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Floor Debate
March 02, 2009

[LB110A LB110 LB121 LB153 LB204 LB206 LB260 LB356 LB666 LB675 LR29 LR30
LR40 LR41]

SENATOR PIRSCH PRESIDING

SENATOR PIRSCH: Good morning, ladies and gentlemen. Welcome to the George W. Norris Legislative Chamber for the thirty-sixth day of the One Hundred First Legislature, First Session. Our chaplain for today is the Reverend Darin Corder of the Bennet Community Church in Bennet, Nebraska, in Senator Wallman's district. Please rise.

PASTOR CORDER: (Prayer offered.)

SENATOR PIRSCH: Thank you. I call to order the thirty-sixth day of the One Hundred First Legislature, First Session. Senators, please record your presence. Mr. Clerk, please record.

CLERK: I have a quorum present, Mr. President.

SENATOR PIRSCH: Thank you, Mr. Clerk. Are there any corrections for the Journal?

CLERK: I have no corrections, Mr. President.

SENATOR PIRSCH: Thank you. Are there any messages, reports, or announcements?

CLERK: There are, Mr. President. LB110 and LB110A are reported to Select File. Committee on Revenue, chaired by Senator Cornett, reports LB121 to General File with amendments. Education, chaired by Senator Adams, reports LB206 to General File with amendments. And Judiciary, chaired by Senator Ashford, reports LB356 to General File with amendments. That's all that I have, Mr. President. (Legislative Journal pages 609-617.) [LB110 LB110A LB121 LB206 LB356]

SENATOR PIRSCH: Thank you, Mr. Clerk. We will now proceed to the first item on the agenda. Mr. Clerk.

CLERK: Mr. President, LB260 is a bill originally introduced by Senator Rogert. (Read title.) Bill was introduced on January 14 of this year, referred to the Judiciary Committee. The bill was advanced to General File. I do have committee amendments, Mr. President. (AM456, Legislative Journal page 571.) [LB260]

SENATOR PIRSCH: Senator Rogert, you are recognized to open on your bill. [LB260]

SENATOR ROGERT: Thank you, Mr. President. Good morning, members of the body. Rex non potest peccare, which is Latin for the king can do no wrong. Sovereign

Floor Debate
March 02, 2009

immunity is the type of immunity that in common law jurisdictions traces its origin from early English law. Generally speaking, it's the doctrine that says a sovereign state cannot commit a legal wrong and is immune from civil suit or criminal prosecution; hence, the king can do no wrong. We have slowly, over time, allowed ourselves to be held liable for misaction in a couple basic ways: through contracts or compacts, such as a multistate water compact; or two, through specific acts of wrongdoing or negligence, as outlined in the State Tort Claims Act. While sovereign immunity is a hundreds-of-years-old philosophy, tort claims have developed in the last century. Nebraska and its political subdivisions remain among the most sovereign of states in the Union, allowing very few avenues for claims by its citizens and others. Our Tort Claims Act, developed in the seventies after a young lady named Lynn Broyhill was killed when the car she was in collided with a state maintenance vehicle. The name may sound familiar as her parents donated the famed Broyhill Fountain to the university thereafter. Many folks, including Senator Roland Luedtke, worked over time to develop the State Tort Claims Act here in the body. LB260 seeks to bring a process by which a claim can be made for compensation for a tort. The tort is wrongful imprisonment and conviction. The liability for the fault cannot be placed upon any one individual, but there is a claim and those who were wronged or might be wronged in the future would believe they deserve restitution. Imagine being sent to prison for a crime that you did not commit. We've all been accused of something we did not do. You might have paid an undeserved fine, been forced to fix something you didn't break. You may have had a privilege taken away for something a friend of yours did that you are only aware of. But imagine being arrested, interrogated, tried, and convicted of a felony that you absolutely did not do. Then you serve the time in prison. You will now have a felony on your record forever. You've lost your freedom for however long--a year, 5 years, 5 months, 20 years. Your family and friends don't know what to think nor will they ever again know what to think of you and your actions. Then by the miracle of modern science or a later confession or finding someone figured it out, you didn't do it. So you get out of jail. You get a pardon from the Pardons Board and they say, sorry, man, we screwed up, good luck with the rest of your so-called life. Today we are not here to mandate a liability. We're not writing a blank check. We are merely seeking to provide a process for which a person who has suffered this fate may seek restitution or compensation for the loss of freedom at the hands of our judicial or law enforcement system. In succeeding to pass this legislation, those released from a conviction that was wrongfully made still have considerable hurdles to overcome before they receive what they think they might deserve. There are four checks currently on the State Tort Claims Act and one further in this act that must be cleared. First, a judge needs to vacate or reverse a judgment or the conviction or a Pardons Board must grant a pardon based upon innocence. Then the State Claims Board or an appeal to a district court must decide that a claim is valid and establish some sort of restitution. Third, the Legislature's Business and Labor Committee must decide whether or not to recommend the approval of the claim to the full Legislature. Fourth, 26 of us or more must approve the appropriating bill and send it down the hall to the Governor's Office. And finally, it has to either be signed by the

Floor Debate
March 02, 2009

Governor or the veto overridden by us. Today, we are here to discuss giving these people an avenue, a process, an avenue of hope to clear their name and get back to whatever life they have left with as solid a footing as we can provide. I look forward to the discussion today and encourage your forward consideration. We have several amendments going to the green copy and I'll let Senator Ashford open on the committee amendment. Thank you, Mr. President. [LB260]

SENATOR PIRSCH: Thank you, Senator Rogert. As the Clerk stated, there are amendments from the Judiciary Committee. Senator Ashford, as Chair of the committee, you are recognized to open on the amendments. [LB260]

SENATOR ASHFORD: Okay. Thank you, Mr. President. People, as Senator Rogert has stated, do get wrongfully convicted of felony crimes and are subsequently imprisoned as was recently shown in the Beatrice Six case. Recognizing that wrongfully convicted people have lost years of freedom and will have difficulty reentering society, the state needs to adopt, in our view, in the view of the Judiciary Committee which has put this bill to the floor with a unanimous vote, a policy to compensate and assist the wrongfully convicted with their reentry into Nebraska communities. LB260, as amended by AM456, the committee amendments, provides an appropriate and specific process to calculate compensation and assistance for wrongfully convicted individuals. This policy, as incorporated in AM456, has been agreed to by Senator Rogert, by the Attorney General, and by the Judiciary Committee to address a situation in which an individual is wrongfully convicted of a felony, sentenced, and serves a portion of that sentence in a state correctional facility. To utilize this act, a person must have received a pardon or had their conviction vacated or reversed by a court. The individual seeking compensation must not have contributed to his or her incarceration by committing or suborning perjury, fabricating evidence, admitting guilt or making a false claim that brought about his or her conviction or the conviction of another person. However, this section would not apply in instances where it can be proved that perjury, admission of guilt or the making of false statements were done as a result of coercive measures. Under the act, as amended, the claimant wrongfully convicted must prove to the State Claims Board by clear and convincing evidence that their exoneration was based on actual innocence. The committee amendment increases the standard of proof from preponderance of the evidence to clear and convincing evidence. Clear and convincing evidence is proved to a reasonable certainty, whereas preponderance of evidence is more likely than not. The clear and convincing evidence standard is a stricter standard of evidence. This policy will utilize the State Claims Board which was created under the State Claims...Tort Claims Act. This amendment would add provisions to the Tort Claims Act outlining a procedure for a wrongfully convicted individual to bring a tort claim against the state or an employee of the state. The State Claims Board has authority to consider, ascertain, adjust, compromise, settle, determine, and allow any tort claim against the state. The State Claims Board is comprised of the Director of Insurance, the Director of Administrative Services, and the Commissioner of the

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

Floor Debate
March 02, 2009

Department of Labor. A member of the Attorney General's Office acts as its legal advisor. The State Claims Board holds hearings every two months, which are open to the public, to determine the disposition of each claim. The board may choose to approve, adjust or deny or table a claim for further investigation. The State Claims Board, under existing law, has six months from the filing of the date of the claim in which to render a decision. If the board fails to render a decision within the six-month time frame, an individual may appeal to the district court. A person may also appeal an unfavorable ruling by the State Claims Board to the district court. If successful in their claim under this amendment, AM456, a wrongfully convicted person shall receive \$25,000 per year of incarceration, plus an additional \$25,000 per year if they were on death row, adjusted for inflation. In addition, the Tort Claims Board may consider lost wages, the costs associated with his or her criminal defense and efforts to prove innocence, medical and dental expenses incurred or expected to be incurred after release, up to five years of physical and mental healthcare, tuition assistance for education of the claimant at any community or state college or the University of Nebraska, compensation for immediate services secured upon exoneration and release, including housing, transportation, and subsistence. Claims must be brought within two years of the granting of the pardon for judicial relief...or judicial relief. Any action by the state challenging or appealing the grant of judicial relief shall toll the two-year statutory period. Individuals convicted, incarcerated, and released from custody prior to the effective date of this act shall have three years to file a claim. A person who obtains a postconviction exoneration through a pardon or a judicial order may petition the district court in which the wrongful conviction occurred for an order expunging all records of the erroneous felony conviction. Under the committee amendment, if the court determines the petition is warranted and orders the expungement of all records pertaining to the erroneous conviction, law enforcement may still gain access to the records upon a court order showing good cause for the access. Finally, a person who obtains a court order to expunge may lawfully answer and swear under oath that an arrest, prosecution or a conviction regarding the erroneous conviction never occurred. Members, the committee, the Judiciary Committee, spent quite a bit of time looking at this bill and working with the Attorney General, as I suggested, and with Senator Rogert coming up with AM456. Again, the committee voted this matter out unanimously. We appreciate the efforts of Senator Rogert in compiling the information necessary to put something before you. We realize as a committee, and I realize, this is new territory. This is new territory for us as a state. But as the laws evolve and as evidentiary standards evolve, it's going to happen--it has, as it happened in Beatrice--in the future with the use of DNA evidence that we are going to have people who are incarcerated, people who are on death row who may in fact be exonerated, and this is the time, members, I believe, for us to step up. And the light is being shown on us nationally on this issue, much as it was the case of safe haven. But as is the case with safe haven, I think we in Nebraska can deal with our issues and we can deal with our issues in a way that comes up with real solutions that affects real people. With that, Mr. President, I certainly would urge the body to adopt AM456 and, with the adoption of those amendments, advance LB260 to Select

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

Floor Debate
March 02, 2009

File. Thank you. [LB260]

SENATOR PIRSCH: Mr. Clerk, there's an amendment to the committee amendment. [LB260]

CLERK: There is, Mr. President. Senator Rogert, you had given me AM524 several days ago, but I understand we want to withdraw that. Mr. President, Senator Rogert would move to amend the committee amendments with AM545. (Legislative Journal pages 617-622.) [LB260]

SENATOR PIRSCH: Senator Rogert, you are recognized to open on your amendment to the committee amendment. [LB260]

