

MINUTES

**MONTANA SENATE
52nd LEGISLATURE - REGULAR SESSION**

COMMITTEE ON JUDICIARY

Call to Order: By Chairman Dick Pinsoneault, on January 29, 1991,
at 10:00 a.m.

ROLL CALL

Members Present:

Dick Pinsoneault, Chairman (D)
Bill Yellowtail, Vice Chairman (D)
Bruce Crippen (R)
Steve Doherty (D)
Lorents Grosfield (R)
Mike Halligan (D)
John Harp (R)
Joseph Mazurek (D)
David Rye (R)
Paul Svrcek (D)
Thomas Towe (D)

Members Excused: Bob Brown (R)

Staff Present: Valencia Lane (Legislative Council).

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

Announcements/Discussion:

HEARING ON SENATE BILL 170

Presentation and Opening Statement by Sponsor:

Senator Eleanor Vaughn, District 1, said SB 170 was requested by the Department of Institutions (DOI) to establish qualifications for sex offender evaluators. She read through the bill, and said it defines who is to pay costs. Senator Vaughn stated an amendment addresses which costs will be reimbursed by local government, under 3-5-901, MCA. She told the Committee there is no fiscal impact.

Proponents' Testimony:

Representative Dorothy Cody, District 20, advised the Committee she co-sponsored SB 170, and had an amendment to page 1, line 23 which is not yet drafted. She explained that the amendment would strike "established by the Montana Sex Offender Treatment

Association" and would insert "Montana Department of Institutions".

Representative Cody advised the Committee there are two different groups, each treating about 50 percent of offenders. She said everyone has ideas about how to treat sex problems, and the amendment would like establishing of guidelines to DOI.

Dan Russell, Administrator, Corrections Division, DOI, said 46-18-111, MCA, refers to probation and parole offices of DOI who prepare pre-sentencing reports. He stated that if the victim is less than 16 years old, an evaluation and treatment recommendation must be included.

Mr. Russell explained that this is a very specialized field, and that it is very important that only those qualified to do so, present investigative reports. He stated that if a defendant is indigent the cost should be the responsibility of the district court, and can be reimbursed by the Department of Commerce, Local Government Assistance Division.

Mr. Russell urged committee support in clarifying language to eliminate problems caused DOI in the past four years. He stated he concurred with Representative Cody's amendment.

Star Jameson, Executive Director, Women Victims of Sexual Assault - Womens Place, Missoula, told the Committee one in three women and one in five men are sexually assaulted before age 20. She reminded the Committee that SB 170 takes very seriously each offender and begins tracking them so that very serious offenders are committed.

Ron Silvers, Montana Sex Offenders Treatment Association, and Helena Center for Sexual Health, said the Center treats both perpetrators and victims. He explained that evaluations need to be very specialized and highly structured to determine outpatient treatment amenability and to asses re-offense risk. Mr. Silvers stated he could not emphasize enough how risk for re-offense will always be there, no matter what the treatment. He added that risk can be reduced by evaluation.

Opponents' Testimony:

There were no opponents of SB 170.

Questions From Committee Members:

Chairman Pinsonault asked Ron Silvers about the comment that even castration does not do any good. Mr. Silvers replied that he agreed, "once a sex offender, always a sex offender", and said chemical castration does minimize risk for re-offense. He explained that it is a daily learning process as to what is not effective and what is not enough.

Mr. Silvers stated that incarceration alone and/or chemical castration is not enough. He advised the Committee treatment is needed before, during, and after incarceration, and said most evaluators are not opposed to incarceration. Mr. Silver commented he is reluctant to accept rapists right from the court system, as they need time to stabilize. He added that he believes those needing Depoprovera do not belong in out-patient treatment.

Chairman Pinsoneault asked Ron Silvers for his background in working with sex offenders. Mr. Silvers replied he is a Licensed Professional Counselor in Montana with a Masters in Guidance and Counseling in Montana. He stated he was trained at Pima County in Arizona as part of his graduate study, working with both victims and sex assaulters.

Ron Silvers explained he has been at the Center for Sexual Health in Helena since 1986, and has been director since 1988. He advised the Committee he is a member of the Montana Sex Offenders Treatment Organization which meets every three months. He said the Organization is seeing perpetrators chronically changing treatment programs, and that the Organization is a place to compare evaluation methods and treatment guidelines.

Mr. Silvers stated there is a need for intensive intervention and close work with probation and parole officers. He commended DOI and their probation and parole staff.

Senator Towe asked what guidelines were anticipated for evaluators. Dan Russell replied it takes special skills, requiring continued education, specialized documented training in normal and abnormal sex functioning, and from 2,000 to 4,000 hours of sex treatment experience.

Closing by Sponsor:

Senator Vaughn asked the Committee to give SB 170 a do pass as amended recommendation.

HEARING ON HOUSE BILL 132

Presentation and Opening Statement by Sponsor:

Representative Dave Brown, District 72, said HB 132 was introduced at the request of the Legislative Council to add to statute that which the Supreme Court says is law (Haug v. Burlington Northern Railroad). He explained the Council's position is that the public should be able to look in the statutes and see law instead of researching to find it.

Representative Brown advised the Committee that Greg Petesch, Director of Legal Services, wrote the title so as not to allow amendments.

Proponents' Testimony:

Mike Sherwood, Montana Trial Lawyers Association, said HB 132 was designed to clear confusion caused by MacAlear in 1988 and codifies law in existence for the past 50 to 60 years, "a long line of case trial law".

Mr. Sherwood stated the Trial Lawyers support the position of Greg Petesch and feel this should be codified. He advised the Committee that, at the House hearing, Leo Berry injected a valid concern with tort claims and FELA (Federal Employers Liability Act) cases in Great Falls. He stated that Great Falls may not have the dollars to handle these cases.

Mr. Sherwood reported that Leo Berry has submitted an additional bill draft request to resolve the problem with Great Falls courts. He said A.G. Blewett would get together with Leo Berry to discuss the matter.

According to Mr. Sherwood, it is often hard to get FELA experts in areas outside Great Falls, and that the same applies for doctors. He said that, with this in mind, he would ask the committee to support HB 132 exactly as worded.

Opponents' Testimony:

Leo Berry, Helena attorney representing Burlington Northern Railroad (BN), stated the non-amendable title raises an issue, but he believes the bill should be considered in conjunction with upcoming legislation referred to by Mike Sherwood. He said Haug ruled that out-of-state corporations can be sued anywhere in the State of Montana.

Mr. Berry explained that FELA is a kind of national workers compensation act, designed to protect railroad workers. He stated that, s transportation systems have markedly changed in the past 100 years, the principles behind this philosophy have changed. He attached cases to his testimony where injured workers and the place of injury reside outside the state of Montana, but were filed in Montana.

Mr. Berry cited the first name on the list of cases, William J. Anderson, who originally filed in Nebrasksa applying the principle of "forum nonconveniens". He said the court dismissed the case which was then refiled in Great Falls, MT. Mr. Berry said BN stated the case had no relation to Montana. He reported that the court said the BN position was correct, but dismissed the case because "forum nonconveniens" does not apply to FELA cases.

Mr. Berry told the Committee "forum nonconveniens" needs to be adopted in the state and to be made applicable to FELA. He said he believes this blatant abuse of our system is compounding problems of courts in Montana, and that he counted 85 cases with no relation

to Great Falls. Mr. Berry asked the Committee to hold HB 132 for consideration when his bill draft request is completed.

