

# MONTANA SNAPSHOT: TORTS AND INSURANCE

**Brooke B. Murphy**  
**Matovich, Keller & Murphy, PC**  
**Billings, Montana**  
**July 2013**

*Note: this outline is not intended to be a substitute for legal research nor a comprehensive summary of Montana Law regarding torts and insurance. It is merely a snapshot of Montana Law on some of the issues pertinent to these areas of practice and a beginning point for further research and analysis.*

- **Negligence in Montana**
  - **Negligence Defined**
    - MPI2d 2.00: “Every person is responsible for injury to the person [or property] of another, caused by his/her negligence. Negligence is the failure to use reasonable care. Negligence may consist of action or inaction. A person is negligent if he/she fails to act as an ordinarily prudent person under the circumstances.”
    - MPI2d 2.01: “A child is negligent if he/she fails to use that degree of care which is ordinarily exercised by children of the same age, intelligence, knowledge and experience under the circumstances then existing.”  
Comment recognizes that children will not exercise the same degree of care for their own safety as adults.
    - But, by law, a child under the age of 7 is incapable of contributory negligence. MPI2d 2.02. *Burns v. Eminger*, 81 Mont. 79, 261 P.2d 613 (1927)
    - Note: General rule is that parents are not liable for their child’s torts. Why? Because “negligence in controlling one’s child should not, of itself, be reason to find parental liability, as it ‘would be extending the hardships of harassed and exasperated parents too far to hold them liable for general incorrigibility, a bad education and upbringing, or the fact that the child turns out to have a nasty disposition.”
    - **Exception to the Rule** was carved out in 2001 when Montana Supreme Court adopted Section 316 of the Restatement (Second) of Torts:

A parent is under a duty to exercise reasonable care so to control his minor child as to prevent it from intentionally harming others or from so conducting itself as to create an unreasonable risk of bodily harm to them, if the parent:

(a) knows or has reason to know that he has the ability to control his child, and

(b) knows or should know of the necessity and opportunity for exercising such control.

- **Comparative/Contributory Negligence: MCA §27-1-702**
  - Contributory negligence does not bar recovery unless its greater than the negligence of the person or the combined negligence of all persons against whom recover is sought
  - Any damaged allowed must be diminished in proportion to the percentage of negligence attributable to the person recovering
- **MCA §27-1-703. Multiple Defendants – determination of liability.**
  - Joint and Several Liability: if the negligence of a party to an action is an issue, each party against whom recovery may be allowed is jointly and severally liable for the amount that may be awarded to the claimant but has a right of contribution from any other person whose negligence may have contributed as a proximate cause to the injury complained of UNLESS, party's negligence is determined to be 50% or less of the combined negligence of all persons on the special verdict form OR party may be jointly liable for all damaged caused by the negligence of another if both acted in concert in contributing to the claimant's damages or one party acted as an agent of another.
  - On motion by a party against whom a claim for negligence is asserted resulting in death or injury to person or property, any other person whose negligence may have contributed to the injury may be joined as an additional party.
  - *A defendant may assert a defense that the damages of the claimant were caused in full or in part by RELEASED parties.* Defendant must affirmatively plead the settlement or release as an affirmative defense in the answer, or, plead the defense with "reasonable promptness" after the defendant has had a reasonable opportunity to discover the existence of a settled or released person and given the settled or released person an

opportunity to intervene and defend. Defendant must also notify each person who the defendant alleges caused the claimant's injuries by mailing a copy of his answer to each settled or released person to their last known address by certified mail.

- In determining the percentage of liability attributable to each person who are parties to the action, trier of fact shall consider the negligence of (1) persons released from liability by the claimant or with whom the claimant has settled in addition to (2) claimant or injured person, (3) defendants, and (4) third-party defendants.
- Comparison of fault with some parties is prohibited: person immune from liability to the claimant, a person who is not subject to jurisdiction of the court, or **any other person who could have been, but is not, named as a third party.**
- *A release or settlement entered into by a claimant constitutes an assumption of the liability, if any, allocated to the settled or released person. The plaintiff's recovery is reduced by the percentage of the released or settled person's equitable share of the obligation, as determined by the trier of fact.*