SENATOR ROBERT: Thank you, Mr. President. AM545 is a result of what Senator Ashford just enlightened you on, is that this is new territory. And we pushed out the bill and the committee amendment last week and, through further discussions and some pondering, Senator Lathrop and I and others noticed that the bill didn't flow very well. It had been written in several parts by several different folks, each in their own expertise. What we did is we smoothed it out a little bit to make more sense, more simple and straightforward, and that's basically what...it doesn't...there's not really any substantive change to the amendment. It just makes a little more sense the way it is. One thing, one change it does make is that it makes reference to the Risk Manager as part of the State Tort Claims Board to administer the monies and to handle the cases as they come through. Members, I put before you a few things. I believe this is going to be short-term legislation. Hopefully, in 20 years we will have no further need for this. With the use of DNA evidence and the preponderance of whatever scientific marvels we continue to come upon, we hope to have nobody that doesn't deserve to be in prison be put in prison in the future. When will the next one of these be? It could be six weeks from now. It could be 6 or 12 years from now. We do not know. We may not have anybody in our prison system that is undeserving of being there or that we will ever figure out they weren't supposed to be there, but the odds are that we will. There have been a total of 232 exonerations across the United States in the past several years, not a whole lot in the terms of how many people are in the prison system. We've had six and that was all one basic case. Twenty-five states have put language such as this into their statutes, some more, some less. This is kind of an average. As we move through the discussion this afternoon, I'd welcome any of the attorneys in the body to offer their thoughts on the policy and on the processes that we go through here. Mr. President, I would yield some time to Senator Lathrop, if he would like to talk about this amendment. [LB260]

SENATOR PIRSCH: Senator Lathrop, would you like the time? [LB260]

SENATOR LATHROP: Sure. Thank you, Mr. President, Senator Rogert. As Senator Rogert indicated, the two of us sat down and looked at the amendments and the bill and

Floor Debate
March 02, 2009

tried to craft a more straightforward, perhaps simpler approach to the problem. With AM545 I think we've done that. It doesn't change what you've heard already this morning and essentially what we have done with this amendment is to provide a process for the wrongfully convicted. And understand, we're not talking about prisoners who are going to find a way to scam the system, but Senator Rogert's bill, with this amendment, makes it very tight. The people who can make a recovery under this amendment and under Senator Rogert's bill are those who can establish that they have been exonerated by the Pardons Board or by a judicial decision. So we're talking about the people who are truly, truly innocent. The bill also requires as a condition of recovery that you have been sentenced to a felony so we're not going to fuss around with people that have misdemeanor convictions but only those that have been charged and convicted with the most serious crimes. A third condition is that the person be sentenced to prison and actually have done some time. So we're not...and we're well beyond the theoretical with this type of an amendment and we will be dealing with folks who are, number one, first and foremost, convicted of a felony they did not commit. It is not just someone's argument or judgment or claim. It is, in a gatekeeper process, is performed by the Board of Pardons which must make a determination that the pardon is based upon actual innocence or a court judgment vacating a conviction based on actual innocence. If those conditions are met then a person is entitled to recovery, and the amendment spells out in very simple terms what those recovery or elements of damages are. They are, for a person's freedom, they will receive \$25,000 per year or \$50,000 per year of incarceration if they were incarcerated on death row. Beyond that, they're entitled to recover what we would generally refer to as the usual elements of damage in a tort claim: physical, mental, emotional pain and suffering; lost wages; lost earning capacity. And we have another thing that would be unique to this bill and that is that they are to be compensated for vocational rehabilitation necessary to restore them to their earning capacity at the time that they were wrongfully convicted so that, under Senator Rogert's bill and this amendment, we are trying to bring these people back to a place that they were at before the time of their conviction. And understand that this bill came out of Judiciary Committee unanimously for a good reason. We listened to testimony in that committee and heard from people. And while you consider this legislation, think about what somebody goes through that spends 20 years in jail for something they didn't do. They miss weddings. They miss funerals. They miss every imaginable family activity. The relationships that they have on the outside world go away. People stop coming by the prison to see them. They're in there, they didn't do something, and they're now doing time and their relationships, their life is essentially taken from them with their incarceration. So I think Senator Rogert's approach is thoughtful. It is not overly generous, but I think really represents a good step. It will be conducted and claims of this nature will be conducted pursuant to the State Tort Claims Act which has safeguards again to provide the Claims Board an opportunity to resolve the matter, and if they don't, then the claimant is entitled to go to the district court, and that is not new ground. That is an approach that has been long established in Nebraska law and jurisprudence. The claims against the state are tried to a judge and not a jury,

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

Floor Debate
March 02, 2009

so this isn't a case where emotional appeal will result in verdicts that you wouldn't like to see. District court judges will decide these matters if the Claims Board cannot. And finally, the state is encouraged to work with an exonerated inmate as soon as they're released, and the incentive to do that is a credit for any services provided to the exonerated, upon their release serves as a credit against any judgment that might be taken later on. So, in short, this is a fair process. It is a necessary process for the truly innocent who have spent years in the penitentiary unnecessarily. It's a thoughtful approach and I would encourage you to support AM545 as well as Senator Rogert's LB260. Thank you. [LB260]

SENATOR PIRSCH: Thank you. Senator Christensen, you are recognized to speak on AM545 to AM456. [LB260]

SENATOR CHRISTENSEN: Thank you, Mr. President. I want to talk a little bit and make sure everybody is looking at this bill. I voted for it out. I had my concerns on it. I am concerned about how expensive this could be even though it's very limited, the number of people that's going to be involved in this. But I'm going to bring this up. I told Senator Rogert I was going to because I think we need good discussion. I voted this out because I believe this really needs floor debate, needs a broad discussion on it, and I do believe they need compensated. But at the same time, I am concerned about the potential cost of this because when you look at this bill, you take somebody that was wrongfully convicted for 20 years. If you use the \$25,000 in the amendment, you're looking at a half a million dollars. If you look at lost wages added on top of that, say they make \$50,000 a year, there's another million dollars if it's a 20-year wrong conviction. Then if you throw in if they couldn't make their child supports because they were in there, pretty soon, if that happens to be, say, \$2,000 a month, I don't know, all depends what they were making, things ahead of that, you can throw another half million in there. I get concerned about the cost of it. I believe something needs done. I understand you cannot replace being able to go to birthday parties, wedding anniversaries, going out, enjoying all the benefits that we do as Americans. And they were wrongfully accused. I believe they need something. But at the same time the conservativeness of me, the fiscal side of me says we need to at least look at how broad this is and what this really could cost. So I told him I was going to bring this up because I think we need to have very good debate, thoughtful consideration on this. They deserve to be compensated because they have been wrongfully harmed. I don't want that fiscal, that I'm bringing up, to be a major...a total concern. They deserve compensation but I also know you can't replace them birthday parties. You can't replace wedding anniversaries no matter how much money we give them. And so I'm talking out of both sides of my mouth, I realize that, because I do support doing something but I'm also concerned on the fiscal side of things. So I tried to get on the queue quickly because I want everybody to think about this. I don't want to pass this too quick without having good discussion on it and having everybody comfortable with the language that's in here. Because I might...you know, the original bill is what I copied off of, which was page 4. You know, it talks about

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

Floor Debate
March 02, 2009

the...\$25,000 is the amendment, \$50,000 was original language. Then it's got adjustment for inflation from the date of enactment, which I don't have a problem with that part. And I believe there's a part in here about education. I think they deserve that. If they want to take schooling, one of our colleges, that's something we should do to better the situation for them. But we also got the economic damages, but not limited to lost wages, I mentioned; the cost of... [LB260]

SENATOR PIRSCH: One minute. [LB260]

SENATOR CHRISTENSEN: ...his or her criminal defense and efforts to prove innocence; medical and dental expenses incurred, as expected to be incurred after release. You know, I don't know how far and how broad that statement is. Hopefully, they've had care inside the facility that was...so we're not looking at major problems afterwards, but how long can they collect that yet? Physical injuries or physical sickness, noneconomic damages, nonphysical injuries such as incurred during or a result of "incarceratedness," up to five years worth of physical, mental healthcare, I don't know that I oppose that part of it either but I just want everybody to realize how broad this is. And we maybe need it all in there; maybe we don't. [LB260]

SENATOR PIRSCH: Time, Senator. [LB260]

SENATOR CHRISTENSEN: Thank you. [LB260]

SENATOR PIRSCH: Senator White, you are recognized next, followed by Senators Ashford, Fulton, Harms, Lautenbaugh, and others. [LB260]

SENATOR WHITE: Thank you, Mr. President. Members of the body, I rise in support of this bill and the underlying bill. And I don't know how many members of the body have ever actually been in a prison. I, in the course of representing people in civil rights cases, have been ordered by courts to represent prisoners. I've also visited a number of prisoners. I've represented guards in prisons. Going to prison in this state is not the horror that it is in a Third World country, but it is a brutal experience nonetheless. We have at stake in this bill far more than the money. When you stand up in front of a judge, whether it's a simple civil case or you believe someone treated you unfairly in a contractual dispute or if you're on trial for your life, one of the great glues that holds us together is, on some level, the fundamental belief that the system embodied by the judge and the prosecutor wants the truth, that they care more about really who did the crime than getting a conviction, that they care that they get it right, that the obligation of society is not to exercise power to put somebody in jail but to do justice, that it is important that the citizens of the state know that we are committed to getting it right, not just to getting it done. If you ever have the misfortune to be a defendant in a civil case, much less a criminal case, ask yourself what it would mean to you as a citizen and your willingness to accept the authority of the state if you didn't think that the people up on

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

Floor Debate
March 02, 2009

the bench and the people behind them cared if they got it right or wrong, and if they got it wrong, did not have the integrity to stand up and say we got it wrong, and if they got it wrong did not do anything to try to help you put the pieces of your life back together. Doing the right thing in this situation is the difference between raw power and authority. It's the difference between a system that is truly committed to justice under the law and a system that just accepts, we will destroy and damage people and that's the way it goes. The latter system does not command the respect of citizens but only their fear. We should never rule because citizens fear us. We should rule from a position that they should fear justice and that we have the power to pursue justice, and when we find that in error we have committed an injustice, we will correct it. Therefore, I fully support this bill and I urge you to do the same. [LB260]

SENATOR PIRSCH: Thank you. (Doctor of the day introduced.) Resuming debate, Senator Ashford, you are next recognized to speak, followed by Senators Fulton, Harms, Lautenbaugh, Louden, Hadley, and Wallman. [LB260]

SENATOR ASHFORD: Thank you, Mr. President. I might, if I could, have a little dialogue with Senator Lathrop. [LB260]

SENATOR PIRSCH: Senator Lathrop, would you yield? [LB260]

SENATOR LATHROP: Yes, I will. [LB260]

SENATOR ASHFORD: Senator Lathrop, I note that in your amendment, AM545, that you're making some changes, suggesting changes in Section 3 of the amendments dealing with the standard of evidence applied to these cases. Is that what you're doing partially here? [LB260]