Questions From Committee Members:

Senator Svrcek asked what the reason is behind this procedure. Representative Brown replied it could be called "sunshine legislation", as the average Montanan can sit down and find out what's in the law.

Senator Towe asked Leo Berry is he were suggesting that "forum nonconveniens" be added to Montana law, and if it would apply. Mr. Berry replied the principle should be statutorily created and be applicable to FELA cases. He stated it is not a federal principle, and said he would provide copies of Haug.

Senator Towe asked Mike Sherwood to comment. Mr. Sherwood replied there are "two discreet issues", that he believes the bill is sound and balanced, that Mr. Berry's issues would be addressed in the upcoming bill.

Senator Towe asked if he were proposing that the place for tort action be the county of _____, and if "forum nonconveniens" should be granted. Mr. Sherwood replied he had the same concerns which got the bill tabled in 1989. He said the Supreme Court has now caged the tiger, and asked why we are poking it. He added that Greg Petesch confirmed this has been practiced since 1989.

Senator Doherty asked Mr. Berry if he had an average over the past six years for the list of 25 cases he presented as testimony. Mr. Berry replied he did not have a breakout by year.

Senator Doherty asked if one-third of counsel was in Great Falls. Mr. Berry replied he would have trouble believing Great Falls is the only place one can find a FELA lawyer. He stated he had no idea how many court cases were filed in federal court, as opposed to district court. He explained that "c" on his list of court cases stands for state courts and "e" is for federal courts.

Senator Doherty asked Leo Berry if he had any idea on cases settled as opposed to going to trial. Mr. Berry replied he did not.

Senator Doherty commented that one very rarely hears of a FELA case going to trial. Mr. Berry replied that is correct, and that litigation is mainly over damages. He added that often motions and discovery prior to settlement take up court and court staff time.

Chairman Pinsonneault asked about the upcoming bill requested by Leo Berry. Mr. Berry replied that BN would prefer not to see HB 132 enacted at all, but rather tort claims.

Chairman Pinsoneault asked Representative Brown if he were familiar with Mr. Berry's bill. Representative Brown replied that Mr. Berry asked to have the bill drafted.

Senator Rye asked Senator Brown if he would object to striking "are" in the title and inserting "is". Representative Brown replied the Committee may want to take that up with the Code Commissioner.

Closing by Sponsor:

Representative Brown stated he believes the language in the bill is clear, and reiterated that the intent of the bill is to let people know what the laws of the state are.

HEARING ON SENATE BILL 153

Presentation and Opening Statement by Sponsor:

Senator Tom Towe, District 46, told the Committee SB 153 deals with the collateral source rule concerning recovery of damages or injury in a court case, and whether social security damages should be recovered.

Senator Towe used the example of an automobile accident injury resulting in substantial medical bills and incurred inability to work for a period of time. He stated that the injured individual could also have health and/or disability coverage; an employer who pays part of the costs; or social security coverage.

Senator Towe stated the court originally took the position that if the injured party paid a premium he or she ought to recover the benefits, but the responsible party would also be required to pay. He said the court was saying recovering twice was okay, but the state was concerned that insurance premiums were too expensive and one solution was the collateral source rule, wherein one could not collect twice. Senator Towe stated that legislation is still in effect today.

Senator Towe reported that many say the collateral source rule should be repealed, but his goal is to address an unworkable problem. As an example, Senator Towe cited an instance where after a case has gone to trial, and future medical costs are estimated at \$5,000 and future work loss at \$15,000, and these amounts are deducted from recovery, an insurance company goes bankrupt or cancels a policy or increases a premium. He stated that is what is addressed by SB 153.

Senator Towe said the top of page 4 allows reduction by the amount of insurance premium, and asked what would happen if the cost of insurance goes up. He stated these things are primarily addressed by saying the collateral source rule is limited to those damages actually paid at the time of the jury verdict or prior to

settlement. He explained that anything incurred after the verdict is future costs and is not deducted. Senator Towe said future medical costs are extremely difficult to determine, and that the bill simplifies this matter, but should not affect insurance premiums.

Senator Towe stated insurance companies are more concerned with work loss. He told the committee there is a provision in SB 153, at the top of page 3, defining plaintiff, and that "must" on page 3, line 15 is stricken and replaced with "may". Senator Towe said it is important to make certain that future medical, work loss, and damages should no longer be deductible.

Proponents' Testimony:

Sharon Morrison, described herself as a citizen of Montana, and said she believes the bill relates to people and their problems experienced in Montana. She said "The difficulty of explaining the bill shows why it needs to be amended". Ms. Morrison stated "The bill is difficult to apply, but is written in lay language".

Ms. Morrison said that, "If the bill is applied as it appears to be written it will result in increased premiums, and that it doesn't make sense for innocent people to bear the cost of increasing insurance". She stated that with Senator Towe's amendment, "the plaintiff never gets double recovery".

Ms. Morrison told the Committee an "economist must be used to reduce costs in a second trial, and that a third trial is currently necessary for punitive damages. She used the example of an injured child with a trust, and said that trust is a collateral source while the defendant is relieved. She asked if that were fair.

Mr. Morrison gave another example wherein the plaintiff's insurance is canceled, and the plaintiff then becomes responsible to pay all future medical costs for the remainder of his or her life. She stated she was not talking about people in equal degree or wrong, but a "wrongdoer and innocent party, and that is not how the Legislature usually operates".

Mike Sherwood, Montana Trial Lawyers Association, stated his support of SB 153, and said he believes the Trial Lawyers were a significant figure in 1989 and 1991, supporting the need for changes in tort reform. Mr. Sherwood said he would provide a document showing that insurance companies were making a lot of dollars, but did not believe that applied to this bill. He told the Committee SB 153 tries to make 1986-87 tort reform workable.

Opponents' Testimony:

John Alke, Montana Defense Trial Lawyers Association, confessed that he did not understand prior testimony. He stated that a critical limiting fact of the collateral source rule, applies only with the right of subrogation. Mr. Alke told the

Committee health insurance has a right of subrogation "which after the insurer is obligated to make payments to the insured the insurer can cancel coverage".

John Alke explained that the only exception would be SSDIB (social security disability insurance benefits), and asked if social security were going to cancel or raise premiums. He said the bill is about vested rights to get double recovery by the plaintiff, and says the judge makes deductions at the end of the trial. Mr. Alke advised the Committee this applies to a very small category of collateral sources, and that no valid state policy says the collateral source rule will be applied at the discretion of a judge.

Gerald Neely, representing the Montana Medical Association, commented that a compromise was arrived at in 1987. He stated this bill allows persons to recover damages again, after being fully compensated once, and makes it 100 percent impossible to give actuarial credence after court action.

Mr. Neely stated the guaranteed effect of the bill will be increased cost of medical liability insurance, which has been decreasing or remaining static since 1987. He said the Utah Medical Insurance Association has tied the 1987 legislation to a downward trend, while premiums increased 20 percent from 1981 to 1986. He told the Committee the 1987 legislation has nothing to do with subrogation, but applies only to cases in excess of \$50,000 and that credit is given for previous insurance premiums paid without right of subrogation.

Mr. Neely said SB 153 would "gut" one of the key proponents of 1987 (Exhibit # 16).

Gary Spaeth, representing Montana Liability Coalition, said that in the historical perspective of 1987, there was conflicting information coming in and the legislation was a compromise (Exhibit # 2). He stated that HB 567 was introduced in 1987 by Representative Ramirez, and that a reference bill is not contained in the Conference Committee changes.