- **Damages Recoverable in Tort**

- **COMPENSATORY DAMAGES**

- MPI2d 25.00. "If you find for the plaintiff on the question of liability then you must determine the amount of money which will reasonable and fairly compensate the plaintiff for all loss caused by the defendant(s), regardless of whether such loss could have been anticipated.
- **SPECIAL DAMAGES:** medical expenses, wage loss (MPI2d 25.03), property damage and other quantifiable damages such as purchases necessitated by the injury (MPI2d 25.06).
- Other economic damages: loss of future earning capacity (MPI2d 25.04), reasonable value of lost services (MPI2d 25.015), necessary care, treatment and services received or reasonably probable to be required (MPI2d 25.07)
- **GENERAL DAMAGES:** noneconomic damages such as pain and suffering, mental and emotional suffering and distress, lost established course of life.

- Pain and Suffering (MPI2d 25.01): “your award should include reasonable compensation for any pain and suffering experienced and reasonably probable to be experienced in the future.”
  - There is no definite standard to calculate compensation for pain and suffering and no requirement that a witness express an opinion on the appropriate amount.
  - Law requires jury exercise calm and reasonable judgment and that the compensation is just and reasonable.
- Mental and Emotional Suffering and Distress (MPI2d 25.02) - same requirements as above.
- Loss of Established Course of Life (MPI2d 25.08): if plaintiff is permanently injured then can award reasonable compensation for the impairment, if any, of her capacity to pursue her established course of life (distinct from lost earning capacity).
- Loss of Consortium MPI2d 25.32: loss or impairment of the marriage relation including right of support, aid, protection, affection and society.
- Note §25-9-411 which provides that an award for past and future damages for noneconomic loss arising from a single action of medical malpractice may not exceed \$250,000. Claimant has burden of proving separate injuries, each arising from a different act or series of acts.
- PUNITIVE DAMAGES: when defendant is guilty of actual fraud or actual malice and all elements of the claim for punitive damages is proven by “**clear and convincing evidence**,” meaning there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence.
  - Actual Malice: “knowledge of facts of intentionally disregard[ed] facts that create a high probability of injury to the plaintiff,” and either “(a) deliberately proceed[ed] to act in conscious or intentional disregard of the high probability of injury to the plaintiff; or (b) deliberately proceed[ed] to act with indifference to the high probability of injury to the plaintiff.”

- Actual Fraud: defendant makes a representation with knowledge of its falsity or conceals a material fact with the purpose of depriving the plaintiff of property, legal rights or otherwise causing injury. Occurs only when plaintiff has a right to rely on the representation and suffers injury as a result.
- Must be compensatory damages for there to be an award of punitive damages
- May not exceed \$10 million or 3% of defendant's net worth, whichever is less unless a class action. MCA §27-1-220.
- Cannot be awarded in any action arising from contract or breach of contract (but allowed in products liability and under Montana's Unfair Trade Practices Act).
- **WRONGFUL DEATH AND SURVIVAL (both brought by PR)**
  - Survival Action governed by MCA §27-1-501: raises claims that came into existence while the decedent was still alive, so claims "survive" the decedent's death. These damages are *personal* to the decedent and do *not* include damages suffered by the spouse, children or other heirs. Include present value of reasonable earnings that would have been earned during the remainder of the decedent's life expectancy without deduction for decedent's own consumption, medical and funeral expenses, reasonable compensation for pain and suffering. Note: no award for loss of established course of life or lost household services.
  - Wrongful Death governed by MCA §27-1-513. Very broad and includes all damages that under the circumstances of the case may be just. Include: loss of consortium by a spouse, loss of comfort and society by the heirs, reasonable value of contributions in money the decedent would have reasonably made for the support, education, training and care of others. Note: there may only be one award to the PR of the Estate, not separate awards for each of the heirs.
  - Wrongful death and survival actions must be combined in one legal action and any element of damages may only be recovered once.

- **Insurance Law**

- **Basic Rules of Insurance Policy Interpretation**

- Court will construe the terms of an insurance policy according to their plain and ordinary meaning. Policies are to be interpreted most strongly in favor of the insured and ANY DOUBTS as to coverage are to be resolved in favor of the insured. *Daly Ditches Irr. Dist. V. National* (1988), 234 Mont. 537.
- Ambiguities construed against insurer. *Lammers v. Moun*, 2008 MT 47.
- Court determines whether an ambiguity exists through the “eyes of a consumer of average intelligence but not trained in the law or insurance business.” *Newbury v. State Farm*, 2008 MT 156.
- Insurance contracts are contracts of adhesion - equal bargaining power between the insurance company and the consumer “simply do not exist.”