SENATOR LATHROP: Yeah. We should be clear, this is Senator Rogert's amendment that I worked with him on over the weekend. [LB260]

SENATOR ASHFORD: Right. [LB260]

SENATOR LATHROP: And, yes, that...as this amendment is currently constituted, it does change the standard to preponderance. [LB260]

SENATOR ASHFORD: And what I would ask you to consider, and Senator Rogert to consider, is that we retain the clear and convincing evidence standard for subsections (1), (2), and (3), which deals with the finding that the person is entitled to damages in the first place. Would that be something that you could agree to, Senator Lathrop? [LB260]

SENATOR LATHROP: I think so. The only reason that change was made is that we

Floor Debate
March 02, 2009

also changed the...just to give you a little perspective or an idea of what we were thinking, it wasn't to try to make it easy for these claims to be made. But we changed the second section to basically require that the person establish that the Pardons Board has pardoned them based on actual innocence or that a court has vacated their conviction based on actual innocence. So it seemed that the clear and convincing was less necessary because we had a gatekeeper in the process. But I'll be happy to visit with Senator Rogert. I'm sure he would be comfortable changing the legal burden of proof to clear and convincing in Section 3, which is on page 1, line 20, to clear and convincing instead of a preponderance, as long as the damages... [LB260]

SENATOR ASHFORD: Right. [LB260]

SENATOR LATHROP: ...which are traditionally based upon a preponderance of the evidence. [LB260]

SENATOR ASHFORD: Right. And I appreciate Senator Lathrop's willingness. And I did chat with Senator Rogert about this and I believe, is that correct, Senator Rogert, that you're okay? If I could ask Senator Rogert, Mr. President. [LB260]

SENATOR PIRSCH: Senator Rogert, would you yield? [LB260]

SENATOR ROBERT: I will. [LB260]

SENATOR ASHFORD: And, Senator Rogert, would it be all right with you if we kept the clear and convincing standard in Section 3 dealing with the initial finding that the state would be responsible to pay damages, if we leave the clear and convincing evidence standard there? [LB260]

SENATOR ROBERT: I believe we can probably work that out. I think that would be okay. [LB260]

SENATOR ASHFORD: Okay. Thanks, Senator Rogert, and I appreciate that. I think...I agree with Senator Lathrop that to some extent it's rote. I mean basically if we have an exoneration, as was the case in Beatrice, it will be very...in all likelihood there will be a finding, whether it's under a preponderance of the evidence or a clear and convincing evidence standard, that the exonerated incarcerated persons would be entitled to damages, but there may be cases where it is not so clear, and I think the committee felt that the clear and convincing evidence standard, which is a little higher standard than the preponderance standard, be applied. And as Senator Lathrop correctly states, when assessing damages, Nebraska traditionally has, in almost all cases that I know of, has adopted and continues to utilize a preponderance of the evidence, which is a little lesser standard, in determining what exact damages should be awarded. So I think that change in Senator Lathrop's amendment would be consistent certainly with the

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

Floor Debate
March 02, 2009

committee's intent to utilize a clear and convincing evidence standard before there's an award of any damages at all, and then utilizing a preponderance of the evidence standard in assessing the damage, which would be consistent with current Nebraska law in damage cases across the board. So thank you, Mr. President, and I would yield the remainder of my time. [LB260]

SENATOR PIRSCH: Continuing on with debate, Senator Fulton, you are recognized, followed by...I'm sorry. Senator Fulton, you are recognized, followed by Senator Harms, Lautenbaugh, Louden, and Hadley. [LB260]

SENATOR FULTON: Thank you, Mr. President. This, members of the body, this has been...I thank Senator Rogert for bringing this bill forward. I want to go out on a limb here and say I can't imagine anybody would have a problem with the principle that we're talking about here. Senator White touched upon it and I'll reiterate, what we're talking about here is an injustice wrought upon an innocent person by the state of Nebraska. There are few things so outrageous. So I would hope that we can all agree on the principle that we should provide some form of remuneration for one who has been wrongly convicted, wrongly deprived of his or her liberty. What that remuneration is should be the topic of our debate, and I hope people tune in because this is pretty important. How we go about making someone whole, remunerating them, is also pretty important. To that end, I was reviewing these amendments and I'm glad that Senator Ashford brought up the difference in standards that has been put forward here between LB260 to AM456 and now to AM545, because that's something that did jump out to me. So I wonder, to that end, would Senator Lathrop yield to a quick question? [LB260]

SENATOR PIRSCH: Senator Lathrop, would you yield? [LB260]

SENATOR LATHROP: Sure. [LB260]

SENATOR FULTON: Can you run me through? I didn't have the benefit of knowledge, what went on in the committee, but I see in LB260, and I'm talking now about just the standard, the standard of evidence, LB260 was clear and convincing, AM456 was a preponderance of the evidence, AM4...or vice versa. We've ended up at a preponderance of the evidence, whereas we were considering clear and convincing. Why and how? [LB260]

SENATOR LATHROP: Let me start out by describing, there's three different burdens of proof in the law. One is a preponderance, which is the greater weight of the evidence or what's more likely than not to be the case by the...as concluded by the trier of fact. At the very top end of the spectrum is beyond a reasonable doubt. That's the standard we use for criminal convictions. And in the middle is clear and convincing. It's more than a preponderance; it's less than beyond a reasonable doubt. We started out with that standard and, really, I'm probably to blame for it, to move them back, because it moved

Floor Debate
March 02, 2009

back to a preponderance. As we were putting this amendment together, it seemed that as long as we required as an element that the Pardons Board or that a judge conclude that the person was actually innocent, that that was a sufficient safeguard. It sounds...and I'm hearing the concerns expressed by people on the floor. I've talked to Senator Ashford and Senator Rogert and I'm actually putting an amendment together right now to change it back to clear and convincing on the elements of liability. We'll still judge the damages by a preponderance, which has always been the case, but that's not about whether the guy ought to get any money or make a recovery. That will be a clear and convincing standard, and that's a pretty exacting standard, Senator. We use it rarely in the law as a greater requirement or a higher hurdle for the plaintiff in making a claim. [LB260]

SENATOR FULTON: The AM545 then, in order...now I understand that there's a difference between whether one has been wrongly convicted and whether one can collect or file a claim such that he or she could collect from the state. [LB260]

SENATOR LATHROP: The one thing that is...that people should take comfort in from this bill and the amendment is that this isn't going to be available to the guy who makes a...you know, claims that the police unlawfully interrogated him or he has a constitutional claim that gets his conviction reversed or the Supreme Court reviews a confession and says that confession is not admissible and now we can't convict the guy. These are people... [LB260]

SENATOR PIRSCH: One minute. [LB260]

SENATOR LATHROP: ...that are found innocent or pardoned or their convictions vacated not because of a constitutional challenge to their confession or a constitutional challenge to their arrest but, rather, a finding that they were actually innocent. [LB260]

SENATOR FULTON: Okay. [LB260]

SENATOR LATHROP: So Senator Rogert has put into this bill... [LB260]

SENATOR FULTON: Senator, I understand that. [LB260]

SENATOR LATHROP: Okay. [LB260]

SENATOR FULTON: I get that. Where...what I'm not following, I guess, in order to recover under Nebraska Claims for Wrongful Conviction Imprisonment Act, the claimant shall prove each of the following by a preponderance of the evidence. Is there a difference then in the level...in the burden of proof for one who is found not guilty versus one who is just filing a claim? [LB260]

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

Floor Debate
March 02, 2009

SENATOR LATHROP: You're not going to be able to...there is a gatekeeper process to this and that is you can't even make a colorable claim unless you can establish that the Pardons Board has pardoned you or that a court has vacated your sentence. So if you... [LB260]

SENATOR PIRSCH: Time. Senator Harms, you are recognized to speak next, followed by Senator Lautenbaugh, Louden, Hadley, and Wallman. [LB260]

SENATOR HARMS: Thank you, Mr. President and colleagues. Is Senator Ashford here? I'd like to have him...would he yield? [LB260]

SENATOR PIRSCH: Senator Ashford? [LB260]

SENATOR HARMS: That's okay. I'll...Mr. President, I would ask Senator Lathrop if he would yield. [LB260]

SENATOR PIRSCH: Senator Lathrop, would you yield? [LB260]

SENATOR LATHROP: Yes. [LB260]

SENATOR HARMS: Senator Lathrop, as I look at this bill, first of all, I want you to understand I have no difficulty with the underlying bill itself. I think people should be taken care of if they've been wrongly committed to prison. Now, the base of this bill for a person who has been committed wrongly would be \$25,000 unless the person was on death row. Is that correct? [LB260]

SENATOR LATHROP: That's true. The element for loss of freedom is \$25,000 a year. [LB260]

SENATOR HARMS: So if the person was on death row, it could be \$50,000. Is that correct? [LB260]

SENATOR LATHROP: Yes, sir. [LB260]

SENATOR HARMS: The thing that I...I guess the concern that I have is that if this is for a period of time, like, you know, five years, eight years, ten years, are we...do we have anything in this legislation or are we giving any thought to...of giving this person a half a million dollars or \$300,000 and helping them manage the money? In other words, giving them \$300,000, I think, is a real risk and I'm wondering whether we shouldn't give them 30 percent of that and thereafter so much each year annually. Have you given that any thought or what are your thoughts about something like this? [LB260]

SENATOR LATHROP: You bring up a point that I think about every day in the practice,

Floor Debate
March 02, 2009

which is handing people, who aren't used to managing money, a settlement or a judgment amount. And we don't do that generally in civil claims. [LB260]

SENATOR HARMS: What are your thoughts about doing that in this case? Because I guess what I am concerned, that they will be unable many times, in many cases, will be unable to manage this money. A half a million dollars will go very quickly. If we gave them a percentage of it and then helped them yearly receive an amount and then slowly move them in to training and educational experience and getting them ready to be a part of it seems to me to be more reasonable. Is that... [LB260]

SENATOR LATHROP: Yeah, I will offer this, and that is that when we resolve cases that involve typically a six-figure kind of a result, generally what we'll try to do is persuade people to accept a structured settlement. Structured settlement is essentially where you take the settlement proceeds, purchase an annuity, and pay them the money over time. It is used frequently with larger cases but it's voluntary. We talk plaintiffs into doing it so that they don't spend all their money in the first two years and then have nothing thereafter. But to set up a process where we're going to dictate when they get the money and how they get the money, that's done in work comp but not in any other civil cause of action. [LB260]

SENATOR HARMS: Can it be done, Senator Lathrop? [LB260]

SENATOR LATHROP: Well, I suppose, to the extent that we are waiving some piece of the state's sovereign immunity, we can set what conditions we need to, to make that happen. And I guess if there's a sense of the body that that's what they want to see done and the bill won't move unless that happens, you know, we can work on trying to find a way to make that take place. [LB260]

SENATOR HARMS: I guess, Senator Lathrop, that's the problem that I have with this portion of the bill, is I just got that feeling that that's going to happen, that people will not be able to manage the dollars and we need to make sure that this is structured, we make sure that we give them a future. We've given them everything else in this bill. We've covered all the areas that I think are really critical and important to them and I believe that that's necessary if we're going to be successful with this. Now, Senator Lathrop, let me ask you another question, if I might. [LB260]

