concern about liability.

STEVE ECKER: That's exactly right.

SEN. LOONEY: Thank you.

SEN. WILLIAMS: Thank you. Further discussion.
Representative Roraback.

REP. RORABACK: Thank you, Mr. Chairman. I'll take Senator Looney's line of argument one step further which is we might discourage conduct which we would view as desirable by allowing this decision to stand to the extent that it takes the heat off the landlord to do the right thing. But isn't there also an argument that could be made that what we're encouraging people to do is to have their conduct characterized as intentional rather than negligent and say, you know what, it wasn't a mistake that I forgot to lock the laundry room. I wanted not to lock the laundry room. I didn't want to spend the money. And so then if people can have their conduct taken out of the negligence box and put into the intentional box, then they have an opportunity to escape and is that something that we should think about as we try to formulate a response to this decision?

ANDREW GROHER: I think it's a fair question. I think as a matter of reality that you will never see that happen because the -- although I certainly could see someone and they do try to characterize intentional misconduct as negligent misconduct in order to bring it within, for example, an insurance policy. I've never seen the opposite and I see absolutely no risk that you would see it here because they would still be responsible and liable and if they have a house, it could be taken by the plaintiff.

STEVE ECKER: And that's the key. Is that they would still -- there's nothing to prohibit a plaintiff from suing the intentional actor, as well. And under -- before this case, you always had joint and several that applied to those situations. So you would still have that option, plus intent is -- if I intended to leave the door open, that doesn't mean I intended that you get attacked.

REP. RORABACK: And what I understand is to be about is we really want to - people should have a duty to take steps to prevent against foreseeable harm. Is that what the essence of this is about?

ANDREW GROHER: Exactly.

REP. RORABACK: And if that's so, would your association support the bill that's going to allow or say to plaintiffs that don't use their seat belt, your failure to use the seat belt is something that the jury should take into consideration in calculating your damages? Because I wasn't at the Transportation Committee hearing, but I understand that the Association thought that that would be undesirable, as a matter of public policy. I'm just trying to square those two positions.

ANDREW GROHER: I think there's a difference - you're right. The Association did take -- did oppose that bill and the reason for that is it has to do with how you define foreseeable harm. Every time I go out in my car, essentially what you're saying is it's foreseeable to me that the other drivers on the road are going to ignore the rules of the road and cause me an accident and therefore, I'm responsible for some of my own injuries if I don't wear a seat belt.

And where the courts had always drawn the line was the question of if I'm -- under what circumstances do I have to foresee that other persons are going to violate again the rules of the road and cause me an injury and do I have to foresee an accident before it occurs and take steps to mitigate my damages before it occurs. Because remember, by failing to wear a seat belt, I'm not causing an accident. The most I'm doing is perhaps causing myself additional harm if somebody else causes the accident.

Here, by failing to take methods and reasonable methods to provide security or whatever it is -- it's not only in the negligent security case that this can arise. I am causing the injury by allowing that person to come in and have access to the --

so, it's got to be proven to be a cause.

REP. RORABACK: But there is an intervening cause in both instances.

Thank you, Mr. Chairman.

SEN. WILLIAMS: Thank you. Further discussion or questions? Representative Bernhard.

REP. BERNHARD: Thank you, Mr. Chairman. Let me just try and play devil's advocate just a little bit. I was a little put off by your -- I think you were stacking the cards a little bit with the sexual predator case as being your illustration for your point and also what you've taken out of the equation is the ability of the jury to make a rational decision with regard to apportionment of liability.

I will give you another illustration. Let's assume a landlord forgets to correct the wiring on the third floor fire alarm. And an arsonist sets a fire to the first floor. And people on the third floor are injured because they didn't get the fire alarm. Now you sue the landlord and you're putting all of the responsibility for the injuries on the landlord for his failing to change the wiring on the third floor smoke alarm.

It seems to me that in that instance a jury could very well apportion liability properly as to how much should be assigned to the landlord and how much should be assigned to the arsonist in that instance. It's not like the act was so grievous that we necessarily used the mad dog or raging dog illustration that you just had a moment ago where it's clear that the owner of that dog has a duty to keep it under confines as to not to -- and it's a very foreseeable risk that if let loose, he's going to attack someone.

Changing the wiring on the third floor isn't quite the degree of negligence, it seems to me, that -- I mean, he should have -- it is foreseeable that if there's a fire and so forth, but to put all the responsibility and blame on the landlord in that

instance and to take the jury out of the equation, seems to me that we're putting a severe bias on paying damages as opposed to assigning responsibility.

Now, --

ANDREW GROHER: I would answer this by asking you why isn't it as outrageous as failing to control a vicious dog? The landlord is the one who is responsible. He's renting out his property for economic benefit. He's bringing people in and he is impliedly saying to them, if not explicitly, I'm complying with the laws. I am giving you a safe place to reside. If it can be proven at the time of the trial and it may not be -- remember, his negligence still has to be a proximate cause of the injury. So if the fire was such that even having a smoke alarm wouldn't have made any difference, then presumably he's got to have no responsibility.

But if the fact that the smoke alarm didn't work, and it's proven that had the smoke alarm worked, those people would have gotten out without dying, why isn't that as outrageous, if not more so, than my failing to control my dog which through a momentary lapse -- maybe I let go of the leash, I'm talking to my neighbor, I'm not holding on as much and the dog takes off and attacks somebody, statutorily I'm liable for that regardless of my conduct and how benign or malevolent it might have been.

Here, you have somebody whose putting out a safe haven, a home to people, making a profit off of that and through his negligence, again, no matter how benevolent or malevolent it may have been, he has subjected them to an extraordinary risk of harm and I don't see why that's any worse than the mad dog.

REP. BERNHARD: And you're very eloquent on the subject and that's why it should be addressed to a jury. Why can't you make that same argument to a jury and assign the culpability to the landlord and then presumably get the damages to which you're entitled?

STEVE ECKER: Well, maybe you can. But the problem is it's very difficult in the real life courtroom situation to imagine the jury -- let's say he's as eloquent as he was here and he persuades the jury that it's actually 50/50? The victim only gets 50% -- the victim doesn't care what the theoretical assignment of percentage is. The victim cares about being compensated for the harm. The victim in this case would only get 50 cents for every dollar of harm. So that's the problem is that it's not so much who should be responsible, but if you give it to the jury what you know, is that the victim isn't going to get compensated for the harm. You know that.

REP. BERNHARD: Well, what you're asking us is to really make a policy decision, isn't it? And maybe that's appropriate. That's what we do here. But it seems to me that we do live in a society where you at least have to assign fault before you can force someone to pay damages.

STEVE ECKER: No question.

REP. BERNHARD: And in some small measure, while you're not changing the burden of proof from a preponderance of evidence, once you get over that hurdle you really are changing the rules with respect to what you can expect in the form of compensation. That you're not willing to let the compensation component be spread out over the culpable characters. Once you get over the burden, we, as legislators, ought to sympathize more with the victim who is getting the money than we ought to for the person whose found culpable paying the money in a fairly proportionate distribution to his culpability.

STEVE ECKER: The criminal justice system assigns fault to the arsonist and puts him in jail if it functions properly. The civil justice system, I think, is about fault in the context of compensation. You know. No harm, no damages. No harm, no foul is the general idea and you're not spreading the fault over the culpable participants if the arsonist can't pay the judgment. All you're

doing is you're taking money away from the victim.

That's all you're accomplishing. So it is a policy argument, I think, but I disagree that it's about - it's about favoring an innocent. It's about favoring an innocent victim over a careless defendant.

REP. BERNHARD: Certainly you can envision and I won't take any more time after this, but certainly you can envision, if I can't think of the illustration, an instance where the negligent party really is just 10% responsible for whatever it is that created that and he's the only target you have. So you go against him and you want him to pay 100% of the damages. Aren't you concerned that that's somewhat unfair if you are on the defense side of this?

STEVE ECKER: No. I fully understand the point and that's the problem is with the situation where there's only a small amount of negligence, but the idea that you're only 10% negligent - I mean, what I would respond to you is the idea that your 10% is like saying you're 10% pregnant. Either you're negligent, which is to say you deviated from the standard of care or you're not.

REP. BERNHARD: Thank you.

SEN. WILLIAMS: Further questions? Thank you. I'm sorry. Representative Rowe.

REP. ROWE: Thank you, Mr. Chairman. A few brief points and I wanted to follow up on Representative Roraback's comments.

One of your points in favor of legislatively overruling Binder is the policy, I guess and this would make outfits like Sunoco more cognizant of the duties that they owe to third parties or plaintiffs.

I do, however, find -- taking you on your word on that, I find your opposition to the seat belt issue inconsistent and I don't want to get off the topic, but that strikes me as a little -- you can correct

me. It does strike me as a little disingenuous with all due respect.