- **Duty to Defend versus Duty to Indemnify**

- Insurance policies contain provision stating insurer will defend claims or lawsuits seeking damages for bodily injury resulting from a covered claim.
  - **Duty to defend is independent from and broader than the duty to indemnify. Arises when an insured sets forth facts that represent a risk covered by the terms of the insurance policy.** *United Nat. Ins. Co. V. St. Paul* 2009 MT 269.
  - Unless there exists an **unequivocal** demonstration that the claim against the insured does not fall within the policy coverage, the insurer has a duty to defend.
- Duty to indemnify requires insurer to pay damages for which an insured person is legally liable because of bodily injury to any person or property damage arising from a covered claim.
  - Reservation of rights letters: because the duty to defend is broader than and independent of the duty to indemnify, insurer must protect its rights to deny coverage for the claim while at the same time complying with its duties under the policy (providing a defense) - ROR clarifies what insurer perceives as its duties under the contract.

- ROR must be prompt so insured can take desired or necessary precautions to protect its rights. Failure to reserve rights promptly can result in estoppel.
- **In re Rules of Professional Conduct and Insurer Imposed Billing Rules and Procedures, 2000 MT 110.**
  - Any attorney working as a defense attorney representing insureds in this state should read in Re Rules of Professional Conduct their first day on the job.
  - This was a unanimous (7 member) decision issued on April 28, 2000. The opinion was 24 pages long:
    - Insured is sole client of defense attorney hired by insurance company to defend
    - Defense counsel who submit to the requirement of prior approval in insurer billing guidelines violate their duties under In re Rules because this requirement fundamentally interferes with defense counsel's exercise of independent judgment and duty to give her undivided loyalty to insureds.
    - Must exercise independent judgment when defending insureds
    - Not a blank check - defense counsel will be held accountable for their work.
- **Ridley & DuBray - Advance Pay Rules**
  - *Ridley*: requires payment in advance of final settlement for medical expenses for which liability is reasonably clear for both the accident and the expense in question. 286 Mont. 325 (1997).
  - *DuBray*: reaffirmed the Court's approval of declaratory judgment actions "as a means for compelling advance payment of medical expenses" per *Ridley*. Extended *Ridley* to wage loss. 2001 MT 251 ("Nothing in *Ridley* suggests that its scope should be categorically limited to medical expenses...medical expenses are just one of the obligations incurred by victims that mandatory liability insurance laws were designed to alleviate. Lost wages which are reasonably certain and directly related to an insured's negligence or wrongful act are another example").

- *Hop v. Safeco Ins. Co. of Ill* (2011): distinguishes RDV from the types of “advance damages” paid in *Ridley*, *DuBray* and *Safeco*, by relying on the public policy on which *Ridley* is premised and the types of damages at issue - RDV is not an indisputable out-of-pocket item of damages and the failure to pay it will not destroy a person’s credit or impose financial stress.
- **Declaratory Judgment Actions**
  - UTPA does not preclude a Ridley-based declaratory judgment action when bad faith damages are not directly sought. *Safeco v. Montana Eighth Judicial Dist. Ct.*, 2000 MT 153 (declaratory judgment action is appropriate vehicle for resolution of advance payment of medical specials in an admitted liability case before final settlement).
  - But, see *Hop v. Safeco Ins. Co. of Ill*, 2011 MT 215: tortfeasor’s liability for residual diminished value was not sufficiently clear to allow owner to maintain independent declaratory judgment action against insurer. Case contrasts RDV from medical expenses and wage loss, relying on the public policy considerations addressed by the Court in *Ridley*. “Medical expenses must be promptly paid and wage loss promptly reimbursed so as not to overwhelm and injured accident victim. RDV, on the other had, is not an indisputable out-of-pocket item of damages; the failure to pay it promptly will neither destroy a person’s credit nor impose financial stress.” Also relies on *DuBray* as instructive, reiterating that general damages and punitive damages are “not authorized pursuant to *Ridley*” and confirming that declaratory judgment actions are not appropriate vehicle for resolution of these types of damages.
    - *Hop* clarified that a third party claimant does not have standing until the requirements of §33-18-242(6) are met - meaning before a third-party may bring a direct action against an insurer he must settle the underlying liability claim or judgment must be entered in his favor.
  - Attorneys fees are recoverable in a declaratory judgment action when “necessary and proper” per the Declaratory Judgment Act. *Mountain West Farm Bureau Mut. Ins. Co. v. Brewer* 2003 MT 98.
- **Made whole doctrine:** When the sum recovered by the Insured from the Tortfeasor is less than the total loss and thus either the Insured or the Insurer must to some extent go unpaid, the loss should be borne by the Insurer for that is a risk the Insured has paid it to assume. *Swanson v. Hartford Ins. Co. of Midwest*, 2002 MT 81. Insured must be “made whole” for all injuries, including costs and fees, before subrogation may be sought from responsible party.