SENATOR LATHROP: Certainly. [LB260]

SENATOR HARMS: Senator Lathrop, in this bill, if a person who has been wrongly accused does not like the settlement, do they have the right to appeal this? And what is the process for this? [LB260]

SENATOR LATHROP: This is the process. It goes through, as do other claims, through

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

Floor Debate
March 02, 2009

the State Claims process. That's by statute. You file a claim with the State Claims Board. You do that by certified... [LB260]

SENATOR PIRSCH: One minute. [LB260]

SENATOR LATHROP: ...mail, and the State Claims Board gets six months to consider your claim. During that six months, the State Claims Board can sit down with the claimant and say, we'll offer you X to resolve your case. Many times they don't do anything with it and after six months, if you haven't settled it with the Claims Board, then you're entitled to make a claim in the district court. You have a trial. Judge enters the judgment. Thereafter, either the state or the claimant could appeal to the Court of Appeals or the Supreme Court to review the judgment of the district court. And that would be the entire process. [LB260]

SENATOR HARMS: Thank you, Senator Lathrop. Mr. President, how much time do I have left? [LB260]

SENATOR PIRSCH: About 17 seconds. [LB260]

SENATOR HARMS: (Laugh) Thank you very much, Mr. President. [LB260]

SENATOR PIRSCH: Senator Lautenbaugh, you are recognized next, followed by Senators Loudon, Hadley, Wallman, Gay, and others. [LB260]

SENATOR LAUTENBAUGH: Thank you, Mr. President, members of the body. And I, too, rise in support of the underlying bill, the committee amendment. As I understand it, the amendment that is to the committee amendment is going to be amended to put back in the clear and convincing standard for the proof of the entitlement to the funds, not so much the damages itself. That would still be clear and convincing...or preponderance, excuse me. This is an important bill and it will be something that is rarely used. And I was just paying attention to Senator Harms as he raised the issue of the payout and the timing of it and possibly stretching it out or providing some mechanism. That's certainly worth considering. But, as Senator Lathrop indicated, that really isn't anything that we do normally in general civil litigation and that may be providing an involvement for the state that we don't want to take on. It's something we hadn't considered previously to this and it would be an ongoing commitment of the state. I don't know, per se, that people who are wrongfully convicted are more or less able to handle a large sum of money than the general populace. I don't know that A leads to B in that regard. But I do think this is an important bill. I salute Senator Rogert for bringing it. And the explanations today from Senators Ashford and Lathrop have been dead on. I appreciate their hard work on this. We did struggle with this in committee and Senator Christensen voiced his concerns there as well. I think it's important that we do discuss this but it's also even more important that we ultimately address it. So I'd ask you to look favorably

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

Floor Debate
March 02, 2009

on this and I'll enjoy the continuing discussion and hopefully find me a way to address Senator Harms's concerns in the right way. Thank you very much. [LB260]

SENATOR PIRSCH: Senator Louden, you are recognized next, followed by Senator Hadley. [LB260]

SENATOR LOUDEN: Thank you, Mr. President and members of the body. As I look at the amendment, which takes the place of the bill, the general idea, is I can support the general idea. Part of the problem I have with it, and I guess the \$25,000 for each year of incarceration is probably something that I could approve of. I think it's...I think that's something that's quite all right. But as you get into the...a little farther in Section 6 and when you start talking about economic damages and lost wages, where do you start with lost wages on somebody that's, you know, what kind of wages were they making beforehand? Now if you're talking about somebody that was a white collar worker, that's one thing. If you're talking about somebody that was making minimum wages at the time and those were usually the people that have stolen something or gotten into trouble and don't have the ability to hire high-class lawyers to get them out of it, they're the ones that usually get into these problems. So I'm wondering how you figure that. As Senator Christensen mentioned, you can be talking about maybe a half million dollars or so. Then as you go on, the medical and dental expenses, I don't have any problem with that and some of that stuff, there would be every right to have that. And then when you have the five years of physical and mental healthcare, I have no problem with that because I'm sure anyone that's been incarcerated for a length of time would be entitled to something like that. But then, when you start talking about reimbursement to any kind of education, colleges or community colleges, there I'm beginning to wonder what your...what this will work for some types of people that have gotten themselves into this situation. Some of them could do quite well with it and would be able to make progress; other ones, I think it would be a case where they would be going to college and probably would just be spending amount of time there. Now it depends on how many years they've been incarcerated and how much money that they would be compensated from the state. The compensation for child support is probably...there's no argument there, that that's a different situation. There were children involved. Here's...when you talk about compensation for reasonable costs from the claimant, then it gets into where they're going to have to hire a lawyer in order to settle those deals, and then you get into subparagraph (6) and it's reasonable attorney's fees, and that can be capped at \$75,000. Then they have to hire an attorney to protect themselves from this. So I'm wondering in there just how much of this would we have to pay and where it would come from. I can remember several years ago in the fifties when a lot of the Native Americans got paid huge sums of money because of a settlement for their lands, and that was a disaster. A lot of those people didn't know how to manage that money and they...and it was all gone in a matter of weeks. What I'm...my concern is, if you do have someone like this and they're entitled to the money, and I have no problem with the fact that they're probably entitled to the money, but should there be some kind of a system

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

Floor Debate
March 02, 2009

so that it isn't all gone in just a matter of time or what...how should that money be spent? Do you just give it to them as if they won the lottery and then they go out and do whatever they want to? So I think there's some other things that have to be taken care of in this bill. I would like to ask Senator Ashford to yield for a question, if he would, please. [LB260]

SENATOR PIRSCH: Would Senator Ashford yield to a question? [LB260]

SENATOR ASHFORD: I'm ready to go, Senator Louden. [LB260]

SENATOR LOUDEN: Okay. Thank you. During committee, when you... [LB260]

SENATOR PIRSCH: One minute. [LB260]

SENATOR LOUDEN: ...came up with this committee amendment, was there any discussion on a case where these people could maybe receive this huge sum of money and it would be gone in a matter of days? I mean how... [LB260]

SENATOR ASHFORD: Yes, there was discussion, Senator Louden, and first of all, we started with \$50,000 and \$100,000 and then we came down to \$25,000, so there was...but there was quite a bit of discussion about that and the sense is that these are adults who have been wrongfully convicted and we normally and under Nebraska law don't create the sort of guardian or conservatorship situations unless they are children or someone who cannot handle their own affairs. It is unlikely that that will be the case here. These are adults. They can handle their own affairs. The \$25,000 was really based on our sense that that was \$2,000 a month, in essence, that that was the value of freedom. And it's very...it's impossible to put a number on that, but that's what we came up with. [LB260]

SENATOR PIRSCH: Time. [LB260]

SENATOR LOUDEN: Now should...should there be a total cap... [LB260]

SENATOR PIRSCH: Time, Senator. [LB260]

SENATOR LOUDEN: ...on the whole thing? Thank you, Mr. President. [LB260]

SENATOR PIRSCH: Senator Hadley, you are recognized next, followed by Senators Wallman, Gay, Rogert, Carlson, and others. [LB260]

SENATOR HADLEY: Mr. President, members of the body, I applaud and appreciate the work of the committee and Senator Rogert in bringing this to the body. I thought it was interesting that most of these reversals, wrongful convictions had dealt with DNA

Floor Debate
March 02, 2009

evidence. And I did just a little research and on the first 30...130 exonerations, 101 of them were mistaken identifications by someone, 21 were microscopic hair comparisons that were wrong, informants or snitches was 21. But the one that really surprised me, 35 out of the first 130 exonerations were because of false confessions. People falsely confessed, which is exactly what happened in Beatrice. And lastly, three of them were that they had DNA that was not used correctly. You know what scares me is that these situations all deal with DNA and we have a whole listing of reasons that people were exonerated. Does it scare anybody else how many people we have in prisons now where there are not DNA evidence? There is not DNA evidence because of their crime. How many people do we have false imprisoned now that, for whatever reason, there's not DNA evidence that we can prove or exonerate them that makes it possible for them to have this amount of money? I do like the idea that there is other help in the bill. Again, doing some reading, this is...psychological issues are very common by people who have been exonerated and such as that. Lastly, I'm torn on Senator Harms's idea of some kind of a stretching out the payments because, again, some research has found that there has been problems with people spending the money very quickly, back on unemployment and such as that, which makes it difficult if you spend a long time imprisoned and then someone gives you a windfall at that point in time. Lastly, I don't know, it's hard to talk about whether we need a limit or not, but I worry as time goes on and we have more exonerations because of DNA and such as that. Is there an absolute amount per case that we're willing to spend? I would just open that up for anybody else to speak on because I think that's something that we, as a body, need to feel comfortable on when we're done. Thank you, Mr. President. [LB260]

SENATOR PIRSCH: Thank you, Senator. Senator Wallman. You are recognized to speak next, Senator Wallman. [LB260]

SENATOR WALLMAN: Thank you, Mr. President, members of the body. I struggle with this. May I ask Senator Rogert a question? [LB260]

SENATOR PIRSCH: Senator Rogert, would you yield for a question? [LB260]

SENATOR ROGERT: Yes, I will. [LB260]

SENATOR WALLMAN: Was this brought by the Beatrice, so-called, group? [LB260]

SENATOR ROGERT: Not necessarily. It was...most of the ideas behind it come from a group called the Innocence Project. They have folks like the so-called Beatrice Six in their sights when they're looking at these issues. So it doesn't come directly from those, but it's aimed at those types of folks. [LB260]

SENATOR WALLMAN: Okay. Thank you. I find it quite interesting. That is my district and they did plead guilty. We did furnish the attorneys for these cases. So they had an

Floor Debate
March 02, 2009

attorney paid for by us, by the county, and they were prosecuted and plead guilty. So was that our fault? Was that our fault they plead guilty? So are we going to pay people that...well, I'm going to plead guilty; I'll be in jail a couple years? Most of these people did not have jobs. They were paid for by us. So I think this is a Pandora's box, Merry Christmas, Happy New Year, so we have to be very careful if we dole out compensation here for unlawful or so-called wrongfully imprisoned individuals. So I would hope we'd all think carefully about this, the way it is now. If we're going to do it just for these people out at Beatrice, I would have to vote no. Thank you. [LB260]

SENATOR PIRSCH: Thank you, Senator. Senator Gay, you are recognized next. [LB260]