And maybe you can comment on that, but I also -- Representative Roraback brought out the point where you might have a -- a defendant could bring in a party and claim that there was negligence and you could have that third party claiming no, their actions were not negligent rather they were intentional and I think you said that you wouldn't foresee that really as happening. That was something that one of the descents brought out. I don't know if it was Judge Borden or not. Do you have thoughts on that?

STEVE ECKER: Yeah and I don't mean to trivialize the point. I thought the descents -- I mean, when you get Justices Borden and Callahan together, it's a powerful statement, I think about the wrongness of the majority opinion. So I guess I would leave it at that.

REP. ROWE: I understand what you're saying without you saying it, I think.

ANDREW GROHER: If I could. I want to address first Binder and then I'll address your question about the seat belts. But the -- what you have to remember is that Binder is a departure from the law. As Representative Tulisano said earlier today, and I'm getting old enough now that I remember the fight in 1986. The law always had been joint and several liability. So that if you brought in the intentional tortfeasor and you could still prove that the negligent actor was negligent, you could collect whatever the intentional actor didn't have from the negligent party.

What Binder did is they looked at the 1986 law and they said, well in our opinion this was to apportion fault in all regards among all the various parties. So therefore, we're going to bring in the intentional actors and say you can apportion fault between them. Common law. But what they didn't do was bring along with it the joint and several liability provision that had always existed.

So Binder isn't some -- we're not in here saying you have to reverse some longstanding policy in the law or trend in the law. That's what the court did in Binder.

And what we're saying to you is that was wrong. That was a misinterpretation of what the Legislature intended in 1986 and it's just flat out unfair and wrong and out to be remedied.

Now, with respect to the idea of the seat belts and I keep coming back to this. If I'm suing you or we'll pick somebody else. I'm suing Mr. Ecker here for negligence. I'm not claiming that his negligence enhanced my damages. What I'm saying is his negligence in failing to have the security or the smoke alarms, that caused my injury. That's why I got hurt.

In the seat belt situation what causes my injuries is the person driving the other car who violates one of the rules of the road and causes a collision with me. Alright. That causes it.

Now, the most you can say about seat belts is that my failure to wear a seat belt may mean that I got hurt worse. But by the same token, if I have an old car that doesn't have an air bag, I could -- I maybe hurt worse, substantially worse than even if I was wearing a seat belt. Or if I bought a small foreign import because that's what I chose to spend on a car instead of buying a big GM Suburban, I got hurt a lot worse when I got hit by that guy driving his Lincoln Continental than if I had bought one of those big tanks to be driving around in.

So it's not that that failure to wear the seat belt causes me to have the accident. And that's why we're saying and again, when that bill was passed, the Legislature said we think it's a good idea to encourage people to wear seat belts so we're going to make it a violation of the rules of the road not to.

But there was so much concern at that point that this could be turned around and used against these

people in the event of an accident, that the compromise that was made was this will not be admissible in evidence in a claim for civil responsibility and again, it had to do with cause versus a condition.

It's just like when I was testifying before Transportation somebody said well, what if you're speeding down the road and somebody crosses over and hits you head on? Shouldn't you be held responsible because you're speeding? The courts have always said no because it's the person crossing over that caused the accident, not your speed. That's where that came out of.

REP. ROWE: I understand that a little better then. But I wanted to ask you one final question. With respect to footnote 12 of the decision -- I don't know if you're familiar with it, but that was, I think, one of the arguments that the majority used to justify their decision. That's when they said that they were engrafting the provisions of 52-572n and then they said basically anyway we note that in addition to damages based on fault, a negligent defendant would also be liable for the entirety of the plaintiff's economic damages should the other party be judgment proof.

You're going to tell me that that's only -- because that's only limited to economic damages, that it's not much of a safeguard?

ANDREW GROHER: Yes. I mean, for example, you take the housewife who is in the laundry and this again is a real case from my office. In the basement of her apartment building and because the landlord has refused to repair the lock on the back door, she is attacked and raped. She has, essentially, very little, if any economic damages. So that would be a meaningless provision to her.

STEVE ECKER: The sexual assault cases - we don't raise them to be inflammatory. We didn't plan to both bring them up. But the fact is that they are out there and that they are very prominent context in which this comes up. With due respect to the Representative, I'm not clear on why it's an unfair

example. In fact, it's a very routine example that would be disseminated by Binder and footnote 12 wouldn't help because in those situations -- and in the assault situations very often too very substantial part of the harm is that the person no longer is whole.

REP. ROWE: The non-economic. Okay. Thank you. Thank you, Mr. Chairman.

SEN. WILLIAMS: Thank you. Further questions? Thank you very much.

Next, we'll have the panel, the Governor's panel on civil commitment come forward. I would also want to mention at this time we've got, by our records, an additional 31 individuals who wish to testify in addition to the panel that's coming forward now.

So I would ask that folks, as they come forward, we will limit it to three minutes of testimony, both members of the public and department heads and so to please keep your remarks concise and then certainly we'll have questions from committee members afterwards.

GAIL STURGES: Good afternoon, Senator Williams, and members of the Judiciary Committee.

My name is Gail Sturges and I'm the Director of Forensic Services for the Department of Mental Health and Addiction Services.

I'm here today on behalf of Governor Rowland to testify in support of HB6784, AN ACT CONCERNING SEXUAL OFFENDERS.

I'd also like to point out that there are a number of other people here to testify and there are some -- Commissioner Armstrong and Deborah Fuller from the judicial branch available to answer questions along with the rest of us.

HB6784 would establish extremely tough new sentencing and supervision requirements for sex offenders, particularly violent repeat offenders and ensure that sex offenders who have a

REP. LAWLOR: Is this panel all set or is there more to go? That's it. Okay.

Next is, as I understand it, a group of Ken Laska, Joe Meaney, and Paul Ianacone.

KENNETH LASKA: Good afternoon. My name is Kenneth Laska and seated to my right is Doris Packard.

HB 6962

About two years ago on March 20, 1977, Doris' mother, Hazel Green was a tenant in the D'Amato apartment complex in the City of New Britain. It is an elderly housing complex that is used exclusively for the elderly. And adjacent to that in the main part of it is a parking garage. This is located in the center of town.

What happened to Doris Packard or what happened to Hazel Green is covered by the Binder law. Unfortunately, Mrs. Green, as a tenant in the apartment had signed a lease with the Housing Authority. The Housing Authority guaranteed her safety.

A man walked into the Housing Authority -- into the apartment complex around two o'clock in the morning, gained entrance. There were no security guards there. There was no security. Nobody patrolling the hallway. Walked up two flights of stairs, into the apartment complex and gained entry into Mrs. Green's apartment.

He then assaulted Mrs. Green. Mrs. Green was 79 years old at the time. She's 81 years old right now and she presently resides in the Brittany Farms Convalescent Home.

And when I say he assaulted her, he sexually assaulted her. He sexually assaulted her so much to the extent that she no longer -- they could not correct the injuries to her rectally. That man was sentenced to prison this year for 27 years.

The Housing Authority guaranteed to my client, to Mrs. Green, that they would keep her safe. They failed to keep her safe. Mrs. Green raised eight

children. Doris Packard is one of those eight children. All those eight children were productive and are productive members of society.

We are here to speak in favor of HB6962. Mrs. Green needs protection from the vicious animals of society and she looks to you people to enact HB6962.

The Binder case was an inappropriate and improper decision by the Supreme Court. The best I can do, the best of what -- the most eloquent I can say on behalf of Mrs. Green is to ask Mrs. Packard to speak on behalf of her mother. Mrs. Packard.

DORIS PACKARD: Before my mother was raped there was an assault of three months prior. And I hold the New Britain Housing Authority 100% responsible for the assault on my mother plus the other lady in the building.

I read the Binder case. I really don't approve of it and I wish that HB6962 would be passed because it would apply to my mother.

And there's a lot of other things I could tell you, but I have nothing else to say.

REP. LAWLOR: Are there questions from members of the committee? If not, thank you very much.

KENNETH LASKA: Thank you.

REP. LAWLOR: Was there going to be a group? Was that was -- okay. A group normally means you all go together.

JOSEPH MEANEY: Mr. Chairman, members of the committee. HB6962
My name is Joseph Meaney. I am in private practice in Hartford and have so for 19 years.

Much of what you heard today in connection with this bill has related to personal injury cases that involve claims similar to those raised in Binder. They relate to inadequate security of a particular premises.

I'd like to talk to you briefly about the ramifications of this case in connection with the negligent conduct of lawyers and accountants in connection with providing services and opinions in business settings.

During the course of my career I have had the occasion to prosecute several actions involving attorney malpractice and accountant malpractice regarding the performance of those particular professionals in certain business settings and in connection with certain business transactions.