Mr. Spaeth stated many changes were made and the process worked at that time. He told the Committee these same arguments were heard from proponents in 1987, and asked what problem would be solved by the changes proposed in SB 153. He asked the Committee to give SB 153 a do not pass recommendation.

John Maynard, representing the Montana Municipal Authority, said there are 109 cities and towns which are self-insuring groups. He stated this bill is presented in the abstract, and is based on speculation of possible wrongs which could happen.

He said the bill has a very narrow application, and has been applied as a negotiation process involving the State of Montana and Cascade County in Haymaker v. Department of Social and

Rehabilitation Services. Mr. Maynard explained that a young girl placed in foster care in 1974 in Great Falls was beaten by her foster father and was seriously brain damaged for life. He said the girl was then sent from foster home to foster home which aggravated her problem, and that the insurance companies came in and began to negotiate a settlement.

Mr. Maynard advised the Committee the girl's condition made her care very expensive. He said that SSDIB benefits are paid regardless of family resources, and that the girl had a huge amount of future medical costs. John Maynard explained that if awarded funds, they could not be considered assets and Montana would have to continue to pay her living costs. He said the insurance companies ultimately negotiated to put the funds into a trust to revert to the State of Montana upon her death, thus eliminating the possibility of double recovery.

Mr. Maynard said page 3, line 13 contains the key provision regarding finding that the plaintiff be fully compensated.

Brett Dahl, Administrator, Tort Claims Division, Department of Administration, stated his support of the position of prior opponents. He stated that he believes collateral source, as it stands, was designed to prevent undue enrichment.

Brett Dahl told the Committee of an accident he was involved in an accident and suffered collision and health costs of \$8,000. He said his insurance premiums increased significantly a year later. He explained that Montana is facing cases on the very things addressed by John Maynard, and that the point is this is neither fair nor just.

Kay Foster, Billings Area Chamber of Commerce, advised the Committee that at the Governor's request she chaired a statewide committee on liability insurance, and supported the 1987 legislation. She said she believes that legislation is still working, and asked the Committee to leave it alone.

Mona Jamison, representing Doctors Company, read from prepared testimony (Exhibit #3). She said Doctors Company pays 75 percent of the medical malpractice insurance in the state. Ms. Jamison stated she believes there is a direct relation between the cost of medical malpractice insurance and that fact that there has been no rate increase since 1988. She explained that some selective rates have decreased in the past year, and urged the Committee to give existing statute more time.

Jacqueline Terrell, representing the American Insurance Association, said the Association is comprised of more than 200 property and casualty insurance companies providing insurance in Montana. She said she wished to stress two points: that this Legislation does not kick in until the plaintiff fully recovers, and that if the insurer goes bankrupt, property and casualty and life and health insurers groups guarantee that funds will kick in.

Ms. Terrell requested the Committee leave the law as originally enacted.

Gene Phillips, National Association of Independent Insurers, and Alliance of American Insurers, urged the Committee to give SB 153 a do not pass recommendation.

Questions From Committee Members:

Senator Svrcek asked John Alke if the right of subrogation applied in the example of a parent paying costs for a child. John Alke replied he thought it would.

Chairman Pinsonneault asked why parents would pay. John Alke replied he did not know.

Chairman Pinsonneault asked Sharon Morrison if most people carried uninsured motorist coverage. Ms. Morrison replied she "was only talking about payments to be made in front", and that defendants should have to pay.

Closing by Sponsor:

Senator Towe stated there appeared to be confusion on a number of items discussed. He said subrogation is a matter of contract with one's own insurance company, and that the matters raised generally do not address issues he addressed, such as bankruptcy of an insurer.

Senator Towe said that if opposing testimony were true it would lessen concerns with health insurance, but it still does not address the policy cancellation problem. He asked what happens then, and said the injured person has no recovery means from anyone. Senator Towe added that he does "not believe how we make laws here".

Senator Towe asked why a parent or a trust should have to pay the bill for future medical costs, if the insurance company of the injuring party has the money to pay them. Concerning Medicaid, he stated he believes resources must be less than \$1500 to be eligible for coverage. He asked how then Medicaid could be a collateral source allowing double recovery.

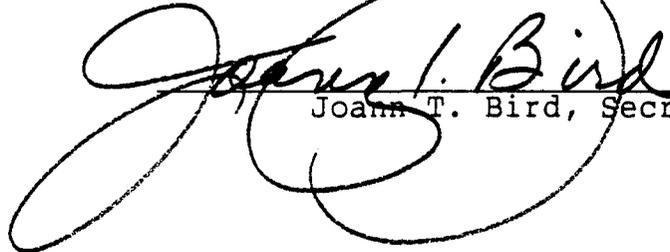
Senator Towe said he did not believe the bill would affect insurance rates, and stated all insurance premium rates have gone down in the past few years. He told the Committee the most important part of the collateral source rule is still remaining. Senator Towe commented that his intention was to fine-tune 1987 legislation to the benefit of injured persons.

ADJOURNMENT

Adjournment At: 12:05 p.m.



Senator Dick Pinsonneault, Chairman



Joann T. Bird, Secretary

DP/jtb

ROLL CALL

SENATE JUDICIARY COMMITTEE

52nd LEGISLATIVE SESSION -- 1991

Date 29 Jan 91

NAME	PRESENT	ABSENT	EXCUSED
Sen. Pinsonneault	✓		
Sen. Yellowtail	✓		
Sen. Brown	✓		
Sen. Crippen	✓		
Sen. Doherty	✓		
Sen. Grosfield	✓		
Sen. Halligan	✓		
Sen. Harp	✓		
Sen. Mazurek	✓		
Sen. Rye	✓		
Sen. Svrcek	✓		
Sen. Towe	✓		

Each day attach to minutes.

Ex. 1
SB 170
1-29-91

AMENDMENT TO LC1303/01

Prepared by the Department of Institutions
January 22, 1991

Page 2, Line 2.

Following the district court add, ", which costs shall be reimbursed by the Local Government Division of the Department of Commerce under 3-5-901 et seq."

Ex. 1a

HB 132

1-29-91

January 29, 1991
House Bill #132
Burlington Northern Railroad

House Bill 132 implements the Montana Supreme Court's decision in Haug v. Burlington Northern Railroad. In that case, the court ruled that a plaintiff filing a tort (personal or property injury) action against a non-resident corporation can pick his/her forum. The plaintiff does not have to file where he/she lives, or where the injury took place or where the corporation has its principle place of business. The plaintiff can file in any county in Montana.

The Federal Employers Liability Act (FELA), a federally mandated form of workers' compensation, allows an injured railroad worker to file an action in state or federal court. Historically the railroad worker could sue his/her employer wherever he/she could find it. That principle has its roots in an era preceding modern forms of transportation. With the advent of expanded and convenient air transportation, plaintiffs' lawyers have developed a system of sophisticated forum shopping.

You have been or will be made aware of the funding crisis in several state district courts, including Great Falls. Montana's venue statutes, and the courts' interpretation of those statutes, compound that fiscal crisis. In most states the statutes are more restrictive or the courts apply the legal principle of forum non-conveniens. That principle allows the court to move a case to a more proper jurisdiction. Montana does not allow actions brought under the FELA to be moved to a more proper jurisdiction. The Haug case not only said that a plaintiff can file suit anywhere in Montana, but also said that forum non-conveniens does not apply to FELA cases.