SENATOR GAY: Thank you, Mr. President. I have been listening and came in just like everyone, with an open mind on the bill, and I still do have an open mind. There are certain things, though, that when I was looking through this amendment, I understand AM545 was written this weekend and adding it to Judiciary amendment which...so I'm just going to talk on AM545. I'm looking at that and I look at, under Section 4, some of the things that can be compensated to the victims who are wrongly convicted: lost wages and earning capacity, which I think I don't know what that earning capacity of somebody may have been. If, let's say, they were put away, you know, for 20 years, I think we should do something on compensation, more of a fixed amount. But I don't know how some of these things are determined. Medical expenses incurred in the treatment of the claimant's injuries to date and certain to be incurred in the future, that's pretty open-ended, I think, on medical expenses. Vocational training, some of these things though when I look through the whole deal, I'm not going to go through every one, but many of these things are provided to our prisoners when they're incarcerated already. Educational opportunities, medical care, all that is provided currently. So to go out and just say, well, we're going to continue that on into the future is a little bit concerning. Senator Christensen brought up about the inflation factors and some of those things. That's a little uncertain as well. I do have a question for Senator Rogert, if he would yield. [LB260]

SENATOR PIRSCH: Senator Rogert, would you yield for a question? [LB260]

SENATOR ROGERT: I'd be happy to. [LB260]

SENATOR GAY: Thank you, Senator Rogert. Senator Rogert, the one thing, in your opening did you say that they go through...you got to be pardoned and then does it come to the Legislature to vote on and then to the Governor to sign? [LB260]

SENATOR ROGERT: Well, yeah, if you allow me a couple seconds here. The process by which all claims against the state work go through the State Tort Claims Board. Typically, if it's a substantial amount, that board will basically deny it in order to get it

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

Floor Debate
March 02, 2009

into court, so that they deny, they can file an appeal, and it goes back to the county, the district court in the county in which the tort was made. Then a judge decides what he feels is a proper settlement, kicks that judgment back to us. What usually has happened then at that point, the Risk Manager, Ms. Peterson, in the Department of Labor (sic) comes forth with two bills, one to approve or one to disapprove a certain amount for the raising of this case. It is taken up by the Business and Labor Committee and we decide whether we want to approve it, disapprove, which one of those bills we want, actually have the opportunity to amend it to a different dollar figure if we so choose. Then we bring...then it comes out to the body. Every year we've been here we've had some of those claims come to us and we voted on them. Many of them are small, we don't notice them, but there have been some fairly substantial ones that we've discussed and debated across here. At that point, we decide whether we approve or disapprove and it ends up to the Governor's Office for either a sign or a veto. [LB260]

SENATOR GAY: Okay. And the part...so just quickly, you said the Legislature could amend that judgment? [LB260]

SENATOR ROBERT: We sure can. [LB260]

SENATOR GAY: That scares me, and the reason why is because it would be a political issue, it would be an emotional issue. I think I'd rather see some sort of...maybe that's the only way we can do it legally, I don't know. But, to me, I'd rather have somebody that's followed that case and makes a good judgment after we created the law, it's written very well, it's covered, here's what you get, and that's the process we're doing now. But down the road, I'm worried. So let's say a case comes eight, ten years down the road, it's an emotional case, something is found. How would 49 members... [LB260]

SENATOR ROBERT: Well,... [LB260]

SENATOR GAY: ...discern that? [LB260]

SENATOR ROBERT: As far as I know, the committee and the Legislature follows pretty close to the recommendation coming from the judgment. [LB260]

SENATOR PIRSCH: One minute. [LB260]

SENATOR ROBERT: To my knowledge, I don't know that we've ever added money to it. I think what may come to it is say, no, it's a tight budget year, we don't want to pay that much, so it's usually amended down. But that's mostly what I've ever seen. Most the time it's either yes or no, but we have the ability to appropriate the money we choose. [LB260]

SENATOR GAY: Well, and, okay, and I guess that open-endedness scares me a little

Floor Debate
March 02, 2009

bit. And I know my time is running out but I think Senator Hadley made a point and he brought it up and I was thinking the same. You're exonerated. Let's say the worst case is you're incarcerated. There's no opportunities for DNA. We're not...is that...you know, but later they get...find out something was wrong. I'm not so sure that was...that would be that fair that it has to be a felony and you have to be...use the DNA. I just want to pay attention and learn a little bit more about that. But I do think that's an important question we need to consider here as we're moving along with this bill. So I thank Senator Rogert for yielding and I will probably ask a few more questions later. [LB260]

SENATOR PIRSCH: Time. Thank you, Senator. Senator Rogert, you are recognized to speak next, followed by Senators Campbell, Council, Fulton, Utter, Lathrop, and others. [LB260]

SENATOR ROGERT: Thank you, Mr. President, and thank you, Senators Fulton and Gay and Wallman and Hadley, for raising your concerns. I'll try to address a few of those on the notes I've taken. Maybe I'll go backwards in terms of...so we can remember what we were talking about. To help answer Senator Gay and Senator Hadley's questions about the cases that don't have DNA evidence with them, this isn't really a DNA case and this bill is not about DNA and it's not about necessarily the Beatrice Six. It's about allowing an opportunity, for those that have been and will be exonerated due to some sort of circumstance, to make a claim for restitution for being wrongfully imprisoned and convicted. They still have to go prove that they were innocent, either through a pardon or a vacated judgment, and they have to prove that they absolutely did not do it to this judge or to this board in order to be rewarded any damages. Also, all these things, medical claims, lost wages, vocational rehabilitation, all those things may be considered. It doesn't say "shall." It says they "may be." They still have to prove beyond preponderance of evidence to these guys that they have damages. If, like Senator Gay said, they've spent time in the prison educating themselves, rehabilitating themselves to a vocational level that's above where they were at prior to when they went into prison, I see no reason why a judge would grant them any further dollars for education, because the language says to a vocational standard of wage-earning capacity where they were at before they went in. So if they came out and they're better off, they've got a degree, that seems to me like they would be finished up with any extra money on that. We took away, in the amendment, any deliberation between dental expenses and other medical expenses and just...we put it all together and said reasonable, reasonable medical expenses that could be incurred in the future. A judge would determine that to be, in my opinion, because of what he has been experiencing prior. Pleading guilty is another issue that was brought up. Senator Wallman brought it up. If you look in Section 3(3) on page 2 of the amendment, "That he or she did not commit or suborn perjury, fabricate evidence, or otherwise make a false statement to cause or bring about his or her conviction or the conviction of another." If he walks in and pleads guilty in order to get off of another charge or to get somebody else in trouble or to try and make favor, that's going to kick him out of the...that's the

Floor Debate
March 02, 2009

gate right there. He's going to be kicked out immediately. Now if they can prove coercion, I don't think it's that hard to prove coercion if there was, the confession that they made will not be used to kick them out. For example, you're sitting in a room, you've been arrested along with your buddy for some type of charge, the prosecutor comes in and says, the other guy confessed, you just as well give up what you need to know or we're going to put you to death, so we need you to confess to something right now so that you can...so we can just get this over with. You're presented with a pretty awful situation there. I believe that happened in a couple of these cases in Beatrice, that they were coerced into confessing to save their skin, and that is a totally different thing than walking in and saying, I did it, to get some other guys in trouble and to try to get yourself off. That's where that language in there will help. That will be sorted out through a judge or through the board, whichever one they get to. [LB260]

SENATOR PIRSCH: One minute. [LB260]

SENATOR ROBERT: I think that answers most of the questions I got to. Senator Fulton asked about who can make the claim and I kind of went out and pointed to him that those...as Senator Lathrop meant, there is a gateway. There's three things they have to do. You have to prove...you have to get a pardon or you have to have your judgment vacated, and you have to...you could not have committed perjury to do it. So right there, that kind of keeps you...that's a big check right there. If one of the three of those things happen, you're going to have a hard time making a claim on this type of a bill. I'll look forward to listening to this more and answer any questions I can further on. Thank you, Mr. President. [LB260]

SENATOR PIRSCH: Thank you, Senator Rogert. Senator Campbell, you are next, followed by Senator Council and Fulton. [LB260]

SENATOR CAMPBELL: Thank you, Mr. President and colleagues. My questions have to do with Section 4, and before I go to this, several questions I'd like to say that I certainly support the underlying concept of this bill. I can't imagine being incarcerated for years and years, knowing that you are innocent. The questions that I have, and I'm going to ask Senator Lathrop if he would yield to the questions. [LB260]

SENATOR LATHROP: Yes, I would. Yes, I would. [LB260]

SENATOR PIRSCH: Very good. [LB260]

SENATOR CAMPBELL: Thank you. It is of great help to us to hear from the attorneys in the body because, as we get questions and e-mails from constituents, it's hard for us who are not attorneys to answer. So the question is, Senator Lathrop, can you frame a little bit about how the law reacts to compensation for physical and emotional pain, which is in Section 4? I've had a number of questions on that and I'm not quite sure how

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

Floor Debate
March 02, 2009

to answer constituents. [LB260]

SENATOR LATHROP: I'd be happy to. There is in the law recognized elements of damages, different things that you can make a claim for. So if you're making a claim in a contract action, you can recover, for example, lost profits. You can recover the cost to find substitute goods, for example. In a tort claim, that involves an injury of some kind, and we use "injury" in a generic sense and not in a particular somebody harmed me, I got a broken arm sense. But in the sense that you've experienced some kind of a wrong, which is how we use that terminology in tort law, then these are the usual elements of damage. So if you go to the Nebraska jury instruction book, which lawyers do when they're trying cases, you will find that these are standard, everyday, ordinary elements of damages for somebody that's suffered an injury in the generic or the general sense. The only thing about this bill that's unusual is that we recognize a loss for...or damages for the loss of freedom, which is very hard to calculate. And we're making a judgment about that with this bill, and I think that's a fair subject of debate. If you think that it's not high enough or you think it's too high, we can talk about that, but certainly the bill deserves our support. [LB260]

SENATOR CAMPBELL: May I follow up, Mr. President? Do I have any time left? [LB260]

SENATOR PIRSCH: You do. You have 2 minutes and 25 seconds. [LB260]

SENATOR CAMPBELL: Senator Lathrop, in the body of law, are there any sections that say that we will compensate someone up to an amount not to exceed? [LB260]

SENATOR LATHROP: Yes, one place. Long time ago we carved out an exception in tort law for doctors and people in the medical profession because they came down here and told the Legislature they were in crisis, so we capped damages at...currently the cap is at \$1.75 million, and political subdivisions also have a cap which is \$1 million, otherwise, no. [LB260]

SENATOR CAMPBELL: Thank you, Mr. President. And thank you, Senator Lathrop. [LB260]

SENATOR PIRSCH: Thank you, Senator. (Visitors introduced.) Continuing on, Senator Council, you are recognized to speak. [LB260]

SENATOR COUNCIL: Thank you, Mr. President, and good morning. I first want to thank Senator Rogert for bringing this bill forward, his recognition of a need for this state to take action to correct injustices. And in that regard, I just would like for us to take note of the fact that what this bill does is basically allocate liability, allocate responsibility, something that this Legislature does on a regular basis when it comes to other entities