Under the Binder decision, certain actions against accountants and attorneys in situations where they are providing services to a business entity or rendering opinions regarding business entities to third parties concerning matters of financial solvency could be affected by the Binder decision.

As Justice Berdon noted in his dissent in Binder, the Supreme Court had previously determined on several occasions that so long as the harm that the claimant had suffered was reasonably foreseeable and within the scope of the risk created by the defendant's negligence, the defendant would be liable. Further, with a negligent actor creates an increase in the risk of a particular harm and the conduct is a substantial factor in causing that harm, the fact that the harm is brought about by the intervention of another force does not relieve the negligent actor of liability except where the harm is intentionally caused by a third person, but is also not within the scope of the risk created by the actor's conduct.

If this apportionment rule applied in the various attorney malpractice and accountant malpractice actions, certain criminal conduct by principals or employees of business entities could be apportioned against the negligent conduct of these professionals.

A jury conducting itself appropriately, conducting its business as it is bound by law, could find the criminal or intentional actors primarily liable. This result would obtain in a situation where the

harmed person's exposure to the risk for which it was the duty of the professional, either the attorney or the accountant to protect them, resulted in the actual harm.

It is the likelihood of harm which makes the actor's conduct negligent and subjects the actor to liability. To illustrate. Take the example of a case involving an accountant who is retained to perform an audit.

If the audit fails to disclose an embezzlement scheme being engaged in by a particular employee of the business or by some other third party, the business may suffer considerable harm. Also consider where an accountant or an attorney is retained to provide opinions in an investment setting. Investors would rely on certain representations of an accountant in making an investment. If the accountant or attorney negligently fails to discover certain criminal activity ongoing in such a business, then the business and its investors could be harmed. The job of the accountants and the attorneys in that case - may I continue, Mr. Chairman? The job of the accountants and the attorneys in that case might be to find out whether such conduct was, in fact, ongoing.

For instance, the continuance of an embezzlement scheme would be fostered by the negligent performance of the duty to uncover such conduct. Additionally, criminal conduct on the part of principals in a particular business in misrepresenting the financial condition of a particular entity might be left unchecked because of the negligent performance of certain professions.

It is inconceivable to me how there can be apportionment of liability between negligent professionals and the criminal wrong doers in those situations.

Further, professional may cause damage to investors who rely on such professionals' work and opinions in deciding whether to invest in a particular

entity.

Under Binder the professional would be able to apportion his liability against someone who committed a criminal act that he was supposed to discover and report in the first place. In situations where lawyers render opinion letters in connection with transactions they're often called upon to make representations concerning litigation, solvency matters pertaining to good (inaudible) in connection with representing certain parties.

REP. LAWLOR: Attorney Meaney, could you kind of summarize it a little bit?

JOSEPH MEANEY: The long and short of it is that in many business situations accountants and lawyers are retained to discover and report questionable conduct. If these professionals breach their duty to their clients or third parties by failing to discover wrongdoing, Binder would allow them to use the very conduct that they were negligent in failing to discover as a basis for apportionment.

Thank you.

REP. LAWLOR: Thank you. Are there questions? If not, thank you very much.

JOSEPH MEANEY: Thank you.

REP. LAWLOR: Jim Gaston.

JAMES GASTON: Good afternoon, Representative Lawlor and members of the Judiciary Committee.

My name is Jim Gaston. And I chair the Litigation Section of the Connecticut Bar Association. We have over 1,200 members. Other than the young lawyers section, it's the largest section of the Bar Association.

I'm here to speak in favor of -- on behalf of the section HB6962. Much of what I would have to say has already been said and there's been a lot of discussion. I would point out that we believe Representative Looney and he spoke earlier, hit the

nail on the head. This Binder decision would practically eliminate causes of actions for premise security cases. In all practicality, it may well eliminate dram shop cases because obviously the intentional drunk may well be more responsible than the dram shop owner. Therefore, making that dram shop (inaudible).

The ramifications would might perhaps go to malpractice cases where someone is shooting -- has been shot and there's malpractice in the medical field -- within the medical realm. It will definitely go so far as dog bite cases.

I should mention the overall ramifications and I've just heard it goes to the legal and the accounting fields. I would suggest we would submit that Binder, in essence, has turned negligent torts on its head.

As far as the previous question that I heard in subrogation. I believe that a negligent tortfeasor would have the right to subrogation similar to the '97 decision of Justice -- I believe it's Justice Berdon, would have the right to subrogation against an intentional tortfeasor.

And I should also mention that in 1994 much of this issue was addressed and that was when 52-102b, the apportionment legislation was drafted. That was legislation which was drafted -- litigation section was intricately involved in it as was AIC, as was the Connecticut Trial Lawyers and yourselves. That was put together and the language, the agreement, the understanding, and the intent expressly related only to negligence and that is in the bill itself.

For example, immunity (INAUDIBLE - BELL RINGING IN BACKGROUND - DROWNING OUT THE TESTIMONY OF THE WITNESS) only people who are negligent are within the spectrum and that was the intent and that's the bill (INAUDIBLE - BACKGROUND NOISE DROWNING OUT THE TESTIMONY OF THE WITNESS) Binder went beyond what was expressly stated in 52-102b.

I think most of what else I would say has already been said.

REP. LAWLOR: Thank you. Are there questions? Yes, Representative Rowe.

REP. ROWE: Thank you, Mr. Chairman. You alluded to this at the end of your comments, Mr. Gaston. I guess you were involved in 52-102 when it was drafted. Your opinion, therefore, is that the majority in Binder -- is your opinion that the majority in Binder ignored the legislative history or the legislative intent of 52-102?

JAMES GASTON: That would be correct. Without being presumptuous, I think it was the legislative or at least it was the intent of the people who were putting the bill together along with the legislators that only negligence be addressed in 52-102b and intention torts would not be part of apportionment as well as neither would the entities that were immune, for example.

And that was expressly stated in 52-102b.

REP. ROWE: Okay. I think that's an important point. Thank you. Thank you, Mr. Chairman.

REP. LAWLOR: Are there other questions? If not, thank you very much.

JAMES GASTON: Thank you.

REP. LAWLOR: Next is Louise Hyppa.

LOUISE HYPPA: Good afternoon, Senator Williams, Representative Lawlor, members of the Judiciary Committee. SB 561

My name is Louise Hyppa. I am the Vice President of Judicial Professional Employees Union. We represent over 850 professionals employed in the State's adult and juvenile court system.

In addition to my duties with the union, I am in my 20th year of employment in the juvenile justice system. I currently serve as the supervisor of Juvenile Probation in Middletown.

goes all the way up to age whatever. So some of the individuals are old.

REP. FARR: Okay. Thank you.

REP. LAWLOR: Are there further questions?
Representative O'Neill.

REP. O'NEILL: Just to make sure I understood your testimony. You're in favor of HB6784's basic approach?

CHIEF ANTHONY SALVATORE: Yes.

REP. O'NEILL: Okay. And that's because we keep them locked up longer as opposed to --

CHIEF ANTHONY SALVATORE: Well, we think an assessment is done and therefore if they need to be -- if you need to continue them in incarceration, then yes, we support that.

REP. O'NEILL: Okay. Thank you.

CHIEF ANTHONY SALVATORE: The assessment is the big key.

REP. LAWLOR: Are there further questions? If not, thanks very much.

CHIEF ANTHONY SALVATORE: Thank you very much.

REP. LAWLOR: Next is Paul Ianacone.

PAUL IANACONE: Representative Lawlor and other members of the committee, my name is Paul Ianacone and I practice law with Riscassi and Davis, down the street.

REP. LAWLOR: Just do me a favor. The problem is that the microphone pick up the transcript for the --

PAUL IANACONE: And I'll stop speaking in one second. With me are two of my clients, Fred Parker and Milna Rosario who are here in support of HB6962. I represent them in connection with a matter that arises out of a shooting at a condo complex at which security was provided. And Fred Parker and

Ms. Milna Rosario have some statements to make.

FRED PARKER: Good afternoon. My name is Fred Parker. I'm a probation officer with the State of Connecticut and have been so for the last 8 years.

And in January of 1995 I held a Super Bowl party at my condo. During that party -- after that party, I escorted Ms. Rosario out to her car and incidentally we were both shot. We were both shot by an assailant who was at -- apparently was stalking Ms. Rosario for at least seven hours because my party started at 5:00 p.m. and didn't end -- we got shot at 12:30 a.m. the following morning.

The security company had ample opportunity to notify the police that there was someone in the complex that was looking for us, a female. They didn't know where she was or what party she was attending. The only thing he knew was that he saw her car outside and that he knew that she was in the building.