Attached is a copy of district court actions brought against Burlington Northern Railroad in Montana courts where the accidents occurred outside Montana. As you can see, most of the filings are in state district court ("C"). In the time period reviewed, 1986-1990, 25 cases were filed in Great Falls in which the accident occurred outside Montana and only two involved Montana residents; they were from Glendive and Livingston. You will see similar filings in Billings, Butte and Missoula.

While the state court funding problems are not solely related to these filings, it is without doubt that these cases have contributed to the financial burdens placed on the system. There is not a legal or moral rationale that justifies burdening Montana courts with these cases that have no relationship to Montana or the local jurisdiction.

The venue statutes should be amended to make the legal principle of forum non-conveniens statutorily applicable to FELA cases or to allow the plaintiffs to file suit in their county of residence, the county in which the tort occurs or the county of principle place of business of the corporation.

FOLLOWING IS A LIST OF PLAINTIFFS WHO HAVE BROUGHT SUIT AGAINST BURLINGTON NORTHERN IN THE STATE OF MONTANA WHEREIN THE INCIDENTS OCCURRED IN STATES OTHER THAN MONTANA. THIS LIST IS FOR ALL SUITS PENDING EFFECTIVE 12/4/90, AS WELL AS THOSE CLOSED 1/1/86 THROUGH 12/4/90.

C = Court Filed In
C = State District Court
E = United States District Court
OP/CLS - Open or Closed
C/86 Closed in 1986, etc...

<u>PLAINTIFF</u>	<u>ATTORNEYS</u>	<u>ACCIDENT LOCATION</u>	<u>SUIT CITY</u>	<u>CT</u>	<u>OP/CLS</u>
William J. Anderson Far Route Hot Springs, SD 57747	Yaeger Firm Minneapolis, MN	Edgemont, SD	Great Falls	C	O
Dennis L. Belden 4 E. Loucks St. Sheridan, WY 82801	Eckman Firm Minneapolis, MN	Bill, WY	Great Falls	C	O
James D. Belden 5 King St. Sheridan, WY 82801	Eckman Firm Minneapolis, MN	Sheridan, WY	Great Falls	C	O
Wynne A. Berumen 11 West 51st St. Jasper, WY 82601	Doshan Firm Minneapolis, MN	Nacco Junction, WY	Great Falls	C	O
Moyd A. Brown 4 Timm Drive Sheridan, WY 82801	Doshan Firm Minneapolis, MN	Sheridan, WY	Great Falls	C	O
Patrick J. Cardinal 6024 N. Jefferson Bozeman, WA 99208	Hoyt Firm Great Falls, MT	Kettle Falls, WA	Great Falls	C	C/89
Lloyd F. Comer Box 1075 Gardiner, MT 59330	Hoyt Firm Great Falls, MT	Mandan, ND	Great Falls	C	O
Floyd H. Counts P.O. Box 896 Hemingford, NE 69348	Eckman Firm Minneapolis, MN	Alliance, NE	Great Falls	C	O
Ralph & Mary Jane Crisman Williston, ND	Bjella Firm Williston, ND	Fort Buford, ND	Great Falls	E	O
Randall K. Dickerson 7 Morehead St. Chadron, NE 69337	Eckman Firm Minneapolis, MN	Bill, WY	Great Falls	C	O

<u>PLAINTIFF</u>	<u>ATTORNEYS</u>	<u>ACCIDENT LOCATION</u>	<u>SUIT CITY</u>	<u>CP</u>	<u>OP/CLS</u>
Walter F. Dietel S. 1304 Skipworth Spokane, WA 99206	Hoyt Firm Great Falls, MT	Yardley, WA	Great Falls	E	C/86
Thomas S. Douglas 1673 Edwards Sheridan, WY 82801	Doshan Firm Minneapolis, MN	Sheridan, WY	Great Falls	C	O
John A. Ericson 1655 E. Joseph Spokane, WA 99207	Hoyt Firm Great Falls, MT	Spokane, WA	Great Falls	C	C/90
Marie A. Hattenburg N. 5321 Chase Road Newman Lake, WA 99025	Hoyt Firm Great Falls, MT	Odessa, WA	Great Falls	C	C/90
James R. Hayes Route 62, Box 3185 Livingston, MT 59047	Regnier Firm Great Falls, MT	Warren, WY	Great Falls	C	C/88
Edgar R. Hernandez P.O. Box 162 Greybull, WY 82426	Doshan Firm Minneapolis, MN	Minnesela, WY	Great Falls	C	O
Vera Hoffman (Pers. Rep. for Ralph) Rt. 4, Box 234 Minot, ND 58701	Yaeger Firm Minneapolis, MN	West Fargo, ND	Great Falls	C	C/90
Shirley Houser (Pers. Rep. for Rex) 11215 West 76th Way Arvada, CO 80005	Yaeger Firm Minneapolis, MN	Broomfield, CO	Great Falls	C	C/88
Robert G. Johnson 324 W. 5th St. Apt. A Alliance, NE 69301	Regnier Firm Great Falls, MT	Alliance, NE	Great Falls	C	C/88
Edward R. Jolley 38 Kelly Drive Sheridan, WY 82801	Doshan Firm Minneapolis, MN	Parkman, WY	Great Falls	C	O
George G. Kobielsuz Box 66 Wynona, WY 82845	Doshan Firm Minneapolis, MN	Sheridan, WY	Great Falls	C	O
Robert S. Meeker Box 228 Ranchester, WY 82839	Doshan Firm Minneapolis, MN	Sheridan, WY	Great Falls	C	O

<u>PLAINTIFF</u>	<u>ATTORNEYS</u>	<u>ACCIDENT LOCATION</u>	<u>SUIT CITY</u>	<u>CT</u>	<u>OP/CLS</u>
Charles M. O'Brien 22 N. Smith Spokane, WA 99207	Yaeger Firm Minneapolis, MN	Spokane, WA	Great Falls	C	C/88
Walter L. Rieck P.O. Box 372 Basin, WY 82410	Morrisard Firm Aurora, CO	Sage Creek Spur, WY	Great Falls	C	C/90
Phillip R. Stazel 22 McHenry Drive S. Liberty Lake, WA 99019	Hoyt Firm Great Falls, MT	Newhauser, ID	Great Falls	C	C/88
Richard E. Bennett Box 105 Greybull, WY 82426	Morrisard Firm Aurora, CO	Himes, WY	Billings	C	O
Robastian Berumen P.O. Box 443 Lurel, MT 59044	Morrisard Firm Aurora, CO	Donkey Creek, WY	Billings	C	C/90
Robert F. Cardona Box 37 Walsall, MT 59086	Deparcq Firm Minneapolis, MN	Alliance, NE	Billings	E	O
Mary D. Cook 7 S. 6th St. Greybull, WY 82426	Morrisard Firm Aurora, CO	Greybull, WY	Billings	E	C/88
Michael H. Deluna 4 Wyoming Ave. Sheridan, WY 82801	Morrisard Firm Aurora, CO	Sully Springs, ND	Billings	C	O
Charles J. Doran P.O. Box 534 Greybull, WY 82426	Sands Firm Chicago, IL	Lovell, WY	Billings	E	O
Leon L. Edeler P.O. Box 286 Greybull, WY 82426	Morrisard Firm Aurora, CO	Worland, WY	Billings	C	C/89
Walter D. Epple P.O. Box 883 Garnsey, WY 82214	Morrisard Firm Aurora, CO	Gillette, WY	Billings	C	C/89
James R. Erickson P.O. Box 361 Big Horn, WY 82833	Yaeger Firm Minneapolis, MN	Lariat, WY	Billings	C	C/90
Tauna Faxon Box 148 Upton, WY 82730	Morrisard Firm Aurora, CO	Antelope, WY	Billings	C	O