Floor Debate
March 02, 2009

and organizations. In this case, the wrongdoing entity or organization is the state. It is the state that conducts the prosecution. And in the case of these confessions, and I certainly appreciate Senator Wallman's concerns, but I can certainly direct his attention to the number of psychological reports that have been written on how people can be psychologically coerced into confessions. And if you look at the language of this bill, this is not an easy hurdle to overcome. In order for someone to be eligible under this bill, they have to prove by clear and convincing evidence. That is one of the highest proof, if not the highest, proof standards in the law to convince someone by clear and convincing evidence. And in the case of coerced confessions, that's going to be an extremely high standard for an individual to overcome. In the case of DNA, it's going to be less difficult of a hurdle because the DNA evidence can conclusively establish someone's involvement. But with regard to the questions that have been asked by my colleagues, and they're all good questions, I just need you to know that the committee--and I want to commend the committee for thoroughly examining and discussing this issue--the committee in fact anticipated many of the questions that have been raised this morning. The one question that we anticipated that has yet to be addressed is the issue of how the state would make the payment of any amount awarded by either the State Tort Claims Board or a court. Now that's something that's certainly worthy of further consideration. Whether it is a lump sum payment or some percentage with the balance paid over installments, that's something that the committee discussed and recognized that there would be some discussion about that. Senator Lathrop, I want to thank him because he clearly explained the list of damages possibilities, and that's what that list is, what damages that an individual could recover if he or she were able to prove those damages by clear and convincing evidence. None of those items are certainties. There was a question raised about lost wages. Clearly, if an individual was not employed at the time, had no significant skill base, they would be hard-pressed to prove that they lost any wages greater than wages based upon minimum wage. But the fact of the matter is they did learn...lose that opportunity to earn and they lost that opportunity as a result of action by the state through its agents. Senator Wallman asked the question about the fact that the...in some cases, the defendants are represented by public defenders or other court-appointed counsel. Now we have to understand.. [LB260]

SENATOR PIRSCH: One minute. [LB260]

SENATOR COUNCIL: ...that, and particularly in the Beatrice case, we're talking about a death penalty case. I'm going to tell you, I would never accept a death penalty case because I'm not proficient in the law of capital punishment. I would not want to risk my client's life on my learning how to handle a death penalty case. And in those cases, oftentimes the offer of a lesser sentence can lead to the result that occurred in the Beatrice case, and that is people admitting to crimes that they did not commit particularly in view of the fact that they were being threatened with the death penalty. I would urge this body to carefully consider this legislation, consider the thought that has

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

Floor Debate
March 02, 2009

gone into the development of this legislation, and urge you to support the amendments and the underlying bill. [LB260]

SENATOR PIRSCH: Thank you, Senator. Senator Fulton, you are recognized next, followed by Senators Harms, Utter, Lathrop, Gay, Wallman, and others. [LB260]

SENATOR FULTON: Thank you, Mr. President, members of the body. Would Senator Rogert yield to a question? [LB260]

SENATOR PIRSCH: Senator Rogert, would you yield to a question? [LB260]

SENATOR ROGERT: Yes, I will. [LB260]

SENATOR FULTON: Thanks again, Senator Rogert. The...I guess I...for my information and hopefully probably for the information of folks here on the floor, how...so I raised a concern about the level of epistemology here or the level of knowledge from a preponderance of the evidence to clear and convincing evidence. You're going to be providing an amendment or someone is going to be providing an amendment to AM545? Or I guess how do we change preponderance of the evidence to clear and convincing in AM545? How will that occur? [LB260]

SENATOR ROGERT: There's two ways we can do that, Senator. Depends on how long we keep talking and how long we get going here. If we're on until noon, we have no problems. The Bill Drafters right now is working on an amendment and it's going to be AM547 and it's basically the same thing that we have right here with AM545 with a couple of changes, putting in on line 20 clear and convincing evidence and then changing the standard back to preponderance for Section 4. If that comes down and we're still on it, we'll file that amendment and I'll just withdraw this one and put that one in its side. If at some point we run out of lights and we want to vote on this amendment, I would ask that we pass the amendment and then I'll make a floor amendment, which we have right here, to the committee amendments that would change that same thing. Because I can't amend this amendment to the amendment. Can't amend to the third degree. [LB260]

SENATOR FULTON: So it's your intention to amend on to AM456? [LB260]

SENATOR ROGERT: Either way. Yes, yes, absolutely, that's the way it has to be done. We'll amend on to AM456 one way or another. [LB260]

SENATOR FULTON: So if there are any other considerations or concerns that we have, how will those... [LB260]

SENATOR ROGERT: All further amendments will be either AM456 or to the underlying

Floor Debate
March 02, 2009

bill once the committee amendments are passed. [LB260]

SENATOR FULTON: Okay. All right. Thank you, Senator Rogert. [LB260]

SENATOR ROBERT: You bet. [LB260]

SENATOR FULTON: I do have a number of questions, some of which I'll probably just get off the mike with Senator Rogert, Senator Ashford, Senator Lathrop, but there is something I think that needs to be discussed publicly and that is how one comes to a finding that the claimant was innocent. So this might be something for Senator Lathrop if he would yield to a question. [LB260]

SENATOR PIRSCH: Senator Lathrop, would you yield to a question? [LB260]

SENATOR LATHROP: Yes, I would. [LB260]

SENATOR FULTON: Okay. I am on AM545, page 2, line 2. It seems to me then from reading this subsection that there are two mechanisms by which one could qualify for this act. Number one, the Board of Pardons pardons the claimant or, and this is line 3, that a court has vacated the conviction of the claimant based upon a finding that the claimant was innocent of the felony crimes. How does...I have...I'm ignorant of the process by which this could occur. Could you explain how one, a claimant, was innocent of the felony crime? Does the judicial branch come back and retry someone? So I understand the Board of Pardons, I get that. What's the "or"? Can you explain the "or" of Section 2? [LB260]

SENATOR LATHROP: Sure. First of all, in both instances whether it's a pardon or having your conviction vacated, in both instances they have to be based upon the finding of innocence. Okay. So it's not enough... [LB260]

SENATOR FULTON: Senator, that might be where my problem is. Where does the finding of innocence come into play? [LB260]

SENATOR LATHROP: Where? It's the standard. I mean, if you get pardoned because of innocence...what we try to make a distinction in the bill is, for example, when the President leaves office the last thing he does pardon a bunch of his friends, right? We've seen it happen as every President leaves. It's just a fact. [LB260]

SENATOR PIRSCH: One minute. [LB260]

SENATOR LATHROP: It doesn't have anything to do with those people being innocent, they're friends or donors or they have a good story and the President buys into it. What we're talking about is if the Board of Pardons pardons somebody because of actual

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

Floor Debate
March 02, 2009

innocence or a district court, typically, concludes that the person was innocent, now, Senator Fulton, that's a very rare thing, very rare. In order for someone to come back to the district court and say, you know what, I found some new evidence, notably DNA, that shows that I was never at the scene or it shows that some guy in the penitentiary was actually there and I wasn't. That's the circumstance. That's how this would all come about and there are two avenues. One is just to go to the Pardons Board and demonstrate your innocence and be pardoned, and the other would be to go to the district court and have the judgment vacated. [LB260]

SENATOR FULTON: Okay. That helps. I think the rarity that you are talking about explains my ignorance because I don't recall this happening. But we are providing a mechanism by which this... [LB260]

SENATOR PIRSCH: Time. [LB260]

SENATOR FULTON: Thank you, Mr. President. [LB260]

SENATOR PIRSCH: Thank you, Senator. Mr. Clerk, for an announcement. [LB260]

CLERK: Mr. President, Natural Resources will hold an Executive Session now underneath the north balcony; Natural Resources now, north balcony.

SENATOR PIRSCH: Thank you, Mr. Clerk. Senator Utter, you are...I'm sorry, Senator Harms, you are recognized to speak, followed by Senator Utter, Lathrop, Gay, Wallman, and others. [LB260]

SENATOR HARMS: Thank you, Mr. President, and colleagues. Senator Rogert, would you yield, please? [LB260]

SENATOR PIRSCH: Senator Rogert, would you yield for a question? [LB260]

SENATOR ROGERT: Yes, I will. [LB260]

SENATOR HARMS: Senator, when you wrote this legislation, did you use...did you review any of the other states in regard to the kind of laws they have and how it's working? [LB260]

SENATOR ROGERT: Yes, I did. [LB260]

SENATOR HARMS: Did you model it after any particular state? [LB260]

SENATOR ROGERT: Well, as...yes. Not necessarily, but I think looking at some others, I would say this is probably as close to the most recent bill...law that was passed, and

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

Floor Debate
March 02, 2009

that would be New York State. [LB260]

SENATOR HARMS: Would you repeat that, please? [LB260]

SENATOR ROBERT: I'd say it's probably most modeled towards the most recent state that passed legislation like this, which would be New York State. [LB260]

SENATOR HARMS: Okay. When you did that, when I look at the base of \$25,000, is that pretty consistent with what you have found as you looked at other states? [LB260]

SENATOR ROBERT: It's about in the middle. There are some that are more and some that are less. At \$50,000 it definitely was one of the higher and at \$25,000 it's, I would call it, right in the middle. [LB260]

SENATOR HARMS: Did any of the other states that you reviewed address the issue of giving them money upfront without any control or any help or any procedure or process that you need to use? [LB260]

SENATOR ROBERT: Well, if you give me about a minute, let me maybe elaborate on that a little bit. [LB260]

SENATOR HARMS: Sure. [LB260]

SENATOR ROBERT: I don't know that they did because at least in the way our statutes work, if what we're doing is we're making this part of the Tort Claims process. So our state Tort Claims process doesn't have a structured settlement provision. It just says we write a check. To do that, we'd have to create a fund and a manager in those types of situations. Other states may do their process a little bit different and that what makes...that's why I really didn't get into that. I will say that I think this is probably some sort of a...close to a two-year process before they get paid. In my amendment it says that nothing in this act says that we can't start helping them right away while they work with the process. Meaning, we'll give them some sort of...find them some housing, take care of their insurance and their medical possibilities, and start working on their vocational training, if necessary, like we did with the Beatrice Six. And by the time they get pardoned, get through the State Tort Claims Board, which could take six months, they could sit on it, it may end up back in an appeal to a district court. It could take another amount of time and then by the time it comes to the Legislature, it could very easily be two years before they got paid the first time, of which, in that time, we would definitely be, probably, be offering them some counseling services and some advice on that. [LB260]

SENATOR HARMS: Thank you very much, Senator. Senator Ashford, would you yield? [LB260]

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

Floor Debate
March 02, 2009

SENATOR PIRSCH: Senator Ashford, will you yield to a question? [LB260]

SENATOR ASHFORD: Yes. Yes, Senator. [LB260]

SENATOR HARMS: Senator Ashford, I'd like to finish the conversation I was having with Senator Lathrop. He was really very helpful in... [LB260]

SENATOR ASHFORD: Okay. No, I can understand that. (Laughter) [LB260]

SENATOR HARMS: And I'm sure you're going to be very helpful, too. [LB260]

SENATOR ASHFORD: Let me see if I can clean it up for you, Senator Harms. [LB260]

SENATOR HARMS: (Laugh) Okay. Well, you pick up the pieces for me, will you? Senator Ashford, as you look at the \$25,000 base, and I keep coming back to that. And then from that point on, we start adding to that. [LB260]