If security companies aren't held liable for providing security for the people that they're supposed to, personally I don't see the reason why they should carry the companies in these buildings. The security guard had three opportunities to either call the police or tell the assailant to leave the complex which he failed to do so.

REP. LAWLOR: Did this guy actually come up the security guard and ask questions about your whereabouts and things like that?

FRED PARKER: Yes, he had because I actually had left my condo and went out and came back an hour later and as I was going into the condo, he was coming out of the building and he had just spoken to the security guard and on numerous occasions, that very same security guard had stopped me from going into the condo because he didn't recognize me, but on this occasion he had no problem letting this guy in for whatever reason.

REP. LAWLOR: And now they're saying we're not going to

pay because we didn't shoot you guys, the assailant? Is that what the --

FRED PARKER: Well, if this bill is not passed, it seriously jeopardizes our chance of getting any remedy in a civil lawsuit against the security company.

The shooter himself is presently incarcerated and is insolvent. So, who do you turn to for civil remedy if the security company is not held liable?

MILNA ROSARIO: If I may add, sir.

REP. LAWLOR: Sure.

MILNA ROSARIO: The security guard did -- the assailant did come in to the building and the security guard even went as far as showing him a list of the tenants to this building and I would hate -- just to think of the thought that he may have known any of the names on that roster and said this might be the apartment she's in. What if he had let him in? It could have turned out far worse than what it did.

FRED PARKER: There were at least ten people at the party. If he had come in and saw ten people in there and just started opening fire, it could have been a lot worse. I mean, I was shot four times and at present, I can't move four toes in my right foot and I can't make a proper fist because I have was shot twice in the hand. And it's just by the grace of God that I'm actually here today to tell you about what happened.

MILNA ROSARIO: And I was shot five times.

REP. LAWLOR: Where did this guy get his gun? Do you have any idea?

MILNA ROSARIO: Excuse me.

REP. LAWLOR: Where did this guy get his gun? Do you have any idea?

MILNA ROSARIO: To be honest with you sir, I don't know.

FRED PARKER: But he had a license for the gun.

REP. LAWLOR: Oh, he did.

MILNA ROSARIO: Yes.

FRED PARKER: Yes.

REP. LAWLOR: Great. Okay. Are there other questions?
If not, thank you very much.

MILNA ROSARIO: You're welcome.

FRED PARKER: Thank you.

MILNA ROSARIO: Thank you.

REP. LAWLOR: A law abiding citizen. Not you guys, the
shooter.

Next is Ann Parrent.

ANN PARRENT: Good afternoon, Representative Lawlor,
members of the committee. Thank you for this
opportunity to speak to you today.

My name is Ann Parrent. I'm a staff attorney with
the Connecticut Civil Liberties Union Foundation.
My testimony today concerns HB6785, AN ACT
CONCERNING THE REGISTRATION OF SEXUAL OFFENDERS.

I'm one of the attorneys for the plaintiffs in a
lawsuit entitled Doe vs. Lee which was filed in
federal District Court three weeks ago. This
lawsuit alleges that the public disclosure
provisions of Public Act 98-111, the current sex
offender registration law are unconstitutional
because they violate the due process clause of the
14th amendment. We support HB6785 to the extent
that it would address certain aspects of the due
process efficiencies in the current law which are
raised in our lawsuit.

In five other states the courts have issued
decisions holding that laws permitting public
disclosure of sex offender status are

a different thing to create a special website for a special category of people because it implicitly conveys the message that these people are particularly dangerous in a different way than people who have simply been convicted of a crime.

The second point is I think we've heard some of the questions and testimony today that illustrates the problem here. Some of you have given examples of the kinds of people that should not appear on the internet as dangerous sex offenders. I think Senator Upson mentioned the messy divorce situation. Somebody else mentioned the statutory rape situation. I think there's a developing understanding that this one size fits all approach doesn't work because, in fact, a conviction for an offense doesn't translate into dangerousness which is the message that you're creating with the internet site.

REP. FARR: Okay. Thank you.

REP. LAWLOR: Are there further questions? If not, thank you very much.

ANN PARRENT: Thank you.

REP. LAWLOR: Beverly Brakeman-Colbath. And if -- I just want -- we're trying to skip back and forth between the state officials list that we had earlier. And so Beverly, you will be followed by Heidi Clark from the Psychiatric Security Review Board. Okay.

BEVERLY BRAKEMAN-COLBATH: Hi. Representative Lawlor, Representative Doyle, Representative Farr, and members of the Judiciary Committee.

HB 6962
SB 1312

My name is Beverly Brakeman-Colbath. I'm with the Connecticut Sexual Assault Crisis Service. I'm here in a little different capacity today. I have testimony on HB6785 from a victim that I'd like to read and I'll try and do it in the three minutes.

"I'm writing you this letter to express my concerns for HB6785, and how Megan's Law has impacted and may continue to impact my family and me.

I also wanted to say that we're submitting testimony on raised HB6962. We do support that legislation and raised SB1312, AN ACT CONCERNING JUVENILE MATTERS, which we also support.

REP. LAWLOR: Thank you. Beverly, in the proposal on civil commitment, I think there's an advisory group established and I don't think it involves - includes the victim advocate's office or does it? Because I know earlier you had suggested that that office be added on the Information Advisory Board which we did in our substantive information this morning and I assume you think that would be a good idea for the Civil Commitment Advisory Board, as well.

BEVERLY BRAKEMAN-COLBATH: Yes. And Gail Burns-Smith will be talking more on that issue when she comes up also.

REP. LAWLOR: Alright. Great. Are there other questions? Yes, Representative Powers.

REP. POWERS: Thank you, Mr. Chairman. When you read the letter, there was a list of concerns from the Mom about things that -- and I think you said could happen to the daughter.

BEVERLY BRAKEMAN-COLBATH: Yes.

REP. POWERS: So at this point none of those things have happened. Is that right?

BEVERLY BRAKEMAN-COLBATH: At this point what's happened with this family is the neighborhood association has started to pass around this information. But the family has not experienced direct consequences, but I think what's important is that they're living in fear about those consequences and it's only really a matter of time, probably. They, in this neighborhood association situation the mother actually went to the leader of the neighborhood association ahead of time and had a discussion with that person who was kind of surprised.

So, it's -- they may not have had direct

happy to answer them.

SEN. WILLIAMS: Thank you. Any questions? Thanks very much.

Is Dennis LaGanza here? Dennis, you're on. To be followed by Jan Van Tassel.

DENNIS LAGANZA: Good afternoon, Senator Williams, members of the committee.

I'm Dennis LaGanza. I'm counsel for the Insurance Association of Connecticut. I'm here today to oppose HB6962, AN ACT CONCERNING APPORTIONMENT OF LIABILITY BETWEEN NEGLIGENT INTENTIONAL TORTFEASORS.

HB6962 would overturn the Supreme Court's decision in Binder vs. Sun Company. If HB6962 becomes law, the practical affect is that parties who are liable for mere negligence will become responsible for the acts of those who act intentionally with reckless disregard.

What Binder essentially does is say that people are responsible for only the harm that they cause. That's a fundamental premise of comparative negligence and for that reason, the case should not be overturned.

I think additionally there is some -- the bill goes beyond simply trying to overturn Binder because it talks about breaches of statutory causes of action. And conceivably that would include acts of negligence. So you could not apportion for acts of negligence such as speeding, things like drunk driving, that type of thing where you have alleged negligence and it's a breach of a statutory cause of action.

So, I would urge this committee not to move forward with the bill. What Binder does is allow for a fair allocation of fault based on conduct and to leave it in place.

I'd be happy to take any questions.

REP. DOYLE: Thank you, Dennis. I have a quick question for you.

Some people have characterized this a reversal of -
- you know, there was -- going back to tort reform,
there was a so-called deal made and this changes
that. Could you comment on that?

DENNIS LAGANZA: I have to tell you, the only history that I'm aware of on this bill is what was referred to in the case itself. And the Justices, in their read of that history basically said that there is nothing in that legislative history that evidenced an intent not to permit what was done in Binder.

REP. DOYLE: Okay. Thank you. Any other questions? Representative Farr.

REP. FARR: I think you heard some of my questions before. The question of contribution. Apparently it's not clear to me. Right now we don't allow contributions and in an ordinary negligence case because there's apportionment of damages. If we were to pass this saying that there wasn't -- if we didn't apportion the damages, would that automatically mean that there's contribution or would we have to say statutorily permit contribution?

DENNIS LAGANZA: Off the top of my head, I really don't know the answer to that question, Representative Farr. It would be something that I would have to look into.