- **Stacking**
  - Adding the policy limit of UM, UIM, or medical pay coverage from an insurance policy on one vehicle with the same coverage on another vehicle. EX: an insured with three vehicles and paying separate premiums for UIM coverage on each vehicle could “stack” or add the three UIM coverages together and feasibly collect all three coverages. *Parish v. Morris*, 2012 MT. 116.
  - In Montana, where separate premiums are charged for separate vehicles insured under the same (or different) policies for “personal and portable” coverages, then an insured has a reasonable expectation that she can stack the limits of these policies. *Hardy v. Progressive Specialty Ins. Co.*, 2003 MT 85.
  - Thus, an anti-stacking provision in a policy that permits an insurer to receive valuable consideration for coverage that is not provided violates public policy, and anti-stacking provisions will not be enforced under these circumstances.
  
- **Insurance Bad Faith in Montana**
  - Statutory bad faith (read MCA §§33-18-201 in conjunction with 33-18-242) governs the handling of insurance claims. The Unfair Trade Practices Act applies to the relationship between an insured and an insurer once a claim has been filed.
    - Insured (first party) or third-party claimant has an independent cause of action against an insurer for damages caused by insured’s violations of (1), (4), (5), (6), (9), or (13) of MCA §33-18-201.
    - Punitive damages are recoverable.
    - Insurer is not liable if it had “reasonable basis in law or in fact for contesting the claim or the amount of the claim, whichever is in issue.”
    - Insured (first party) may file action under UTPA simultaneously with any other cause of action he has against the insurer. Insured has 2 years from date of violation of MCA §33-18-201 to file UTPA action. Insured may bring action for fraud, breach of contract, and under the act but **not under any other theory or cause of action.**

- Third party claimant may not file an action under this section until after the underlying claim has been settled or judgment entered in favor of the claimant on the underlying claim. This is to (1) protect insurers from frivolous claims; and (2) facilitate judicial economy. Third-party has 1 year from date of settlement or entry of judgment on the underlying claim to file UTPA action.
- Common law bad faith: applicable to duties independent of statutory bad faith or the insurance contract such as good faith and fair dealing; applies to first party claims.
  - Insurance companies have a duty to act in good faith with their insureds, and this duty exists independent of the insurance contract and independent of statute. If this duty is breached the cause of action of the insured against the insurer sounds in tort.
  - First party claims limited to fraud, breach of contract and UTPA per MCA §33-18-242.
  - Three year statute of limitations.
- Attorneys fees are not recoverable as an element of damages in a third party UTPA action. *Jacobsen v. Allstate Ins. Co.* 2009 MT 248.
- **Statutes of Limitation**
  - An action accrues for purposes of statutes of limitation when all elements of the claim or cause exist or have occurred, the right to maintain an action on the claim or cause is complete, and a court or other agency is authorized to accept jurisdiction of the action. The action is commenced when the complaint is filed. MCA §27-2-102.
    - unless otherwise provided by statute, lack of knowledge of the claim or cause of action, or its accrual, by the party to whom it has accrued does not postpone the beginning of the period of limitation.
    - the period of limitation does not begin on any claim for an injury to person or property until the facts constituting the claim have been discovered or, in the exercise of due diligence should have been discovered by the injured party if the facts constituting the claim are by their nature concealed or self concealing or the defendant has taken any action to prevent the injured party from discovering the injury or its cause (does not apply to medical malpractice, as explained below).
  - Fraud or Mistake (including constructive fraud): 2 years after discovery by the aggrieved party of facts constituting the fraud or mistake. MCA §27-2-203