<u>PLAINTIFF</u>	<u>ATTORNEYS</u>	<u>ACCIDENT LOCATION</u>	<u>SUIT CITY</u>	<u>CT</u>	<u>OP/CLS</u>
William D. Ford 338 Adkins Ave. Sheridan, WY 82801	Morrisard Firm Aurora, CO	Sheridan, WY	Billings	C	C
Timothy J. Friend 720 Burton Sheridan, WY 82801	Morrisard Firm Aurora, CO	Sheridan, WY	Billings	E	C/88
Robert L. Galles P.O. Box 1019 Laurel, MT 59044	Bricker Firm Portland, OR	Sheridan, WY	Billings	E	C/87
Edubijen V. Garcia, Jr. 134 W. 8th St. Lovell, WY 82431	Doshan Firm Minneapolis, MN	Bonneville, WY	Billings	E	C/89
Laurence & Gerald Gessner Bainville, MT	Parker Firm Billings, MT	Fort Buford, ND	Billings	E	O
Ardis J. Harrod 150 W. 11th, Space 1 Sheridan, WY 82801	Morrisard Firm Aurora, CO	Sheridan, WY	Billings	C	O
Gene J. Healy 504 Locust Yankton, SD 57078	Morrisard Firm Aurora, CO	Newcastle, WY	Billings	C	C/89
Robb D. Hitchcock 3347 Stagecoach Casper, WY 82604	Morrisard Firm Aurora, CO	Casper, WY	Billings	C	C/89
Ray J. Hofmeister, Jr. P.O. Box 2513 Gillette, WY 82717	Hubbell Firm Kansas City, MO	Elkhorn, WY Coal Creek Jct.	Billings Billings	C C	C/89 C/89
Donald M. Holzheimer 906 Sixth Ave. Laurel, MT 59044	Doshan Firm Minneapolis, MN	Lyons, ND	Billings	E	C/89
Gerald L. Horton Rte. 1, Box 55A Joliet, MT 59041	Doshan Firm Minneapolis, MN	Parkman, WY	Billings	C	C/89
Thomas L. Johnson 534 Meridian Sheridan, WY 82801	Morrisard Firm Aurora, CO	Sheridan, WY	Billings	C	O
Duane J. Knoll 610 East Clement Glendive, MT 59330	Yaeger Firm Minneapolis, MN	Elmira, ID	Billings	E	C/89

<u>PLAINTIFF</u>	<u>ATTORNEYS</u>	<u>ACCIDENT LOCATION</u>	<u>SUIT CITY</u>	<u>CT</u>	<u>OP/CLS</u>
Richard Layman 616 Arrowhead Drive Gillette, WY 82716	Eckman Firm Minneapolis, MN	Gillette, WY	Billings	E	C/89
John M. Luoma 172 Lane 11 Lovell, WY 82431	Richter Firm Billings, MT	Lovell, WY	Billings	C	C/89
Erwin K. McFall 25 S. Fenway Casper, WY 82601	Morrisard Firm Aurora, CO	Casper, WY	Billings	C	O
Thomas Mikes North Dakota	Bricker Firm Portland, OR	Hensler, ND	Billings	E	C/87
Bert F. Peccia P.O. Box 268 Mayton, WY 82836	Morrisard Firm Aurora, CO	Bill, WY	Billings	C	C/89
Andrew L. Sams 361 Highway 335 Sheridan, WY 82801	Morrisard Firm Aurora, CO	Gillette, WY	Billings	C	C/89
Francis J. Tomsche 1041 Adair Ave. Sheridan, WY 82801	Morrisard Firm Aurora, CO	Dutch, WY	Billings	E	C/86
John E. Yeager 27 Davis Tee Sheridan, WY 82801	Morrisard Firm Aurora, CO	Sheridan, WY	Billings	E	C/86
Barney R. Averill Box 534 Big Horn, WY 82833	Morrisard Firm Aurora, CO	Arvada, WY	Butte	C	C/87
William H. Jeanneret 7309 Country Homes Blvd. Spokane, WA 99208	Bricker Firm Portland, OR	Parkwater, WA	Butte	C	C/86
James C. Scott 1124 E. 28th St. Spokane, WA 99206	Bricker Firm Portland, OR	Spokane, WA	Butte	C	O
Winston J. Wyant Box 995 Anaconda, MT 59711	Bricker Firm Portland, OR	Bonnors Ferry, ID	Butte	E	C/90
Constance S. Courchane P.O. Box 4698 Helena, MT 59604	Doshan Firm Minneapolis, MN	Wenatchee, WA	Missoula	E	C/89

<u>PLAINTIFF</u>	<u>ATTORNEYS</u>	<u>ACCIDENT LOCATION</u>	<u>SUIT CITY</u>	<u>CT</u>	<u>OP/CLS</u>
Wallace J. Rainsberry Jr. P.O. Box 1485 Whitefish, MT 59937	Rerat Firm Minneapolis, MN	Quincy, WA	Missoula	E	C/87
David D. Smith 3570 Indreland Rd. Missoula, MT 59802	Bricker Firm Portland, OR	Athol, ID	Missoula	C	O
Jeffrey Vitamanti (PR for Diane & Anthony) Address Unknown	Hoyt Firm Great Falls, MT	Colburn, ID	Missoula	D	C/87
Martin H. Cheney Box 756 Ranchester, WY 82830	Roberts Firm Bozeman, MT	Parkman, WY	Livingston	C	C/89
Robert P. Wilson Bainville, MT	Bjella Firm Williston, ND	Fort Buford, ND	Wolf Point	C	O

SB 153
29 Jan 91

SB 153 - Outline Of Testimony On Behalf Of Montana Medical Association
In Opposition - By Gerald J. Neely, Esq., Special Counsel On Liability
Insurance, Montana Medical Association

SB 153 seeks to allow claimants in certain cases to receive duplicate payments - to be compensated twice - in court actions, and where there is no right of subrogation involved, to keep the excess compensation after they've already been fully compensated.

By making the offset of double compensation permissive rather than mandatory and by reducing the types of defined collateral sources or duplicate payments, the legislation would -- in a premature move -- seek to "gut" moderate, compromise legislation passed in the 1987 legislature to help solve some of the pressing insurance cost and availability problems facing Montana business people, including physicians.

The consequence of this legislation will be equivalent to affirmatively encouraging insurance carriers to increase their insurance rates, while intentionally encouraging the over-compensation of injured parties, to the ultimate detriment of the public.

One actuarial study indicated that the total downward impact on premiums (in medical malpractice insurance) from the mandatory elimination of duplicate payment of damages was equivalent to 8% of the premium dollar.¹ A Rand Corporation study concluded that states that have enacted a mandatory collateral offset found the severity of awards drop by 50%, on average.²

Because the 1987 legislation -- effective in October, 1987 -- is only very recent, hardly enough time has passed to fully gauge its full effectiveness. We know that rates have moderated in the last few years, but as the law applies to cases tried and because it takes between three and six years from when an incident occurs to when it is tried, only a very small percentage of the cases which happened in 1988 have made it to the suit stage. Only when the experience from a particular year is played out and substantial differences in the number of claims being filed and the amounts paid in settlement or by judicial award are made clear is there an impact on rates.

For these reasons, the Montana Medical Association strongly opposes SB 153 or any modification of it, and supports the current law, which type of law has received the support of such organizations like the American Bar Association's committees on tort reform.