REP. FARR: Because obviously, from a public policy point of view, if you're going to say that somebody does an intentional tort and somebody else is negligent and because of that negligence, what for that negligence the -- it might not have occurred in the first place and so then you end up recovering against the negligent party. There's no apportionment, but that's the deep pocket which would seem clear that that negligent -- that person who has had to pay should now be able to go after the intentional tortfeasor. I mean, from a public policy point of view, that would seem to make a lot of sense.

I don't know if that can be done or not.

DENNIS LAGANZA: And just briefly to comment. And again, from -- legally, I don't know the answer to that question whether or not you need legislation, but really the one thing I would say is that Binder does, in effect, produce a fair result and one thing I wanted to comment on was this whole idea of what the Supreme Court did in footnote 12. Where they basically engrafted onto what they did in the common law, what's I think referred to in the (inaudible) as the orphan's share, the collectability. So, I mean, there was some comment made earlier that what this case would do as a practical matter preclude people from collecting. And I don't see if for that reason and also, with all due respect to the proponents of the bill, I just don't see the continuum as being as stark as may have been painted. I think that there are a number of instances in Binder, frankly, just allows the fact finder to take those circumstances into account.

REP. FARR: Okay. Thank you.

REP. DOYLE: Any other questions? Thank you.

DENNIS LAGANZA: Thank you.

REP. DOYLE: Next up is Jan Van Tassel.

JAN VAN TASSEL: Good afternoon. Evening. My name is Jan Van Tassel. I'm the Executive Director of the Connecticut Legal Rights Project, a non-profit agency that represents people with psychiatric disabilities.

HB 6784
SB 465
SB 456

I have submitted testimony and will try to simply highlight some of the key points that are part of that testimony.

First and foremost, we are opposed to any proposals that are going to mix the criminal justice system and the mental health system. Some of the issues that have already been raised here today, we think it's very important to protect the integrity of the

only seven years old. And I was very, very concerned because there is a -- there is no good samaritan law in the State of Connecticut. There are only two states in the country that have good samaritan laws, Massachusetts and Minnesota. Connecticut does not have one.

Subsequently, this individual was not prosecuted. And clearly, I would like to see that here in Connecticut. It would certainly be a safeguard for children and certainly put us in the level of being responsible adults.

REP. FARR: Okay. Thank you.

SEN. WILLIAMS: Further questions? Thank you, Mr. Kelly.

CRAIG KELLY: Thank you very much.

SEN. WILLIAMS: Elizabeth Gara to be followed by Rod Savoye.

ELIZABETH GARA: Good evening, Senator Williams, Representative Lawlor, members of the committee.

My name is Elizabeth Gara and I'm here representing CBIA. CBIA also opposes HB6962, AN ACT CONCERNING APPORTIONMENT OF LIABILITY BETWEEN NEGLIGENCE AND INTENTIONAL TORTFEASORS.

We believe that this bill undermines one of the basic tenants of comparative negligence law and that is that a defendant should be liable only for the proportion of damages which he or she is responsible. And I think that it does this by, in effect, shielding criminals and other intentional tortfeasors from liability for their share of damages.

The purpose of Connecticut's comparative negligence law, as you know, is to prevent the unfairness of a situation where a party who is only minimally culpable as compared to other parties is forced to bear 100% of the damages. This bill turns the comparative negligence principle on its head by making a negligent party solely responsible for the

conduct of a criminal or other intentional tortfeasor or anybody that breaches a statutory duty.

In fact, as conceded in both the majority and descending opinions, this bill would have the effect of allowing a defendant to avoid apportionment of liability by demonstrating that his conduct was, in fact, intentional rather than negligent.

Allowing apportionment between negligent and intentional tortfeasors does not, as a lot of people argued here today, absolve the negligent parties of liability. It similarly ensures that their degree of liability is consistent with their degree of culpability. We agree that a negligent party should not be shielded from liability for the very event or act that made the conduct negligent, but neither should that negligent party be 100% responsible where a culpable party is also deemed responsible. We feel that juries are fully competent to assess the varying degrees of fault between negligent and intentional tortfeasors.

I'd also like to point out that under the law where a plaintiff cannot collect a damage award from an intentional tortfeasor, the negligent defendant or defendants would be held liable for payment of the economic damages and this, as was mentioned earlier, was footnoted in the Binder decision. This ensures that permitting apportionment of liability between negligent and intentional tortfeasors is equitable for both the plaintiffs and the defendants.

I also want to point out there was an argument made that the defendants will ignore their duty to maintain safe premises under this law and I think that this argument is wholly without merit. There are a number of reasons that employers would want to maintain safe premises. Certainly, as I mentioned, this bill does not absolve someone from liability. There are clearly going to be liability concerns that remain. There are also a number of other reasons why employers would like to maintain safe premises, obviously, to attract businesses,

attract good workers, attract customers, and also to comply with the safety and health laws of this state.

I also want to mention that a number of jurisdictions across the country have also concluded that comparative negligence statutes compel apportionment between negligent and intentional tortfeasors. This was also mentioned in the footnote in the Binder decision and these jurisdictions include New Jersey, California, Arizona, New Mexico, and Utah.

So I would urge you to take a look at that decision and reject HB6962.

Thank you.

SEN. WILLIAMS: Thank you. Questions? Representative Farr.

REP. FARR: In those jurisdictions that -- I'm sorry, I thought the previous testimony was there was only one jurisdiction that had --

ELIZABETH GARA: Yeah, I was puzzled by that because although we did not do a 50-state analysis of this, I'd be happy to try to do that in the next few weeks. These decisions and states were noted in the footnote in the Binder decision. Footnote 13.

REP. FARR: And in those states then the apportionment is exactly -- done exactly the same way it is in Connecticut?

ELIZABETH GARA: I don't know that it's exactly done the same way. The footnote does reference different cases. I will be taking a look at those, but it's clear that it's not one state or one jurisdiction that concludes apportionment in this fashion.

REP. FARR: And there are a number of jurisdictions that don't, though. Is that correct?

ELIZABETH GARA: Not that I'm aware of. No. Again, we will try to put together some kind of an analysis, but it doesn't appear that it's one way or the

other. It seems that there's a split among the states.

REP. FARR: Okay. Thank you.

SEN. WILLIAMS: Further questions? Thank you very much.

Rod Savoye. Is Rod Savoye here? Is Raphael Podolsky, to be followed by - - is Bonnie Stewart here or has she left? She left. Okay.

RAPHAEL PODOLSKY: Thank you. My name is Raphael Podolsky with the Legal Assistance Resource Center of Connecticut.

I'm testifying in support of HB6962, which deals with the apportionment of liability among tortfeasors.

As you know from other testimony, the bill would overturn the Supreme Court's decision in Binder vs. Sun Company which was decided last year by a four to three vote of the Supreme Court.

What I've done is I've actually attached to my written testimony Tom Sheffy's article from the "Connecticut Law Tribune" because it seems to me that that article does effect the critique on that decision as really as any witness could do.

I come to this from the perspective, as you know, of representing renters in kind of a landlord/tenant context and I'm interested in the bill because of the impact that has. Essentially, what Binder did was in a number of circumstances where criminal activity inter-plays with negligence by the property owner, it effectively deprives the victim of the criminal activity of the ability to recover of the losses.

So, for example, the kind of context that I would be looking at would be something like an arson where a building is burned and a renter is injured or killed and there are no smoke detectors. And so that you have a negligence claim against the property owner, but of course, the argument is going to be made that the primary cause of the

injury was the arson and the property owner is going to apportioned down to next to nothing. And as a practical matter, the arsonist will be in jail and will be judgment-proof.

Similarly, the same thing is true with burglary or rape where there are break-ins into a building. If it turns out that there was no, for example, the landlord hadn't repaired locks that were supposed to be fixed.

So that's the kind of context. And that's really analogous to what actually happened in Binder where you had a case where a gas station night attendant was killed and the claim was that the owner of the franchise had failed to provide proper security.

In the descending opinion by Judge Callahan, he wrote something that I think is interesting and is right on point. He wrote, "I do not believe that a negligent defendant should be able virtually to absolve itself of liability by impleading an intentional tortfeasor whose very conduct it allegedly had a duty to protect against." And that's the major unfairness that this opens up.

It's interesting when you look at the Supreme Court opinion that the three descentors, whereas an unlikely combination of descentors as you would expect to find - it was Justice Callahan, Justice Borden, and Justice Berdon, really ideologically, spanning the entire spectrum.

It seems to me that back in 1986 and 1987 when tort reform was adopted, there was a very delicate balancing act going on and actually Representative Tulisano testified to that, to some extent earlier in this hearing. And that that was an effort in some ways to hold down certain kinds of costs, but at the same time, not to strip victims of their ability to be compensated. And what is so unfortunate about the Binder decision is that it essentially throws that balance to the wind and takes away the ability in this whole category of cases for the innocent victim to be compensated.