- Tort actions - general and personal injury: 3 years after the occurrence or event (includes wrongful death unless the death is a result of a homicide). MCA §27-2-204
- Other torts (libel, slander, assault, battery, false imprisonment, seduction): 2 years. MCA §27-2-204
- Legal Malpractice: 3 years after plaintiff discovers or through use of reasonable diligence should have discovered the act, error, or omissions (but in no case after 10 years). MCA §27-2-206
- Medical Malpractice: 3 years after date of injury or w/in 3 years after the plaintiff discovers or through the use of reasonable diligence should have discovered the injury, whichever occurs last, but in no case longer than 5 years after the date of injury. See rules for minors (if under 4, does not begin to run until minor reaches his 8<sup>th</sup> birthday or dies, whichever occurs first). MCA §27-2-205. Note that statute is tolled upon receipt of the application to the Montana Medical Legal Panel and does not begin again until entry of and service on the parties on the panel's decision. MCA §27-6-702.
- Injuries Involving Property: 2 years (injury, waste, trespass, taking, killing or injury to stock by railroad, etc.). MCA §27-2-207
- Execute on Judgment: 10 years. MCA §27-2-201
- **Substitution of Judges (MCA §3-1-804)**
  - In a tort action, each adverse party is entitled to one substitution of a district judge.
    - Motion for substitution must be filed within 30 calendar days after the first summons is served or an adverse party has appeared.
    - A motion for substitution by the party served must be filed within 30 calendar days after service has been completed in compliance with Mont. R. Civ. P. 4.
  - When initial pleading is filed, clerk shall stamp the name of the district judge to whom the case is assigned on the face of the original and all copies of the document.
    - Motion for substitution must be made by filing a written motion with the clerk.
      - Copies must be served on all other parties to the proceeding; clerk shall immediately notify the judge of the substitution.
      - Not effective unless filing fee is paid to clerk of district court (not required in criminal cases or by parties who have qualified for representation at public expense).

- If motion not filed timely it is void.
- **Arbitration Clauses in Montana**
  - Generally arbitration agreements are valid and enforceable. MCA §27-5-114
    - written agreement to submit an *existing* controversy is enforceable except upon grounds that exist at law or in equity for the revocation of the contract.
    - written agreement to submit a future controversy to arbitration is enforceable except upon grounds that exist for the revocation of a contract.
      - does not apply to: claims arising out of personal injury; any contract for the acquisition of real or personal property, services, or money or credit when the total consideration to be paid or furnished is \$5,000 or less; any agreement re insurance policies or annuity contracts except for those between insurance companies; or workers compensation claims.
      - but, a written agreement b/w members of trade or professional organization to submit to arbitration any controversies arising b/w members of the trade or professional organization after the agreement is made is valid except upon grounds for revocation of the contract.
  - Enforcement of arbitration clauses in Montana is a question of state contract law (Federal Arbitration Act does not pre-empt state law).
  - Party may contract away his fundamental and constitutional right to a jury trial, but waiver of that right must be proven to have been made voluntarily, knowingly and intelligently. *Kortum-Managhan v. Herbergers* 2009 MT 79 (citations omitted - see case).
  - To determine whether individual deliberately, understandingly and intelligently waived their right to trial by jury, must look at totality of circumstances:
    - whether there were any actual negotiations over the waiver provision; whether the clause was included on a take-it-or-leave-it basis as part of a standard-form contract; whether the waiver clause was conspicuous and explained the consequences of the provision (e.g. waiver of the right to trial by jury and right of access to the courts); whether there was disparity in the bargaining power of the contracting parties; whether there was a difference in business experience and sophistication of the parties; whether the party charged with the waiver was represented by counsel at the time the agreement was executed; whether economic, social or practical duress

compelled a party to execute the contract (e.g. where a consumer needs phone service and the only company or companies providing that service require execution of an adhesion contract with a binding arbitration clause before service will be extended); whether the agreement was actually signed or the waiver provision separately initialed; whether the waiver clause was ambiguous or misleading; and whether the party with the superior bargaining power lulled the inferior party into a belief that the waiver would not be enforced.

*Kloss v. Edward D. Jones & Co.*, 2002 MT 129, P 65 (Nelson, Cotter Leaphart & Trieweiler, JJ., specially concurring), 310 Mont. 123, 54 P.3d 1, *cert. denied*, 538 U.S. 956, 123 S.Ct. 1633, 155 L.Ed. 506 (2003).