In a moderate form of reducing duplicate payment of damages -- far different than more punitive measures in other states -- the law on the books was:

- made applicable only to cases involving bodily injury and death
- and then only where the case involves \$ 50,000 in damages³
- and then only where the claimant was already fully compensated for his or her damages
- exclusive of life insurance, family-obligated loans as defined "collateral sources"

¹ AMA General Counsel's Office commission of actuarial survey by Milliman & Robertson, Inc, New York. Actuarial Analysis of American Medical Association Tort Reform Proposals, September, 1985.

² Danzon, P.M.. The Frequency and Severity of Medical Malpractice Claims. Santa Monica, Rand Institute for Civil Justice, 1983.

³ The adverse side of reversal of the collateral source rule is that most minor claims, involving medical expense and short-term wage loss, which are extensively covered by private insurance, would not be worth filing, which is solved by having the legislation only apply to large cases.

- giving specific (and unusual) credits back to the injured party for insurance premiums paid

The general objectives of the law on the books was to:

- reduce some of the amounts of duplicate payments which claimants receive from third parties in addition to that which they receive in settlements and court awards, after giving credit for contributions made by the claimants on their insurance;
- thus assuring that injured parties in large cases receive full compensation, but not more than full compensation in major cases, for economic damages
- thus further assuring the affordability and availability of liability insurance, specifically including medical malpractice insurance

To allow a claimant to be paid from a third party for a particular damage, such as a medical expenses or lost wages, and then to prohibit the jury from knowing about this and allowing them to award the damage again to the injured party is socially irresponsible.

The argument against double recovery is powerful: people would not voluntarily choose to buy two separate policies to cover the same event. In allowing such a double recovery in the court system, the people who receive services from the insured -- like medical care -- are in fact buying a second policy, because the premiums for those double recoveries are passed on to the public, if the insureds even stay in business as a result of the higher premiums.

The idea of a windfall runs counter to the basic aim of the tort law, which is to make the plaintiff whole, not to overcompensate him. The aim should be to assure the plaintiff fair compensation from available sources, but no more. Because insurance makes the double payments, there is no deterrent effect from the practice of allowing double damages. It only inflates the amount of the award -- and hence the amount of attorney fees which are recovered.

The American Bar Association Report of the Commission On Medical Professional Liability recommended also that recovery of damages should be reduced by collateral source payments, and that subrogation should not be allowed to any collateral sources for medical benefits thus set off.⁴

The ABA Report concluded that the set-off of collateral source payments should be mandated as a matter of law rather than left to the jury's discretion and that legislation should require that the trial judge deduct all collateral source payments from the jury's award before entering judgment. The jury would be instructed to resolve any dispute as to the amount of a collateral source payment under the ABA Committee proposal.

Prepared by the Montana Medical Association, 2021-11th Ave., Helena, Montana 59601, G. Brian Zins, Executive Director, 406-443-4000.	SB 153
1/91	DUPLICATE BENEFITS

⁴ American Bar Association. 1977 Report of the Commission on Medical Professional Liability, 1977, pp. 146 -7.

SELECT MEDICAL MALPRACTICE INSURANCE RATES
SINCE EFFECTIVE DATE OF 1987 TORT REFORM
IN MONTANA (OCTOBER 1, 1987)

Obstetricians And Family Practitioners

~~Family Practice With Obstetrics~~

First Rates Issued After Effective
Dates Of Legislation Thru Current Rates

<u>Company</u>	<u>1988</u>	<u>1989</u>	<u>1991</u>
UMIA	\$ 21,475	\$ 20,185	\$ 16,385
DOCTORS CO	\$ 20,880	\$ 20,880	\$ 20,880

~~Obstetricians/Gynecologists~~

First Rates Issued After Effective
Dates Of Legislation Thru Current Rates

<u>Company</u>	<u>1988</u>	<u>1989</u>	<u>1991</u>
UMIA	\$ 44,971	\$ 42,132	\$ 30,479
DOCTORS CO	\$ 47,608	\$ 39,036	\$ 39,036

~~Family Practice - No Surgery & No Obstetrics~~

1989 & 1991

<u>Company</u>	<u>1989</u>	<u>1991</u>
UMIA	\$ 3,939	\$ 3,585
DOCTORS CO	\$ 7,332	\$ 6,012

Seventy-Five Percent Of Policyholders: Mature Claims-Made Without Tail
Cost - \$ 1 Million/\$ 3 Million Primary Coverage. All Prices Include
Maximum Discounts And Exclude Required Surcharges Or Cost Of "Tail"
Or Extended Reporting Endorsements.

Keep w/ SB 153

EX. 2
1-29-91
SB 153

1 HOUSE BILL NO. 567

2 INTRODUCED BY RAMIREZ, SPAETH, LORY,

3 J. BROWN, MERCER

4

5 A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING THAT--IN--AN

6 ACTION--ARISING--FROM--BODILY--INJURY--OR--DEATH,--PLAINTIFFS

7 REIMBURSEMENT--FROM--A--COLLATERAL--SOURCE--IS--ADMISSIBLE--IN

8 EVIDENCE--AND--THAT--UNLESS--THE--SOURCE--OF--THE--REIMBURSEMENT--HAS

9 A--SUBROGATION--RIGHT--UNDER--STATE--OR--FEDERAL--LAW,--AN--AWARD--TO

10 PLAINTIFF--MUST--MAY--BE--REDUCED--BY--THE--AMOUNT--OF--THE

11 REIMBURSEMENT,--PROVIDING--THAT--UNLESS--A--SUBROGATION--RIGHT--IS

12 SPECIFICALLY--GRANTED--BY--STATE--OR--FEDERAL--LAW,--THERE--IS--NO

13 SUBROGATION--RIGHT--REGARDING--AN--AMOUNT--PAID--OR--PAYABLE--IF--AN

14 AWARD--IS--REDUCED--BY--THAT--AMOUNT, PROVIDING THAT EVIDENCE--OF

15 INSURANCE--DEPENDANT--MAY--HAVE--AND--EVIDENCE--OF--PLAINTIFF'S--AND

16 DEPENDANT'S--LITIGATION--COSTS--AND--ATTORNEY--FEES--ARE

17 ADMISSIBLE,--AMENDING--SECTION--33-23-102,--MEA; FOR THE

18 REDUCTION OF JURY AWARDS BY THE TRIAL COURT FOR AMOUNTS PAID

19 OR PAYABLE FROM COLLATERAL SOURCES AND PROVIDING AN

20 APPLICABILITY DATE."

21

22 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

23 Section 1. Definitions. As used in [sections 1 and 2]:

24 (1) "Collateral source" means a payment for something

25 that is later included in a tort award and which is made to

1 or for the benefit of a plaintiff or is otherwise available

2 to the plaintiff;

3 (a) for medical expenses and disability payments under

4 the federal Social Security Act, any federal, state, or

5 local income disability act, or any other public program;

6 (b) under any health, sickness, or income disability

7 insurance or automobile accident insurance that provides

8 health benefits or income disability coverage, and any other

9 similar insurance benefits available to the plaintiff,

10 except life insurance;

11 (c) under any contract or agreement of any person,

12 group, organization, partnership, or corporation to provide,

13 pay for, or reimburse the costs of hospital, medical,

14 dental, or other health care services, except gifts or

15 gratuitous contributions or assistance;

16 (d) any contractual or voluntary wage continuation

17 plan provided by an employer, or other system intended to

18 provide wages during a period of disability; and

19 (e) any other source, except the assets of the

20 plaintiff or of his immediate family if he is obligated to

21 repay a member of his immediate family.