So I would urge you to adopt this bill.

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gmh

JUDICIARY COMMITTEE

March 15, 1999

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Thank you very much.

SEN. WILLIAMS: Representative Doyle.

REP. DOYLE: A quick question.

RAPHAEL PODOLSKY: Did I say the wrong words?

REP. DOYLE: No. Good evening, Raphie. Were you involved in the tort reform discussion --

RAPHAEL PODOLSKY: Sort of marginally. I wasn't at the core of them. So I don't purport to know the details of all the negotiations.

REP. DOYLE: You were --

RAPHAEL PODOLSKY: But I was around then and I --

REP. DOYLE: You were closer than I was, let's say. And I was -- I'm trying to get to the fact some people -- I asked the previous speaker was there back then -- there was some sort of deal or a perceived deal with the legislation and I know the Binder decision changed it. Do you want to comment on that?

RAPHAEL PODOLSKY: I guess, I don't want to claim, but I have first hand knowledge. I was told that by other people and I was certainly aware of sort of the delicate balancing process that was going on, but I cannot tell you with certainty whether the intentional tortfeasor issue was or was not specifically a part of any package deal that came out. So, I think you have to ask somebody else. I just don't know the answer to that question.

REP. DOYLE: Okay. Thank you.

SEN. WILLIAMS: Further questions? Thank you.

RAPHAEL PODOLSKY: Thank you very much.

SEN. WILLIAMS: Is Chris Pawlik here? Am I pronouncing that right? Robert Kolesnik.

ROBERT KOLESNIK: Good evening and thank you. Actually, HB 6785

JOINT
STANDING
COMMITTEE
HEARINGS

JUDICIARY
PART 5
1450-1790

1999

001538



Connecticut Sexual Assault Crisis Services, Inc.

110 Connecticut Boulevard
East Hartford, CT 06108
(860)282-9881 Phone/TTY
(860)291-335 Fax
www.connsacs.org

Board of Directors March 15, 1999

President
Mary Farrell

To: Senator Williams, Representative Lawlor and Members of the Judiciary Committee

Vice President
Beverly Brakeman Colbath

From: Beverly Brakeman Colbath
Connecticut Sexual Assault Crisis Services

Treasurer
Catherine A. Schuster

Re: R.B. 6962 An Act Concerning Apportionment of Liability Between negligent and
Intentional Tortfeasors

Jacqueline S. Cobbina
David A. D'Amora
Donna Feinstein
R. Lee Grant
Sheila Greenstein
Susan T. Johnson
Diane R. Martell
Susan K. Smith, Attorney
Jerry Stowell
Maureen Travis, Ph.D.

Position: Support

My name is Beverly Brakeman Colbath and I am the Associate Director for the Connecticut Sexual Assault Crisis Service, Inc. which is an association of 12 rape crisis centers located around the State. Through our community based member centers we provide a broad array of services to and for victims of sexual violence and their families and significant others. These services include confidential, free and 24 hour crisis intervention counseling, medical, legal advocacy, and information and referrals. In addition, all of our centers provide prevention and risk reduction community education for all ages at no cost to the communities we serve.

Member Centers

Center for Women and
Families of Eastern
Fairfield County, Inc.

CONNSACS strongly supports the passage of this act which would effectively overrule and reverse the harsh results of the Supreme Court's decision in Bhinder v. Sun Co., 246 Conn. 223 (1998). The Bhinder decision is bad public policy and is not good for victims of sexual assault because it allows negligent defendants in civil sexual assault cases to apportion their liability off to judgment proof or intentional defendants. This, in effect, leaves victims with no ability to recover economic damages and may render court decisions in the victims favor an empty victory.

Hill Health Corporation

Northeastern Connecticut
Sexual Assault Crisis
Services, Inc.

An example of what might happen under the Bhinder decision, is a woman who is sexually assaulted in the laundry room of her apartment building, brings suit against the landlord claiming that the landlord negligently failed and refused to maintain proper security in the building. The court finds that the landlord was negligent and awards the plaintiff economic and noneconomic damages. Under Bhinder, the negligent defendant may effectively apportion off its liability to the rapist or intentional defendant, who is incarcerated or otherwise judgment proof. The negligent landlord may now absolve itself of liability for negligently failing to protect against the very type of harm it is required to protect against. This is, a landlord, has a duty to maintain proper security on its premises. This outcome undermines public policy by shifting the consequences of a judgment proof defendant to the innocent victim from the negligent defendant.

Rape and Sexual Abuse
Crisis Center, Inc.

Rape Crisis Center
of Milford, Inc.

Susan B. Anthony Project, Inc.

Women's Center of
Greater Danbury, Inc.

It is well documented that sexual assault is vastly under-reported, and that those sexual assaults that are reported rarely end in a successful conviction in a criminal court of law. A successful conviction is often a victory for victims, however, it may often be a hollow victory without any economic compensation for their losses resulting from the sexual assault. It is, therefore, only in the civil proceeding, that a victim may seek to recover for losses caused by the sexual assault. The Bhinder decision, judicially has created public policy that is harmful to victims of sexual assault who seek justice through our court system.

Women's Center of
Southeastern Connecticut, Inc.

Women's Emergency Shelter

YWCA of the Hartford
Region, Inc.

YWCA of Meriden

We urge you to enact this legislation which would reverse this harmful decision.

YWCA of New Britain, Inc.

Thank you.



001539

AFFIDAVIT

OF

ERNESTINE REES
NEW HAVEN, CT

IN SUPPORT OF

RAISED BILL 6962

**AN ACT CONCERNING APPORTIONMENT OF LIABILITY
BETWEEN NEGLIGENT AND INTENTIONAL
TORTFEASORS**

001540

AFFIDAVIT

The undersigned deposes and says:

1. I am over the age of eighteen and understand the obligations of an oath.
2. On February 10, 1995, I was working at a halfway house in the inner city of New Haven, Connecticut. I was covering the night shift from 10:00 p.m. to 8:00 a.m.
3. I was working alone and had to cover four floors on my own.
4. The house was located in a high crime area and housed eight residents, all of whom had some form of schizophrenia or organic brain syndrome.
5. At approximately 10:50 p.m., I was on the telephone in another part of the house when the doorbell rang. One of the residents, who was severely mentally debilitated, opened the door and turned around and went upstairs, never bothering to see who was at the door.
6. Three men, who I did not know, entered looking for one of the residents. Since the resident was not there, they proceeded to attack me, cut my shirt and jeans with a sharp instrument, and brutally raped me.
7. The rape involved forced sexual intercourse, rape with a banana, forced oral sex, and urinating in my mouth. I aspirated the urine.
8. One of the attackers called me at home in December, 1995 and told me that he was HIV positive. He confessed to the rape at that time and thanked me for the memories.
9. The building where the rape occurred was located in the inner city of New Haven, in a high crime area. There was previous crime in the building, and I personally witnessed people trying to enter the building. I actually put a refrigerator in front of the back door so this would not occur during my shift.
10. The residents are frequently drug or alcohol dependent and attract associates from the streets who are involved in drug, alcohol and criminal activities.

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11. My life is forever changed by this horrible incident. I have experienced severe depression, suicidal ideation, post-traumatic stress disorder, fear of AIDS, nightmares, flashbacks, weight loss, continued negative sensations in my mouth and nose from forced oral sex and urine aspiration, a resistance to be touched or be near strangers or crowds, and many other problems. I have been in psychotherapy to help me deal with my problems caused by this incident.

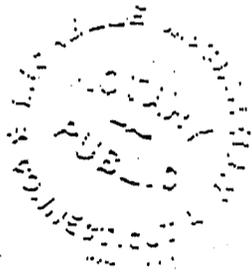
12. Had the company that ran the building provided the workers with a \$35.00 panic button, security guard at the door in the night hours, had two people work the night shift instead of one, and many other simple safety and security measures, this horrible event would not have happened to me.

13. Under the Bhinder decision, a crime victim's ability to receive adequate compensation would be severely compromised or eliminated, leading to an unfair result whereby a company could neglect their duty to keep the premises safe while resting in the comfort of the Bhinder decision. It would be glorifying social irresponsibility for the fault to be apportioned to the animals that I should have been protected against.

Ernestine Reese
ERNESTINE REESE

STATE OF CONNECTICUT
COUNTY OF

Subscribed and sworn to before me this 10th day of March,
19 99.