SENATOR ASHFORD: Correct. [LB260]

SENATOR HARMS: Have you done any numbers at all? And I know you can put models together and you can run all kinds of different opportunities that...or cost issues that might occur with the bottom line of this. Have you done any of that at all in regard to looking... [LB260]

SENATOR ASHFORD: Well, that's a good question. I'll tell you from my perspective, Senator Harms, what I...my thinking, the \$25,000 was a compromise down from the \$50,000 that was originally proposed. And to be honest with you, that was my kind of sort of gut amount. We all have to look at this at what is fair for having...to be incarcerated. You know, and there's also been some discussion about having some sort of cap for these cases. [LB260]

SENATOR PIRSCH: One minute. [LB260]

SENATOR ASHFORD: And the one model...and it's possible that these cases could exceed \$1 million. And maybe there is some discussion, probably is some discussion. We had a little of it in the committee over putting some kind of a cap. It is hard for me and I thought about it for three or four days or more, a couple of weeks, as to what is a fair amount and \$25,000 is what I kept coming back to. I don't want to take any more of your time. [LB206]

SENATOR HARMS: Thank you, Senator. I don't have a problem with the \$25,000, okay. The issue or the concern that I have is when you start adding to that and what all these

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

Floor Debate
March 02, 2009

other components will cost us, and what the bottom line would be, that's really what I'm concerned about. I support LB260. [LB260]

SENATOR ASHFORD: Yeah, it could... [LB260]

SENATOR HARMS: I think it's something we need to do. [LB260]

SENATOR ASHFORD: Right. And I think that's right, Senator Harms. And I think some discussion around some top-end number is probably a good idea at some point as we get through Select or General or whatever. I mean...but certainly, the \$25,000 is probably too low as a cap but some sort of discussion... [LB260]

SENATOR PIRSCH: Time. [LB260]

SENATOR ASHFORD: ...about that would be probably worthwhile. [LB260]

SENATOR HARMS: Thank you. [LB260]

SENATOR PIRSCH: Senator Utter, you are recognized next, followed by Senators Lathrop, Gay, Wallman, Carlson, Price, and others. [LB260]

SENATOR UTTER: Thank you, Mr. President, and good morning colleagues. I have several questions here that I would like to ask and I guess I'd like to address those questions to Senator Rogert and if that's not the appropriate place, then, Senator Ashford, I see you as next in line. [LB260]

SENATOR PIRSCH: Very good. [LB260]

SENATOR UTTER: And I assume that under the provisions of law that we currently have in the state that anyone that has been wrongly convicted and has been exonerated similar to the provisions that would occur under this law, have the right to sue now, is that correct? [LB260]

SENATOR PIRSCH: Senator Rogert, would you yield to that question? [LB260]

SENATOR ROBERT: Actually I'm going to have you repeat the question if you would, please. [LB260]

SENATOR UTTER: Now you're asking me to do double duty here and you're using up my time. (Laughter) My question was...well, Senator Ashford...let me redirect the question to Senator Ashford. [LB260]

SENATOR PIRSCH: Senator Ashford, would you yield to a question? [LB260]

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

Floor Debate
March 02, 2009

SENATOR ASHFORD: Thank you, Mr. President, and I...the answer, I believe, hopefully, is that right now there is no limit on the amount that someone can recover under the State Tort Claims Act for other kinds of actions. So there is no cap. When we implemented the State Tort Claims process in the committee, traditionally, and everywhere, there is no limit to liability. The \$25,000 was an amount that we felt would compensate someone for the loss of their freedom realizing that there is no amount that can compensate somebody for the erroneous loss of freedom. That's how we got to that. [LB260]

SENATOR UTTER: So they do have that right to sue, even though we don't have this to sue the state for wrongful imprisonment and to collect some kind of damages even... [LB260]

SENATOR ASHFORD: No. No, I don't believe they do, Senator. [LB260]

SENATOR UTTER: Okay. [LB260]

SENATOR ASHFORD: There is no cause of action for wrongful conviction, I do not believe. That's why we have to do this. I was talking about the general Tort Claims Act, but I don't believe that there is a cause of action allowable. [LB260]

SENATOR UTTER: And so then the next question would be that would the folks that have been wrongly convicted and served time and then exonerated have the right to sue for any damages beyond the provisions that we're placing in this bill? [LB260]

SENATOR ASHFORD: That's correct, Senator. And you've analyzed it absolutely correctly. And the reason for that is the unique nature of this kind of claim. In this case there is a denial of freedom through no fault of the individual claimant. That is an unusual, unique, very rare kind of occurrence. And that's why we put the \$25,000 minimum, if you will, in there. [LB260]

SENATOR UTTER: And Senator Ashford, can you, can you lead me just a little ways down the road and give me the thinking beyond the doubling of that amount for someone that is held on death row? [LB260]

SENATOR ASHFORD: Senator Utter, only that I cannot imagine what it would be like to be on death row and not having committed the crime. I think it was...I just can't even imagine it. So I think, again, it's again our effort to try to react to the circumstance and come up with a number. It seemed doubling was appropriate with the, you know, the fear and just the frustration that must go into somebody who is...and of whom...and we've had those cases in Nebraska where someone is on death row and they shouldn't be there. So I don't know. I mean everybody has to come up with their own number, I

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

Floor Debate
March 02, 2009

think. I don't know what that number... [LB260]

SENATOR UTTER: One further question... [LB260]

SENATOR PIRSCH: One minute. [LB260]

SENATOR UTTER: ...that hopefully somebody can answer for me. The...what are the tax consequences of any receipt of proceeds under this bill? [LB260]

SENATOR ASHFORD: There are no tax consequences. The claimant would have no income tax consequence. [LB260]

SENATOR UTTER: Thank you. And thank you, Mr. President. [LB260]

SENATOR PIRSCH: Thank you, Senator. Senator Lathrop, you are recognized next, followed by Senators Gay, Wallman, Carlson, Price, and others. [LB260]

SENATOR LATHROP: Thank you, Mr. President, and colleagues. I did want to stand up and let you know that we have an amendment coming that will make that preponderance of the evidence to a clear and convincing. If we don't see that before lunch today, we'll see it tomorrow morning. The other thing I wanted to do is to talk about what we're doing here today in Senator Rogert's bill, because a number of you have brought up very real and understandable concerns about the dollars involved. How we came up with \$25,000? How we came up with \$50,000? Should there be a cap? Shouldn't there be a cap? Let me encourage the body to approach it this way: First of all, Senator Rogert's bill is first and foremost primarily about a process. The process is if the criminal procedure, and at the process that we use in this country and the state of Nebraska, results in the wrongful conviction of somebody and somebody does time, should that person be compensated? That's the question. That's the underlying question about LB260. And my sense of the body is, most people say, yeah. Somebody that's had that happen to him, somebody that spends time in prison ought to be compensated. Beyond that, we're talking about: What should the amount be? Should there be a cap? Those are different subjects and the reason I bring that up now is because we'll probably take a series of amendments before we get LB260 to a place that everyone or more people will be comfortable voting on. Moving this amendment or the substitute that we'll see shortly can happen and I would urge you to support it with the understanding that we'll take up, somebody can put a request for an amendment in or an amendment in, about the dollar amount--whether you think \$25,000 is too high. We can talk about whether there ought to be a cap on a recovery. Those are all fair, but they're not reasons to not support this amendment or the bill. So what I'm going to ask you to do for the rest of our discussion on Senator Rogert's bill is, if you have concerns, share them. Please turn your light on and tell us what you're thinking about the damages because if they need to be capped or if they need to be brought down some.

Floor Debate
March 02, 2009

Senator Fulton has expressed some concerns as has Senator Christensen about what happens if one of these occur. Are we looking at \$1 million liability for the state? If so, boy, I'm spooked on the bill. You know what? Tell us that's what your concern is and let's have a conversation about damages. But that's in addition to the bigger question, which is process. And Senator Rogert's bill, I think, provides a process. I think it deserves our support. I think your concerns about the dollar amount, what we're spending, and whether there ought to be a cap deserve attention and they deserve debate. And we ought to have that debate so when we get down to LB260, it reflects the consensus of the body on what should be the dollar amount per year for the loss of freedom. What should be, if anything, the cap. So I appreciate the conversation that's gone on so far, the debate. I appreciate your concerns and those of us that are a little bit invested in this, in addition to Senator Rogert, understand that some of these things may have to be changed to accommodate the body. That's perfectly fine, but please don't vote against the amendments because you have concerns about the dollars, which we can take up momentarily. Thank you. [LB260]

SENATOR PIRSCH: Thank you. Senator Gay, you are recognized next, followed by Senators Wallman and Carlson and others. [LB260]

SENATOR GAY: Thank you, Mr. President. I'm sure the committee had many discussions on all these questions we're asking here on the floor, I'm sure were probably covered in committee, I would hope. So I agree with Senator Lathrop, it should be clarified out here on the floor. I do believe there should be a cap. I have a lot of concerns with some of the vagueness of these, what I had just mentioned earlier in Section 4, that we need to look at. But that's exactly why we're here and asking questions and, I think, getting good answers and good questions. Would Senator Ashford yield to a question? [LB260]

SENATOR PIRSCH: Senator Ashford, would you yield to a question? [LB260]

SENATOR ASHFORD: Yes. [LB260]

SENATOR GAY: Senator Ashford, on this bill, spurred by other things, but this Beatrice Six is obviously the biggest cause, could any of those victims be eligible for these funds if this law were to pass? [LB260]

SENATOR ASHFORD: The victims of the crimes? [LB260]

SENATOR GAY: Those wrongly convicted, now they've been pardoned. [LB260]

SENATOR ASHFORD: Yes. Yes. [LB260]

SENATOR GAY: So they're eligible to receive these. So it's very important that we get

Floor Debate
March 02, 2009

some of these things worked out. [LB260]

SENATOR ASHFORD: Yes. Absolutely, Senator Gay. You're absolutely right. [LB260]

SENATOR GAY: Okay. All right. Thank you, Senator Ashford. What I was...one of the questions I had talked about, why a flat sum. I do believe there's many times if you were...and I'm sure it would be terrible, but you have educational opportunities, medical, you get a lot of things when you're incarcerated that, you know, are not great and no one, of course, wants to be incarcerated. I'm not saying that, but I do believe some of these things if our system is working, correction system is working the way it should be, should be covered, you know, and I hope people would try to advance their education and learn and do some other things. When we talked about this, I have a question for Senator Rogert, if he'd yield to a question. [LB260]

SENATOR PIRSCH: I'm sorry, would you yield to a question? [LB260]

SENATOR ROGERT: Yes, I will. [LB260]

SENATOR GAY: Thank you, Senator Rogert. Is there a federal...if you were...is there a federal bill like this somewhere? [LB260]