22 (2) "Person" includes individuals, corporations,

23 associations, societies, firms, partnerships, joint stock

24 companies, government entities, political subdivisions, and

25 any other entity or aggregate of individuals.





Exhibit #3
29 Jan 91
SB 153

SB 153

JIM CATHCART

Vice President
Governmental and Corporate Relations

January 28, 1991

Senator Dick Pinsoneault
Chairman
Senate Judiciary Committee
Montana State Senate
Capitol Station
Helena, Montana 59620

Dear Senator Pinsoneault:

The Doctors' Company opposes SB 153 that is to be heard before the Senate Judiciary Committee on Wednesday, January 30, 1991.

The Doctors' Company was encouraged when duplicate payments and collateral sources were limited by compromised legislation passed in the 1987 legislature. We believe this legislation, along with some additional legislation that was also passed that year, has had a favorable impact on professional liability insurance rates. While we cannot give you specific data as to the impact of collateral sources simply because many of the claims which have been filed since the passage have not been settled out, we do believe that it has had a significant impact on the reduced size of claims.

Since its enactment, The Doctors' Company's experience in Montana has been better than prior to its enactment. Since 1988, there have been no rate increases and there have been some selective rate decreases in the current year. For example, there has been a 15% reduction in rates for emergency room physicians and a 5% reduction in rates for OB/Gyn physicians. Additionally, there is a dividend payment for doctors in the amount of 3%.

With more time and experience with the statute, we believe we will be able to more clearly demonstrate its utility in moderating rates and by rate moderation demonstrate increases in availability and increases in competition for doctors in the State of Montana.

We would hope that you would postpone judging the merits of this statute until more time has elapsed.

1127 First St.
P.O. Box 2900
Napa, CA 94558-0900

707 / 226-7160

FAX: 707 / 226-1600

Ex. 3

1-29-91

SB 153

With this statute in place, you will assist in the favorable climate for insurance carriers to offer malpractice insurance and thus assure competition in your state and through competition lower rates. To the extent that this bill is defeated, it impinges on that climate and will tend to discourage other medical malpractice insurance carriers from entering or thinking about making a market penetration in your state.

Thank you for your attention to this matter. We respectfully urge you not to support SB 153.

Sincerely,



Jim Cathcart
Vice President
Governmental and Corporate Relations

JC/hls

DEPARTMENT OF ADMINISTRATION
TORT CLAIMS DIVISION

SB 153
1-29-91
Ex. 4



STAN STEPHENS, GOVERNOR

CAPITOL STATION

STATE OF MONTANA

(406) 444-2421

HELENA, MONTANA 59620

SB153

January 29, 1991

Dear Venerable Judiciary Committee Members:

I have drafted this memo in response to our concerns regarding Senate Bill 153, sponsored by Senator Towe, scheduled for hearing January 29, 1991 at 10:00 a.m.

As you know, the Tort Claims Division is responsible for the defense of the State of Montana against Tort Claims. A tort is defined as "wrongful or negligent actions caused by state agencies and employees acting within the course and scope of employment."

Collateral Source Rule

The Collateral Source rule as it presently exists in MCA 27-1-307, defines payments that may constitute collateral sources as "a payment from a source other than a tortfeasor for something later recovered by the plaintiff as damages."

The most common form of collateral source is that of medical, disability and automobile accident insurance but also may include medicaid or publicly supported disability plans. The principle behind the present collateral source statute is that a plaintiff should not be unjustly enriched from more than one collateral source when he/she suffers tort damages such as bodily injury. It is our position that a collateral source should offset damages that a defendant is liable for.

For example, in a bodily injury case, a plaintiff suffers significant damages in the form of future medical expenses, but his/her medical insurance or other public insurance (such as medicaid, state or federally funded disability) will cover all medical expenses. The issue here is whether a defendant should pay for a plaintiff's medical expenses when these same medical expenses may already be funded by a collateral. The rule and statute were enacted precisely to prevent the scenario that I have described above from occurring.

Ex 4
SB 153
1-29-91

Judiciary Committee Members
January 29, 1991
Page 2

S.B. 153, if passed will change the intent of the original bill. Specifically we have concerns with two key provisions:

- 1) In section 2, MCA 27-1-308(1), the amendment states that 'a plaintiff's recovery ~~must~~ may be reduced by an amount paid or payable from a collateral source that does not have a subrogation right.

The term 'may' connotes that a judge will make the determination as to whether or not a collateral source applies. If passed, the result will be that certain plaintiffs will achieve double recovery, and others won't.

- 2) In section 2, MCA 27-1-308(1), the language has been changed to state that a 'plaintiff's recovery may be reduced by an amount paid or payable from a collateral source that does not have a subrogation right, except that the reduction is limited to those amounts paid prior to judgment for the plaintiff in the action.

In many cases involving tort damages, damages are awarded on the basis of future medical expenses. We can see a number of scenarios in which a plaintiff under this proposed rule might collect collateral medical damages from several other sources including the State of Montana, thus unjustly enriching plaintiff.

It is my understanding that the intent of the changes to the statute is as follows:

- 1) In some cases where collateral sources are used to offset damages, insurance companies have filed for bankruptcy and the plaintiff no longer has legal redress or insurance for the medical damages suffered.
- 2) The collateral source rule forces a plaintiff to remain with an insurance company. The argument here is that the injuries a plaintiff may have suffered are pre-existing conditions and are no longer an insurable exposure, thus a plaintiff not be able to procure adequate insurance from other sources.
- 3) Finally, that insurance companies may indiscriminantly 'prey' on these hapless individuals by raising their insurance rates, knowing full well that the injured party is now no longer in a position to change insurance companies.

SB 153

1-29-91

Judiciary Committee Members
January 29, 1991
Page 3

While, some of these issues are very valid, we feel that the above examples are exceptions rather than the rule. For instance, my background in regulating insurance companies leads me to believe that insurance companies 'do not' indiscriminantly raise the rates for individuals who may have suffered bodily injury even if significant medical expenses were incurred. Rather, most insurance companies raise their rates based on the loss experience of an entire population of insured and not one individual.

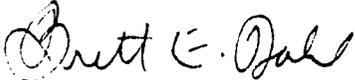
Additionally, insurance companies like any other business are subject to increases and decreases and some will fail. While this is regrettable from a plaintiff's recovery standpoint, once again, we do not feel that this is widespread and will not affect a significant number of insured.

Finally, we oppose S.B. 153 because the language is very broad and may allow for inequities in application and administration and thus result in unjust enrichment for certain parties.

Additionally, the language changes as proposed will most likely have very broad application to the Damages that the State of Montana may incur as a result of cutting off collateral source reductions for amounts paid after judgement.

Thank you for your consideration.

Sincerely,



Brett E. Dahl
Administrator

Ex. 5
1-29-91
SB 153

January 30, 1991

Honorable Members of the Judiciary Committee
of the Montana Senate

Thank you for permitting me to testify at your hearing in favor of Senate Bill 153 sponsored by Senator Tom Towe. That Bill would amend MCA 27-1-307 and 27-1-308. Under those statutes, a person bodily injured through the fault of another must nonetheless pay the costs of his own injuries if he has insurance or some other source of payment without a subrogation right. Thus the wrongdoer is relieved of paying such costs.

Putting aside the question of whether this is fair, the statute is difficult to apply as to medical costs expected to occur after the date of a judgment.