Michelle McGinnelly
Commissioner of the Superior Court //
Notary Public

Expiration Date: _____
MICHELLE MCGINNELLY
NOTARY PUBLIC
MY COMMISSION EXPIRES FEB. 28, 2003

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CONNECTICUT CONFERENCE OF MUNICIPALITIES

900 Chapel St., 9th Floor, New Haven, CT 06510-2807 • Phone (203) 498-3000 • FAX (203) 562-6314

Testimony

of the

Connecticut Conference of Municipalities

to the

Judiciary Committee

March 15, 1999

The Connecticut Conference of Municipalities appreciates the opportunity to testify on H.B. 6962, "An Act Concerning Apportionment of Liability Between Negligent and Intentional Tortfeasors"

CCM opposes H.B. 6962.

This bill would reverse a reasonable Connecticut Supreme Court decision, *Bhinder v. Sun Co.*, 246 Conn. 223 (1998).

It is grossly unfair to make negligent parties fully liable when another person or entity caused harm. Reversing *Bhinder*, as H.B. 6962 proposes, would go against the sound legal premise on which the Court based its decision.

In *Bhinder*, the Court relied on the common law to go beyond the statutes that this bill seeks to amend and permit the impleading of an apportionment defendant who committed an *intentional* tort rather than just negligence. The facts of *Bhinder* illustrate what this means: A service station attendant was killed and the owner of the gas station was sued in negligence for having provided inadequate security, which led to the killing. The gas station owner then brought the killer in as a defendant. *Bhinder* allowed the damages to be apportioned between the gas station owner and the killer. Under H.B. 6962, the owner would have been required to pay all of the damages because it was the only defendant charged with negligence.

To the extent municipalities are not protected by suits in negligence due to the continuing erosion of governmental immunity, *Bhinder* may be beneficial to municipalities. Cities and towns own land or conduct activities where intentional torts may occur – e.g., recreational programs; municipal parking lots, etc.

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While H.B. 6962 is legislation that plaintiffs' attorneys would prefer -- going after the negligent (and presumably insured) parties for the full amount of the damages in the first instance and not have to try to get damages from an intentional tortfeasor who will not be insured -- it seems fundamentally unfair for a negligent party or parties to have to pay full damages and the intentional tortfeasor none.

CCM urges the Committee to take no action on H.B. 6962.

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If you have any questions, please call Ron Thomas, CCM Senior Legislative Associate; or Gian-Carl Casa, CCM Director of Legislative Services; at (203) 498-3000.

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Connecticut Bar Association

Testimony of James O. Gaston, Chairman, Litigation Section of the
Connecticut Bar Association Concerning House Bill No. 6962,
An Act Concerning Apportionment of Liability
Between Negligent and Intentional Tortfeasors
Before the Judiciary Committee
Monday, March 15, 1999

Senator Donald E. Williams, Jr., Co-Chairman
Representative Michael P. Lawlor, Co-Chairman
Members of the Judiciary Committee

Thank you for the opportunity to appear before the committee to comment on House Bill No. 6962, **An Act Concerning Apportionment of Liability Between Negligent and Intentional Tortfeasors**. I am speaking this afternoon in my capacity as Chairman of the Litigation Section of the Connecticut Bar Association, representing more than 1,000 members statewide. **The Litigation Section of the Connecticut Bar Association enthusiastically supports HB 6962 and, on behalf of the Litigation Section, I respectfully request that the Judiciary Committee act favorably on the bill.**

Thank you for addressing House Bill No. 6962. This bill was introduced to address the anomaly created by the Connecticut Supreme Court in its decision last August of Bhinder v. Sun Co., 246 Conn. 223 (1998). In this personal injury premise security case which stemmed from the tragic shooting of a gas station attendant, the Court permitted the negligence of the defendant owner of the station--who was long aware of the multiple prior criminal incidents and dangers at the station--to be reduced and apportioned against the intentional actions of the murderer.

The Litigation Section of the CBA strongly agrees with the dissent authored by Justices Berdon and Callahan who stated that "apportionment of damages between negligent and intentional tortfeasors is not appropriate when the intentional acts that harm the victim are within the scope of the risk created by the negligent tortfeasor." Bhinder at 248. The owner of the gas station knew that its employees who worked at night faced a threat to their physical well-being because the owner failed to install adequate security measures.

In essence, to eliminate the cause of action of premise security liability mixes apples and oranges, i.e., negligence apportioned against intentional conduct, and creates uncertainties with other statutory causes of action such as those brought for strict liability for a dog bite and those brought under the state's Dram Shop Act against liquor sellers for damage caused by an intoxicated person. See Conn. Gen. Stat. §§22-355 and 30-102, respectively.

Members of the Litigation Section of the CBA were actively involved in the amendments to the statute governing liability of multiple tortfeasors for damages, Conn. Gen. Stat. §52-

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572h(h), when it was amended in 1987 and the statute concerning potential defendants for apportionment of liability, Conn. Gen. Stat. §52-102b, enacted in 1995. It was never contemplated then, nor is it the purpose of those sections today, that they would apply to a situation such as was encountered in Bhinder. Section 52-572h eliminated common law joint and several liability that existed prior to 1987. And, section 52-102b was never intended to permit a defendant to apportion liability to a person whose conduct was other than negligent. The statute is expressly stated as such.

The Litigation Section of the Connecticut Bar Association respectfully requests that the Judiciary Committee act favorably on House Bill No. 6962, An Act Concerning Apportionment of Liability Between Negligent and Intentional Tortfeasors. The bill would go a long way toward addressing the result created in Bhinder that is unfair to victims and other persons seeking fair, just and reasonable compensation for their injuries in Connecticut's courts.

Thank you again for the opportunity to appear before the committee to present the position of the Litigation Section of the Connecticut Bar Association. I would be pleased to answer any questions you may have.

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**STATEMENT
THE INSURANCE ASSOCIATION OF CONNECTICUT**

**HB 6962-An Act Concerning Apportionment of Liability Between Negligent
and Intentional Tortfeasors**

Judiciary Committee

Monday, March 15, 1999

The Insurance Association of Connecticut opposes HB 6962-An Act Concerning Apportionment of Liability Between Negligent and Intentional Tortfeasors.

HB 6962 legislatively overrules the Connecticut Supreme Court's decision in Bhinder v. Sun Co., 246 Conn. 223 (1998). Additionally, HB 6962 goes beyond overturning Bhinder because it would prohibit apportionment in all instances except for negligence. In this regard, HB 6962 appears to preclude apportionment claims based on negligence involving a breach of a statutory duty.

The IAC opposes HB 6962 because it is fundamentally unfair to defendants. Bhinder correctly held that defendants should only be responsible for the damages they cause. HB 6962 makes parties who are liable for mere negligence responsible for the acts of people who intentionally, recklessly or wantonly harm other people. It may also make defendants responsible for the acts of others who negligently breach a statutory duty such as speeding or drunk driving. None of these results are just or fair.

Bhinder established a common law right of apportionment between negligent and intentional tortfeasors. The Bhinder court recognized that a common law right of apportionment for intentional acts was consistent with statutory apportionment for negligence under section 52-572h of the general statutes (the comparative fault statute). The Bhinder court correctly found that the principles of comparative fault require that a defendant should be responsible only for the proportion of damages which he or she causes. To do otherwise would make a negligent party solely responsible for the conduct of an intentional tortfeasor, whose conduct is clearly more culpable.

HB 6962 also prohibits apportionment when there has been a breach of a statutory duty. This potentially includes negligence claims for such things as speeding under section 14-219 of the general statutes and drunk driving under section 14-227 of the general statutes even if the speeder or drunk driver was primarily responsible for the accident.

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Legal Assistance Resource Center
❖ of Connecticut, Inc. ❖

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H.B. 6962 – APPORTIONMENT OF LIABILITY OF INTENTIONAL TORTFEASORS

Judiciary Committee Public Hearing
March 15, 1999

Recommended Committee action:

ADOPTION OF THE BILL

H.B. 6962 would overturn the Connecticut Supreme Court's 4-3 decision in Bhinder vs. Sun Co., Inc., 246 Conn. 223 (1998), which held that an intentional tortfeasor (i.e., a person deliberately causes injures someone) can be brought into a negligence action for the purpose of apportioning damages. The decision produces bizarre and unfair results, in effect penalizing the innocent victim of criminal conduct by restricting his or her ability to recover for the injury. It also undercuts a key element of the balance which went into Connecticut's tort reform statute in the first place. I urge you to adopt the bill. I have attached a copy of Thomas Scheffey's Connecticut Law Tribune article on Bhinder, because it so effectively shows why the decision needs to be reversed.