SENATOR ROGERT: Yeah, there is. One of the major...when I went into discussion about torts when we first got started here, a major classification of tort is federal imprisonment or false imprisonment, excuse me. Many years ago, I think in 1947, we developed the Federal Tort Claims Act and so if we put people in a federal prison wrongfully, they can make claim just similar to this. I don't know the numbers and what the caps are, but I believe it's more than where we're at right now. When I saw it, I believe it was like \$50,000. [LB260]

SENATOR GAY: Okay. Thank you, Senator Rogert. Also, Senator Rogert, when you were in committee..., [LB260]

SENATOR ROGERT: Right. [LB260]

SENATOR GAY: ...I still am very uncomfortable when Senator Lathrop saying what are you uncomfortable with. I'm still very uncomfortable with the fact that the Legislature could come in and they're awarded healthcare and then somebody eight years or two years down the road say, oh, that's way too much in healthcare. They shouldn't receive this. They shouldn't receive that. And it starts getting like any amendment. There's three amendments now, maybe more coming on this bill. Anything could happen. That scares me. I think...did you look into an alternative that would be available that's not a political body per se, but a...some other board that could look at this thing instead of bringing it to the Legislature? That concerns me. [LB260]

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

Floor Debate
March 02, 2009

SENATOR ROBERT: Well, actually it originally was brought down through a court system and in conversations with the Attorney General's Office and the attorneys in this building, we decided that any time that the state is going to make a payment for some type of claim against it, it has to come through here. And that process has been written out because it is as limited as it possibly can this way. It actually has more likely greater parameters of getting out of control if you leave it up to the sole judgment of a court. I think...because then you're leaving it up to one person. You can get a very, very liberal judge that would say we're going to award this guy \$10 million for... [LB260]

SENATOR PIRSCH: One minute. [LB260]

SENATOR ROBERT: ...all of his stuff, so. [LB260]

SENATOR GAY: Well, so they couldn't go against the Department of Corrections then or the Chief Justice? It's a suit against the state of Nebraska is what it is what I'm saying. There's no other way... [LB260]

SENATOR ROBERT: It is. It is, because everything...everybody, the Department of Justice, the Corrections and the courts, they're all employees of the state. [LB260]

SENATOR GAY: Well, we're looking for, I guess, input in...that still concerns me. I think it always will concern me. Unfortunately, if there's no other way and you've looked at that, I will continue to look as well. Maybe there's something that we can do. Thank you, Mr. President. [LB260]

SENATOR PIRSCH: Thank you, Senators. Senator Wallman, you are recognized next, followed by Senators Carlson, Price, Ashford, Rogert, and others. [LB260]

SENATOR WALLMAN: Thank you, Mr. President. Would Senator Ashford yield to a question? [LB260]

SENATOR PIRSCH: Yes, Senator Ashford, would you yield? [LB260]

SENATOR ASHFORD: Yes. [LB260]

SENATOR WALLMAN: If I'm incarcerated as now, do we, does the state pay child support? [LB260]

SENATOR ASHFORD: Does the state pay child support? No. [LB260]

SENATOR WALLMAN: Okay. But they get a per diem, so much money per day in prison, right? [LB260]

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

Floor Debate
March 02, 2009

SENATOR ASHFORD: Correct. If they're working. [LB260]

SENATOR WALLMAN: Okay. You know, I still have trouble if we incarcerate people that are innocent. Do they have the due process? Maybe we should look at due process of law. Review those cases before this happens and if some counties have troubles with this, maybe that's where we should go. But this compensation issue is like we're bailing out, like a golden parachute almost with what we've been dealing with in federal government. So I'm looking interesting to see, be interested in how this goes, and I'll turn my time, the rest of my time to Senator Ashford, if he wants it. [LB260]

SENATOR ASHFORD: I wouldn't mind taking it. Thank you, Senator Wallman. Mr. Speaker, I'm taking Senator Wallman's time if it's okay with you. [LB260]

SPEAKER FLOOD PRESIDING

SPEAKER FLOOD: You may proceed. [LB260]

SENATOR ASHFORD: Thank you. Senator Lathrop, could I ask you a question on the record, if I could? [LB260]

SENATOR LATHROP: Yes. [LB260]

SENATOR ASHFORD: Senator Lathrop, could you explain the effect of two things? One... [LB260]

SPEAKER FLOOD: Senator Lathrop, will you yield to a question from Senator Ashford? [LB260]

SENATOR LATHROP: Yes, I will. [LB260]

SENATOR ASHFORD: So question number one is, what would happen and as often does in a case where there's a claim filed and there's a settlement reached, how would the...how would that normally be handled as it relates to other causes of action that could be out there against the state of Nebraska? [LB260]

SENATOR LATHROP: Very good question. I've heard that concern which is, what's stopping somebody from filing one of these claims, getting some money from the state, and then bringing a second one? And the answer is, if you resolve your claim, and Senator Lautenbaugh is on the defense side of things and I think will agree with me, when you settle a case, before you receive the settlement proceeds, you have to sign a release, which is your promise as a claimant, that you're not going to bring another claim. So that release typically says that the claimant receives X number of dollars in

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

Floor Debate
March 02, 2009

the settlement of his claim, that he promises never to bring a claim against the state of Nebraska or any of its officers, agents, employees or assigns, and it will also say that the release does not and the payment of the money does not operate as an admission. Which means, that if there's three people all in the same circumstance, paying one of them doesn't mean that you've just admitted responsibility to plaintiffs two and three, and that's very typical. [LB260]

SENATOR ASHFORD: What would happen then in the second case where there's a judgment rendered against the state under this process for these exonerated persons, these are the other lawsuits that they might bring potentially against other state agencies or... [LB260]

SENATOR LATHROP: You can have a case where you bring a claim, one of several...let's take a bus accident, one of several people in the bus. The bus runs a red light. The first person brings a claim. If that person establishes liability, then it would serve to benefit the others in the bus. But that doesn't mean that they've established their damages, just liability. [LB260]

SENATOR ASHFORD: Would there be...in the exoneration cases that we're talking about here, could we preclude theoretically that claimant from bringing, in this bill, subsequent actions against the state? [LB260]

SENATOR LATHROP: We could. And I just had that conversation with a number of people that were gathered here a moment ago. We can bring an...put an amendment on this bill that says that if a person elects to bring a claim under the...Senator Rogert's bill, that it shall be their exclusive remedy and they shall have no other remedy in or be able to avail themselves of any other remedy in tort or in federal or state law. [LB260]

SPEAKER FLOOD: One minute. [LB260]

SENATOR ASHFORD: Thanks, Senator Lathrop. And I, Mr. Speaker, members, I appreciate Senator...and I could have asked Senator Lautenbaugh the same question. We have two very good, very...we have two experts on these issues in this body on, normally that take two different sides of this issue, one on the plaintiff's side and one on the defendant's side, Senator Lautenbaugh and Senator Lathrop. So I think that's a good amendment, Senator Lathrop, and I certainly...that's something we could draft and deal with either on General File or on Select. Thanks, Mr. Speaker. [LB260]

SPEAKER FLOOD: Thank you, Senator Ashford. While the Legislature is in session and capable of transacting business, I propose to sign and do hereby sign LR29 and LR30. Continuing with discussion, our last speaker for the day in all likelihood is Senator Carlson, you are recognized. [LB260 LR29 LR30]

Floor Debate
March 02, 2009

SENATOR CARLSON: Mr. President and members of the Legislature, first of all I support the idea in the underlying bill of LB260. As I've thought about this, I could imagine if my son had been convicted of a crime he didn't commit, spent that time in prison, that my attitude would be, you better watch out, because there needs to be some compensation here, and I do understand that. As I make some comments here, I may be asking questions or commenting on something that's already been discussed, but those of us that are here know that we have other responsibilities. We come in and out by necessity, and so if I'm repeating something, I'm sorry, but this is important enough that I'm going to do it anyway. When we talk about innocence, I think of the term. What does innocence mean? My definition would be that it is fault free. The opposite of innocent is guilty. And a lot of times you talk about so-and-so is guilty, the response will be, yes, but. And we all kind of understand that and we're in that category and as I think about this whole process, that's kind of what bothers me a little bit about this concept. It's maybe someplace in between. There are degrees of innocence in our minds. There's 100 percent innocence. I think the unborn fall in that category. There are maybe 95 percent innocent, maybe 80 percent innocent, 51 percent innocent. What happens in this bill to someone that might be 51 percent innocent? Then I think of the concept of being wrongly convicted. In trying to think in layman's terms of some various circumstances that that might entail. I think in a crime if someone is misidentified, they weren't even there, they had nothing to do with it, but somehow through a scheme or whatever, they got pulled in. They got wrongfully convicted and they served time. That would be an example to me of totally innocent. Then you have the possibility of someone that was present at the crime, but really took no part, but got thrown into it. And perhaps by the guilty, wasn't even too well acquainted with that crowd but happened to be there, went with them, got pulled in, wrongly convicted. Then you have the one that's been there awhile, been with those friends maybe, out with them, maybe thought that crime wouldn't be a bad idea, but just didn't really take part in it but gets pulled into it anyway, now we're getting down into the 80 percent or whatever of innocence. So this whole concept is a serious matter. We had evidence and I know the Judiciary Committee has spent a lot of time, lot of discussion, lot of good heads on that committee, but the original bill LB260 came out as AM456 and then today we have AM545, and in a relatively short period of time, we've got substantial changes to a bill. The point is, I think we all understand this is serious. We're not under any time constraints. Let's take our time. I think that there needs to be a cap established for damages. And we're talking about a crime that someone didn't commit,... [LB260]

SPEAKER FLOOD: One minute. [LB260]

SENATOR CARLSON: ...and then perhaps coming up with a cap on damages that could be paid. And as Senator Harms brought up, I think it perhaps could be another crime to give somebody \$1 million tax free all at once, and we don't want to commit that. If I was given \$1 million tax free today, could I handle it? I hope so, but it might be spent in a hurry. So let's take our time on this. Let's get it right and let's stay at it until we do.

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

Floor Debate
March 02, 2009

Thank you, Mr. President. [LB260]

SPEAKER FLOOD: Thank you, Senator Carlson. Mr. Clerk, items for the record.
[LB260]

CLERK: Mr. President, your committee on Enrollment and Review reports LB204 as correctly engrossed. Have hearing notices from the General Affairs Committee signed by its Chair, Senator Karpisek. New resolutions: LR40, Senator Harms; LR41, Senator Giese. Both will be laid over. Have confirmation hearing report from Natural Resources offered by Senator Langemeier as Chair. Amendments to LB260 to be printed, Senators Lathrop and Wallman. Name adds: Senator Sullivan, LB153; Senator Cornett, LB675; Senator Sullivan to withdraw from LB666. (Legislative Journal pages 623-625.) [LB204 LR40 LR41 LB260 LB153 LB675 LB666]

And I have a priority motion. Senator Mello would move to adjourn until Tuesday morning, March 3, at 9:00 a.m.

SPEAKER FLOOD: Thank you, Mr. Clerk. Members, you have heard the motion. All those in favor of adjourning say aye. Those opposed say nay. We are adjourned.
(Gavel)