At the time of judgment, past medical costs are a sum certain and capable of determination by a court. Application of the law to future costs is much more difficult. The law seems to say that the court will have a trial in which it will be determined by expert testimony the present value of premiums which plaintiff will have to pay in the future to keep his own insurance policy in effect. Defendant then is to pay that money. Theoretically, then, plaintiff continues to keep his insurance in force for the time period of the medical treatments. It is not clear how a court should factor in to its decision the fact that Plaintiff's health insurance might restrict treatment for which defendant would reasonably be responsible, or how a court might deal with the fact that plaintiff might want to change jobs in the future, but would be prevented from doing so lest he lose the insurance in effect at the time of the accident. It does not describe what should be done in the event of a 50% subrogation - or a contested subrogation. In short, as to post judgment payments, the present statutes are extremely confusing.

In addition to being confusing, the problem with 27-1-307 and 308 is that they shift the cost of injuries from the casualty carriers, whose premiums are paid by wrongdoers, to the health and accident

Ex. 5

1-29-91

SB 153

Honorable Members
of the Judiciary Committee
of the Montana Senate
Page -2-
January 30, 1991

carriers, whose premiums will necessarily be affected as their pay-out increases. Thus it is the innocent victim who suffers the consequences of the wrongdoing. This will affect almost every Montanan and many responsible employers who are trying to pay health insurance premiums for their employees.

It has always been thought to be appropriate policy to rest the cost of wrongdoing with the wrongdoer to the end that it encourages safer, more responsible conduct. A policy of shifting the cost of wrongdoing to the victim should be looked at very carefully. If it is decided, as it is in 27-1-307 and 308, to shift such costs to victims, it would seem as if the law should be very narrowly tailored to further harm victims as little as possible. Senator Towe's amendment has this effect on MCA 27-1-307 and 308.

Senator Towe's amendment would leave in place the victim's obligation to pay the costs of his injury up to the time of judgment, but would transfer that obligation to the wrongdoer after a judgment. At that point, the victim's insurance would make no further payments. Thus there would be no double recovery, but the impact of the future costs of the wrongdoing would fall on the wrongdoer instead of on the injured person's health insurance company.

While there may be disturbing policy questions in relieving defendant of paying for any of the costs of his wrongdoing, Senator Towe's amendment does not address those. Rather it appears simply to remove the confusing aspects of 27-1-307 and 308. Thus, the law would remain in force as to those payments made certain by past payments, but a court would be relieved of having to hold a second trial to try to determine how to calculate the wholly uncertain aspects of future cost of the injuries.

Honorable Members
of the Judiciary Committee
of the Montana Senate
Page -3-
January 30, 1991

Ex. 5
SB 153
1-29-91

Brett Dahl, Tort Claims Division Administrator, testified by letter that the language of SB 153 is very broad and may allow for inequities in application and thus result in unjust enrichment for certain parties. Of course, the language is not broad, but rather the language is conservative and more narrowly tailors the language of the statute to the purpose intended to be accomplished. The only unjust enrichment in Senate Bill 153 is that to wrongdoers which remains because of the unamended portion of MCA 27-1-307 and 308.

Thank you for your very kind consideration of these remarks.

Sincerely,

Sharon M. Morrison

Sharon M. Morrison

Ex. 6
HB 132
1-29-91

WITNESS STATEMENT

To be completed by a person testifying or a person who wants their testimony entered into the record.

Dated this 29th day of January, 1991.

Name: Michael Sherwood

Address: _____

Telephone Number: 449-0650

Representing whom?

MTLA

Appearing on which proposal?

HB 132

Do you: Support? Amend? Oppose?

Comments:

This bill merely codifies a recent unanimous Supreme Court decision, *Haug v. Burlington Northern, Inc.*, in which the court affirmed a long line of decisions allowing an ^{injured victim} ~~plaintiff~~ to bring an action against an ~~out of court~~ a non-resident defendant in any county in the state.

The bill is submitted at the request of the Code Commissioner to clarify the law. An anomaly decision, *MacAlear*, muddied the waters for a short time. The Code Commissioner advises that this bill should not be amended. DN has concerns about out of state elements these will be addressed in another bill.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY

↓
Doctors

SB 153
1-29-91



Utah Medical
Insurance Association
540 East 500 South
Salt Lake City
UT 84102-2775
Phone (801) 531-0375
FAX (801) 531-0381

RECEIVED
JAN 28 1991
MONTANA MEDICAL
ASSOCIATION

January 25, 1991

Montana Medical Association
2021 Eleventh Avenue
Helena, Montana 59601

Attention: G. Brian Zins, Executive Vice President

Dear Brian:

I have reviewed SB-153 and HB-346 which are obvious attempts to erode important tort reform achieved in Montana over the past several years. SB-153 erodes the collateral source rule and will essentially render it ineffective as a result of the elimination of the mandatory offset provision. HB-346 erodes the existing protection afforded by Montana law to a tortfeasor whose negligence is found to be less than 50% of the combined fault.

Our rates in 1989 were reduced 5.5% and a rate increase for 1990 was unnecessary. Our rates for 1991 have been reduced 18.5%. Over the last three years, our rates have decreased a total of 24%. While there are several factors that may have contributed to this downward trend, the tort reform in Montana has certainly been a major contributing factor. The rate reductions are obviously consistent with our own loss experience in Montana. The same trends are seen here in Utah where we have had similar tort reform on the books since 1985 and 1986.

The adoption of these bills, in my opinion, will do nothing more than reverse the current trends and destroy the rate stability that has been achieved in Montana.

If I can be of further assistance, please advise.

Sincerely,

Martin J. Osowski
President & Chief Executive Officer

MJO:gb

DATE 29 January, 1991

COMMITTEE ON Senate Judiciary

S.B 153

HB 132

VISITORS' REGISTER S.B 170

NAME	REPRESENTING	BILL #	Check One	
			Support	Oppos
DAVE BROWN	State Rep. - HD #72	132	X	
Gerald I. Neely	Montana Medical Assoc.	SB153		X
BRUCE ZINS	Montana Medical Assoc	SB 153		X
Burt Dahl	Dept of Administration	SB153		X
Ray F. Sprack	Liability Coalition	SB153		X
Michael Sherwood	MTLA	SB153 HB132	X	X
LIM TETWILER	MT CHAMBER			
John Maynard	MMIA	SB153		X
John Alke	Mont. Defense Trial League	SB153		X
Jacqueline Terrell	Amer. Ins. Assoc.	SB153 HB132		X
Col. Dorothy A. Cozy	House Dist #20	SB170	X	
Senator Edward Lehman	S-D #1	SB170	X	
John Russell	Corrections Div.	SB170	X	
R. Ashbaker	State Farm Ins	SB-153		X
Roger McGLENN	INDEPENDENT INS AGENTS ASSOC. OF MT	SB-153		X
LEONARDO KAUFMAN	THE DOCTORS' CO	SB153		X
STAR JAMESON	Women Victims of Sexual Assault - Women's Place	SB170	X	
Lea Silvers	Center for Sexual Health	SB170	X	
Sue Henneman	MT Def Trial League	SB 153		X
JUDITH CARLSON	MT CHPTZ - NAT ASSN SOCIAL WORKERS	SB 170		AMEN
Sharon Morrison	Self	SB153	X	
Kay Foster	Billings Chamber	SB153		X
GENE PHILLIPS	NAT. ASSN. IND. INSURERS ALLIANCE OF AMER. INSURERS	SB132 SB153		X