I testify from the perspective of one who represents renters. If not overturned, Bhinder will have a devastating impact on recovery by a tenant who, because of landlord negligence, is injured or killed as the result of someone else's criminal behavior. Consider, for example, a tenant who dies or is injured as the result of arson in a building in which the landlord had failed -- contrary to code requirements -- to install smoke detectors. Or a tenant who is raped in the laundry room or whose apartment is burglarized in an apartment building whose landlord has failed to repair broken locks. These kinds of injuries are the very ones which code requirements are designed to prevent. Yet Bhinder will allow a landlord to limit his own liability to perhaps 10% or 15% of the tenant's loss on the argument that the primary cause of the tenant's injury was the criminal's conduct. The imprisoned criminal will almost surely be judgment-proof, and the victim will be unable to recover any significant portion of his or her injuries. As Justice Berdon noted in his dissent, quoting from the Restatement: "To deny recovery because the other's exposure to the very risk from which it was the purpose of the duty to protect him resulted in harm to him, would be to deprive the other of all protection and to make the duty a nullity," 246 Conn. 223, at 249.

That is the very reason that Tort Reform dealt with apportionment only among negligent tortfeasors and did not apportion for intentional misconduct. Indeed, the Supreme Court in Bhinder agreed unanimously that the Tort Reform statute does not permit apportionment to those who cause deliberate injury. But it created a new common law doctrine which, in effect, overturns the legislative balance which produced the statute. In fairness to victims of criminal behavior, the legislature needs to reassert the intended meaning of the statute by overturning Bhinder.

– Submitted by Raphael L. Podolsky

By THOMAS SCHEFFEY

If intellectual ferment had an aroma, the Connecticut Supreme Court building would smell like a brewery.

Not content to be mere curators of the law, the "hot bench" of this past year has been busily stirring things up—with yet-to-be-seen consequences.

The remarkable case of *Bhinder v. Sun Oil Co. Inc.* is a striking example. Defense lawyers for a Norwalk Sunoco gas station used a novel tactic in defending against the wrongful-death claim of night attendant Baljit Singh Bhinder, who was shot and killed by a robber. The attorneys sought to implead the imprisoned, presumably judgment-proof, shooter to apportion liability.

On appeal *en banc*, Justice Fleming L. Norcott Jr. wrote for a bare minority of the three newest justices, Richard N. Palmer, Joette Katz and Francis M. McDonald Jr.

Retracing their reasoning is awe-inspiring—like watching a salmon fling itself headlong up a waterfall. It leaps from one point of logic to another, drawn variously from statute, case law and parts of the Restatement of Torts. Its conclusion is a common-law rule that a criminal tortfeasor can be dragged into a negligence suit—to let the jury apportion fault.

The court's veterans, Chief Justice Robert J. Callahan, David M. Borden and Robert I. Berdon, all dissented vigorously, predicting that juries will assign liability to the reckless, wanton, criminal (and penniless) tortfeasor.

Wrote Callahan: "I do not believe that a negligent defendant should be able virtually to absolve itself of liability by impleading an intentional tortfeasor whose very conduct it allegedly had a duty to protect against."

No Statute, No Case

Before ruling in its favor, Norcott began by demolishing most of Sunoco's arguments. Sunoco was mistaken to argue, he said, that the language of

the comparative negligence statute, CGS §52-572h, can be applied to intentional torts. Its language is unambiguous, Norcott wrote, and by its very terms applies only to cases of negligence.

Furthermore, the precedent Sunoco cited is inapt, Norcott concluded. The defense cited the 1996 state Supreme Court case of *Bohan v. Last*, a wrongful-death action against a bar for serving alcohol to the minor plaintiff. It included negligence counts against the bar and others who allegedly gave the minor alcohol, and didn't support Sunoco's argument in *Bhinder*, Norcott wrote.

The court then went on to analyze the demise of common-law joint and several liability before Tort Reform I, in 1986, when the old rule was that any defendant, regardless of degree of fault, could be tapped for the whole amount of the judgment. This was said to be a cause of soaring insurance rates, and the Legislature got busy. Norcott noted the legislative process leading to the comparative negligence act "represents a complex web of interdependent concessions and bargains struck by hostile interest groups and individuals of opposing philosophical opinions."

Then in 1987, with Tort Reform II, defendants were permitted to implead other negligent defendants, even if the plaintiff hadn't. Norcott—not the dissenters, mind you—went on to note that the Legislature was "focused on the protection of insurable interests, which ordinarily do not encompass intentional conduct."

He quoted a hornbook rule that "it is universally recognized that an implied exception to coverage under any form of insurance is an intentional or expected injury, damage or loss."

That seemed a third good reason not to head the way the majority was going. But one argument remained.

Sunoco requested the court to extend the policy of apportionment to reckless, willful and wanton conduct as a matter of common law. "We agree," Norcott wrote.

Sorcerer's Apprentice

Norcott next quoted, without specifically citing, a jurisprudential technique Borden outlined in his 1993 case of *Fahy v. Fahy*. State statutes can be "a useful source of policy for common law adjudication, particularly if there was a close relationship between the statutory and case law subject matter. *Fahy* created case law to modify alimony orders, tracking the statute for modifying child support orders.

Borden's *Fahy* approach to filling in missing blanks is thus analogous to the computer screen process of "dithering"—filling in the black hole between a pink dot and a red dot with, say, a dark-pink dot, to create a finer-grain, clearer picture.

Such mild sorcery in Borden's hands turned wild in *Bhinder*. The majority didn't just fill in the blanks or connect the dots. Instead, it extended the points of Tort Reform I and II on a ballistic trajectory.

Tort Reform I's apportionment of negligence among defendants chosen by the plaintiff was enlarged by Tort Reform II to include negligence defendants brought in by the defendant. With *Bhinder*, a kind of court-made Tort Reform III is achieved, with a defendant permitted to cite in not just an intentional tortfeasor, but a criminal one.

Norcott's majority summarily rejected the *Bhinder* estate's final claim, that negligence is different "in kind rather than in degree" from reckless, willful and wanton conduct.

The majority drew no distinctions among negligence, recklessness, willful and wanton conduct, intentional torts and crimes. It said simply, "We conclude that juries are fully competent to assess fault between negligent and intentional tortfeasors."

No way, said Borden in dissent. Any jury that follows the court's instructions and does its duty will inevitably assign most, if not all fault, to the gunman. That will leave negligent, insured defendants responsible for only a small fraction of the judgment. Instead of following the intent of the Legislature in the comparative negligence law, Borden concluded, *Bhinder* amounted to judicial legislation that's contrary to that intent.

To its credit, the court sat *en banc* for this one, and 22 others in 1998—increasingly its tendency when major policy issues arise.

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TESTIMONY
ELIZABETH E. GARA
ASSOCIATE COUNSEL
CONNECTICUT BUSINESS & INDUSTRY ASSOCIATION
BEFORE THE
JUDICIARY COMMITTEE
LEGISLATIVE OFFICE BUILDING
MARCH 8, 1999

My name is Elizabeth (Betsy) Gara, associate counsel for the Connecticut Business & Industry Association (CBIA). CBIA represents over 10,000 employers across Connecticut, the vast majority of which are small employers with fewer than 100 employees.

CBIA *opposes* **HB-6962, An Act Concerning Apportionment of Liability Between Negligent and Intentional Tortfeasors**, which overturns the Connecticut Supreme Court's decision in Bhinder v. Sun Co., 246 Conn. 223 (1998).

HB-6962 undermines the very foundation of comparative negligence law – that a defendant should be liable only for the proportion of damages which he or she was responsible – by shielding criminals from liability for their share of damages.

The purpose of Connecticut's comparative fault statute is to prevent the unfairness of requiring a party "who is only minimally culpable as compared to other parties to bear all the damages". Blazovic v. Andrich, 124 N.J. 90 (1991). **HB-6962** turns that statute on its head by making a negligent party solely responsible for the conduct of a criminal or other intentional tortfeasor. In fact, as conceded in both the majority and dissenting opinions in Bhinder, under **HB-6962**, a defendant would be able to avoid apportionment of liability by demonstrating that his conduct was intentional rather than negligent.

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As further stated in Bhinder, “permitting apportionment in the present case best comports with the principle of equitable apportionment of losses among responsible parties.” Allowing apportionment between negligent and intentional tortfeasors does not, as some argue, absolve negligent parties of liability – it simply ensures that their degree of liability is consistent with their degree of fault. The Court in Bhinder correctly concluded that “...precluding the defendant from allocating fault to an intentional tortfeasor is inconsistent with the principle of comparable negligence that a defendant should be liable only for that proportion of damages for which he or she is responsible.

It should also be noted that the Court in Bhinder engrafted the provisions of Section 52-572h of the Connecticut General Statutes to apportionment between a negligent and an intentional tortfeasor. Consequently, where a plaintiff cannot collect a damage award from an intentional tortfeasor, the negligent defendant or defendants would be held liable for payment of the entire damage award, regardless of their degree of fault. This ensures, then, that permitting apportionment of liability between negligent and intentional tortfeasors is equitable for plaintiffs as well as defendants.

Accordingly, CBIA urges the committee to *reject* HB-6962.